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Amy Coney Barrett
Nominee to be Associate Justice
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2019 Sumner Canary Memorial Lecture: Assorted Canards of Contemporary Legal Analysis: Redux

Honorable Amy Coney Barrett

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ASSORTED CANARDS OF
CONTEMPORARY LEGAL ANALYSIS:
REDUX

Honorable Amy Coney Barrett[†]

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INTRODUCTION

It would be an honor for me to speak to you at any time, but I’m particularly honored to be doing so now, on the thirtieth anniversary of the Sumner Canary Lecture delivered by Justice Antonin Scalia, my former boss and mentor. His lecture, titled *Assorted Canards of Contemporary Legal Analysis*, described his “most hated legal canards” baseless but frequently repeated statements that lawyers are “condemned to read, again and again, in the reported cases.”¹ He took aim, for example, at the hoary canon that “remedial statutes are to be broadly construed.” He asked, “How are we to know what is a remedial statute?” “Are not all statutes intended to remedy some social problem?” “And why should we construe any statute broadly?” Statutes should be construed neither broadly nor narrowly, but at the level of generality at which they are written. And he bemoaned the well-worn phrase, “A foolish consistency is the hobgoblin of little minds.” Why is consistency in the law a bad thing?

Tonight, in the spirit of Justice Scalia’s Canary Lecture, I’m going to share my own list of canards.

† Judge, United States Court of Appeals for the Seventh Circuit. This Essay is adapted from the 2019 Sumner Canary Lecture delivered at Case Western Reserve University School of Law on September 19, 2019.

1. Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 581 (1989).

I. TEXTUALISM IS LITERALISM

Here is my first: “textualism is literalism.” Before I explain why this is false, I ought to begin with a very brief definition of textualism. Textualism, a method of statutory interpretation closely associated with Justice Scalia, insists that judges must construe statutory language consistent with its “ordinary meaning.”² The law is comprised of words and textualists emphasize that words mean what they say, not what a judge thinks that they ought to say. For textualists, statutory language is a hard constraint. Fidelity to the law means fidelity to the text as it is written.

Textualism stands in contrast to purposivism, a method of statutory interpretation that was dominant through much of the twentieth century. For purposivists, statutory language isn’t necessarily a hard constraint. As one famous Supreme Court case put it, “[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”³ Sometimes, statutory language appears to be in tension with a statute’s overarching goal, and when that happens, purposivists argue that a judge should go with the goal rather than the text.

Today, purposivism is largely out of fashion, at least in its more extreme form. It was once unsurprising to see a judicial opinion stress the importance of adhering to a statute’s purpose even at the expense of clear text. Now, however, it’s rare to see a judicial opinion asserting the authority to depart from the statutory text in service of the statutory purpose. The shift away from purposivism is largely due to the force of Justice Scalia’s arguments. As he put it, “It is the *law* that governs, not the intent of the lawgiver. . . . Men may intend what they will; but it is only the laws that they enact which bind us.”⁴ I won’t rehearse all of his arguments against purposivism here, but suffice it to say that they have had a significant effect on the way that lawyers and judges think about the law.

The fact that textualism has become influential, however, does not mean that everyone understands what it means to be a textualist. And one misunderstanding held by some of textualism’s sympathizers as well as by some of its critics is that textualism is literalism. Some who have only passing familiarity with the theory assume that textualism requires judges to construe language in a wooden, literalistic way. And that, of course, would lead to absurd results.

If you want a vivid illustration of the dangers of literalism, consider the pitfalls of translating from one language to another. When I was in

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2. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 69–77 (2012).
 3. *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).
 4. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 17 (Amy Guttmann ed., 1997).

college, I spent a summer in France with the primary goal of becoming fluent in French. One evening at dinner, my host asked if I wanted more food, and I responded, translating literally, “*Je suis pleine*” “I am full.” I was proud of myself for responding in French. But my sentence was greeted with uproarious laughter—and not, as I initially assumed, because I spoke French with a distinctive southeastern Louisiana accent. It was much worse than that. I learned that in French, the phrase “*je suis pleine*” means “I am pregnant.” One could make a similar gaffe by declining food with the phrase “*je suis fini*,” which, literally translated, means “I am finished.” In French, though, this phrase means “I am about to expire.” Perhaps such mistakes might make one *want* to expire.

As a budding French speaker, I was unaware of the nuance. Language is a social construct made possible by shared linguistic conventions among those who speak the language. It cannot be understood out of context, and literalism strips language of its context. As my examples illustrate, fluent speakers of language are not literalists. There is a lot more to understanding language than mechanically consulting dictionary definitions.

Textualists understand this, and they have spent more than thirty years driving home the point. Justice Scalia himself insisted that “the good textualist is not a literalist.”⁵ Still, textualism and literalism are often treated as synonyms. The distinction between them, though, is fundamental to the validity of the textualist enterprise. Here is how one scholar distinguishes the two:

Literalism should be distinguished from the genuine search for textual meaning based on the way people commonly understand language. Literalism is a kind of “spurious” textualism, unconcerned with how people actually communicate—with how the author wanted to use language or the audience might understand it. It holds up the text in isolation from actual usage.⁶

Collapsing the distinction is a strawman when presented by critics of textualism and a dangerous distortion when floated by textualists themselves. It bears emphasis, though, that this might be the most common misperception of textualism. I teach a seminar on statutory interpretation, and after our class on textualism, students routinely say that they were surprised to learn that textualism isn’t the same thing as either “literalism” or “strict construction.” Despite the best efforts of textualists, the caricature is still around.

5. *Id.* at 24.

6. WILLIAM D. POPKIN, MATERIAL ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 224 (3d ed. 2001).

II. A DICTIONARY IS THE TEXTUALIST'S MOST IMPORTANT TOOL

This rejection of literalism bleeds right into the next proposition that I would like to shoot down: “A dictionary is a textualist’s most important tool.” Don’t get me wrong—a dictionary is *a* tool, and it is one used by interpreters of all stripes. But because textualism isn’t literalism, textualists do not come to the enterprise of statutory interpretation armed only with a dictionary. As John Manning a prominent textualist scholar (and now dean of Harvard Law School) explains, “[D]ictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of language and, in particular, of legal language.”⁷ A dictionary can help, but it can’t get you all the way there.

Justice Scalia frequently invoked the case *Smith v. United States* to make this point.⁸ In that case, the Supreme Court was faced with the task of deciding what it means to “use a firearm” for purposes of 18 U.S.C. § 924(c)(1), a statute that prohibits a felon from using a gun.⁹ The majority (of which Justice Scalia was not a member) cited multiple dictionary definitions of the verb “to use” and concluded that “[a]s the dictionary definitions and experience make clear, one can use a firearm in a number of ways.”¹⁰ So it held that a person who trades his firearm for drugs “uses” the firearm during a drug-trafficking crime within the meaning of § 924(c)(1).¹¹

In dissent, Justice Scalia explained that the fact that a word *can* be used a certain way does not mean that it is *ordinarily* used that way or that it was used that way in a particular context.¹² In his view, the majority’s reliance on multiple, broad dictionary definitions of what the term “use” *could* mean violated the “fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.”¹³ In typical fashion, he offered a memorable illustration to bring his point home:

When someone asks, “Do you use a cane?,” he is not inquiring whether you have your grandfather’s silver handled walking stick on display in the hall; he wants to know whether you *walk* with

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7. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2393 (2003).
 8. 508 U.S. 223, 228 (1993).
 9. *Id.*
 10. *Id.* at 228–30.
 11. *Id.* at 225.
 12. *Id.* at 241–42 (Scalia, J., dissenting).
 13. *Id.* at 241 (quoting *Deal v. United States*, 508 U.S. 129, 132 (1993)).

a cane. Similarly, to speak of “using a firearm” is to speak of using it for its distinctive purpose, *i.e.*, as a weapon.¹⁴

This isn’t to say that dictionaries are useless; it’s simply a warning against overstating their usefulness. They should be used as evidence that terms can in fact bear a certain meaning, not as conclusive evidence of what a term means in context.

The upshot here is that textualism isn’t about holding language “in isolation from actual usage.” It isn’t about taking things out of context or strictly construing language that isn’t strict. It is about identifying the plain communicative content of the words. “A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.”¹⁵

III. TEXTUALISTS AND ORIGINALISTS ALWAYS AGREE

I hope I’ve made it clear by now that textualism isn’t a mechanical exercise, but rather one involving a sophisticated understanding of language as it’s actually used in context. That principle brings me to my third canard: “Textualists always agree.” Those who take an oversimplified view of textualism imagine that it works like Google Translate: a judge punches in words, and voila! out pops the result. If that were how interpretation worked, one could expect every textualist judge to interpret text in exactly the same way. Popping words into a mental machine, after all, does not require judgment.

Construing language in context, however, does require judgment. Skilled users of language won’t always agree on what language means in context. Textualist judges agree that the words of a statute constrain but they may not always agree on what the words mean. Thus, in a case that preceded my time on the Seventh Circuit, two of my colleagues on the court both textualists disagreed about whether Title VII, which prohibits discrimination on the basis of sex, prohibits discrimination on the basis of sexual orientation.¹⁶ Judge Frank Easterbrook joined the majority, which held that it does;¹⁷ Judge Diane Sykes wrote a dissent arguing that it does not.¹⁸ Neither disavowed the text; they simply disagreed about what the text meant.

The same holds true for originalists, who insist that judges must adhere to the original public meaning of the Constitution’s text. Justices Scalia and Thomas are both known as originalists, yet they

14. *Id.* at 242.

15. SCALIA, *supra* note 4, at 23.

16. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc).

17. *Id.* at 340–41.

18. *Id.* at 359 (Sykes, J., dissenting).

didn't agree in every case. The differences between them enable my friend Judge Amul Thapar of the Sixth Circuit to teach a class at the University of Virginia that he colloquially describes as "Scalia versus Thomas." Here is an example of a case in which those two Justices diverged: in *Davis v. Washington*,¹⁹ the Court had to decide whether the Sixth Amendment's Confrontation Clause prohibits the admission of statements made during a 911 call.²⁰ Justice Scalia wrote the majority opinion, grounding the Court's decision in an analogy to statements that would have been considered "testimonial" at common law.²¹ The relevant portion of the 911 call qualified as "nontestimonial hearsay," the majority held, because its "primary purpose" was not "to establish or prove past events potentially relevant to later criminal prosecution" but rather "to enable police assistance to meet an ongoing emergency."²² Justice Thomas, by contrast, rejected the majority's "primary purpose" test.²³ He chided the majority for selecting a standard "disconnected from history" and observed that "the Court all but concedes that no case can be cited for its conclusion."²⁴ Justice Thomas read the historical record to support a much narrower Confrontation Clause test: only those statements that "include 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions'" are prohibited from admission.²⁵

On the current Court, Justices Thomas and Gorsuch have been the most vocal about their commitment to originalism. But they don't always agree either. Just last Term, they split in *Gamble v. United States*, a case that validated the so-called "dual sovereignty doctrine" of the Double Jeopardy Clause.²⁶ That doctrine means that two offenses are not "the same offense" for purposes of the Double Jeopardy Clause if they are prosecuted by separate sovereigns.²⁷ Thus, the federal government can't prosecute someone twice for the same murder, but the Double Jeopardy Clause doesn't bar the state and federal governments from each prosecuting someone for the same murder.

19. 547 U.S. 813 (2006).

20. *Id.* at 817.

21. *Id.*

22. *Id.* at 822.

23. *Id.* at 834 (Thomas, J., concurring in the judgment in part and dissenting in part).

24. *Id.* at 838.

25. *Id.* at 836 (alteration in original) (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)).

26. 139 S. Ct. 1960, 1964 (2019).

27. *Id.* at 1977.

Where there are two sovereigns, there are two laws and therefore two different offenses.

Justice Gorsuch dissented from that holding on the ground that the dual-sovereignty doctrine is inconsistent with the original meaning of the Fifth Amendment.²⁸ Justice Thomas, however, agreed with the majority. In his concurring opinion, he had this to say:

The historical record presents knotty issues about the original meaning of the Fifth Amendment, and Justice Gorsuch does an admirable job arguing against our longstanding interpretation of the Double Jeopardy Clause. Although Justice Gorsuch identifies support for his view in several post-ratification treatises, I do not find these treatises conclusive without a stronger showing that they reflected the understanding of the Fifth Amendment at the time of ratification. . . . Ultimately, I am not persuaded that our precedent is incorrect as an original matter, much less demonstrably erroneous.²⁹

In short, even card-carrying originalists don't always wind up at the same spot, and it oversimplifies originalism to expect that they always will.

IV. “[W]E MUST NEVER FORGET, IT IS A *CONSTITUTION* WE ARE EXPOUNDING.”

In his Canary Lecture thirty years ago, Justice Scalia identified and attempted to correct the common misuse of one of Chief Justice Marshall's most famous quotes from *McCulloch v. Maryland*: “[W]e must never forget, that it is a *constitution* we are expounding.”³⁰ Justice Scalia explained that this quote “is often trotted out, nowadays, to make the point that the Constitution does not have a fixed meaning that it must be given different content, from generation to generation, retaining the ‘flexibility’ needed to keep up with the times.”³¹ In his view, this reading of Chief Justice Marshall's language is exactly backwards. Rather than sanctioning judicially guided constitutional evolution, the *McCulloch* quote is simply an acknowledgment that “it is the nature of a constitution not to set forth everything in express and

28. *Id.* at 1996 (Gorsuch, J., dissenting) (“[T]his ‘separate sovereigns exception’ to the bar against double jeopardy finds no meaningful support in the text of the Constitution, its original public meaning, structure, or history.”).

29. *Id.* at 1987 (citation omitted).

30. Scalia, *supra* note 1, at 594 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819)).

31. *Id.*

minute detail” *precisely because* it is a fixed document “intended to endure for ages to come” as is.³²

So Justice Scalia made the point that the *McCulloch* quote offers no support for a theory of an evolving constitution. Today, I want to make a different but related point: the *McCulloch* quote offers no support for the idea that the Constitution should be interpreted differently from other legal texts. After all, the Constitution is, at its base, democratically enacted written law. Our approach to interpreting it should be the same as it is with all written law.

I willingly concede that no matter how one reads “[W]e must never forget, it is a *constitution* we are expounding,” Chief Justice Marshall surely meant to communicate that the Constitution is unique.³³ And he was indisputably right. None of our other written laws purport to lay out an entire system of government meant to endure through the ages. That singularity often manifests itself in expansive phrasing and broad delegations of congressional and executive authority to address unforeseen circumstances.³⁴ But as Justice Scalia explained elsewhere, “The problem [of interpreting the Constitution] is distinctive, not because special principles of interpretation apply, but because the usual principles are being applied to an unusual text.”³⁵ The text itself remains a legal document, subject to the ordinary tools of interpretation.

Due in large part, I’m sure, to Justice Scalia’s contributions, the idea of approaching the Constitution like any other legal text has gained not only traction but force in judicial opinions, and it has inspired a rich proliferation of scholarship in the area.³⁶ For example, Vasan

32. *Id.* at 595–96 (quoting *McCulloch*, 17 U.S. at 415).

33. *Id.* at 594.

34. See SCALIA, *supra* note 4, at 37 (“In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear.”); see also John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1699–700 (2004) (“Marshall’s statement merely addressed the virtue of recognizing adequate congressional authority to address unforeseen circumstances under the Necessary and Proper Clause.”); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 387 (2013) (“As originalists have long recognized (and sometimes even emphasized), the power granting provisions of the Constitution are designed to give the legislative and executive branches discretionary authority to make policy and the necessary tools to implement those policies.”).

35. SCALIA, *supra* note 4, at 37; see also *id.* at 38 (“What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text . . .”).

36. See, e.g., Manning, *supra* note 34, at 1670 (“Whereas the Rehnquist Court has tended toward textualism in statutory cases, few would contend that

Kesavan and Michael Stokes Paulsen have emphasized that “any project of constitutional interpretation that seeks to apply the Constitution as law must reckon with the fact that it is a written text that the Constitution purports to make authoritative.”³⁷ They also point out that judges take an oath to be bound by that written text.³⁸

So what does it mean to be bound by written law? Well, at the very least it means that the meaning of the law is fixed when it is written. This is a largely, though not entirely, uncontroversial proposition when it comes to statutory interpretation. Textualists and purposivists are both inclined to ground their approaches to statutory interpretation in the concept of faithful agency, giving voice and authority to what the enacting Congress did in a particular statute.³⁹

Textualists, though, place more significance on the very existence of a written, enacted law. As I said before, textualists limit the meaning of text to the semantic communicative content (in context) of the words themselves—not some underlying purpose behind the words—because it is the words themselves that are written down and enacted. Indeed, those words “reflect (unknowable) legislative compromise,” and “the carefully drawn lawmaking process prescribed by the Constitution makes it imperative for judges to respect such compromise.”⁴⁰ That means reading the text of the statute at the level of specificity and generality at which it was written, even if the result is awkward or the interpretation “does not appear to make perfect sense of the statute’s

constitutional interpretation warrants the same strictness as statutory interpretation. Instead, the conventional wisdom, often traced (mistakenly) to *McCulloch v. Maryland*, presupposes that judges have greater freedom to interpret the Constitution atextually to effectuate its broader purposes. . . . I argue here that the conventional wisdom is backwards . . .”).

37. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1128 (2003).
38. *Id.* at 1127–28 (“But if one does decide to be bound by [the Constitution] (and takes an oath to support it, as the very next clause of the Constitution requires for all legislative, executive, and judicial officers holding positions under the regime created by the Constitution), one necessarily has decided to be bound by the text as law, because that is what the document itself appears to specify.” (footnote omitted)); see also Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 8–9 (2016) (describing originalism’s claim that the original public meaning of the Constitution’s text is enforceable law).
39. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 9 (2001) (“[I]t is important to realize that strong purposivism and textualism differ markedly in technique, but they do so in the name of an ostensibly shared constitutional premise. In particular, strong purposivism and textualism both seek to provide a superior way for federal judges to fulfill their presumed duty as Congress’s faithful agents.”).
40. Manning, *supra* note 34, at 1713.

overall policy.”⁴¹ That awkward compromise made it through the process of becoming law.

When we look at the Constitution for what it is—a popularly enacted legal text subject to the same kind of “bargaining and compromise over the reach and structure of the policy under consideration”⁴²—it makes sense that statutory textualists are usually constitutional originalists.⁴³ These approaches are premised on the same fundamental orientation toward legal text that finds legitimacy in popular sovereignty. Kesavan and Paulsen summarize the import of written law this way:

We therefore think that to avoid creeping or lurching anachronism infecting the interpretation of an authoritative legal text, the proper approach must be one of “originalist” textualism—faithful application of the words and phrases of the text in accordance with the meaning they would have had at the time they were adopted as law, within the political and linguistic community that adopted the text as law.⁴⁴

Originalists, like textualists, care about what people understood words to mean at the time that the law was enacted because those people had the authority to make law. They did so through legitimate processes, which included writing down and fixing the law. So “[e]ach textual provision must necessarily bear the meaning attributed to it at the time of its own adoption.”⁴⁵ And, as with statutes, the law can mean no more or less than that communicated by the language in which it is written. Just as “when a precise statute seems over- or underinclusive in relation to its ultimate aims[,] . . . [a textualist] hews closely to the rules embedded in the enacted text, rather than adjusting that text to make it more consistent with its apparent purposes,” so too an originalist submits to the precise compromise reflected in the text of the

41. Manning, *supra* note 39, at 3–4; *see also* Manning, *supra* note 34, at 1665, 1735.

42. Manning, *supra* note 34, at 1715.

43. *See* Manning, *supra* note 39, at 26.

44. Kesavan & Paulsen, *supra* note 37, at 1131.

45. Whittington, *supra* note 34, at 377–78; *see also* Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 *GEO. L.J.* 97, 129 (“Putting the Constitution in writing was one of the ways in which the law of the Constitution was to be fixed.”); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 *NW. U. L. REV.* 923, 944–46 (2009) (explaining the originalist premise that the meaning of the Constitution’s text is fixed at the time of its formal legal approval).

Constitution.⁴⁶ That is how judges approach legal text, and the Constitution is no exception.

I will end this section where I started, leaving you with a simple but astute observation from Justice Scalia himself. The judiciary is charged with authoritatively interpreting the Constitution *because* it is a legal text—and interpreting it requires the same tools and skills that one would bring to bear on any other legal text. Were it otherwise that is, “if the people come to believe that the Constitution is *not* a text like other texts; that it means, not what it says or what it was understood to mean, but what it *should* mean” “well, then, they will look for qualifications other than impartiality, judgment, and lawyerly acumen in those whom they select to interpret it.”⁴⁷ This is a Constitution that we are expounding, unique in many ways. But it is also, at its core, a legal text, and we should not misconstrue a quote from the great Chief Justice Marshall as license to treat it as anything else.

V. JUDICIAL ACTIVISM IS A MEANINGFUL TERM

As for the next canard, I will be brief—but I think my point will be clear. The term “judicial activist” is thrown around a lot today, both inside and outside the legal world. People use it all the time with great authority, confident that they know exactly who the judicial activists are. But there is no agreed-upon definition of what it means to be an activist. The only thing that is clear is that it is never a compliment.

Sometimes, people use the term “judicial activism” to describe a judge who is willing to hold a statute or executive action unconstitutional. Judicial restraint, the argument goes, means deference to the popular will; it is activism, therefore, to say that the popular will has run afoul of constitutional limits. The problem, however, is that it has been settled since *Marbury v. Madison* that judicial review is part of the judicial function.⁴⁸ Everyone agrees that judges—within the limits of their authority, of course—must hold political actors accountable to

46. Manning, *supra* note 34, at 1665; *see id.* at 1702 (“Precisely because political minorities do have an extraordinary right to insist upon compromise in the framing of constitutional texts, it is especially important to pay attention to the level of generality of the relevant text—that is, the type of compromise reached.”); Whittington, *supra* note 34, at 386 (“Originalism has instead recently emphasized the value of fidelity to the constitutional text as its driving principle. The goal of constitutional interpretation is not to restrict the text to the most manageable, easily applied, or majority favoring rules. The goal is to faithfully reproduce what the constitutional text requires. Textual rules need not be narrow. The breadth of the rule is determined by the embodied principle, not an a priori commitment to narrowness.”).

47. SCALIA, *supra* note 4, at 46–47.

48. 5 U.S. (1 Cranch) 137 (1803).

the Constitution. If a statute or executive action is unconstitutional, a judge discharges her judicial duty by calling a spade a spade. So if judicial activism merely means exercising judicial review, then it simply describes a well-settled and uncontroversial part of what judges do.

When people use the term “judicial activism,” I think they are really referring to a misuse of judicial authority. Criticizing misuses of judicial authority is fair game, but we ought to do it with an explanation of *why* a particular decision was misguided. As David Kaplan wrote in his recent book about the Supreme Court, judicial activism today means nothing more than “what the other guy does.”⁴⁹ It goes without saying that finger-pointing isn’t an argument.

VI. CONGRESSIONAL SILENCE IS ACQUIESCENCE

My next canard returns to statutory interpretation. It is the notion that congressional inaction can tell us something about what Congress thinks what is known as “congressional acquiescence.” One noted scholar and judge has explained the logic of the acquiescence rationale this way: “When a court says to a legislature, ‘You (or your predecessor) meant X,’ it almost invites the legislature to answer: ‘We did not.’”⁵⁰ So, the theory goes, if the legislature does not respond, then the court, as Congress’s faithful agent, should treat its silence as acquiescence or approval and stay the course even if the original interpretation was wrong.

But there are several reasons why such an approach makes little sense. For starters, why should we care what the current Congress thinks about a previously enacted statute? Whether you think that what matters is “the language of the statute enacted by Congress,”⁵¹ the intent or purpose behind the enacted statute,⁵² or something else,

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49. DAVID A. KAPLAN, *THE MOST DANGEROUS BRANCH* 12 (2018).
50. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 31–32 (1982); *see also* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 *GEO. WASH. L. REV.* 317, 322 (2005); William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 *MICH. L. REV.* 67, 71–78 (1988); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 *GEO. L.J.* 1361, 1402–08 (1988).
51. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002); *see also* *Johnson v. Transp. Agency*, 480 U.S. 616, 671 (1987) (Scalia, J., dissenting) (“It is . . . [a] patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant.”).
52. *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980); *United States v. Price*, 361 U.S. 304, 313 (1960); *European Cmty. v. RJR Nabisco, Inc.*, 355 F.3d 123, 136 (2d Cir. 2004) (holding that “expressions of legislative intent made years after the statute’s initial enactment are entitled to limited weight under any circumstances, even when the post enactment views of Congress as a whole are evident”), *vacated by* 544 U.S. 1012 (2005).

most theories of statutory interpretation seek to give a statute the meaning it had at the time that it was enacted.⁵³ So what a later Congress thinks is irrelevant.⁵⁴

And even if we did care, there is no way to reliably count on congressional silence as a source of information. There are many reasons other than approval for why Congress might not pass a bill to override a court's interpretation of a statute.⁵⁵ For one, Congress must first know about the judicial decision before the body can make a collective, conscious decision to act (or not act) in response—and that is not a given.⁵⁶ Then, even assuming that Congress knows about a given judicial interpretation and disagrees with the decision, it may be deterred from acting out of concern for political expedience: Who takes the credit? Who bears the responsibility? Is this the best time to act to achieve the best result? How much capital—both political and monetary—will this legislation cost? And on and on.⁵⁷ But let us assume that Congress knows about the decision, disagrees with it, and would like to respond. Political realities might still prevent it from doing so. This won't come as news to anyone, but passing legislation is hard and resources are limited. As I've said elsewhere, "Numerous obstacles, both

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53. See Lawrence C. Marshall, "Let Congress Do It": *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 193 (1989).
54. See *id.* at 193 ("No one has ever explained how a court attempting to understand the intent of a Congress that passed a statute in 1866 or 1870 can find any guidance in the views of a Congress sitting in the 1970s."); *Price*, 361 U.S. at 313 ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.").
55. See *United States v. Craft*, 535 U.S. 274, 287 (2002) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction.") (alteration in original) (quoting *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994)); *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) ("It does not follow . . . that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it. It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation.") (quoting *Johnson*, 480 U.S. at 672 (Scalia, J., dissenting)).
56. See Marshall, *supra* note 53, at 187 ("[I]t seems quite unrealistic to assume that a substantial number of congressional actors are routinely made aware of most court decisions on statutory matters. This being the case, how can a court possibly find acquiescence in Congress' silence?"). And if members of Congress are unaware of Supreme Court decisions on matters of statutory interpretation, it would seem even less likely that Congress is aware of decisions at the court of appeals level. See Stefanie A. Lindquist & David A. Yalof, *Congressional Responses to Federal Circuit Court Decisions*, 85 JUDICATURE 61, 61 (2001).
57. See Barrett, *supra* note 50, at 335–36; Marshall, *supra* note 53, at 190–91.

procedural and practical, hinder the passage of legislation, and, as a result, even a legislature with a majority that vehemently disagrees with a judicial decision may fail to act on its disagreement.”⁵⁸ Thus, mistaking inaction for agreement “reflects a simple and complete misunderstanding of the legislative process.”⁵⁹

Equating abstract agreement with any kind of legal salience also reflects a misunderstanding of the separation of powers prescribed by the Constitution. This is the most fundamental flaw in the approval-by-silence approach. Even if we could know that Congress’s current silence on a particular statutory question meant that it wholeheartedly endorsed a court’s interpretation of that statute, that approval is not the standard by which the Constitution confers legal effect. To have the force of law, a bill must be passed by both Houses of Congress and presented to the President for possible veto.⁶⁰ Congress can’t shirk the responsibility of acting, sidestep procedural obstacles, or skirt the President’s veto power in the name of efficiency. And courts can’t usurp any of those same powers by assuming away the bicameralism and presentment requirements. The Supreme Court has been clear on this point: those requirements serve “essential constitutional functions . . . [and] represent[] the Framers’ decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.”⁶¹ Relying on congressional silence for legal meaning thwarts that finely wrought and exhaustively considered procedure.

I will conclude this section with a warning from Justice Frankfurter, who was one of the first to recognize this canard and call out its folly:

To explain the cause of non action by Congress when Congress itself sheds no light is to venture into speculative unrealities. . . . Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of the Treasury and of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.⁶²

It is, of course, a good thing that we have a process by which Congress can override a court’s interpretation of a statute if the

58. Barrett, *supra* note 50, at 336.

59. *Id.*

60. See U.S. CONST. art. I, § 7, cl. 2 (bicameralism and presentment).

61. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983); see also *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (“Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President. Congressional inaction cannot amend a duly enacted statute.”) (citation omitted).

62. *Helvering v. Hallock*, 309 U.S. 106, 119–21 (1940).

interpretation does not reflect what Congress meant. But congressional silence in the face of a judicial decision constitutionally and practically has no legitimate role in that process.

CONCLUSION

Justice Scalia ended his Canary Lecture not because he was out of canards, but because he was out of time.⁶³ Likewise, I could list canards until the cows come home, but I will follow my boss's lead and conclude my remarks here. I hope that my contribution to Justice Scalia's list has shown that the last three decades have not done much to eradicate our canard problem. We lawyers love to repeat what has already been written—it's our stock-in-trade. In its best form, our invocation of vintage verbiage serves the purpose of tying us to precedent and creating continuity in the law. But in its worst form we reflexively repeat these "certain ritual errors" without scrutiny.⁶⁴ We should not mistake ubiquity for accuracy.

63. Scalia, *supra* note 1, at 596.

64. *Id.* at 581.

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Text

[*19] *Judge Amy Coney Barrett:* I could not agree more with Judge Pryor's eloquent description of Justice Scalia's commitment to democracy. He was an avid proponent of leaving the decision-making in the hands of the People. And the thing I wanted to comment on briefly is the criticism that Judge Pryor alluded to: that Justice Scalia used his commitment to originalism as a cover for imposing his private beliefs on the Constitution and, particularly, his private religious beliefs.

The irony is that this criticism is frequently leveled by those who are his intellectual opponents--the living constitutionalists--who expressly welcome moral and value-based decisions into constitutional interpretation. And I think he would have laughed at the irony of those who welcome such moral-based judgments lambasting him for making moral-based judgments.

I think one reason why Justice Scalia and those who defend originalism and their critics talk past each other is that originalism is such a fundamentally different view of constitutional decision-making. Critics almost cannot believe what he is saying is true. Because if you embrace a values-based approach to constitutional interpretation, and if you see judicial review as a mechanism for reasoning out moral judgments, it cannot be true that Justice Scalia was not doing the exact same thing.

[*20] Of course, you might say that you are trying to follow the original public meaning, but, of course, if constitutional decision-making really is an enterprise about finding what our contemporary values are, you are just imposing your version of contemporary values on everyone else.

But, as Judge Pryor said, that is absolutely not what Justice Scalia was about. Nothing he said, either on or off the bench, seems to persuade his critics. But in this regard, one thing to point out is that someone who was committed to privileging religious believers in the public square would not really have identified *Employment Division v. Smith*¹ as his manifesto.

In conclusion, I think it is crucial in a pluralistic society for judges to let those value-based judgments be made by the People. We cannot function in a pluralistic society any other way. And Justice Scalia was a great advocate for that. He brought that idea out to popular audiences as well as to law schools. And I think those nine people from the Kansas City phonebook found that idea quite attractive.

Professor David Bernstein: That was a great talk by Judge Pryor. I agree with the thrust of what he said. But I want to emphasize that rather than supporting democracy as such, Justice Scalia believed in self-government and the sovereignty of the People. That includes not simply what the legislature has dictated but the Constitution itself, enacted by the sovereign American People.

While Scalia's perspective does not give the judiciary the right to read its own views into the Constitution or to take sides in the culture war, when the Constitution is clear about a matter--and Justice Scalia sometimes thought the Constitution was clear about a matter--he would enforce the Constitution at the expense of transient democratic majorities.

This was a very important issue for Justice Scalia and remains so for the country. When I started law school in 1988, people in Federalist Society--type circles were what I would call neo-Progressives in their attitudes toward the Constitution. They did not like what they saw as "activist" Warren Court and Burger Court decisions that ignored constitutional text and original meaning, so they looked for inspiration to earlier generations of progressives who had opposed what they saw as judicial activism--luminaries like Learned Hand, Oliver Wendell Holmes, and Louis Brandeis. That generation of conservatives even occasionally had a nice word for F.D.R. despite F.D.R.'s dismissal of the so-called horse-and-buggy Constitution, because he was (at least rhetorically) against judicial activism.

But unlike the Progressives whose opposition to what they considered judicial activism often arose from contempt for the written Constitution, Justice Scalia's opposition to judicial activism focused on originalism and enforcing the text as written.

[*21] I still remember during my first year of law school when the flag-burning decision² came down. Justice Scalia was in the majority. He joined Justice Brennan's (!) opinion arguing that the First Amendment does not allow the government to ban the burning of the American flag because it is a matter of free speech protected by the First Amendment. And I remember there being some whispers: *Maybe we made the wrong move with this Scalia guy? Maybe he's a judicial activist?* But in fact, Scalia was simply enforcing a plausible, and I think the correct, interpretation of the First Amendment.

¹ [485 U.S. 660 \(1988\)](#).

² [Texas v. Johnson, 491 U.S. 397 \(1989\)](#).

Later in his career, Justice Scalia became a great champion of the Confrontation Clause of the Sixth Amendment to the extent that--while the Court's decisions went back and forth five to four--if Justice Scalia's view had consistently won out in this regard, it really would have upended the criminal procedure system and the way criminal trials were run in basically every state in the union. But he was very much convinced that the explicit right to confront one's accusers needed to be strictly enforced. And if that would make life inconvenient for the prosecutors, that is too bad.

Justice Scalia early in his Supreme Court career called himself a faint-hearted originalist.³ He was concerned with precedent; he was concerned with the temptation to be a judicial activist. But over time, as originalist scholarship developed in large part because of his own influence, he became less of a faint-hearted originalist.⁴

In the written version of Judge Pryor's remarks, he references *Gonzales v. Raich*,⁵ the medical marijuana case that analyzed whether punishing someone for growing marijuana for medical use without any related commercial transactions fell within the Congress's Commerce Clause power. In that case, Justice Scalia wrote a concurring opinion in which he essentially reasserted the validity of *Wickard v. Filburn*.⁶ Yet, less than a decade later, in a book that he coauthored on judicial interpretation, he wrote that in *Wickard* the Supreme Court expanded the Commerce Clause "beyond all reason" by holding that a farmer's cultivation of wheat for his own consumption affected interstate commerce and thus could be regulated under the Commerce Clause.⁷

Justice Scalia had been more deferential to an assertion of the Commerce power in *Raich* than his later remarks about *Wickard* would suggest, but he explained that he knew there was some contradiction to what he said in his books and what he said earlier in his career and in some of his Supreme Court opinions. Some contradictions, he said, were explained by adherence [*22] to stare decisis, while others, he wrote, were "because wisdom has come late." So, another admirable thing about Justice Scalia is that he was willing to change his mind when he thought the evidence required it.

As originalist scholarship has developed, those on the conservative side have moved away from merely opposing judicial activism as such to figuring out how judges can properly interpret the Constitution according to its original meaning. This evolution includes Justice Scalia, who was increasingly willing invalidate legislation (though not engage in what he thought of as "activism") when he thought enforcing the correct interpretation of the Constitution so required. He was, for example, willing to vote with the majority on the Commerce issue in *NFIB v. Sebelius*,⁸ which, if he had his druthers, would have invalidated a very significant piece of legislation.

Thus, while Judge Pryor is right that Justice Scalia believed in constitutional self-government and self-determination, we must keep in mind that his ultimate loyalty was to the Constitution and, as he understood it, to a constitutional republic, and not to democracy, as such.

Paul Clement: Judge Pryor, thank you for that wonderful speech. I thought it was terrific. There is in my view just one problem with the speech. And that is that way too many of the decisions of Justice Scalia that you were referring to and were citing were dissents. And what that means is that his commitment and his vision of the judicial

³ Antonin Scalia, *Originalism: The Lesser Evil*, [57 U. CIN. L. REV. 849 \(1989\)](#).

⁴ See Ilya Somin, *Justice Scalia Repudiates "Fainthearted Originalism"*, VOLOKH CONSPIRACY (Oct. 7, 2013, 11:20 AM), <http://volokh.com/2013/10/07/justice-scalia-repudiates-fainthearted-originalism/>.

⁵ [545 U.S. 1 \(2005\)](#).

⁶ [317 U.S. 111 \(1942\)](#).

⁷ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 406 (2012).

⁸ [567 U.S. 519 \(2012\)](#).

role as being consistent with democracy and reflecting a commitment to democracy were not shared in many of the very important cases by a majority of his colleagues. And, of course, that has consequences for the judiciary and, in particular, for the confirmation process.

There are many ways in which the Justices who have already been confirmed can insulate themselves from the democratic process. And they can decide major social issues even when the Constitution does not speak directly to those issues. But there is one place where the Supreme Court cannot avoid touching democracy, and that is the Senate confirmation process.

I do not think it is a surprise that in the one place where the Supreme Court touches the democratic process, it ends up being like grabbing the third rail. And, of course, none of this was lost on Justice Scalia. He alluded to this in a number of dissenting opinions--probably most expressly in his dissenting opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁹

After criticizing what judicial confirmation hearings had become, Justice Scalia ended up sort of *not* criticizing them because he said, "Look, if this is the way that the Court is going to go about interpreting the Constitution in a very antidemocratic fashion, then the Senate confirmation process should be a mess." He particularly said that it should be a process where the democratically elected Senators ask a variety of questions about every social issue [*23] that matters to them and matters to their constituents and try to get commitments on the record from the Justices about how they are going to vote.

If you look at the most recent Supreme Court confirmation process, it is very easy to criticize some of the members of the Senate Judiciary Committee for the process, and there is certainly plenty of criticism to go around. But I do think, consistent with the thrust of Judge Pryor's speech, that Justice Scalia would also point the finger of blame at the Justices in the majority of many of those opinions given the very antidemocratic way in which they have interpreted the Constitution. And I think he would have less criticism, frankly, for some of the members of the Senate Judiciary Committee than a lot of Republicans watching the most recent confirmation process. That is the first point I wanted to make. And it is obviously a point that Justice Scalia made.

The second point I wanted to make is that, not only was Justice Scalia committed to the democratic process, but he was committed to a no-holds-barred, take-off-the-gloves process of democracy that included a very robust role for parties and partisanship. And you really saw this strain in two kinds of cases.

One is the patronage series of cases,¹⁰ wherein the Supreme Court said that there was a First Amendment problem with a new mayor or a new governor coming in and replacing a large number of civil servants with people who agree with the new governor or the new mayor. Maybe it was his growing up in New York or spending time in Chicago, but Justice Scalia had no sympathy for the idea that there was anything unconstitutional about that process. It might have been unwholesome, but it was not unconstitutional in his view.

The other place where you really see this strain in his jurisprudence is in the partisan gerrymandering cases. One of Justice Scalia's great, but underappreciated, opinions was his plurality opinion in *Vieth v. Jubelirer*,¹¹ where he really took down the arguments against partisan gerrymandering.

To put these two thoughts together: I do think that if there is one thing that the Supreme Court could do to make the Senate confirmation process even worse, it would be to not accept Justice Scalia's view in *Vieth* and decide that partisan gerrymandering claims are justiciable.

Judge Neomi Rao: It is great to be back at the Law School and wonderful to be on this panel talking about Judge Pryor's speech with so many great people. I want to highlight two points in my remarks. First, I want to address the

⁹ **502 U.S. 1056 (1992).**

¹⁰ *E.g.*, [Rutan v. Republican Party of Ill.](#), 497 U.S. 62 (1990).

¹¹ **539 U.S. 957 (2003).**

question of democracy that Judge Pryor raised. Judge Pryor emphasized that Justice Scalia was committed to our very particular form of constitutional democracy. I do not think Justice Scalia was committed to democratic outcomes categorically, and I do not think he was committed to a limited judiciary generally. But rather, Justice Scalia's commitment was to the [*24] Constitution and a form of "just-right" judiciary--one that would respect the limits of courts, but also enforce constitutional limits on the political branches.

It is this particular form of constitutional democracy, *our* constitutional democracy, that Justice Scalia was committed to. This is important to highlight because there are many competing theories of legal interpretation that also reference democracy. For example, Justice Stephen Breyer in his book *Active Liberty* discusses how interpreting statutes in light of their purposes can serve democracy.¹² He notes that judges are part of the democratic process, furthering the purposes of statutes. Similarly, Bill Eskridge has propounded a theory of "dynamic statutory interpretation."¹³ He justifies his theory, in part, with reference to democratic norms. He believes that a judge should interpret statutes dynamically and use evolving public values to understand the meaning of statutes. Justice Breyer and Professor Eskridge both rely on democracy, but their theories defend very different methods of statutory and constitutional interpretation from Justice Scalia.

Justice Scalia did not think judges should take an active role in democracy, but rather, he favored certain methods of interpretation such as textualism and originalism that would ensure that judges stuck to the judicial role and not the legislative role. Thus, he did not advocate for judges' decisions to reflect democratic preferences or outcomes that change over time, but rather for judges to respect the *law*, that is the results of the democratic process found in the text of statutes that went through bicameralism and presentment and the meaning of the Constitution as originally enacted by the People.

For my second point, I briefly want to consider an area not addressed by Judge Pryor's speech: administrative law. In this area, it is harder to see the same commitment to our constitutional democracy in some of the Court's precedents. And I think Justice Scalia was very faithful to the Supreme Court's precedents in this area. These precedents, however, have had the effect over time of transferring power from Congress, our representative branch, to the executive branch.

For example, with respect to the nondelegation doctrine, Justice Scalia consistently emphasized just how important the nondelegation principle was to the separation of powers.¹⁴ Of course, the Constitution vests all legislative [*25] power in Congress,¹⁵ and Justice Scalia maintained that Congress could never delegate its truly legislative power.¹⁶ But despite the importance of this principle, Justice Scalia also argued that this was not a line that courts could draw--that the nondelegation principle was not easily susceptible to judicial enforcement.

¹² STEPHEN G. BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 85-101 (2005).

¹³ WILLIAM ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION* 120-38, 151-61 (1994).

¹⁴ See [Reynolds v. United States, 565 U.S. 432, 450 \(2012\)](#) (Scalia, J., dissenting) (urging the Court to interpret SORNA narrowly to avoid "sailing close to the wind with regard to the principle that legislative powers are nondelegable"); [Whitman v. American Trucking, 531 U.S. 457, 472-73 \(2001\)](#) ("We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute. . . . 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."); see also C. Boyden Gray, *The Nondelegation Canon's Neglected History and Underestimated Legacy*, [22 GEO. MASON L. REV. 619, 645 \(2015\)](#) ("Justice Scalia's opinion [in *Whitman*] rejected the notion that agencies could play any role in discerning the textual limits on their own authority, for purposes of the nondelegation inquiry.").

¹⁵ [U.S. CONST. art. I, § 1.](#)

¹⁶ See [Loving v. United States, 517 U.S. 748, 776-77 \(1996\)](#) (Scalia, J., dissenting) ("While it has become the practice in our opinions to refer to 'unconstitutional delegations of legislative authority' versus 'lawful delegations of legislative authority,' in fact the latter category does not exist. Legislative power is nondelegable.").

¹⁷Justice Scalia found it hard to find a rule, a line, that courts could draw between permissible and impermissible delegations.

This is an important form of judicial restraint. Yet it is perhaps a form of judicial restraint that does not consistently serve constitutional democracy, because it allows the widespread transfer of authority from the Congress to executive branch agencies. ¹⁸

In the area of administrative law, the deference doctrines are another important aspect of the relationship between courts and democracy. Judicial deference to agency decision-making was a principle that Justice Scalia was a strong proponent of, at least through much of his career. ¹⁹He was, of course, rethinking some of the deference doctrines such as the *Auer* ²⁰doctrine. ²¹Yet a consistent practice of deference reinforces delegations of authority to agencies, because courts are deferring to an agency's interpretation of an ambiguous statute. Thus, deference allows regulatory decision-making to rest with agency officials, rather than the people's democratically elected representatives in Congress.

To Justice Scalia's credit, one justification he often offered for judicial deference was that it furthered a certain kind of democratic accountability. He noted that at least executive branch agencies were democratically [*26] accountable through the President, which, of course, they are. ²²As between courts and agencies, then, agencies had greater democratic legitimacy. ²³

Administrative law, however, involves not only courts and agencies, but also Congress. While the executive branch is democratically accountable, it lacks the kind of collective, representative decision-making that we have in the first branch of government. ²⁴Thus, permitting open-ended delegations of authority to agencies and then deferring to their interpretations moves important decisions further from Congress and the representative legislative power.

¹⁷ [Mistretta v. United States, 488 U.S. 361, 415-22 \(1989\)](#) (Scalia, J., dissenting) ("But while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts.").

¹⁸ See, e.g., Neomi Rao, *Why Congress Matters: The Collective Congress in the Structural Constitution*, 70 FLA. L. REV. 1 (2018); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, [90 N.Y.U. L. REV. 1463 \(2015\)](#).

¹⁹ See, e.g., [United States v. Mead Corp., 533 U.S. 218, 239 \(2001\)](#) (Scalia, J., dissenting); see also [City of Arlington v. FCC, 569 U.S. 290, 296 \(2013\)](#) ("Chevron thus provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency. Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." (citation omitted)).

²⁰ *Auer v. Robbins, 518 U.S. 1016 (1996)*.

²¹ [Decker v. Nw. Env'tl. Def. Ctr., 568 U.S. 597, 617 \(2013\)](#) (Scalia, J., concurring in part and dissenting in part) ("Our cases have not put forward a persuasive justification for *Auer* deference.").

²² See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, [1989 DUKE L.J. 511, 518 \(1989\)](#) ("If Congress is to delegate broadly, as modern times are thought to demand, it seems to me desirable that the delegee be able to suit its actions to the times, and that continuing political accountability be assured, through direct political pressures upon the Executive and through the indirect political pressure of congressional oversight.").

²³ *Id.*

²⁴ See generally sources cited *supra* note 18.

This is something that Justice Scalia certainly understood and wrote about before taking the bench. He was very aware that a tremendous amount of political decision-making was happening in the executive branch:

The main problem is that the agencies have been assigned too many tasks requiring judgements that are of an essentially political nature and that ought to be made by our elected representatives. And the only remedy, if we really want a remedy, is to take some of those tasks away and to perform them instead by legislation, or not to perform them at all.²⁵

We know Justice Scalia was willing to reconsider his precedents,²⁶ so I think he would appreciate our discussion on his very important legacy and how the principles he articulated continue to be applied to new problems of separation of powers.

Judge David Stras: Thank you for inviting me, and thanks to Judge Pryor for a wonderful talk. That was quite provocative. I am going to reach pretty far back into my own career to make two points. It has been about ten years since I was a law professor, but both of my points rely on things that I learned in that role.

The first thing, and it is sort of a preliminary point, is that it struck me early in my professorial career how fundamentally Justice Scalia changed judging. When you look back at briefs and judicial opinions in the '40s, '50s, '60s, and '70s, you notice how the briefs would often start with policy and [*27] legislative history, and then by the end they would get around to the text and say, "Oh, by the way, this is consistent with what the text says as well."

Justice Scalia prompted a complete reversal. Having been a judge now for a little while, I am now happy to see people start with the text and sometimes end with the text. And that is a fundamental change that I think Justice Scalia brought to the judiciary that was only enhanced and accelerated when Justice Thomas joined him in the early 1990s.

The second point I want make is that one of the things I admire about Justice Scalia, among many things, is his rejection of what I call working backwards or results-oriented judging. Political scientists believe that judges cannot leave their politics at the door--that their policy preferences infect many of their decisions. But that relies on a proposition that I think I--and I'm sure Justice Scalia--would reject, which is that judges are inherently political.

I think Justice Scalia would reject that. And I think Justice Scalia proves that there is room for first principles, for text, and for reading the law in judicial interpretation. And I think that was Justice Scalia's first allegiance. As many others on the panel have mentioned, legislating and executing the law are the stuff of the other branches of government.

There are many examples of this, but I think there is no better example than his criminal procedure jurisprudence. Justice Scalia once said that he should be the darling of the criminal defense bar for all of his pro--criminal defendant decisions. And there are many of them.

One that was alluded to by Professor Bernstein is *Crawford v. Washington*.²⁷ There, Justice Scalia turned a doctrine that was based on pure pragmatism into one based on a simple proposition of law: is a statement testimonial? If the answer to that question is yes, then you need to bring an actual witness to the trial to have him testify and make that statement. If the answer is no, the Confrontation Clause does not apply. *Crawford's* categorical rule, to use Justice Scalia's own words, took discretion out of "judicial hands."

²⁵ Antonin Scalia, *The Legislative Veto: A False Remedy for System Overload*, REG.: AEI J. ON GOV'T & SOC'Y (Dec. 6, 1979), <http://www.aei.org/publication/the-legislative-veto-a-false-remedy-for-system-overload/>.

²⁶ See, e.g., *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring in the judgement) ("I would therefore restore the balance originally struck by the APA with respect to an agency's interpretation of its own regulations, not by rewriting the Act in order to make up for *Auer*, but by abandoning *Auer* and applying the Act as written.").

²⁷ [541 U.S. 36 \(2004\)](#).

Another example I think that Judge Pryor mentioned was *Apprendi v. New Jersey*²⁸ and the Sixth Amendment jury-trial right. Justice Scalia joined the majority opinion in *Apprendi*, which echoed the serious concerns he had raised two years earlier in a case called *Almendarez-Torres v. United States*.²⁹ Interestingly, Justice Scalia authored a separate concurrence in *Apprendi*. I think this gets back to his rejection of pragmatism and purposivism, both of which Judge Pryor mentioned. In his concurrence, Justice Scalia said that equitable considerations of fairness and efficiency are irrelevant because the Constitution unambiguously guarantees a trial by jury. And it is an erroneous "assumption that the Constitution means what we think it ought to mean. It does not; it means what it says."

[*28] And Justice Scalia was equally true to his principles even when, as Paul Clement just mentioned, he lost. In *Maryland v. King*,³⁰ for example, the Supreme Court held that the Fourth Amendment permits states to collect DNA samples from arrestees by swabbing their mouths as part of a routine booking procedure. Justice Scalia did not buy that. He said it may very well be that the Court's decision would have "the beneficial effect of solving more crimes." And, in one of his best lines, he said he doubted "that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection." Each of these examples was typical Justice Scalia: clear, concise, and, most importantly, principled.

Let me leave you with a parting thought. Figuring out Justice Scalia's philosophy, at least to me, has never been a Rorschach test. That is not true for every judge. Pick up any Justice Scalia opinion, and you will come away with the same impression. In fact, his approach may be best encapsulated by the two-word title of a book he coauthored towards the end of his career: *Reading Law*.³¹

As I now enter my tenth year of judging, I think of what it means to be a judge. I think Justice Scalia's answer was really simple. His job was to read the law, figure out what it means, and leave the policy questions for everyone else to figure out, including, as Judge Pryor pointed out, for We the People. And I think that Justice Scalia's example to law students, to lawyers, and to law professors may, in fact, be his most enduring legacy.

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²⁸ [530 U.S. 466 \(2000\)](#).

²⁹ [523 U.S. 224 \(1998\)](#).

³⁰ [569 U.S. 435 \(2013\)](#).

³¹ SCALIA & GARNER, *supra* note 7.

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ORIGINALISM AND STARE DECISIS**INTRODUCTION**

Justice Scalia was the public face of modern originalism. Originalism maintains both that constitutional text means what it did at the time it was ratified and that this original public meaning is authoritative. This theory stands in contrast to those that treat the Constitution's meaning as susceptible to evolution over time. For an originalist, the meaning of the text is fixed so long as it is discoverable.

The claim that the original public meaning of constitutional text constitutes law is in some tension with the doctrine of stare decisis. Stare decisis is a sensible rule because, among other things, it protects the reliance interests of those who have structured their affairs in accordance with the Court's existing cases. But what happens when precedent conflicts with the original meaning of the text? If Justice Scalia is correct that the original public meaning is authoritative, why is the Court justified in departing from it in the name of a judicial policy like stare decisis? The logic of originalism might lead to some unpalatable results. For example, if the original meaning of the Constitution's Gold Clauses prohibits the use of paper money, is an originalist bound to plunge the economy into ruin? Some constitutional theorists treat precedent as capable of supplementing and even supplanting the text's historical meaning; for them, choosing to follow precedent that diverges from the original meaning is relatively unproblematic. Originalists, in contrast, have difficulty identifying a principled justification for following such precedent, even when the consequences of overruling it would be extraordinarily disruptive.

Faced with this problem, Justice Scalia famously described himself as a “faint-hearted originalist” who would abandon the historical meaning when following it was intolerable.¹ He claimed that “*stare decisis* is not *part of my* *1922 originalist philosophy; it is a pragmatic *exception* to it.”² That concession left him vulnerable to criticism from both his intellectual opponents and his allies. His opponents argued that Justice Scalia's willingness to make a pragmatic exception revealed that originalism is unprincipled in theory and unworkable in practice. Some of his allies contended that a principled originalist should not be afraid to depart from even well-settled precedent.

The tension between stare decisis and originalism gave stare decisis a newly significant role in debates about constitutional theory. To be sure, judges and scholars had long grappled with the pragmatic considerations that inform the choice between keeping law settled and getting it right. But for an originalist, the decision whether to follow erroneous precedent can be more than a matter of weighing the costs and benefits of change. At least in cases involving the interpretation of constitutional text, originalists arguably face a choice between following and departing from the law embodied in that text. While the debate about stare decisis is old, modern originalism introduced a new issue: the possibility that following precedent might sometimes be unlawful.

This issue was unexplored before Justice Scalia helped propel originalism to prominence. Since then, the question whether stare decisis is compatible with originalism has occupied both originalists and their critics. In this Essay, I explore what light Justice Scalia's approach to precedent casts on that question. I argue that while he did treat stare decisis as a pragmatic exception to originalism, that exception was not nearly so gaping as his “fainthearted” quip suggests. In fact, a survey of his opinions

regarding precedent suggests new lines of inquiry for originalists grappling with the role of stare decisis in constitutional adjudication.

I. THE PROBLEM OF PRECEDENT

Before addressing the tension between originalism and stare decisis, it is important to emphasize that precedent itself is not only consistent with, but critical to, originalism. Most discussions of originalism's relationship to precedent focus on prior Supreme Court opinions. Yet one cannot paint a complete picture of Justice Scalia's attitude toward precedent without addressing his treatment of nonjudicial precedent. In an important sense, originalism can be understood as a quintessentially precedent-based theory, albeit one that does not look primarily to judicial decisions as its guide.

***1923** Originalists maintain that the decisions of prior generations, cast in ratified text, are controlling until lawfully changed. The contours of those decisions are typically discerned by historical sources. For example, the meaning of the original Constitution may be gleaned from sources like the Constitutional Convention, the ratification debates, the Federalist and Anti-Federalist Papers, actions of the early Congresses and Presidents, and early opinions of the federal courts. Originalism thus places a premium on precedent, and to the extent that originalists reject the possibility of deviating from historically-settled meaning, one could say that their view of precedent is particularly strong, not weak as their critics often contend.

Moreover, Justice Scalia framed some of his most vociferous disagreements with Supreme Court precedent as a defense of a competing form of precedent: the history and traditions of the American people. For example, he characterized the standards of scrutiny as “essential” to determining whether laws violated the Equal Protection Clause but insisted that these standards “cannot supersede--and indeed ought to be crafted *so as to reflect*--those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts.”³ When it came to the Free Speech Clause, the Justice said that he would “take my guidance as to what the Constitution forbids, with regard to a text as indeterminate as the First Amendment's preservation of ‘the freedom of speech,’ and where the core offense of suppressing particular political ideas is not at issue, from the long accepted practices of the American people.”⁴ Dissenting from the Court's holding that the Establishment Clause prohibits prayer at commencement ceremonies, Justice Scalia argued that “the Court ... lays waste a tradition that is as old as public school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally.”⁵ And while Justice Scalia would not have interpreted the Due Process Clause to have a substantive component, he did not insist upon cleaning the slate altogether. Instead, he argued that any substantive content should be determined by history and tradition rather than by modern attitudes.⁶ It was what many conceived of as wrong-headed and excessive devotion to this form of precedent--a devotion that made change difficult--that marked the fault line between Justice Scalia and those who take an evolutionary approach to constitutional interpretation.

***1924** Thus originalism does not breed contempt for precedent--quite the opposite. That said, originalism prioritizes what we might think of as the original precedent: the contemporaneously expressed understanding of ratified text. When new interpretations deviate from the old, and those deviations become entrenched, this comparatively new precedent and a commitment to the old can be in real tension.⁷

Originalism rests on two basic claims.⁸ First, the meaning of constitutional text is fixed at the time of its ratification.⁹ Second, the original meaning of the text controls because “it and it alone is law.”¹⁰ Nonoriginalists consider the text's historical meaning to be a relevant factor in interpreting the Constitution, but other factors, like value-based judgments, might overcome it. Originalists, by contrast, treat the original meaning as a relatively hard constraint.

Justice Scalia and his contemporaries did not pull originalism from thin air in the 1980s. On the contrary, Keith Whittington explains that

[a]s a method of constitutional interpretation in the United States, originalism has a long history. It has been prominently advocated from the very first debates over constitutional meaning. At various points in American history, originalism was not a terribly self-conscious theory of constitutional interpretation, in part because it was largely unchallenged as an important component of any viable approach to understanding constitutional meaning. Originalism, in its modern, self-conscious form, emerged only after traditional approaches had been challenged and, to some degree, displaced.¹¹ ***1925** Justice Scalia was at the forefront of the movement that developed

originalism in its “modern, self-conscious form” by defending it as the only democratically legitimate way to interpret and apply the Constitution.

As originalism rose to prominence, its relationship to precedent became an issue.¹² Stare decisis had received scholarly attention throughout the twentieth century. But before originalism recalled attention to the claim that the original meaning of the text constitutes binding law, no one worried much about whether adherence to precedent could ever be unlawful—as it might be if the text's original meaning constitutes the law and relevant precedent deviates from it. To be sure, many had contended that stare decisis ought to be relatively weak in constitutional cases, both out of respect for the Constitution and because of the difficulty of correcting mistakes by constitutional amendment.¹³ Justice Douglas, for example, famously asserted that “it is the Constitution which [a Justice] swore to support and defend, not the gloss which his predecessors may have put on it.”¹⁴ He did not suggest, however, either that the Court lacked the authority to sometimes adhere to its predecessors' erroneous gloss or that it was problematic for the Court to follow precedent that conflicted with the original meaning of the text. The latter would have been inconsistent with Justice Douglas's insistence that “[i]t is better that we make our own history than be governed by the dead. We too must be dynamic components of history if our institutions are to be vital, directive forces in the life of our age.”¹⁵ For a living constitutionalist, the point of overruling precedent is to bring the meaning of constitutional law into line with what the Court views as the demands of modernity. It does not involve (and indeed vehemently rejects) a return to the past in ways that could potentially disrupt modernity.

Originalists, in contrast, must grapple with this risk. Although there is dispute about which well-settled precedents depart from the original understanding, many claim that originalism cannot account for important precedents, including the New Deal expansion of federal power, the administrative state, and *Brown v. Board of Education*.¹⁶ Henry Monaghan states the problem starkly: the claim that originalism is the “only legitimate standard for judicial decisionmaking entails a massive repudiation of the present constitutional order.”¹⁷ No serious person would propose to repudiate the constitutional order, yet some suggest that the logic of originalism requires it. As Michael Gerhardt puts it, “Originalists ... have difficulty in developing a coherent, consistently applied theory of adjudication that allows them to adhere to originalism without producing instability, chaos, and havoc in constitutional law.”¹⁸ Consequently, as originalists John McGinnis and Michael Rappaport admit, “Precedent is often seen as an embarrassment for originalists.”¹⁹

Some originalists have tried to reconcile the tension between originalism and stare decisis. For example, Michael McConnell, Michael Paulsen, Steven Calabresi, and Julia Rickert have each tried to blunt the force of the stare decisis critique by making an originalist case for some arguably nonoriginalist precedents.²⁰ (While it is an imperfect label, I use the term “nonoriginalist” as shorthand for precedents that conflict with the original meaning.) Kurt Lash has argued that a “popular sovereignty-based originalist” can follow at least some erroneous precedents without sacrificing her normative commitment to popular sovereignty.²¹ John McGinnis and Michael Rappaport have repudiated the proposition that the original public meaning constitutes the law in favor of the claim that judges and public officials should follow the original public meaning because doing so yields good consequences.²² Following deeply rooted nonoriginalist precedents is justified, they say, because when departing from the original public meaning would wreak havoc, following *1927 precedent yields better consequences than following the original meaning.²³

Other originalists, by contrast, have concluded that a principled originalist cannot follow nonoriginalist precedent.²⁴ Consider Gary Lawson's provocative argument that departures from the original public meaning can never be justified.²⁵ Grounding his argument in *Marbury v. Madison*'s justification for judicial review, Lawson claims that because the Constitution is hierarchically superior to all other sources of law, a statute in conflict with the Constitution is void.²⁶ The same principle applies, he says, to judicial opinions. Judicial opinions, like statutes, are hierarchically inferior to the Constitution itself, and if they conflict with the Constitution, they are, properly understood, no law at all.²⁷ “If a statute,” Lawson argues, “enacted with all of the majestic formalities for lawmaking prescribed by the Constitution, and stamped with the imprimatur of representative democracy, cannot legitimately *1928 be given effect in an adjudication when it conflicts with the Constitution, how can a mere judicial decision possibly have a greater legal status?”²⁸ Thus, he claims, “If the Constitution says *X* and a prior judicial decision says *Y*, a court has not merely the power, but the obligation, to prefer the Constitution.”²⁹

Justice Scalia took neither tack: he neither articulated a theory attempting to reconcile adherence to nonoriginalist precedent with originalism nor argued that the original public meaning must always control. Instead, he treated stare decisis as a “pragmatic exception to [his originalist theory].”³⁰ In his well-known essay, *Originalism: The Lesser Evil*, he described his position this way:

I can be much more brief in describing what seems to me the second most serious objection to originalism: In its undiluted form, at least, it is medicine that seems too strong to swallow. Thus, almost every originalist would adulterate it with the doctrine of *stare decisis*--so that *Marbury v. Madison* would stand even if Professor Raoul Berger should demonstrate unassailably that it got the meaning of the Constitution wrong.³¹

This is consistent with the views he expressed at his confirmation hearing. Pressed by Senator Edward Kennedy to describe his position on stare decisis, Justice Scalia responded that “[t]o some extent, Government even at the Supreme Court level is a practical exercise. There are some things that are done, and when they are done, they are done and you move on.”³² While he allowed that there were some mistakes he would be willing to correct,³³ he characterized others as “so woven in the fabric of law” that he would not touch them.³⁴

Justice Scalia's pragmatism earned him criticism from both allies and intellectual opponents. Some of the former expressed regret that Justice *1929 Scalia was willing to make any sacrifice of principle,³⁵ and the latter seized upon his willingness to compromise as evidence that originalism is itself unprincipled.³⁶ In the remainder of this Essay, I will consider whether Justice Scalia's approach to stare decisis was as unprincipled as these criticisms suggest.

II. ORIGINALISM IN PRACTICE

The thrust of the stare decisis-based critique of originalism is that “if [originalists] were to vote their principles, their preferred approach would produce instability, chaos, and havoc in constitutional law.”³⁷ This threat is vastly overstated, because no originalist Justice will have to choose between his principles and the kind of chaos critics predict. Justice Scalia was never forced to make any of the decisions that critics cast as deal-breakers for originalism. He was never required, for example, to decide whether paper money is constitutional or whether *Brown v. Board of Education* was rightly decided. The validity of these cases--and, for that matter, most of the cases printed in the United States Reports--is never challenged because the rules of adjudication keep the question of their validity off the table.

As I have explained elsewhere, “other features of the federal judicial system, working together, do more than the constraint of horizontal stare decisis to keep the Court's case law stable.”³⁸ A combination of rules--some constitutional, some statutory, and some judicially adopted--keep most challenges to precedent off the Court's agenda. The Justices not only lack any *1930 obligation to work systematically through the United States Reports looking for errors; the “case or controversy” requirement prevents them from doing so. Not only are they limited to answering questions presented by litigants seeking resolution of a live dispute, the Court's discretionary jurisdiction generally permits it to choose which questions it wants to answer. This in and of itself keeps the most potentially disruptive challenges to precedent off the Court's docket. Even if a petitioner asked the Court to revisit, say, its 1937 conclusion that the Social Security Act is constitutional, there is no chance that the Court would grant certiorari.³⁹

To be sure, erroneous precedents may lie in the background of cases that the Court has agreed to decide. Assume that a Justice has doubts about whether *Marbury v. Madison* was wrongly decided. The Justice will implicitly rely upon *Marbury* in every exercise of judicial review. But the Justice, whatever her theoretical doubts, has no obligation to open an inquiry into whether *Marbury* (and, for that matter, every other decision lying in the background of the case before her) is right. Indeed, the rule that the Court will decide only those questions presented in the petition for certiorari constrains Justices from deciding the merits of every legal issue that lurks in a case.⁴⁰ That rule is not hard and fast, and the Justices sometimes raise additional issues, like the matter of precedent's validity, on their own.⁴¹ But doing so happens when a Justice *wants* to address the merits of precedent. If a precedent is so deeply embedded that its overruling would cause chaos, no Justice will want to subject the precedent to scrutiny.

Taken together, these features of the judicial system function like a hidden avoidance mechanism: they keep the question whether precedent should be overruled off the table altogether.⁴² The doctrine of stare decisis is often credited with keeping precedent stable, but the force of that doctrine only kicks in when the question whether to overrule precedent is called. The *1931 overwhelming majority of Supreme Court cases remain stable because the Court never faces the question. Stability, therefore, is less attributable to the doctrine of stare decisis than to the fact that the Constitution does not require the Court to identify, much less rectify, every constitutional mistake. Justices focus their attention on the contested question in front of them and are permitted to operate on the assumption that surrounding but unchallenged law is correct. The system could not operate otherwise; it would grind to a halt if the Justices were obliged to identify and address every single legal issue contained within a case.

Justice Scalia operated within this system. Stephen Sachs jokes that originalists are often viewed as “followers, allegedly, of a nefarious ‘Constitution in Exile,’ waiting in their subterranean lairs to subdue the populace and abolish the New Deal.”⁴³ But Justice Scalia had no desire to exhume all errors from the United States Reports. On the contrary, he observed:

Originalism, like any theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew. It is of no more consequence at this point whether the Alien and Sedition Acts of 1798 were in accord with the original understanding of the First Amendment than it is whether *Marbury v. Madison* was decided correctly. ... [O]riginalism will make a difference ... not in the rolling back of accepted old principles of constitutional law but in the rejection of usurpatious new ones.⁴⁴

And that, indeed, is the field on which Justice Scalia played. He faced some conflicts between the Constitution's original meaning and contrary precedent, but his commitment to originalism did not put him at continual risk of upending settled law. Originalism does not obligate a justice to reconsider nonoriginalist precedent *sua sponte*, and if reversal would cause harm, a Justice would be foolhardy to go looking for trouble. Justice Scalia didn't. As he once quipped, “I am a textualist. I am an originalist. I am not a nut.”⁴⁵

The precedents that Justice Scalia voted to overrule were not in the category that constitutional scholars sometimes call “super precedent”—cases so deeply embedded that their overruling is off the table.⁴⁶ For example, Justice Scalia rejected precedent asserting the power to give newly decided civil cases only prospective application on the ground that this is not a feature of the “judicial Power”⁴⁷ as it was understood at the Founding,⁴⁸ and he argued *1932 that *Miranda v. Arizona* should be discarded for its lack of support in “history, precedent, or common sense.”⁴⁹ He was persistent in his view that “the Double Jeopardy Clause prohibits successive prosecution, not successive punishment,”⁵⁰ and he refused to join opinions using the *Lemon* test to enforce the Establishment Clause.⁵¹ He repeatedly argued that the Court should overrule its cases holding that a woman has a substantive due process right to terminate her pregnancy,⁵² and he consistently declined to apply the cases *1933 holding that the Due Process Clause imposes a “fairness” cap on punitive damages.⁵³

He was willing to overrule precedent outright in the above cases because he thought that the error was clear and that traditional stare decisis factors like reliance or workability counseled it. There were other cases, however, in which he thought that precedent was wrong but did not advocate outright overruling. The following four areas illustrate Justice Scalia's pragmatism in handling conflicts between his commitment to the original public meaning and the pull of settled precedent: (1) the dormant Commerce Clause; (2) substantive due process; (3) the Eighth Amendment; and (4) Congress's power under Section 5 of the Fourteenth Amendment.

A. Dormant Commerce Clause

Justice Scalia attacked the Court's dormant Commerce Clause jurisprudence in his very first term. In *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, he concluded a lengthy explanation of his disagreement with those cases with the assertion that

the Court for over a century has engaged in an enterprise that it has been unable to justify by textual support or even coherent nontextual theory, that it was almost certainly not intended to undertake, and that it has not undertaken very well. It is astonishing that we should be expanding our beachhead in this impoverished territory, rather than being satisfied with what we have already acquired by a sort of intellectual adverse possession.⁵⁴

Tyler Pipe, however, did not require him to decide whether he would vote to overrule the dormant Commerce Clause doctrine; he could decide the case by refusing to extend it. When he faced the former question in his second term, Justice Scalia articulated the following approach: he would adhere to the line of cases invalidating state laws that discriminated against interstate commerce despite his belief that those cases were wrong,⁵⁵ but he refused to apply the line of cases that required the Court to balance the state law's burden on interstate commerce against its benefit unless the challenged law was *1934 indistinguishable from a law previously held unconstitutional by the Court.⁵⁶ In that event, he “would normally suppress [his] earlier view of the matter and acquiesce in the Court's opinion that it is unconstitutional.”⁵⁷ He thus drew a line between “decisional theory,” which he felt free to reject, and application of that theory to particular facts, which he felt constrained to follow.⁵⁸ He remained constant in this approach to dormant Commerce Clause cases throughout his entire tenure on the Court.⁵⁹

It is worth paying attention to the careful distinction that Justice Scalia drew between “decisional theory” and results. In some circumstances, he felt obligated to adhere to nonoriginalist *decisional theory*. He adhered to the “discrimination” test in dormant Commerce Clause doctrine because it established a clear line that was relatively easy for courts to apply. By contrast, he thought the “balancing” test was unpredictable and that it therefore did not offend reliance or stability interests to abandon it.⁶⁰ His judgment about *1935 when to challenge and when to acquiesce in decisional theory thus reflected a traditional application of stare decisis.⁶¹

Even when he rejected a nonoriginalist decisional theory, however, he considered whether to treat the nonoriginalist *results* reached under that theory differently. Because reliance interests in the Court's view about specific laws (as opposed to the Court's view about more general doctrines) are particularly high, he stuck with those results even in the “balancing” cases whose decisional theory he rejected. He felt particularly strongly about the reliance interests at stake in that situation. While he did not think that specific dispositions were set in stone, he thought that the Court should “retain [its] ability ... sometimes to adopt new principles for the resolution of new issues without abandoning clear holdings of the past that those principles contradict.”⁶²

B. Substantive Due Process

Justice Scalia had “misgivings about Substantive Due Process as an original matter.”⁶³ Nonetheless, he acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights “because it is both long established and narrowly limited.”⁶⁴ He refused, however, to accept the body of precedent standing for the “proposition that the Due Process Clause guarantees certain (unspecified) liberties, rather than merely guarantees certain procedures as a prerequisite to deprivation of liberty.”⁶⁵ Despite this belief, he did occasionally acquiesce in the line of due process opinions maintaining that the liberty interest in the Due Process Clause protected those rights deemed fundamental by history and tradition.⁶⁶ He thus did not entirely distance *1936 himself from a decisional theory he thought unsupported by the Constitution. At the same time, he found that history and tradition were reason to refuse rather than to recognize the existence of the urged right; the result in these cases, if not the analysis, was the same as it would have been under his preferred approach.⁶⁷

Like the dormant Commerce Clause cases, the substantive due process cases draw a line between “decisional theory” and “results.” In *Troxel v. Granville*, Justice Scalia dissented from the Court's holding that a Washington statute permitting the children's paternal grandparents to gain court-ordered visitation against the mother's wishes violated the Due Process Clause. He conceded that older opinions of the Court had recognized a substantive due process right of parents to direct the upbringing of their children, but he characterized their “claim to *stare decisis* protection” as “small” given that their application did not yield predictable results.⁶⁸ Consistent with his approach in dormant Commerce Clause cases, he did not propose disturbing the

results of the two cases on which the Court relied (especially because that had not been urged), but he did propose abandoning the theory of decision upon which they rested by refusing to apply it in new contexts.⁶⁹

C. Eighth Amendment

Justice Scalia thought that the Court's Eighth Amendment cases were flawed in at least two respects. First, he thought that the Court should look *1937 to the original application of the Eighth Amendment, not evolving standards of decency, to determine whether a punishment was “cruel and unusual.”⁷⁰ Second, he rejected the proposition that the Eighth Amendment requires that a punishment be proportionate to the offense.⁷¹ He applied the former decision theory, but not the latter, on grounds of stare decisis.⁷² He justified the latter departure on the ground that the precedent was not only inconsistent with the Eighth Amendment, but one he could not “intelligently apply.”⁷³

His concession to “evolving standards of decency” might be taken as some evidence of faint-hearted originalism because, as in the substantive due process context, he acceded to a decisional theory that he thought at odds with the original public meaning of the Constitution's text. As in the case of substantive due process, however, the results in the cases were the same as those he would have reached under his preferred reasoning.⁷⁴

Two other death penalty cases are revealing of Justice Scalia's approach to potential conflicts between original meaning and erroneous precedent. He expressed doubts about *Furman v. Georgia*'s holding that it was “cruel and unusual” to give the sentencer unfettered discretion to decide whether to impose the death penalty because it rendered the penalty a “random and infrequent event.”⁷⁵ But because *Furman* did not clearly contradict the text, he was willing to adhere to it on grounds of stare decisis. Indeed, because of stare decisis, he explicitly refrained from even undertaking to examine *1938 whether *Furman*'s interpretation was consistent with the historical meaning of “unusual punishment.”⁷⁶

He was not willing, however, to follow a line of cases holding that the mandatory imposition of death (i.e., a scheme that gives the sentencer no discretion) was cruel and unusual punishment.⁷⁷ In contrast to *Furman*, which rested on the ground that the randomness and infrequency of capital punishment in discretionary capital sentencing rendered that punishment “cruel and unusual,” Justice Scalia thought that mandatory capital sentencing “cannot possibly violate the Eighth Amendment, because it will not be ‘cruel’ (neither absolutely nor for the particular crime) and it will not be ‘unusual’ (neither in the sense of being a type of penalty that is not traditional nor in the sense of being rarely or ‘freakishly’ imposed).”⁷⁸ He refused to follow these cases on grounds of stare decisis not only because they had “no proper basis in the Constitution,” but also because he found them in irreconcilable tension with *Furman*.⁷⁹ He announced, moreover, that he had no intention of acquiescing in those cases in the future: “I will not, in this case or in the future, vote to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted.”⁸⁰

D. Section 5

Despite “misgiv[ing],” Justice Scalia joined *City of Boerne v. Flores*,⁸¹ which announced that Congress's exercise of its power under Section 5 of the Fourteenth Amendment must be “congruen[t] and proportional[]” to the constitutional violation it was designed to remedy.⁸² By the time *Tennessee v. Lane* arrived at the Court, the Justice had reconsidered his view. He concluded that the limit on Congress's power was set by the language of Section 5: Congress had the power “to enforce” the Fourteenth Amendment but not to enact prophylactic measures going beyond what the Constitution itself requires.⁸³ Yet as he acknowledged, “The major impediment to the approach I have suggested is *stare decisis*.”⁸⁴ Major statutes like the Voting *1939 Rights Act assumed the validity of the Court's earliest Section 5 cases, which held that Section 5 conferred prophylactic power on Congress.⁸⁵ The longstanding cases endorsing prophylactic power were almost exclusively in the area of racial discrimination, which was the principal concern of the Fourteenth Amendment. He decided, therefore, to preserve both the results and the decisional theory of the Section 5 cases in the context of racial discrimination. “[P]rincipally for reasons of *stare decisis*, I shall henceforth apply the permissive *McCulloch* standard to congressional measures designed to remedy racial discrimination by the States.”⁸⁶ Outside the context of race, he would not accept assertions of prophylactic power, and if

the legislation truly “enforced” the amendment, he would give it full effect without considering whether it was congruent and proportional.⁸⁷

III. PRAGMATISM AND PRINCIPLE

Justice Scalia's opinions in the cases are consistent with the approach he described in extrajudicial writing: he was willing to treat stare decisis as a limited, pragmatic exception to originalism. The careful explanations he gave, however, open up potential lines of inquiry for those exploring whether the tension between originalism and stare decisis can be resolved as a matter of principle.

First, it is worth paying attention to Justice Scalia's distinction between decisional theory and results. Discussions of stare decisis tend not to differentiate between the two. Adhering to a nonoriginalist decisional theory poses a different and more theoretically difficult issue for the originalist than does simply leaving the result of a decision in place. Perpetuating a decisional theory might function as a “virtual amendment” of the Constitution's text, substituting a new legal standard for the one originally imposed by the text. For example, Laurence Tribe levies this charge: “That Justice Scalia, despite his protestations, implicitly accepts some notion of evolving constitutional principles is apparent from his application of the doctrine of *stare decisis*.”⁸⁸ But there is a difference between leaving the result of precedent in place (for instance, the holding that certain state laws violate the dormant Commerce Clause) and accepting its decisional theory as governing new contexts (as he would have done had he applied the dormant Commerce Clause “balancing test” to new state laws).⁸⁹ Originalist scholars have raised the possibility *1940 that a principle of equity might be able to justify giving stare decisis effect to nonoriginalist decisions.⁹⁰ If that theory were developed, it might be better suited to holding results, rather than decisional theories, in place.

Second, Justice Scalia's “no harm, no foul” approach to the decisional theories of “evolving standards of decency” in the Eighth Amendment and substantive due process contexts prompts reflection on what fidelity to the Constitution requires. In both contexts, he accepted nonoriginalist decisional theories that led to the same result as the originalist approach he preferred.⁹¹ Is a Justice unfaithful to the Constitution because he joins a poorly reasoned opinion that gets to the right place? Put differently, is fidelity to the Constitution measured by the Court's judgment or its opinion, by its result or by its reasoning?⁹²

Third, stability is fostered by what we might call an “avoidance canon” for stare decisis--avoiding the reexamination of precedent by assuming *arguendo* that it is correct. This technique of assuming, and therefore not investigating, a precedent's validity to avoid the possibility of overruling it is a critical means of keeping law stable. As Part II explained, every judicial decision makes this implicit assumption with respect to a large swath of the law that surrounds the issue contested in court. Sometimes, however, an opinion makes that assumption explicit with respect to specific “neighboring” precedent. Such a move does not endorse the correctness of the prior decision; rather, it avoids inquiry into the decision's merits. Thus, for example, Justice Scalia did not “reconsider” the view that the Fourteenth Amendment incorporated the Bill of Rights against the states, when “straightforward application *1941 of settled doctrine suffice[d] to decide it.”⁹³ Despite doubts, he did not “explore the subject” whether *Furman v. Georgia*'s interpretation of “cruel and unusual” was consistent with the Eighth Amendment's historical meaning because the text could bear its meaning. And in several cases, he declined to decide whether precedent should be overruled when the parties did not urge overruling.⁹⁴ To be sure, explicitly stating that one is refraining from considering whether precedent is right signals that one thinks the precedent is probably wrong. That may be an invitation to parties to argue that point in the future, or a Justice may feel compelled to acknowledge obvious tension between relevant precedent and his otherwise stated views. Whatever the motivation, it preserves the precedent without having to address either its merits or the stare decisis question. Justice Scalia once said that the “whole function of [stare decisis] is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability.”⁹⁵ The avoidance technique for stare decisis says “I am not deciding whether this is false or, if it is, whether stare decisis would compel me to say that it is true.”

The practice of assuming--without deciding--that all surrounding, unchallenged law is correct operates invisibly. It is thus hardly noticed, and the way in which it contributes to the law's stability is underappreciated. The attention comes when the presumption is set aside. For example, the Court sometimes calls for supplemental briefing to address the issue whether a precedent that the parties did not challenge should be overruled.⁹⁶ Or, Justices *1942 sometimes urge the overruling of a case where the merits of the precedent were neither raised nor briefed by the parties.⁹⁷ The Court also decides how much precedent to unsettle when it decides how broadly to write an opinion: there are sometimes disputes about whether the Court should overrule a precedent outright or merely narrow it and leave the question whether it should be overruled for another day (or never).⁹⁸ These choices

are not best understood as choices about the strength of stare decisis. They are better understood as choices about whether to put the merits of precedent on the agenda, thereby forcing the Court to consider whether stare decisis should hold the precedent in place.

Students of stare decisis focus primarily on how stare decisis should play out once the validity of a precedent is on the table, but agenda control is equally if not more important. It also poses a distinct set of questions. For example, it is worth considering whether principle ever obligates a justice to put the question of precedent's validity on the table *sua sponte*; whether duty strongly counsels a minimalist approach that avoids questioning precedent wherever possible; whether it is a matter left to the prudential judgment of each Justice; and, if it is a prudential judgment, what factors should guide the decision.

CONCLUSION

Justice Scalia admitted that “in a crunch I may prove a faint-hearted originalist.”⁹⁹ Stare decisis, however, rarely put him in a crunch, mostly because of the underappreciated features of our system that keep the law stable without need for resort to the doctrine of stare decisis. To the extent he was occasionally faint hearted, however, who could blame him for being human? As the Justice himself put it:

As for the fact that originalism is strong medicine, and that one cannot realistically expect judges (probably myself included) to apply it without a trace *1943 of constitutional perfectionism: I suppose I must respond that this is a world in which nothing is flawless, and fall back upon G.K. Chesterton's observation that a thing worth doing is worth doing badly.¹⁰⁰

Nothing is flawless, but I, for one, find it impossible to say that Justice Scalia did his job badly.

Footnotes

^{a1} Diane and M.O. Miller, II Research Chair in Law, Notre Dame Law School. This Essay was prepared for the *Notre Dame Law Review's* federal courts symposium on the jurisprudence of Justice Scalia. Thanks to all participants for discussing and thereby sharpening the argument developed in this contribution.

¹ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (“I hasten to confess that in a crunch I may prove a faint-hearted originalist.”). Justice Scalia recanted this statement insofar as it indicated his willingness to hold laws unconstitutional simply because they were unpalatable. See MARCIA COYLE, *THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION* 165 (2013) (reporting a 2011 interview in which Justice Scalia “recanted” being a “faint-hearted” originalist and asserted that, contrary to his 1989 statement, he would uphold a state law imposing a punishment like “notching of ears” because “it's a stupid idea but it's not unconstitutional”). He never recanted it, however, insofar as it reflected his pragmatic approach to stare decisis.

² ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 140 (Amy Gutmann ed., 1997).

³  [United States v. Virginia](#), 518 U.S. 515, 568 (1996) (Scalia, J., dissenting); see also  *id.* at 568-69 (arguing that when a practice is not contradicted by constitutional text and is supported by “a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down” (quoting  [Rutan v. Republican Party of Ill.](#), 497 U.S. 62, 95 (1990) (Scalia, J., dissenting))).

⁴  [44 Liquormart, Inc. v. Rhode Island](#), 517 U.S. 484, 517 (1996) (Scalia, J., concurring in part and concurring in the judgment).

- 5  [Lee v. Weisman](#), 505 U.S. 577, 631-32 (1992) (Scalia, J., dissenting).
- 6 *See infra* notes 63-69 and accompanying text.
- 7 When considered from the perspective of the Supreme Court, precedent provoking this problem is most often judicial. But deeply entrenched, erroneous nonjudicial precedents can also provoke this problem, particularly for political actors committed to originalism. *See* Amy Coney Barrett & John Copeland Nagle, [Congressional Originalism](#), 19 U. PA. J. CONST. L. 1, 24 (2016) (identifying several decisions, including the admission of the state of West Virginia, that some have characterized as inconsistent with the Constitution's original meaning).
- 8 *See* Keith E. Whittington, [Originalism: A Critical Introduction](#), 82 FORDHAM L. REV. 375, 378 (2013) (“The two crucial components of originalism are the claims that constitutional meaning was fixed at the time of the textual adoption and that the discoverable historical meaning of the constitutional text has legal significance and is authoritative in most circumstances.”); *see also* Lawrence B. Solum, [District of Columbia v. Heller and Originalism](#), 103 NW. U. L. REV. 923, 944-46 (2009) (similarly describing the two core claims of originalism).
- 9 Whittington, *supra* note 8, at 378.
- 10 Steven G. Calabresi & Saikrishna B. Prakash, [The President's Power to Execute the Laws](#), 104 YALE L.J. 541, 552 (1994) (footnote omitted); *see also* Steven D. Smith, [Reply to Koppelman: Originalism and the \(Merely\) Human Constitution](#), 27 CONST. COMMENT. 189, 193 (2010) (“[O]riginalism insists ... that what counts as *law*--as valid, enforceable law--is what human beings enact, and that the meaning of that law is what those human beings understood it to be.” (footnote omitted)). *But see* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013) (arguing that the original public meaning should control not because it is “the law” but because following it yields the best consequences).
- 11 Keith E. Whittington, [The New Originalism](#), 2 GEO. J.L. & PUB. POL'Y 599, 599 (2004) (footnote omitted).
- 12 Justice Scalia fielded questions about the relationship between originalism and stare decisis during his confirmation hearing before the Senate. *See infra* notes 32-34 and accompanying text. The issue figured even more prominently in the confirmation hearings on the nomination of Robert Bork. THE BORK HEARINGS: HIGHLIGHTS FROM THE MOST CONTROVERSIAL JUDICIAL CONFIRMATION BATTLE IN U.S. HISTORY 54-66 (Ralph E. Shaffer ed., 2005).
- 13 *See, e.g.*,  [Burnet v. Coronado Oil & Gas Co.](#), 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting) (“[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.” (footnote omitted)).
- 14 William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).
- 15 *Id.* at 739; *see also id.* at 749 (suggesting that a willingness to overrule precedent is a necessary means of updating the law to keep it in line with our living Constitution).
- 16 *See, e.g.*, Jamal Greene, [Selling Originalism](#), 97 GEO. L.J. 657, 668-69 (2009) (“A committed historicist could easily conclude that the Court's privacy and women's rights decisions are wrong, and that the use of paper money as legal tender, the use of the federal commerce power to establish the welfare state and federal civil rights laws, and the federal administrative state itself are all unconstitutional. Yet all of these doctrinal developments lie beyond any reasonable constitutional objection.” (footnote omitted)). I do not address the question whether these cases or any others are in fact inconsistent with the original public meaning.
- 17 Henry Paul Monaghan, [Stare Decisis and Constitutional Adjudication](#), 88 COLUM. L. REV. 723, 727 (1988).
- 18 Michael J. Gerhardt, [Super Precedent](#), 90 MINN. L. REV. 1204, 1224 (2006). This is not to say, of course, that other constitutional theories do not face similar challenges. The concern is especially acute, however, with respect to originalism.
- 19 MCGINNIS & RAPPAPORT, *supra* note 10, at 195.

- 20 See, e.g., Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011) (advancing an originalist argument for the proposition that the Constitution rules out sex discrimination); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (arguing that *Brown v. Board of Education* is consistent with the original meaning of the Fourteenth Amendment); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 900-07 (2009) (arguing that *Brown*, the *Legal Tender Cases*, and cases validating the administrative state are each consistent with an originalist understanding of the Constitution).
- 21 See Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1473-77, 1480 n.126 (2007).
- 22 *Id.*
- 23 See John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 836-38 (2009) (arguing that an originalist should follow nonoriginalist precedent rather than overrule it when, *inter alia*, the costs of overruling would be borderline catastrophic--as they would be with respect to paper money--or when the principles would be supported by constitutional amendment in the absence of the cases--as they would be with respect to race and gender discrimination); see also MCGINNIS & RAPPAPORT, *supra* note 10, at 154-74 (arguing that Article III incorporates a minimal notion of precedent and empowers judges to develop it further; because the Constitution itself authorizes precedent, it authorizes judges to adhere to the precedent in preference to the original meaning; the question for the judge is simply how to measure the tradeoff so that he knows when to follow precedent and when to follow the original public meaning).
- 24 See, e.g., Randy E. Barnett, *It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1233 (2006) (insisting that while "faint-hearted originalists" are willing to make a pragmatic exception to stare decisis to avoid political suicide, "[o]ther originalists like Mike Paulsen, Gary Lawson, and myself--call us 'fearless originalists,' ...--reject the doctrine of stare decisis in the following sense: if a prior decision of the Supreme Court is in conflict with the original meaning of the text of the Constitution, it is the Constitution and not precedent that binds present and future Justices." (footnotes omitted)); see also Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 258-59 (2005) (arguing that originalism is inconsistent with precedent because "[o]riginalism amounts to the claim that the meaning of the Constitution should remain the same until it is properly changed," and the Constitution authorizes change only by constitutional amendment).
- 25 See Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994). Lawson was the first to argue that enforcing precedent in conflict with the Constitution is unconstitutional. See *id.* at 28 n.16 (noting that "[p]rior critics of precedent have stopped short of actually declaring the practice unconstitutional," and that "I know of no judge who expressly renounced the use of precedent on constitutional grounds" (citations omitted)).
- 26 See *id.* at 26; see also *id.* at 27 (maintaining that *Marbury's* rationale for judicial review means that "legislative or executive interpretations of the Constitution are no substitute for the Constitution itself. The court's job is to figure out the true meaning of the Constitution, not the meaning ascribed to the Constitution by the legislative or executive departments." (footnote omitted)).
- 27 See *id.* at 26-27.
- 28 *Id.* at 27; see also *id.* at 28 ("[T]he case for judicial review of legislative or executive action is precisely coterminous with the case for judicial review of prior judicial action. What's sauce for the legislative or executive goose is also sauce for the judicial gander.").
- 29 See *id.* at 27-28. Justice Scalia, by contrast, accepted stare decisis, while admitting that its "whole function ... is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability." SCALIA, *supra* note 2, at 139.
- 30 SCALIA, *supra* note 2, at 140 (emphasis omitted).
- 31 Scalia, *supra* note 1, at 861.

- 32 13 ROY M. MERSKY & J. MYRON JACOBSTEIN, *THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1986*, at 132 (1989).
- 33 He stated, “I will not say that I will never overrule prior Supreme Court precedent.” *Id.* at 131. He characterized some precedents as weaker and others stronger under the doctrine of stare decisis, *see id.*, and said that the weight a precedent carries “depends on the nature of the precedent, the nature of the issue,” *id.*
- 34 *Id.* at 132. He did not specify, however, where any actual Supreme Court precedent fell. *Id.* (“Now, which of those you think are so woven in the fabric of the law that mistakes made are too late to correct, and which are not, that is a difficult question to answer. It can only be answered in the context of a particular case, and I do not think that I should answer anything in the context of a particular case.”).
- 35 *See, e.g.*, Randy E. Barnett, *Scalia's Infidelity: A Critique of 'Faint-Hearted' Originalism*, 75 U. CIN. L. REV. 7, 13 (2006) (arguing that Justice Scalia is “unfaithful to the original meaning of the text” because, *inter alia*, “he is willing to avoid objectionable outcomes that would result from originalism by invoking [nonoriginalist] precedents”); Nelson Lund, *Antonin Scalia and the Dilemma of Constitutional Originalism* 14 (George Mason Univ. Legal Studies Research Paper Series, Paper No. LS16-36, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2880578 (arguing that Justice Thomas's approach to stare decisis, not Justice Scalia's, is “what one would expect from a committed originalist,” because Justice Thomas, unlike Justice Scalia, is willing to “repudiate[]” constitutional doctrine inconsistent with the Constitution).
- 36 Laurence Tribe's critique of Justice Scalia's position is representative: “That Justice Scalia, despite his protestations, implicitly accepts some notion of evolving constitutional principles is apparent from his application of the doctrine of *stare decisis*.” Laurence H. Tribe, *Comment*, in SCALIA, *supra* note 2, at 65, 82. Justice Scalia resented the suggestion that originalists were uniquely unprincipled, because, as he put it, stare decisis is a “compromise of all philosophies of interpretation.” SCALIA, *supra* note 2, at 139. The demand that originalists alone “be true to their lights” and forswear *stare decisis* is essentially a demand that they alone render their methodology so disruptive of the established state of things that it will be useful only as an academic exercise and not as a workable prescription for judicial governance. *Id.*
- 37 MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 192 (2008).
- 38 Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1730 (2013). For a fuller discussion of the relationship between originalism, stare decisis, and agenda control, *see id.* at 1730-37; *see also* Barrett & Nagle, *supra* note 7.
- 39 *See*  [Helvering v. Davis](#), 301 U.S. 619 (1937) (holding that the Social Security Act is constitutional).
- 40 *See* SUP. CT. R. 14.1(a) (“Only the questions set out in the petition, or fairly included therein, will be considered by the Court.”).
- 41 *See, e.g.*,  [Montejo v. Louisiana](#), 556 U.S. 778, 792, 797 (2009) (overruling  [Michigan v. Jackson](#), 475 U.S. 625 (1986), after calling for supplemental briefing on the question whether it should be overruled);  [Payne v. Tennessee](#), 498 U.S. 1076 (1991) (ordering supplemental briefing on the question whether two controlling precedents should be overruled). This practice has been sharply criticized. *See, e.g.*,  [Citizens United v. Fed. Election Comm'n](#), 558 U.S. 310, 396 (2010) (Stevens, J., dissenting) (asserting that ordering the parties to address whether precedent should be overruled is “unusual and inadvisable for a court” (footnote omitted)). The Court has also occasionally reconsidered precedent without even asking the parties to argue the point, a practice that is also criticized. *See, e.g.*,   [Mapp v. Ohio](#), 367 U.S. 643, 673-74 (1961) (Harlan, J., dissenting) (criticizing the Court for having “reached out” to decide whether to overrule precedent when the issue was neither raised nor briefed by the parties).

- 42 Cf. GERHARDT, *supra* note 37, at 45 (“The justices’ respect for the Court’s precedents is evident in their choices of which matters not to hear. Thus, in the certiorari process, the justices often demonstrate their desire to adhere to or accept precedents they might not have decided the same way in the first place.”).
- 43 Stephen E. Sachs, *The “Constitution in Exile” as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2254 (2014).
- 44 SCALIA, *supra* note 2, at 138-39.
- 45 COYLE, *supra* note 1, at 163 (quoting Justice Antonin Scalia) (emphasis omitted).
- 46 See Gerhardt, *supra* note 18, at 1207-17 (identifying several “constitutional decisions whose correctness is no longer a viable issue for courts to decide,” including *Marbury v. Madison*, *Mapp v. Ohio*, the *Legal Tender Cases*, *Brown v. Board of Education*, and the *Civil Rights Cases*); see also Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1180-82 (2006) (identifying the constitutionality of social security, paper money, school segregation, independent agencies, federal economic regulation, and the incorporation of the Bill of Rights as “bedrock precedents” that “cannot be undone”).
- 47 U.S. CONST. art. III, § 1.
- 48 See  [James B. Beam Distilling Co. v. Georgia](#), 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment);  [Am. Trucking Ass'ns, Inc. v. Smith](#), 496 U.S. 167, 200-05 (1990) (Scalia, J., concurring in the judgment) (similar). He also maintained, despite contrary precedent, that the separation-of-powers principle prohibits Congress from assigning cases to an Article I court on the theory that they involve “public rights” if the federal government is not a party to the suit. See  [Stern v. Marshall](#), 564 U.S. 462, 503 (2011) (Scalia, J., concurring) (“I adhere to my view ... that--our contrary precedents notwithstanding--‘a matter of public rights ... must at a minimum arise between the government and others.’” (second alteration in original) (citations omitted));  [Granfinanciera, S.A. v. Nordberg](#), 492 U.S. 33, 68-69 (1989) (Scalia, J., concurring in part and concurring in the judgment) (arguing that the traditional “public rights” exception was grounded in the original understanding of the concepts of sovereign immunity and “the judicial power,” but the modern, pragmatic balancing test extending that exception was unmoored from both text and history (emphasis omitted)).
- 49  [Dickerson v. United States](#), 530 U.S. 428, 450, 461-65 (2000) (Scalia, J., dissenting).
- 50  [Witte v. United States](#), 515 U.S. 389, 407 (1994) (Scalia, J., concurring in the judgment) (internal quotation marks omitted) (quoting  [Dep't of Revenue of Mont. v. Kurth Ranch](#), 511 U.S. 767, 804-05 (1994) (Scalia, J., dissenting)); see also  *id.* at 406 (“This is one of those areas in which I believe our jurisprudence is not only wrong but unworkable as well, and so persist in my refusal to give that jurisprudence *stare decisis* effect.”).
- 51  [Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.](#), 508 U.S. 384, 399-400 (1993) (Scalia, J., concurring in the judgment) (“I will decline to apply *Lemon*--whether it validates or invalidates the government action in question--and therefore cannot join the opinion of the Court today.”).
- 52 He repeatedly urged the overruling of *Roe v. Wade*. See, e.g.,  [Planned Parenthood of Se. Pa. v. Casey](#), 505 U.S. 833, 979 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part);  [Webster v. Reprod. Health Servs.](#), 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment) (urging an explicit overruling of *Roe*). Once *Casey* superseded *Roe*, he urged its overruling as well. See  [Stenberg v. Carhart](#), 530 U.S. 914, 955 (2000) (insisting that “*Casey* must be overruled”). While some have characterized *Roe v. Wade* as a “superprecedent [],” see Arlen Specter, Op-Ed., *Bringing the Hearings to Order*, N.Y. TIMES (July 24, 2005), <http://www.nytimes.com/2005/07/24/opinion/24specter.html>, scholars do not put *Roe* on the super precedent list because the public controversy about *Roe* has never abated. See, e.g., Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1116 (2008) (“[A] decision as fiercely and

enduringly contested as *Roe v. Wade* has acquired no immunity from serious judicial reconsideration, even if arguments for overruling it ought not succeed.”); Gerhardt, *supra* note 18, at 1220 (asserting that *Roe* cannot be considered a super precedent in part because calls for its demise by national political leaders have never retreated).

53

See [State Farm Mut. Auto. Ins. Co. v. Campbell](#), 538 U.S. 408, 429 (2003) (Scalia, J., dissenting) (“[T]he punitive damages jurisprudence which has sprung forth from *BMW v. Gore* is insusceptible of principled application; accordingly, I do not feel justified in giving the case *stare decisis* effect.”); [BMW of N. Am., Inc. v. Gore](#), 517 U.S. 559, 599 (1996) (Scalia, J., dissenting) (“When, however, a constitutional doctrine adopted by the Court is not only mistaken but also insusceptible of principled application, I do not feel bound to give it *stare decisis* effect--indeed, I do not feel justified in doing so.”).

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[483 U.S. 232, 265 \(1987\)](#) (Scalia, J., dissenting). In [American Trucking Ass'ns v. Scheiner](#), 483 U.S. 266 (1987), a case handed down the very same day, Justice Scalia asserted, “For the reasons given in my dissent in [*Tyler Pipe*], I do not believe that test can be derived from the Constitution or is compelled by our past decisions.” [Id.](#) at 304 (Scalia, J., dissenting) (citation omitted).

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See [Bendix Autolite Corp. v. Midwesco Enters., Inc.](#), 486 U.S. 888, 898 (1988) (Scalia, J., concurring in the judgment) (“In my view, a state statute is invalid under the Commerce Clause if, and only if, it accords discriminatory treatment to interstate commerce in a respect not required to achieve a lawful state purpose.”).

56

[Id.](#) at 897 (“I would therefore abandon the ‘balancing’ approach to these negative Commerce Clause cases, first explicitly adopted 18 years ago in *Pike v. Bruce Church, Inc.*, and leave essentially legislative judgments to the Congress.” (citation omitted)); see also *id.* (“Issues already decided I would leave untouched.”).

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[Am. Trucking Ass'ns v. Smith](#), 496 U.S. 167, 204 (1990) (Scalia, J., concurring in the judgment). He refused to do so, however, if the law at issue predated the Court's decision holding unconstitutional a similar law and would have been consistent with the Court's then-existing jurisprudence. [Id.](#) at 204-05. In that event, protecting settled expectations cut the opposite way. See *id.*

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See [id.](#) at 204 (“Although I will not apply ‘negative’ Commerce Clause decisional theories to new matters coming before us, *stare decisis*--that is to say, a respect for the needs of stability in our legal system--would normally cause me to adhere to a decision of this Court already rendered as to the unconstitutionality of a particular type of state law.”). *Crawford v. Washington* also illustrates this commitment to the preservation of results, albeit from a different angle.

[541 U.S. 36 \(2004\)](#). There, Justice Scalia wrote the opinion for the Court rejecting the decisional theory of *Ohio v. Roberts* in favor of what he believed to be the original meaning of the Confrontation Clause. [Id.](#) at 60. The Justice was at pains to emphasize, however, that the new theory left the past results, if not their methodology, intact. *Id.* (“Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales.”).

59

See, e.g., [Comptroller of the Treasury of Md. v. Wynne](#), 135 S. Ct. 1787, 1809-10 (2015) (Scalia, J., dissenting) (reiterating the illegitimacy of the Court's negative Commerce Clause jurisprudence and identifying the two circumstances in which he would nonetheless adhere to it); [Dep't of Revenue of Ky. v. Davis](#), 553 U.S. 328, 359 (2008) (Scalia, J., concurring in part) (same); [United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.](#), 550 U.S. 330, 348 (2007) (Scalia, J., concurring in part) (same); [Gen. Motors Corp. v. Tracy](#), 519 U.S. 278, 312 (1997) (Scalia, J., concurring) (same); [Healy v. Beer Inst.](#), 491 U.S. 324, 344 (1989) (Scalia, J., concurring in part and concurring in the judgment) (joining the Court's opinion insofar as it held a Connecticut statute facially discriminatory).

60

In [Bendix Autolite](#), 486 U.S. at 897-98, he asserted that abandoning the “balancing” prong of negative Commerce Clause analysis does not upset reliance interests because “the outcome of any particular still-undecided issue under the current methodology is in my view not predictable ... no expectations can possibly be upset.” At the same time,

“[b]ecause the outcome of the [discrimination] test I would apply is considerably more clear, confident expectations will more readily be able to be entertained.” [Id.](#) at 898.

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See [Intel Containers Int'l Corp. v. Huddleston](#), 507 U.S. 60, 78-79 (1993) (Scalia, J., concurring in part and concurring in the judgment) (describing his approach to negative Commerce Clause cases as “serv[ing] the principal purposes of *stare decisis*, which are to protect reliance interests and to foster stability in the law”).

62

[Quill Corp. v. North Dakota](#), 504 U.S. 298, 320-21 (1992) (Scalia, J., concurring in part and concurring in the judgment).

63

[McDonald v. City of Chi.](#), 561 U.S. 742, 791 (2010) (Scalia, J., concurring).

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Id. (internal quotation marks omitted) (quoting [Albright v. Oliver](#), 510 U.S. 266, 275 (1994) (Scalia, J., concurring)).

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[Albright](#), 510 U.S. at 275 (Scalia, J., concurring); see also [TXO Prod. Corp. v. All. Res. Corp.](#), 509 U.S. 443, 470-71 (1993) (Scalia, J., concurring) (asserting that while he was willing to accept incorporation, he was unwilling to accept that the Due Process Clause “is the secret repository of all sorts of other, unenumerated, substantive rights”); SCALIA, *supra* note 2, at 24 (“[I]t may or may not be a good thing to guarantee additional liberties, but the Due Process Clause quite obviously does not bear that interpretation. By its inescapable terms, it guarantees only process.”).

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In *Michael H. v. Gerald D.*, Justice Scalia wrote for the Court that “[i]n an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a ‘liberty’ be ‘fundamental’ (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society.” [491 U.S. 110, 122 \(1989\)](#) (footnote omitted). He joined the Court’s opinion in *Washington v. Glucksberg*, which described substantive due process analysis as recognizing “those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition’” and requiring that the right at stake be carefully described. [521 U.S. 702, 720-21 \(1997\)](#) (quoting [Moore v. City of E. Cleveland](#), 431 U.S. 494, 503 (1977)). He joined Chief Justice Robert’s dissent in *Obergefell v. Hodges* acknowledging the validity of substantive due process so long as the rights it found implied were rooted in history and tradition. [135 S. Ct. 2584, 2618 \(2015\)](#) (Roberts, C.J., dissenting); see also [United States v. Virginia](#), 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (“It is my position that the term ‘fundamental rights’ should be limited to ‘interest[s] traditionally protected by our society.’” (alteration in original) (quoting [Michael H.](#), [491 U.S. at 122](#))).

67

See also [Nat’l Aeronautics & Space Admin. v. Nelson](#), 562 U.S. 134, 161 (2011) (Scalia, J., concurring in the judgment) (insisting that the Due Process Clause had no substantive component but that even under the history-and-tradition formula applied to identify these “faux” rights, respondent’s claim to a right to informational privacy would fail). As he once put it in an extrajudicial context, “[t]he vast majority of my dissents from nonoriginalist thinking ... will, I am sure, be able to be framed in the terms that, *even if* the provision in question has an evolutionary content, there is inadequate indication that any evolution in social attitudes has occurred.” Scalia, *supra* note 1, at 864 (emphasis added) (footnote omitted).

68

[Troxel v. Granville](#), 530 U.S. 57, 92 (2000) (Scalia, J., dissenting) (“The sheer diversity of today’s opinions persuades me that the theory of unenumerated parental rights underlying [[Wisconsin v. Yoder](#), 406 U.S. 205, 232-33 (1972); [Pierce v. Soc’y of Sisters](#), 268 U.S. 510, 534-35 (1925); [Meyer v. Nebraska](#), 262 U.S. 390, 399 (1923)] has small claim to *stare decisis* protection. A legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance.”).

69

See *id.* (“While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context.”).

- 70 In *Stanford v. Kentucky*, Justice Scalia described the “evolving standards” test as “cast loose from the historical moorings consisting of the original application of the Eighth Amendment.” [492 U.S. 361, 378-79 \(1989\)](#) (opinion of Scalia, J.), *abrogated by* [Roper v. Simmons, 543 U.S. 551 \(2005\)](#). He nonetheless applied it on behalf of a plurality of Justices to conclude that the execution of minors does not violate the Eighth or Fourteenth Amendments. [Id. at 369-73](#) (opinion of Scalia, J.) (plurality opinion).
- 71 He thought that the text squarely foreclosed the proportionality requirement because, while it forbids “excessive” bail, it says nothing about “excessive” punishment. [Walton v. Arizona, 497 U.S. 639, 670 \(1990\)](#) (Scalia, J., concurring in part and concurring in the judgment). On the contrary, the only express limitation on punishment is that it not be “cruel and unusual.” *Id.*; *see also* [Penry v. Lynaugh, 492 U.S. 302, 351 \(1989\)](#) (Scalia, J., concurring in part and dissenting in part) (arguing that the proportionality rule “has no place in our Eighth Amendment jurisprudence” and that “[t]he punishment is either ‘cruel and unusual’ (*i.e.*, society has set its face against it) or it is not” (alteration in original) (quoting [Stanford, 492 U.S. at 378](#) (internal quotation marks omitted)), *abrogated by* [Atkins v. Virginia, 536 U.S. 304 \(2002\)](#)).
- 72 *See supra* note 60.
- 73 *See* [Ewing v. California, 538 U.S. 11, 31 \(2003\)](#) (Scalia, J., concurring in the judgment) (asserting that he would not apply the proportionality requirement on grounds of stare decisis because the requirement was not one he could “intelligently apply”).
- 74 *See* [Stanford, 492 U.S. at 368](#) (noting that the execution of minors was permitted when the Bill of Rights was adopted); *see also* [Roper, 543 U.S. at 608-15](#) (Scalia, J., dissenting) (describing the “evolving standards” test as in accordance with our modern (though I think mistaken) jurisprudence and demonstrating why that test did not justify the majority’s conclusion); [Atkins, 536 U.S. at 341-48](#) (Scalia, J., dissenting) (similar).
- 75 [Walton, 497 U.S. at 670](#) (Scalia, J., concurring in part and concurring in the judgment).
- 76 [Id. at 671](#).
- 77 *Id.*
- 78 *Id.*
- 79 *Id. at 672-73*.
- 80 *Id. at 673*.
- 81 [521 U.S. 507 \(1997\)](#).
- 82 [Tennessee v. Lane, 541 U.S. 509, 556 \(2004\)](#) (Scalia, J., dissenting) (describing *City of Boerne* and listing its progeny, which he had joined).
- 83 [Id. at 560](#) (“[W]hat § 5 does not authorize is so-called ‘prophylactic’ measures, prohibiting primary conduct that is itself not forbidden by the Fourteenth Amendment.” (emphasis omitted)).
- 84 *Id.*; *see also id.* (“Literally, ‘to enforce’ means to compel performance of the obligations imposed; but the linguistic argument lost much of its force once the *South Carolina* and *Morgan* cases decided that the power to enforce embraces any measure appropriate to effectuating the performance of the state’s constitutional duty.” (quoting Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 110-11 (1966) (internal quotation marks omitted))).

- 85 *Id.*
- 86 *Id.* at 564.
- 87 *Id.* at 565.
- 88 Tribe, *supra* note 36, at 82 (footnote omitted).
- 89 See *supra* notes 54-62 and accompanying text. He also drew a distinction between results and decisional theory in the context of substantive due process. See *supra* notes 68-69 and accompanying text. And *Mitchell v. United States* provides yet another example. [526 U.S. 314 \(1999\)](#). There, he expressed doubt about the soundness of precedent holding that prosecutorial or judicial comment on the defendant's refusal to testify violates the Fifth Amendment. [Id. at 332](#) (Scalia, J., dissenting). Because he thought that this rule may well have “become ‘an essential feature of our legal tradition,’” he did not propose overruling it. *Id.* He did, however, refuse “to extend these cases into areas where they do not yet apply, since neither logic nor history can be marshaled in defense of them.” *Id.*
- 90 See Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 858-64 (2015) (raising the possibility that stare decisis is a “domesticating doctrine” permitting courts to treat mistaken precedents “as if” they are the law).
- 91 Justice Scalia took a similar tack in [Hudson v. United States](#), 522 U.S. 93 (1997). The Justice believed that the Double Jeopardy Clause prohibited successive prosecution, not multiple punishment, and he had dissented to the Court's prior cases holding otherwise. [Id. at 106](#) (Scalia, J., concurring in the judgment). In *Hudson*, the Court backtracked from its position, although not as completely as Justice Scalia would have liked; it continued to maintain that the Double Jeopardy Clause prohibited multiple punishments, but it required successive criminal prosecutions as well. *Id.* Even though this was not the decisional theory that Justice Scalia thought correct, he concurred because the presence of the requirement for successive prosecutions “essentially duplicates what I believe to be the correct double jeopardy law, and will be ... harmless in the future.” *Id.*
- 92 Cf. Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126-27 (1999) (“As valuable as opinions may be to legitimize judgments, to give guidance to judges in the future, or to discipline a judge's thinking, they are not necessary to the judicial function of deciding cases and controversies. It is the judgment, not the opinion, that ‘settle[s] authoritatively what is to be done.’” (alteration in original) (footnote omitted) (quoting Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371 (1997))).
- 93 See [McDonald v. City of Chi.](#), 561 U.S. 742, 791 (2010) (Scalia, J., concurring) (asserting that the case did not require him to “reconsider” the view that the Fourteenth Amendment incorporates the Bill of Rights against the States, because “straightforward application of settled doctrine suffices to decide it”).
- 94 See also [Troxel v. Granville](#), 530 U.S. 57, 92 (2000) (Scalia, J., dissenting) (“While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context.”). In *44 Liquormart v. Rhode Island*, he expressed “discomfort” with *Central Hudson*, a case counseling “special care” in the review of blanket bans on commercial speech that were not deceptive or otherwise flawed. [517 U.S. 484, 517 \(1996\)](#) (Scalia, J., concurring). At the same time, the parties did not raise or brief the question whether the precedent should be overruled, and Justice Scalia did not want to reach the question with inadequate information: Since I do not believe we have before us the wherewithal to declare *Central Hudson* wrong--or at least the wherewithal to say what ought to replace it--I must resolve this case in accord with our existing jurisprudence, which all except Justice Thomas agree would prohibit the challenged regulation. I am not disposed to develop new law, or reinforce old, on this issue, and accordingly I merely concur in the judgment of the Court. [Id. at 518](#).
- 95 SCALIA, *supra* note 2, at 139; see *supra* note 28.

- 96 For example, in *Montejo v. Louisiana*, Justice Scalia was part of the majority who sought supplemental briefing on the question whether a precedent key to resolving that case should be overruled. [556 U.S. 778, 792 \(2009\)](#) (“Accordingly, we called for supplemental briefing addressed to the question whether *Michigan v. Jackson* should be overruled.”). The Court ultimately overruled *Michigan v. Jackson*. [Id. at 797](#).
- 97 For example, in *Randall v. Sorrell*, Justices Thomas and Scalia urged the overruling of *Buckley v. Valeo* even though the respondents asked only as an “afterthought” and did not brief the stare decisis issue. See [548 U.S. 230, 263-64 \(2006\)](#) (Alito, J., concurring in part and concurring in the judgment) (insisting that it was “unnecessary” to reach the issue whether *Buckley v. Valeo* should be overruled when respondents asked only as an “afterthought” and did not brief the stare decisis issue); [id. at 264](#) (Kennedy, J., concurring) (similar); cf. [id. at 265-73](#) (Thomas, J., concurring).
- 98 See [Hein v. Freedom From Religion Found., Inc., 551 U.S. 587 \(2007\)](#) (holding that an Establishment Clause challenge to the executive expenditure of funds did not fall within *Flast v. Cohen*'s narrow exception to the prohibition on “taxpayer standing”). Justice Scalia concurred only in the judgment, because he would have overruled *Flast* altogether rather than distinguish it as the majority did. See [id. at 636](#) (Scalia, J., concurring in the judgment) (“Overruling prior precedents, even precedents as disreputable as *Flast*, is nevertheless a serious undertaking, and I understand the impulse to take a minimalist approach.”); see also [id. at 633](#) (“Minimalism is an admirable judicial trait, but not when it comes at the cost of meaningless and disingenuous distinctions that hold the sure promise of engendering further meaningless and disingenuous distinctions in the future.”).
- 99 See Scalia, *supra* note 1, at 864; *supra* note 1 and accompanying text.
- 100 Scalia, *supra* note 1, at 863.

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CONGRESSIONAL INSIDERS AND OUTSIDERS

INTRODUCTION

When Justice Antonin Scalia began writing about statutory interpretation, he attacked the then-dominant proposition that the point of statutory interpretation is to identify and enforce Congress's unenacted purposes. He argued that the existence of congressional intent is pure fiction and that it would not control even if it could be found. Because the Court cited legislative history as authoritative evidence of legislative intent, he rejected its use as illegitimate. He focused on the text and insisted that its meaning controlled. His arguments were so successful that today, one would be hard pressed to find anyone willing to say that a court should depart from statutory text to better serve Congress's purpose. There is a general consensus that the text constrains.

With everyone talking text and rejecting intent, it can sometimes seem that almost all of the differences lie in application. Judges might have different thresholds for ambiguity, for example, or disagree about the utility of canons. Such disagreements are important and can affect the outcome of cases, but they do not inevitably reflect conflicting first-order principles about the aims of statutory interpretation.

Fundamental differences, however, do remain, and the process-based turn in statutory interpretation underscores the point. Recently, scholars have begun arguing that interpretive doctrines should account for the on-the-ground realities of the legislative process. Considering how their arguments might influence textualism draws attention to textualism's own assumptions. The process-based arguments assume that everyone, including textualists, ^{*2194} strives to calibrate interpretive doctrines to actual drafting practices. Textualists, however, strive to calibrate interpretive doctrines to actual reading practices. The disagreement is not about statutory meaning versus congressional intent, as it was in the old days, but about which set of linguistic conventions determine what the words mean.

In this Essay, I explore the implications of the new process-based theories for textualism. Part I describes the process-based turn in statutory interpretation, which maintains that courts should take their interpretive cues from congressional practices and procedures. Members of Congress (and their drafters) rely heavily on legislative history but put much less stock in dictionaries and canons. Courts should follow suit, the argument goes, because doing so would better reflect Congress's understanding of the language it enacts.

Part II claims that these process-based arguments do not require textualists either to abandon dictionaries and canons or to begin using legislative history. While textualists have not always made their assumptions clear, they approach language from the perspective of an ordinary English speaker--a congressional outsider. In contrast, the process-based theories approach language from the perspective of a hypothetical legislator--a congressional insider. Congressional insiders may reject particular canons, eschew dictionaries, and treat certain legislative history as a guide to statutory meaning. Textualists, however, do not use canons and dictionaries in an effort to track the linguistic patterns of the governors; they use them because they reflect the linguistic patterns of the governed. And if the conventions of legislative history or the legislative process reveal that Congress used language in something other than its natural sense, a textualist court should not necessarily defer to that meaning. What matters to the textualist is how the ordinary English speaker--one unacquainted with the peculiarities of the legislative process--would understand the words of a statute. Congressional insiders and outsiders share common ground as English speakers, but there may be some respects in which their linguistic conventions differ. When they do, the outsider's perspective controls.

Part III sketches reasons why textualists interpret language from the perspective of an ordinary English speaker rather than an ordinary member of Congress. Process-based theories argue that courts, as faithful agents, should adopt interpretive methods to track the drafting practices of Congress, their principal. *2195 Part III suggests that textualists would reject this approach because they subscribe to a different conception of faithful agency. While textualists have not fully developed the point, they view themselves as agents of the people rather than of Congress and as faithful to the law rather than to the lawgiver. The lines of their loyalty thus run differently. Textualists consider themselves bound to adhere to the most natural meaning of the words at issue because that is the way their principal--the people--would understand them.

I. THE PROCESS-BASED TURN

Purposivism and textualism have moved closer together in the decades since Justice Scalia launched his campaign for textualism.¹ The claim that it is permissible to depart from clear text in the service of congressional purpose--an approach epitomized by *Church of the Holy Trinity v United States*²--has fallen into disrepute.³ There is general agreement on the Court that statutory text is both the focal point of and a constraint on statutory interpretation. As Justice Elena Kagan observed when she delivered the Scalia Lecture at Harvard Law School, "we're all textualists now."⁴

Yet disagreement remains about how to interpret the text. A recent, important line of scholarship has argued that the Court should shape its approach to account for the realities of the complex legislative process.⁵ Studying how Congress works, these *2196 scholars say, indicates that textualists, who reject legislative history and embrace the canons, have it exactly backwards. Drafters prioritize legislative history and minimize the utility of canons. A faithful agent should try to understand the text as Congress did, and doing so requires using the tools it used.

Legislative history tops the list of tools important to Congress. Professors Abbe Gluck and Lisa Bressman's influential survey of 137 congressional staffers involved in drafting legislation found that "legislative history was emphatically viewed by almost all of our respondents--Republicans and Democrats, majority and minority--as the *most important* drafting and interpretive tool apart from text."⁶ To be sure, a process-based approach requires courts to be smart about how they use legislative history.⁷ Professor Victoria Nourse says that judges, who are typically unschooled in the way Congress works, have been guilty of cherry-picking statements unlikely to reflect the way that supporters of a statute understood its language.⁸ But, she argues, if they view legislative history through the lens of Congress's procedural rules, it can serve as a powerful tool for clarifying statutory text.⁹

In contrast, some say, dictionaries and canons risk distorting text because they run contrary to the way Congress drafts statutes. A majority of the respondents in the Gluck-Bressman study expressly (and in some cases vehemently) disclaimed reliance on *2197 dictionaries.¹⁰ The linguistic canons fared only slightly better. A majority agreed that the concepts of *ejusdem generis* and *noscitur a sociis* accurately reflected drafting practices.¹¹ But *expressio unius* and the rule against superfluities garnered much less support,¹² and respondents largely rejected the presumption that words have consistent meaning through a whole act, much less the whole code.¹³

Renewed confidence in legislative history and skepticism about dictionaries and canons are not the only implications of the process-based view. Professors Gluck, Anne Joseph O'Connell, and Rosa Po maintain that faithful agency may require sensitivity to the variety of ways in which Congress legislates.¹⁴ Traditionally, courts have deployed a one-size-fits-all set of interpretive presumptions to statutes; they situate language within the context of judicially created doctrines rather than within the particular process that produced it. Yet the legislative process is not itself one-size-fits-all. Modern lawmaking increasingly proceeds in unorthodox fashion rather than along the straightforward route depicted in the classic *Schoolhouse Rock!* cartoon.¹⁵ For example, the omnibus appropriations process no longer serves simply as a mechanism for distributing money to a variety of *2198 existing programs, but also as a means of bundling unrelated substantive policies.¹⁶ Legislation frequently bypasses committees altogether and is instead pushed through the process by party leadership or even the White House.¹⁷ Statutes passed in response to an emergency may be overly brief, general, or ill considered because of time pressure.¹⁸ Tailoring interpretive methods to the circumstances of a statute's passage might better capture the meaning Congress intended. For example, courts might decline to apply canons like the presumption of consistent usage and the rule against surplusage to omnibus and emergency

laws. Or they might “pay less attention to legislative history for statutes that did not go through committee or that are the product of different bills drafted at different times.”¹⁹

These arguments might have penetrated the Court in *King v Burwell*,²⁰ the last major statutory interpretation case decided before Scalia's death. Gluck, O'Connell, and Po characterize *King* as “a watershed moment--the most explicit recognition ever from the Court that unorthodox lawmaking may require alterations in common interpretive presumptions.”²¹ The Court interpreted the phrase “established by the State” in light of the unorthodox process that produced the statute. The Court observed:

The Affordable Care Act contains more than a few examples of inartful drafting Several features of the Act's passage contributed to that unfortunate reality. Congress wrote key parts of the Act behind closed doors, rather than through “the traditional legislative process.” And Congress passed much of the Act using a complicated budgetary procedure known as “reconciliation,” which limited opportunities for debate and amendment, and bypassed the Senate's normal 60-vote filibuster requirement. As a result, the Act does not reflect the type of care and deliberation that one might expect of such significant legislation.²²

Scalia criticized the majority for “chang[ing] the usual rules of statutory interpretation for the sake of the Affordable Care Act.”²³ But the Court's willingness to tailor its interpretive rules to account for Congress's process is precisely the reason why some praise the opinion.

It is too soon to say whether the process-based turn will have a broader impact than its influence on the occasional extraordinary case. But it is important to see its potential to change the terms of the debate. *King* could easily have been written as a straightforwardly purposive opinion: the Court could have said that interpreting the Affordable Care Act²⁴ to limit insurance subsidies to state-run exchanges was “within the letter of the statute and yet not within the statute, because [such a limitation is] not within its spirit, nor within the intention of its makers.”²⁵ That reasoning, however, rests on the now-maligned argument that congressional purpose can trump unambiguous statutory text.²⁶ The process-based approach, in contrast, remains tethered to the statutory language. It acknowledges the importance of text but offers reasons for accepting arguably unorthodox interpretations of it.

II. CONGRESSIONAL INSIDERS AND OUTSIDERS

In a Special Issue dedicated to Justice Scalia, it is fitting to consider how the recent process-based turn bears on textualism, a key part of Scalia's legacy. Insofar as process-based arguments are geared toward interpreting text rather than justifying departures from it, they reflect textualism's influence on the terms of the statutory interpretation debate. And because they share textualism's emphasis on text, legislative supremacy, and faithful agency, they appear--at least at first blush--to give textualists reason to adjust the interpretive tools they deploy. Indeed, the process-based theorists expressly contend that empirical evidence about how Congress works requires all interpreters committed to legislative supremacy and faithful agency, including textualists, to rethink their use of tools like canons, dictionaries, and legislative history.

***2200** Confronting these arguments underscores a feature of textualism whose importance may be unappreciated: its insistence that the relevant user of language be *ordinary*. Textualists do not only reject the once-popular notion that a subjective congressional intent actually exists. They also insist that the hypothetical reader of language--the construct they use in the task of interpretation--be a congressional outsider. The new process-based theories, by contrast, employ the construct of a congressional insider. This is a significant choice. While congressional insiders and outsiders share common ground as English speakers, there may be some respects in which their linguistic conventions differ.

It bears emphasis that the process-based theorists, in contrast to traditional purposivists, do not propose using legislative history or unenacted congressional intent to supplant statutory text. Insofar as textualism disciplines interpreters to acknowledge that words constrain, its victory holds. Nor does a process-based approach necessarily depend on the proposition that a court can identify and rely on actual congressional intent.²⁷ In this respect, a process-based theory generally shares the intent skepticism that characterizes modern theories of statutory interpretation, including textualism.²⁸

But textualism and the process-based approach diverge from there. If one rejects the existence of *actual* intent, one must construct some sort of *objective* intent.²⁹ Textualists focus on “the ring the words would have had to a skilled user of words at the time.”³⁰ Process-based theorists focus on “the ring the words would have had” to a skilled legislator at the time.³¹ Put differently, textualists *2201 use the construct of a hypothetical *reader*, and the process-based theorists use the construct of a hypothetical *writer* of a statute.

Saying that process-based theorists read the statute through the eyes of a hypothetical legislator is not to say that they endorse the intentionalist technique of imaginative reconstruction. A court engaged in imaginative reconstruction asks how the enacting legislature would have wanted the statute to apply to the problem at hand. The process-based theorist, in contrast, does not try to assume the perspective of a legislator (or staffer) who *actually* participated in the drafting of the relevant statute. She assumes the perspective of a hypothetical insider who knows how Congress works. In using congressional preferences to guide the choice of interpretive tools, the process-based theorist assumes that the relevant linguistic conventions are those of the typical legislator. That, after all, is the basis of the argument that courts should abandon reliance on canons and dictionaries. The linguistic community of those within Congress--members, staff, and professional drafters-- do not use language that way.

Scalia described the relevant linguistic community differently. He explained that textualists “look for a sort of ‘objectified’ intent--the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”³² Judge Frank Easterbrook has similarly expressed it: “We should look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words.”³³ To be sure, Scalia was not always clear about whether the prototypical reader is an ordinary member of the public or a lawyer. He once colorfully said that “the acid test of whether a word can reasonably bear a particular meaning is whether you *2202 could use the word in that sense at a cocktail party without having people look at you funny.”³⁴ On other occasions, he treated lawyers as the relevant linguistic community--one can hardly claim that the ordinary guest at a cocktail party would be aware of the ancient principles of common law that form the backdrop against which Scalia presumed Congress to legislate.³⁵

It is not clear to me that textualists must pick a single perspective applicable across all statutes. Sometimes the relevant reader may be a layperson, and sometimes she may be a lawyer, just as terms are sometimes used in their ordinary and sometimes in their technical sense. Whatever the resolution of that issue, however, the point for present purposes is that the textualist describes the hypothetical reader in a way that necessarily includes congressional outsiders. Members of Congress are skilled English speakers who are presumed to understand the language of the law. As such, members of Congress are included within the prototype of an English speaker, typically conversant in legal conventions, who serves as the textualist construct.³⁶ But the textualist construct does not privilege the way legislative drafters as a subclass use language.

To be sure, if legislative outsiders familiarized themselves with the internal workings of Congress, the prototypical ordinary lawyer-reader might share the hypothetical legislator's understanding of language. But textualism's presumptions charge Congress with accommodating the linguistic expectations of the regulated, rather than the other way around. Textualists do not presume that the regulated are familiar with Congress's own, sometimes idiosyncratic, linguistic conventions and would thus understand language that way. Rather, textualists presume that Congress communicates with the regulated according to the conventions that the two share as skilled users of English. As Scalia put it in rejecting the existence of actual congressional intent, “[A]ll we can know is that they voted for a text that they presumably thought would be read the same way any reasonable English *2203 speaker would read it.”³⁷ And if the relevant English speaker is a lawyer, textualists assume that Congress speaks the lawyer's language: Scalia, writing with Professor John Manning, once cautioned that “[i]f legislators didn't look up the materials needed to define a technical term, they should have--because that's the meaning the persons subject to the law will understand.”³⁸

Textualists use dictionaries and canons as a way of identifying the linguistic expectations of the regulated. Dictionaries are useful to the textualist not because the textualist assumes that legislators use them but because they offer some evidence of the meaning attributed to words by ordinary English speakers. In a similar vein, the linguistic canons are designed to capture the speech patterns of ordinary English speakers and, in some cases, of the subclass of lawyers. (I put substantive canons aside because, as I have argued elsewhere, substantive canons are not designed to interpret text but rather to advance substantive policies.)³⁹ Thus, the treatise that Scalia wrote with Professor Bryan Garner describes canons as “principles of expression that are as universal as principles of logic.”⁴⁰ To be sure, Congress can override these linguistic patterns or dictionary definitions

by dictating *2204 interpretive instructions or statutory definitions. But absent such an override, textualists effectively hold Congress to speaking in the manner most natural to congressional outsiders.

If the linguistic canons simply reflect ordinary, sometimes lawyerly, English usage, one might wonder why it is necessary to systematize them. The community of English speakers--both congressional insiders and outsiders--would presumably follow such rules unconsciously. Textualists explain the canons' systemization by pointing out that it supplies a useful list of presumptions for legislators to use in drafting.⁴¹ Language can be unwieldy, and speakers sometimes employ language in ways that--while they may make sense--depart from common patterns of usage and are thus subject to misunderstanding. Recall that textualists presume that Congress uses language "the same way any reasonable English speaker would read it."⁴² The canons, by making linguistic conventions explicit, offer Congress an accessible way of confirming how ordinary English speakers will understand the text.

Whether the canons actually capture patterns of ordinary usage is an empirical question.⁴³ If they do not track common usage, then the textualist rationale for using them is undermined. But it is not undermined by evidence that *Congress* rejects them as linguistic defaults. Professor Gluck has argued that "most of the Court's justifications for deploying the canons are grounded in purported empirical understandings of how Congress actually works or what rules Congress actually knows."⁴⁴ The textualist justification, however, is that they reflect the linguistic rules that the *ordinary speaker* actually employs. Again, they may not, and if they do not, textualists should reconsider them. But the fact that the hypothetical congressional insider would not read statutory language against the backdrop of the canons does not pull the rug out from under the textualist. Scalia's response would likely be a variation on his response to Congress's potential lack of knowledge of background legal principles: "If legislators didn't *2205 [take linguistic canons into account], they should have--because that's the meaning the persons subject to the law will understand."⁴⁵

Note that Scalia's likely answer suggests that reliance on canons would improve the drafting process, a goal that might justify the canons wholly apart from their ability to capture ordinary linguistic patterns.⁴⁶ Yet that answer is not rooted in a judicial ambition to discipline Congress by holding it to judicially crafted rules that will impose coherence on the law. It is rooted in the principle that courts are entitled to adopt a default presumption that Congress legislates in the language of the ordinary reader, and that presumption would hold even in the face of evidence that Congress's own defaults are different. That position requires a justification, and I sketch one in Part III. For now, however, my aim is simply to describe it.

I have said that process-based arguments about how Congress uses dictionaries and canons would not cause textualists to rethink them. Legislative history is trickier. Textualists have long objected to the use of legislative history on the ground that it is designed to uncover a nonexistent, and in any event irrelevant, legislative intent.⁴⁷ In addition, to the extent that the Court treats committee reports as an authoritative way of resolving statutory ambiguity, it permits Congress to delegate lawmaking authority to a subset of itself in violation of the constitutional prohibition against self-delegation.⁴⁸ A process-based approach to legislative history does not necessarily run into these well-known objections. It does, however, proceed from the perspective of the hypothetical congressional insider and for this reason is unlikely to move textualists.

*2206 Consider Professor Nourse's proposal that courts use legislative history according to Congress's own rules.⁴⁹ Her theory does not assume that Congress can functionally authorize a committee to fill in statutory details that the text leaves open. Nor does it depend on the proposition that members of Congress *actually* consulted and assented to the relevant legislative history. Instead, her approach interprets language from the perspective of the hypothetical legislator familiar with Congress's conventions.⁵⁰ The relevant legislative history functions in at least some instances like an internal glossary, enabling a court to determine how a reasonable member of Congress would have understood the statutory language.⁵¹

Nourse offers *Public Citizen v Department of Justice*⁵² as an example. In that case, the Court had to decide whether the American Bar Association's Standing Committee on the Federal Judiciary, which advised the president on judicial nominations, was "utilized" by the president and therefore subject to the sunshine requirements imposed by the Federal Advisory Committee Act.⁵³ The case is controversial because the Court, asserting that the straightforward meaning of "utilize" would lead to absurd results (like bringing the president's consultation with his own political party within the Act), cited *Holy Trinity* and essentially read the word "utilize" out of the statute.⁵⁴ Nourse maintains that the Court could have reached the same result without

provoking the criticism that it had performed “judicial surgery.”⁵⁵ Had the Court consulted the conference committee report, she says, it would have learned that Congress used the word “utilize” to mean “established or organized.”⁵⁶ Those were the words in the House and *2207 Senate bills that went to the conference committee, which, under Congress's own rules, had no power to substantively change them.⁵⁷ “[A] judge,” Nourse argues, “should interpret ‘utilize’ precisely as a member of Congress would interpret it—as making no significant change to ‘established or organized.’”⁵⁸ When a word like “utilize” can be read in a prototypical ordinary-meaning sense or a technical meaning-for-this-statute sense,” Nourse contends that a court should choose the latter.⁵⁹

Interpreting language according to Congress's own rules thus clearly takes the perspective of a congressional insider. To be sure, legislative history is not categorically unhelpful for an interpreter taking the ordinary-reader perspective. Even Scalia did not object to using legislative history to shed light on how ordinary speakers use words in a particular context.⁶⁰ So used, legislative history provides evidence of “how a reasonable person uses language” because “the way legislators use language is some evidence of that.”⁶¹ A textualist, however, would not privilege the legislative perspective by adopting a strained usage that complies with congressional conventions that do not map onto ordinary uses of English. Congress must be presumed to play by the linguistic rules ordinary English speakers follow rather than its own special set.

III. COMPETING CONCEPTIONS OF FAITHFUL AGENCY

Process-based theorists ground their approach in the principle of faithful agency. They describe faithful agency as “a theory *2208 under which the ostensible goal of interpretive doctrine is to reflect how Congress drafts.”⁶² Courts, as Congress's faithful agents, must filter language through Congress's linguistic rules, which are sometimes peculiar to the legislative context, because that serves the principal.⁶³ The textualist commitment to the ordinary-reader perspective might be explained by a competing conception of faithful agency—one that understands courts to be the faithful agents of the people rather than of Congress.

Textualists have routinely described courts as the faithful agents of Congress.⁶⁴ I have done it myself.⁶⁵ Justice Scalia, however, put it differently. He took a relatively strong view of legislative supremacy, consistently arguing that courts must follow Congress's will, as expressed in the text, and denying any judicial power to alter the text. At the same time, he did not think that a commitment to legislative supremacy casts courts in the role of Congress's agents. He characterized courts as agents of the people rather than agents of Congress,⁶⁶ and he depicted the duty of fidelity as one owed to enacted texts rather than to the legislature itself.⁶⁷ Scalia maintained, moreover, that a statute is not a command to a court (as it would be if one treated Congress as the principal and the court as the agent), but a command “to the executive or the citizenry.”⁶⁸

*2209 On this theory of faithful agency, courts engaging in statutory interpretation are justified in adopting the perspective of the people because they are agents of the people. If, moreover, a legislative command is directed to the citizenry, it is both sensible and fair for the courts to interpret that command as its recipients would. In this respect, textualists might refuse to adopt the sometimes-unorthodox linguistic conventions of the hypothetical drafter for the same fairness reason they reject the idea of giving legal effect to unenacted congressional intent. In the latter context, Scalia insisted that “it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawmaker promulgated.”⁶⁹ Fairness requires that laws be interpreted in accordance with their ordinary meaning, lest they be like Nero's edicts, “post[ed] high up on the pillars, so that they could not easily be read.”⁷⁰ This is reason both to employ sources that capture ordinary meaning, such as usage canons and dictionaries, and to refuse to strain ordinary meaning to account for the vagaries of the legislative process.

The idea that courts are agents of the people is perhaps in some tension with the textualist's occasional use of the perspective of the “ordinary lawyer” rather than the ordinary English speaker.⁷¹ This is a point that a fully developed defense of Scalia's conception of faithful agency would have to address in more detail than space permits here. For present purposes, I note simply that a court interpreting statutes as one familiar with legal conventions does not function as a faithful agent of lawyers. Lawyers are themselves agents of the people they represent, and in that role they interpret the law on behalf of clients to whom it might not be otherwise accessible. In reading a statute as a lawyer would, a court is not betraying the ordinary people to whom it owes fidelity, but rather employing the perspective of the intermediaries on whom ordinary people rely. Moreover, the fiction

that the people are on constructive notice of the law--and must therefore conform to it regardless of whether they are actually aware of it--does not depend on the proposition that the language of the law is accessible to all people. On the contrary, this fiction assumes that the people are capable of deciphering language that is sometimes specialized and technical. Attributing that ability to the ordinary *2210 person by positing familiarity with legal conventions is thus consistent with the fiction that the law otherwise employs. More should be said about whether and when a court should interpret statutes through the eyes of an ordinary lawyer rather than an ordinary person. Adopting the former perspective, however, is not inherently inconsistent with the idea that courts are faithful agents of the people.

The power of the House and Senate to adopt rules governing their proceedings is not a constitutional barrier to Scalia's conception of faithful agency. Process-based theorists invoke congressional rulemaking power as a reason for interpreting language within its procedural context.⁷² The Constitution empowers each chamber to organize its participation in the lawmaking process, and pursuant to this authority, each makes choices about, among other things, how bills progress and the role of legislative history in internal deliberations. Interpreting language in light of Congress's own rules, the argument goes, honors Congress's authority over its own affairs and preserves the integrity of the legislative process.⁷³

Textualists have a different understanding of what that respect requires, and on their account they also respect Congress's procedural choices. They do not argue that Congress must use committees in any particular way or that it cannot generate legislative history for its own purposes. From the point of view of the textualist, the House and Senate may structure their internal deliberations as they see fit. But Congress's power over its internal deliberations does not control how courts, external to Congress, interpret the statutes that emerge from the legislative process. Indeed, the only power that Congress has to control others is to use words to enact texts via the specific lawmaking process prescribed by Article I, § 7--and nothing in that process gives (or can give) legal status to internal norms or practices that do not run that gauntlet. All that process produces is a text, and fidelity to that lawmaking process and fairness to the people require the *2211 words of that law to be interpreted in their ordinary sense. The details of the legislative process-- whether it was hasty or careful, complex or ordinary--do not justify departures from the text's natural meaning.⁷⁴

CONCLUSION

Considering the implications of the process-based turn in statutory interpretation exposes the unappreciated textualist assumption that its prototypical ordinary reader is a congressional outsider. Because earlier debates in statutory interpretation pitted text against intent, textualists had no need to be particularly precise about the perspective they employed to determine statutory meaning. They identified their construct as a skilled user of language, typically familiar with legal conventions, but they did not say much more than that.

Process-based theories proceed from the perspective of a hypothetical legislator, and that focus requires textualists to look more closely at their own assumptions. It is clear that textualists have almost always defined the relevant linguistic community to include congressional outsiders, but they have not made that explicit. The choice to define the relevant community as including congressional outsiders is significant because it determines how elastically courts will treat language. The peculiarities of the legislative process mean that congressional insiders sometimes understand language in something other than its most natural sense. If courts employ an outsider's perspective, those less natural readings are off the table.

Textualists must, of course, defend their choice of perspective. Scholars who advocate a focus on congressional procedure say that faithful agency requires courts to comply with Congress's linguistic conventions. Justice Scalia's work, which emphasizes fidelity to the text and duty to the people, offers textualists the beginning of a response. It remains to them to develop it.

Footnotes

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1 See John F. Manning, *The New Purposivism*, 2011 S Ct Rev 113, 114 (“[T]he Court in the last two decades has mostly treated as uncontroversial its duty to adhere strictly to the terms of a clear statutory text, even when doing so produces results that fit poorly with the apparent purposes that inspired the enactment.”).

- 2  143 US 457 (1892).
- 3 See Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 Harv L Rev 62, 90 (2015) (“*Church of the Holy Trinity v. United States*--oft-maligned for its statement that statutory ‘spirit’ may trump the plain ‘letter of the statute’--is long since dead.”) (citation omitted).
- 4 *The Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes* 8:28 (Harvard Law School, Nov 18, 2015), online at <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation> (visited Mar 26, 2017) (Perma archive unavailable).
- 5 See, for example, Gluck, 129 Harv L Rev at 62 (cited in note 3). See also generally Abbe R. Gluck, Anne Joseph O’Connell, and Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 Colum L Rev 1789 (2015); Lisa Schultz Bressman and Abbe R. Gluck, *Statutory Interpretation from the Inside--an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 Stan L Rev 725 (2014); Abbe R. Gluck and Lisa Schultz Bressman, *Statutory Interpretation from the Inside--an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan L Rev 901 (2013); Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 Yale L J 70 (2012); Robert A. Katzmann, *Judging Statutes* (Oxford 2014).
- 6 Gluck and Bressman, 65 Stan L Rev at 965 (cited in note 5) (citation omitted).
- 7 In using the term “process-based approach,” I do not mean to invoke the Legal Process method associated with Henry Hart and Albert Sacks. See generally Henry M. Hart Jr and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation 1994) (William N. Eskridge Jr and Philip P. Frickey, eds). The Hart and Sacks approach instructs a judge to assume “that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.” *Id.* at 1378. It does not, however, attempt to calibrate interpretation to the details of the legislative process. See John F. Manning, *Inside Congress's Mind*, 115 Colum L Rev 1911, 1928-29 (2015) (pointing out that in contrast to empirical approaches like Gluck and Bressman’s, “Legal Process purposivism reflects ‘a normative statement prescribing proper attitudes for judges in their dealing with the work of legislatures, rather than a positive one describing what legislatures are’”), quoting Peter L. Strauss, *The Common Law and States*, 70 U Colo L Rev 225, 242 (1999).
- 8 See Nourse, 122 Yale L J at 99, 106-09, 114-18, 120-28 (cited in note 5) (giving examples).
- 9 *Id.* at 85-87 (criticizing textualists for paying more attention to the canons of interpretation than to the rules of Congress). See also Gluck and Bressman, 65 Stan L Rev at 989 (cited in note 5) (arguing that their study is a guide to “how to separate the useful [legislative history] from the misleading”).
- 10 Gluck and Bressman, 65 Stan L Rev at 938 & n 111 (cited in note 5) (noting that more than 50 percent said they were “never or rarely used” and that only 15 percent said they “were always or often used”). See also *id.* at 938 (quoting one respondent’s assertion that “no one uses a freaking dictionary”).
- 11 *Id.* at 932-33. Approximately 70 percent of respondents endorsed *noscitur a sociis* (the principle that the meaning of terms may be ascertained by reference to the meaning of surrounding terms) and *ejusdem generis* (the principle that when a general term follows a list of specific items, the general term refers to the same kind of things specifically listed). *Id.*
- 12 Approximately 33 percent of respondents said that the *expressio unius* canon--the rule that the inclusion of specific terms signifies the exclusion of others--“always or often applies.” *Id.* See also *id.* at 934 (noting that 18 percent said that the rule against superfluities rarely applies and that 45 percent said that it only sometimes does).
- 13 See *id.* at 936 (reporting that while consistent usage within the same act is desirable, institutional barriers related to committee structure are an obstacle and that a majority of respondents “vigorously disputed” the proposition that Congress even tries to use words consistently throughout the US Code). I put aside here substantive canons because those do not purport to track either how Congress actually drafts or how an ordinary reader understands language. See note 39 and accompanying text.
- 14 See Gluck, O’Connell, and Po, 115 Colum L Rev at 1851 (cited in note 5).
- 15 *Id.* at 1794 (“And so it seems that the *Schoolhouse Rock!* cartoon version of the conventional legislative process is dead. It may never have accurately described the lawmaking process in the first place.”), citing *Schoolhouse Rock!*

America--I'm Just a Bill Music Video (Disney Educational Productions, 1975), online at <http://www.youtube.com/watch?v=FFroMQIKiag> (visited Sept 1, 2017) (Perma archive unavailable).

- 16 See Gluck, O'Connell, and Po, [115 Colum L Rev at 1803-07 \(cited in note 5\)](#).
- 17 See *id* at 1800.
- 18 See *id* at 1807-10.
- 19 *Id* at 1851.
- 20  [135 S Ct 2480 \(2015\)](#).
- 21 See Gluck, O'Connell, and Po, [115 Colum L Rev at 1847-48 \(cited in note 5\)](#).
- 22  [King](#), [135 S Ct at 2492](#) (citations omitted).
- 23  *Id* at 2506 (Scalia dissenting).
- 24 Patient Protection and Affordable Care Act, [Pub L No 111-148, 124 Stat 119 \(2010\)](#).
- 25  [Holy Trinity](#), [143 US at 459](#).
- 26 See Gluck, [129 Harv L Rev at 90 \(cited in note 5\)](#) (arguing that “*King* is not *Holy Trinity*”). But see Richard M. Re, [The New Holy Trinity 18 Green Bag 2d 407, 413-15 \(2015\)](#) (arguing that *King* is a variation of *Holy Trinity*, albeit one that pays lip service to text).
- 27 See Gluck and Bressman, [65 Stan L Rev at 915 \(cited in note 5\)](#) (describing “the notion of a single ‘congressional intent’” as “most certainly false”); Nourse, [122 Yale L J at 83 \(cited in note 5\)](#) (looking at “decisions” Congress makes rather than its “subjective desires”).
- 28 See Manning, [115 Colum L Rev at 1917-24 \(cited in note 7\)](#) (explaining the intent skepticism characteristic of both textualism and its rivals). Manning doubts whether Gluck and Bressman are truly intent skeptics. See *id* at 1935 (contending that while they reject classic intentionalism, Gluck and Bressman “plainly invoke intentionalist reasoning--the subjective expectations of legislative drafters”).
- 29 See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 17 (Princeton 1997) (Amy Gutmann, ed) (arguing that a court should look for “‘objectified’ intent,” the meaning that a reader would glean from the text, not “subjective [] intent,” the meaning that resides in the legislative mind). See also note 32 and accompanying text.
- 30 Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, [11 Harv J L & Pub Pol 59, 61 \(1988\)](#).
- 31 See, for example, Nourse, [122 Yale L J at 95-96 \(cited in note 5\)](#) (arguing that the interpreter should interpret words “precisely as a member of Congress would”). See also Katzmann, *Judging Statutes* at 22 (cited in note 5) (arguing that judges should interpret language so as to better capture Congress's understanding of the language it enacted).
- 32 Scalia, *A Matter of Interpretation* at 17 (cited in note 29). See also Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 33 (Thomson/West 2012) (endorsing the “‘fair reading’ method,” which asks “how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued”). Admittedly, Scalia occasionally described “members of Congress” as the relevant interpretive community. In  [Chisom v Roemer](#), [501 US 380 \(1991\)](#), he asserted that an interpreter should “read the words of [a statutory] text as any ordinary Member of Congress would have read them.”  *Id* at 405 (Scalia dissenting), citing Oliver Wendell Holmes, *The Theory of Legal Interpretation*, [12 Harv L Rev 417 \(1899\)](#). He was not, however, distinguishing between an “ordinary member of Congress” and an “ordinary member of the public.” On the contrary, the Holmes article that Scalia cites argues that words should be interpreted as the “normal speaker of English” would understand them. Holmes, [12 Harv L Rev at 417-18 \(cited in note 32\)](#).

- 33 Easterbrook, 11 Harv J L & Pub Pol at 65 (cited in note 30).
- 34  [Johnson v United States](#), 529 US 694, 718 (2000) (Scalia dissenting).
- 35 See, for example,  [Moskal v United States](#), 498 US 103, 121-26 (1990) (Scalia dissenting) (using old cases and treatises to determine the meaning of “falsely made”).
- 36 For example, in *King*, Scalia explained that the rule against surplusage does not always apply, because “[l]awmakers sometimes repeat themselves--whether out of a desire to add emphasis, a sense of belt-and-suspenders caution, or a lawyerly penchant for doublets[.]”  [King](#), 135 S Ct at 2498 (Scalia dissenting). He thus did not treat repetition as a uniquely legislative pattern, but rather as one that careful lawyers often follow.
- 37 Antonin Scalia and John F. Manning, [A Dialogue on Statutory and Constitutional Interpretation](#), 80 Geo Wash L Rev 1610, 1613 (2012). See also John F. Manning, [Textualism and the Role of The Federalist in Constitutional Adjudication](#), 66 Geo Wash L Rev 1337, 1341 & nn 16-17 (1998) (“Even if we cannot know the actual intent of the legislature, we can at least charge each legislator with the intention ‘to say what one would be normally understood as saying, given the circumstances in which one said it.’”), citing Joseph Raz, *Intention in Interpretation*, in Robert P. George, ed, *The Autonomy of Law: Essays on Legal Positivism* 249, 264-65, 266 (Oxford 1996); Raz, *Intention in Interpretation* at 267 (cited in note 37):
Legislators who have the minimal intention know that they are, if they carry the majority, making law, and they know how to find out what law they are making. All they have to do is establish the meaning of the text in front of them, when understood as it will be according to their legal culture assuming that it will be promulgated on that occasion.
See also Jeremy Waldron, *Legislators' Intentions and Unintentional Legislation*, in Andrei Marmor, ed, *Law and Interpretation: Essays in Legal Philosophy* 329, 339 (Oxford 1995) (“A legislator who votes for (or against) a provision ... does so on the assumption that--to put it crudely--what the words mean to him is identical to what they will mean to those to whom they are addressed (in the event that the provision is passed).”).
- 38 Scalia and Manning, 80 Geo Wash L Rev at 1616 (cited in note 37).
- 39 See Amy Coney Barrett, [Substantive Canons and Faithful Agency](#), 90 BU L Rev 109, 120-21 (2010) (arguing that despite the Court's frequent protestations to the contrary, canons like avoidance, lenity, and clear-statement rules cannot plausibly be characterized as attempts to capture the ordinary use of language).
- 40 Scalia and Garner, *Reading Law* at 51 (cited in note 32). See also *id* (asserting that canons “are not ‘rules’ of interpretation in any strict sense but presumptions about what an intelligently produced text conveys”).
- 41 See *id* at 61 (“The canons influence not just how courts approach texts but also the techniques that legal drafters follow in preparing those texts.”).
- 42 See note 37 and accompanying text.
- 43 See Bressman and Gluck, 66 Stan L Rev at 784-85 (cited in note 5) (pointing out the absence of empirical work substantiating the idea that “average citizens interpret language in accordance with the canons”).
- 44 Gluck, 129 Harv L Rev at 83 (cited in note 3) (emphasis omitted).
- 45 Scalia and Manning, 80 Geo Wash L Rev at 1616 (cited in note 37).
- 46 See Gluck and Bressman, 65 Stan L Rev at 905 (cited in note 5) (suggesting that “judges might use the canons for more dialogical reasons, such as to encourage Congress to draft more precisely or in other ways that judges think would be preferable”). See also Gluck, O'Connell, and Po, 115 Colum L Rev at 1847 (cited in note 5):
[S]ome statutory interpretation doctrines aim to reflect how Congress drafts; others aim to influence, or improve, the drafting process; still others impose policy presumptions atop legislation that Congress may not have considered; and still others are about imposing a coherence and rationality on the U.S. Code that Congress did not.

- 47 See [Lawson v FMR LLC](#), 134 S Ct 1158, 1176-77 (2014) (Scalia concurring in principal part and concurring in the judgment) (rejecting reliance on legislative history because a statute means what it said, not what Congress intended it to say, and because there is no actual congressional intent to find in any event).
- 48 See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum L Rev 673, 701-31 (1997) (developing this argument).
- 49 See Nourse, 122 Yale L J at 73-75 (cited in note 5).
- 50 See id at 92 (“[J]ust as Congress is presumed to know and follow the ‘surrounding body of law,’ there should be an even stronger presumption that Congress knows and follows its *own* rules.”) (citation omitted).
- 51 Nourse also addresses scholarly and judicial misuses of the legislative history “glossary”—for example, she points out that interpreters sometimes erroneously rely on “losers’ history” to define statutory terms. See id at 121-28 (discussing this misuse of legislative history in the *Holy Trinity* debate about the meaning of “labor or service of any kind”).
- 52 [491 US 440](#) (1989).
- 53 Pub L No 92-463, 86 Stat 770 (1972), codified at 5 USC App 2 § § 1-15. See also [Public Citizen](#), 491 US at 440.
- 54 [Id](#) at 452-56. See also Nourse, 122 Yale L J at 93 (cited in note 5) (“Today, *Public Citizen* is taught as a controversial case.”).
- 55 Nourse, 122 Yale L J at 93 (cited in note 5) (noting that textualists criticize the case for, among other things, its “apparent judicial surgery”).
- 56 [Id](#) at 95.
- 57 [Id](#) at 94-95 (noting that the House bill used the word “establish” and the Senate bill used the phrase “established or organized” and that both House and Senate rules prohibit conferees from changing the text “in any significant way”).
- 58 [Id](#) at 95. See also [id](#) at 96 (“A faithful member of Congress would assume that, when both Houses pass the same language, that any added language must be read as making no substantive change in the bill.”). Because Nourse “propose[s] this as a principle to resolve ambiguity, not to supplant the statute’s text,” [id](#) at 95 n 101, the argument depends on the conclusion that the word “utilize” can bear the meaning “established or organized.”
- 59 Nourse, 122 Yale L J at 96 (cited in note 5).
- 60 See Scalia and Manning, 80 Geo Wash L Rev at 1616 (cited in note 37) (“If you want to use [legislative history] just to show that a word could bear a particular meaning—if you want to bring forward floor debate to show that a word is sometimes used in a certain sense—that’s okay.”).
- 61 [Id](#).
- 62 Bressman and Gluck, 66 Stan L Rev at 735 (cited in note 5) (identifying this as the meaning of faithful agency). See also [id](#) at 736 (asserting that it is a conventional assumption of both textualists and purposivists that “the only democratically legitimate theory of interpretation for unelected federal judges is one that is linked to congressional intent or practice”). See also Gluck and Bressman, 65 Stan L Rev at 950 (cited in note 5) (observing that “[a]lthough most theorists have couched the faithful-agent paradigm only in terms of the courts-Congress relationship, a few have advanced versions of [the view that courts are faithful agents of the public]”).
- 63 See Katzmann, *Judging Statutes* at 29 (cited in note 5) (“Judicial respect for Congress ... means using the interpretive materials the legislative branch thinks important to understanding its work.”). See also Nourse, 122 Yale L J at 96 (cited in note 5) (arguing that a faithful agent must interpret statutory language as Congress would have understood it).
- 64 See, for example, John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum L Rev 1, 15 (2001) (asserting that both textualists and purposivists understand themselves to be the faithful agents of Congress).

- 65 See Barrett, [90 BU L Rev at 112-17 \(cited in note 39\)](#) (asserting that textualists and purposivists share the premise that courts are the faithful agents of Congress).
- 66 See Scalia and Garner, *Reading Law* at 138 (cited in note 32) (asserting that “courts are assuredly not agents of the legislature ... [t]hey are agents of the people”).
- 67 [Scalia and Manning, 80 Geo Wash L Rev at 1610 \(cited in note 37\)](#) (asserting that “the people and agents of the people owe fidelity to democratically enacted texts”).
- 68 Scalia and Garner, *Reading Law* at 138 (cited in note 32). Scalia and Garner except the “relatively few statutes that deal with the jurisdiction and procedures of the courts themselves” from this description. *Id.*
- 69 Scalia, *A Matter of Interpretation* at 17 (cited in note 29).
- 70 *Id.*
- 71 See notes 32-35 and accompanying text.
- 72 See [US Const Art I, § 5, cl 2](#) (“Each House may determine the Rules of its Proceedings[.]”). See also [Gluck, 129 Harv L Rev at 105 \(cited in note 5\)](#) (emphasizing that “the Constitution entrusts *Congress*, not the Court, with control over legislative procedures”); [Katzmann, *Judging Statutes* at 12-17 \(cited in note 5\)](#) (emphasizing significance of this grant); [Nourse, 122 Yale L J at 92-97 \(emphasizing importance of “Congress's own rules”\)](#).
- 73 See [Katzmann, *Judging Statutes* at 4 \(cited in note 5\)](#) (“[H]ow Congress makes its purposes known, through text and reliable accompanying materials constituting legislative history, should be respected, lest the integrity of the legislative process be undermined.”).
- 74 See text accompanying notes 21-23. See also [King, 135 S Ct at 2506](#) (Scalia dissenting):
It is not our place to judge the quality of the care and deliberation that went into this or any other law. A law enacted by voice vote with no deliberation whatever is fully as binding upon us as one enacted after years of study, months of committee hearings, and weeks of debate.

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ARTICLES

CONGRESSIONAL ORIGINALISM

*Amy Coney Barrett**
*John Copeland Nagle***

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INTRODUCTION

Precedent poses a notoriously difficult problem for originalists. Some decisions thought inconsistent with the Constitution’s original public meaning are so well baked into government that reversing them would wreak havoc. Adherence to originalism arguably requires, for example, the dismantling of the administrative state, the invalidation of paper money, and the reversal of *Brown v. Board of Ed-*

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ucation.¹ Originalists have been pressed to either acknowledge that their theory could generate major disruption or identify a principled exception to their insistence that judges are bound to enforce the Constitution's original public meaning.

Commentators, who typically approach matters with the courts in mind, tend to frame this problem as one for a Supreme Court Justice. It might, however, be more acute for a member of Congress. The standard hypothetical posits an originalist Justice forced to choose between principled adherence to original meaning and compromised adherence to precedent. Yet at least in the case of so-called "super precedents"—decisions that no serious person would propose to undo even if they are wrong—an originalist justice will not have to choose between fidelity and faint-heartedness. No one is likely to ask the Supreme Court to rethink arguably nonoriginalist decisions like the constitutionality of the Social Security Administration, paper money, or segregated public schools—and if anyone did ask, the Court would deny certiorari.

An originalist member of Congress, by contrast, might have a harder time avoiding the conflict between original meaning and precedent. Congress has to decide whether to fund the Social Security Administration,² to seat the elected representatives of the arguably unconstitutional state of West Virginia,³ and to rely on the Section Five power conferred by the possibly illegitimate Fourteenth Amendment.⁴ If an honest originalist must reject precedent in situations like these (assuming she decides that they are indeed unconsti-

1 We do not want our choice of examples to obscure our argument. We identify some well-settled precedents whose consistency with the original public meaning has been challenged, but we recognize that different readers will reach different conclusions about whether any given precedent in fact conflicts with the text. We do not ourselves undertake to examine how any of the precedents we mention would fare under an originalist analysis. For our purposes, it is sufficient to say that it is inevitable that some well-settled precedents conflict with the original public meaning, and we use the familiar examples simply to illustrate the nature of the problem posed by such a conflict. See *infra* notes 34–47 and accompanying text.

2 See Erin Mershon, *Ron Paul Admits He's On Social Security, Even Though He Believes It's Unconstitutional*, HUFFINGTON POST (June 21, 2012), http://www.huffingtonpost.com/2012/06/20/ronpaulsocialsecurity_n_1612117.html (explaining Ron Paul's stance that Social Security and Medicare should not be eliminated "despite his belief that the programs are unconstitutional").

3 See generally Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Constitutional?*, 90 CALIF. L. REV. 293 (2002) (exploring originalist arguments that the admission of West Virginia to the United States did not comply with the Constitution).

4 See generally Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627 (2013) (arguing that irregularities in the ratification of the Fourteenth Amendment pose a problem for originalism).

tutional), adherence to originalism is a recipe for folly, ending in electoral failure. If honest originalism does not require this result, the originalist must say why.

In undertaking to answer that question, this Article proceeds as follows. Part I adopts the position that the original public meaning of the Constitution is the law. Early originalists sometimes presented originalism as a theory of judging—specifically, as a mechanism of judicial restraint. On this view, which is suffused with worries about the counter-majoritarian nature of judicial review, the original public meaning of the Constitution would have no particular claim on the conscientious legislator. The conventional position of modern originalists, however, is that the original public meaning of the Constitution’s text is “the law.” The consequence of that position is that the original public meaning of the Constitution binds the legislators who swear to uphold it.

Part II recounts why nonoriginalist precedent tests the originalist commitment to the binding force of the Constitution’s original public meaning. It also explains why framing the super precedent problem as one about the obligations of a Supreme Court Justice, rather than one about the obligations of political actors, obscures the issue at stake. The issue is not, as is commonly assumed, a matter of *stare decisis*: the force of these super precedents derives not from the Court’s decision to afford them precedential strength but from the People’s choice to accept them. Once a precedent is deeply rooted, challenges die out and the Court is no longer required to deal with the question of the precedent’s correctness. The rules of adjudication, moreover—including the Court’s practice of answering only the questions presented in the petition for certiorari—relieve the Court of any obligation to identify and correct any error that may lurk in a case. The Court employs a variety of techniques that permit it to assume the correctness of some background issues and focus its attention on the ones that are actually controverted. The upshot is that the Court need not confront the question whether foundational precedent ought to be overruled.

Members of Congress are differently situated. While the stylized process of adjudication narrows the questions presented to the Court, in Congress the question of a measure’s constitutionality is always on the table. And because framing constraints do not narrow the relevant and permissible grounds of decision as they do in litigation, evaluating a bill’s constitutionality arguably requires analysis of every possible constitutional flaw. That could put the originalist legislator in a bind. After all, if the legislator owes allegiance to the original public meaning, it is not obvious why the legislator need not ensure

that a bill complies with that meaning in every respect. Because the kinds of procedural outs that permit originalism and deep-seated error to coexist in courts are not as readily apparent in the legislative context, the originalist legislator might have to face questions that an originalist justice can escape—such as the constitutionality of the administrative state or the legitimacy of the Fourteenth Amendment. Indeed, broad-brush arguments about the obligation imposed by the legislator's oath of office, combined with the originalist emphasis on the preeminence of the text's original meaning, strongly suggest that a member of Congress must do just that.

We think that is wrong. Part III contends that it misinterprets the duty of fidelity to the text to maintain that Congress (or any individual member) must strip every constitutional question down to the studs. That is not because Congress is obliged to treat precedents as the equivalent of the Constitution itself or because longstanding judicial departures from the Constitution function as virtual amendments. It is because the Constitution permits Congress, much like the Supreme Court, to employ techniques of avoidance that keep constitutional questions off its agenda.

We argue that Congress may employ a working presumption that super precedents are constitutional and thereby refrain from re-examining them. Presuming that a super precedent is correct is different from endorsing its correctness. If the precedent is erroneous, the latter course gives priority to the precedent rather than the original meaning. The former course, however, is a technique for avoiding the question whether the precedent is right or wrong. Congress may assume *arguendo* that well-settled precedents are correct and focus its attention on questions that are politically salient. To be sure, Congress is free to reconsider super precedent any time it so chooses. The point is simply that a commitment to the primacy of the original meaning does not force Congress to reconsider super precedent when it has no interest in doing so. If the Court is likely to revisit super precedent only in response to litigants, Congress is likely to do so only in response to constituents—which is to say that as a practical matter, the People decide whether and when Congress should initiate correction of a deep-seated constitutional error.

Any theory of constitutional interpretation must be able to accommodate error because mistakes are an inevitable part of any human institution. It is more difficult for originalism to account for errors than other theories, because most originalists insist that the Constitution's original meaning is binding law that cannot be overcome by other considerations, including pragmatic ones. This has led originalist scholars to search for ways to justify treating constitu-

tional mistakes as the functional equivalent of constitutional law. Yet public officials need not make that choice at all. Stability is built into the constitutional structure because the Constitution does not require them to identify, much less rectify, every constitutional mistake. It permits some errors to exist unexamined. Politics, not legal duty, determines whether Congress reconsiders the soundness of super precedent.

I. ORIGINALISM IN CONGRESS

A. *Originalism as a Theory of Law*

Originalism is characterized by a commitment to two core principles.⁵ First, the meaning of the constitutional text is fixed at the time of its ratification.⁶ Second, the historical meaning of the text “has legal significance and is authoritative in most circumstances.”⁷ Commitment to these two principles marks the most significant disagreement between originalists and their critics. A nonoriginalist may take the text’s historical meaning as a relevant data point in interpreting the demands of the Constitution, but other considerations, like social justice or contemporary values, might overcome it.⁸ For an originalist, by contrast, the historical meaning of the text is a hard constraint. Throughout the Article, when we refer to the originalist commitment to “text,” we mean text as originalists interpret it—i.e., in accordance with its original public meaning.

5 See Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *FORDHAM L. REV.* 375, 378 (2013) (“The two crucial components of originalism are the claims that constitutional meaning was fixed at the time of the textual adoption and that the discoverable historical meaning of the constitutional text has legal significance and is authoritative in most circumstances.”); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 *NW. U. L. REV.* 923, 944–45 (2009) (describing the core claims of originalism). While originalists hold these convictions in common, there are other matters about which they disagree: for example, there is disagreement about the rationale for originalism and the legitimacy of “constitutional construction.” See Whittington, *supra*, at 394–404 (detailing the “points of contention” between originalists). These differences are unimportant for present purposes.

6 See Whittington, *supra* note 5, at 394–404 (explaining the originalist position that constitutional meaning is fixed at the time the text is adopted). The dominant view among modern originalists is that the text should be interpreted with reference to its original public meaning rather than the private intentions of those who drafted it. See *id.* at 380 (“Originalist theory has now largely coalesced around original public meaning as the proper object of interpretive inquiry.”).

7 *Id.* at 378. Originalists disagree about why the historical meaning constrains and when, if ever, the interpreter can depart from the historical meaning. See *id.*

8 See *id.* at 406–08 (describing the disagreement between originalists and nonoriginalists about the authoritativeness of the original public meaning).

Originalists, like most constitutional theorists, focus almost exclusively on constitutional interpretation in the Supreme Court. Whether a *legislator* is legally bound by the Constitution's original public meaning depends upon whether originalism is a theory of constitutional law or a theory of adjudication.⁹ The former is a theory about what counts as constitutional law, and the latter is a theory about how judges should decide cases. There is no necessary correlation between the two. One might reject the proposition that the original public meaning of the Constitution's text itself constitutes the law but nonetheless think that judges should enforce only the original public meaning of the text in the service of a value like judicial restraint. On this view, originalism is not so much a theory of constitutional law as a theory about how to exercise judicial review. It reflects a policy choice about how an institution comprised of unelected, life-tenured judges should enforce the Constitution, but in a different institutional context, one subscribing to originalism as a theory of adjudication might make a different judgment.¹⁰ Congress is a pragmatic decision-making institution comprised of members who are responsive to the

9 Cf. Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 *FORDHAM L. REV.* 545, 557 (2013) (distinguishing between theories of adjudication, which address "how judges should behave," and theories of constitutional law, which are concerned with identifying "the ultimate determinants of the contents of constitutional norms or propositions"). There is also a third possibility: some offer originalism as a theory of how to interpret language but take no position on whether the Constitution's language binds even judges. Gary Lawson, for example, draws a careful distinction between the claim that originalism is the correct way to interpret the Constitution and the claim that judges must adhere to the original public meaning of the Constitution in deciding cases. See Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 *FLA. L. REV.* 1551, 1567 n.53 (2012) (explaining that "originalism is uniquely the correct way to ascertain the meaning of the Constitution" but taking no position on "whether the original meaning of the Constitution should be considered authoritative by judges"); Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 *GEO. L.J.* 1823, 1824 (1997) ("[A] theory of interpretation allows us to determine what the Constitution truly means, while a theory of adjudication allows us to determine what role, if any, the Constitution's meaning should play in particular decisions."). Given that Lawson does not engage the question whether judges must or even should adhere to the original public meaning, his approach does not compel the conclusion that legislators are so bound.

10 For example, Neal Katyal, while not an originalist, argues that Congress, as a politically accountable institution in regular contact with the citizenry, is better able than the courts to interpret provisions like the Due Process Clause in a way reflective of contemporary values. Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 *DUKE L.J.* 1335, 1336 (2001). Thus he says that "constitutional interpretation by Congress is, and should be, quite different from constitutional interpretation by courts," with the latter taking a more restrained approach and the former taking a "living and evolving" approach. *Id.* at 1335, 1341. A "restrained approach" is not necessarily an originalist approach, but the argument highlights how one's theory of adjudication may be distinct from one's theory of what is fairly encompassed by the Constitution itself.

desires of the people they represent, and a theory designed to ensure that judges defer to legislative majorities would not necessarily make sense in the context of the body that expresses what those majorities want.

To be sure, when a legislative act is subject to judicial review, things might run smoothest if Congress and the courts are on the same page. If a legislator committed to originalism in adjudication got the courts she preferred, she might assume an originalist perspective to predict whether a given statute would survive judicial review.¹¹ But the situation would be different if the courts were largely non-originalist or the legislative act was immune from judicial review. Then someone committed to originalism as a theory of adjudication might think it permissible for legislators to make the kind of all-things-considered constitutional judgment that is off-limits to a judge constrained by original meaning. Thus, one attracted to originalism as a mechanism of judicial restraint might think it permissible for a senator to decide whether perjury is a “high crime or misdemeanor” with reference to her constituents’ views, regardless whether those views conflict with the way the phrase was originally understood.¹² Those constituent views might be part of what counts as constitutional law, albeit a part of the law that judges should not enforce.

Insofar as they grounded their argument for originalism in the need for judicial deference to legislative majorities, first-generation originalists might have conceived of originalism as a theory of adjudication.¹³ Modern originalists, however, have backed away from the earlier emphasis on judicial restraint. As Keith Whittington explains, “[t]he primary virtue claimed by the new originalism is one of constitutional fidelity, not of judicial restraint or democratic majoritarianism.”¹⁴ Today, most originalists cast the theory as a claim about what

11 In this predictive posture, Congress would be functioning somewhat like the proverbial Holmesian “bad man.” See Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 994 (1997) (“[I]f we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact.”).

12 Cf. Katyal, *supra* note 10, at 1382 (offering the High Crimes and Misdemeanors Clause as an example of one that the Senate should interpret with respect to what the public currently thinks, in contrast to the restrained approach the courts should take to interpretation in the exercise of judicial review).

13 See Berman & Toh, *supra* note 9, at 560 (maintaining that “first generation originalists advocated judicial adherence to some fixed originalist object for reasons that did not depend upon any particular view about the ultimate criteria or determinants of constitutional law”).

14 Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 609 (2004).

the law is.¹⁵ Steven Calabresi and Saikrishna Prakash put it succinctly: “Originalists do not give priority to the plain dictionary meaning of the Constitution’s text because they like grammar more than history. They give priority to it because they believe that *it and it alone is law*.”¹⁶ Similar statements abound.¹⁷ Steven Smith is particularly clear on this

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- 15 Berman and Toh characterize this as the mainstream neo-originalist position. Berman & Toh, *supra* note 9, at 574–75. Not all originalists, however, embrace it. Gary Lawson takes no position on it. See Lawson, *supra* note 9 (declining to express a view about whether historical meaning binds judges). Moreover, John McGinnis and Michael Rappaport disclaim it. McGinnis and Rappaport do not insist that interpreters should follow the original public meaning because it is the law; rather, their argument for originalism is consequentialist. See John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693 (2010) (arguing for originalism on the ground the supermajoritarian process of constitution-making is likely to generate good constitutional law); Berman & Toh, *supra* note 9, at 561 (claiming that McGinnis and Rappaport present their argument for originalism as a theory of adjudication rather than a theory of law); Mike Rappaport, *Should We Follow the Original Meaning Because It Is the Law?*, ORIGINALISM BLOG (Oct. 24, 2013, 7:59 AM), <http://originalismblog.typepad.com/the-originalism-blog/2013/10/in-response-to-my-priorposton-my-new-book-with-john-mcginnis-originalism-and-the-good-constitution-a-commentator-takes-iss.html> (expressing doubt that the Constitution’s original meaning is “the law”). McGinnis and Rappaport extend this consequentialist argument to legislators, who, like judges, should adhere to the original public meaning not because it is “the law,” but because doing so yields desirable results. See McGinnis & Rappaport, *supra*, at 1697-98 (asserting that the Constitution’s supermajoritarian nature “requires interpreters to choose the meaning that gained consensus among the Constitution’s enactors”); *id.* at 1741 n.138 (specifically including legislatures in that universe of interpreters because legislatures have a “duty to . . . determine the Constitution’s meaning.”); Mike Rappaport, *Berman and Toh on the New and Old Originalism: Part II—McGinnis and Rappaport*, ORIGINALISM BLOG (Dec. 10, 2013, 8:02 AM), <http://originalismblog.typepad.com/the-originalism-blog/2013/12/berman-and-toh-on-the-new-and-old-originalism-part-ii-mcginnis-and-rappaport.html> (“The normatively [sic] desirability of the Constitution is not intended as a constraint on judges only or principally, but on all actors.”).
- 16 Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 552 (1994) (emphasis added).
- 17 See, e.g., Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMM. 291, 292–93 (2007) (claiming that the Constitution’s original meaning is “binding law”); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1130 (2003) (“The meaning of the words and phrases of the Constitution as law is necessarily fixed as against private assignments of meaning”) (emphasis added); Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 360–61 (1988) (asserting that constitutional interpretation aims to determine “what consistent, coherent rules of law our forefathers laid down for the governance of those elected to rule over us”) (emphasis added); *Original Intent and a Living Constitution* (C-Span television broadcast Mar. 23, 2010) 15:43 to 18:08, <http://www.c-spanvideo.org/program/292678-1> (remarks of Justice Scalia) (“The validity of government depends upon the consent of the governed . . . [s]o what the people agreed to when they adopted the Constitution . . . is what ought to govern us.”); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 111 (1999) (“[O]riginalism both enforces the authoritative decision of the people acting as sovereign and, equally important, preserves the possibility of simi-

point. According to Smith, “originalism insists (with some arguable lapses . . .) that what counts as *law*—as valid, enforceable law—is what human beings enact, and that the meaning of that law is what those human beings understood it to be.”¹⁸ As Mitchell Berman and Kevin Toh observe, such claims reflect that originalism—at least in its contemporary form—“is principally a theory about ‘what counts as law.’”¹⁹

Originalism, then, is not a theory about how judges should decide cases. As a theory of law, it makes a claim about the content of the law that all public officials—including legislators—must observe.²⁰

To be sure, many contest originalism’s claim that the Constitution’s original public meaning constitutes binding law.²¹ Our project does not seek to explore the validity of this claim; instead, we ask whether originalism, taken on its own terms, requires Congress to bring major disruption to the constitutional landscape. Of course, the answer to that question has something to say about originalism: if the answer is yes, originalism is unsustainable in practice no matter how persuasive it is in theory.

B. *Originalism in Congress*

Critics have not challenged the ability of legislators to identify and adhere to the Constitution’s original public meaning because originalists themselves have paid little attention to how the theory might function in Congress.²² Two likely objections come to mind. The first echoes general skepticism about a legislator’s capacity to engage in conscientious interpretation, and the second questions

lar higher-order decision making by the present and future generations of citizenry.”) (emphasis added).

18 Steven D. Smith, *Reply to Koppelman: Originalism and the (Merely) Human Constitution*, 27 CONST. COMM. 189, 193 (2010).

19 Berman & Toh, *supra* note 9, at 559.

20 For discussion of the source of this obligation, see *infra* Part III.A.

21 See generally Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1 (2009) (criticizing originalism).

22 Joel Alicea is a notable exception. See generally Joel Alicea, *Stare Decisis in an Originalist Congress*, 35 HARV. J.L. & PUB. POL’Y 797 (2012) (exploring, from an originalist perspective, whether the arguments in favor of judicial stare decisis carry over to the legislative context); José Joel Alicea, *Originalism and the Legislature*, 56 LOYOLA L. REV. 513 (2010) (arguing that the leading justifications for originalism require an originalist Congress, not simply an originalist Court); Joel Alicea, *An Originalist Congress?*, NATIONAL AFFAIRS 31, 40 (2011) [hereinafter Alicea, *An Originalist Congress?*] (arguing that lawmakers who purport to be originalist need to think through what that commitment requires of them).

whether even a conscientious legislator is capable of undertaking an originalist inquiry.²³

It is frequently claimed, without respect to any particular interpretive theory, that legislators are incapable of engaging in conscientious constitutional interpretation.²⁴ Congress's critics contend that legislators lack the time and inclination to study the Constitution, that constitutional arguments are a cover for policy preferences, and that legislators are unlikely to let constitutional constraints thwart a desired policy outcome. One could customize this complaint to originalism by insisting that legislators lack the time and inclination to study historical arguments, that historical arguments are a cover for policy preferences, and that legislators are unlikely to let the original public meaning thwart a desired policy outcome. We think that skepticism about Congress's capacity to interpret the Constitution is overblown. For one thing, evidence exists that Congress can and does interpret it.²⁵ For another, Congress has an institutional obligation to do so, and every member of Congress has an individual obligation to do so by virtue of her oath of office. An inclination to shirk the obligation may reflect upon the quality of Congress's work, but it cannot excuse Congress and its members from a duty the Constitution itself imposes.

Still, some might contend that originalism is an impossibly tall order for even a conscientious legislator. Probing history is an academic exercise far afield of the legislator's typical work, the argument might run, while a pragmatic approach involves considerations that resemble those made in the policy context. Eclectic approaches might translate well to the legislative context, the critic might say, but originalism is an ill fit.

This argument minimizes the rigor of nonoriginalist constitutional interpretation by treating it as roughly equivalent to policymak-

23 The phrase "conscientious legislator" comes from Paul Brest's famous article. Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587 (1975).

24 See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1368 (1997) ("[T]here are few examples of Congress subjugating its own policy views to its views about constitutional constraints."); Jeffrey K. Tulis, *On Congress and Constitutional Responsibility*, 89 B.U. L. REV. 515, 516 (2009) ("In the nineteenth century, Congress was a site of healthy constitutional contestation, but there has been a significant decay over the last century.").

25 For example, the American Law Division of the Congressional Research Service routinely responds to congressional requests for analysis of constitutional questions provoked by, among other things, proposed legislation. See Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 838–43 (2014) (describing the American Law Division's role in the legislative process).

ing—a characterization that nonoriginalists resist. History is a standard modality of constitutional argument.²⁶ Originalists are not unique in considering historical meaning; they are unique in treating it as conclusive when it is determinate. Pragmatic approaches also account for the historical meaning; they simply permit the interpreter more flexibility in deciding how much weight to give it. Moreover, other modalities of constitutional reasoning—for example, the analysis of judicial precedent—may be equally alien to members of Congress. Interpreting the Constitution inevitably requires legislators to step beyond the pragmatic, policy-based arguments with which they are most comfortable.

The prospect of constitutional interpretation in Congress should not conjure up an image of a senator or representative poring over the United States Reports, much less Farrand's Records or Elliot's Debates. Even apart from staff, members of Congress have significant resources available to them for the analysis of constitutional issues. Most significantly, the nonpartisan American Law Division ("ALD") of the Congressional Research Service routinely generates memoranda reflecting sophisticated analysis of constitutional issues that arise in the course of Congress's work.²⁷ Any member of Congress can request the assistance of the ALD, not to mention the help of her own staff. A duty to make decisions consistent with the Constitution does not mean that members have to do the background work themselves. They can draw upon analyses their advisors provide in choosing the right course.

Originalist arguments in Congress have a lengthy pedigree. David Currie's multi-volume study *The Constitution in Congress* reveals that members of Congress repeatedly invoked the Constitution's original public meaning as a constraint upon their decision making. Currie goes so far as to say that throughout the nineteenth century, "just about everybody was an originalist."²⁸ Constitutional arguments in Congress thus involved what originalism demanded, not whether originalism was the proper interpretive approach. To cite just one of Currie's examples, when Senators Thomas Hart Benton and John Calhoun debated the constitutionality of proposed bankruptcy legis-

26 See generally PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982) (identifying historical argument as an archetypal form of constitutional argument).

27 See *supra* note 25.

28 DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS 1829-1861* xiii (2005).

lation, they both proceeded from an originalist perspective.²⁹ Originalist arguments remain prominent in Congress today. Senators Mike Lee and Ted Cruz, for example, are both self-described originalists.³⁰ While on the campaign trail, Senator Lee promised, “I will not vote for a single bill that I can’t justify based on the . . . original understanding of the Constitution, no matter what the Court says you can do.”³¹ In a eulogy for Justice Antonin Scalia, Senator Cruz praised Justice Scalia’s focus on “the Constitution as it was understood by the people who ratified it and made it the law of the land.”³²

None of this is to say that self-professed legislative originalists are always faithful to or good at discovering the Constitution’s original public meaning. No matter what the constitutional theory, there is room to debate Congress’s sincerity and skill in making constitutional arguments. This is to say, however, that Congress is no stranger to originalist arguments. When Congress considers constitutional questions, claims that it is constrained by the Constitution’s original meaning are typically in the mix.³³

²⁹ *Id.* at 130.

³⁰ Other modern examples include Senator Rand Paul, *see* Sam Tanenhaus & Jim Rutenberg, *Rand Paul’s Mixed Inheritance*, N.Y. TIMES (Jan. 25, 2014), <http://www.nytimes.com/2014/01/26/us/politics/rand-pauls-mixed-inheritance.html> (quoting Rand Paul as expressing belief “in a strict, or originalist, interpretation of the Constitution”); Representative Jody Hice, *see* Richard Zimdars, *Zimdars: Questions About Hice Endorsement*, ATHENS BANNER-HERALD (July 18, 2014), <http://onlineathens.com/opinion/2014-07-18/zimdars-questions-about-hice-endorsement> (noting that Hice argues “for following the Constitution in terms of the original intent of the Founding Fathers as the best path for America”); and former Representative David McIntosh, *see* David M. McIntosh, *What is Originalism? Introduction: A View for the Legislative Branch*, 19 HARV. J.L. & PUB. POL’Y 317, 318 (1996) (arguing that Congress should engage in originalist constitutional interpretation).

³¹ Jeffrey Rosen, *Radical Constitutionalism*, N.Y. TIMES MAG. (Nov. 26, 2010), <http://www.nytimes.com/2010/11/28/magazine/28FOB-idealab-t.html>; *see generally* MIKE LEE, *OUR LOST CONSTITUTION: THE WILLFUL SUBVERSION OF AMERICA’S FOUNDING DOCUMENT* (2015) (urging a return to the Constitution’s original meaning).

³² 162 CONG. REC. S1436 (daily ed. Mar. 10, 2016) (statement of Sen. Cruz); *see also id.* at S1435 (statement of Sen. Wicker) (praising Justice Scalia as “an icon for constitutional originalism”); 152 CONG. REC. S10122 (daily ed. Sept. 26, 2006) (statement of Sen. Hatch) (“Justice Scalia’s critics attack his judicial philosophy for the same reason he embraces it. Originalism limits a judge’s ability to make law.”).

³³ In addition to constitutional arguments advanced by Members of Congress themselves, it is worth noting that the ALD frequently considers originalist arguments in rendering constitutional advice to Congress. For two of many examples, *see* JACK MASKELL, CONG. RESEARCH SERV., R41946, *QUALIFICATIONS OF MEMBERS OF CONGRESS 1–2, 10–15, 18–19* (2015) (considering the original meaning of constitutional provisions governing qualifications for and disqualifications from congressional office), and TODD B. TATELMAN, CONG. RESEARCH SERV., R40124, *THE EMOLUMENTS CLAUSE: HISTORY, LAW, AND PRECEDENTS 1–5* (2009) (considering the original meaning of the Emoluments Clause).

Thinking about originalism from the congressional perspective raises many questions, but here we focus on the one that has proven most troublesome for those exploring originalism from the judicial perspective: how to handle so-called super precedents that conflict with the Constitution's original public meaning. It turns out that exploring this question sheds light not only on congressional constitutional interpretation but on originalism itself.

II. ORIGINALISM AND THE CHALLENGE OF SUPER PRECEDENT

Every theory of constitutional interpretation believes that some precedents—even well-settled ones—are correct while others are not. Originalists, like all interpreters, surely stand ready to overrule some precedents that they believe to be incorrect. But originalists, like their counterparts, recognize that there are some mistakes whose correction would do far more harm than good. It is highly unlikely, for example, that any originalist justice is eager to provoke crisis by declaring that paper money is unconstitutional; yet both originalists and their critics have assumed that fidelity to the original meaning would require a justice to do just that. In this Part, we examine the nature of super precedent and explain why originalist justices can avoid causing chaos while still remaining faithful to their principles.

A. *Super Precedent*

Scholarly debates about *stare decisis* have paid particular attention to so-called “super precedent.” The term is not a doctrinal one designating a formal legal status. Rather, it is a descriptive one capturing the hard-to-dispute reality that regardless of whether they are right or wrong, some cases are so firmly entrenched that the Court would not consider overruling them.³⁴ Some super precedents establish foundational institutional practices; others establish foundational doctrine.³⁵

³⁴ See Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1221 (2006) (“Super precedent is a construct employed to signify the relatively rare times when it makes eminent sense to recognize that the correctness of a decision is a secondary (or far less important) consideration than its permanence.”); see also Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1116 (2008) (“[T]he claim that there are super precedents immune from judicial overruling seems basically correct.”); Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1180–82 (2006) (endorsing the proposition that some precedents are so entrenched that they cannot be overruled).

³⁵ See Gerhardt, *supra* note 34, at 1207 (“The first kind of super precedent consists of longstanding Supreme Court decisions that establish what I call foundational institutional practices. These decisions create and maintain particular modes of operation or particu-

They have five characteristics: endurance over time, support by political institutions, influence over constitutional doctrine, widespread social acquiescence, and widespread judicial agreement that they are no longer worth revisiting.³⁶ The cases that appear most frequently on lists of super precedents include *Marbury v. Madison*,³⁷ *Martin v. Hunter's Lessee*,³⁸ *Helvering v. Davis*,³⁹ the *Legal Tender Cases*,⁴⁰ *Mapp v. Ohio*,⁴¹ *Brown v. Board of Education*,⁴² and the *Civil Rights Cases*.⁴³ Because their overruling is extraordinarily unlikely, decisions like these are invoked as evidence that *stare decisis* at least occasionally imposes a functionally absolute constraint upon the Court in constitutional cases.

They are also invoked as evidence that originalism is unsustainable.⁴⁴ At least some super precedents are thought to run contrary to the Constitution's original meaning,⁴⁵ and while that is disputed, we

lar practices that become indispensable to the functioning of our government. The practices established by these precedents have become so well entrenched within our society, have been so repeatedly endorsed and supported by public institutions, and have been the source of so many other lines of decisions, that they may be undone only through the most extremely radical, unprecedented acts of political and judicial will.”); *id.* at 1210 (“Foundational doctrine refers to the support in case law for recognizing the existence and application of basic categories, kinds, or classes of constitutional disputes that endure over time.”).

36 *Id.* at 1213. As noted below, congressional action may also establish constitutional super precedents. See *infra* at notes 81–86 and accompanying text.

37 5 U.S. (1 Cranch) 137 (1803) (holding constitutional the exercise of judicial review).

38 14 U.S. (1 Wheat.) 304 (1816) (holding constitutional the exercise of Supreme Court review of state court judgments).

39 301 U.S. 619 (1937) (holding constitutional the Social Security Act).

40 *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1870) (holding constitutional the issuance of paper money).

41 367 U.S. 643 (1961) (holding the Fourth Amendment incorporated against the states through the Fourteenth Amendment).

42 347 U.S. 483 (1954) (holding that the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools).

43 109 U.S. 3 (1883) (holding that the Fourteenth Amendment applies only to state action). Of course, there are other prominent decisions whose status as super precedents remains disputed. Compare *Richmond Med. Ctr. for Women v. Gilmore*, 219 F.3d 376, 376–77 (4th Cir. 2000) (positing that the Supreme Court has given *Roe v. Wade* “super-*stare decisis*” effect) with Gerhardt, *supra* note 38, at 1220 (observing that “the persistent condemnation of *Roe* . . . undermines its claim to entrenchment”). And some super precedents derive from legislative actions, as we discuss below. We are not concerned here with the precise content of the list of super precedents. Rather, we assume that some super precedents exist, and that they present unique challenges for any theory of constitutional interpretation and for originalism in particular.

44 See, e.g., Gerhardt, *supra* note 34, at 1224 (arguing that strict adherence to originalism is inconsistent with *stare decisis*).

45 See, e.g., Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 668–69 (2009) (“A committed historicist could easily conclude that the Court’s privacy and women’s rights decisions are wrong, and that the use of paper money as legal tender, the use of the federal commerce

will assume for the sake of argument that it is true. (Indeed, it would be extraordinary if it were not. Originalists do not claim that the entire corpus of constitutional precedents is characterized by unwavering fidelity to, much less flawless identification of, the Constitution's original public meaning.) Because originalists insist that the Constitution's text is the law, alterable only through the Article V amendment process, the conventional account casts the originalist Justice as facing a dilemma: she must either abandon principle or adhere to it at great (and in some cases, catastrophic) cost. As Michael Gerhardt puts it, "Originalists . . . have difficulty in developing a coherent, consistently applied theory of adjudication that allows them to adhere to originalism without producing instability, chaos, and havoc in constitutional law."⁴⁶

Originalists have responded to this critique in a variety of ways. Some have bitten the bullet, maintaining that a Justice must remain true to the text regardless of the consequences.⁴⁷ Others have tried to reconcile originalism and stare decisis, either by explaining why some important precedents thought to be at odds with the text are actually consistent with it⁴⁸ or by offering a general theory about why original-

power to establish the welfare state and federal civil rights laws, and the federal administrative state itself are all unconstitutional. Yet all of these doctrinal developments lie beyond any reasonable constitutional objection."); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 728, 731, 739 (1988) (asserting that originalism cannot account for major features of our constitutional order, including *Brown v. Board of Education*, the New Deal expansion of federal power, and the increased role of the administrative state).

46 Gerhardt, *supra* note 34, at 1224. This is not to say, of course, that other constitutional theories do not face similar challenges. The concern is especially acute, however, with respect to originalism.

47 See, e.g., Randy E. Barnett, *It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1233 (2006) (insisting that while "faint-hearted originalists" are willing to make a pragmatic exception to stare decisis to avoid political suicide, "[o]ther originalists . . . reject the doctrine of stare decisis in the following sense: if a prior decision of the Supreme Court is in conflict with the original meaning of the text of the Constitution, it is the Constitution and not precedent that binds present and future Justices.") (footnotes and internal quotations omitted).

48 Several prominent originalists have tried to blunt the force of the stare decisis criticism by making an originalist case for supposedly nonoriginalist precedent. See, e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 949–53, 962–71 (1995) (arguing that *Brown v. Board of Education* is consistent with the original meaning of the Fourteenth Amendment); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?* 103 NW. U. L. REV. 857, 901–02, 905–07 (2009) (arguing that *Brown*, the *Legal Tender Cases*, cases rejecting state sex discrimination, and cases validating the administrative state are consistent with an originalist understanding of the Constitution); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 2–3 (2011) (arguing that the Supreme Court's gender discrimination cases are,

ism can accommodate nonoriginalist precedent.⁴⁹ Justice Scalia, for his part, lived with the contradiction, describing himself as a “faint-hearted originalist” willing to adulterate principle with pragmatism.⁵⁰

A. *Judicial Agenda Control*

The challenge that nonoriginalist super precedent poses to originalism is real, but as one of us has argued elsewhere, *stare decisis* is the wrong lens through which to view it.⁵¹ The *stare decisis* critique posits an originalist justice confronted with the prospect of affirming or overruling a super precedent. Yet the hypothetical is contrived,

contrary to conventional wisdom, consistent with an originalist interpretation of the Fourteenth Amendment).

- 49 See, e.g., Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1473–77 (2007) (maintaining that “a popular sovereignty-based originalist” can follow at least some erroneous precedents without sacrificing her normative commitment to popular sovereignty); Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 2–3 (2011) (arguing that an originalist interpretation of the Constitution can accommodate the doctrine of *stare decisis*). The problem of *stare decisis* is conceptually easier for those who justify originalism on consequentialist grounds because following precedent rather than original meaning does not involve setting “the law” aside. The consequences of overruling deeply rooted precedent simply provide an exception to the general rule that the benefits of following the original public meaning outweigh the costs. See John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 836–37 (2009) (arguing that an originalist should follow non-originalist precedent rather than overrule it when, *inter alia*, the costs of overruling would be borderline catastrophic—as they would be with respect to paper money—or when the principles would be supported by constitutional amendment in the absence of the cases—as they would be with respect to race and gender discrimination). For those who accept the proposition that the original meaning constitutes the law, a particularly promising justification for choosing to follow precedent that conflicts with the original public meaning is that the Constitution itself authorizes courts to do so. See Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817, 861–64 (2015) (asserting that if the doctrine of *stare decisis* “was part of the law at the Founding,” it might legitimately authorize or even require us to treat some unauthorized departures from precedent “as if the Court’s opinion correctly states the law”). Whether the original Constitution incorporates this strong form of *stare decisis*, however, is an as-yet-unexplored historical question.
- 50 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989). Joel Alicea flags the problem that precedent can pose for a legislative originalist and posits that Congress could follow Justice Scalia in making a pragmatic exception to originalism. Alicea, *An Originalist Congress?*, *supra* note 22; see also Alicea, *Questioning The Eminent Tribunal*, NATIONAL REVIEW ONLINE (Oct. 24, 2011), <http://www.nationalreview.com/node/281116> (opining that originalism carries “real political liabilities for a member of the political branches” but that “[a] great many of these liabilities can be alleviated by ‘adulterat[ing]’ one’s theory of originalism with a respect for precedent, as Justice Antonin Scalia once put it . . .”).
- 51 See Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1730 (2013) (“[O]ther features of the federal judicial system, working together, do more than the constraint of horizontal *stare decisis* to keep the Court’s case law stable.”).

because no Supreme Court Justice will have to face the question whether paper money is constitutional or whether *Brown v. Board of Education* was rightly decided. The question is never called, and it is worth paying careful attention to why. It is not because of stare decisis: when the question is not called, the force of stare decisis never kicks in. These cases do not stay in place because Supreme Court Justices continually reaffirm them—sometimes, as the hypothetical goes, against a Justice’s first-order commitments. These cases stay in place because the rules of adjudication keep the question of their validity off the table.

A combination of constitutional, statutory, and judicially adopted rules would prevent a challenge to super precedent from coming before the Court. As an initial matter, federal courts cannot answer questions in the abstract. A justice lacks any obligation to systematically examine and volunteer an opinion about all aspects of the constitutional landscape; indeed, Article III’s “case or controversy” requirement prevents her from doing so.⁵² Constitutional adjudication is not like a confirmation hearing, in which answering hypothetical questions about the soundness of particular precedents is par for the course. Judges can only address issues when litigants with standing bring them, and given that the overruling of a super precedent is, by definition, unthinkable, a litigant is unlikely to spend resources litigating the point. An outlier litigant who did so in a district court would lose on a motion to dismiss, and the court of appeals would summarily affirm.⁵³

Congress’s decision to make Supreme Court jurisdiction discretionary, along with the Supreme Court’s rules about the cases it will take, would prevent the question from going farther than that. The Court grants certiorari to decide an important, unsettled question of federal law; to resolve issues over which lower federal courts and/or state courts of last resort have split; or to deal with a lower court decision conflicting with Supreme Court precedent.⁵⁴ This rule necessari-

52 A cluster of doctrines enforce this requirement, including standing, mootness, ripeness, and the prohibition of advisory opinions.

53 The question whether an originalist judge in the lower courts would face a dilemma involves questions of vertical stare decisis, which we put aside here. Even if an originalist judge thinks that Supreme Court precedent conflicts with the original public meaning, her court’s position as “inferior” in the Article III hierarchy may well oblige her to follow it anyway. See generally Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents*, 46 STAN. L. REV. 817 (1994) (offering rationales for a lower court’s obligation to follow the precedent of a superior court). Because the situation of the lower-court judge involves a distinct set of constitutional questions, we do not explore it here.

54 See SUP. CT. R. 10(a)-(c) (identifying these grounds for granting certiorari).

ly keeps so-called super precedents off the Court's merits docket, for super precedents are defined as opinions that have won nearly universal acceptance. There is not likely to be a single decision below, much less a conflict, addressing the question whether the Gold Clauses permit the issuance of paper money or whether the Fourteenth Amendment prohibits the states from maintaining racially segregated schools. The conditions for bringing a head-on challenge to super precedent before the Court thus do not exist.

To be sure, some super precedents lie in the background of cases that do come before the Court. The validity of *Marbury v. Madison* will not be the question presented, but its holding underlies every exercise of judicial review.⁵⁵ The incorporation of the exclusionary rule against the states is settled, but a case reviewing whether a particular state action violated the Fourth Amendment builds on the foundation of *Mapp v. Ohio*.⁵⁶ One might wonder whether the Court is obligated to consider the validity of such background precedents in the course of rendering a decision.⁵⁷

Once again, institutional features of Supreme Court decision-making permit the Justices to keep the soundness of such precedents off their agenda. The Supreme Court has adopted rules, some pursuant to its inherent authority under Article III and some pursuant to a congressional grant of rulemaking authority, to structure its affairs.⁵⁸ Many of these rules are mechanisms for narrowing the questions the Court will address in the cases before it. The Court deliberately restrains itself from identifying and opining upon every possible error presented by a case before it. For example, the Court deems waived—and thus will not address—issues not raised in the courts below.⁵⁹ Supreme Court Rule 14.1, moreover, provides that the Court

55 5 U.S. (1 Cranch) 137 (1803).

56 367 U.S. 643, 673–74 (1961).

57 To be sure, the Court may attempt to narrow longstanding precedent even if it refrains from considering whether to overrule it. See, e.g., *United States v. Lopez*, 514 U.S. 549, 567 (1995) (noting that prior cases “suggested the possibility of additional expansion [of the commerce power]” but “declin[ing] here to proceed any further”).

58 See 28 U.S.C. § 2071 (granting the Supreme Court the authority to “prescribe rules for the conduct of [its] business”). On inherent authority, see Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 842–79 (2008) (arguing that Article III’s grant of “the judicial power” endows federal courts with the authority to adopt procedural rules).

59 See, e.g., *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (finding a waiver of the argument that federal maritime governed a boating accident case “[b]ecause this argument was not raised below”). The “harmless error” rule also contradicts the picture of a Court obligated to right every wrong. See 28 U.S.C. § 2111 (instructing appellate courts, including the Supreme Court, to “give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the par-

will decide only those questions presented in the petition for certiorari.⁶⁰ It is thus contrary to the Court's longstanding practice for it to decide whether to overrule precedent if a petitioner did not ask—and four justices did not agree to answer—that question.⁶¹ Granted, this prohibition is not absolute, and the Court has occasionally ordered briefing on an issue that the litigants did not raise.⁶² This practice is controversial, however, and any such order requires having Justices who *want* to reach the issue.⁶³ The premise of the super precedent challenge to originalism is that originalism compels Justices to disturb precedents they want to leave alone.

We do not contend that the Court consciously applies these rules to avoid having to decide whether well-settled precedent is erroneous—although it sometimes might. We contend only that a salutary effect of the standard rules allocating judicial resources is to keep the validity of these precedents off the Court's agenda. Insofar as we characterize these effects as salutary, our argument has something in common with the “passive virtues” that Alexander Bickel extolled.⁶⁴

ties”). The centuries-old avoidance doctrine is similarly at odds with a vision of a Supreme Court on a mission to clear up all constitutional confusion.

- 60 See *Citizens United v. FEC*, 130 S. Ct. 876, 919–20 (2010) (Roberts, C.J., concurring) (asserting that the Court had not considered whether to overrule precedent in other corporate speech cases because “[n]ot a single party in any of those cases asked [it] to” and “the Court generally does not consider constitutional arguments that have not properly been raised”) (citation omitted); SUP. CT. R. 14.1(a) (“Only the questions set out in the petition, or fairly included therein, will be considered by the Court.”).
- 61 The Court will grant a petition for certiorari if four justices favor doing so. See Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975, 981 (1957) (discussing the origins of the “rule of four”).
- 62 See, e.g., *United States v. Texas*, No. 15-674, 2016 U.S. LEXIS 841 (U.S. Jan. 19, 2016) (granting certiorari and directing the parties to address the additional question of whether federal immigration law guidance violates the Take Care Clause); *Citizens United v. FEC*, 129 S. Ct. 2893, 2893 (2009) (requesting supplemental briefing on whether the Court should overrule two of its prior precedents); *Montejo v. Louisiana*, 556 U.S. 778, 792, 797 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625 (1986), after calling for supplemental briefing on the question whether it should be overruled); *Payne v. Tennessee*, 498 U.S. 1076 (1991) (ordering supplemental briefing on the question whether two controlling precedents should be overruled).
- 63 See, e.g., *Citizens United*, 558 U.S. at 396 (Stevens, J., dissenting) (asserting that ordering the parties to address whether precedent should be overruled is “unusual and inadvisable for a court”). See generally Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665 (2012) (describing the controversial nature of the practice). The number of Justices required to order briefing or argument on a question not raised by the parties appears to be a matter of internal practice, for it is not addressed by the Supreme Court Rules. Given that the practice is controversial, it is unlikely that it could be done without the support of a majority.
- 64 See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962) (commending the techniques that the Court employs to avoid unnecessarily deciding constitutional questions); Alexander M. Bickel, *The Supreme*

Bickel argued that doctrines like standing, mootness, and ripeness left a “wide area of choice open to the Court in deciding whether, when, and how much to adjudicate.”⁶⁵ He credited Justice Louis Brandeis for believing that “the mediating techniques of ‘not doing’ were ‘the most important thing we do.’”⁶⁶ That “not doing” helps the Court navigate the proper course between constitutional principle and pragmatic decision making. So conceived, the passive virtues are about timing. They posit a distinction between deciding what the Constitution means and deciding when to decide what the Constitution means.

None of this is to say that a Justice cannot attempt to overturn long-established precedent. While institutional features may hinder that effort (for example, the fact that it takes four to grant certiorari and five to command a majority on the merits), a Justice is free to try.⁶⁷ The point is simply that a commitment to originalism does not force a Justice to do so.

Institutional features of Supreme Court practice permit all Justices to let some sleeping dogs lie, and so far as we are aware, no one has ever argued that a Justice is duty-bound to wake them up. Such a claim would be extraordinary, for the Court’s agenda-limiting rules are well within its authority to adopt. The formal rules—i.e., the ones published as “Rules of the Supreme Court of the United States”—plainly fall within the Enabling Act’s grant of authority to the Court to “prescribe rules for the conduct of [its] business.”⁶⁸ A major point of procedural rules in both the Supreme Court and the lower federal

Court 1960 Term—Foreword: The Passive Virtues, 75 HARV. L. REV. 40 (1961). For a comprehensive summary of Bickel’s work, see generally Anthony T. Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 YALE L.J. 1567 (1985).

65 BICKEL, *supra* note 64, at 79.

66 *Id.* at 112 (quoting Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 313 (1986)).

67 Justice Thomas, for example, has expressed willingness to revisit the “substantial effects” test that the Court applies to the Commerce Clause, but he has been a lone voice. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) (“Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.”); *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring) (“In an appropriate case, I believe that we must further reconsider our ‘substantial effects’ test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence.”).

68 28 U.S.C. § 2071(a) (2012). Unlike other federal courts, whose local rules are subject to, *inter alia*, notice-and-comment requirements, this statute leaves the Supreme Court in complete control of its rulemaking process. *See* 28 U.S.C. § 2071(b) (exempting the Supreme Court from notice-and-comment requirement).

courts is the efficient allocation of judicial resources, which often involves narrowing the legal issues that a court will address. Thus, for example, a district court deems certain defenses waived if not properly raised,⁶⁹ a court of appeals refuses to consider meritorious arguments in an untimely brief,⁷⁰ and the Supreme Court decides only those questions presented in a petition for certiorari.⁷¹ Even the imposition of page limits on briefs operates to reduce the number of issues before a court. It would be quite something, and contrary to centuries of history, to maintain that such standard procedural rules are unconstitutional because their application may preclude consideration of a potential constitutional error.

The same is true for procedures that the Court develops in common-law fashion.⁷² The Court's ability to develop procedural common law yields familiar doctrines like claim and issue preclusion, both of which promote efficiency by treating some matters (including claims of constitutional error) as closed.⁷³ In addition, Article III's grant of "the judicial Power" carries with it the inherent authority to adopt rules governing adjudication.⁷⁴ This authority empowers the Court to make myriad other, less visible decisions like how certiorari petitions make a "discuss" list,⁷⁵ how many votes are necessary for a grant of certiorari,⁷⁶ and whether to resolve a case on a constitutional or nonconstitutional ground.⁷⁷ The Court could not function without

69 See, e.g., FED. R. CIV. P. 12(b), (h) (providing that certain defenses are waived if not raised in a particular manner).

70 See, e.g., FED. R. APP. P. 25 (providing that a brief is timely only when the clerk receives the papers within the time fixed for filing).

71 See, e.g., SUP. CT. R. 14 ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). Other examples appear throughout the rules.

72 See Barrett, *supra* note 58, at 879–88 (explaining the sources of the federal courts' power to develop procedural common law).

73 *Id.* at 829–32 (identifying preclusion as a paradigmatic example of procedural common law). Stare decisis itself is a judicially created doctrine. See *id.* at 823–29, 879, 885 (explaining the nature of stare decisis).

74 See *id.* at 842 ("A long and well-established tradition maintains that some powers are inherent in federal courts simply because Article III denominates them 'courts' in possession of 'the judicial power.'").

75 See Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 14–18 (2011) (describing the Court's certiorari practice).

76 The rule that it takes four votes to grant certiorari is an internal practice of the Court rather than a formal rule. See *Rogers v. Mo. Pac. R. Co.*, 352 U.S. 521, 529 (1957) (Frankfurter, J., dissenting) (describing the "Rule of Four" as a "working rule devised by the Court as a practical mode of determining that a case is deserving of review").

77 See, e.g., *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009) (reiterating that the Court's "usual practice is to avoid the unnecessary resolution of constitutional questions"). Canons like the avoidance doctrine are also exercises of inherent au-

some ability to set ground rules to channel its decision-making process. Again, it would be quite something, and contrary to centuries of history, to insist that a duty to ferret out and rectify constitutional error overrides the doctrines and internal practices that otherwise regulate the Court's decision-making process.

In sum, the rules of adjudication—constitutional, jurisdictional, and procedural—promote efficiency and stability in constitutional law by narrowing the Court's agenda. Unless originalism or any other constitutional theory requires a Justice to undertake the task of rooting out all errors from the United States Reports, super precedent need never put any Justice, originalist or not, in a dilemma. If a nonoriginalist precedent is truly part of the constitutional fabric, the Court will not be asked to reconsider it, nor does a commitment to originalism require that any Justice volunteer to do so.

Focusing on the source of super precedent's force reveals a point that is entirely overlooked in the stare decisis debate: the rules of adjudication contemplate the presence of mistaken constitutional interpretations that the Court has no obligation to correct. They promote stability by instructing the Court at almost every stage of the process not to pick a fight. The prohibition on advisory opinions prevents federal courts from roving around on a hunt for errors, including errors in judicial precedents. The Court's internal rules governing certiorari prevent it from revisiting precedent unless pressure builds from below. Keeping to the question presented prevents justices from reaching out to correct mistakes not squarely before them. Combined, these rules and others like them do as much or more than stare decisis doctrine to promote stability in constitutional law by keeping some questions off the table. There is much precedent that the Court simply never squarely confronts and is therefore never forced to either sanction or condemn.

Despite its usual framing as part of the stare decisis debate, the challenge that super precedent poses for originalism is not really one of stare decisis. Stare decisis is a self-imposed constraint on the Court's ability to overrule its prior cases. Its constraint operates (or yields) when the Court is asked to overturn a precedent. In the context of super precedent, however, that question is never asked. If it were, the precedent would no longer be "super," because the condition necessary for super precedent status—that its overruling be un-

thority. See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 163, 163 n.260 (2010) (noting that inherent authority is the basis for many of the canons).

thinkable—would no longer hold true. *Stare decisis* is not what holds a super precedent in place, for the force of a super precedent does not derive from the Court's refusal to overrule it. Rather, it stays in place largely because it stays off the Court's agenda.

III. SUPER PRECEDENT IN CONGRESS

Super precedent may pose little challenge for an originalist Supreme Court Justice, but does the same hold true for an originalist senator or representative? Members of Congress, after all, are among the public officials whose thorough embrace of super precedents keeps them off the Supreme Court's agenda. In that respect, they might bear more responsibility than the Court for perpetuating unconstitutional interpretations. A Supreme Court Justice will not have to decide whether the Social Security Administration is unconstitutional. A senator, however, will have to decide whether to fund it and whether to confirm the President's nominees to head it.

One way to frame the issue is to ask which branch, if any, has an affirmative duty to identify and rectify deep-seated constitutional error. Part II explained that the rules of adjudication, from the prohibition on advisory opinions to the Court's internal procedures, create structural barriers to the Court's ability to correct constitutional errors, which makes it hard to argue that a Justice has a constitutional duty to do so. The Justice answers the questions she is asked. A member of Congress, however, is differently situated. Institutional differences abound, but for present purposes, one is particularly salient.

The Court is a reactive body, limited to answering only those questions that come to it, and the rules of adjudication narrow those questions with near laser-like focus. There is no similarly stylized agenda-narrowing mechanism in the legislature. The constitutional question presented to Congress before it acts is more nebulous and arguably much broader than that presented to the Court. In adjudicating a First Amendment challenge to a counterfeiting statute,⁷⁸ for example, the Court is not asked—and is thus constrained from answering—the question whether the United States' issuance of paper money is constitutional in the first place. In Congress, by contrast, the question is not so neatly confined. The oath requires each member of Congress to ensure that a proposed measure is constitutional. Does that mean

⁷⁸ See *Regan v. Time*, 468 U.S. 641, 650, 653, 658 (1984) (holding a statute prohibiting the publication of illustrations of United States currency to be valid in part and invalid in part under the First Amendment).

that the member must evaluate every possible constitutional issue? When a member evaluates a bill appropriating money to the Bureau of Engraving and Printing, whose mission is “to develop and produce United States currency notes,”⁷⁹ must she analyze whether the issuance of paper money is constitutional? If not, why not?

Judicial supremacy is not the answer. As an initial matter, many originalists reject judicial supremacy in favor of departmentalism.⁸⁰ In other words, they reject the proposition that the reasoning of Supreme Court opinions binds the other branches in favor of the view that each branch must interpret the Constitution for itself.⁸¹ For a departmentalist, it is insufficient to say that because the Supreme Court decided a case, Congress has no choice but to follow it. And if departmentalists are right that members of Congress have the freedom and even the obligation to challenge precedents that they do not like, the burden rests on them to explain why the duty does not exist with respect to precedents that members of Congress would prefer to leave alone.

In addition, however, one cannot invoke judicial supremacy to resolve a conflict between text and precedent when the precedent is nonjudicial. The canon of super precedent is comprised of cases because constitutional scholars focus on the Supreme Court. But Congress and the President have also created super precedents, including the constitutionality of the Louisiana Purchase,⁸² the admission of the state of West Virginia,⁸³ the seating of territorial delegates in the House,⁸⁴ the ratification of the Fourteenth Amendment,⁸⁵ the crea-

79 U.S. DEPT. OF ENGRAVING AND PRINTING, ABOUT THE BEP (2015), <http://www.moneyfactory.gov/about.html>.

80 See, e.g., Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221 (1994) (“The President’s power to interpret the law is, within the sphere of his powers, precisely coordinate and coequal in authority to the Supreme Court’s.”); Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1554–55 (2005) (arguing that the other branches must enforce court judgments in individual cases but that “[t]hey have no obligation to adopt and implement the constitutional interpretations that form the basis of those judgments”).

81 See Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401, 406–07 (1986) (defining judicial supremacy as “the obligation of coordinate officials not only to obey that ruling but to follow its reasoning in future deliberations”).

82 See generally Samuel Issacharoff, *Meriwether Lewis, The Air Force, and the Surge: The Problem of Constitutional Settlement*, 12 LEWIS & CLARK L. REV. 649 (2008).

83 See Kesavan & Paulsen, *supra* note 3, at 313–25 (recounting the “remarkably substantive debate” in Congress “over the constitutional issues surrounding West Virginia’s admission into the Union as a State”).

84 See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801* 200–03 (1997) (discussing the seating of a delegate from the Southwest Territory “in accordance with the tradition created by the Northwest Ordinance and the ‘compact’

tion of the Smithsonian Institution,⁸⁶ and the establishment of the United States Air Force.⁸⁷ As in our discussion of judicial super precedents, we will assume for the sake of argument that some of these political super precedents are inconsistent with the Constitution's original public meaning. Not having examined the question whether any of these super precedents is consistent with the original public meaning, we don't rule out the possibility that they all are. But it strikes us as highly unlikely that an originalist could successfully show that every single significant precedent is indeed consistent with an originalist interpretation of the text. And if deeply rooted political precedent is at odds with the text, it poses as great a challenge to the originalist legislator as precedent of the judicial variety.

In this Part, we argue that while Congress is very different from the Court, it too can employ techniques that narrow the questions it addresses. In particular, it can avoid the need to examine the soundness of super precedent by adopting a presumption that such precedent is constitutional. This presumption need not, as is commonly assumed, reflect a legislative decision to treat super precedent as controlling law that trumps any contrary constitutional text. Rather, it can serve as a reason for Congress not to weigh in at all on the question whether the precedent conflicts with the text. Adopting a presumption that it will not revisit the correctness of long-settled precedent is both sensible and consistent with what Congress already does.

Most arguments that an office holder must choose text rather than precedent have focused on the role of the office holder's oath

made when the territory was established"); Everett S. Brown, *The Territorial Delegate to Congress*, in *THE TERRITORIAL DELEGATE TO CONGRESS AND OTHER ESSAYS* 5 (1950) (describing the practice of choosing delegates as an early precedent created by the House); Michael Stern, *The First House Debate on Admitting Delegates*, *POINT OF ORDER: A DISCUSSION OF CONGRESSIONAL LEGAL ISSUES* (Jan. 21, 2015, 3:00 PM) (discussing the congressional debate regarding the seating of territorial delegates in Congress).

85 See *CONG. GLOBE*, 40th Cong., 2d Sess. 4295–96 (1868) (concurrent resolution declaring that the Fourteenth Amendment "is hereby determined to be part of the Constitution of the United States" approved by the House by a vote of 127-33, with fifty-five members not voting); see also S. RES. 198, 114TH CONG., 1ST SESS. (2015) (commemorating the 150th anniversary of the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments in an unanimous resolution and stating that "the people of the United States . . . ratified the 14th Amendment to the Constitution of the United States on July 9, 1868").

86 See *Springer v. Gov't of Phil. Islands*, 277 U.S. 189, 211 (1928) (Holmes, J., dissenting) (stating that "Congress long ago established the Smithsonian Institution, to question which would be to lay hands on the Ark of the Covenant"); CURRIE, *supra* note 28, at 136–41 (discussing the creation of the Smithsonian Institute, an organization financed by money gifted to the United States and run by federal officers but whose functions were governmental rather than proprietary in nature).

87 See Issacharoff, *supra* note 82, at 660–62 (addressing the reconciliation between the text of the Constitution and existence of the Air Force).

to support the Constitution, so we begin there. After explaining the general requirements of the oath and its implications for the problem of precedent, we advance our argument that the presumption of constitutionality offers the conscientious legislator a way to avoid choosing between the text and a settled interpretation. By controlling its agenda, Congress, like the Court, may control the timing of its constitutional deliberations, especially when confronted with a super precedent.

A. *The Oath*

The Constitution provides that members of Congress “shall be bound by Oath or Affirmation, to support this Constitution.”⁸⁸ The current form of that oath, which is prescribed by statute, commits each member of Congress to “support and defend the Constitution of the United States against all enemies, foreign and domestic” and to “bear true faith and allegiance to the same.”⁸⁹ The oath-based argument against reliance on precedents assumes that “supporting” the Constitution requires a member of Congress to follow the Constitution itself, rather than a presumptively erroneous interpretation of it.

While the oath to “support . . . the Constitution” implicates matters other than constitutional interpretation,⁹⁰ it is widely understood

88 U.S. CONST. art. VI, cl. 3.

89 5 U.S.C. § 3331 (2016).

90 To start, the oath underscores the seriousness of the responsibilities of a Member of Congress. See JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 252 (1847) (“[T]hose, who are intrusted with the execution of the powers of the National Government, should be bound, by some solemn obligation, to the due execution of the trusts reposed in them . . . Oaths have a solemn obligation upon the minds of all reflecting men, and especially upon those, who feel a deep sense of accountability to a Supreme being.”); Patrick O. Gudridge, *The Office of the Oath*, 20 CONST. COMMENT. 387, 402 (2003) (concluding that the point of the oath is “to show the sincerity of the invocation of the Constitution”); Vic Snyder, *You’ve Taken An Oath To Support The Constitution, Now What? The Constitutional Requirement For a Congressional Oath Of Office*, 23 U. ARK. LITTLE ROCK L. REV. 897, 919 (2001) (citing officials who described the “sacred obligation” imposed by the oath). Members of Congress have cited the oath as establishing a duty to defend the prerogatives of Congress against encroachment by the executive and the judiciary. See Lee Hamilton, *What It Means When You Take That Oath*, THE CENTER ON CONGRESS AT INDIANA UNIVERSITY (Apr. 21, 2006), <http://centeroncongress.org/what-it-means-when-you-take-oath-office> (“When you take the oath of office as a member of Congress, it means that you are swearing to defend the Congress as a strong, independent, and co-equal branch of government.”); U.S. Senator Robert C. Byrd, Remarks by U.S. Senator Robert C. Byrd at the Orientation of New Senators (Dec. 3, 1996), *reprinted in* 156 CONG. REC. S5471 (daily ed. June 28, 2010) (“In order to live up to that solemn oath, one must clearly understand the deliberately established inherent tensions between the 3 branches, commonly called the checks and balances, and separation of powers which the framers so carefully crafted.”). “Defend,” the other requirement, featured in debates

to also require legislators to observe the constitutional limits upon congressional action. As Paul Brest observed in his classic article, “the most obvious way for a legislator to support the Constitution is to enact only legislation that is constitutional.”⁹¹ Put differently, a legislator must refrain from supporting legislation that is unconstitutional.⁹² Judges have cited the oath as a reason for presuming that legislators have enacted legislation that is consistent with the Constitution.⁹³ Recently, the House itself relied on the oath when instituting the requirement that each proposed bill contain a statement identifying its constitutional authority. “While the courts have the power to over-

concerning the fate of Confederate officials. Both “support” and “defend” have been at issue in subsequent controversies involving allegedly subversive officials. See *Bond v. Floyd*, 385 U.S. 116, 136 (1966) (holding that a state legislature could not refuse to seat an elected official who opposed the Vietnam War); Snyder, *supra*, at 912 (recounting that the House twice refused to seat a Socialist elected by Wisconsin voters because he was too disloyal to take the oath of office).

- 91 Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587 (1975); see also Paulsen, *supra* note 80, at 260 (“Can one ‘support’ the Constitution and simultaneously abet what one considers to be a violation of *any* of its provisions?”). For affirmations of this duty from legislators themselves, see, e.g., 159 CONG. REC. S6771 (daily ed. Sept. 24, 2013) (statement of Sen. Lee) (“We, as Senators of the United States, having taken an oath under article VI of the Constitution to uphold the Constitution of the United States, are never excused from our responsibility to look out for, protect, and defend the Constitution of the United States.”); 81 CONG. REC. app. 378–79 (1937) (extension of remarks of Sen. Alva B. Adams, reprinting radio address of Sen. Royal S. Copeland) (arguing that “since all members of Congress likewise take an oath to support the Constitution, they must, when a proposed law is before them, decide whether they have the constitutional power to pass the legislation”).
- 92 William Baude maintains that the President can sign a new law that he knows, or believes, is unconstitutional without violating his oath to support and defend the Constitution. See William Baude, *Signing Unconstitutional Laws*, 86 IND. L.J. 303, 304–05 (2011). Baude argues that “[t]here is simply no constitutional provision, and no plausible interpretation of the President’s oath, that flatly forbids signing unconstitutional bills into law.” *Id.* at 304–05. His argument is not limited to the situation in which the constitutional flaw inheres in precedent conflicting with the text; it is a broader one about the President’s duty to uphold the Constitution. Baude contrasts the constitutional harm resulting from signing a law containing an unconstitutional provision with “the President’s broad duty to enforce the Constitution,” which “frequently *requires* him to help pass legislation—especially in the national-security and individual-rights contexts.” *Id.* at 305. Faced with a bill that both violates and enforces the Constitution, Baude suggests that the President enjoys the discretion to determine the proper course. We are not so sure. But because different considerations shape the President’s duty—for example, his oath is differently worded and his role in the legislative process is different—we do not address Baude’s argument in our discussion of the implications of the oath for a Member of Congress.
- 93 See *Nat’l Endowment for Arts v. Finley*, 524 U.S. 569, 605 n.3 (1998) (Souter, J., dissenting) (“[m]embers of Congress must take an oath or affirmation to support the Constitution . . . and we should presume in every case that Congress believed its statute to be consistent with the constitutional commands.”); *Edward v. Aguillard*, 482 U.S. 578, 610–11 (1987) (Scalia, J., dissenting) (noting that each of the state legislators who had passed a law “had sworn to support the Constitution”).

turn an Act of Congress on the basis that it is unconstitutional,” the House leaders explained, “Members of Congress have a responsibility, as clearly indicated by the oath of office each Member takes, to adhere to the Constitution.”⁹⁴

We do not mean to imply that the oath is the exclusive source of Congress’s duty to observe the limits of the Constitution. Indeed, we think the conventional arguments about Congress’s duty of fidelity to the Constitution risk overstating the role of the oath. Even apart from the oath, the Constitution’s structure reflects an expectation that Congress will interpret and adhere to its limits. For example, it would be odd for the Constitution to prescribe detailed rules about how Congress must conduct its affairs (including detailed rules about bicameralism, presentment, and overriding a presidential veto) and simultaneously think Congress free to disregard them. The Constitution expresses a baseline devotion to a government bound by law and is thus itself a source of the obligation for the government to follow the law. Moreover, while the oath constrains individuals, the more general demands of the Constitution constrain Congress as an institution. Undue focus on the oath obscures these points.

For present purposes, however, these distinctions are unimportant. The oath is convenient shorthand for the obligation of fidelity, even if that obligation is reinforced by other sources. And regardless whether our protagonist is an originalist Congress or an originalist member of Congress, the dilemma posed by nonoriginalist super precedent is the same.

B. Precedent and the Oath

The connection between precedent and the oath has been given close attention in the literature on judicial supremacy. While the Court itself has insisted that its interpretations of the Constitution constitute the supreme law of the land, both the President and Congress have periodically asserted the authority to contradict the opinions of the Supreme Court.⁹⁵ Most scholars have rejected the Supreme Court’s view of its own supremacy in favor of the proposition that the other departments of the federal government enjoy some in-

94 Hanah Metchis Volokh, *Constitutional Authority Statements in Congress*, 65 FLA. L. REV. 173, 184 (2013).

95 See, e.g., Amy Coney Barrett, *Introduction*, 83 NOTRE DAME L. REV. 1147, 1158–59 (2008) (providing examples of occasions on which the President and Congress have asserted the authority to contradict the opinions of the Supreme Court).

terpretive autonomy.⁹⁶ Invoking the oath, some supporters of this interpretive autonomy emphasize that Congress and the President have not only the freedom but also the obligation to interpret the Constitution for themselves.

Consider what Andrew Jackson had to say in his oft-quoted message vetoing the bill that would have renewed the Second Bank of the United States:

The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision.⁹⁷

Jackson refused to concede the constitutionality of the Bank despite the Supreme Court's holding in *McCulloch v. Maryland* that Congress had the authority to establish it.⁹⁸ His argument, echoed by others, is not that the other departments simply have the power to reject Supreme Court interpretations with which they disagree. It is that they have a duty to interpret the Constitution for themselves.

Originalists are among the most ardent supporters of a strongly departmentalist view, but they have not focused on the dilemma it poses for an originalist President or member of Congress who thinks a Supreme Court interpretation is wrong but does not *want* to depart from it. Departmentalists, including originalists, are entirely occupied with situations in which the President or Congress is eager to express its disagreement with the Court because the decision conflicts with a policy preference—like Jackson and the Bank. But the strong view of departmentalism, with its emphasis on the duty of interpretive

96 Larry Alexander and Frederick Schauer are notable exceptions. See generally Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (arguing for judicial supremacy). But theirs is a minority view. See Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126 (1999) (gathering a list of all of the scholars who find Alexander and Schauer “eloquen[t]” but unconvincing). Among those who reject a strong form of judicial supremacy, there is a range of views about the amount of interpretive independence that the political branches enjoy. Compare Paulsen, *supra* note 80 (maintaining that the President must refuse to execute even judgments he deems unconstitutional) with Hartnett, *supra* (rejecting the view that Supreme Court opinions bind the other branches but maintaining that the political branches nonetheless owe them deference).

97 Andrew Jackson, *Veto Message* (July 10, 1832) in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1139 (James D. Richardson, III ed., 2d ed. 1911) [hereinafter Jackson's Veto Message].

98 *McCulloch v. Maryland*, 17 U.S. 316 (1819).

autonomy, poses a problem for an originalist that is particularly pronounced when the judicial interpretation is a super precedent. A President or member of Congress subscribing to a pragmatic constitutional approach could assert the duty of independent evaluation but could also, like the pragmatic Justice, conclude that the best course is to defer to longstanding precedent with which she disagrees.⁹⁹ An originalist, however, is constrained to treat the original public meaning as controlling; precedent cannot alter or supersede it.¹⁰⁰ If the oath forbids a member of Congress to vote in favor of a bill that the member believes to be unconstitutional, an originalist legislator may well be duty-bound to refuse to support, say, the funding of the Bureau of Engraving and Printing on the ground that *The Legal Tender* cases were wrongly decided.

Precedent established by the political branches does not implicate judicial supremacy, but it presents a variation of the same problem.¹⁰¹ Consider another discussion of the relationship between precedent and the oath, this one also involving the Bank of the United States. While Representative James Madison argued in 1791 that the Bank was unconstitutional, President James Madison signed a bill creating the Second Bank of the United States in 1816.¹⁰² Reflecting later on his decision and criticizing Jackson's, Madison insisted that it is consistent with the oath for an office holder to act in accordance with settled precedent rather than with the office holder's own understanding of the Constitution. (The precedent on which Madison himself relied in 1816 was political, for *McCulloch v. Maryland* was not decided until 1819.¹⁰³) Madison wrote Pennsylvania Representative Charles Ingersoll:

99 That is one reading of Jackson's concession in his veto message that precedent should not control "except where the acquiescence of the people and the States can be considered as well settled." Jackson's Veto Message, *supra* note 97, at 1145.

100 To be sure, an originalist could treat precedent rather than text as controlling if the Constitution itself permits precedent, in at least some circumstances, to be treated "as if" it were the law. See Sachs, *supra* note 49, at 860–64 (raising, but not answering, the question whether such an approach to stare decisis "has its own good title to being part of our law—whether it was part of the law at the Founding or has been lawfully added since").

101 They are not, of course, exactly the same. Dealing with judicial precedent implicates the separation of powers and inter-branch comity; dealing with Congress's own precedent does not.

102 See Richard S. Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV. 267, 286 (1997) (explaining Madison's changing position regarding the Bank).

103 See *McCulloch*, 17 U.S. 316 (holding that Congress had the authority under the Necessary and Proper Clause to establish the Bank); Letter from James Madison to Charles Jared Ingersoll (June 25, 1831) reprinted in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 391 (Marvin Meyers ed., revised ed. 1981) [hereinafter Madison Letter to C.J. Ingersoll] ("The charge of [my] inconsistency . . . turns on

But it be said that the legislator, having sworn to support the constitution, must support it in his own construction of it, however different from that put on it by his predecessors, or whatever be the consequences of the construction. . . . Yet has it ever been supposed that he was required, or at liberty to disregard all precedents, however solemnly repeated and regularly observed, to disturb the established course of practice in the business of the community?¹⁰⁴

Madison thus rejected the idea that the oath required him to adhere to his own best reading of the text. Indeed, he suggested that duty cuts in the opposite direction. Absolute fidelity to one's own interpretive theory would, he maintained, be impossible in any event. He went on to tell Ingersoll that "[the most ardent theorist] will find it impossible to adhere, and act officially upon, his solitary opinions as to the meaning of the law or Constitution, in opposition to a construction reduced to practice during a reasonable period of time."¹⁰⁵

Thus Jackson claimed that the oath bound him to follow his own best understanding rather than precedent, and Madison insisted that the oath permitted him to choose precedent rather than what he thought was the right interpretation. Some originalists applaud Jackson's view and express skepticism, to say the least, about Madison's.¹⁰⁶ It is easy to see why. Broad-brush arguments about the oath, combined with emphasis on the preeminence of the text's original meaning, yield the following position: If the text's original meaning is the law, the legislator must ensure that a bill complies with that meaning—period.¹⁰⁷ The legislator owes fidelity to the text, not to precedent deviating from it.¹⁰⁸

the question how far *legislative* precedents, expounding the Constitution, ought to guide succeeding Legislatures and overrule individual opinions.") (emphasis added).

¹⁰⁴ *Id.* at 391. Madison repeatedly defended his 1816 support of the Bank on the ground that the pattern of political precedent overruled his individual judgment. See, e.g., Letter from James Madison to C.E. Haynes (Feb. 25, 1831) reprinted in 9 WRITINGS OF JAMES MADISON 442–43 (Gaillard Hunt, ed.) (1910) [hereinafter Madison Letter to C.E. Haynes] (insisting that he had not changed his mind about the Bank's constitutionality but rather acted consistently with his belief that settled political precedent "was an evidence of the public will necessarily overruling individual opinions"); Letter from James Madison to George McDuffie, (May 8, 1830) reprinted in *id.* at 364–65 ("I am glad to find that the Report sanctions the sufficiency of the course and character of the precedents which I had regarded as overruling individual judgments in expounding the Constitution.").

¹⁰⁵ Madison Letter to C.J. Ingersoll, *supra* note 103, at 392.

¹⁰⁶ See, e.g., Paulsen, *supra* note 80, at 261 n.161 ("[I]f Madison is saying that concerns of mere stability and continuity trump an officeholder's oath to support the Constitution, where he remains persuaded that the precedent is wrong, I emphatically disagree.").

¹⁰⁷ For example, Senator Mike Lee promised to undertake independent constitutional analysis with the following pledge: "I will not vote for a single piece of legislation that I can't justify based on the original understanding of the Constitution, no matter what the Court

This position imagines the legislator, like the Supreme Court Justice in the standard hypothetical, facing a diametrical choice between the best interpretation yielded by her independent analysis of the text and conflicting precedent. Yet it over-reads the legislator's duty to be faithful to the text to maintain that she must independently analyze every constitutional provision implicated by a proposed measure.

C. *Super Precedent and Congressional Agenda Control*

Part II explained that the rules of adjudication keep super precedent off the Court's agenda; by narrowing the questions presented to the Court they effectively instruct the Court not to engage in independent analysis of every constitutional issue. The Court directs its attention to contested issues, effectively assuming that precedent settling related constitutional questions is correct.¹⁰⁹ It can thus avoid deciding whether precedent is right or wrong.

The rules of adjudication obviously do not apply in Congress, but Congress, like the Court, has the power to narrow the questions it addresses for the sake of efficiency and stability. To be sure, if Congress is considering a bill, and there is no precedent on point, it cannot avoid deciding the constitutional issue from scratch. But when settled precedent exists—and in particular, precedent so well settled it qualifies as super precedent—Congress can adopt a working pre-

says you can do." Mike Lee, U.S. Senator-Elect, Address at the 2010 Federalist Society National Lawyers Convention (Nov. 19, 2010) (audio/video available at http://www.fed-soc.org/publications/pubid.2020/pub_detail.asp) (quoted in Alicea, *Stare Decisis in an Originalist Congress*, *supra* note 22, at 799). Mike Paulsen has also emphasized the fidelity that the President owes to the document rather than to the Court's interpretation of it. See Paulsen, *supra* note 80, at 267 ("The Constitution is paramount law; the President of necessity must interpret the law in the course of performing his constitutional duties to 'take care' that the laws be 'faithfully executed'; therefore, where, in the performance of his duties, the President finds a statute contrary to the Constitution as paramount law, he must follow the Constitution and refuse to give effect to the statute."). Later, Paulsen hedges with a concession that the President may, consistent with the oath, defer to an interpretation at odds with the document when "it is clearly futile to [adhere to the correct interpretation] and when doing so would cause serious damage to the nation." *Id.* at 339. This concession appears to be a pragmatic one in the vein of Justice Scalia's "faint hearted" originalism, for Paulsen does not identify the textual or structural arguments that would justify the President in deviating from the law.

108 See Michael Stokes Paulsen, *The Intrinsicly Corrupting Influence of Precedent*, 22 CONST. COMMENT 289 (2005) (arguing that adherence to precedents is unjustifiable).

109 If the issues not before the Court do not involve its own precedent, the Court assumes that those issues were correctly settled by some other actor—for example, the lower court, if its holding on a related matter was not contested, or Congress, if the constitutionality of a related statute was not challenged.

sumption that the precedent is constitutional. That presumption can take some issues off the table entirely (making it unnecessary, for example, for the Senate to spend one second considering the constitutional status of West Virginia before seating its newly elected senators) and provide an efficient way to resolve issues that are flagged (for example, permitting Congress to take the incorporation of the First Amendment against the States as given in exercising its Section Five power). In other words, Congress can employ this presumption to reduce both its issue-spotting and merits-resolving burdens, and it can do so consistent with the demands of both the oath and the text.

This insight has implications for Congress's treatment of all precedent, not just super precedent. Still, the case for taking precedent as given is not only strongest for super precedent (for example, one could imagine an argument that the presumption is unreasonable if a precedent is new or has been subject to unrelenting challenge), but it is, for our purposes, also much more significant. Super precedent is what poses the supposedly intractable problem for originalism, because it is super precedent that ostensibly forces even the originalist to concede that an errant interpretation can sometimes virtually amend the text. That is the claim we dispute.

Presuming that a precedent is correct is different from endorsing its correctness.¹¹⁰ If a precedent is erroneous, the latter course gives priority to the precedent rather than the text. The former course is a technique for avoiding the question whether the precedent is wrong or right. This is a permissible technique, because Congress's duty to comply with the Constitution does not oblige it to engage in an independent analysis of every constitutional question. It can adopt a working presumption that prior decision-makers got it right and look behind precedent only when it has reason to do so.

Before we proceed further, it is worth observing that we should probably not think about Congress's relationship to "Supreme Court precedent," including "super precedent," monolithically. It is common for the judicial supremacy literature to frame the question as whether Congress must treat "Supreme Court opinions" as binding. But Supreme Court opinions address a wide range of constitutional issues, and the deference due may vary with the topic addressed.

The proposition that a branch possessing independent interpretive authority may defer to, and sometimes altogether refrain from evaluating, the choices made by a coordinate branch is unexceptional

110 Nor does a presumption of correctness mean that the precedent itself is the law.

in the judicial context.¹¹¹ The Court, after all, has a fairly aggressive view of its own interpretive authority, yet it nonetheless embraces the proposition that the political question doctrine sometimes restrains it from evaluating the constitutionality of the actions of a coordinate branch. The Court also varies the level of scrutiny it applies in judicial review based partly upon its assessment of Congress's relative competence. Rational basis review under the Commerce Clause, for instance, rests in part on the judgment that fact-driven determinations like whether regulated activity "substantially affects" interstate commerce are particularly well suited to legislative resolution.

Such deference might run both ways. Could Congress reasonably conclude that it should give more deference to Supreme Court decisions that rely heavily on technical legal analysis than to those incorporating factual assumptions? If the Constitution commits some decisions exclusively to, say, the Senate in the case of impeachment, might it not commit some decisions exclusively to the judiciary?

Pursuit of these questions lies beyond the scope of this Article. For now, we make two points. First, the subject matter of a Supreme Court opinion might affect what is required of Congress in interpreting the Constitution—the subject matter itself may be a reason why Congress need not or cannot give an issue the equivalent of *de novo* review. Second, a commitment to departmentalism does not itself demand the conclusion that Congress must render independent judgment on every question of constitutional interpretation that the Court has already addressed. As the judicial context makes clear, interpretive autonomy and deference—even absolute deference on selected matters—can comfortably coexist.

We now turn to the feature of congressional decision-making that is our principal concern: Congress's ability to give super precedent—both the Court's and its own—a presumption of constitutionality. A presumption of constitutionality is familiar in the judicial context. Rooted in the respect due a coordinate branch, it promotes restraint in the exercise of judicial review.¹¹² Just as the Court affords statutes a presumption of constitutionality, Congress should perhaps give Su-

111 Cf. Hartnett, *supra* note 96, at 156 (defending the proposition that Congress owes Supreme Court opinions deference with analogy to the deference that the Court gives to the constitutional decisions of the other branches).

112 See *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."); ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* 248–51 (2012) (examining the varying levels of deference that the Court has given to congressional interpretations of the Constitution).

preme Court opinions the benefit of the doubt when it undertakes to evaluate their merits.¹¹³ But Congress can employ the presumption for a different, albeit related, function: as a reason for not undertaking independent analysis of a constitutional issue in the first place. When either the Court or predecessor public officials have already addressed an issue, and the resulting decision is so deeply settled that its reversal is unthinkable, Congress can choose to operate on the assumption that the prior decision-makers got it right. Such an assumption does not preclude Congress's ability to revisit the issue later. It simply permits Congress to avoid having to make its own judgment now.

Congress's possession of "the legislative power" gives it authority over its agenda, and nothing in the Constitution prohibits it from using this authority to avoid engaging the merits of well-settled precedents. Reading the Constitution to impose such a requirement would be odd, given that the duty of constitutional fidelity does not override the flexibility that the Court enjoys in that regard. Consider that while some originalists insist that *stare decisis* is unconstitutional, we are unaware of any who have maintained that the rules of adjudication that filter such questions off of the Court's agenda are unconstitutional. Rules like sticking to the question presented permit the Court to assume *arguendo* that related matters were correctly decided (by Supreme Court precedent, another institutional actor, or the court below) and render judgment based upon the issue or issues actually contested by the litigants. Supreme Court Justices take the same oath and owe the same duty of fidelity to the Constitution. Yet no one maintains that the Court violates this duty by bracketing some questions in the course of deciding others.

So too for Congress. When a favored measure raises an open constitutional question, Congress must resolve it before proceeding. But Congress can decide to treat the existence of well-settled precedent as grounds for taking the merits of a constitutional question off its agenda.

The constraint of time supports the prudence of this approach. Bickel recognized that the Supreme Court's ability to decide constitutional questions was limited by "the sheer necessity of limiting each

113 Cf. Hartnett, *supra* note 96, at 154–55 (arguing that the executive branch should give Supreme Court opinions a presumption of constitutionality in evaluating them); Paulsen, *supra* note 80, at 332–33 (rejecting the proposition that the executive branch owes Supreme Court opinions any deference but maintaining that it ought to review Supreme Court opinions with "humility").

year's business to what nine men can fruitfully deal with."¹¹⁴ Similarly, each Congress operates with a limited amount of time until its authority ends. It would be an exceedingly poor use of resources for Congress to resolve every possible constitutional issue from scratch every time. Legislative business would grind to a halt, and members of Congress would find their attention directed toward questions that no one wants them to ask.

Legislative attention is focused by constituent pressure. Constituents—which is to say, all of us—are likely to seek or oppose congressional action based on an undefined mixture of concerns, with policy outcomes likely to greatly outweigh constitutional requirements. The many issues that compete for limited public attention mean that many constitutional precedents are unlikely to generate much popular interest. In the case of a super precedent, which is by definition a decision that public and private actors treat as settled beyond doubt, there is no political pressure for reconsideration. By contrast, if there is enough political pressure to revisit even a seemingly settled constitutional precedent, then the precedent fails to qualify as a super precedent, and it is freed from the claims that attach to super precedents (and only super precedents).

As a practical matter, then, the People determine whether Congress is likely to initiate the process of correcting a deeply rooted constitutional error.¹¹⁵ A member of Congress can attack a venerable constitutional precedent, but the oath of fidelity to the text does not oblige her to do so. And if she moves to reconsider a precedent that is accepted by her constituents, she proceeds at her electoral peril.

James Madison's explanation for his ultimate acquiescence in the constitutionality of the Second Bank of the United States contains the seed of the idea for which we argue here: when another institutional actor has settled a constitutional question, an elected representative can (and as a practical matter, must) be responsive to the public in

114 BICKEL, *supra* note 64, at 128.

115 In considering whether the People have an obligation to press for the correction of constitutional error, it is worth noting that the People are not generally bound by an oath to support the Constitution. Natural born citizens do not take an oath to uphold the Constitution, but naturalized citizens do. See 8 U.S.C. § 1448 (2012) ("A person who has applied for naturalization shall, in order to be and before being admitted to citizenship, take in a public ceremony . . . an oath (1) to support the Constitution of the United States . . ."). Some groups of citizens—for example, certain federal employees—also take an oath. See 5 U.S.C. § 3331 (2012) (providing that "[a]n individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services" must take an oath swearing to "support and defend the Constitution of the United States against all enemies, foreign and domestic" and "to bear true faith and allegiance to the same").

deciding whether to reopen it. Madison vetoed the bill proposing to charter the Second Bank the first time it came to him, but he emphasized that he did so on policy rather than constitutional grounds. In his veto message to the Senate in 1815, he stated:

Waiving the question of the constitutional authority of the Legislature to establish an incorporated bank as being precluded in my judgment by repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation¹¹⁶

Madison viewed the question of the Bank's constitutionality as "waived." He did not concede the constitutionality of the Bank; rather, he regarded the question as no longer being on the table.¹¹⁷ As he explained to Representative Ingersoll years later in justifying his decision to ultimately sign legislation chartering the Bank, "[the most ardent theorist] will find it impossible to adhere, and act officially upon, his solitary opinions as to the meaning of the law or Constitution . . . when no prospect existed of a change of construction by the public or its agents."¹¹⁸

One could understand Madison to be saying that the public and its agents established a precedent that subsequent office holders must treat as controlling law. But one could also understand Madison to be saying, as he did in his earlier veto message, that public acquiescence in precedent waives the question—the office holder thus has no duty to answer it but can rather treat it as presumptively correct. We think the latter reading of Madison is the better way of thinking about the relationship between precedent and the duty of fidelity to the Constitution. That reading also squares with Madison's humble recognition that a "solitary opinion"—even his—may not be correct.

Seventeen years later, President Andrew Jackson agreed that politicians ought to be responsive to the public in choosing which precedents to challenge. While Jackson refused to accept the Supreme Court's conclusion that the Bank of the United States was constitutional, he did not say that he would insist on his own interpretation of

116 JAMES MADISON, VETO MESSAGE ON THE NATIONAL BANK (Jan. 30, 1815) <http://millercenter.org/president/madison/speeches/speech-3626> (emphasis added). To be sure, Madison's situation is different from the one upon which we focus for two reasons: he was explaining his conduct as President rather than as a Member of Congress, and it is doubtful that the constitutional status of the Bank of the United States qualified as a "super precedent" at the time. Whether Madison was right or wrong to waive the question of the Bank's constitutionality, however, his explanation is revealing.

117 See Madison Letter to C.E. Haynes, *supra* note 104, at 442–43 (defending his position on the Bank as a necessary consequence of the circumstances at the time).

118 Madison Letter to C.J. Ingersoll, *supra* note 103, at 392.

the Constitution in every circumstance. “Mere precedent is a dangerous source of authority,” Jackson explained, “and should not be regarded as deciding questions of constitutional power *except where the acquiescence of the people and the States can be considered as well settled.*”¹¹⁹

Most recent commentary on Jackson’s statement emphasizes its general condemnation of precedent; we are more interested in Jackson’s exception for popular acquiescence. To be sure, regarding public acquiescence as “deciding questions of constitutional power” might mean that widespread support creates constitutional meaning, legally supplanting the text when contrary to it. Maybe that’s what Jackson meant; more likely, he just didn’t think it through.¹²⁰ Regardless, the common sense view that an elected representative ought not choose to challenge precedent that constituents have overwhelmingly accepted, or even embraced, is consistent with our position that public acquiescence in a constitutional precedent can legitimately relieve an elected official of asking the question rather than compelling her to give the wrong answer to it. Jackson’s explanation suggests that the official should be judicious in determining which constitutional questions she can, consistent with the oath, avoid. Public debate about the legitimacy of precedent may make it unreasonable for the official to treat the precedent as presumptively constitutional.

While Presidents have traditionally been the focus of the fidelity versus precedent debate, members of Congress have taken similar positions. David Currie observes that throughout the nineteenth century—when, as he describes it, everyone was an originalist¹²¹—members

119 Andrew Jackson, *Veto Message* (July 10, 1832), in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1139, 1144–45 (James D. Richardson ed., 1897) (emphasis added). Years later, Abraham Lincoln drew on Jackson’s distinction to defend his refusal to acquiesce in the Supreme Court’s then-recent interpretation of the Constitution in *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (holding that a descendant of African slaves cannot be a “citizen” within the meaning of the Constitution and opining that Congress lacked the power to outlaw slavery in United States territories); see also Abraham Lincoln, *Speech on the Dred Scott Decision at Springfield, Illinois* (June 26, 1857), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1858 390, 393 (1989) (asserting that when a precedent has been, *inter alia*, “affirmed and re-affirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, not to acquiesce in it as a precedent”).

120 Jackson, unlike Madison, was not confronting a precedent he considered well-settled. Jackson made this observation in the course of defending his view that the Bank’s constitutionality was a matter of dispute despite the Court’s holding in *McCulloch*. The same was true of Lincoln’s resistance to *Dred Scott*. See Lincoln, *supra* note 119, at 401 (asserting that *Dred Scott*’s interpretation of the Constitution was recent and disputed).

121 CURRIE, *supra* note 28, at xiii (“With the possible exception of a few radicals beyond the fringe on the question of slavery, just about everybody was an originalist during the period of this study.”).

of Congress treated originalism as “not inconsistent with a recognition that questions sometimes do get settled, for better or worse.”¹²² Those “nineteenth-century interpreters made incessant appeals to precedent, whether, legislative, executive, or judicial.”¹²³ Yet members of Congress also emphasized that settled questions did not require further consideration. During an 1862 debate regarding the constitutionality of establishing a federal Department of Agriculture, Maine’s Senator William Fessenden allowed that “[a]s an original question,” he would be likely to agree that Congress lacked the power to appropriate certain funds, “but there is such a thing as having a constitutional question settled by legislative construction, to such an extent at least that Senators feel compelled to follow the precedents that have been set, and are perfectly justified in following them, because they cannot be raised always in reference to matters of this description.”¹²⁴ Likewise, by 1895, it was “utterly impossible that any question of constitutional law ever can be so settled” as the constitutionality of national banking.¹²⁵

To be sure, there are abundant examples of Senators and Representatives seeking to correct constitutional interpretations they deem mistaken, and these efforts typically claim fidelity to the Constitution’s true meaning rather than an erroneous interpretation. But these efforts always respond to political desire to correct the mistake. For example, Congress has enacted statutes deliberately flouting Supreme Court precedent on politically controversial issues from partial birth abortion to *Miranda* rights to flag burning.¹²⁶ Most recently, when Senator Mike Lee argued against funding the Affordable Care Act even after the Court upheld it—reasoning that “[w]hen we see an unconstitutional action, we need to call it out as such, and we need to do whatever we can to stop the Constitution from being violated”¹²⁷—he was responding to widespread popular opposition to the Affordable Care Act on policy grounds, as well as to the constitutional concerns. Additionally, even apart from trying to correct perceived er-

122 *Id.* at xiii n.7.

123 *Id.*

124 CONG. GLOBE, 37th Cong., 2d Sess. 2016 (1862) (statement of Sen. Fessenden).

125 27 CONG. REC. 672 (1895) (statement of Rep. Boatner).

126 See *Gonzales v. Carhart*, 550 U.S. 124, 133 (2007) (upholding the Partial-Birth Abortion Ban Act of 2003); *Dickerson v. United States*, 530 U.S. 428, 431–32 (2000) (invalidating a federal statute which sought to allow the admission of voluntary confessions, *contra Miranda v. Arizona*, 384 U.S. 436, 478 (1966)); *United States v. Eichman*, 496 U.S. 310, 312 (1990) (holding that the Flag Burning Act was unconstitutional under the Court’s precedent in *Texas v. Johnson*, 491 U.S. 397 (1989)).

127 159 CONG. REC. S6771 (daily ed. Sept. 24, 2013) (statement of Sen. Lee).

rors that become a matter of public debate, Congress has resisted precedents that infringe upon its institutional prerogatives.¹²⁸ In all of these instances, the issues at stake had political traction at the time Congress acted, undermining any claim to super precedent status.

By contrast, there is a dearth of examples of members of Congress seeking to disrupt the entire constitutional terrain in an effort to root out error.¹²⁹ Instead, when faced with a precedent that no one wants to question—and that has thus achieved “super” status—members of Congress have been willing to stipulate the precedent’s correctness and move on. As Currie recounts, there were repeated admonitions during the course of nineteenth century constitutional debates that constitutional interpretation may become settled, even by congressional or presidential action rather than the courts.¹³⁰ Given the constraints imposed on congressional representatives generally, including limited hours in the day and a responsibility to focus on issues important to constituents, it is hard to imagine that such stipulations violate the oath.

The analogy to the Court’s control of its agenda is instructive. The Constitution does not compel the Court—whose primary function is the interpretation of texts—to unearth and correct every constitutional error that may lurk in a case. It would be strange, then, for the Constitution to require more of Congress. To employ another

128 For example, Congress continued to enact “legislative vetoes” even after the Supreme Court held them unconstitutional in *INS v. Chadha*, 462 U.S. 919 (1983). See Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 288 (1993) (observing that “Congress enacted more than two hundred new legislative vetoes” in the years following the Court’s decision in *Chadha*).

129 Consider Senator Mike Lee’s recent book. See generally MIKE LEE, *OUR LOST CONSTITUTION: THE WILLFUL SUBVERSION OF AMERICA’S FOUNDING DOCUMENT* (2015). Senator Lee is harshly critical of both the Supreme Court’s constitutional jurisprudence and the failure of his congressional colleagues to take the Constitution seriously. But when Lee outlines the changes that he recommends, he concentrates on tweaking existing federal programs or declining to extend them, rather than proposing to refashion the entire federal government in a manner that would be more consistent with his constitutional vision. See *id.* at 157–216 (describing how the courts, Congress, and the People can reclaim the Constitution).

130 See, e.g., DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829* 254 (2001) (quoting Secretary of the Treasury Alexander Dallas’s defense of the constitutionality of the Bank of the United States, specifically that “there must be a period when discussion shall cease and decision shall become absolute”); CURRIE, *supra* note 28, at 10 (quoting President Andrew Jackson’s claim in the context of federal support for internal improvements that “individual differences should yield to a well-settled acquiescence of the people and confederated authorities in particular constructions of the Constitution on doubtful points”); *id.* at 17 (describing how President John Tyler bowed to longstanding precedent); *id.* at 19 (explaining that President James Polk declined to question a constitutional question settled by “long acquiescence”).

metaphor, there is ample precedent for the suggestion that a member of Congress may serve as a repairman who will respond to any constitutional errors that she is called upon to fix. But there is no precedent for the suggestion that a member of Congress must serve as a building inspector obliged to examine the entire body of federal law in search of latent constitutional flaws.

There is a sense in which the presumption we propose is a congressional version of Bickel's passive virtues. Bickel was concerned about the Court, and more recent scholarship has applied the passive virtues to administrative law.¹³¹ Congress too can exercise the equivalent of the passive virtues. Rather than employing judicial doctrines such as standing and mootness, Congress may rely on its broad agenda-setting discretion to time its consideration of constitutional questions. Whatever the limits of that discretion are, using it to avoid re-considering a super precedent does not exceed them.

An extensive body of political science literature examines why and how the House and the Senate decide which issues receive their attention.¹³² Political scientists have offered a number of agenda control theories, but they all agree that the decision is fundamentally political.¹³³ Such a political understanding of agenda control is controversial with respect to the Supreme Court,¹³⁴ but it is well suited

131 See Sharon B. Jacobs, *The Administrative State's Passive Virtues*, 66 ADMIN. L. REV. 565, 621 (2014) (arguing that government agencies employ methods of restraint similar to those used by the judiciary).

132 See, e.g., GARY W. COX & MATHEW D. MCCUBBINS, *SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES* (2005) (arguing that legislators assign agenda power based on their party preferences); BRYAN D. JONES & FRANK R. BAUMGARTER, *THE POLITICS OF ATTENTION: HOW GOVERNMENT PRIORITIZES PROBLEMS* (2005) (describing how the government processes information and prioritizes problems); JOHN W. KINGDON, *AGENDA, ALTERNATIVES, AND PUBLIC POLICIES* (2d ed. 2011) (attempting to answer the question of how issues make their way onto the national agenda); STEVEN S. SMITH, *PARTY INFLUENCE IN CONGRESS* (2007) (explaining the role that political parties play in setting the congressional agenda).

133 For example, "throughout all periods of congressional history from the end of Reconstruction to the present, the majority party has maintained a secure grip on the floor agenda." Gary W. Cox & Mathew D. McCubbins, *Agenda Power in the U.S. House of Representatives, 1877–1986*, in *PARTY, PROCESS, AND POLITICAL CHANGE IN CONGRESS: NEW PERSPECTIVES ON THE HISTORY OF CONGRESS* 144 (David W. Brady & Mathew D. McCubbins, eds., 2002).

134 Bickel posited that it was legitimate for the Court to factor the likely public reaction into its calculation of the timing of constitutional decision-making. Bickel's primary concern was to reconcile the Warren Court's constitutional interpretation with the frequently hostile public response that the Court's decisions received. As later explained by his colleague Anthony Kronman, Bickel believed that there were no principled rules governing the Court's decision whether or not to exercise the passive virtues. See Kronman, *supra* note 64, at 1588 ("According to what standard or principle should the Court decide when to exercise one or another of the techniques of abstention that comprise the passive vir-

for the role of Congress. Politics, rather than hard-and-fast rules, controls the timing of congressional challenges to super precedent. As a result, such challenges arise only arise when the consensus supporting a super precedent crumbles.

CONCLUSION

Originalists have struggled to explain how public officials—from Supreme Court Justices, to Presidents, to members of Congress—can meaningfully follow “the law” when they treat nonoriginalist precedents as authoritative. The assumption of both originalists and their critics seems to be that originalism cannot be a viable constitutional theory if it would not be possible for the Supreme Court, for example, to purify the United States Reports so that its contents faithfully reflect the original public meaning of the Constitution.

Such a burden is too heavy for any constitutional theory. The Constitution does not require the Supreme Court to correct every constitutional error, and it does not require Congress to do so either. It permits errors to exist until an institution in a position to do so—the Court, Congress, or the President—decides that it is an opportune time to correct them. In the case of Congress, that question of timing is driven by political calculations, which are largely dependent upon pressure from the People to question what had previously seemed unquestionable precedents. In this sense, the People have power to initiate the process of correcting constitutional error—an observation consistent with the popular constitutionalist claim that the People have power to initiate constitutional change.¹³⁵

No constitutional theory, including originalism, needs to account for all constitutional law as it currently exists or explain how an office

tues, and when instead to render final judgment? Bickel's answer is: According to no standard or principle at all, if by 'principle' we mean a firm rule or fixed procedure.”). As Bickel himself wrote, “the techniques and allied devices for staying the Court's hand, as is avowedly true at least of certiorari, cannot themselves be principled in the sense in which we have a right to expect adjudications on the merits to be principled.” BICKEL, *supra* note 64, at 51. The suggestion that the Court should not be guided by principle in deciding whether or not to decide a constitutional question prompted Gerald Gunther to famously quip about Bickel's “100% insistence on principle, 20% of the time.” Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment On Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 3 (1964); *see also* Monaghan, *supra* note 63, at 714 (“Bickel's claim of a judicial prerogative to manipulate jurisdictional doctrine so as to deny the assertion of jurisdiction which is given drew intense fire.”).

¹³⁵ Our argument is limited to the power of the People to champion the correction of constitutional error. Popular constitutionalism makes a broader claim—that the People get to determine the meaning of the Constitution—which is distinct from the point that we make here.

holder could realistically go about correcting deeply rooted errors present in existing constitutional law. Justice Scalia was right to say that originalists can be pragmatic about precedent. But that pragmatism is not, as is commonly assumed, a choice to treat erroneous precedent as law superseding the text it purports to interpret. The pragmatism is one of timing. The office holder has the discretion to decide when the timing is right to correct the error. Until then, the office holder—be it the Supreme Court through the rules of adjudication or Congress with a presumption of constitutionality—can, as it were, assume *arguendo* that certain settled precedents are correct.

In this sense, the Constitution itself is pragmatic. It would have been utterly unrealistic for the Framers or any succeeding generation to suppose that those in charge of interpreting and enforcing the Constitution would make no errors in doing so. And it would have been utterly unrealistic to assume that some of those errors would not become firmly entrenched. One way that the Constitution handles that problem is to permit error to exist, albeit uneasily, alongside the governing constitutional law. Because it does not require office holders to rectify every error that they see, the Constitution permits errors to exist uncorrected. That is an acceptable approach for originalists and nonoriginalists alike.

The question whether settled precedents constitute “law” in a positivist sense is a complicated jurisprudential one that we do not tackle. We will simply make one observation relevant to that question. Whether or not one could say that precedent, including a deeply settled erroneous precedent, constitutes “law,” both the Court and Congress have consistently treated it as a different kind of law than the constitutional text itself. The Court has asserted the authority to depart from its precedent, but it has never asserted the authority to depart from the Constitution. Similarly, Congress has asserted the authority to defy Supreme Court precedent, but it has never asserted the authority to defy the Constitution. The unbroken practice in the United States is to treat interpretations of the Constitution, in contrast to the Constitution itself, as provisional and subject to change.¹³⁶

¹³⁶ See Hartnett, *supra* note 96, at 146–59 (arguing that Supreme Court opinions do not conclusively settle the Constitution’s meaning); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 44 (1993) (arguing that our legal tradition is more consistent with treating judicial opinions as explanations for judgments than with treating them as the law itself); Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 639 (2006) (drawing on history to argue that the Court is willing to abandon “even deeply seated precedents because it became persuaded they were unfaithful to the best reading of our constitutional text, of its structure, or of the first principles embodied in that text”).

Even if constitutional interpretations are “law” from a jurisprudential point of view, we think an office holder could treat this provisional law as presumptively correct without betraying the commitment to treat the constitutional text as controlling when the question is called. Nor is it inconsistent with that commitment to permit the office holder some discretion about when to answer the question.

COUNTERING THE MAJORITARIAN DIFFICULTY

OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE. By Randy E. Barnett.¹ New York: HarperCollins Publishers. 2016. Pp. xiv + 283. \$26.99 (cloth).

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In *Our Republican Constitution*,³ Randy Barnett argues that the United States Constitution rests on a foundation of individual rather than collective popular sovereignty. Grounding the legitimacy of the government in the authority given it by each individual rather than by the People as a whole echoes the thesis, advanced in Barnett's prior work, that the government must justify incursions upon individual liberty.⁴ If the People as a body are sovereign and the Constitution is designed to facilitate democratic self-governance, legislation is presumptively legitimate because it represents the sovereign will of the democratic majority. If the individual is sovereign, by contrast, legislation does not represent the sovereign will but rather the work product of government officials who serve as the agents of

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3. RANDY BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE (2016) [hereinafter BARNETT].

4. See, e.g., RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004) (arguing, *inter alia*, that courts should replace a "presumption of constitutionality" with a "presumption of liberty"). RESTORING THE LOST CONSTITUTION has been described as "the best defense ever written of a libertarian or conservative/libertarian approach to constitutional law." Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1081 (2005).

individual sovereigns. The citizen is thus positioned to demand that his agents explain why legislation lies within the authority he has constructively given them to secure his natural rights.

Courts play an important role under Barnett's Republican Constitution. They provide the forum in which citizens seek protection of their natural rights from legislative infringement. Like legislators, judges serve as agents of each individual sovereign, and judicial deference to democratic majorities is "misguided and inconsistent with the most basic premises of the Constitution" (p. 18). Rather than treating legislation as presumptively constitutional, they must treat the citizen's challenge as presumptively correct. And on the merits, they must critically rather than deferentially assess the question whether the legislature has exceeded its authority, which is limited to regulation securing the "equal protection of the rights of each and every person" (p. 25). Barnett thus calls for, among other things, a return to the pre-New Deal approach to the Due Process Clause.

Constitutional scholars have long viewed judicial review through the lens of the countermajoritarian difficulty. Under the Republican Constitution, however, it is legislatures rather than courts that we should worry about. In this essay, I begin by developing the connection between Barnett's theory of the Constitution and his approach to judicial review. I then express doubt about the historical support for Barnett's approach, contend that the task he would give courts fails to account for the realities of the legislative process, and argue that he overestimates the institutional capacity of courts. I conclude by praising Barnett's attention to the often-misunderstood concept of judicial restraint. That is a point on which many can agree with Barnett, regardless whether they accept his republican take on our Constitution.

I. THE MAJORITARIAN DIFFICULTY

Generations of constitutional scholars have grappled with the so-called countermajoritarian difficulty.⁵ The power of judicial review enables courts to interfere with the majority's preferences. Because the baseline in our republic is set in favor of democracy, the argument runs, courts should generally defer to

5. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

what the majority wants. Courts apply heightened scrutiny to statutes implicating fundamental rights or suspect classes, but outside of that context, they are reluctant to interfere with the outcome of the democratic process. They give federal and state legislatures wide berth in enacting social and economic legislation and apply only minimal scrutiny when evaluating federal statutes for consistency with the limits on federal power.

In attacking this state of affairs, Barnett starts with its premise: that we should be concerned about the countermajoritarian nature of judicial review. Instead, Barnett claims, we should be concerned about the majoritarian nature of legislation. Democratic majorities pose a consistent threat to minority rights.

Barnett points out that many of the Founders had reservations about democracy. Madison's essay on "The Vices of the Political System of the United States," which matured into Federalist No. 10, details the concerns. Every society contains factions that will pursue their own self-interest.⁶ When a faction includes a majority of citizens, what is to stop it from unjustly infringing upon the rights of those in the minority? Majorities will give into the temptation to self-deal by, among other things, enriching themselves at the expense of the minority.⁷

A republican form of government was the Founders' solution to the excesses of democracy. On a view of our Republic that Barnett dubs "the Democratic Constitution," the Founders countered the risk of democratic excess by opting for indirect rather than direct democracy (pp. 18-19). Direct democracy carries a greater risk of runaway majorities and is in any event impracticable in a country the size of the United States, even as it existed at the time of the Founding. Thus the Democratic Constitution filters its commitment to majority rule through the senators and representatives whom the majority votes into office. Structural features like federalism, bicameralism, equal state representation in the Senate, and differing terms lengths in the House and Senate were among the mechanisms the Founders

6. See p. 56 (A faction is "a number of citizens . . . who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.") (quoting THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961)).

7. See p. 54 (observing that "[i]n a democracy, the debtors outnumber the creditors and the poor outnumber the rich").

employed to mute the influence of faction. But the Democratic Constitution does not eschew the importance of majority rule; it aims simply to temper the risk that the majority will get carried away. The majority vote of those senators and representatives represents, albeit indirectly, the majority will of the People. Hence government regulation is legitimate as the product of majority rule.

Barnett rejects this view of the Constitution in favor of what he calls “the Republican Constitution.” On Barnett’s account, the Founders did not design our Republic to enable elected representatives to “re-present” the will of the majority.⁸ For one thing, such an approach would be inadequate to counter the risk of factions and democratic excess. For another, the Founders’ mistrust of democracy indicates that preserving majority rule was not in fact their primary concern. Drawing on, among other things, the Declaration of Independence and the Virginia declaration that inspired it, Barnett claims that the Founders’ purpose in forming the United States was the preservation of the pre-existing natural rights of the People—each and every one.⁹ These natural, inalienable rights include the rights to life, liberty, and property.¹⁰

In the design of the Republican, as opposed to the Democratic, Constitution, elected representatives serve to secure the natural rights of the individual sovereigns who comprise “We the People,” not to carry out the mandate of the majority that voted them into office. The legitimacy of government rests on the consent of the governed, and the Republican Constitution conceives of that consent as flowing from individuals rather than the people as a group. Given that the consent of these individuals is only constructive, it ought to extend no farther than that to which a rational person would consent. A rational person would give up his liberty interests only if doing so advanced the larger

8. See p. 27 (maintaining that under the republican approach, our representative government serves as “a popular ‘check’ on the servants of the people” rather than as “a practical way to ‘re-present’ the will of the sovereign people”); p. 23 (under a Republican Constitution, the “purpose [of government] is not to reflect the people’s will or desire—which in practice means the will or desires of the majority—but to secure the preexisting rights of the We the People, each and every one of us”).

9. See pp. 33–41 (describing the origins of the Declaration and how it captured thinking about natural rights at the time of the Founding).

10. See pp. 38–39; see also p. 69 (asserting that “the right to acquire, possess, and use property is a vital means to the pursuit of happiness”).

goal of securing his life, liberty, and happiness.¹¹ That line defines the scope of authority conferred by the People (the principals) to government officials (their agents).

Thus the republican vision of the Constitution counsels courts and constitutional scholars to worry less about preserving the product of the democratic process than about the way the democratic process is apt to trample the rights of individuals. Because the point of government is to secure the pre-existing natural rights of the People, legislation is not presumptively legitimate simply because it has majority sanction. On the contrary, regardless of that majority sanction, it is presumptively illegitimate to the extent that it infringes upon the natural rights of individual sovereigns. Courts should not give statutes a presumption of constitutionality when they review them; instead, the state should bear the burden of justifying legislation as lying within its limited authority to secure the life, liberty, and property of the People. Nor should courts be unduly deferential when reviewing the state's proffered justification. They should return in Due Process and Equal Protection challenges to the more demanding form of "rational basis" review practiced by courts in the *Lochner* era. And because structural constraints are often more effective than substantive limits in preserving individual liberty, courts should put teeth in the doctrines that enforce limits on federal legislative power.¹² As Barnett explains, "when the liberty of a fellow citizen and joint sovereign is restricted, judges as agents of these citizens have a judicial duty to critically assess whether the legislature has improperly exceeded its just powers to infringe upon the sovereignty of We the People" (p. 25).

II. THE HISTORICAL CASE FOR JUDICIAL ENFORCEMENT OF THE REPUBLICAN CONSTITUTION

Given Barnett's stature as an originalist, one might come to *Our Republican Constitution* expecting an originalist argument, and the book's first chapter, which is devoted to founding-era history, gives it that flavor. Yet Barnett does not contend that the

11. Thus, for example, "any rational person" would consent to "the equal protection of their [sic] fundamental rights, including their [sic] health and safety" (p. 43); *see also* p. 75 (attributing this view of consent to John Locke).

12. *See* pp. 169–84 (describing the Constitution's structural and substantive constraints upon legislative power and arguing that the former are more effective in preserving individual liberty).

Constitution's text demands acceptance of either the republican vision or the more searching form of judicial review for which he advocates. The book is less about what the Constitution's original public meaning requires than about what is normatively attractive. Barnett claims it is desirable to understand the Constitution as a document designed to secure the natural rights of individual sovereigns, and that one accepting that view should find it similarly desirable for courts to play an active role in ensuring that the government not exceed the bounds of its authority. History, particularly founding-era history, is an important data point in his normative case: one reason we should find the republican vision attractive is that the founding generation did.

It is worth observing, however, that the history Barnett recounts is not entirely one-sided. He assembles evidence from the Declaration of Independence, early state Constitutions, and the Federalist Papers to support his argument that those who drafted and ratified the Constitution were committed to an individual rather than collective view of popular sovereignty. Vetting that claim would require independent study of the historical record, but even taken on its own terms, the evidence does not reflect unwavering insistence upon what Barnett describes as the republican conception. Instead, his account suggests that conflict between the republican and democratic views surfaced almost immediately. For instance, he indicates that the division is evident in the conflict between the Hamiltonian Federalists who favored broad national power and the Jeffersonian Republicans who stood for more limited federal government.¹³ Barnett points to the opinions of Justices Jay and Wilson in *Chisholm v. Georgia* as support for an individual conception of popular sovereignty, but, as he acknowledges, Justice Iredell's opinion clearly adopts the collective view.¹⁴ The same divide exists between the opinions of Justices Chase and

13. See p. 86 (asserting that "in its early days, the Republican opposition to the Federalists was in defense of the constitutional limitations of national power that characterizes what I am calling our Republican Constitution").

14. See pp. 72–73 (describing the opinions in *Chisholm v. Georgia*, 2 U.S. 419 (1793)). Barnett disputes the claim that the ratification of the Eleventh Amendment represented an embrace of Justice Iredell's view. See p. 80 (arguing that the Eleventh Amendment "said nothing to repudiate the underlying principle of individual popular sovereignty articulated by Jay and Wilson . . . [i]t merely changed the text of Article III to deny federal courts the jurisdiction to hear such cases").

Iredell in *Calder v. Bull*.¹⁵ If conflict existed that early, it is difficult to characterize Barnett's republican view as one uniformly held in the founding era.

Competition, moreover, apparently persisted between these two views throughout American history. According to Barnett, the issue of individual versus collective popular sovereignty divided the pro-slavery Democratic Party (that emerged during Andrew Jackson's presidency) from the abolitionist Republican Party (that emerged gradually in the years leading up to 1860).¹⁶ Barnett describes the Reconstruction amendments as a triumph of the republican over the democratic view.¹⁷ That triumph was short-lived, however, for the South used the democratic view as a justification for a white majority to impose the odious Jim Crow regime on an African American minority.¹⁸ New Deal progressives succeeded in rendering the democratic view the dominant one, and modern conservatives as well as modern liberals are the heirs of the New Dealers insofar as they both profess commitment to the importance of majority rule and concern about the ability of judicial review to interfere with it.¹⁹

Barnett puts his finger on some of theoretical commitments that divide modern Americans. I do not here explore Barnett's choice of the labels "Democratic" and "Republican" or the way he describes the political history; other contributions to this symposium take up those questions.²⁰ Here, I simply observe that

15. See p. 73 (contrasting Justice Chase's commitment to the sovereignty of each individual with Justice Iredell's commitment to the sovereignty of the democratic majority in *Calder v. Bull*, 3 U.S. 386 (1798)).

16. See p. 87 (asserting that the Democratic Party of Andrew Jackson and Martin Van Buren "often called itself 'the Democracy' because it presumed to speak for the people as a whole"); pp. 89-97 (maintaining that the Democratic Party was pro-slavery and that its view of popular sovereignty permitted the majority to enslave the minority); pp. 90-98 (describing the evolution of the Republican party from the antislavery movement and characterizing it as grounded in a commitment to the sovereignty of each individual).

17. See pp. 106-11 (describing how the Reconstruction amendments led to a more Republican Constitution).

18. See *id.* at 120-24 (describing the decline of the republican view in the post-Reconstruction era).

19. See pp. 124-63 (describing the rise and influence of progressivism).

20. See Jack Balkin, *Which Republican Constitution?* 32 CONST. COMMENT. 31 (2016) (arguing that Barnett's version of "republicanism" is closer to "natural rights liberalism" than to the "historical tradition of republicanism"); *id.* at 42 (arguing that Barnett's imagined opposition "between the Republican and Democratic Constitutions is really a schematic or idealized version of the struggle between classical liberalism and progressivism at the beginning of the twentieth century"); *id.* at 43 (claiming that Barnett unfairly "lumps modern liberals together with progressives"); see also Sanford Levinson,

even taken on Barnett's own terms, competition between the republican and democratic views of sovereignty seems to be as old as the Constitution itself.

History is more complicated when it comes to Barnett's argument about the role of the courts in protecting the natural rights of individual sovereigns against unauthorized government interference. As with the republican vision itself, Barnett does not claim that the Constitution's original public meaning requires courts to review statutes as he suggests. On the contrary, he acknowledges that the constitutional text is silent on this point and maintains that the approach one takes "will depend on whether one holds a republican or democratic vision of the Constitution" (p. 111). Yet if founding-era commitment to the republican vision was as unwavering as Barnett maintains, and if the republican vision logically leads to greater reliance upon judicial review, one would expect to see many founding-era cases in which litigants came to the courts to enforce their rights to liberty and property against self-seeking democratic majorities. But Barnett does not identify federal or state cases in which litigants claimed—under either the federal or state constitutions—that statutes were invalid because they infringed upon the natural rights of the People.²¹ To be sure, the lack of general federal question jurisdiction meant that federal courts, at least, would have had a limited opportunity to consider such claims, but that limited jurisdiction itself reflects an early view about the limited role of the federal courts.²² Whatever support history gives to the case for a Republican Constitution, it appears

Randy Barnett's Disdain for Democracy (and John Marshall), 32 CONST. COMMENT. 113, 114–16 (2016) (critiquing Barnett's use of the term "republican").

21. Litigants could have raised such a challenge to federal legislation after the Fifth Amendment was ratified in 1791. See U.S. CONST. amend. V (providing that no person shall be deprived of life, liberty, or property without due process of law). A claim that rent-seeking state legislation violated the United States Constitution could not have been made until after the Fourteenth Amendment was ratified. Nonetheless, one would expect to see such challenges made to state laws under state constitutions, particularly if those state constitutions were indeed committed to the republican vision. See p. 67 (contending that many state constitutions were so committed). Barnett does point out that *Corfield v. Coryell*, 6 Fed. Cas. 546 (C.C. Ed. Pa. 1823) invoked the concept of natural rights, but that case involved a claim by a nonresident that New Jersey was discriminating in violation of Article IV's Privilege and Immunities Clause rather than a claim that a statute is invalid if it is not truly designed to secure the natural rights of the People.

22. Congress did not enact a lasting grant of general federal question jurisdiction until 1875.

to cut the other way with respect to the role of the courts in enforcing it.

III. THE RATIONAL BASIS TEST AND THE LEGISLATIVE PROCESS

The modern rational basis test instructs courts to uphold a statute if it can posit a permissible reason why the legislature might have enacted it. Barnett criticizes this test, insisting that courts must identify a statute's *actual* purpose to evaluate its constitutionality. As he puts it, courts "should ferret out when [the legislature's] 'just powers' are being invoked as a mere pretext to exercising powers that have not been—and cannot justly be—entrusted to a republican government, where the people are the ultimate sovereigns" (p. 112). Courts need to "realistically assess whether restrictions on liberty were *truly* calculated to protect the health and safety of the general public, rather than being the product of 'other motives' beyond the just powers of a republican legislature."²³ This is necessary because "[r]equiring the government to identify its true purpose and then show that the means chosen are actually well suited to advance that purpose helps to smoke out illicit motives that the government is never presumed by a sovereign people to have authorized" (p. 232).

Barnett portrays the statutes at issue in many of the classic Fourteenth Amendment cases—including *Lochner*, *Carolene Products*, and *Lee Optical*—as illustrative of regulations actually designed to protect the economic interests of a powerful faction at the expense of a weaker minority rather than to advance any public interest in health or safety.²⁴ The anemic rational basis test permits such statutes to be characterized as reasonably calculated to serve a legitimate end, but Barnett maintains that anyone who believes that has been hoodwinked. The maximum-hours statute challenged in *Lochner* protected commercial bakeries from

23. See p. 125 (emphasis added) (praising the late-18th and early 19th century courts who took this approach).

24. Barnett also characterizes the statute at issue in the *Slaughter-House Cases*, which required all butchers to use a particular facility, as one giving a private monopoly to the company that owned this facility. See pp. 115–16. *Muller v. Oregon* addressed a statute protecting white male union members from competition with women, and *Nebbia v. New York* involved a statute that helped large milk distributors avoid competition from small retailers operating in poor neighborhoods. See p. 223.

competition by smaller, ethnic bakeries;²⁵ the ban on filled milk challenged in *Carolene Products* insulated the makers of other dairy products from competition;²⁶ and the prescription requirement challenged in *Lee Optical* protected optometrists from competition by opticians who could sell cheaper glasses (pp. 222-223).

Barnett's emphasis on the importance of recovering the legislature's true purpose understates the complexity of identifying legislative intent. It is extraordinarily difficult—if possible at all—for a court to glean what was “really” going on behind the scenes of a statute.²⁷ A legislature is a multimember body, and different members may have different motives. Perhaps some legislators enacting a ban on filled milk were concerned about its health effects and others were beholden to a powerful dairy lobby. Whose intent controls? Is such a statute *truly* calculated to promote health and safety or is it the kind of rent-seeking statute that rational individual sovereigns would not countenance? Do the rent-seeking motives of some legislators corrupt the statute if other legislators act with the public welfare in view? Where, moreover, would a court look to discover the legislature's true motive? Legislative history is unlikely to contain an express acknowledgement of illicit motive, and even if it did, floor statements and committee reports do not reliably reflect the views of the majority who supported the statute. Current doctrine accepts a possible, rational purpose—*i.e.*, one that can be inferred from the statutory text—rather than engaging in a hunt for the actual, subjective purpose precisely because the latter is illusory.²⁸

25. See p. 138 (noting that the provision capping the hours of bakery employees at 60 per week benefited commercial bakeries that could schedule their workers in shifts at the expense of smaller, ethnic bakeries with fewer employees).

26. See p. 156 (asserting that filled milk was healthier than fresh cow's milk, which carried dangerous bacteria, and the “politically powerful dairy farm lobby” pushed Congress to ban it from the market).

27. Cf. *Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662, 702-03 (1981) (Rehnquist, J., dissenting) (criticizing Justice Brennan's argument that the Court should consider only the legislature's actual purpose, rather than a possible purpose, in adjudicating a Dormant Commerce Clause challenge because, *inter alia*, “it assumes that individual legislators are motivated by one discernible ‘actual’ purpose . . .”).

28. See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2450 (2003) (arguing that a court that looks for “‘actual’ legislative purpose risks attributing unwarranted coherence to the legislative process, which may entail logrolling or other strategic voting, making concessions to strongly felt but outlying interests, or papering over disagreements to ensure the legislation's passage” and that respect for this “inherently unruly legislative process” requires judges to “focus only on the rationality of the

In addition to forcing identification of the government's true purpose, Barnett calls for greater scrutiny of the fit between statutory ends and means. On the one hand, he offers a compelling case that modern courts have occasionally stretched even the existing rationality test too far. For example, it is indeed difficult to see the connection between safe casket-making and a funeral home director's license.²⁹ A rational basis test ought not mean that courts are obliged to accept explanations that beggar all belief.

On the other hand, the strength of the "rational basis" test can vary according to the perspective of the beholder, and Barnett favors one with more bite. In calibrating the strength of the test, it is important to keep in mind—especially with respect to the kind of complex legislation that emerges at the federal level—that courts cannot seek too much perfection from the often-chaotic legislative process.³⁰ Modern textualists in particular have emphasized the ways in which the battle between competing interests shapes legislation. In the federal system, the process of bicameralism and presentment forces compromise between the House and the Senate, as well as between both houses and the President. But even within each house, "[b]ills are shaped by a process that entails committee approval, the scheduling of a floor vote, logrolling, the threat of filibuster, the potential for presidential veto, and an assortment of other procedural obstacles."³¹ Passing these veto gates requires proponents to compromise with opponents, and compromise can produce awkward language.³² For example, it may be necessary to narrow

legislative outcomes themselves, not on whether those outcomes further some actual or likely legislative purpose."); *see also* *Edwards v. Aguillard*, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting) ("For while it is possible to discern the objective 'purpose' of a statute (*i.e.*, the public good at which its provisions appear to be directed) . . . discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task.").

29. *See* p. 233 (relating "story of the Benedictine monks of St. Joseph Abbey in Louisiana who were barred by the Louisiana State Board of Embalmers & Funeral Directors from selling caskets without a funeral home director's license").

30. *See* Manning, *supra* note 28, at 2446 ("[T]he rational basis test . . . starts from the premise that a properly functioning legislative process often produces imperfect legislation, rough accommodations, and uneven compromises.").

31. *Id.* at 2417.

32. *See* *Landgraf v. USI Film Prods., Inc.*, 511 U.S. 244, 286 (1994) ("Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal."); *Preseault v. I.C.C.*, 494 U.S. 1, 19 (1990) ("The process of legislating often involves

or broaden language in order to bring others on board.³³ As Justice Thomas wrote for the Court in refusing to apply the absurdity doctrine to awkwardly drawn provisions in a pension statute:

[N]egotiations surrounding enactment of this bill tell a typical story of legislative battle among interest groups, Congress, and the President. Indeed, this legislation failed to ease tensions among many of the interested parties. Its delicate crafting reflected a compromise amidst highly interested parties attempting to pull the provisions in different directions. As such, a change in any individual provision could have unraveled the whole.³⁴

Reaching agreement about how to handle a particular social or economic problem requires give and take from parties who have not only conflicting self-interests but also conflicting ideas about what best serves the public interest.

No statute, moreover, pursues its purpose at all costs. A legislature must draw the line somewhere, and deferential rational-basis review acknowledges that line-drawing is often awkward.³⁵ Take, for example, the statute at issue in *Lochner*. Barnett insists that it was irrational for the New York legislature to cap the hours of bakery employees but not bakery owners (p. 130). Even assuming that it would have better served the legislative purpose to cap the hours of the owners too, must the legislature do everything at once?³⁶ Perhaps the legislature drew the line at bakery employees because it thought they were, all things considered, likely to benefit more than owners from fewer hours. Or perhaps owners would have vehemently opposed limits on their hours, and the bill might have failed if they were included.

tradeoffs, compromises, and imperfect solutions, and our ability to imagine ways of redesigning the state to advance one of Congress' ends does not render it irrational.”).

33. See Manning, *supra* note 28, at 2417 (pointing out that imperfect statutory language “may well reflect an unrecorded compromise or the need to craft language broadly or narrowly to clear the varied veto gates encountered along the way to enactment”).

34. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002).

35. Cf. *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (observing that line-drawing “inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line,” and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration”) (quoting *Matthews v. Diaz*, 426 U.S. 67, 83-84 (1976)).

36. Cf. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“Men whom I certainly could not pronounce unreasonable would uphold [the hours cap] as a first instalment [sic] of a general regulation of the hours of work.”).

A statute is not necessarily irrational or contrary to the public interest because it would have been reasonable to do more.

In sum, the Court's current approach, which accepts hypothetical purposes and demands only minimal rationality, accounts for the normal functioning of the legislative process. The legislature is not an idealized body that acts with one mind, but a multimember body that produces legislation through a complex and even chaotic process. Any bill that runs the gamut of this process represents compromises made along the way, sometimes to resolve the competing desires of different constituencies and sometimes because the legislature has drawn a line somewhere.

IV. THE INSTITUTIONAL CAPACITY OF THE COURTS

Barnett proposes to alter the current regime of highly deferential judicial review of social and economic legislation in two respects. He would both put more bite into rationality review and reverse the presumption of constitutionality. Under current doctrine, courts assume that statutes are constitutional unless the challenger shows otherwise. When applied to federal legislation, this presumption reflects respect for a coordinate branch, and when applied to a state statute, it reflects respect for the states. Barnett implicitly rejects departmentalism, inter-branch comity, and federalism as good reasons for the presumption; he argues that the presumption is always inappropriate because it favors the servant over the principal.³⁷ A constitutional challenge to a statute is a mechanism by which an individual sovereign calls the legislature to account. The presumption, he says, should thus run the other way—the individual sovereign is entitled to an explanation for why the legislature has acted within the scope of its limited authority to secure the People's natural rights. Reallocating the burden, particularly when combined with more searching substantive review, better preserves the sovereignty of the People.

37. See p. 229 (asserting that a judge who "simply 'presumes' that the legislature is acting properly, or 'defers' to the legislature's own assessment of its powers, then that judge is not acting impartially"). In any suit, someone has to bear the burden of proof. Here, either the challenger must bear the burden of showing that the statute is unconstitutional or the government must bear the burden of showing that it is. Despite Barnett's wording, his attack on the presumption of constitutionality seems better understood as a claim about where the burden should be placed than as a claim that placing a burden reflects judicial bias.

Barnett's call for greater judicial willingness to invalidate statutes reflects confidence in the ability of the courts to protect individual liberty, particularly relative to the legislatures he describes as so easily corrupted by faction. Yet while he offers a fulsome explanation of why we should mistrust legislatures, he spends less time defending the institutional capacity of the courts.

Highly deferential judicial review reflects the judgment that a more searching inquiry would pull judges into terrain they are not good at navigating. Rational-basis review under the Due Process and Equal Protection Clauses is a case in point. The current, deferential regime reflects humility about the capacity of judges to evaluate the soundness of scientific and economic claims; Barnett's approach, by contrast, reflects confidence that they are up to the job. Is that confidence warranted? Are judges well suited to assess competing claims about the nutritional value of filled milk or a complex environmental policy?³⁸ To be sure, Barnett acknowledges that judges are not perfect; he observes that "[a]cross-the-board skepticism about the rationality of a restriction on liberty does not guarantee that prejudice bolstered by junk science will lose" (p. 148). He does not address the opposing concern, however, that judges will reject scientific or economic claims that they ought to accept.

Moreover, nearly every government regulation comes at some price to individual liberty. Determining whether a government regulation truly serves the public interest, therefore, requires determining whether the price is worth paying. Would courts be good at identifying and re-weighting relative costs and benefits of decisions like a ban on the use of medicinal marijuana?³⁹ They attempt to identify and reweigh the costs and benefits of state regulation in the context of the Dormant Commerce Clause, and there is longstanding controversy about whether they are equipped to do it well.⁴⁰

38. See p. 234 (criticizing the *Carolene Products* Court for relying on "junk science" to sustain a ban on the sale of "filled milk"). Barnett says that it was easy for the lower court in *Lee Optical* to conclude that operating a lensometer does not require the expertise of a specialist (like an optometrist) but can be operated by any "reasonably intelligent person" (like an optician) (p. 238). Regardless whether that conclusion would be easy to reach, many statutes would present far more complex questions.

39. See p. 188 (suggesting that prohibiting medicinal marijuana would violate either the Due Process Clause or the Ninth Amendment).

40. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997) (Thomas, J., dissenting) (insisting that "any test that requires us to assess," *inter*

Apart from institutional capacity, Barnett does not talk about the features of Article III that have traditionally provoked worry about over-zealous exercises of the power of judicial review. Consider life tenure. On the one hand, life tenure may make judges brave enough to stand up to the majority. On the other hand, life tenure means that judges are unaccountable for bad decisions so long as they are not insane or corrupt. If judges get it wrong, the People have no way to remove them from office. While one can doubt whether the People can effectively discipline legislators at the ballot box for any given policy choice,⁴¹ legislators must still ultimately face the People to keep their jobs. Article III judges—particularly Supreme Court justices, whose decisions are not subject to reversal by a higher authority—answer to no one. The feeling of infallibility that accompanies finality is a force to be guarded against.⁴² Properly understood, a commitment to judicial restraint is a commitment to resist the temptation to exceed the bounds of the judicial power.

My choice of the word “power” is deliberate. Barnett contrasts the “power” of Congress with the “duty” of judicial review. He says that Article I’s choice of the word “power” to describe the scope of Congress’s authority invokes “long-standing principles of agency law;” the government exercises its power “on behalf of and subject to the control of the principal,” the sovereign People who granted it power (p. 63, emphasis omitted). Power, he explains, goes hand in hand with limits. When he is talking about judicial review, by contrast, he stresses that it is not a “power” but a “duty” of the courts. In characterizing it as a duty, he stresses that Federalist No. 78 called it a “duty,” as did *Marbury v. Madison* in insisting that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” (p. 60,

alia, “whether a particular statute serves a ‘legitimate’ local public interest” and “whether there are alternative means of furthering the local interest that have a ‘lesser impact’ on interstate commerce, and even then makes the question ‘one of degree,’ surely invites us, if not compels us, to function more as legislators than as judges.”); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) (Black, J., dissenting) (“Whether it is in the interest of society for the length of trains to be governmentally regulated is a matter of public policy. . . . this Court [should] leave that choice to the elected legislative representatives of the people themselves, where it properly belongs both on democratic principles and the requirements of efficient government.”).

41. See pp. 176–77 (arguing that it is a fiction to believe that voters can discipline the policy choices of legislators through elections).

42. Cf. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (“We are not final because we are infallible, but we are infallible only because we are final.”).

emphasis omitted). The choice of the word “duty” rather than “power” is significant, Barnett argues, because “[p]owers can and should be exercised with discretion or ‘restraint,’ but we don’t speak the same way of our duties . . . [r]ather, we think these duties should be completely and fully honored. In contrast, the exercise of our powers can be characterized as a matter of discretion and moderation” (p. 126).

The Constitution, however, nowhere refers to a “duty of judicial review.” The ability to engage in judicial review exists by virtue of the “judicial Power” conferred by Article III, because that is the provision that enables federal courts to act. For constitutional purposes, then, judicial review is an exercise of power. If the distinction between “duty” and “power” matters in the way Barnett says—*i.e.*, that the concepts of restraint and limits are inapplicable to the exercise of “duty”—then judicial review falls in the “power” category. Just as Congress must be cognizant of the limits upon its legislative power, the courts must be cognizant of the limits upon their judicial power.

Barnett is much less concerned about courts exceeding the limits of the judicial power than about their not doing enough. When he addresses the potential harms of judicial review, he focuses on the harm the Court inflicts when it fails to invalidate a statute that it should. To make the point, he invokes examples about which there is agreement that the Court should have intervened, such as *Plessy v. Ferguson*,⁴³ as well as those about which there is not, such as *United States v. Carolene Products*.⁴⁴ Barnett does not discuss, however, the harm the Court can do when the mistake runs the other way: when it invalidates legislation that it should let stand. Focusing on the danger of the Court’s doing too little rather than too much is consistent with Barnett’s generally libertarian approach, which is reflected in the presumption of unconstitutionality he would give statutes—regulation is presumed to be unauthorized unless the government can show otherwise.⁴⁵ If government should regulate less, it is better for the Court to err on the side of striking down too much regulation than on the side of letting too much stand.

43. 163 U.S. 537 (1896).

44. 304 U.S. 144 (1938).

45. In other work, Barnett has argued that courts should replace the presumption of constitutionality with a presumption of liberty. See *supra* note 4. He does not make that argument express in OUR REPUBLICAN CONSTITUTION.

Even under the republican vision that Barnett elaborates, however, wrongful invalidation of regulation should be concerning. He argues that the purpose of government is to secure our pre-existing rights and that the government does that through regulations that promote health and safety. If courts stand in the way of legitimate health and safety regulation, they cripple the ability of government officials (the agents) to pursue policies securing the rights of individual sovereigns (the principals). Barnett keeps his focus on the sovereigns who challenge legislation in court. But of course other sovereigns favor the challenged policy, and it is unfair (not to mention unconstitutional) for courts to prevent them from achieving permissible aims.

There are winners and losers in the battle over whether to pass any given statute. Barnett is not a big fan of democracy, but voting is undeniably part of our system. Even if our Constitution is the republican one for which Barnett advocates, when a majority of the elected representatives who serve the People supports a constitutionally permissible statute, that statute is binding even on those who dissent from it. Overall, Barnett too quickly dismisses concerns about judicial activism. While he is right to insist that courts ought not operate based on a distorted understanding of judicial restraint,⁴⁶ he overcompensates in the other direction. There is a risk that a faction can run away with the legislative process, but there is also a risk that a faction will conscript courts into helping them win battles they have already lost, fair and square.

When litigants challenge the constitutionality of a statute in the Supreme Court, the question is whether those who object to the statute are entitled to a national rule precluding such regulation. Barnett's insights about federalism, while aimed at Congress, are relevant here. Barnett observes that nationalizing policy preferences risks increasing political polarization by entirely eliminating the possibility of dissent. "[T]he more important the issue," he points out, "the more likely it will engender a political war of all against all to avoid having another's social policy imposed on you" (p. 183, emphasis omitted).⁴⁷ While he is talking about Congress, the point is also applicable to the

46. See *infra* Part V.

47. See also pp. 183–84 ("[T]he more important the issue, the less it is fit to be decided at the national level.").

Supreme Court. Because the Court's holding on a constitutional question stands as a national rule that precludes local variation, battles in high profile cases are incredibly pitched and their results can be politically polarizing.⁴⁸ The Court's reluctance to disturb statutes that do not involve fundamental rights or suspect classifications limits the number of such battles that play out before it; insofar as state laws are concerned, the Court's deferential approach errs on the side of permitting local variation. More vigorous enforcement of federalism might decrease the risk of over-nationalizing policy preferences at the hands of Congress; at the same time, more vigorous enforcement of the Due Process and Equal Protection Clauses may increase the risk of over-nationalizing policy preferences at the hands of the Supreme Court. Once the Supreme Court weighs in on a constitutional question, the entire nation is bound, and the opportunity for regional differences is extinguished.

Deferential judicial review of run-of-the-mill legislation is consistent with the reality that the harm inflicted by the Supreme Court's erroneous interference in the democratic process is harder to remedy than the harm inflicted by an ill-advised statute. The Supreme Court's constitutional mistakes are extremely difficult to correct; one can hope only for a change of heart, a change of personnel, or a change by constitutional amendment. By contrast, it is feasible, even if difficult, to repeal or amend bad statutes, and both Congress and state legislatures do it with varying levels of frequency. At the state level, moreover, the harm of an ill-advised statute is regionally confined. Even if one state legislature makes a mistake, the other forty-nine remain free to choose a different course. A Supreme Court constitutional error, however, applies nationwide.

When it comes to confidence in the courts, it is worth noting that Barnett's examples highlight the ability of courts to curb the legislatures who enable rent-seeking majorities to unfairly restrict the liberty and property rights of minorities. He thus envisions the way that property-protective courts can curb the influence of progressive legislatures. But what if the tables are turned, and

48. Cf. William Eskridge, *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1313 (2005) (asserting that "Roe essentially declared a winner in one of the most difficult and divisive public law debates of American history," and it "was a threat to our democracy because it raised the stakes of an issue where primordial loyalties ran deep").

there are progressive courts and a property-protective legislature?⁴⁹ Would Barnett find it as attractive to have courts engaging in more aggressive judicial review? If one worries about the political inclinations of judges creeping in—and Barnett’s critique of progressive judges indicates that he does—then one might be warier about enhancing the risk that judges will confuse the demands of the Constitution with their own conception of the public interest.

Barnett characterizes courts as a refuge from the majoritarian excesses of the legislature, but they are only a refuge if they are untainted by the corrupting influences that Barnett sees in the democratic process. The history he recounts leaves one to wonder why he has such faith in courts. Would *Prigg*, *Dred Scott*, and *Plessy* have come out differently if courts had only applied the standard Barnett proposes? Was it really a misguided attachment to judicial restraint that drove those cases, or did the Court see through the same discriminatory lens as the legislature?⁵⁰ Courts are not always heroes and legislatures are not always villains. They are both capable of doing good, and they are both capable of doing harm.

Even if courts were always heroes, however, they could not offer us complete protection from legislative overreaching. The reality is that Congress and the President are frequently the only institutional actors with the opportunity to evaluate the constitutionality of legislation. In describing checks and balances, Barnett says, “Not only does such legislation have to pass two chambers of Congress, but it must be approved by the president and evaluated for constitutionality by the judiciary” (p. 211). But it doesn’t. Courts only get the opportunity to engage in judicial review when litigants with standing file complaints. Limitations upon standing—most notably, the general prohibition of “taxpayer standing”—mean that there are a great number of laws that federal courts never review. Courts do not, and in our

49. Cf. John Copeland Nagle, *Newt Gingrich, Dynamic Statutory Interpreter?* 143 U. PA. L. REV. 2209 (1995) (pointing out that proponents of dynamic statutory interpretation may be less enthused about the project of updating statutes to reflect current political preferences when the congressional majority is conservative).

50. A court opining that “we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable,” *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896), does not seem the kind of court likely to reach a different result even if the standard of review were more exacting.

constitutional system cannot, have as great a role in policing the political branches as Barnett would like them to.

V. JUDICIAL RESTRAINT

Our Republican Constitution is animated in large part by Barnett's frustration with what he regards as a misguided attachment to judicial restraint, particularly on the part of conservatives.⁵¹ In *NFIB v. Sebelius*, the inspiration for Barnett's book, Chief Justice Roberts pushed the Affordable Care Act beyond its plausible meaning to save the statute. He construed the penalty imposed on those without health insurance as a tax, which permitted him to sustain the statute as a valid exercise of the taxing power; had he treated the payment as the statute did—as a penalty—he would have had to invalidate the statute as lying beyond Congress's commerce power.⁵² Barnett vehemently objects to the idea that a commitment to judicial restraint—understood as deference to democratic majorities—can justify a judicial refusal to interpret the law as written.

Barnett is surely right that deference to a democratic majority should not supersede a judge's duty to apply clear text. That is true, incidentally, even if one subscribes to the collective view of popular sovereignty, for a judge who adopts an interpretation inconsistent with the text fails to enforce the statute that commanded majority support. If the majority did not enact a "tax," interpreting the statute to impose a tax lacks democratic legitimacy. Insofar as Barnett aims his critique of judicial restraint

51. See p. 17 (asserting that with *NFIB v. Sebelius*, "[t]he chickens of the conservative commitment to judicial restraint had thus come home to roost."); see also p. 81 (asserting that "the tragedy of the Supreme Court's decision in the Obamacare case was made possible by modern-day 'judicial conservatives' accepting as valid the progressive attack on our Republican Constitution."); p. 248 ("The visibility of our Obamacare challenge and the way a Republican-nominated, conservative chief justice snatched defeat from the jaws of victory, may prove to be a political inflection point.")

52. See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2593–2600 (2012) (characterizing the "penalty" imposed by the individual mandate as a "tax"). The other four justices in the majority on this issue would not have needed to construe the penalty as a tax to save the statute, because they thought that the Commerce Clause authorized Congress to impose the mandate. See *id.* at 2609 (Ginsburg, J., concurring in part, dissenting in part) ("Unlike the Chief Justice, however, I would hold, alternatively, that the Commerce Clause authorizes Congress to enact the minimum coverage provision."). The four dissenting justices objected that "[w]e have never held that *any* exaction imposed for violation of the law is an exercise of Congress' taxing power—even when the statute *calls* it a tax, much less when (as here) the statute repeatedly calls it a penalty." See *id.* at 2651 (joint opinion of Scalia, J., Kennedy, J., Thomas, J., and Alito, J., dissenting).

at the conservatives in his popular audience; it is worth considering why they might misunderstand the concept. It may be because they consider themselves originalists but misunderstand originalism.

Originalism is associated with judicial restraint in the popular consciousness because it emerged in the 1980s as a conservative response to the perceived activism of the Warren and Burger Courts.⁵³ Originalists insisted that the Court needed to be reined in so that the democratic process could function. They characterized originalism as a mechanism for stopping the minority of Supreme Court justices (and the elites who supported them) from imposing their will on the American majority. Originalism's ability to restrain judges was trumpeted as its chief virtue. It "was thought to limit the discretion of the judge" and to promote "judicial deference to legislative majorities."⁵⁴

Originalists have refined their arguments in the intervening years, however, and they have abandoned the claim that one should be an originalist because originalism produces more restrained judges.⁵⁵ Originalism has shifted from being a theory about how judges should decide cases to a theory about what counts as valid, enforceable law.⁵⁶ The Constitution's original public meaning is important not because adhering to it limits judicial discretion, but because it is the law. And because it is the law, judges must be faithful to it.⁵⁷ As Keith Whittington has explained, "The new originalism does not require judges to get

53. See Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL. 599, 601 (2004) ("[O]riginalism was a reactive theory motivated by substantive disagreement with the recent and then-current actions of the Warren and Burger Courts . . ."). By saying that originalism "emerged in the 1980s," I do not mean that it was entirely new. It is simply that before the 1980s, it was "not a terribly self-conscious theory of constitutional interpretation, in part because it was largely unchallenged as an important component of any viable approach . . ." *Id.* at 599. It emerged "in its modern, self-conscious form" after it was attacked. *Id.*

54. *Id.* at 602.

55. *Id.* at 608-09 (explaining that the new originalists have largely abandoned the emphasis on judicial restraint).

56. See Mitchell N. Berman & Kevin Toh, *On What Distinguishes the New Originalism from the Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545, 559 (2013) (asserting that it is accurate to say that the new originalism "is principally a theory about 'what counts as law.'" (quoting Steven D. Smith, *Reply to Koppelman: Originalism and the (Merely) Human Constitution*, 27 CONST. COMMENT. 189, 193 (2010)).

57. Keith Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 393 (2013) ("There is now a widespread emphasis on the centrality of constitutional fidelity to the originalist project, rather than the centrality of judicial restraint.").

out of the way of legislatures. It requires judges to uphold the original Constitution—nothing more, but also nothing less.”⁵⁸

The measure of a court, then, is its fidelity to the original public meaning, which serves as a constraint upon judicial decisionmaking.⁵⁹ A faithful judge resists the temptation to conflate the meaning of the Constitution with the judge’s own political preference; judges who give into that temptation exceed the limits of their power by holding a statute unconstitutional when it is not. That was the heart of the originalist critique of the Warren and Burger Courts. At the same time, fidelity will inevitably require a court to hold some statutes unconstitutional.⁶⁰ When a statute conflicts with the Constitution, the fundamental law of the Constitution must take precedence, and the ordinary law of the statute must give way—because, properly understood, it is not law at all. A court does not overstep simply by holding a statute unconstitutional; it oversteps if it does so without constitutional warrant. Assessing whether the Court has been activist requires one to evaluate the merits of its decisions, not to tally the number of statutes it has held unconstitutional.

Given their commitment to textual fidelity, one would be hard-pressed to find many originalists who think that a court should find a way to uphold a statute when determinate text points in the opposite direction. That is certainly true if the relevant text is constitutional. The Constitution’s meaning is fixed until lawfully changed; thus, the court must stick with the original public meaning of the text even if it rules out the preference of a current majority. It is also true, however, if the relevant text is a statute. Most originalists in constitutional interpretation are textualists in statutory interpretation.⁶¹ Textualists interpret statutes in accord with their original public meaning and maintain

58. See Whittington, *supra* note 53, at 609.

59. See Thomas Colby, *The Sacrifice of the New Originalism*, 99 GEO. L. J. 713, 751 (2011) (distinguishing between “judicial restraint—in the sense of deference to legislative majorities” and “judicial constraint—in the sense of promising to narrow the discretion of judges” (emphasis omitted)).

60. See Whittington, *supra* note 57, at 393 (asserting that “the tendency of the judiciary to uphold or strike down political actions must be purely contingent” because it is “[t]he stringency of constitutional requirements and the decisions of political actors [that] will determine the extent to which an originalist court will actively strike down legislation”).

61. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 8 (2001) (noting that “statutory textualists are originalists in matters of constitutional law”).

that their meaning is fixed until lawfully changed. Because textualists refuse to depart from clear statutory text, they would consider it wrong to twist statutory text beyond what its meaning will bear to avoid collision with a constitutional barrier.⁶²

NFIB v. Sebelius might be explained by the fact that Chief Justice Roberts has not proven himself to be a textualist in matters of statutory interpretation. Even in straight-up statutory interpretation cases, Chief Justice Roberts has found himself on the opposite side of staunch textualists like Justices Scalia, Thomas, and Alito precisely because of his willingness to depart from ostensibly clear text to better serve the statutory purpose.⁶³ Indeed, Richard Re has dubbed the Roberts Court's approach "the new *Holy Trinity*" after the case best known for openly prioritizing purpose over text. While the Roberts version does not expressly assert the power to depart from statutory text, Re

62. Thus modern textualists have backed away from the absurdity doctrine, which justifies textual departures when the application of a statute's plain text would produce an inequitable result. See Manning, *supra* note 28, at 2485-86 (arguing that the absurdity doctrine is inconsistent with the premises of modern textualism). They have also expressed doubt about the legitimacy of those canons that arguably permit courts to depart from a text's ordinary meaning. See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 164 (2010) (asserting that substantive canons permitting courts to alter the language of a statute conflict with "[t]he bedrock principle of textualism," which "is its insistence that federal courts cannot contradict the plain language of a statute, whether in the service of legislative intention or in the exercise of a judicial power to render the law more just").

63. Compare *King v. Burwell* 135 S. Ct. 2480, 2496 (2015) (holding in an opinion written by Chief Justice Roberts that the phrase "Established by the State" in the Affordable Care Act allows tax credits for insurance purchased on an exchange established by the federal government) with *id.* at 2496 (Scalia, J., dissenting) (insisting in an opinion joined by Justices Thomas and Alito that an exchange established by the federal government does not qualify as an exchange "Established by the State"); compare *Bond v. United States*, 134 S. Ct. 2077 (2014) (holding in an opinion written by Chief Justice Roberts that the defendant's use of toxic chemicals to injure her husband's lover did not constitute use of a "chemical weapon," defined by the relevant statute as "any chemical that can cause death, temporary incapacitation, or permanent harm to humans or animals") with *id.* at 2094 (Scalia, J., dissenting) (insisting in an opinion joined by Justices Thomas and Alito that "it is clear beyond doubt that [the Chemical Weapons Convention Implementation Act of 1998] covers what Bond did; and we have no authority to amend it. So we are forced to decide—there is no way around it—whether the Act's application to what Bond did was constitutional"). Chief Justice Roberts has also joined opinions that reflect disagreement with the Court's textualists. In *Yates v. United States*, 135 S. Ct. 1075 (2015), Chief Justice Roberts joined the majority to hold that a fish is not a "tangible object" for purposes of the Sarbanes-Oxley Act; Justice Alito concurred only in the judgment, and Justices Scalia and Thomas joined Justice Kagan's dissent. In *American Broadcasting Co., Inc. v. Aereo*, 134 S. Ct. 2498 (2014), Chief Justice Roberts joined the majority's interpretation of the word "perform" in the Copyright Act; Justices Scalia, Thomas, and Alito dissented. See *id.* at 2515.

observes that it accomplishes a similar result by considering “non-textual factors when determining how much clarity is required for a text to be clear.”⁶⁴ This methodology, when combined with Chief Justice Roberts’ devotion to constitutional avoidance,⁶⁵ has yielded cases like *NFIB v. Sebelius*.

To the extent that *NFIB v. Sebelius* expresses a commitment to judicial restraint by creatively interpreting ostensibly clear statutory text, its approach is at odds with the statutory textualism to which most originalists subscribe. Thus Justice Scalia, criticizing the majority’s construction of the Affordable Care Act in both *NFIB v. Sebelius* and *King v. Burwell*, protested that the statute known as Obamacare should be renamed “SCOTUScare” in honor of the Court’s willingness to “rewrite” the statute in order to keep it afloat.⁶⁶ For Justice Scalia and those who share his commitment to uphold text, the measure of a court is its fair-minded application of the rule of law, which means going where the law leads. By this measure, it is illegitimate for the Court to distort either the Constitution or a statute to achieve what it deems a preferable result.

All of this is to say that Barnett is not alone in his skepticism of either the Roberts Court’s conception of judicial restraint or its approach to statutory interpretation. Indeed, this is a point on which those who treat the original public meaning of text as a constraint might agree, regardless whether they embrace Barnett’s Republican Constitution.

64. Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407, 408 (2015).

65. See Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2112 (2015) (arguing that the Roberts Court has applied the avoidance canon so aggressively that it is willing to rewrite statutes to avoid addressing constitutional questions).

66. See *King*, 135 S. Ct. at 2507 (Scalia, J., dissenting). *King*, of course, is a case about statutory rather than constitutional interpretation, but insofar as the Court strained the language to avoid a holding that would have gutted the statute, the opinion reflects the same impulse animating *NFIB v. Sebelius*.

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9. POWERS DENIED CONGRESS

SUSPENSION CLAUSE

Interpretation of Suspension Clause

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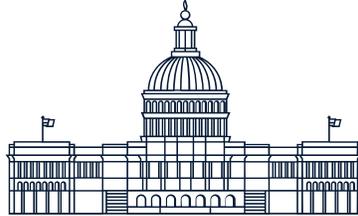
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Common Interpretation

The Suspension Clause

THE SUSPENSION CLAUSE

By Amy Barrett and Neal K. Katyal

The Suspension Clause protects liberty by protecting the privilege of the writ of habeas corpus. It provides that the federal government may not suspend this privilege except in extraordinary circumstances: when a rebellion or invasion occurs and the public safety requires it.

Appreciating the significance of this restraint first requires understanding the writ of habeas corpus. This writ, which Americans imported into the Constitution from English

common law, is a means by which a prisoner can test the

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legality of her detention. A person who believes she is being imprisoned illegally can file a petition asking a judge to issue a writ of habeas corpus. When a prisoner files a petition for a writ of habeas corpus, her custodian must explain why the restraint is lawful. If the explanation does not satisfy the court, it will order the custodian to release her. The writ is thus a crucial means by which a prisoner can obtain freedom.

Today, the writ of habeas corpus is primarily used by those serving prison sentences to challenge the legality of the process that resulted in their conviction. Historically, however, the writ was primarily used by those imprisoned without judicial process. Early Americans were keenly aware that monarchs of England had sometimes jailed people indefinitely without charging or trying them in court. Although the writ of habeas corpus existed, the king often ignored it. To protect against such abuse, Parliament enacted the Habeas Corpus Act of 1679 to ensure that the king released prisoners when the law did not justify confining them. This “Great Writ” guaranteed prisoners held on authority of the crown the right to invoke the protection of the judicial process.

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The founding generation valued the Great Writ because they had this history in mind. Yet those who framed and ratified the Constitution also believed that in times of crisis, the executive might need leeway to hold suspects without answering to a court. Parliament had suspended the writ during the seventeenth and eighteenth centuries when it concluded that the king needed expanded detention power to contain threats. Similarly, several states had equipped their governors with emergency power by suspending the writ during the Revolutionary War. Pre-ratification practice thus embraced both the importance of the writ and the need for a safety valve.

The Suspension Clause follows in this tradition. It protects the writ by imposing a general bar on its suspension. At the same time, it makes an exception for cases when an invasion or rebellion endangers the public safety. A suspension is temporary, but the power it confers is extraordinary. When a suspension is in effect, the president, typically acting through subordinates, can imprison people indefinitely without any judicial check.

The Clause does not specify which branch of government

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has the authority to suspend the privilege of the writ, but

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most agree that only Congress can do it. President Abraham Lincoln provoked controversy by suspending the privilege of his own accord during the Civil War, but Congress largely extinguished challenges to his authority by enacting a statute permitting suspension. On every other occasion, the executive has proceeded only after first securing congressional authorization. The writ of habeas corpus has been suspended four times since the Constitution was ratified: throughout the entire country during the Civil War; in eleven South Carolina counties overrun by the Ku Klux Klan during Reconstruction; in two provinces of the Philippines during a 1905 insurrection; and in Hawaii after the bombing of Pearl Harbor.

The most hotly debated questions concerning the Suspension Clause involve its effect in the absence of a formal suspension.

A threshold question is whether the Clause simply restrains Congress's ability to suspend whatever habeas jurisdiction is currently on the books, or whether the Clause grants an affirmative right to habeas review (or an adequate substitute for it). On the one hand, the Clause's general bar on

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suspension assumes that some access to habeas relief will

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exist when the privilege of the writ has not been suspended. On the other hand, as Chief Justice Marshall noted in *Ex Parte Bollman* (1807) the Clause does not itself expressly guarantee that access. The Court seems to have resolved this dispute in *Boumediene v. Bush* (2008), where it held that the Clause does not simply restrain Congress's ability to suspend existing habeas statutes but affirmatively guarantees prisoners some forum in which they can challenge the legality of their detention. Also in *Boumediene*, the Court decided—to much controversy—that habeas jurisdiction extends to prisoners detained outside the United States at Guantanamo Bay.

In recent years, the writ is most commonly sought by convicted defendants in state prison. Each year, over 18,000 petitions for the writ of habeas corpus are filed in federal court by state prisoners against their prison wardens. But a very slim fraction of those petitions are actually successful, in part due to the limits Congress placed on federal courts reviewing habeas petitions when it enacted the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). AEDPA significantly limited federal courts' power to grant habeas relief for state prisoners.



The questions about the scope of and limits on the Great Writ are far from settled. Both the Supreme Court's Guantanamo decisions and AEDPA remain controversial, as we grapple with the Founders' vision of the writ and the proper balance to strike between liberty and security.

Matters of Debate



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THE SCOPE OF THE SUSPENSION CLAUSE BY AMY BARRETT

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Neal K. Katyal

Paul and Patricia Saunders
Professor of National
Security Law, Georgetown
University Law Center

THE SUSPENSION CLAUSE BY NEAL K. KATYAL

Over the past two
decades, Congress has
made several efforts to

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American citizens held by the United States have the right to seek the writ of habeas corpus whether they are held at home or abroad.

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limit the availability of the writ of habeas corpus.

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SUSPENSION CLAUSE

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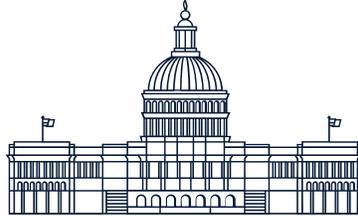
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Matters of Debate

The Scope of the Suspension Clause By Amy Barrett

THE SCOPE OF THE SUSPENSION CLAUSE

By Amy Barrett

American citizens held by the United States have the right to seek the writ of habeas corpus whether they are held at home or abroad. Noncitizens held within the United States also have a right to seek the writ. *Boumediene v. Bush* (2008) extends the right to a third category of detainees: noncitizens held outside the territorial jurisdiction of the United States. The case is controversial because its holding, which has significant implications for national security, is contrary to precedent and unsupported by the Constitution's text and

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history.

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Boumediene was not the first case in which the Supreme Court confronted the argument that a noncitizen enemy held abroad is entitled to seek a writ of habeas corpus in an American court. In *Johnson v. Eisentrager* (1950), a case decided in the wake of World War II, twenty-one German citizens held in an American military facility in Germany petitioned for the writ, maintaining that their detentions violated both the United States Constitution and international law. The Supreme Court held that American courts lacked authority to entertain these petitions. It observed that the constitutional text did not expressly confer such a right, and that no court in history had ever issued a writ of habeas corpus on behalf of a noncitizen held captive outside the territorial jurisdiction of the United States.

ANOTHER PERSPECTIVE

This essay is part of a discussion about the Suspension Clause with **Neal K. Katyal**, Paul and Patricia Saunders Professor of National Security Law, Georgetown University Law Center. [Read the full discussion here.](#)

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Boumediene abandoned *Eisentrager*'s bright-line test based on sovereignty and citizenship in favor of a multi-factor test that extends habeas jurisdiction to locations where courts think it reasonable to do so. In *Boumediene*, the Court asserted that the U.S. Constitution grants noncitizens imprisoned in Guantanamo Bay, which is in the sovereign territory of Cuba, the right to seek habeas corpus in federal court. Its conclusion rested on three considerations: (1) the fact that the detainees disputed their status as enemy combatants; (2) the Court's determination that the United States has functional control over Guantanamo Bay; and (3) its judgment that forcing the military to participate in habeas proceedings would not compromise national security. It then held that the Military Commissions Act, which permitted petitioners to challenge the legality of their detention in military tribunals but not federal habeas proceedings, was unconstitutional.

Reasonable people disagree about the wisdom of empowering the judiciary to second-guess the military's decision, often made on the battlefield, to classify a prisoner as an enemy combatant. *Boumediene*, however, was not about choosing sides in that policy debate; it was about determining what the Suspension Clause required. The Court struggled to justify its new rule as one imposed by the

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Constitution. Because the text of the Suspension Clause does not specify the scope of the protected habeas right, the Court has always defined it with reference to history. And the *Boumediene* Court conceded that the historical record fails to establish that courts had ever entertained habeas petitions filed by noncitizens held in other countries. The dissenters, who maintained that the Suspension Clause did not override Congress's choice to deny federal jurisdiction, had the better of the argument.

Whether *Boumediene* is right or wrong, it dealt with the core office of the writ: testing the legality of executive detention. The application of the Suspension Clause in the post-conviction context is much less certain. Because habeas was not a tool for obtaining post-conviction relief at the time the Constitution was ratified, the founding generation could not have understood the Clause to protect this use of the writ. Congress made post-conviction relief for state prisoners available in the late nineteenth century. Even if legislative expansions of the writ ratchet up the protection offered by the Clause—a proposition that the Court has never squarely embraced—Congress surely has more flexibility to shape jurisdiction here than it does in the executive detention context.

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STATUTORY INTERPRETATION

Because federal judges spend a substantial portion of their time interpreting statutes, a judge's theory of statutory interpretation has great practical importance. The two leading theories of statutory interpretation are purposivism and textualism. Both textualists and purposivists start from the premise that judges should serve as Congress's faithful agents when they interpret federal statutes. They disagree, however, about how judges should discharge that duty. On the United States Supreme Court, Justice Antonin Scalia (on the Court since 1986) has been an outspoken proponent of textualism and Justice Stephen Breyer (on the Court since 1994) an outspoken proponent of purposivism.

PURPOSIVISM

Purposivists maintain that a judge should be faithful to Congress's purpose rather than the statutory text when the two conflict. Although the statutory text is the best evidence of legislative intent, Congress's purposes may be narrower or broader than the text reflects. The limits of language and foresight may prevent Congress from drafting a statute that yields the result it would prefer in every case that will arise. To ensure that its interpretation advances Congress's objectives, a court should ask how a reasonable member of Congress would have wanted the court to interpret the statute in the circumstances at hand. It should then interpret the statute accordingly, even if its interpretation deviates from the statutory text.

Holy Trinity Church v. United States, 143 U.S. 457 (1892), is perhaps the most famous illustration of the purposive approach. That case involved a federal statute making it illegal to "in any way assist or encourage the importation or migration, of any alien . . . into the United States" by hiring the alien "to perform labor or service of any kind in the United States. . . ." (143 U.S. at 458). Holy Trinity Church was held liable for violating the statute after it hired an Englishman to move to New York to serve as its pastor. The Supreme Court reversed on the ground that Congress could not have intended the prohibition to apply to any professional worker, much less a minister. Summarizing the purposive approach, the Court explained that "a thing may be

within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.” (143 U.S. at 459).

TEXTUALISM

Textualists contend that it is impermissible for a judge to treat Congress’s unexpressed intent, rather than the enacted text, as controlling. As an initial matter, textualists are deeply skeptical that a coherent congressional intent exists apart from the statutory language. A bill begins with a policy impulse, but the legislative process shapes it into a statute on which legislators with conflicting priorities can agree. No bill successfully navigates the process of bicameralism and presentment, much less the internal committee structure in each House, unless proponents of the bill compromise on its terms. Moreover, no statute pursues its purposes at all costs: Congress must draw a line somewhere, and line drawing often renders statutes under- or over-inclusive. A judge who reshapes statutory language to alleviate its awkwardness risks undoing the very compromises that made the statute’s passage possible.

For the textualist, *Holy Trinity Church v. United States* illustrates what is wrong with the purposive approach. How could the Court know that Congress wanted to exclude professionals from the statutory prohibition? Even if the legislation was inspired by a desire to protect Americans in the manual labor market, it might have been controversial—and ultimately fatal to the bill—to create a broad exception for professionals. The statute referred to “labor or service of any kind,” and the textualist would apply it as written.

United States v. Locke, 471 U.S. 84 (1985), is an example of textualist interpretation. In that case, holders of unpatented mining claims attempted to comply with a statutory requirement that they file certain paperwork “prior to December 31st” by filing on December 31. The Supreme Court held that the mining claimants had missed the statutory deadline. The dissenting justices, taking a purposivist approach, would have interpreted the phrase “prior to December 31st” as Congress’s clumsy effort to authorize filing anytime before the end of the calendar year. But the Court refused to deviate from the statute’s plain language, which imposed a December 30 deadline. It asserted that “to attempt to decide whether some date other than the one set out in the statute is the date actually ‘intended’ by Congress is to set sail on an aimless journey.”

TOOLS OF INTERPRETATION

Both purposivists and textualists begin with the language of the statute, but both will consult other sources for assistance in interpreting it. Two prominent interpretive tools are canons of construction and legislative history.

Canons of Statutory Construction. The canons of construction are principles that courts apply when they read statutes. Some canons are linguistic rules of thumb. For example, the “rule against surplusage” counsels a court to avoid interpreting a statute in a way that will render any word superfluous, and the “*in pari materia*” (Latin for “on the same subject”) canon instructs a court to construe individual words in the context of the whole statute. Other canons reflect policy choices. For example, the “rule of lenity” (leniency) requires a court to resolve any ambiguity in a penal statute in favor of the defendant, and the “avoidance canon” advises a court to avoid interpreting a statute in a way that provokes a serious constitutional question.

Purposivists are less confident than textualists in the utility of linguistic canons. Given their focus on language, textualists regard linguistic canons as presumptively reliable guides to a statute’s ordinary meaning. Purposivists, by contrast, argue that linguistic canons focus excessively on the text. For the purposivist, the legislative history of a statute is more helpful than linguistic canons in determining what Congress hoped to communicate by the language it chose.

The federal courts have routinely applied both linguistic and substantive canons since the country’s founding. Theorists have pressed the courts, however, to better justify some of the canons that they apply. The United States Supreme Court has not explained the source of its authority to adopt policy-based canons, and empirical work suggests that the canons might rest on inaccurate assumptions about how Congress expects courts to interpret statutes. Despite these critiques, the canons continue to play a prominent role in statutory interpretation.

Legislative History. The use of legislative history is a particular point of contention between textualists, who reject it, and purposivists, who embrace it. Textualists’ fundamental objection to legislative history reflects their theoretical disagreement with purposivists. Judges use legislative history to discover legislative intent, and textualists reject the proposition that what Congress intended matters more than what Congress said.

Even assuming the relevance of legislative intent, however, textualists insist that legislative history is a poor indication of it. They argue that legislative history does not reflect the views of senators and representatives, who rarely read it; rather, it reflects the views of the staffers and lobbyists who draft it in the hope of influencing courts. And because partisans on all sides insert their agendas into the legislative record, the use of legislative history corrupts the judicial process by enabling a court to cherry-pick the statements with which it is most sympathetic.

Purposivists admit that judges can cherry-pick legislative history, but they point out that willful judges can impose their policy preferences on a statute even without using legislative history. They also acknowledge that members of Congress do not always read the legislative history attributed to them, but insist that is the way complex institutions work: subordinates write reports on behalf of high-level officers, who may or may not read them. Purposivists thus do not argue that legislative history is a perfect tool. Instead, they argue that it is often the best available means of discovering Congress's purpose.

CONSTITUTIONAL INTERPRETATION VERSUS STATUTORY INTERPRETATION

Lawmakers typically draft statutes to address specific, current problems of governance. The Framers of the Constitution, by contrast, drafted a document designed to give future lawmakers the flexibility to address problems that the Framers could not foresee. Detailed statutes become outdated as the circumstances that inspired them change, but the relatively sparse language of the Constitution has permitted it to endure. In over 200 years, it has been amended only twenty-seven times.

The differences between the United States Code and the United States Constitution prompted Chief Justice John Marshall's famous remark in *McCulloch v. Maryland* that "we should never forget it is a constitution we are expounding" (17 U.S. 316, 404 [1819]). Statutory interpreters often parse detailed provisions, but constitutional interpreters typically confront language written at a relatively high level of generality. They also confront language adopted long ago, which gives history and tradition a far more prominent role in constitutional than in statutory interpretation. For example, when interpreting a provision in the United States Constitution, the Supreme Court may consider how it was understood in the late 1700s, as well as how it has been used in the two centuries since. Statutory interpretation rarely requires such extensive historical study.

Yet there are also similarities. Constitutional interpreters, like statutory interpreters, must decide whether the text is a hard constraint. Unsurprisingly, those who maintain that courts must apply statutes as written take the same position on the Constitution, and those who accept judicial adjustments of statutory text treat constitutional language with similar flexibility.

STATUTORY INTERPRETATION AND AMERICAN GOVERNANCE

At bottom, purposivism and textualism take differing views of the role of the federal courts in American governance. Purposivists cast courts as the partners of Congress. Shaping statutory text to avoid consequences Congress would

not have intended helps Congress govern more effectively. Voters, moreover, would presumably prefer courts to decide cases in accordance with the legislative purposes they know rather than the detailed language with which they are unfamiliar.

Textualists, by contrast, insist that a judge who tampers with the product of the democratic process undermines democracy itself. Congress can enlist the help of courts by using broad language that invites them to reach decisions sensitive to the facts of each case. But clear language constrains. A court that fails to apply the enacted text substitutes its view for that of the democratically elected legislature. In doing so, it both exceeds "the judicial power" granted by Article III and subverts the process of bicameralism and presentment prescribed by Article I, Section 8.

SEE ALSO *Article III, United States Constitution*; *Constitutional Interpretation; Statutes and Case Law*; *Supreme Court of the United States*.

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American Governance

VOLUME 2

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decide it. Congress possesses significant authority to shape federal jurisdiction within the limits set by the Constitution. Its choices in that regard reflect, among other things, judgments about the proper role of the federal courts in American governance.

THE JURISDICTION OF THE INFERIOR FEDERAL COURTS

The Constitution does not itself establish inferior federal courts. Article III vests federal judicial power “in such inferior Courts as the Congress may from time to time ordain and establish,” and Article I, Section 8, gives Congress the power “[t]o constitute Tribunals inferior to the supreme Court.” While Congress has varied the structure of the federal judicial system over time, the modern system consists of two levels of inferior courts. The US District Courts exercise original jurisdiction, which is the authority to decide a case in the first instance, and the US Courts of Appeals possess the authority to review the judgments of the district courts.

Article III of the Constitution specifies the matters subject to federal jurisdiction. For example, Article III identifies cases arising under federal law and controversies between citizens of different states as matters within federal judicial power. Article III does not itself, however, authorize inferior federal courts to hear cases. That decision belongs to Congress, which decides how much of the federal judicial power to grant. Congress has never vested federal courts with the full scope of jurisdiction permitted by the Constitution.

HISTORICAL FOUNDATIONS

When Congress first created inferior federal courts in the Judiciary Act of 1789, it gave them relatively narrow original jurisdiction. Among other things, the first Judiciary Act gave inferior federal courts exclusive jurisdiction over federal crimes, matters of admiralty and maritime, and suits against consuls and vice-consuls. It gave them jurisdiction concurrent with the state courts over cases brought by the United States and cases in which an alien sued in tort for a violation of the law of nations or a United States treaty. And it gave inferior federal courts diversity jurisdiction over suits in which an alien was a party and suits between a citizen of the state in which a suit was brought and a citizen of another state. The first Judiciary Act did not, however, give federal courts the branch of federal jurisdiction considered most important today: general federal question jurisdiction, which is the authority to decide cases arising under federal law. Instead, the act left the interpretation and application of federal law largely to the state courts.

This trust of state courts was consistent with founding-era attitudes toward federalism. The very existence of

FEDERAL COURT JURISDICTION

Federal jurisdiction is the authority of a federal court to adjudicate a case. Article III of the United States Constitution specifies the matters within federal jurisdiction, but the fact that a case falls within Article III does not necessarily mean that a federal court has the authority to

inferior federal courts was a point of contention at the Constitutional Convention because some feared that federal courts would displace the role of state courts in American governance. A compromise engineered by James Madison settled the controversy by rendering inferior federal courts optional. To be sure, the First Congress immediately exercised its power to establish inferior federal courts. But the relatively limited jurisdiction it gave them reflected the judgment that state courts were the primary adjudicators in the American system, even for cases involving federal law.

For most of the nineteenth century, Congress made no significant modifications to this basic jurisdictional scheme. In the 1860s, Congress began slowly expanding the jurisdiction of the federal courts, and in the Judiciary Act of 1875, it radically enlarged their jurisdiction by granting general federal question jurisdiction to the inferior federal courts. This Reconstruction-era judgment fundamentally shaped the history of the federal courts. Since then, interpreting and applying federal law has been their most important role.

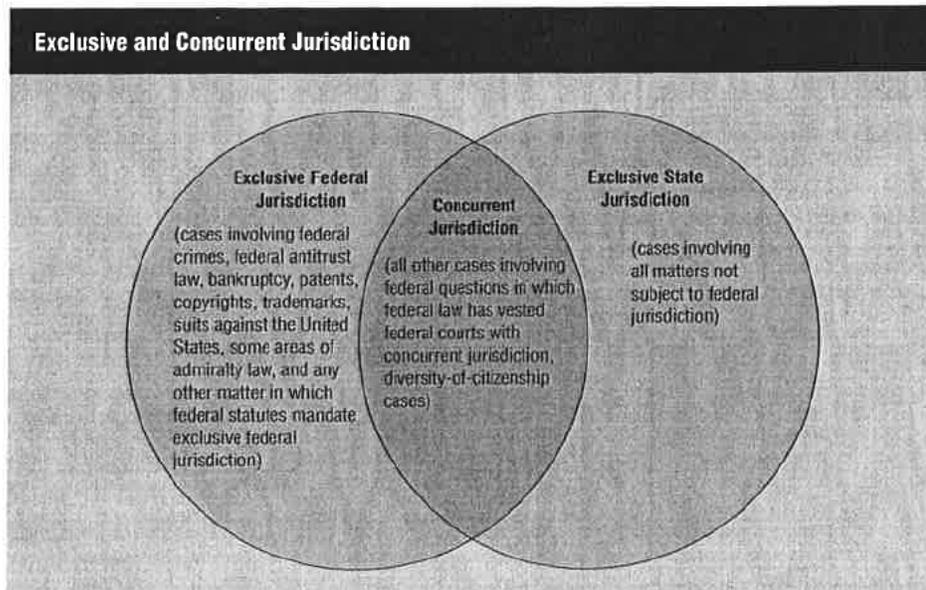
FEDERAL QUESTION AND DIVERSITY JURISDICTION

The most significant modern sources of original federal jurisdiction are the federal question statute, 28 U.S.C. § 1331, which is the descendant of the grant of federal question jurisdiction in the Judiciary Act of 1875, and

the diversity statute, 28 U.S.C. § 1332, which is the descendant of the diversity grant in the Judiciary Act of 1789. While these grants are substantial, both fall well short of the federal jurisdiction authorized by the Constitution.

The federal question statute implements Article III, Section 2, of the Constitution, which provides that “[t]he 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.” In *Osborn v. United States*, 22 U.S. 738 (1824), the Supreme Court interpreted this portion of Article III quite broadly, holding that it empowers Congress to authorize federal jurisdiction whenever federal law is an “ingredient” of the case.

Even though 28 U.S.C. § 1331 uses language nearly identical to that of Article III, Section 2, the Supreme Court has interpreted the statutory grant far more narrowly. In *Louisville & Nashville, Railroad v. Mottley*, 211 U.S. 149 (1908), the Court held that a case only “arises under” federal law for purposes of § 1331 if federal law is part of the plaintiff’s “well-pleaded complaint.” In other words, § 1331 does not authorize a federal court to assume jurisdiction over a case in which a federal question is asserted only as a defense, even though a federal defense would constitute an “ingredient” of the case for purposes of Article III. For many years, Congress limited



Venn diagram of exclusive and concurrent jurisdiction for US federal and state courts as reflected in the statutory division of jurisdiction as of 2015. GRAPHIC BY LUMINA DATAMATICS LTD. © 2015 CENGAGE LEARNING®

the federal question jurisdiction of the federal courts still further, providing that they could only hear such cases when the amount in controversy exceeded \$500. It dropped that requirement in 1980.

The diversity jurisdiction of the federal courts reflects a similar gap between the constitutionally permissible and the statutorily granted. For one thing, Congress has always imposed an amount-in-controversy limitation on diversity jurisdiction, even though the Constitution imposes no such limit. The Judiciary Act of 1789 limited diversity jurisdiction to those suits in which the amount in controversy exceeded \$500. Congress has periodically increased that amount in the centuries since; 28 U.S.C. § 1332, as amended in 1996, sets the amount-in-controversy requirement at \$75,000.

More confining than this amount-in-controversy requirement, however, are the limitations the statute imposes upon diversity of citizenship. Article III extends federal jurisdiction to “controversies . . . between citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.” This language requires only minimal diversity: for purposes of the Constitution, jurisdiction exists if even one plaintiff and one defendant are citizens of different states. By contrast, the statute requires complete diversity: each plaintiff must be a citizen of a different state than each defendant. This requirement of complete diversity renders the diversity jurisdiction of the federal courts significantly narrower than that permitted by Article III itself.

DEBATES ABOUT INFERIOR COURT JURISDICTION

Crowded federal dockets have generated a debate about whether Congress should restructure federal jurisdiction in a way that would ease the workload of the federal courts. The most common proposal is for Congress to significantly narrow or entirely abolish the diversity jurisdiction of the federal courts. Diversity jurisdiction is designed to offer a neutral federal forum to litigants who might face prejudice in a court of the opponent’s state. Many claim that while the risk of regional bias may have been real in the founding era that risk no longer exists today. Others argue that bias or at least the fear of it persists, and that without diversity jurisdiction, businesses may be unwilling to invest in other parts of the country for fear of facing litigation in state courts that are hostile to outsiders. Thus far, critics have failed to persuade Congress to further restrict the diversity jurisdiction of the federal courts.

Another jurisdictional debate concerns the scope of Congress’s power over the inferior federal courts. While that power is indisputably broad, controversy exists about whether it is absolute. In particular, commentators

disagree about whether Congress must ensure that an inferior court has jurisdiction to hear any case falling outside the Supreme Court’s appellate jurisdiction. Some interpret Article III to require that some federal forum—either original or appellate—be available for every case within the federal judicial power. Critics of this view point out that Article III makes inferior federal courts optional and insist that state courts can adequately adjudicate federal claims. The Supreme Court has never confronted a case requiring it to squarely choose between these competing conceptions of Congress’s power to define federal jurisdiction.

THE JURISDICTION OF THE SUPREME COURT

In contrast to the inferior federal courts, which exist at Congress’s discretion, the Supreme Court is created by the Constitution itself. It also derives its jurisdiction, both original and appellate, directly from the Constitution. The degree to which Congress can modify these constitutional grants of jurisdiction is a difficult and contested question of constitutional law.

Original Jurisdiction. Article III grants the Supreme Court original jurisdiction over “all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party.” In *Marbury v. Madison*, 5 U.S. 137 (1803), the Supreme Court squarely held that Congress cannot expand the Court’s original jurisdiction. It is less clear whether Congress can contract it.

From the beginning, Congress has acted on the assumption that it can contract the Court’s original jurisdiction. In the Judiciary Act of 1789, Congress specified the original jurisdiction of the Supreme Court in a manner falling short of the constitutional grant. For example, the statute described the Court’s original jurisdiction as extending to suits in which ambassadors were parties, even though the Constitution grants the Court jurisdiction over cases merely “affecting” ambassadors. The modern statute governing the Supreme Court’s original jurisdiction, 28 U.S.C. § 1251, likewise falls short of the constitutional grant. The Supreme Court has never passed on the constitutionality of such statutory limitations on its original jurisdiction. It has suggested in dicta, however, that they are unconstitutional (see, e.g., *California v. Arizona*, 440 U.S. 59 [1979]).

While the Court has expressed doubts about Congress’s ability to contract its original jurisdiction, it has held that Congress may make that jurisdiction concurrent with the jurisdiction of inferior federal courts or state courts. And indeed, while Congress has given the Supreme Court exclusive jurisdiction of all controversies between two or more states, it has made all other

cases within the Court's original jurisdiction subject to adjudication by other courts.

Appellate Jurisdiction. Article III, Section 2, provides that in all cases outside the Supreme Court's original jurisdiction and within the federal judicial power, "the supreme Court shall have appellate Jurisdiction . . . with such exceptions, and under such Regulations as the Congress shall make." While this clause vests the Supreme Court with appellate jurisdiction, it also explicitly gives Congress the power to withdraw that jurisdiction. In *Durosseau v. United States*, 10 U.S. 307 (1810), the Court chose to construe all statutes affirmatively, describing its appellate jurisdiction as implicitly withdrawing any appellate jurisdiction that they did not describe. As a practical matter, then, the Court treats its appellate jurisdiction as dependent upon statutory grant.

From the beginning, Congress has given the Supreme Court jurisdiction to review the judgments of inferior federal courts. The Judiciary Act of 1789 gave the Supreme Court jurisdiction to review the civil judgments of federal circuit courts when the judges of the circuit court were divided on a question and the amount in controversy exceeded \$2,000. Notably, the Court had no appellate jurisdiction over criminal cases. The Court's jurisdiction over inferior federal courts has increased over time; it now has jurisdiction over both criminal and civil appeals from inferior federal courts, and its jurisdiction exists without regard to the amount of money at stake. The bulk of the Court's docket is devoted to the review of judgments rendered by inferior federal courts.

The Supreme Court also has the authority to review the judgments of state courts insofar as they turn on questions of federal law. Section 25 of the Judiciary Act of 1789 gave the Supreme Court jurisdiction to review cases in which a state's highest court decided against a federal claimant, and in 1914, Congress expanded the Court's jurisdiction to permit it to review cases in which a state's highest court held in favor of a federal claimant. This basic jurisdictional scheme remains in place today and is codified at 28 U.S.C. § 1257. In the eighteenth and nineteenth centuries, many states objected to the proposition that the Supreme Court could review their judgments, but in *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), the Court interpreted Article III to permit it to exercise such jurisdiction.

A major change to the Supreme Court's docket over time has been the shift from mandatory to discretionary appellate jurisdiction. The first Judiciary Act obliged the Court to hear all appeals within its jurisdiction. Over time, Congress rendered more and more of the Court's jurisdiction discretionary, and in 1988, it almost entirely eliminated the Court's mandatory jurisdiction. As a

result, the Court now has substantial control over both the size and subject matter of its docket. It typically hears only cases presenting important questions of federal law on which the US Courts of Appeals and/or the highest courts in each state are divided. It rarely takes cases simply to correct an error in the judgment of an inferior federal court or a state court.

A persistent controversy regarding the Supreme Court's appellate jurisdiction is the degree to which Congress can abrogate it. The Constitution expressly gives Congress the authority "to make Exceptions" to the Supreme Court's appellate jurisdiction. Congress has occasionally proposed legislation that would withdraw the Court's ability to decide cases involving controversial issues like abortion and school prayer. In response to such jurisdiction-stripping proposals, critics have insisted that Congress does not have unlimited power over the Supreme Court's appellate jurisdiction. For example, Leonard Ratner argues in "Congressional Power over the Appellate Jurisdiction of the Supreme Court" that any "exceptions" to the Court's appellate jurisdiction cannot "negate" the Court's "essential constitutional functions of maintaining the uniformity and supremacy of federal law" (1960, 201-2).

CONCLUSION

Congress has greatly expanded the power of the federal courts since the founding. At the same time, it has resisted giving federal courts the full scope of judicial power available under Article III. This resistance stems from a variety of factors, including respect for state courts, the need to allocate federal resources, and inter-branch struggle over controversial judicial decisions. The way in which Congress calibrates federal jurisdiction inevitably expresses a judgment about the role of the federal courts in American governance.

SEE ALSO *Article III, United States Constitution; Constitutional Litigation; Ex parte McCardle; Federal Circuit Courts; Federal District Courts; State Court Jurisdiction; Supreme Court of the United States.*

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Reflection - December 22, 2015

Amy Barrett '97 J.D.



Diane and M.O. Miller, II Research Chair in Law

One of the many remarkable things about the Magnificat is that it reflects Mary's complete embrace of the long view.

Her present circumstances were precarious, given the very real possibility that she would face abandonment and scandal. Yet Mary sees beyond the judgment her contemporaries might render to proclaim that "all generations will call me blessed." She goes on to praise not only what the Mighty One has done for her but also the mercy God shows to generation after generation.

In sum, Mary does not focus on the consequences of the Incarnation for her own life. She understands that her life is not just about her, but also—and more importantly—about her place in salvation history.

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Reflection - December 22, 2015 <u>Gospel - December 22, 2015</u> <u>Prayer - December 22, 2015</u>	<p>Mary's place in salvation history is far more significant than any of ours, but what she sees is true for all of us. Life is about more than the sum of our own experiences, sorrows, and successes. It's about the role we play in God's ever-unfolding plan to redeem the world.</p> <p>That sounds lofty, but it's about taking the long view. Do we see success through the eyes of our contemporaries, or through the eyes of God? Do we focus only on what God does for us, or also on what God can do for others through us?</p> <p>This perspective challenges me to reorient my priorities. For example, I have been reflecting lately on how we allocate our time as a family. Our schedule is crowded with soccer practices and music lessons. We do not, however, block out regular time for activities like serving the poor or visiting the elderly. That happens when the calendar is free of other scheduled events—and it rarely is. When I take the long view, I see that the resources we devote to shorter-term priorities outstrip the ones we devote to work that is closer to our Father's heart.</p> <p>To know Christ is to love him, and in loving him, his concerns become ours. In these last days of Advent, let us join Mary in praising our King, who raises the lowly and fills the hungry with good things. And let us resolve to join him in this work.</p>
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SUSPENSION AND DELEGATION

Amy Coney Barrett†

A suspension of the writ of habeas corpus empowers the President to indefinitely detain those suspected of endangering the public safety. In other words, it works a temporary suspension of civil liberties. Given the gravity of this power, the Suspension Clause narrowly limits the circumstances in which it may be exercised: the writ may be suspended only in cases of “rebellion or invasion” and when “the public Safety may require it.” Congress alone can suspend the writ; the Executive cannot declare himself authorized to detain in violation of civil rights. Despite the traditional emphasis on the importance of exclusive legislative authority over suspension, the statutes that Congress has enacted are in tension with it. Each of the suspension statutes has delegated broad authority to the President, permitting him in almost every case to decide whether, when, where, and for how long to exercise emergency power. Indeed, if all of these prior statutes are constitutional, Congress could today enact a law authorizing the President to suspend the writ in Guantánamo Bay if he decides at some point in the (perhaps distant) future that the constitutional prerequisites are satisfied. Such a broad delegation undermines the structural benefits that allocating the suspension decision to Congress is designed to achieve. This Article explores whether such delegations are constitutionally permissible. It concludes that while the Suspension Clause does not prohibit Congress from giving the President some responsibility for the suspension decision, it does require Congress to decide the most significant constitutional predicates for itself: that an invasion or rebellion has occurred and that protecting the public safety may require the exercise of emergency power. Congress made this determination during the Civil War, but it violated the Suspension Clause in every other case by enacting a suspension statute before an invasion or rebellion actually occurred—and in some instances, before one was even on the horizon.

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† Professor, Notre Dame Law School. I am grateful to Anthony Bellia, Jr., Paul Diller, Tara Grove, Bill Kelley, Andrew Kent, David Moore, Trevor Morrison, John Nagle, Jeff Pojanowski, Saikrishna Prakash, Alexander Tsesis, and Amanda Tyler for helpful comments on earlier drafts. Thanks also to participants in workshops at Brigham Young University, the University of Illinois, and the University of Notre Dame. Research librarian Dwight King provided expert assistance and Erin Brown, Nathan Catanese, Jessica Ettinger, Mike Gerardi, Alyssa Hazelwood, and Ryan Snyder provided excellent research assistance.

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INTRODUCTION

After the Japanese bombed Pearl Harbor, President Franklin D. Roosevelt suspended the privilege of the writ of habeas corpus in Hawaii, thereby empowering authorities to preventatively and indefinitely detain anyone suspected of endangering the public. He relied on a forty-one-year-old statute authorizing the President to suspend the privilege in that territory whenever he determined that a rebellion or an invasion had occurred and that protecting the public safety required it. This statute was a remarkable delegation of authority to the Executive insofar as it enabled him to both trigger and define the scope of his own emergency power. It does not stand in isolation, for the seven federal suspension statutes enacted since the Civil War have all delegated suspension power to the President.¹

A sweeping assignment of suspension authority to the President sits uneasily with the widespread insistence of scholars and judges that

¹ See Act of Aug. 1, 1950, ch. 512, § 6, 64 Stat. 384, 386 (delegating authority to suspend writ in Guam); Act of June 22, 1936, ch. 699, § 20, 49 Stat. 1807, 1812 (Virgin Islands); Phillipines Organic Act, 32 Stat. 691, 692 (1902) (Philippines); 31 Stat. 77, 81 (1900) (Puerto Rico); Hawaii Organic Act, 31 Stat. 141, 153 (1900) (Hawaii); Ku Klux Klan Act of 1871, 17 Stat. 13, 14-15 (1871) (authorizing a suspension of habeas corpus in areas affected by Ku Klux Klan activity); Habeas Corpus Suspension Act of 1863, 12 Stat. 755, 755 (1863) (granting the President power to suspend habeas corpus during the Civil War).

for formal and functional reasons, suspension is an exclusively legislative task. The chief function of the writ is to protect from executive detention in violation of civil rights. Because a suspension of the writ's privilege grants the executive emergency power to detain in violation of civil rights, giving the President charge of the decision to suspend concentrates tremendous power in his hands. Building on settled English practice, our constitutional tradition has almost unfailingly treated the suspension decision as belonging to the legislature, a body that is more deliberative, more politically representative, and less biased in favor of exercising emergency power in a national security crisis. Broad delegations of suspension authority to the President arguably undercut the protection offered by this institutional arrangement. While there is virtual unanimity in the view that the Constitution vests Congress alone with the power to suspend, the question whether Congress is constrained in its ability to delegate this power is difficult and unsettled.²

The Constitution provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”³ A decision to suspend the privilege thus requires two determinations: (1) that a rebellion or an invasion exists, and (2) that protecting the public safety may require the exercise of emergency power. This Article asks whether Congress must itself determine the existence of these predicates to suspension or whether it can delegate either or both of these decisions to the Executive Branch. In so doing, the Article addresses a gap in the scholarly debate about the ways in which the Suspension Clause limits the power of the political branches.

After Part I recounts the rationale for vesting the suspension power in Congress, Part II discusses how legislatures have historically allocated responsibility for the suspension decision. The practice in that regard has varied widely over time. While Parliament and founding-era state legislatures suspended the privilege outright, the Civil War Congress introduced the delegation model in the Habeas Corpus Act of 1863 after President Abraham Lincoln's unilateral and contro-

² See, e.g., Trevor W. Morrison, *Hamdi's Habeas Puzzle: Suspension as Authorization?*, 91 CORNELL L. REV. 411, 429 n.106 (2006) (“The scope of Congress’s power to delegate suspension authority has never been conclusively determined, and there is considerable variation in the legislation authorizing past suspensions.”); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 689–90 (2009) (“Historically and functionally speaking, . . . the executive should not be understood to lay claim to the unilateral power to suspend. But beyond this important premise, many very difficult questions remain. . . . [M]ay Congress delegate the ultimate decision to suspend to the President?”); Developments in the Law, *Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1265 n.14 (1970) [hereinafter *Federal Habeas Corpus*] (“The validity of a delegation [of suspension power] or the terms of a delegation have apparently never been clearly adjudicated.”).

³ U.S. CONST. art. I, § 9, cl. 2.

versial decision to suspend. There was no doubt in 1863 that a rebellion was underway, but in a departure from historical practice, the statute allowed the President to determine whether, when, where, and for how long protection of the public safety required suspension. The 1863 Act was an influential legislative precedent: all subsequent federal suspension statutes followed its delegation model. The Reconstruction Congress authorized President Ulysses S. Grant to suspend the privilege of the writ if he decided that Klan activity in the South rose to the level of a rebellion sufficiently threatening the public safety. A series of twentieth-century statutes enacted outside the context of any particular security crisis conferred still greater power upon the President. In these five statutes, which all governed United States territories, Congress empowered the President to exercise emergency power in response to any invasion or rebellion that might arise in the future. Despite the dominance of the delegation model in the nineteenth and twentieth centuries, a study of history reveals repeated challenges to it on the ground that the Constitution renders the suspension decision wholly nondelegable. Indeed, Part II emphasizes that the separation of powers controversy in this context has been more complicated than the notorious "Lincoln versus Congress" fight about whether Congress alone possesses the power to initiate a suspension. The emergence of the delegation model provoked a recurring debate about whether Congress could empower the President to decide when, where, and for how long to suspend the privilege of the writ. This debate identifies issues that may well arise in the future. For example, could Congress give the President advance authorization to suspend the writ in Guantánamo Bay whenever he concludes that a terrorist invasion of the United States has occurred and that the public safety requires it?

Part III confronts a threshold constitutional objection to delegation in the context of suspension. Congress structured each of the seven federal suspension statutes as a contingent delegation—a statute triggered by the Executive's determination that some condition has been satisfied. Consistent with this contingent format, none of the suspension statutes suspended the writ outright; instead, each gave the President discretion to suspend once he concluded that there was a rebellion or an invasion and that requisite threat to public safety existed. An initial difficulty with these statutes is that they permitted the President to temporarily repeal otherwise binding federal law in violation of Article I, Section 7's requirement of bicameralism and presentment. Part III explains that while this objection is fatal to these statutes as written, the flaw could have been avoided by careful drafting. As far as Article I, Section 7 is concerned, Congress can grant the President what is functionally the authority to repeal statutes

so long as it ensures that the consequence of repeal formally flows from the statute rather than the executive order. In other words, Congress cannot authorize the President to suspend the writ, but it can render suspension an automatic consequence of the President's determination that the conditions for the statute's effectiveness exist. Article I, Section 7 thus does not itself pose an insurmountable barrier to Congress's ability to give the President control of a suspension's timing.

Part IV explores whether the Suspension Clause alters Congress's otherwise broad power to delegate responsibility to the Executive Branch. Contingent delegations are often desirable because they allow Congress the flexibility to provide in advance for events that it cannot foresee. The Suspension Clause, however, establishes an important exception to the general rule permitting contingent legislation. It is well recognized that the Clause serves as a substantive limit describing the circumstances under which Congress can authorize emergency power. Unappreciated is that the Clause also serves as a temporal limit dictating the time at which Congress can enact the authorization. For both historical and functional reasons, its proscription of suspension "unless when in Cases of Rebellion or Invasion the public Safety may require it"⁴ is best understood as prohibiting Congress from passing a suspension statute unless the country is actually *in* a state of rebellion or invasion. That said, the Clause does not rule out contingent delegations altogether. By its very terms, Congress need only decide that "the public Safety *may* require [suspension]"⁵ before it enacts a suspension statute. Thus, so long as Congress concludes that an invasion or rebellion presently exists and that the public safety is in a precarious state, it can task the President with determining the point at which protecting the public safety actually requires the exercise of emergency power.

While the Suspension Clause limits Congress's ability to employ contingent delegations, Part V maintains that it does not demand that Congress further constrain the President's discretion. Historically, critics of the federal suspension statutes have claimed that Congress can leave the President virtually no discretion in defining a suspension's scope. In particular, they have objected to the omission of restraints traditionally included in parliamentary and early state suspension legislation. Those laws almost invariably contained a sunset clause and a requirement that only a defined set of the highest-ranking executive officials could order preventative arrests. In contrast to these laws, the seven federal statutes have given the President almost total power to define the suspension's terms. Only one

⁴ *Id.*

⁵ *Id.* (emphasis added).

statute contained a sunset clause, and only two included any sort of geographic limitation. None prohibited the President from subdelegating his power to declare the writ suspended, much less to issue warrants for mere suspects. Yet while these restrictions may be advisable as a matter of policy, nothing in the text of the Clause either expressly or impliedly requires them. The default rule of congressional freedom to implement legislation as it sees fit thus remains in place. History nonetheless reveals the consequences of omitting these kinds of restraints from suspension statutes: broad statutes tend to yield broad executive orders and thus impose a greater cost upon civil liberty.

Scholarly discourse about suspension and separation of powers focuses on whether Congress or the President has the authority to suspend. In that respect, it flows from the argument that Lincoln began when he suspended the writ of his own accord in 1861. The debate, however, should look beyond the terms of that argument to its result. While Lincoln ultimately lost his claim of executive prerogative, his battle with Congress yielded a new statutory model that significantly increased the President's role in the suspension decision. A suspension accomplished by delegation provokes reflection upon precisely what it means to insist that suspension power is exclusively legislative. The answer is not, as members of Congress have sometimes claimed, that the suspension decision is wholly nondelegable, but neither do the default, permissive rules of the nondelegation doctrine apply. Instead, the legislative responsibility is expressed through the temporal limit of the Suspension Clause, which requires Congress itself to decide that a rebellion or an invasion actually exists before it enlists the Executive's assistance in deciding whether suspension is a necessary response to a security crisis.

I

THE DELEGATION PROBLEM

A. Congress's Exclusive Authority to Suspend the Writ

To understand the significance of the choice to allocate the suspension power to Congress, it is necessary to be clear about the grave consequences of suspension. The writ's core purpose is to safeguard individual liberty against arbitrary executive detention.⁶ When a prisoner invokes the privilege, the Executive (or a representative) must explain to a court why detention of the individual is consistent with due process. If the court is not satisfied with the response, it will order the prisoner's release. When the privilege of the writ is sus-

⁶ See RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1162 (6th ed. 2009).

pended,⁷ however, the Executive is freed from the constraints of the criminal process and courts are powerless to order the release of any prisoner detained pursuant to the suspension.⁸ As this design suggests, suspension functions as a grant of emergency power.⁹ It enhances the Executive's ability to contain a crisis by withdrawing core protections like the prohibition upon seizure in the absence of probable cause and the right to be released if not charged and tried.¹⁰ The upshot is that the Executive can detain preventatively and indefinitely without affording the detainee any of means of defending herself. The power is so extreme that the Suspension Clause restricts its exercise to a very limited class of emergencies: "when in Cases of Rebellion or Invasion the public Safety may require it."¹¹

Scholars and courts have overwhelmingly endorsed the position that, Lincoln's unilateral suspensions of the writ notwithstanding,¹² the Constitution gives Congress the exclusive authority to decide

⁷ Technically speaking, it is the writ's privilege, not the writ itself, that is suspended. See U.S. CONST. art. I, § 9, cl. 2 (providing that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended"). In keeping with the shorthand frequently employed by the cases and literature, see, e.g., FALLON ET AL., *supra* note 6, at 1160 (referring to "a Suspension of the Writ"), I will use the phrases "suspending the writ" and "suspending the privilege of the writ" interchangeably.

⁸ See David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 89 (2006) (maintaining that a suspension "frees the Executive from the legal restraints on detention that would otherwise apply"); Tyler, *supra* note 2, at 672–87 (arguing that a suspension relieves the Executive both of the duty to account to a court and the duty to comply with the criminal process). *But see* Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1575–79 (2007) (arguing that a suspension enables the Executive to detain without answering to a court but does not relieve him of the obligation to comply with the due process rights that the detainee may vindicate when the suspension ends).

⁹ See Tyler, *supra* note 2, at 603–04.

¹⁰ Amanda Tyler explains that by the time of the Founding, "the privilege had come . . . to be equated with a host of protections including the rights to presentment or indictment, speedy trial, and reasonable bail where applicable." Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 999 (2012). Suspension is the only mechanism by which those owing allegiance to the United States can be deprived of these protections. See *id.* at 1000. Some contend that a declaration of martial law functions as a de facto suspension of the writ's privilege. See, e.g., JOEL PARKER, *HABEAS CORPUS AND MARTIAL LAW: A REVIEW OF THE OPINION OF CHIEF JUSTICE TANEY, IN THE CASE OF JOHN MERRYMAN* 24 (2d ed. 1862) ("[I]n time of actual war, . . . there may be justifiable refusals to obey the command of the writ without any act of Congress, or any order . . . of the President[;] . . . the existence of martial law . . . is, *ipso facto*, a suspension of the writ."). The effect of a declaration of martial law is a complicated topic beyond the scope of this Article, which deals only with statutes formally authorizing the exercise of emergency power. It is worth observing, however, that even if a situation warranting the exercise of martial law effectively justifies the Executive in detaining mere suspects, his defense in a later civil suit (absent an indemnity statute) would likely be that he violated the law because of necessity—not, as in the case of suspension, that he violated no law. See *infra* notes 34, 281 and accompanying text.

¹¹ U.S. CONST. art. I, § 9, cl. 2.

¹² See *infra* note 110 and accompanying text.

when the predicates specified by the Suspension Clause are satisfied.¹³ In other words, the President cannot exercise emergency power unless Congress authorizes him to do so. The presence of the Suspension Clause in Article I is the most important evidence that the decision to suspend rests with Congress. While the Clause, written in the passive voice, does not itself identify who has authority to suspend, its placement in Article I reflects an assumption that Congress is the branch to which the authority belongs.¹⁴

History strongly supports this interpretation. The Framers' experience as subjects of the King of England left them suspicious of sweeping executive power, and not even the King possessed the power to suspend the writ.¹⁵ Parliament alone possessed the power to sus-

¹³ Chief Justice Taney's opinion in *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) is the seminal defense of this position. See also Stephen I. Vladeck, *The Field Theory: Martial Law, the Suspension Power, and the Insurrection Act*, 80 TEMP. L. REV. 391, 408 (2007) ("[A] number of courts confronted some form of the legal question raised in *Ex parte Merryman*, and virtually all of them reached a similar conclusion—i.e., that Lincoln's extra-legislative suspension of habeas corpus was unconstitutional."); *id.* at 408 n.117 (collecting citations). While these lower court opinions are the only ones that address the question directly, dicta and separate opinions from the Supreme Court are consistent with this view. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting) ("Although [the Suspension Clause] does not state that suspension must be effected by, or authorized by, a legislative act, it has been so understood . . ."); *Ex parte Bollman*, 8 U.S. 75, 101 (1807) ("If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so."). For a thorough argument in favor of exclusive congressional suspension power, see Saikrishna Bangalore Prakash, *The Great Suspender's Unconstitutional Suspension of the Great Writ*, 3 ALB. GOV'T L. REV. 575 (2010); see also 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1336, at 208–09 (photo. reprint 1991) (1833) [hereinafter STORY'S COMMENTARIES] (treating the suspension power as exclusively legislative); Shapiro, *supra* note 8, at 71–72 (maintaining that the Constitution gives the power exclusively to Congress); Tyler, *supra* note 2, at 687–89 (arguing that structural, historical, and functional arguments foreclose any claim that the Executive possesses the suspension power); *Federal Habeas Corpus*, *supra* note 2, at 1263–65 (arguing that constitutional history and structure support the proposition that suspension power belongs exclusively to Congress). Some have defended the constitutionality of Lincoln's action. See, e.g., DANIEL FARBBER, LINCOLN'S CONSTITUTION 163 (2003) (asserting that "although the constitutional issue can hardly be considered free from doubt, on balance Lincoln's use of habeas in areas of insurrection or actual war should be considered constitutionally appropriate"); Paul Finkelman, *Limiting Rights in Times of Crisis: Our Civil War Experience—A History Lesson for a Post-9–11 America*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 25, 33–41 (2003) (defending Lincoln's unilateral suspension as constitutional). Delegation obviously poses no problem for those adopting this view.

¹⁴ See Shapiro, *supra* note 8, at 71 (maintaining that given the Clause's placement in Article I, "the inference that the power to authorize belongs to the legislature seems a natural one").

¹⁵ See *Merryman*, 17 F. Cas. at 151 ("If the [P]resident of the United States may suspend the writ, then the constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust to the crown . . ."); see also *Federal Habeas Corpus*, *supra* note 2, at 1264 ("[T]he dominant climate at the Convention of fear of executive power renders it improbable that the Constitution gave the President greater powers than the King with respect to habeas." (citations omitted)).

pend,¹⁶ and following suit, newly formed American states treated the power as exclusively legislative.¹⁷ Notes from the convention debates, records of the ratifying conventions, and writings of the first several generations of Americans are virtually unanimous in treating the suspension power as exclusively legislative.¹⁸ Indeed, until the Civil War, there was apparently no serious suggestion that the Executive possesses a unilateral power to suspend the writ.¹⁹

Allocating the suspension power to Congress has a number of structural implications. First and foremost, locating the suspension power in the legislature provides structural protection from executive excess.²⁰ A suspension places dramatic power in the President's hands: it essentially permits him to preventatively and indefinitely detain persons he deems dangerous. English kings had abused this power, which is one reason Parliament withdrew it from the Crown.²¹

¹⁶ See Prakash, *supra* note 13, at 592–93 (describing English history in detail); see also Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 623 (2008) (“Suspension after 1689 was characterized by one feature more than any other: it could only be made by Parliament.”); *Federal Habeas Corpus*, *supra* note 2, at 1264 (“[W]hen the framers looked to practice in England, they saw a system in which exclusive suspension powers resided in Parliament. . . . It seems unlikely that the framers would choose to alter this scheme by granting suspension powers to authorities other than the legislature, and even more unlikely that they would do so without a clear statement.”).

¹⁷ See Jeffrey D. Jackson, *The Power to Suspend Habeas Corpus: An Answer from the Arguments Surrounding Ex parte Merryman*, 34 U. BALT. L. REV. 11, 47 (2004) (“[S]tate constitutions vested the suspension power in their legislatures rather than [in] their executives.”); Prakash, *supra* note 13, at 593–94 (describing early state practice).

¹⁸ See Prakash, *supra* note 13, at 593–97 (describing framing and ratification debates about the Suspension Clause, all of which treated the power as legislative when they discussed a source of authority); *id.* at 597 (pointing out that it never occurred to anyone during the Burr Conspiracy that Jefferson could have suspended the writ himself); *id.* at 597–98 (laying out extensive evidence that nineteenth century “[t]reatise writers referenced the congressional monopoly repeatedly”); *id.* at 598 (“The only Attorney General to opine on the issue prior to the Civil War, Caleb Cushing, noted that in the United States, only legislatures could suspend.”). Prakash notes that then-General Andrew Jackson’s unilateral declaration of martial law in New Orleans, which Jackson treated as a suspension, is the only piece of contrary evidence. *Id.* at 599. But as Prakash observes, the defenses of Jackson are difficult to take seriously. They were not only “mired in partisanship” but also rested on the “fantastic claim that the Constitution authorized every military commander to suspend, a claim never made before or since.” *Id.* at 602.

¹⁹ See Tyler, *supra* note 2, at 688 n.415 (“Notably, to my knowledge, it was not until the Civil War that anyone ever suggested that the power could be wielded unilaterally by the executive.”).

²⁰ Indeed, the primary function of the writ itself is protecting against executive excess. See Paul Diller, *Habeas and (Non-)Delegation*, 77 U. CHI. L. REV. 585, 590 (2010) (“In the American Colonies as well [as in Britain], the Great Writ was considered a primary safeguard of individual liberty against a tyrannical Executive.”); THE FEDERALIST No. 84, at 512 (Alexander Hamilton) (Jack N. Rakove ed., 2003) (describing the writ “as protection against the pervasive tyranny and illegitimacy of an unchecked executive”).

²¹ See Prakash, *supra* note 13, at 592–93 (describing how England’s Habeas Corpus Act of 1679 and its 1689 amendment secured legislative control over suspension). As Justice Taney put it in *Ex parte Merryman*, “no one can believe that . . . [the framers] would have

The gravity of the power and the precedent for its misuse loomed large in the minds of those who framed and ratified the Constitution.²² To be sure, as Edward Bates, Lincoln's Attorney General, pointed out in Lincoln's defense, the Executive is not the only one capable of abusing the power; it is susceptible to legislative abuse as well.²³ Yet concentrating the power to suspend and the resulting power to preventatively detain in the same hands increases the risk and is in considerable tension with the Constitution's general scheme of separated powers.²⁴

One need not envision a tyrannical Executive to appreciate the value of denying the President the suspension power. Giving the decision to Congress checks the judgment of the person most institutionally inclined to think suspension is necessary, even when that person acts upon his good-faith perception of the national interest.²⁵ The President, as Commander in Chief, is the first responder in the event of an armed conflict on American soil. Because he is in the thick of the conflict and the one with primary responsibility for beating it back, it is natural for him to want to use any tool at his disposal to do so. He would be more likely than Congress to approach the option of emergency power with a bias in favor of its use. Congress, while not a neutral observer in the event of either an internal or external attack on the United States, is institutionally more removed from the situation. Because it will feel the heat of the moment less intensely than the President, putting the suspension decision in Congress's hands creates an opportunity for cooler heads to prevail.

Locating the suspension power in Congress does more than guard against tyranny and offset the risk of institutional bias. Forcing the decision to be made within the procedural confines of the formal legislative process better advances the goal that the writ be suspended as rarely as possible and only after careful deliberation.²⁶ Consider

conferred on the [P]resident a power which the history of England had proved to be dangerous and oppressive in the hands of the crown; and which the people of England had compelled it to surrender." 17 F. Cas. 144, 150 (C.C.D. Md. 1861).

²² See *supra* note 15 and accompanying text.

²³ See Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74, 84 (1861) ("Why should this power be denied to the President, on the ground of its liability to abuse, and not denied to the other departments on the *same grounds*?") (emphasis in original).

²⁴ See Tyler, *supra* note 2, at 688.

²⁵ See Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2068 (2007) ("To put a familiar point bluntly, human nature makes the executive branch all too likely to favor security over liberty in times of crisis.").

²⁶ See Tyler, *supra* note 2, at 688 ("Not only does the Suspension Clause require the existence of a 'Rebellion or Invasion,' in such circumstances, any decision to suspend must also emerge from the arduous process of bicameralism and presentment, internal checks . . . that ensure careful deliberation on a decision of this magnitude.").

the differences, from a constitutional point of view, in the process that produces an executive order and the process that produces a statute. As a single actor, the Executive is capable of moving quickly. He need not consult other executive officers for advice,²⁷ nor must he consult or even inform Congress before he acts. At the end of the day, his is the only judgment that counts. Congress, by contrast, is institutionally designed to be slower moving. The decision rests with hundreds of people rather than one. Even putting aside the vetogates erected by the committee process, which is a matter of internal policy rather than constitutional command, the requirement of bicameralism poses a significant barrier to a bill's passage.²⁸ Either house can kill a bill, and a bill that successfully navigates both houses reflects compromise on the language and scope of the proposed legislation.²⁹ A President has little incentive to limit the scope of his own emergency power, but the legislative process is likely to yield a statute that imposes at least some restraint upon the Executive.³⁰ In sum, legislative suspensions are not easy to accomplish, and when they occur, the need to secure majority buy-in inevitably narrows their scope.

Rendering the decision legislative also ensures that a decision to suspend emerges from a process that is relatively more representative of the people whose civil liberties are at stake.³¹ The President has a

²⁷ See U.S. CONST. art. II, § 2, cl. 1 ("The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments . . .") (emphasis added).

²⁸ See William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1442–43 (2008) ("To become a federal law, a proposal must pass through multiple 'vetogates'—not just adoption by floor majorities in both the House and the Senate and presentment to the President as required by Article I, Section 7, but also those internal vetogates Congress has created pursuant to Article I, Section 5: substantive committees in both chambers, calendar expedition through the Rules Committee (House) or unanimous consent agreements (Senate), and supermajorities if there is a Senate filibuster.").

²⁹ See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2409–19 (2003) (explaining that a bill cannot survive the complexities of the legislative process unless legislators compromise on its terms).

³⁰ For example, both the Civil War and Reconstruction statutes imposed a cap on the length of time that the President could hold detainees without charging them. See *infra* notes 82–83, 136 and accompanying text. Lincoln's unilateral order, by contrast, contained no limitations upon his ability to detain. See *infra* note 110 and accompanying text.

³¹ Cf. William L. Sharkey, *Essay on Habeas Corpus* (June 1933) (printed in F. Garvin Davenport, *The Essay on Habeas Corpus in the Judge Sharkey Papers*, 23 MISS. VALLEY HIST. REV. 243, 245 (1936)) ("When the writ of Habeas Corpus is to be suspended, we have a right to be heard and to decide whether the public safety requires it. The people did not confide this delicate duty to the President, they hold their representatives responsible for its exercise."). Of course, the benefit of electoral accountability inures only to those entitled to vote, a category excluding noncitizens, among others. While citizens living in American territories are not directly represented by members of Congress, they do typically have at least some voice in the legislative process. Nonvoting delegates have represented territories in Congress since 1787, and they have sat in the House of Representatives since 1794. See BETSY PALMER, CONG. RESEARCH SERV., R40555, DELEGATES TO THE U.S. CONGRESS: HISTORY AND CURRENT STATUS 1, 4 (2011). Their ability to serve on and vote in

national constituency; members of Congress represent regional interests.³² Because the need for suspension is likely to be keenest in the geographic area invaded or under the sway of rebellion, the interests of those most affected will be best expressed by their senators and representatives. The ability of senators and representatives to participate in debates about and cast votes on the suspension decision gives regional interests a voice in the process. They have no similar influence over the Executive's decision-making process; indeed, they may not know that the President is considering suspension until a decision has already been made. Nor will they necessarily be able to hold the President accountable after the fact at the ballot box. The region might not control enough electoral votes to have a significant impact on the next presidential election, and in any event, the President responsible might not run. The lack of term limits in Congress makes it reasonably likely that the prospect of reelection will force a member of Congress to take the interests of her constituents into account. If a President is in his second term, he may have party loyalty, but he has no electoral accountability.

One might reasonably resist the proposition that suspensions must be accomplished by statute. Lincoln did. The Commander in Chief power commits battlefield decisions to the President precisely because they require quick, decisive action by either one person or the military officials accountable to him. Because suspension is a means of defending the country in a national security crisis, it bears some resemblance to the package of decisions the President will simultaneously make with respect to military strategy. But for better or worse, the fact that the Constitution does not vest this power in the President reflects a judgment that this decision—one with a dramatic impact on domestic civil liberties—ought not be included in this package. Moreover, it is not as if the suspension power is a lone exception to an otherwise absolute power of the President to make decisions regarding the defense of the country when it is under attack. On the contrary, decisions about military conflict are decisions that the President and Congress share. For example, Article I gives Congress the authority to declare war, and Congress's appropriations power gives it

committees has varied over time, but today, all delegates and Puerto Rico's resident commissioner "shall be elected to serve on standing committees in the same manner as Members . . . [and] may be appointed to any select committee and to any conference committee." JOHN V. SULLIVAN, RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 111-157, at 376, 378 (2011).

³² Committing the decision to Congress rather than the President is also more protective of small states because their equal representation in the Senate gives them "disproportionate power, relative to their populations, to defeat legislation that promotes the interests of the larger states at their expense." John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 76 (2001).

tremendous influence over the conduct of military operations.³³ Responsibility for military decisions is coordinated, with the President bearing primary responsibility for some and Congress bearing it for others. Suspension is one that falls on the congressional side of the ledger. As Saikrishna Prakash has observed, the suspension power is one “given to Congress because of a sense, borne out by history, that vesting such powers with the Executive might prove dangerous to civil liberties. Though that cautious approach to executive authority has its costs, there will be drawbacks associated with any allocation of power.”³⁴

In sum, the heavy weight of commentary and public opinion for several hundred years is at odds with Lincoln’s view that the President should be “the sole judge, *both* of the exigency which requires him to act, and of the manner in which it is most prudent for him to employ the powers entrusted to him.”³⁵ To better protect civil liberty, the Constitution commits to Congress the decision whether a rebellion or an invasion exists and so threatens the public safety that the exercise of emergency power is warranted.

B. Delegation

This, at least, is the theory. We have tended to approach the problem of suspension power as an either-or question, presumably because Lincoln’s infamous unilateral suspensions framed it that way: either the President has the authority to suspend or the authority belongs exclusively to Congress. The reality that emerged after Lincoln’s claim, however, is more complex.

Congress enacted the first federal suspension statute, the Habeas Corpus Act of 1863, in the wake of Lincoln’s aggressive claim of inherent executive authority to initiate a regime in which he could detain indefinitely on mere suspicion. Given this context, it was inevitable that the statute be written as a broad delegation of the authority to suspend. Lincoln’s unilateral orders were still in effect when the statute was enacted, and even those congressmen protective of legislative power in this area were careful to avoid the appearance of reprimand-

³³ Other relevant Article I powers include Congress’s power to “raise and support Armies,” “provide and maintain a Navy,” “make Rules for the Government and Regulation of the land and naval Forces,” and “to provide for organizing, arming, and disciplining, the Militia.” U.S. CONST. art I, § 8.

³⁴ Prakash, *supra* note 13, at 611 (emphasis omitted). There may be extreme circumstances in which the President might be justified in detaining suspects in the absence of a suspension. If so, however, he would have to rely on a necessity defense or a later-passed indemnity statute if a detainee later sued him for violating her civil liberties. He could not, as in the case of suspension, maintain that he had violated no law. See *supra* note 10 and *infra* note 281 and accompanying text.

³⁵ Suspension of the Privilege of the Writ of Habeas Corpus, *supra* note 23, at 84 (emphasis added).

ing Lincoln while the nation was at war. The statute was therefore deliberately drafted so that it could be read either as authorizing Lincoln to act or approving what he had already done.³⁶ The only language in which that could be accomplished was the language of delegation—and an extraordinarily broad one at that.³⁷

This delegation model was a significant departure from the history that has otherwise influenced our approach to suspension under the U.S. Constitution: parliamentary practice during the seventeenth and eighteenth centuries and state practice in the late eighteenth century. Neither Parliament nor early state legislatures assigned the king or governor the task of determining whether the time was ripe for the exercise of his emergency power. The legislature itself made that judgment and when it concluded that suspension was necessary, directly authorized the king or governor to detain those he deemed dangerous. These statutes, moreover, typically cabined the executive authority by including a sunset clause and giving only high-ranking officials the authority to detain. The 1863 Act, by contrast, allowed the President not only to decide when suspension was warranted but also to define the scope of his own power. He could subdelegate both the suspension decision and the detention power to inferior officers, and because the statute contained no sunset clause, the suspension of basic criminal process rights continued for as long as he deemed it necessary.

Lincoln may have lost his argument that the President possesses inherent authority to suspend, but his battle with Congress yielded a model that greatly enlarged the Executive's traditional role in the suspension decision. The 1863 Act has been an influential legislative precedent. Expressly invoking its example, Congress in 1871 empowered Ulysses S. Grant to suspend the writ of habeas corpus as part of his effort to suppress the Ku Klux Klan.³⁸ In the twentieth century, Congress delegated to territorial governors and the President the authority to suspend the writ in five American territories.³⁹ The territorial delegations were particularly sweeping insofar as they were passed entirely independently of any event that might have justified suspension. The statute justifying suspension in the Philippines was enacted three years before the administration of Theodore Roosevelt invoked it,⁴⁰ and the statute that Franklin Delano Roosevelt invoked to suspend the

³⁶ See *infra* notes 87–89 and accompanying text.

³⁷ See *infra* note 80 and accompanying text.

³⁸ See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 483 (1871) (statement of Rep. Wilson) (characterizing the 1871 Act as following the “distinguished precedent” of the 1863 Act insofar as it delegated to the President the authority to suspend).

³⁹ See *infra* Part II.C.4.

⁴⁰ See *infra* notes 160–62 and accompanying text.

writ in Hawaii during World War II was enacted forty-one years before the Japanese bombed Pearl Harbor.⁴¹

The “suspension by delegation” model presents a more nuanced question than that posed by the starker “President versus Congress” debate. On the one hand, the modern nondelegation doctrine imposes few limits upon Congress’s ability to shift policymaking discretion to the Executive. The 1863 Act and its successors may well be consistent with this vein of authority. On the other hand, our tradition has placed particular emphasis on the importance of the Constitution’s choice to give this emergency power to Congress. Delegating too much discretion to the Executive risks undermining the structural protections built into this design.

The ensuing Parts consider how well the “suspension by delegation” model fits into the constitutional structure. It is worth keeping in mind that even if suspension is a political question,⁴² the constitutionality of delegation in this context is not likely immune from judicial review. During the Civil War, courts willingly reviewed both Lincoln’s assertion of inherent executive authority to suspend⁴³ and the constitutionality of Congress’s delegation of that authority to him.⁴⁴ Courts might be ill-equipped to review political-branch judgments about the existence of a rebellion, an invasion, and the threat to the public safety, but analyzing the Constitution’s distribution of responsibility between branches is a traditional judicial task.

II

OUR HISTORICAL EXPERIENCE WITH EMERGENCY POWER

Parliament and founding-era state legislatures accomplished suspensions outright rather than by delegation. As Sections A and B of this Part recount, the legislature decided that current circumstances rendered suspension necessary and authorized the king or governor, effective immediately, to detain anyone suspected of posing a threat to the public safety. The imprisonment of a suspect pursuant to any of these statutes, then, was the result of two public safety determinations: the legislature determined that the situation was dangerous enough to require suspension, and the king or governor decided which persons to detain in order to protect the public safety. The executive thus had significant discretion at the second step but very little discretion in making the initial decision that he should be vested with emergency power. Beginning in the Civil War, the United States Congress gave

⁴¹ See *infra* notes 168–69 and accompanying text.

⁴² See Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 351–62 (2006) (describing the conventional view that the decision to suspend is nonjusticiable).

⁴³ See *supra* note 13.

⁴⁴ See *infra* notes 111–17 and accompanying text.

the President the responsibility for making both public safety determinations: it charged him with deciding not only whom to arrest, but also whether the overall threat to public safety justified his possession of emergency power in the first place. In all but one instance, Congress also gave the President the authority to decide whether the requisite "invasion or rebellion" had occurred. Section C describes these statutes, the vehement objections their delegation model generated, and the scope of the executive orders they yielded.

A. Parliamentary Practice in the Seventeenth and Eighteenth Centuries

When Parliament suspended the writ during the seventeenth and eighteenth centuries, it did so outright by legislative enactment rather than by granting suspension authority to the king.⁴⁵ Accordingly, each suspension responded to a current security crisis. Consistent with the view that suspension authorizes detention upon mere suspicion rather than simply removing a judicially enforceable remedy, these statutes directly "empower[ed] His Majesty to apprehend and detain such Persons, as he shall find Cause to suspect are conspiring against His Royal Person and Government."⁴⁶ The acts reflected Parliament's judgment that a threat to public security made expansion of the king's detention power necessary⁴⁷ and left the king to decide whom to detain.

⁴⁵ For a comprehensive list of seventeenth and eighteenth century English suspension statutes, see Halliday & White, *supra* note 16, at 617 n.116. English suspension practice greatly influenced the American practice. *See id.* at 580–81 ("The Supreme Court . . . has consistently maintained that the contemporary constitutional jurisprudence of habeas corpus needs to be informed by the legal and constitutional history of the 'Great Writ,' both in England and in the framing period of the Constitution."). That said, it must be considered advisedly given the differences between English and American governmental structure.

⁴⁶ *Id.* at 618 (describing language in English statutes passed prior to the Revolutionary War). The Revolutionary War suspension, enacted in 1777 and renewed five times, *see id.* at 617 n.116, 645 n.207, is similarly entitled "An act to empower [sic] his Majesty to secure and detain persons charged with, or suspected of, the crime of high treason . . ." *See* 17 Geo. 3 c. 9 (1777).

⁴⁷ Halliday and White explain that "necessity" was the "principal justification for suspension[ion,]" and "[t]he necessity rationale operated when, in *Parliament's estimation*, the subjects' liberties could only be protected by temporary, carefully contained limits on a writ that had come to be associated with those liberties." *Id.* at 624 (emphasis added). Parliament watered down the necessity standard during the Revolutionary War by justifying suspension with reference to the "inconven[ience]" of trying colonists for treason "forthwith" and the "evil example" of permitting them to remain at large. *Id.* at 645 (quoting 17 Geo. 3, c. 9). Americans resented the Revolutionary War suspensions, and their ratification of a constitutional provision limiting suspension to "when in cases of rebellion or invasion the public safety may require it" adopted "suspension usage in England between 1689 and 1747, while rejecting the novel terms of suspension that Americans endured starting in 1777." PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 253 (2010).

Paul Halliday and G. Edward White group the parliamentary suspensions into two groups: those enacted between 1689 and 1747, and those enacted during the Revolutionary War.⁴⁸ They describe those in the former group as having a “formulaic quality.”⁴⁹ All specified who could be imprisoned: those suspected of treason or “treasonable practices.”⁵⁰ All provided that only “specific officials—six members of the Privy Council and eventually either of the two secretaries of state—could exercise the suspension power to imprison without review by the judiciary.”⁵¹ And all ran for a fixed period: some for as little as one month and only one for more than a year.⁵² The Revolutionary War suspension, enacted in 1777 and renewed five times, followed this formula with the exception of the requirement that only high-ranking officials could exercise the authority to detain.⁵³ That statute, which was controversial in both England and America,⁵⁴ permitted detention by “any magistrate having competent authority.”⁵⁵

As we will see, the early state statutes closely tracked the traditional English formula, but beginning with the Civil War suspension, federal suspension statutes departed in significant respects from it. They delegated the suspension decision to the Executive, they did not always have finite duration, they did not always specify the category of people subject to the detention power, and they did not limit the officials who could exercise the detention power.

⁴⁸ There are twelve statutes in the former group and six in the latter. See Halliday & White, *supra* note 16, at 617 n.116.

⁴⁹ *Id.* at 617, 644–45.

⁵⁰ See *id.* at 618–19.

⁵¹ *Id.* at 619.

⁵² See *id.* at 617 n.116. Note that while all but one suspension statute ran for one year or less, suspensions were often renewed upon their expiration. See *id.*

⁵³ Like the earlier acts, they specified who could be imprisoned, see *id.* at 644, and contained sunset clauses, see *id.* at 617 n.116, 645 n.207.

⁵⁴ Many criticized the statute for deviating from the traditional “necessity” justification. See *supra* note 47. They also objected to the fact that it drew distinctions between subjects. Unlike past suspensions, it rendered access to the privilege dependent upon the place of capture. Only those taken in America or on the high seas for treason or piracy could be preventatively and indefinitely detained; the privilege remained intact in England. See *infra* note 308. For a description of the controversy surrounding the 1777 Act, see Halliday & White, *supra* note 16, at 646–51 and HALLIDAY, *supra* note 47, at 252.

⁵⁵ 17 Geo. 3, c. 9.

B. Early State Practice

Several states passed legislation suspending the writ of habeas corpus during the Revolutionary War.⁵⁶ Massachusetts,⁵⁷ Pennsylvania,⁵⁸ Maryland,⁵⁹ South Carolina,⁶⁰ and Virginia⁶¹ each suspended the writ, and with the exception of the Maryland legislation, these statutes followed the traditional English pattern. Each suspended the writ outright rather than delegating the suspension decision to the governor. Each contained a sunset provision.⁶² Each

⁵⁶ See Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1920–21 (2009) (discussing the Maryland statute); Tyler, *supra* note 2, at 622–27 (gathering statutes from Massachusetts, Pennsylvania, South Carolina, and Virginia). New Jersey also suspended the writ, see Tyler, *supra* note 2, at 623 n.102, but its statute is distinguishable from the others discussed in this section insofar as it did not authorize preventative detention. The New Jersey act made it a crime to, among other things, cross enemy lines without a license to do so. See Act of Dec. 22, 1780, ch. 5, § 1, 1781 N.J. Laws 11, 12 (identifying this and other means of abetting the enemy as grounds for being “legally convicted on Indictment before any Court of Justice holding Jurisdiction in criminal Causes”). Section 9 of the New Jersey act then provided that the privilege of the writ of habeas corpus was suspended for any person jailed pursuant to a warrant “setting forth that the Prisoner was apprehended for” committing one of the crimes specified in section 1. *Id.* ch. 5, § 9, at 15.

⁵⁷ Act of May 9, 1777, ch. 45, reprinted in 5 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 641 (Boston, Wright & Potter Printing Co. 1886). Its preface noted the legislature’s finding that “the Public Enemy have [sic] actually invaded some of our neighbouring States, and threaten an Invasion of this State, the Safety of the Common-Wealth requires that a Power somewhere be lodged to apprehend and imprison any Persons whose Enlargement is dangerous to the Community.” *Id.* at 641.

⁵⁸ Act of Sept. 6, 1777, ch. 762, 1777 Pa. Laws 138. The preface of the statute contained two notable findings. First, the General Assembly noted that “the preservation of this state . . . at the time of an . . . invasion may require the immediate interposition of the supreme executive council when the judicial powers of the government cannot in the ordinary course of the law sufficiently provide for its security.” *Id.* Second, it noted that “for this important purpose the supreme executive council of this commonwealth have lately at the recommendation of Congress taken up several [dangerous] persons[,] . . . and it is apprehended that there are still more such persons among us, who cannot at this juncture be safely trusted with their freedom without giving proper security to the public.” *Id.* at 138–39.

⁵⁹ Act of Apr. 20, 1777, ch. 20, § 12, 1777 Md. Laws 19, 21.

⁶⁰ Act of Oct. 17, 1778, No. 1109, S.C. Stat. 458 (1833), reprinted in 4 THE STATUTES AT LARGE OF SOUTH CAROLINA 458–59 (Thomas Cooper ed. 1838). The statute’s preface explained that “it is necessary in this time of public danger, when this State is threatened with an invasion by the enemy, that the hands of the executive should be strengthened.” *Id.*

⁶¹ Act of May 1781, ch. 7 reprinted in 10 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 413–16 (William W. Hening ed., 1822). The preface explained that the measure was necessary “in this time of public danger.” *Id.* The statute made no mention of invasion.

⁶² The Massachusetts statute expired one year after its effective date. See Act of May 9, 1777, ch. 45. The Pennsylvania legislation remained in force until the “first sitting of the next general assembly of the commonwealth and no longer.” Act of Sept. 6, 1777, ch. 762, § 3. The Virginia statute similarly lasted “until the end of the next session of assembly, and no longer.” Act of May 1781, ch. 7. The South Carolina statute “continue[d] in force until

specified who could be detained.⁶³ And each of these statutes vested the authority to decide whom to preventatively detain in a high-ranking executive official who could not delegate that discretion to sheriffs or other subordinates.⁶⁴ Any warrant had to be signed by one or more of the high-ranking officials identified in the statute. None of these statutes, including Maryland's, contained a geographic limitation, although the authority necessarily existed only within the state's borders.

The Maryland legislation varied slightly from this pattern. It had no sunset provision, and unlike the suspension legislation in other states, it did not take immediate effect. It authorized preventative arrests "in case this state shall be invaded by the enemy," which required the governor to make the predicate determination of when said "invasion" occurred.⁶⁵ But the fact of invasion did not trigger executive authority to decide whether to suspend; suspension followed automatically. In other words, the governor was not left to decide whether the ensuing threat to public safety warranted his assumption of emergency power. He had only to decide whether the exercise of that power was warranted in any individual case. It is noteworthy that in Maryland, as elsewhere, the authority to dispense with due process in any individual case was given only to high-ranking officials. Once the British were in Maryland, "the governor and council" could arrest or order the arrest of "all persons whose going at large the governor and council shall have good grounds to believe may be dangerous to the safety of this state"⁶⁶

ten days next after the meeting and sitting of the next General Assembly, and no longer." Act of Oct. 17, 1778, at 459.

⁶³ The Pennsylvania and Virginia acts referred specifically to those suspected of treasonous activity. See *supra* notes 58–61. The Massachusetts, Maryland, and South Carolina acts defined the class of the detainable much more broadly, as anyone dangerous to the state. See *supra* notes 57, 60.

⁶⁴ The Massachusetts act provided that "the Council may from Time to Time issue their Warrant . . . signed by the President of the Council for the Time being, and directed to any Sheriff or Deputy Sheriff within this State, or to any other person by Name, to command and cause to be apprehended and Committed to any [jail] . . . any Person" who the Council judged to be a threat to public safety. See Act of May 9, 1777, ch. 45. (emphasis added). The Pennsylvania act provided that only "the president or vice-president and the members of the supreme executive council of this state or any two of them" could direct an arrest. Act of Sept. 6, 1777, ch. 762, § 1. The Virginia statute authorized "[t]he governor, with the advice of council" to arrest those "whom they may have just cause to suspect." Act of May 1781, ch. 7. The South Carolina statute authorized the "President or Commander-in-chief[,] . . . by and with the advice and consent of the Privy Council, by warrant under his hand and seal, to arrest" persons endangering public safety. Act of Oct. 17, 1778, No. 1109 at 458.

⁶⁵ Act of Apr. 20, 1777, ch. 20, § 12, 1777 Md. Laws 19, 21.

⁶⁶ *Id.* (specifying that "during any invasion of this state by the enemy, the *habeas corpus* act shall be suspended, as to all such persons arrested by the order of the governor and council." (second emphasis added)).

At the time these Revolutionary War-era acts were passed, none of these states had constitutions with clauses limiting the circumstances in which the writ could be suspended. Massachusetts was the first state to include a suspension clause in its constitution.⁶⁷ It enacted its constitution in 1780 and suspended the writ two years later in response to the Ely riots.⁶⁸ The statute, which suspended the writ outright, empowered the governor, with the advice of the Council, "to apprehend and secure in any [jail] in this Commonwealth without Bail or Mainprize, any Person or Persons whose being at large may be judged by His Excellency and the Council, to be Dangerous to the Peace and Well-being of this or any of the United States."⁶⁹ Again, the decision to preventatively detain any individual had to be made by the governor himself (with the advice of the council) rather than by a subordinate acting on the governor's behalf. The Act contained a sunset provision.⁷⁰ In 1786, the Massachusetts legislature again suspended the writ outright, this time in response to Shay's Rebellion.⁷¹ This legislation, like the earlier statutes, required the governor himself to sign the warrant for the arrest of any person deemed deserving of detention under the statute.⁷² The Act expired roughly eight months after its passage.⁷³

C. Federal Suspensions

Congress has debated whether to suspend the writ of habeas corpus on three occasions: in response to the Burr Conspiracy, the Civil War, and Klan violence during Reconstruction. On the latter two occasions, it passed suspension legislation. There have been two other suspensions at the federal level: one in Hawaii after Pearl Har-

⁶⁷ See Dallin H. Oaks, *Habeas Corpus in the States—1776–1865*, 32 U. CHI. L. REV. 243, 247 (1964); see also MASS CONST. pt. II, ch. VI, art. VII (providing that "the writ of habeas corpus . . . shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a limited time not exceeding twelve months").

⁶⁸ Act of June 27, 1782, ch. 2, 1782 Mass. Acts 6, 6–7. For discussion of this suspension, see Tyler, *supra* note 2, at 624.

⁶⁹ Act of June 27, 1782, ch. 2, at 6–7.

⁷⁰ It expired in six months. After its expiration, it was renewed for another four months. See Act of Feb. 5, 1783, ch. 1, 1783 Mass. Acts 207.

⁷¹ Act of Nov. 10, 1786, ch. 10, 1786 Mass. Acts 510. For a discussion of this suspension, see Tyler, *supra* note 2, at 624–27.

⁷² [T]he Governour, with the advice and consent of the Council, be, and hereby is authorized and empowered, by warrant, under the seal of the Commonwealth, by him subscribed, and directed to any Sheriff, Deputy-Sheriff, or Constable, or any other person, by name, to command, and cause to be apprehended, and committed to any [jail] . . . any person or persons whatsoever, whom the Governour and Council shall deem the safety of the Commonwealth requires should be restrained of their personal liberty

Act of Nov. 10, 1786, ch. 10, at 510.

⁷³ The Act expired on July 1, 1787. *Id.*

bor and one in the Philippines during a 1905 insurrection. Congress itself did not consider whether the exercise of emergency power was warranted in either of these two instances. Both of these suspensions were initiated by territorial governors under the supervision of the President, acting under statutory delegations of authority that Congress enacted long before the provoking events. Congress included delegations of suspension authority in three other territorial statutes—those of Puerto Rico, Guam, and the Virgin Islands—but none of these were ever invoked. My research did not disclose a suspension provision in any other statute governing a U.S. territory.

1. *The Burr Conspiracy*

The first congressional debate about whether to suspend the writ of habeas corpus occurred in 1807, when the Jefferson Administration asked Congress to suspend the writ in connection with the Burr Conspiracy.⁷⁴ The Senate responded to this request on the same day with a bill suspending the writ for three months as to “any person or persons, charged on oath with treason, misprision of treason, or other high crime or misdemeanor.”⁷⁵ The bill authorized arrest by order of the President, by anyone acting under his authority, and by the Chief Executive Magistrate of any State or Territorial Government. Permitting arrests by someone other than the President and high-ranking federal officers was a feature of the bill that Representative Dana found “highly objectionable” and “without precedent.”⁷⁶ Like other suspension statutes of the time, it suspended the writ outright, providing that “the privilege of the writ of *habeas corpus* shall be, and the same *hereby* is suspended.”⁷⁷ The House voted overwhelmingly against the bill three days later after a debate in which many representatives questioned both whether the conspiracy amounted to a rebellion and

⁷⁴ See WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 135 (1980).

⁷⁵ 16 ANNALS OF CONG. 402 (1807) (Joseph Gales & William W. Seaton eds., 1852). Senator James Bayard, who cast the only dissenting vote, did not “think the public safety at this time requires this measure.” WILLIAM PLUMER’S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE 1803–07, at 587–88 (Everett S. Brown ed., 1923) (emphasis omitted). Interestingly, James Bayard was the first in a line of prominent opponents of suspension legislation. His son, Senator James Asheton Bayard, Jr., was one of the most vocal opponents of the Civil War suspension, see *infra* note 92 and accompanying text and notes 95–97, and his grandson, Senator Thomas Francis Bayard, was a similarly strong opponent of the Reconstruction suspension, see *infra* note 141 and accompanying text.

⁷⁶ 16 ANNALS OF CONG., *supra* note 75, at 424 (“There is another principle, which appears to me highly objectionable. It authorizes the arrest of persons, not merely by the President, or other high officers, but by any person acting under him. I imagine this to be wholly without precedent. If treason was marching to force us from our seats, I would not agree to do this.”).

⁷⁷ *Id.* at 402 (second emphasis added); see also DUKER, *supra* note 74, at 136 (“Note, the suspension bill did not seek to delegate power to suspend to the President, but provided directly for that suspension.”).

whether the threat to public safety warranted such an extreme measure.⁷⁸

2. *The Civil War*

The Habeas Corpus Act of March 3, 1863, is the first federal suspension statute.⁷⁹ It provides in relevant part “[t]hat, during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof.”⁸⁰ Thus, while Congress determined the existence of a rebellion for itself (a point on which there was no dispute), it empowered the President to decide whether, for how long, and where the public safety required suspension. This stands in contrast to earlier parliamentary and state suspension statutes in which the legislature not only made the public safety determination but also specified the duration of the emergency power.⁸¹ The

⁷⁸ The House refused the Senate’s request that it too conduct its deliberations in secret and instead “threw open its doors and on the first reading rejected the bill 113–19.” DUKER, *supra* note 74, at 137; *see also* 16 ANNALS OF CONG., *supra* note 75, at 424 (recording that the bill was rejected by a vote of 113–19). Many were skeptical that Burr led a rebellion within the meaning of the Suspension Clause. *See, e.g., id.* at 414 (statement of Rep. Varnum) (“I think it does not deserve the name of a rebellion; it is a little, petty, trifling, contemptible thing, led on by a desperate man, at the head of a few desperate followers . . .”); *id.* at 419 (statement of Rep. Randolph) (characterizing affair as “nothing more nor less than an intrigue”); *id.* at 422 (statement of Rep. Smilie) (“I really doubt whether either [a rebellion or sufficient threat to public safety] exist.”). Even among those who accepted the existence of a rebellion, many were skeptical that the public safety was sufficiently endangered. *See, e.g., id.* at 406 (statement of Rep. Burwell) (asserting that the supposed rebellion was “not accompanied with such symptoms of calamity as rendered the passage of the bill expedient”); *id.* at 406–07 (statement of Rep. Elliot) (insisting that the writ cannot be suspended “in any and every case of invasion and rebellion,” but only “with a view to national self-preservation,” a situation he did not believe existed here); *id.* at 411 (statement of Rep. Eppes) (“I cannot, however[,] bring myself to believe that this country is placed in such a dreadful situation as to authorize me to suspend the personal rights of the citizen, and to give him, in lieu of a free Constitution, the Executive will for his charter.”).

⁷⁹ The Confederate Congress enacted a series of suspension statutes during the Civil War, the first several of which authorized the President of the Confederate States to suspend the privilege of the writ. Delegation of suspension authority was as controversial in the Confederacy as it was in the United States. *See* David P. Currie, *Through the Looking-Glass: The Confederate Constitution in Congress, 1861–1865*, 90 VA. L. REV. 1257, 1327–33 (2004) (describing the controversy). In response to criticism of the delegation model, the Confederate Congress ultimately abandoned it and suspended the writ outright. *See id.* at 1331.

⁸⁰ Act of Mar. 3, 1863, ch. 81, 12 Stat. 755.

⁸¹ *See supra* Part II.B. The Maryland statute was the exception insofar as it lacked a sunset provision. *See supra* note 65 and accompanying text. Note that the 1863 Act also differs from the bill passed by the Senate during the Burr Conspiracy. While that bill contained no geographic limitation, it expired after three months and applied only to those suspected of crimes related to treason. *See supra* note 75 and accompanying text. The 1863 Act, by contrast, was not only open-ended but also permitted detention in “any case.” *See supra* note 80 and accompanying text.

absence of any limitation on the officials who could exercise the emergency detention power was also a contrast to prior statutes. Historically, only specific, high-ranking officials could make arrests; the 1863 Act permitted anyone acting under Lincoln's authority to do so.

While the statute provided little limit on the President's power to suspend the writ, it did contain a significant restriction on his power to detain once the emergency power was activated. Section 2 of the Act required the Secretaries of State and War to provide federal judges with a list of all prisoners who were "citizens of states in which the administration of the laws has continued unimpaired in the said Federal courts."⁸² These lists limited the detention authority as follows:

[If] a grand jury, having attended any of said courts having jurisdiction in the premises . . . after the furnishing of said list . . . has terminated its session without finding an indictment or presentment . . . it shall be the duty of the judge of said court forthwith to make an order that any such prisoner desiring a discharge from said imprisonment be brought before him to be discharged.⁸³

Those officers of the United States who refused to "immediately . . . obey and execute" such orders were subject to fine and imprisonment.⁸⁴ As it happened, however, section 2 had little practical effect; the Lincoln Administration blatantly ignored the provision despite repeated congressional entreaties that it comply.⁸⁵

Given Lincoln's multiple, unilateral suspensions of the writ before 1863, it was inevitable that Congress would structure the 1863 Act as a delegation. These suspensions were extremely controversial, and there had been a years-long, heated debate about whether Lincoln had acted unconstitutionally.⁸⁶ The statute was drafted carefully to gloss over that controversy so that both supporters and opponents of Lincoln's pre-statute proclamations could vote for it.⁸⁷ As Senator Doolittle explained:

[T]hose persons who conscientiously maintain that under the Constitution the President is clothed with power without any legislation of Congress, can vote for this section upon the ground that this section is merely declaratory of a power which inheres in him under

⁸² § 2, 12 Stat. 755. Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See Tyler, *supra* note 2, at 651–52 nn.246–50 and accompanying text (detailing the Lincoln administration's failure to comply with section 2 of the 1863 Act).

⁸⁶ See generally George Clarke Sellery, *Lincoln's Suspension of Habeas Corpus as Viewed by Congress*, 1 BULL. U. OF WIS. 213 (1907) (providing an account of this debate).

⁸⁷ See FARBER, *supra* note 13, at 159 (explaining that the statutory language was deliberately "ambiguous about whether Congress was conferring the power to suspend the writ or merely recognizing its existence in the hands of the president").

the Constitution itself; and those who maintain that it is to be derived from an act of Congress can sustain this section upon the ground that it is an enacting clause which gives him the power.⁸⁸

Had the statute suspended the writ outright, it could not have been interpreted as “merely declaratory of a power which inheres in him under the Constitution itself.”⁸⁹ On the contrary, a straightforward assertion of legislative power would have strongly implied that Congress believed the President’s earlier proclamations to be unlawful. If language susceptible of both interpretations was necessary for the statute’s passage, it is difficult to imagine how that could have been accomplished in language other than that of delegation.

That said, structuring the statute as a delegation was controversial.⁹⁰ Throughout the debates, critics repeatedly argued that the momentous decision to suspend was one committed exclusively to legislative discretion.⁹¹ Senator Bayard’s argument is representative:

[I]f there ever was a case to which the *delegatus non potest delegari* applied, it is precisely this case with those who believe that in Congress is vested the sole power to suspend the writ of *habeas corpus* The decision as to the public safety, the extent to which the right is to run, the duration of time during which the suspension is to last, are all matters for legislation, and legislation alone, and you have no authority to delegate your legislative powers to the Executive of the United States.⁹²

⁸⁸ CONG. GLOBE, 37th Cong., 3d Sess. 1092 (1863).

⁸⁹ See *id.*

⁹⁰ Objections to delegation were voiced primarily by those who thought that the suspension power was legislative. Some who thought that the power was executive, however, also spoke against it. For example, Senator Lane argued that if the power was, as he believed, an executive one, the statute was “an improper interference with the duties and powers of the executive office.” *Id.* at 157. And if Congress possessed the power, as his opponents claimed, he asserted that it would be “clearly unconstitutional” for Congress “to bestow [that power] upon another department.” *Id.*; see also *id.* at 216 (statement of Sen. Field) (“I hold that the Constitution of the United States confers upon the President, and not upon Congress, the power of suspending the privilege of the writ of *habeas corpus*, but if mistaken in this, I hold that Congress has no authority to delegate to the President the exercise of such a power.”).

⁹¹ There were three suspension bills introduced in the 37th Congress: S. 33, H.R. 362, and H.R. 591. See Sellery, *supra* note 86, at 231–63. All three bills delegated suspension authority to the Executive. S. 33 was short-lived. See *id.* at 231–34, 239 n.1 (explaining that the bill died two weeks after its introduction in the first session, and that the Judiciary Committee recommended its indefinite postponement in the second). H.R. 362 and H.R. 591 passed both houses, and the Habeas Corpus Act, while formally passed as H.R. 591, was a fusion of the Senate version of both bills. *Id.* at 261–63. Because H.R. 362 and H.R. 591 are the bills that contributed to the Habeas Corpus Act, this section will focus on them. The debate about delegation was the same with respect to each; thus, for simplicity’s sake, this section will not, as a rule, specify the bill to which a comment about delegation was addressed.

⁹² CONG. GLOBE, 37th Cong., 3d Sess. 1094 (1863); see also *id.* at 111 (statement of Sen. Powell) (“I do not believe that we have the right to delegate to any person the power to suspend the writ of *habeas corpus*.”); *id.* at 1204 (statement of Sen. Saulsbury) (arguing

In other words, the “public safety” prong of the Suspension Clause required Congress, as guardian of the emergency power, to judge whether, where, and for how long the privilege of the writ should be withdrawn. The bill abdicated this responsibility by leaving these matters entirely to the President’s judgment. Indeed, the legislation was so broadly drawn that it permitted the President to impose a nationwide suspension of unlimited duration if he saw fit to do so.⁹³ Some argued that there was little difference between this bill and “that political heresy that the right to suspend the writ exists in the President of the United States, and not in Congress.”⁹⁴ Bayard and others complained that the bill concentrated too much power in the hands of the Executive.⁹⁵ While the power to arrest belonged to the President, the power to suspend belonged to the legislature; giving both to the President created the risk of abuse that the separation of powers was designed to minimize.⁹⁶ Those advancing this argument insisted that they were not accusing Lincoln of readiness to abuse the authority but rather resisting the delegation of such sweeping power to any man.⁹⁷ As Senator Powell asserted:

I would not confer it on any man, I care not how great, how good, how wise, how virtuous he may be, and I do not concede that those who are the real and true friends of constitutional and civil liberty ever will part with this power. They should exercise it themselves.⁹⁸

Powell and others invoked history in support of their position, pointing out that Parliament had never given suspension authority to the

that H.R. 362 was unconstitutional because “it proposes to delegate [the suspension] power to the President of the United States”). On December 22, 1862, thirty-six members of the House—a substantial minority—submitted a protest against H.R. 591, challenging, among other things, the constitutionality of the delegation. The protest was tabled by a vote of 75–41. *See id.* at 165–66.

⁹³ The potential for such a sweeping suspension was a feature that opponents of the suspension legislation found particularly offensive. *See infra* note 109 and accompanying text.

⁹⁴ CONG. GLOBE, 37th Cong., 3d Sess. 1462 (1863) (statement of Sen. Wall); *see also id.* at 1195 (statement of Sen. Carlile) (characterizing delegation as a variant of the argument that the “the power to suspend this writ [is] in the Executive of the United States”).

⁹⁵ Senator Bayard argued the Executive ought not decide whether the primary safeguard against abuse of executive discretion should be removed. He characterized the writ “as the sole security of every citizen of the United States against executive oppression” and asserted that “[w]hether the oppression is intended or not is not the question.” *Id.* at 1094; *see also id.* at 111 (statement of Sen. Powell) (“I do not think a more dangerous power [than the ability to suspend the writ nationwide] could be committed to the hands of an Executive.”).

⁹⁶ *Id.* at 1095 (statement of Sen. Bayard) (arguing that the legislation “merges the legislative and executive power in one”).

⁹⁷ *See, e.g., id.* at 1094 (statement of Sen. Bayard) (“Now, sir, it is not a question of whether the President will abuse the power you so delegate The precedent is such that it gives a power which I would yield to no man”).

⁹⁸ *Id.* at 1192.

Crown but had rather authorized the Crown to arrest and detain for some limited period of time—typically one year.⁹⁹

Defenders of delegation viewed the blending of legislative and executive power in the suspension decision as a virtue, for neither Congress nor the President alone suspended the writ. Instead, “the united power of both” was brought to bear.¹⁰⁰ They also claimed that delegation of the suspension power was no different than the many other instances in which Congress transfers responsibility to the Executive. When asked why it is constitutional for Congress to grant this power to the President, Representative Bingham responded: “I say that this form of legislation is not new, that our statute-books abound in precedents of this sort, which leave the exercise of a discretion in the Executive of the United States”¹⁰¹ Senator Trumbull argued that authorizing the Executive to suspend was no different than authorizing him to grant letters of marque and reprisal or to call out the militia, both of which Congress had done.¹⁰² The latter case, in particular, involved a similar judgment insofar as the President’s statutory authority was triggered by his determination that an insurrection existed.¹⁰³ Moreover, supporters claimed, treating suspension as delegable made sense. Assessing the public safety “would be practicable and easy” for the President but “would be impracticable” for Congress.¹⁰⁴ “In the ever-changing circumstances which grow out of a war, and a gigantic war like this,” Senator Doolittle argued, “who can judge two months or six months beforehand the places where it will be necessary that this writ shall be suspended?”¹⁰⁵ These arguments did not persuade critics of the bill, who remained firm in the belief that suspen-

⁹⁹ See, e.g., *id.* (statement of Sen. Powell) (“[I]t has been the immemorial practice of Parliament to prescribe the time during which and the localities in which it shall be suspended. They perform the whole function themselves. They leave nothing to the executive, except to see that the law is executed.”); *id.* at 1094 (statement of Sen. Bayard) (pointing out that Parliament suspended directly rather than authorizing the king to do it).

¹⁰⁰ *Id.* at 1194 (statement of Sen. Doolittle).

¹⁰¹ *Id.* at 1192; see also *id.* at 1185 (statement of Sen. Trumbull) (“[Y]ou could not carry on this Government a day unless the powers which are vested in Congress could be exercised and carried out by instrumentalities other than Congress itself.”).

¹⁰² *Id.* at 1185.

¹⁰³ *Id.*; see also *id.* at 1194 (statement of Sen. Doolittle) (invoking the Calling Forth Act as authority for the proposition that Congress can “delegate to the President the power to judge of the exigency upon which the exercise of [the suspension] power shall depend”). Senator Carlile, an opponent of delegation, conceded that Congress could identify a “given and fixed” event that would enable the President to declare war but argued that the determination of where and when the threat to public safety warranted suspension was one Congress alone could make. *Id.* at 1187.

¹⁰⁴ *Id.* at 1188 (statement of Sen. Howard). He pointed out that the Executive, unlike Congress, is never in recess. Moreover, it is possible for the writ to be suspended only as to designated individuals or localities, and it is impractical for Congress to legislate at that level of specificity. *Id.*

¹⁰⁵ *Id.* at 1194.

sion was distinguishable from the analogies that the bill's supporters invoked. Issuing letters of marque and reprisal, calling out the militia, and declaring war were "war measures," Senator Powell insisted, and "there is a marked difference . . . between authorizing the President [to take a war measure], and authorizing him to suspend the functions of a great remedial civil writ."¹⁰⁶

It is noteworthy that the pro- and antidelegation camps disagreed not only on the question of delegation but also on the scope of the Suspension Clause itself. Those opposed to delegation generally took a narrow view of the Clause. For them, a rebellion in one part of the country did not justify suspension in another, nor did a threat to public safety in one location justify suspension in regions beyond it.¹⁰⁷ The Clause permitted the writ to be suspended only so far as is necessary, and Senator Bayard and his allies did not expect the President to make fine-tuned judgments in that regard. They knew that the suspension would have no geographic or temporal limits unless Congress imposed them. Senator Trumbull and his allies, by contrast, took a broader view of the Clause.¹⁰⁸ Tellingly, they did not defend delegation on the ground that the President was likely to suspend with the precision that Bayard and others thought the Clause required; on the contrary, they were comfortable on both constitutional and policy grounds with the prospect of a nationwide suspension. The stakes of

¹⁰⁶ *Id.* at 1192 ("One is military, purely military; the other is civil."). This distinction echoes one drawn in the case law. In areas in which the President possesses inherent authority—like his authority as Commander in Chief—the Court has allowed particularly broad delegations. See *infra* notes 213 and 286. The fact that Congress may delegate particularly broad authority to the President with respect to the conduct of war, then, does not necessarily support the argument that it may do so with respect to the decision to revoke civil rights.

¹⁰⁷ See, e.g., *id.* at 1104 (statement of Rep. Wickliffe) (arguing that insurrection in one part of the country does not justify suspension in another); *id.* at 1094 (statement of Sen. Bayard) (insisting that a suspension statute "must . . . describe where and in what part of the country, in your solemn judgment, the public safety requires that this writ should be suspended."); *id.* at 1187 (statement of Sen. Carlile) ("It cannot and it will not be contended that an invasion or rebellion existing in a particular section of the country would authorize an entire suspension of this writ all over that portion of the country where there was no rebellion or invasion, and where the public safety was not threatened."); *id.* at 1199 (statement of Sen. Henderson) (objecting to suspension in loyal states); *id.* at 1204 (statement of Sen. Saulsbury) (objecting that the Constitution did not permit suspension in states unaffected by the rebellion). Some appeared to characterize this as a prudential rather than constitutional constraint on the exercise of the power. See, e.g., *id.* at 111 (statement of Sen. Powell) ("[I]f it should be necessary to suspend the writ of *habeas corpus*, I trust [Congress] will exercise the power with circumspection, and only cause it to be suspended in certain States and in certain localities where it becomes necessary that it should be suspended, and not throughout the whole country.").

¹⁰⁸ *Id.* at 1185 (statement of Sen. Trumbull) ("It is entirely competent for Congress to authorize the President to suspend the writ of *habeas corpus* during this rebellion throughout the United States.").

delegating the suspension decision to the President, therefore, were considerably lower for them.

On September 15, 1863, six months after Congress passed the Act, Lincoln suspended the writ nationwide as to a broad class of prisoners.¹⁰⁹ This order did not dramatically change the status quo, for many of those to whom it applied were already subject to detention under earlier suspensions that Lincoln had instigated without Congress's permission.¹¹⁰

Those earlier orders had provoked challenge, most famously in *Ex parte Merryman*, on the ground that the power to suspend belonged exclusively to Congress.¹¹¹ The new orders provoked challenge on the ground that Congress could not delegate that power. In *In re Oliver*, the Wisconsin Supreme Court acknowledged the general proposition that the legislature has broad authority to delegate policymaking authority to the other branches of government.¹¹² Nonetheless, the court opined, suspension is different: "[T]he power to determine whether the emergency has arrived, when, under the constitution, the privilege may be suspended, seems one of those essential trusts confided to the legislature which cannot be delegated."¹¹³ Indeed, the court found the language in the 1863 Act so broad that it could be interpreted as "an attempt to transfer bodily to the [P]resident the entire legislative function upon this subject."¹¹⁴ The court avoided its serious doubts about the statute's constitutionality by interpreting the statute as "an expression of the legislative judgment that the time has already arrived when the public safety requires the legislature to provide for a suspension."¹¹⁵ In other words, it interpreted the statute as an outright suspension that left the President to execute the law by

¹⁰⁹ 8 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3372 (James D. Richardson ed., 1897) [hereinafter MESSAGES AND PAPERS].

¹¹⁰ I say "instigated" because Lincoln did not himself suspend the writ in all of the pre-1863 orders. Most often, he delegated the suspension authority to his subordinates. He authorized subordinate military commanders to suspend the writ between Philadelphia and Washington on April 27, 1861, *id.* at 3219; along portions of the Florida coast on May 10, 1861, *id.* at 3217-18; as to one Major Chase on June 20, 1861, *id.* at 3220; between New York and Washington on July 2, 1861, *id.* at 3220; between Bangor, Maine, and Washington on October 14, 1861, *id.* at 3240; in Missouri on December 2, 1861, *id.* at 3300; and in Baltimore on April 5, 1862, *id.* at 3313. On at least three occasions, Lincoln suspended the writ himself rather than authorizing a military commander to do so. On November 11, 1861, he "direct[ed] that the writ of habeas corpus be suspended" as to U.S. military personnel and "marshals and their deputies within the State of New York." An order dated August 8, 1862, "hereby suspended" the writ as to draft-dodgers. *Id.* at 3322. Another dated September 24, 1862, suspended it as to all the disloyal and their abettors. *Id.* at 3299-300.

¹¹¹ 17 F. Cas. 144 (C.C.D. Md. 1861).

¹¹² 17 Wis. 681, 682-84 (1864).

¹¹³ *Id.* at 685.

¹¹⁴ *Id.* at 685-86.

¹¹⁵ *Id.* at 682, 686.

deciding whether to exercise the emergency power in any particular case.¹¹⁶ In a different case, the Supreme Court of the District of Columbia agreed with the Wisconsin Supreme Court that the statute would almost surely be unconstitutional if it delegated suspension power to the President.¹¹⁷ Rather than interpreting it as an outright suspension, however, the District of Columbia court interpreted it as a (proper, in its view) recognition of the President's inherent authority to suspend.¹¹⁸

Interestingly, both pre- and post-1863 cases expressed concern not only about the division of power between the Legislative and Executive Branches but also about the President's ability to redelegate suspension power to his subordinates within the Executive Branch. As one court put it:

[E]ven if the [P]resident possessed the delicate and dangerous power of suspending the writ of habeas corpus, it will hardly be claimed that he could delegate it to all or any of his subordinates, to be exercised when, in their discretion, the 'public safety' might require it, any more than he could delegate the veto power.¹¹⁹

Nor, once the writ was suspended, were courts comfortable with the President broadly delegating emergency detention power to his subordinates. Recall that the state suspension statutes required detention orders to be signed by a high-ranking executive official, either the governor himself or a member of his council.¹²⁰ The 1863 Act contained no such limitation; instead, it authorized imprisonment "by order *or authority of* the President of the United States or [the Secretaries of State or War]."¹²¹ The Circuit Court in the District of California observed:

If every officer in the United States, during the suspension of the habeas corpus, is authorized to arrest and imprison whom he will, as 'aiders and abettors of the enemy,' without further orders from the [P]resident, or those to whom he has specially committed such au-

¹¹⁶ See *id.*

¹¹⁷ *In re Dugan*, 6 D.C. 131, 137 (1865) (asserting that if the suspension power belonged to Congress, the Act would be "a perfect and complete abnegation of that power" if Congress attempted to delegate the power to the President).

¹¹⁸ *Id.* at 146 (characterizing the statute as "enacted from 'abundant caution' to justify such exercise of authority if, as claimed by some, the provision should be finally declared to be a grant of legislative power").

¹¹⁹ *Ex parte Field*, 9 F.Cas. 1, 5 (D. Vt. 1862); see also *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (Taney, C.J.) (expressing surprise that the "[P]resident not only claims the right to suspend the writ of habeas corpus himself, at his discretion, but to delegate that discretionary power to a military officer").

¹²⁰ See *supra* Part II.B.

¹²¹ Act of Mar. 3, 1863, ch. 81, § 2, 12 Stat. 755 (emphasis added).

thority, the state of things that would follow can be better imagined than expressed.¹²²

Entrusting the President with the authority to suspend or the power to detain was one thing; entrusting that power to every man in the field was another.

While the Habeas Corpus Act of 1863 did not delegate to the President the question whether a rebellion existed at the time the statute was passed, it did leave him to determine when the rebellion ended.¹²³ President Andrew Johnson's judgment in this regard is open to question.¹²⁴ Robert E. Lee surrendered at Appomattox on April 9, 1865,¹²⁵ and the last Confederate army of any substance surrendered on May 26 of that year.¹²⁶ Yet Johnson did not fully revoke Lincoln's 1863 order instituting a nationwide suspension until August 20, 1866.¹²⁷ He thus left the suspension in place for more than a year after fighting had ceased. And while he did gradually narrow the scope of the suspension over the course of that year, his orders in that regard do not reflect a decision to target only those regions under

¹²² *McCall v. McDowell*, 15 F. Cas. 1235, 1247 (C.C.D. Cal. 1867); *see also Ex parte Benedict*, 3 F. Cas. 159, 162 (N.D.N.Y. 1862) ("Could it have been intended that military officers of every grade, and policemen of every class, throughout the loyal states, acting upon their own suspicions . . . should be authorized to arrest and imprison any citizen, without the possibility of a judicial investigation?"); CONG. GLOBE, 38th Cong., 2d Sess. 320 (1865) (statement of Rep. Davis) (lamenting the fact that arrests under the act were not being made by the President or heads of departments but by lieutenants, provost marshals, and sometimes "by a person calling himself a provost marshal"); *id.* at 1373 (statement of Sen. Trumbull) ("[W]hen I voted for that law, I did not expect that the writ of *habeas corpus* was to be regarded as suspended by all the subordinate officers throughout the land. I did not suppose that every provost marshal in the land would be at liberty to arrest whom he pleased, and keep him in confinement.").

¹²³ The statute permitted the President to suspend only "during the present rebellion." Thus, by the terms of the statute, the President's authority to exercise emergency power ceased when the rebellion ceased. Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755.

¹²⁴ Andrew Johnson became President after Abraham Lincoln was assassinated on April 14, 1865. JAMES M. MCPHERSON, *ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION* 520–21 (3d ed. 2001).

¹²⁵ *Id.* at 519.

¹²⁶ *Id.* at 530. The very last Confederate surrender of the war was the surrender of the C.S.S. *Shenandoah* in England on November 6, 1865. JOHN BALDWIN & RON POWERS, *LAST FLAG DOWN: THE EPIC JOURNEY OF THE LAST CONFEDERATE WARSHIP* 315–20 (2007).

¹²⁷ On June 13, 1865, he issued an order lifting certain restrictions on previously disloyal states but emphasized that the nationwide suspension remained in place. 8 MESSAGES AND PAPERS, *supra* note 109, at 3516 (emphasizing that "nothing herein contained shall be considered or construed . . . as impairing existing regulations for the suspension of the *habeas corpus*"). On December 1, 1865, Johnson revoked the suspension everywhere except "the States of Virginia, Kentucky, Tennessee, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas, and Texas, the District of Columbia, and the Territories of New Mexico and Arizona." *Id.* at 3531. On April 2, 1866, he revoked the suspension everywhere except Texas upon a finding that the insurrection was "at an end" in those states. *Id.* at 3630. He proclaimed the insurrection "completely and everywhere suppressed and ended . . . in the said State of Texas" and ended the suspension there on August 20, 1866. *Id.* at 3635–36.

particular threat. For example, Johnson deliberately left the suspension in place even in the northern states until December 1, 1865.¹²⁸ Moreover, this December order—the first to narrow the suspension—included Kentucky and Tennessee on a list of states singled out for continued suspension despite the fact that Johnson had earlier declared the insurrection successfully suppressed in both states.¹²⁹

3. Reconstruction

The Ku Klux Klan Act of 1871 authorized the President to suspend the writ of habeas corpus in order to put down Klan uprisings in the South.¹³⁰ The Civil War statute had delegated to the President only the authority to determine when the public safety required suspension. There was, of course, no dispute in that circumstance that a rebellion was underway, and Congress said as much in the statute itself. The Reconstruction statute, by contrast, required the President to decide not only what the public safety demanded but also when a rebellion existed—a question hotly debated in Congress.¹³¹ In tasking the President with this decision, Congress laid down specific guide-

¹²⁸ See *supra* note 127.

¹²⁹ The December order left the suspension intact in Tennessee, see *supra* note 127, despite the fact that Johnson's order of June 13, 1865, specifically declared the insurrection suppressed in that state. 8 MESSAGES AND PAPERS, *supra* note 109, at 3515 ("I am satisfactorily informed that dangerous combinations against the laws of the United States no longer exist within the State of Tennessee; that the insurrection heretofore existing within said State has been suppressed; that within the boundaries thereof the authority of the United States is undisputed, and that such officers of the United States as have been duly commissioned are in the undisturbed exercise of their official functions . . ."). Similarly, Johnson declared on October 12, 1865, that "the danger of insurgent raids . . . has substantially passed away" in Kentucky, *id.* at 3530, but Kentucky was also included in the list of states that Johnson singled out for continued suspension in his December 1, 1865 order. See *supra* note 127.

¹³⁰ See Tyler, *supra* note 2, at 655–62 (describing the context of this suspension).

¹³¹ See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. app. 160 (1871) (statement of Rep. Golladay) ("[F]or however the friends of this measure may insist, they can never convince any sane man that a few outrages committed by bad men, and not sanctioned by law or the community, constitute a rebellion."); *id.* at 368 (statement of Rep. Sheldon) ("I have no doubt of the existence of outrages in certain localities in the South, and of an aggravated and, perhaps, of an alarming character; alarming because they forebode anarchical tendencies, and a growing disposition to ignore and overturn social securities. . . . But bad as the condition is, or may have been, I have never believed, and do not now believe, that there is any purpose on the part of the responsible and influential people of the South to make another attempt to become independent of the Government of the United States."); *id.* at 373 (statement of Rep. Archer) ("This is magnifying individual quarrels, individual trespasses to rebellion against the Government, although the parties concerned may have had no idea, no desire to jeopardize the existence of the Government."). Notably, Senator Lyman Trumbull, the architect of the 1863 suspension statute, was among those in the 42nd Congress who thought the statute authorized suspension in circumstances that fell short of "rebellion." See *id.* at 582 (urging the "impropriety of authorizing the suspension of the writ of *habeas corpus* because of the existence of an unlawful combination armed and powerful, and that has done nothing whatever").

lines for determining what constituted a rebellion and concomitant threat to public safety:

[W]henever in any State or part of a State the unlawful combinations [of those who obstruct the execution of the law so as to deprive any class of people their civil rights] shall be organized and armed, and so numerous and powerful as to be able, by violence, to either overthrow or set at defiance the constituted authorities of such State, and of the United States within such State, or when the constituted authorities are in complicity with, or shall connive at the unlawful purposes of, such powerful and armed combinations; and whenever, by reason of either or all of the causes aforesaid, the conviction of such offenders and the preservation of the public safety shall become in such a district impracticable, *in every such case such combinations shall be deemed a rebellion against the government of the United States . . .*¹³²

This ability to determine when violence escalated to the level of a rebellion was the only respect in which the 1871 Act was broader than the 1863 Act. In every other respect, the authority it conferred was markedly narrower. It was geographically limited: the President could suspend the writ only “within the limits of the district which shall be so under the sway thereof.”¹³³ It was temporally limited: the authorization expired “after the end of the next regular session of Congress.”¹³⁴ It was also subject to conditions. The President could suspend the writ only if he first issued a proclamation “commanding such insurgents to disperse.”¹³⁵ Furthermore, once a suspension was in effect, detentions were subject to the same limitations imposed by the 1863 Act with respect to furnishing lists of prisoners to the courts and discharging those who were not prisoners of war and whom the grand jury did not indict.¹³⁶

¹³² Ku Klux Klan Act of 1871, ch. 22, § 4, 17 Stat. 13 (emphasis added). This statute bears some resemblance to the 1777 Maryland statute, which provided for suspension once the governor determined that an “invasion” had occurred. See *supra* note 65 and accompanying text. The difference between the two is that suspension automatically followed in the Maryland case, while the Ku Klux Klan Act made suspension contingent upon the President’s determination that the public safety required it. Once the President determined that a rebellion existed, the Ku Klux Klan Act provided “that it shall be lawful for the President of the United States, when in his judgment the public safety shall require it, to suspend the privileges of the writ of habeas corpus, to the end that such rebellion may be overthrown.” The different format of the 1871 Act is constitutionally significant. Ku Klux Klan Act of 1871, at § 4, 17 Stat. 15; see also *infra* Part III.

¹³³ § 4, 17 Stat. at 15.

¹³⁴ *Id.* Congress passed the Act on April 20, 1871, and the next session of Congress ended on June 10, 1872, giving the Act a lifespan of almost fourteen months. See *House History*, OFFICE OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, http://artandhistory.house.gov/house_history/Session_Dates/40to59.aspx (last visited Nov. 11, 2013).

¹³⁵ Ku Klux Klan Act of 1871, ch. 22, §4, 17 Stat. 13.

¹³⁶ *Id.*

As it had during the Civil War, delegating suspension authority to the President generated controversy. Many of the arguments levied against delegation echoed those made in the context of the 1863 Act, which opponents of the current legislation characterized as bad precedent that ought not be followed.¹³⁷ Critics insisted that the Constitution required Congress to exercise its own judgment about what the public safety required.¹³⁸ They contended that concentrating the suspension and detention powers in the hands of the Executive was both dangerous and in violation of the separation of powers principle.¹³⁹ And they pointed out that once the power was treated as delegable, there was no reason why Congress could not give it to someone lower ranked and perhaps less able than the President.¹⁴⁰

¹³⁷ See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 373 (1871) (statement of Rep. Archer) (insisting that the 1863 Act is a bad precedent because the suspension power cannot be delegated); *id.* at 411 (statement of Rep. Van Trump) (arguing that the 1863 act was “absolutely null and void” insofar as it delegated suspension power to the President). Senator Vickers made the same point in a debate about whether to extend the Ku Klux Klan Act. CONG. GLOBE, 42d Cong., 2d Sess. 3715 (1872) (“But I do not think that Congress even [in 1863] had any authority to invest the President with the power.”).

¹³⁸ See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 411 (1871) (statement of Rep. Van Trump) (describing the public safety determination as a discretionary judgment that is Congress’s alone to make); *id.* at 479 (statement of Rep. Leach) (“[I]f the legal principle of *delegatus non delegare* holds good, as it does, where matters of even little importance are involved, how much more so in that most delicate question and great inalienable right, the liberty of the citizen?”); *id.* at app. 160 (statement of Rep. Golladay) (“But this bill, sir, attempts to shirk the question [whether the exigency has arisen] and confer the power on the President. This cannot be done.”); *id.* at app. 222 (statement of Sen. Thurman) (asserting that the point of making the suspension power legislative is for Congress to judge whether the grounds for suspension exist); *id.* at app. 260 (statement of Rep. Holman) (arguing that the decision to suspend is entrusted to Congress alone, yet this bill “make[s] the President of the United States the sole judge of the conditions on which these vast and final powers of absolute government shall be assumed”).

¹³⁹ See, e.g., *id.* at app. 260 (statement of Rep. Holman) (arguing that vesting the President with this power disturbed the Constitution’s finely wrought separation of powers); *id.* at 399–400 (statement of Rep. Kinsella) (objecting to the danger of vesting one man, particularly one of military background, with the discretion to suspend habeas corpus); *id.* at 479 (statement of Rep. Leach) (“God never made any one man that I would trust with such a high prerogative . . .”). Senator Hamilton made the same point in the debate about whether to extend the suspension provision of the Ku Klux Klan Act. See CONG. GLOBE, 42d Cong., 2d Sess. 3724 (1872) (asserting that he would clothe no man, not even George Washington, with the power to suspend the writ); see *id.* at app. 510 (statement of Sen. Stevenson) (“I tell the Senator that the pending proposition to invest the President with the power of a Roman dictator over the liberty of the citizen is forbidden alike by law and fact. The Constitution forbids it, because it is an exclusive legislative trust, which Congress cannot redelegate.”).

¹⁴⁰ See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 352 (1871) (statement of Rep. Beck) (contending that “[i]f Congress can thus shift the responsibility, it can confer it on . . . the General of the Army, or an executive committee sitting during recess, or on any man or set of men it pleases, and the carefully guarded provisions of the Constitution may thus be set at naught”).

New, however, was the argument that even if the public safety determination was delegable, the question whether a rebellion or an invasion existed was not. Senator Bayard protested:

[A rebellion] cannot be contemplated in advance. . . . Now, Congress not only has sought to delegate to the President of the United States the exercise of a power confided to its discretion alone, but it has gone further, and authorized him to suspend this writ of right in a case where Congress itself has not the power constitutionally to do it.¹⁴¹

In other words, an active rebellion or invasion had to exist in order to justify any sort of suspension statute, including one that gave the President the authority to suspend when he judged it necessary for the public safety. Of course, not everyone saw the existence of an active rebellion or invasion as an immovable requirement. Anticipating the open-ended delegations Congress later enacted with respect to U.S. territories, Representative Sheldon of Louisiana opined that Congress had "the authority to place upon the statute-book a permanent law empowering the President to suspend the privileges of the writ of *habeas corpus* whenever in his judgment a case of rebellion or invasion exists."¹⁴² And here, the law was not so abstract as the one Representative Sheldon described. It was tied to current events, and it gave the President detailed guidelines to apply in determining whether the contingency had come to pass.¹⁴³ The bill's supporters contended

¹⁴¹ *Id.* at 245; *see also, e.g., id.* at 367 (statement of Rep. Arthur) (objecting on the ground that "Congress alone can rightfully suspend the privilege of [habeas corpus], and only in time of rebellion or invasion" and "Congress cannot devolve it upon the capricious will of the Executive, to do with as he may in contingencies"); *id.* at 479 (statement of Rep. Leach) (arguing that Congress cannot authorize the President to decide when public safety warrants suspension, much less to decide when "insurrection or war exists"); *id.* at app. 754 (statement of Rep. Wood) (objecting that the President "is to be the sole and exclusive judge of what constitutes a rebellion He may construe the assembling of two or more men in a bar-room fight as constituting that condition of things as under the bill would justify him in assuming that that kind of 'combination' or conspiracy or rebellion existed which warranted the full exercise of all the power granted"); *id.* at 352 (statement of Rep. Beck) ("The people have a right to have the action of their Representatives, under all their responsibilities, acting on the existing facts; and there is no warrant anywhere for the transfer of that authority to the President to act on such facts as may arise hereafter").

¹⁴² *Id.* at 368. He added that it would be "impolitic and dangerous" to do so. *Id.*

¹⁴³ *See, e.g., id.* at 483 (statement of Rep. Wilson) ("[The bill] does not make the President the sole and exclusive judge of what constitutes a rebellion. The bill specifies what facts shall be deemed a rebellion, and allows the President to judge when those facts exist."); *id.* at 698 (statement of Sen. Edmunds) (supporting delegation on the ground that Congress "delegate[s] powers constantly; not legislative powers, but powers to act in a contingency which the Legislature prescribes or provides for or defines in advance").

that Congress's act of empowering the President served as the necessary exercise of legislative authority.¹⁴⁴

Six months went by before President Ulysses S. Grant exercised the authority given him by the 1871 Act. On October 17, 1871, Grant suspended the writ in nine South Carolina counties after declaring that a rebellion existed as defined by the statute and that "the public safety especially requires that the privileges of the writ of *habeas corpus* be suspended."¹⁴⁵ The 1871 Act, like the 1863 Act, did not restrict the exercise of detention authority to high-ranking officials, and Grant delegated it to a range of subordinates: the U.S. marshal, any of his deputies, any federal military officer, and "any soldier or citizen acting under the orders of said marshal, deputy, or such military officer within any one of said counties."¹⁴⁶ Just over two weeks later, Grant revoked the suspension in one county.¹⁴⁷ On November 10, 1871, he suspended the writ in another county after finding the requisite rebellion and threat to public safety.¹⁴⁸ These suspensions remained in place until the statute expired on June 10, 1872.¹⁴⁹ A bill extending the President's authority to suspend was proposed, but Congress did not enact it.¹⁵⁰ Interestingly, the 1871 Act appears to be the only fed-

¹⁴⁴ See, e.g., *id.* at 698 (statement of Sen. Edmunds) (agreeing that the power is legislative but maintaining that Congress's delegation to the President was the required exercise of legislative authority).

¹⁴⁵ 9 MESSAGES AND PAPERS, *supra* note 109, at 4091–92 (Proclamation of Oct. 17, 1871).

¹⁴⁶ *Id.* at 4091. Major Lewis Merrill and his troops "responded with a massive round-up of suspects." Tyler, *supra* note 2, at 660 (quoting Kermit L. Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871–72*, 33 EMORY L. J. 921, 925 (1984)).

¹⁴⁷ 9 MESSAGES AND PAPERS, *supra* note 109, at 4093 (Proclamation of Nov. 3, 1871).

¹⁴⁸ *Id.* at 4094–95 (Proclamation of Nov. 10, 1871).

¹⁴⁹ Section 4 of the statute states that "the provisions of this section shall not be in force after the end of the next regular session of Congress." § 4, 17 Stat. at 15. The next session began on December 4, 1871, and ended on June 10, 1872. See *House History*, OFFICE OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, http://artandhistory.house.gov/house_history/Session_Dates/40to59.aspx (last visited Nov. 11, 2013).

¹⁵⁰ See S. 656, 42d Cong. (1872) (proposing to extend the President's emergency power through the end of the next regular session of Congress, which concluded on March 3, 1873); see also CONG. GLOBE, 42d Cong., 3d Sess. 2111 (March 3, 1873) (noting that the bill proposing to extend the Act had been tabled in the House and had now been "superseded by time"). The constitutional arguments against delegation were renewed when the extension was proposed. See, e.g., CONG. GLOBE, 42d Cong., 2d Sess. 3714 (1872) (statement of Sen. Vickers) ("It is among the legislative powers of Congress, and belongs exclusively to it. It is impossible from the nature of the power that it can be conferred upon another."); *id.* at 3719 (statement of Sen. Hamilton) ("[A] bill cannot be defended in any way, by any mode of argument, which proposes to invest the President of the United States with the authority to determine when the public safety requires suspension of the writ."); *id.* at 4373 (statement of Sen. Saulsbury) (arguing that only Congress can judge whether the requisites for suspension have been met); *id.* at app. 665 (statement of Sen. Thurman) (complaining that in the bill to extend the Act, as in the original, "Congress, instead of deciding itself whether the state of case *exists* which authorizes the suspension of

eral suspension statute whose constitutionality was not challenged in court.

While the Lincoln Administration had refused to comply with the report-and-release provisions included in section 2 of the 1863 Act,¹⁵¹ the Grant Administration obeyed those same statutory requirements.¹⁵² And in addition to turning over lists of prisoners to the courts, Grant gave Congress an account of the detentions made pursuant to the suspension order. In his annual message to Congress on December 4, 1871, Grant reported "many arrests" in two of the counties where he had suspended the writ¹⁵³ but noted that "several hundred" had been released because their "criminality was ascertained to be of an inferior degree."¹⁵⁴ The most recent count reflected that 168 remained in custody.¹⁵⁵ He asserted that "[g]reat caution has been exercised in making these arrests, and, notwithstanding the large number, it is believed that no innocent person is now in custody."¹⁵⁶ Shortly after Grant delivered this message, Congress asked him to submit a formal report detailing both the arrests made under the Act and the basis for his decision to suspend the writ in the first place.¹⁵⁷ Grant responded within three months with a report identifying the basis of his decision to suspend as information gathered by his attorney general, along with:

information of a similar import from various other sources, among which were the Joint Select Committee of Congress upon Southern Outrages, the officers of the State, the military officers of the United States on duty in South Carolina, the United States attorney and marshal and other civil officers of the Government, repentant and abjuring members of those unlawful organizations, persons spe-

the writ, undertakes to devolve the decision of that question upon the President of the United States").

¹⁵¹ See *supra* note 85 and accompanying text.

¹⁵² See, e.g., JOURNAL OF THE JOINT SELECT COMM. TO INQUIRE INTO THE CONDITION OF THE LATE INSURRECTIONARY STATES, S. REP. NO. 41-1, at 624 (1872) (noting that the clerk of the circuit court of the United States at Columbia, South Carolina, had provided it with the "number of indictments, [sic] found at the late term" and an "official copy of the presentment of the grand jury at the late term").

¹⁵³ 9 MESSAGES AND PAPERS, *supra* note 109, at 4096, 4105 (Third Annual Message).

¹⁵⁴ *Id.* at 4105.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ A House Resolution adopted on January 25, 1872, pursuant to the advice of the Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States requested that the President communicate to the House "all information in his possession upon which he acted in exercising the powers conferred upon him by [*inter alia*, the suspension provision] of the [Ku Klux Klan Act]." See CONG. GLOBE, 42d Cong., 2d Sess. 596 (1872) (setting forth the text of the resolution); *id.* at 598-99 (recording House approval of it).

cially employed by the Department of Justice to detect crimes against the United States, and from other credible persons.¹⁵⁸

A detailed report prepared by the attorney general detailed the number and names of those arrested and the disposition of those cases.¹⁵⁹ This transparency was a check on executive excess, and it also gave Congress information relevant to deciding whether further legislation, including an extension of the suspension provision, was necessary to restore order.

4. *Territorial Suspensions*

On January 31, 1905, the territorial governor of the Philippines, Luke Edward Wright, suspended the writ in response to the “open insurrection” of violent bands of robbers who so terrorized the people of the Cavite and Batangas provinces that it was “impossible in the ordinary way to conduct preliminary investigations before justices of the peace and other judicial officers. . . .”¹⁶⁰ Wright, who had been appointed by Theodore Roosevelt,¹⁶¹ issued the order pursuant to the territory’s organic act, which provided:

[T]he privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the governor, with the approval of the Philippine Commission, wherever during such period the necessity for such suspension shall exist.¹⁶²

¹⁵⁸ CONDITION OF AFFAIRS IN THE SOUTHERN STATES, H.R. EXEC. DOC. No. 268, at 2 (2d Sess. 1872).

¹⁵⁹ *Id.* at 3–19.

¹⁶⁰ *Fisher v. Baker*, 203 U.S. 174, 179–80 (1906) (quoting order).

¹⁶¹ Wright, who succeeded William Howard Taft in the post, was appointed by Roosevelt and confirmed by the Senate in 1904. See *Luke Edward Wright*, U.S. ARMY CENTER OF MILITARY HISTORY, <http://www.history.army.mil/books/Sw-SA/Wright.htm> (last visited Nov. 11, 2013); see also Act of July 1, 1902, ch. 1369, § 1, 32 Stat. 692 (providing that the President would appoint all civil governors of the Philippines, as well as all members of the Philippines Commission, with the advice and consent of the Senate). Like Taft, Wright went on to become Secretary of War. See *Luke Edward Wright*, *supra*.

¹⁶² Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 691, 692. In 1916, Congress passed a new organic statute for the Philippines. Act of Aug. 29, 1916, ch. 416, 39 Stat. 545. That statute contained a similar delegation of suspension authority; the primary difference was that the Philippines Commission no longer had a role in the process. See *id.* at 546 (“[T]he privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the Governor General, wherever during such period the necessity for such suspension shall exist.”). The constitution of the Philippines, adopted pursuant to congressional authorization in 1935, superseded the Act. See CONSTITUTION OF THE PHILIPPINES (Feb. 8, 1935). The Philippines became independent of the United States in 1946, see Treaty of General Relations, U.S.-Phil., Jul. 4, 1946, 61 Stat. 1174.

Finding the conditions for suspension satisfied, the Philippines Commission, members of which had also been appointed by Roosevelt, adopted a resolution authorizing the governor to suspend the writ, which he did in two provinces on the very same day.¹⁶³ Wright revoked the suspension nearly ten months later.¹⁶⁴

Congress's delegation of suspension authority to the Executive Branch drew constitutional challenge. In *Fisher v. Baker*, a prisoner held pursuant to the January 31 order contended that the order was invalid because "[u]nder the Constitution, the power to suspend the privilege of the writ of *habeas corpus* rests in Congress, and cannot be delegated to the Philippine Governor and Commission."¹⁶⁵ The Solicitor General of the United States countered that the Constitution left Congress free to delegate the suspension power to the Executive.¹⁶⁶ Because the Supreme Court dismissed the case on jurisdictional grounds, it did not resolve the question.¹⁶⁷

The writ was suspended for a second time in a U.S. territory on the day Japan bombed Pearl Harbor. On December 7, 1941, Joseph Poindexter, the territorial governor of Hawaii, issued an order "hereby suspend[ing] the privilege of the writ of *habeas corpus* until further notice."¹⁶⁸ Poindexter, who had been appointed by Franklin

¹⁶³ *Fisher*, 203 U.S. at 179–80.

¹⁶⁴ *Id.* at 181.

¹⁶⁵ *Id.* at 176. He also argued that the order was invalid because "[i]nsurrection is necessarily political," but ladorism (robbery), the stated basis for the suspension, "is [a] mere common law crime." *Id.* at 175 (internal quotation marks omitted). He pointed out, moreover, that the Suspension Clause did not authorize suspension in cases of "insurrection," as opposed to cases of "rebellion." *Id.* at 176 ("The attempted inclusion of 'insurrection,' as a ground of suspension, is unconstitutional and void. 'Insurrection' is not synonymous with rebellion."). As this argument reflects, the petitioner took the position that the protection of the Suspension Clause extended to the Philippines, a position with which the United States disagreed. *Id.* at 178 (argument of the Solicitor General) (asserting that "the act for the Philippines . . . is not subject to the precise limitations of the constitutional provision").

¹⁶⁶ The Solicitor General claimed that "[i]t has been decided" that Congress could leave the "public safety" determination to the President's discretion and that "[i]t has not been decided that, so authorized, he may not determine whether the exigency of invasion or rebellion has arisen." *Id.* For the former proposition, he cited *In re Oliver*, 17 Wis. 681 (1864), which upheld the Habeas Corpus Act of 1863 against a delegation challenge. *Fisher*, 203 U.S. at 177. As discussed above, that opinion does not hold it permissible for Congress to give the President the authority to decide the public safety issue. On the contrary, the Wisconsin Supreme Court's serious constitutional doubts about whether Congress could do so prompted it to avoid the question by construing the 1863 Act as an outright suspension. See *supra* notes 112–16 and accompanying text.

¹⁶⁷ *Fisher*, 203 U.S. at 181–82.

¹⁶⁸ Garner Anthony, *Martial Law, Military Government and the Writ of Habeas Corpus in Hawaii*, 31 CALIF. L. REV. 477, 507 (1943) (reprinting order in Appendix I). The Hawaiian Organic Act provided that the territorial governor "shall be appointed by the President by and with the advice and consent of the Senate of the United States, and shall hold office for four years . . . unless sooner removed by the President." See Act of Apr. 30, 1900, ch. 339, § 66, 31 Stat. 141, 153.

D. Roosevelt, acted pursuant to the Hawaiian Organic Act, in which Congress included the following authorization:

[The governor] may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known.¹⁶⁹

Governor Poindexter cabled President Roosevelt on December 7 to inform him that he had both imposed martial law and suspended the privilege of the writ.¹⁷⁰ Roosevelt approved this decision two days later.¹⁷¹ The suspension remained in effect for almost three years; Roosevelt restored the privilege on October 24, 1944.¹⁷² Some contended that the suspension had continued long after both the threat to public safety and the risk of another invasion had diminished.¹⁷³

While the Philippines and Hawaii are the only territories in which the writ was actually suspended, the organic acts of the Virgin Is-

¹⁶⁹ Act of Apr. 30, 1900, ch. 339, § 67, at 153. The lack of a comma after the phrase “martial law” makes it possible to read the statute as giving the President power to override the territorial governor only with respect to the declaration of martial law and not to the suspension of the privilege of the writ. This ambiguity was corrected in Guam’s later-enacted statute, which employed nearly identical language but included a comma to make clear that the “presidential notification” clause applied to both the suspension and martial law decisions. See *infra* note 176. Hawaii’s territorial law was superseded after Hawaii became a state in 1959. See Act of Mar. 18, 1959, Pub. L. No. 86-3, § 15, 73 Stat. 4, 11 (providing that “[t]erritorial law enacted by the Congress shall be terminated two years after the date of admission of the State of Hawaii into the Union or upon the effective date of any law enacted by the State of Hawaii which amends or repeals it, whichever may occur first”).

¹⁷⁰ See Anthony, *supra* note 168, at 478 (“I have today declared martial law throughout the Territory of Hawaii and have suspended the privilege of the writ of habeas corpus.”).

¹⁷¹ See *id.*

¹⁷² Proclamation No. 2627, 3 C.F.R. § 41 (Oct. 19, 1944).

¹⁷³ In July of 1943, the district court of the Territory of Hawaii held in an unpublished opinion that detainees could invoke the privilege because Hawaii was no longer in imminent danger of invasion after the Battle of Midway. Anthony, *supra* note 168, at 486–87; see also *Ex parte Spurlock*, 66 F. Supp. 997, 1004 (D. Haw. 1944) (asserting that “[t]he privilege cannot remain suspended by fiat after all reason for its suspension has passed”). The Ninth Circuit took the position that in the face of conflicting evidence about the necessity of continued suspension, a federal court could not substitute its judgment for that of military authorities. See *Duncan v. Kahanamoku*, 146 F.2d 576, 581–83 (9th Cir. 1944), *rev’d on other grounds*, 327 U.S. 304 (1946).

lands¹⁷⁴ and Puerto Rico¹⁷⁵ also contained at one point a delegation of suspension authority identical to that contained in the Hawaiian organic statute. The Organic Act of Guam had a nearly identical suspension provision.¹⁷⁶ None of these delegation provisions remains in effect today.¹⁷⁷

The delegations in these five territorial statutes were sweeping. In contrast to the Civil War and Reconstruction statutes, they were not enacted in response to events that arguably justified suspension. In Puerto Rico, the Virgin Islands, and Guam, such events never in fact arose. The Philippines suspension provision was enacted in 1902; the events giving rise to its exercise did not occur until three years later. The time lag is even more extreme in the case of Hawaii: the governor exercised the suspension authority forty-one years after Congress delegated it.

¹⁷⁴ See Act of June 22, 1936, ch. 699, § 20, 49 Stat. 1807, 1812. This provision also appeared in the 1954 Revised Organic Act of the Virgin Islands. See Act of July 22, 1954, ch. 558, § 11, 68 Stat. 497, 503. A 1968 amendment to this section omitted the reference to suspension, while retaining the governor's authority to declare martial law. See Act of Aug. 3, 1968, Pub. L. No. 90-496, § 4, 82 Stat. 837, 838. The original organic act providing a temporary government for the Virgin Islands contained no suspension provision; however, that omission is unsurprising given the skeletal nature of the statute which simply vested "all military, civil, and judicial powers" in a governor appointed by the President. Act of Mar. 3, 1917, ch. 171, § 1, 39 Stat. 1132, 1132.

¹⁷⁵ See Jones Act, ch. 145, § 12, 39 Stat. 951, 955 (1917) (authorizing the governor "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it [to] suspend the privilege of the writ of habeas corpus, or place the island, or any part thereof, under martial law until communication can be had with the President and the President's decision therein made known"). The Jones Act was Puerto Rico's second organic statute. Its first did not contain a suspension provision. See Act of Apr. 12, 1900, ch. 191, § 17, 31 Stat. 77, 81. The Act of July 3, 1950, which allowed Puerto Rico to draft its own constitution, repealed the suspension provision of the Jones Act. See Act of July 3, 1950, ch. 446, § 5(2), 64 Stat. 319, 320.

¹⁷⁶ That statute provided that "[the governor] may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place Guam, or any part thereof, under martial law, until communication can be had with the President and the President's decision thereon communicated to the Governor." Act of Aug. 1, 1950, ch. 512, § 6, 64 Stat. 384, 386. Note that this statute supplies a comma after the phrase "martial law," making clear that it extends the power of presidential override to the suspension of habeas as well as to the declaration of martial law. See *supra* note 169. The 1960 version of the Act retained the suspension provision, see § 6(b); the 1968 version eliminated the suspension authority but retained gubernatorial authority to declare martial law, see Act of Sept. 11, 1968, Pub. L. No. 90-497, § 1, 82 Stat. 842, 843.

¹⁷⁷ See *supra* notes 162, 169, 175, 176, and 176. The legislative history of the statutes regarding Puerto Rico and Guam, which remain U.S. territories, suggests that Congress withdrew the suspension power from the territorial governor when he became an elected official not subject to the supervision of the President. See, e.g., H.R. REP. NO. 89-1520, at 7 (1966) (explaining that the territorial governor's power to suspend the writ of habeas was removed under the revised organic acts of Guam and the Virgin Islands because that power is "inappropriate for an elected local official, not supervised by the President or his designee").

Congress's rationale for vesting these territorial governors with suspension authority may have been the distance of these territories from the mainland. A House report on the bill that became the 1900 Hawaiian Act noted that:

The governor of the Territory of Hawaii . . . is given authority to suspend the privilege of the writ of habeas corpus, and to place the Territory under martial law when such course is required by the public safety. These provisions are necessary in view of the distance of the islands and the nature of existing means of communication and transportation.¹⁷⁸

That said, Congress did not consistently delegate suspension authority to every governor of a distant territory.¹⁷⁹ Its inclusion of such provisions in territorial statutes was sporadic rather than systematic.

In contrast to the Civil War and Reconstruction statutes, delegation in the territorial context apparently generated no controversy in Congress. It is impossible to say why, although some have speculated that the inattention may be partly explained by contemporary doubts about whether the Constitution—and thus the protection of the Suspension Clause—applied in American territories.¹⁸⁰ Whatever as-

¹⁷⁸ H.R. REP. NO. 55-1808, at 2 (1899).

¹⁷⁹ For example, both the Organic Act of Hawaii, adopted in 1900, and the Organic Act of the Philippines, adopted in 1902, vested the territorial governor and commission with such power, *see supra* note 162, but the first Puerto Rican Organic Act, adopted in 1900, did not. Congress added the Puerto Rican suspension provision in 1917. *See supra* note 175. Moreover, the acts governing the territory of Alaska, passed in the same period, did not grant suspension authority to the Alaskan governor. *See* Act of May 17, 1884, ch. 53, § 2, 23 Stat. 24, 24; *see also* Act of Aug. 24, 1912, ch. 387, 37 Stat. 512. Delegations of suspension authority were also absent from acts establishing territories located in the mainland United States but far enough away from the capital so as to render the exchange of information difficult given then-existing means of transportation and communication. Historically, most territorial statutes have incorporated by reference the Northwest Ordinance, which rendered the territorial governor the “commander-in-chief of the militia,” but said nothing about either martial law or the suspension of habeas. Act of Aug. 7, 1789, ch. 8, 1 Stat 50, 51. Current territorial statutes typically grant the territorial governor the power to impose martial law but not to suspend the privilege of the writ. *See supra* note 177.

¹⁸⁰ *See* Diller, *supra* note 20, at 598 n.66 (positing that the “rather unbridled discretion Congress gave territorial governors to suspend habeas in the Philippine and Hawaiian Organic Acts is likely a result of Congress not initially viewing those territories as fully protected by the United States Constitution”) (internal citations omitted). The question whether the Constitution was understood to apply to these territories in the early twentieth century is a complicated one. *See* Andrew Kent, Boumediene, Munaf, and the Supreme Court’s Misreading of the Insular Cases, 97 IOWA L. REV. 101, 127–32 (2011) (describing political controversy at the turn of the twentieth century about whether the Constitution “followed the flag” to newly acquired American territories); Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 874–78 (1990) (describing the evolution of Supreme Court doctrine between 1901 and 1922 on this question). The answer, moreover, may not be the same for each territory. Hawaii, as an incorporated territory, was one to which the Constitution was thought to extend of its own force, *see* Kent, *supra*, at 108–09 (describing the doctrine of territorial incorporation), and even if it did not, Congress had rendered it almost fully applicable by statute. *See* Act of Apr. 30, 1900,

sumptions Congress may have made at the time, these statutes provoke the question whether Congress could employ the same open-ended model again. Indeed, recall that during the Reconstruction debates, Representative Sheldon contended that Congress had the authority to pass just that sort of statute with respect to the United States proper.¹⁸¹ These statutes and the suspensions resulting from them offer concrete examples of what such an assertion of authority might look like and a means of considering whether such broad delegations adequately preserve the benefits of locating the suspension power in Congress.

III

CONTINGENT SUSPENSION AND CANCELLATION AUTHORITY

This history makes clear that the separation of powers debate surrounding suspension has been more complicated than the stark “Lincoln versus Congress” dispute about whether Congress alone possesses the power to initiate a suspension. The emergence of the delegation model provoked a serious debate about whether Congress has to make the “invasion or rebellion” and “public safety” determinations itself or whether it can vest the President with authority to make those judgments at some later date. While critics of the statutes did not frame the argument quite this way, the claim is essentially that contingency format delegations are unconstitutional in this context.

Contingent legislation—legislation taking effect upon satisfaction of some condition rather than a date certain—is a standard means by which Congress delegates discretion to the Executive Branch.¹⁸² As Gary Lawson has observed, “Normally, a statute’s effective date will be

ch. 339, § 5, 31 Stat. 141, 141–42 (“[T]he Constitution, and . . . all the laws of the United States . . . not locally inapplicable, shall have the same force and effect within the said Territory [of Hawaii] as elsewhere in the United States.”). Unincorporated territories like the Philippines, Guam, Puerto Rico, and the Virgin Islands enjoyed the protection of only the Constitution’s “fundamental rights”; the question whether the protection afforded by the Suspension Clause qualified as one of those rights was apparently unsettled. *See supra* note 165. As a matter of modern doctrine, the Suspension Clause applies not only to territories over which the United States is formally sovereign but also to those over which it exercises *de facto* control. *See Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (holding that the Suspension Clause “has full effect at Guantánamo Bay”).

¹⁸¹ *See supra* note 142 and accompanying text.

¹⁸² Laurence Tribe has explained that statutes delegating authority to the Executive Branch fall into two broad categories: (1) contingent legislation, which “condition[s] the operation of legislation upon an administrative agency official’s determination of certain facts” and (2) legislation authorizing interstitial administrative action, which sets forth a broad policy directive and charges an administrative agency to “fill up the details.” LAURENCE H. TRIBE, 1 *AMERICAN CONSTITUTIONAL LAW* 979 (3d ed. 2000) (citations omitted). Kevin Stack has observed that “[w]hile these contingency format delegations are no longer the standard form of delegations to agencies, Congress still regularly employs them when it delegates power directly to the President.” Kevin M. Stack, *The Reviewability of the President’s Statutory Powers*, 62 *VAND. L. REV.* 1171, 1174 (2009).

a calendar date, but there is no evident reason why that effective date cannot be determined by some event other than celestial motions—such as legislation that takes effect only upon occurrence of natural disasters.”¹⁸³ Delegation is what makes contingent legislation possible, for Congress must rely upon executive or judicial agents to determine when the conditions rendering the statute effective are satisfied.¹⁸⁴ Congress has passed contingent legislation since the early days of the Republic,¹⁸⁵ and the Court has held that refusing Congress this ability would “rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know.”¹⁸⁶ So long as Congress lays down an “intelligible principle” to guide the determination of when the conditions rendering the statute are satisfied, contingent legislation is permissible.¹⁸⁷

One difficulty with the use of contingent legislation in this context relates to the particular kind of authority the federal suspension statutes have conferred. The statutes passed thus far have granted the President so-called cancellation authority—that is, the authority to cancel the operation of other then-effective laws upon the occurrence of a stated contingency. Once the President determined that the statutory prerequisites of “invasion or rebellion” and “threat to public safety” had been met, each statute permitted him to cancel statutes granting federal courts jurisdiction to order the release of prisoners, statutes granting various procedural rights, and even some of the pro-

¹⁸³ Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 364 (2002); see also *Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1474 (1998) (observing that “[t]he Court frequently has upheld Congress’ delegation of responsibilities to the Executive through contingent legislation requiring an executive agent to take some action upon the finding of specified conditions”).

¹⁸⁴ See Lawson, *supra* note 183, at 387 (“[T]here is no reason why Congress cannot entrust executive and judicial agents with the implementational task of determining whether those specified events have occurred.”).

¹⁸⁵ For example, the Calling Forth Act of 1792, a version of which remains in the United States Code today, see 10 U.S.C. §§ 331–332 (2012), provided that “whenever the United States shall be invaded, or be in imminent danger of invasion . . . it shall be lawful for the President . . . to call forth such number of the militia of the state or states . . . as he may judge necessary to repel such invasion.” Calling Forth Act of 1792, ch. 28, § 1, 1 Stat. 264, 264. In the event of insurrection, the statute authorized the President “to call forth such number of the militia of any other state or states . . . as he may judge sufficient to suppress such insurrection.” *Id.* For a comparison of the President’s power to call forth the militia and his power to suspend, see *infra* notes 211–14 and accompanying text.

¹⁸⁶ *Field v. Clark*, 143 U.S. 649, 694 (1892); see also *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 407 (1928) (“Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive . . .”).

¹⁸⁷ See *J. W. Hampton*, 276 U.S. at 409 (“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.”).

cedural guarantees enshrined in the Bill of Rights. Congress assuredly has the power to repeal statutes either temporarily or permanently and, by virtue of the Constitution's emergency power, to suspend temporarily some of the procedural protections of liberty guaranteed therein.¹⁸⁸ But the temporary repeal accomplished pursuant to these statutes was effected by executive order rather than by legislation. Contingent legislation does not always or even often include cancellation authority.¹⁸⁹ When it does, however, such legislation is susceptible to the objection that it permits the President to repeal law outside the process of bicameralism and presentment.

The Court has sent mixed signals about the validity of statutes that vest the Executive with contingent authority to revive or cancel statutes. In two leading nineteenth century cases, the Court upheld such legislation. In *The Brig Aurora*, the Court held constitutional a statute providing that if either Great Britain or France violated the neutral commerce of the United States, the President could revive by

¹⁸⁸ See *supra* notes 9–10 and accompanying text. The Suspension Clause is not itself the source of Congress's authority to suspend, for it is phrased as a restraint upon power rather than a grant of it. *But see* Diller, *supra* note 20, at 602 (proposing that the Suspension Clause itself impliedly authorizes Congress to suspend the writ). While the Court has never addressed the issue, scholars and legislators have proposed a number of theories about the source of congressional power. One is that the power to suspend emanates from Congress's power to regulate the federal courts. This proposition, however, "is in significant tension with the very plausible understanding of the Suspension Clause as designed, at least in part, to restrain Congress from suspending habeas corpus in the state courts." *Id.* at 602 n.94. Another leading scholar has posited that the "federal power to suspend the writ . . . must be deduced as an ancillary power to implement one of Congress's substantive powers that is relevant to the particular emergency." Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555, 600 (2002). Candidates include the War Power (if war is declared); the Militia Clause (if the Militia is called to suppress the rebellion or repel the invasion); the Guarantee Clause (when suspension offers protection from invasion or when the state seeks assistance in suppressing domestic violence); and the Commerce Clause (when the invasion or rebellion threatens interstate commerce). *See id.* There are still other clauses that may justify suspension in particular situations. For example, the Reconstruction Congress, which suspended to subvert the Ku Klux Klan, identified Section 5 of the Fourteenth Amendment as the source of its power. *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. app. 75 (1871) (statement of Rep. Wood) (asserting that suspension of the writ, among other things, is "proposed to be . . . authorized by the fourteenth amendment to the Constitution of the United States."). When it comes to U.S. territories, Article IV, Section 3, cl. 2 of the Constitution, which grants Congress plenary authority to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," might empower Congress insofar as suspension may be a "needful Rule" under this Article. Perhaps most attractive, however, is to simply say that whatever the particular circumstance, a suspension carries into execution all powers vested in the government of the United States by helping to "ensure the continued execution of governmental laws and [to] sustain [] the Constitution's ultimate authority." Prakash, *supra* note 13, at 592 (offering further detail as to why suspensions are both "necessary" and "proper" to furthering this aim).

¹⁸⁹ For example, the Calling Forth Act of 1972, ch. 28, § 1, 1 Stat. 264, one of the earliest examples of contingent legislation, gave the President authority to call out the militia upon satisfaction of certain conditions but did not confer cancellation authority.

proclamation a then-expired law imposing trade restrictions on the offending country.¹⁹⁰ In *Field v. Clark*, the Court upheld a statute providing that if the President deemed duties imposed on products exported from the United States to be “reciprocally unequal and unreasonable,” it was his “duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such [items produced by that country], for such time as he shall deem just.”¹⁹¹ The appellants in both *The Brig Aurora* and *Field* argued that authorizing the President to render a law effective or ineffective by proclamation violated Article I, Section 7’s requirement of bicameralism and presentment.¹⁹² The Court maintained, however, that enactment satisfied the legislative process and the President merely executed the law. As the Court put it in *Field*, “[t]he legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.”¹⁹³ In support of its conclusion, the Court cited a string of statutes, dating from 1798, authorizing the President to either impose or lift statutory trade restrictions when he judged that doing so would be in the interest of the United States.¹⁹⁴

One might have thought the Court settled the validity of this kind of contingent legislation—legislation empowering the Executive to render expired statutory provisions effective or otherwise applicable ones ineffective—after cases like *The Brig Aurora* and *Field*. The Court more recently suggested, however, that cancellation statutes like the one upheld in *Field* may be exceptional. In *Clinton v. City of New York*, the Court held that the Line Item Veto Act, which permitted the President to cancel spending provisions,¹⁹⁵ authorized the President “to effect the repeal of laws . . . without observing the procedures set out in Article I, Section 7.”¹⁹⁶ The Court distinguished *Field* and the statutes it approvingly cited for two reasons. First, those statutes all dealt

¹⁹⁰ *Cargo of the Brig Aurora v. United States (The Brig Aurora)*, 11 U.S. 382, 388 (1813) (“[W]e can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct.”).

¹⁹¹ 143 U.S. 649, 680 (1892).

¹⁹² See *The Brig Aurora*, 11 U.S. at 386 (“To make the revival of a law depend upon the President’s proclamation, is to give to that proclamation the force of a law.”); *Field*, 143 U.S. at 681 (“The plaintiffs in error contend that this section, so far as it authorizes the President to suspend [certain] provisions of the act . . . is unconstitutional, as delegating to him both legislative and treaty-making powers . . .”).

¹⁹³ *Field*, 143 U.S. at 694 (internal quotation marks omitted).

¹⁹⁴ *Id.* at 684–90.

¹⁹⁵ 524 U.S. 417, 436 (1998) (noting that “[t]he Line Item Veto Act [gave] the President the power to ‘cancel in whole’ three types of provisions that have been signed into law”).

¹⁹⁶ *Id.* at 445.

with foreign trade, an area in which the President's inherent authority over foreign affairs increases the discretion he may exercise.¹⁹⁷ Second and more important, the cited statutes imposed a *duty* upon the President to suspend the operation of a particular statute when he found the condition satisfied rather than leaving the decision to his discretion.¹⁹⁸ The *Field* Court had itself emphasized the importance of this factor insofar as it insisted that "[n]othing involving the expediency or the just operation of [the Customs Administration Act] was left to the determination of the President," for Congress prescribed the conditions that would trigger a suspension of free trade, and once the President ascertained the existence of those conditions, it "became his duty to issue a proclamation declaring the suspension."¹⁹⁹ As a legal matter, then, the statute itself temporarily repealed the free trade provisions, and the President's proclamation merely recognized that fact. Had Congress authorized the President to suspend when he saw fit, the temporary repeal would have resulted from the executive order rather than the statute, and that would have been impermissible.²⁰⁰

The suspension statute the Maryland legislature enacted during the Revolutionary War is an example of the sort of contingent legislation that the Court approved in *Field* and *Clinton*. Once the governor determined that an "invasion" had occurred, suspension automatically

¹⁹⁷ See *id.* at 444–45.

¹⁹⁸ *Id.* at 445 (emphasizing that in the statutes discussed in *Field*, "Congress itself made the decision to suspend or repeal the particular provisions at issue upon the occurrence of particular events subsequent to enactment, and it left only the determination whether such events occurred up to the President").

¹⁹⁹ *Field*, 143 U.S. at 693. The statute at issue in *The Brig Aurora* operated the same way insofar as it provided that the President "shall declare by proclamation" when either France or Great Britain ceased unfair trade practices, at which point restrictions imposed by that statute "shall . . . cease and be discontinued" as to that nation, and provisions of another statute imposing restrictions "shall . . . be revived[] and have full force and effect" as to the other if that nation did not cease unfair practices within three months. 11 U.S. at 384 (emphases added) (internal quotations omitted); see also *Field*, 143 U.S. at 682. In upholding the Act, the Court apparently accepted counsel's argument that the statute, rather than the executive order, accomplished the repeal of one law and revival of the other, as Congress "only prescribed the evidence which should be admitted of a fact, upon which the law should go into effect." 11 U.S. at 387 (argument of counsel).

²⁰⁰ While the statute at issue in *Field* imposed a duty on the President, not all of the statutes cited approvingly in *Field* did. As Justice Breyer noted in the dissent, "some of the statutes imposed no duty upon the President at all," and "[o]thers imposed a 'duty' in terms so vague as to leave substantial discretion in the President's hands." *Clinton*, 524 U.S. at 493 (Breyer, J., dissenting) (citations omitted). For example, a statute passed in 1799 permitted the President to suspend statutory restrictions on trade with France "if he shall deem it expedient and consistent with the interest of the United States," and to reimpose them "whenever, in his opinion, the interest of the United States shall require." See *Field*, 143 U.S. at 684 (quoting statute) (emphasis omitted). The *Clinton* majority responded that insofar as any of the statutes cited in *Field* could be interpreted as giving the President discretion to cancel or revive statutes, the Court had never passed on their constitutionality. See 524 U.S. at 444 n.36.

followed.²⁰¹ All of the federal suspension statutes, however, have given the President the discretion, rather than the duty, to suspend the writ. Both the Civil War and Reconstruction statutes authorized, but did not require, the President to suspend the privilege of the writ when he judged the public safety to require it,²⁰² and the five territorial statutes each provided that the President, or the governor subject to his supervision, “may” suspend the privilege upon finding the statutory conditions satisfied.²⁰³ If, as the *Clinton* Court contends, a statute giving the President the discretion to suspend other statutes upon the occurrence of some contingency violates Article I, Section 7, then all of the federal suspension statutes passed thus far fail on that basis.

This defect, however, is one of form rather than substance, and accordingly, it should not give us great pause. To the extent that the suspension-by-delegation model employed thus far has permitted the amendment or repeal of statutes outside of the Article I, Section 7 process, that flaw could be remedied. Consider that the effectiveness of the line-item veto lay in the very structure of the innovation.²⁰⁴ In the case of suspension statutes, however, the structure of the suspension—i.e., whether the legal consequence of repeal flows from the statute or the executive order—should be a matter of indifference to Congress. Congress could have rewritten any of the seven federal suspension statutes to provide that when an invasion or a rebellion occurs, and when the public safety requires it, the President shall notice the same by proclamation, at which point the privilege of the writ of habeas corpus shall be suspended. That formulation does not change the substance of the President’s responsibility, but it avoids the objection that the order, rather than the statute itself, has the legal effect of suspending other laws. So long as Congress ensures that the President acts as a fact-finder rather than a law-repealer, it observes the requirements of the lawmaking process.²⁰⁵ It is thus unnecessary to examine the soundness of the Court’s reasoning in *Clinton* or to settle conclu-

²⁰¹ See *supra* note 65 and accompanying text. The rebellion prong of the Reconstruction statute functioned similarly. When the President determined that the conditions Congress described existed, the statute provided that “such combinations shall be deemed a rebellion.” Ku Klux Klan Act of 1871, ch. 22, § 4, 17 Stat. 13 (emphasis added). It was the public safety prong on which he had discretion. *Id.*; see also *supra* note 132 and accompanying text.

²⁰² See *supra* notes 80–132 and accompanying text.

²⁰³ See *supra* note 169 and accompanying text and notes 174–76.

²⁰⁴ *Clinton*, 524 U.S. at 497 (Breyer, J., dissenting) (characterizing the mechanism of the line-item veto as “an experiment that may, or may not, help representative government work better”). The value of the one-house veto—another delegation that ran afoul of Article I, Section 7—similarly lay in its very structure. See *INS v. Chadha*, 462 U.S. 919, 972 (1983) (White, J., dissenting) (characterizing the one-house veto as “an important[,] if not indispensable[,] political invention”).

²⁰⁵ Note that the structure of such a statute would track almost exactly the structure of the statute approved in *Field v. Clark*. As the Court there put it,

sively whether that case applies here, for its holding poses no absolute bar to contingency format delegations of what is functionally, if not formally, cancellation authority.²⁰⁶

To be sure, the proposition that Congress can accomplish something as serious as suspension on a contingent basis is unsettling, for such a statute relinquishes Congress's ability to assess the need for suspension when the events provoking it actually arise. That determination is left instead to the President, who is more likely to value security over liberty in a time of crisis.²⁰⁷ Because, however, the Constitution does not generally prohibit contingent cancellation legislation, any objection to Congress's leaving the need for suspension to the President's judgment must rest on the Constitution's specific treatment of suspension. The next Part considers whether the Suspension Clause itself imposes any limits.

IV THE SUSPENSION CLAUSE AS A LIMIT UPON CONTINGENT LEGISLATION

This Part explores whether the Suspension Clause limits Congress's ability to pass contingent suspension legislation in a class of cases that may or may not arise. As explained above, the Necessary and Proper Clause generally permits Congress to pass statutes whose effectiveness hinges upon events that may occur soon, in the distant future, or not at all. Conditional grants of authority thus give the legislature great flexibility to provide for the future, and Congress has taken advantage of that flexibility in the suspension statutes, which have varied widely in their relationship to specific events. Congress

[l]egislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. . . . He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.

Field, 143 U.S. at 693.

²⁰⁶ That said, *Clinton* does suggest in passing that contingent delegations of cancellation authority might be confined to the context of foreign trade, which is the only context in which the Court has upheld contingent cancellation statutes. See 524 U.S. at 445 (emphasizing that the contingent cancellation statutes cited approvingly in *Field* "all relate to foreign trade, and this Court has recognized that in the foreign affairs arena, the President has 'a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved'") (citation omitted); *cf. id.* at 464-65 (Scalia, J., concurring in part and dissenting in part) (rejecting the argument that the power to cancel an item of spending is wholly nondelegable but suggesting that the nondelegation doctrine may impose "much more severe limits" on cancellation statutes than on other kinds of statutes). Because its scope extends far beyond the context of suspension, I will not pursue the Court's suggestion in this Article. If, however, the Court is correct, there may be reasons wholly apart from the Suspension Clause to treat these delegations differently.

²⁰⁷ See *supra* note 25 and accompanying text.

enacted the Civil War statute after the start of a rebellion. But it passed the the Reconstruction statute before it was ready to say that Klan violence constituted a rebellion, and it passed the territorial statutes prior to any anticipated, much less imminent, rebellion or invasion. Congress passed all seven of the statutes before it was certain that emergency power was necessary to protect the public safety.

This Part argues that only the Civil War suspension was constitutional. The Suspension Clause requires two findings before a suspension can be imposed: first, that a rebellion or an invasion exists and second, that the public safety may require it.²⁰⁸ This Part explains that Congress must make both findings itself, as it did in the Habeas Corpus Act of 1863. It emphasizes, however, that the Clause requires only a tentative finding on the public safety prong. Once Congress determines that a rebellion or an invasion exists and that protecting the public safety *may* require suspension, it can task the President with the responsibility of deciding when and where the threat to public safety is severe enough to require suspension. In other words, the Clause limits, but does not entirely rule out, contingency format delegations to the Executive. So long as Congress makes the threshold findings that the Clause demands, Congress can condition the suspension's effectiveness upon the Executive's determination that the public safety actually requires the exercise of emergency power.

This interpretation of the Suspension Clause is consistent with its language and history but is rendered particularly compelling by a functional analysis. While Congress has significant leeway to act independently of triggering events in the context of social and economic regulation and in areas of inherent executive authority, the Suspension Clause limits Congress's freedom to do so when it empowers the Executive to deploy emergency power.

A. The Text and Background Assumptions of the Clause

The Suspension Clause provides in full: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."²⁰⁹ It thus requires two determinations: first, that a rebellion or an invasion exists and second, that protecting the public safety may require suspension. The question whether Congress can task the President with making the first determination—that an invasion or rebellion exists—is a diffi-

²⁰⁸ The "invasion or rebellion" determination and the "public safety" determination cannot be collapsed into a single step; rather, there is work for Congress to do on both prongs of the analysis. Recall, for example, that during the Burr Conspiracy debates, some congressmen conceded the existence of a rebellion but refused to suspend on the ground that the rebellion did not sufficiently endanger the public safety. See *supra* note 78 and accompanying text.

²⁰⁹ U.S. CONST. art. I, § 9, cl. 2.

cult one on which the language of the Clause is inconclusive. The issue is presented by the Reconstruction statute, which left the President to determine when Klan violence matured into a rebellion, and by all five territorial statutes. On the one hand, the Clause's provision that Congress can suspend the privilege of the writ only "when in Cases of Rebellion or Invasion" could mean that Congress can act only when the country is actually *in* a state of rebellion or invasion—and thus that Congress must make a real-time determination itself rather than leaving that question to the President. On the other hand, one could take the phrase "when in" to refer to general circumstances rather than a specific event. This interpretation would permit Congress to enact a suspension statute in advance, leaving the President to decide when an invasion or rebellion and sufficient threat to public safety activated his authority to preventatively and indefinitely detain. The word "cases" in the Clause is similarly ambiguous. It can be understood to mean action on a case-by-case basis, but it could also describe all "cases" of a particular type. Thus, it cannot be said, based on the text alone, that the existence of actual invasion or rebellion is a prerequisite to legislative action.

Nor is the history conclusive. Those discussing the Clause in the eighteenth and early nineteenth centuries did not expressly address whether Congress could make a suspension of the writ contingent upon a rebellion or an invasion that might arise sometime in the (perhaps distant) future. Yet they did firmly believe both that Congress was the department with authority to suspend the writ and that Congress should be severely limited in its ability to do so. These two widely accepted principles are at least some evidence that those in the founding generation took the phrase "when in Cases of Rebellion or Invasion" as a temporal constraint permitting Congress to enact an authorization of emergency power only when then-existing facts put it on the table. This understanding is consistent with the way Parliament and state legislatures acted in the eighteenth and early nineteenth centuries and indeed with the way the United States Congress acted until the twentieth century. Some of those statutes were passed when invasion was imminent rather than actual,²¹⁰ but none was passed in total isolation from any provoking event.

Late-eighteenth-century Americans were familiar with open-ended contingency format delegations. One of the best known examples is the Calling Forth Act of 1792, which empowered the President to call forth state militia "whenever the United States shall be invaded,

²¹⁰ This was true of the 1777 Massachusetts suspension, *see supra* note 57, as well as the 1777 Maryland statute, *see supra* note 65 and accompanying text. Neither Massachusetts nor Maryland was bound by a constitution that specifically restricted suspension to rebellion or invasion.

or be in imminent danger of invasion from any foreign nation or Indian tribe.”²¹¹ One might view the Calling Forth Act as precedent supporting Congress’s power to employ the contingent format in the suspension context. This statute has a long historical pedigree, is uncontroversial, and requires the President to make a judgment similar to that involved in a decision to suspend the writ. As a result, advocates of broad congressional authority to delegate suspension power to the President have sometimes invoked the Calling Forth Act as evidence that open-ended grants of contingent authority are permissible in the suspension context as well.²¹² The analogy, however, is inapposite. The limitation upon a contingent delegation of suspension authority derives from the Suspension Clause, which is inapplicable to statutes delegating power to call out the militia.²¹³ Indeed, rather than imposing a temporal limitation, the Constitution’s Calling Forth Clause, which authorizes Congress to “*provide for calling forth the Militia*,”²¹⁴ contemplates that Congress will equip the President with authority on a contingent basis. Early Americans knew how to confer open-ended contingent authority, yet they did not do so in either the state suspension statutes or the bill considered during the Burr Conspiracy.

Contingency format legislation gives Congress the flexibility to provide in advance for events that it cannot foresee, but those who framed and ratified the Suspension Clause were not interested in legislative flexibility. Instead, they sought to restrain Congress by reserving the exercise of emergency power for the most extreme

²¹¹ Act of May 2, 1792, ch. 28, §§ 1–2, 1 Stat. 264, 264. The current version of the statute confers similar authority. See 10 U.S.C. § 332 (2012) (providing that “[w]henver the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion”).

²¹² See *supra* notes 102–05 and accompanying text; cf. Prakash, *supra* note 13, at 612 (“In the first Militia Act, Congress exercised its authority to provide for calling for the militia to execute the laws by specifying conditions in which the President might summon the militias. Similarly, the Congress might use the Necessary and Proper Clause to specify the circumstances in which the President might suspend habeas corpus.”).

²¹³ The delegation in the Calling Forth Act is also distinguishable from that in the suspension statutes because of the kind of power it confers. The Court has consistently held that the Constitution permits particularly sweeping delegations in areas in which the Executive possesses some authority in his own right. See *supra* note 106 and *infra* note 286. The President’s power as Commander in Chief coincides with his power to call out the militia. See U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief . . . of the Militia of the several States, when called into the actual Service of the United States . . .”). The President possesses no inherent authority, however, to suspend the privilege of the writ. See Prakash, *supra* note 13, at 602–04 (explaining why neither the Commander in Chief clause nor the grant of executive power gives the President inherent authority to suspend); *supra* note 13 and accompanying text.

²¹⁴ See U.S. CONST. art. I, § 8, cl. 15 (emphasis added).

circumstances.²¹⁵ It would be somewhat odd for those intent on severely restricting Congress to believe simultaneously that the Clause allowed Congress to unleash emergency power more easily by providing for it in advance. Interpreting the phrase “when in Cases of Rebellion or Invasion” to require contemporaneous legislative evaluation of security crises on a case-by-case basis is more consistent with the posture of the founding generation toward the authorization of emergency power. On this reading, the phrase specifies not only the circumstances under which Congress can authorize emergency power but also the time at which Congress can enact the authorization.

Neither the Clause’s text nor its history conclusively establishes that those in the founding era believed that the Suspension Clause precluded Congress from authorizing emergency power contingent upon a later rebellion or invasion. Evidence for this proposition is embedded in the view that suspension power belongs to the legislature, which is itself a background assumption of the Clause.²¹⁶ Nonetheless, it seems probable that those who deemed legislative supremacy in suspension important agreed with Blackstone, who observed:

[T]he happiness of our constitution is, that it is *not left to the executive power to determine when the danger of the state is so great*, as to render this measure expedient. For the parliament only, or legislative power, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for so doing.²¹⁷

²¹⁵ The state constitutions authorizing suspension reserved it for the “most urgent and pressing occasions.” MASS. CONST. of 1780, pt. II, ch. VI, art. VII; N.H. CONST. of 1784 pt. II, art. XCI. In narrowing those occasions to “invasion” or “rebellion,” the U.S. Constitution went even further in protecting individual liberty. Commentators were clear that the Clause was designed to restrict powers that Congress might otherwise possess. *See, e.g., R. Carter Pittman, Jasper Yeates’s Notes on the Pennsylvania Ratifying Convention, 1787*, 22 WM. & MARY Q. 301, 307 (1965) (describing James Wilson’s characterization of the Clause as “restrictive of the general Legislative Powers of Congress”); *see also* The Massachusetts Convention, in 6 RATIFICATION OF THE CONSTITUTION BY THE STATES: MASSACHUSETTS 1107, 1358–59 (John P. Kaminski et al. eds., 2000) [hereinafter *The Massachusetts Convention*] (recounting Judge Sumner’s assertion to the Massachusetts Convention that the Clause “was a restriction on Congress”); The Election of Convention Delegates, in 9 RATIFICATION OF THE CONSTITUTION BY THE STATES: VIRGINIA 561, 1002 (John P. Kaminski et al. eds., 2000) (remarks of George Nicholas) (“[I]n every other case [apart from rebellion or invasion], Congress is restrained from suspending it. In no other case can they suspend our laws—and this is a most estimable security.”); *cf.* 1 BLACKSTONE, *infra* note 217 at *132 (observing that “this experiment [of suspension] ought only to be tried in cases of extreme emergency”).

²¹⁶ *See supra* Part I.A.

²¹⁷ 1 WILLIAM BLACKSTONE, COMMENTARIES *132 (emphasis added). Blackstone further linked the legislative power with current events by observing that English practice mimicked that of Rome, whose Senate resorted to the establishment of “a magistrate of absolute authority, when *they judged* the republic in any imminent danger.” *Id.* (emphasis added). The view that the legislature should assess current circumstances was also evident

In other words, the very benefit of entrusting the power to the legislature was so that it, rather than the Executive, would make the real-time judgment about whether individual liberty should be sacrificed. Permitting Congress to suspend the privilege contingent upon the later occurrence of rebellion or invasion is inconsistent with the proposition that evaluating current events is the essence of the legislative task.²¹⁸

That said, the Clause does not altogether rule out contingency format suspension. It provides that Congress can suspend the privilege “when in Cases of Rebellion or Invasion the public Safety *may* require it.”²¹⁹ Contrary to arguments of those who opposed delegation during the Civil War and Reconstruction debates,²²⁰ Congress need not wait until it is certain about the threat to public safety to authorize emergency power. Once Congress concludes that an invasion or rebellion has occurred and that the resulting threat to public safety is serious enough that suspension might be warranted, it may pass a statute whose effectiveness depends upon the President’s judgment. The Clause may well treat the determination whether a *particular* security crisis is likely to require the exercise of emergency power as a matter that the legislature must decide, but the Clause contemplates that the decision about whether and when the public safety ultimately reaches that point is a matter that Congress can leave to the President.²²¹ Permitting Congress flexibility in this regard is protec-

in early nineteenth century England. See, e.g., J. L. DE LOLME, THE CONSTITUTION OF ENGLAND 304 (1821) (explaining that when the writ was suspended in England, “the executive power did not thus of itself stretch its own authority; the precaution was *deliberated upon and taken by* the representatives of the people”) (emphasis added). Chief Justice Marshall’s opinion in *Ex parte Bollman* can be read to take a similar approach: he asserts that the decision to authorize emergency power “depends on political considerations, on which the legislature is to decide.” 8 U.S. 75, 101 (1807). The political considerations surrounding a decision to suspend most naturally refer to the benefits and detriments that would result from the execution of emergency power in a particular situation.

²¹⁸ This is the position the Wisconsin Supreme Court took in its review of the Habeas Corpus Act of 1863. See *In re Oliver*, 17 Wis. 681, 685–86 (1864). The court accepted the general legitimacy of contingent legislation, *id.* at 685, but said that in the context of suspension, the legislature “must itself judge when the emergency had arrived which justified” suspending the privilege of the writ. *Id.*; cf. STORY’S COMMENTARIES, *supra* note 13, § 1336, at 208–09 (“[A]s the power is given to congress to suspend the writ of habeas corpus in cases of rebellion or invasion, that the right to judge, whether exigency had arisen, must exclusively belong to that body.” (citation omitted)); Tyler, *supra* note 2, at 689 (arguing that the power to suspend belongs to Congress, which “must, at a minimum, timely declare that current circumstances constitute a Rebellion or Invasion”).

²¹⁹ U.S. CONST. art. I, § 9, cl. 2 (emphasis added).

²²⁰ For examples of such arguments, see *supra* notes 92, 103, 138 and accompanying text.

²²¹ Cf. *Wayman v. Southard*, 23 U.S. 1, 43 (1825) (distinguishing “those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details”).

tive of civil liberty, for the Executive may be better suited than Congress to making fine-tuned judgments about the state of public safety in a particular location.²²² After Congress makes its threshold determinations, it can equip the President to respond with speed and require him to do so with geographical precision.²²³

B. Functional Analysis

A functional analysis cuts heavily in favor of reading the Clause to restrict Congress's ability to enact contingent suspension legislation. As Part I describes, allocating suspension power to the legislature guards civil liberty by checking executive excess; promoting transparent, vigorous, and representative debate; and harnessing the benefits of legislative compromise. Using our historical experiences with suspension as case studies, this subpart considers whether we still realize these structural benefits when Congress suspends the writ on a contingent basis.

Before this subpart begins, a caveat is in order. It is clear in what follows that a statute like the 1871 Act, which was connected to the then-current threat of the Ku Klux Klan, largely preserves those structural benefits. While that connection underscores the importance of timing in preserving those benefits, consistency with constitutional structure does not trump consistency with constitutional text. A statute coincident with an imminent rebellion may preserve the benefits of allocating the decision to Congress, but the Suspension Clause prohibits Congress from passing a suspension statute until invasion or rebellion actually occurs.²²⁴ The framers of Article I, Section 9, Clause 2

²²² For example, it would have been cumbersome for Congress itself to attempt to suspend the writ on a county-by-county basis in South Carolina during Reconstruction. Relying on President Grant to make county-by-county judgments, however, enabled Congress to confine the scope of the suspension. See Tyler, *supra* note 2, at 689 ("Permitting such fine-tuning by the executive and his officials on the ground . . . ultimately might lead to lesser infringements on liberty interests than forcing Congress to define the scope of the suspension being authorized at the outset, when Congress might err on the side of overinclusiveness."); see also *supra* note 104 and accompanying text.

²²³ Note that while Congress can include a geographical restriction in a suspension statute, as it did in the Ku Klux Klan Act, the Clause does not require it to do so. See *infra* notes 304–10 and accompanying text.

²²⁴ See U.S. CONST. art. I, § 9, cl. 2 (forbidding suspension "unless when in Cases of Invasion or Rebellion the public Safety may require it"). Note that the requirement of actual invasion or rebellion is relevant even to those who might disagree that this language imposes a temporal restraint upon Congress. Even if the phrase is only a substantive limit, it would prevent Congress from authorizing the President to suspend when invasion or rebellion was imminent rather than actual. This was another flaw in the statutes governing Hawaii, Puerto Rico, Guam, and the Virgin Islands, which authorized the President to suspend "in case of rebellion or invasion, or *imminent danger thereof*." Act of Apr. 30, 1900, ch. 339, § 67, 31 Stat. 141, 154; Act of June 22, 1936, ch. 699, § 20, 49 Stat. 1807, 1812; Act of Aug. 1, 1950, ch. 512, § 6, 64 Stat. 384, 386; Act of Mar. 2, 1917, ch. 145, § 12, 39 Stat. 951, 955 (emphasis added); see Act of July 1, 1902, ch. 1369, 32 Stat. 691, 691–92 (permitting

made an apparently deliberate choice to specify the circumstances justifying emergency power even more narrowly than did the Massachusetts clause they used as a model,²²⁵ which limited the exercise of emergency power to “the most urgent and pressing occasions.”²²⁶ Interpreting the Clause to permit suspension in the face of imminent rebellion or invasion would disrupt that choice. Thus—perhaps ironically—the 1871 Act illustrates why temporal proximity is crucial as a matter of constitutional structure despite the fact that the Act runs afoul of the precisely written constitutional text.

1. *Checking the Executive*

Recall that the primary rationale for allocating the suspension power to Congress is the desire to check both executive excess and the Executive’s institutional bias in favor of the power’s exercise.²²⁷ Requiring the support of three institutional actors—the President, the Senate, and the House—ensures that suspensions will occur more rarely than they would if accomplished by executive order. Thomas Jefferson’s failed request for suspension in the Burr affair illustrates this check at work. Had Jefferson been able to unilaterally suspend, he presumably would have done so; the need to seek legislative permission checked his judgment and halted the process. Indeed, the need for the concurrence of both houses was an additional check on that proposed suspension, for while the Senate quickly passed it, the House summarily rejected it. Abraham Lincoln, of course, refused to acknowledge congressional authority, but the Reconstruction Congress did check Ulysses Grant. Had it been his choice, Grant presumably would have preferred to extend the suspension provision of the Ku Klux Klan Act beyond its expiration date of June 10, 1872, as the suspension orders he had issued under the original statute were still in place when the sunset date arrived.²²⁸ But a bill to extend that provision—which, like its predecessor, operated by giving the President conditional authority to suspend based on his judgment about whether a rebellion existed and whether the public safety required it—passed the Senate but died in the House.²²⁹

When a contingent suspension is removed in time from the events that provoke the exercise of emergency power, Congress’s role

suspension in the Philippines “in cases of rebellion, *insurrection*, or invasion”) (emphasis added). The Clause carefully limits suspension to an extant invasion or rebellion, and a functional analysis cannot expand either its temporal or substantive constraint.

²²⁵ See Neuman, *supra* note 188, at 564 (explaining that the Suspension Clause in the U.S. Constitution was most directly modeled on the Massachusetts clause).

²²⁶ MASS. CONST. pt. II, ch. VI, art. VII.

²²⁷ See *supra* notes 19–25 and accompanying text.

²²⁸ See *supra* note 150 and accompanying text.

²²⁹ See *id.*

as a check on the Executive is far less effective. Consider the territorial statutes. In a very general sense, the requirement of some legislative involvement made suspension less likely in any of those five territories; if Congress had failed to include a delegation of authority in the relevant organic statute, the Executive could not have suspended the writ. At the same time, inclusion of blanket suspension authority removed in time from the provoking event does not make suspension less likely in *any specific case*. Once Congress vested the President with the authority to suspend the writ in the Hawaiian territory, suspension was just as likely after the Japanese bombed Pearl Harbor as it would have been in a constitutional system where the President could unilaterally suspend. The point is even clearer when put in the context of a suspension that did not happen: had Congress enacted a statute in 1790 authorizing the Executive to suspend whenever, in his judgment, an invasion or rebellion and the concomitant threat to public safety required it, Jefferson probably would have suspended seventeen years later when confronted with the Burr Conspiracy. Once passed, “blank check” delegations of the territorial variety remove the brake that the requirement of legislative involvement otherwise puts on the Executive’s response to a particular security threat. The institutional bias that naturally tilts toward suspension in close cases is left free to operate.²³⁰

To be sure, the territorial suspension statutes are extreme. Congress not only passed them independently of any provoking event but also gave the President and territorial governors literally no guidance in determining what constituted an invasion, a rebellion, or a requisite threat to public safety.²³¹ Whether a particular set of events constitutes a rebellion or an invasion is a matter on which reasonable people often disagree.²³² Recall the disagreement in Congress about

²³⁰ Congress’s ability to pass legislation overriding the suspension does not provide the same kind of brake on executive action. Rather than working against the imposition of a suspension, the force of legislative inertia will work against an override. See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1388 (2001) (“[O]nce Congress delegates power to the executive, it can reclaim its authority only if it can overcome the substantial impediments built into the lawmaking process (including a potential presidential veto) and enact further legislation.” (citations omitted)); see also *Clinton v. City of New York*, 524 U.S. 417, 451–52 (1998) (Kennedy, J., concurring) (“It is no answer . . . to point out that a new statute, signed by the President or enacted over his veto, could restore to Congress the power it now seeks to relinquish.”); Diller, *supra* note 20, at 647 (arguing that “Posner and Vermeule’s ‘political correction’ argument against the nondelegation doctrine underestimates just how hard it is for a later Congress to reverse broad delegations by an earlier Congress”).

²³¹ This lack of guidance means that they are problematic even under the Court’s conventional nondelegation doctrine, which requires Congress to articulate an intelligible principle to guide a statute’s execution. See *infra* notes 289–92 and accompanying text.

²³² Consider that the similar question whether a particular military engagement amounts to “hostilities” requiring congressional sanction under the War Powers Act is one that has provoked dispute even among able lawyers within the Executive Branch. See

whether the Burr Conspiracy was a rebellion,²³³ as well as the heated dispute about whether Klan uprisings satisfied that definition.²³⁴ The question whether an invasion or its threat continued in Hawaii after the Battle of Midway was disputed,²³⁵ and Johnson's implicit decision that a rebellion continued for more than a year after the Confederate surrender was questionable.²³⁶ A statute that specifically described Congress's view of the events that constitute an invasion or a rebellion and a necessary threat to public safety would better constrain the President insofar as it would narrow the circumstances in which he could declare the privilege suspended. Even so, leaving the President alone to judge how those standards apply to events at hand limits Congress's ability to check the Executive's reaction to any specific case.

Imagine that Congress passed a statute providing that "the privilege of the writ of habeas corpus is hereby suspended whenever the United States or any of its territories is invaded by foreign terrorists using a weapon of mass destruction and the exercise of emergency detention authority is necessary to protect the public safety." In the abstract, there is likely to be agreement that this is the kind of scenario in which suspension may well be warranted. But there is likely to be disagreement about whether the statute justifies suspension in any particular case. Reasonable people can reach different conclusions on the same set of facts about how a statutory standard applies. Who counts as a "terrorist"?²³⁷ What counts as an "invasion"?²³⁸ What

Trevor W. Morrison, *Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62, 65 (2011) (describing conflict between lawyers in the White House, the State Department, and the Department of Justice about whether military intervention in Libya amounted to "hostilities" under the Act). The question whether a given military intervention constitutes a war can be similarly controversial. See, e.g., Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327, 330–34 (1995) (describing controversy about whether military interventions in Haiti, Korea, and Bosnia, among others, amounted to "wars" requiring congressional authorization under the Constitution's Declare War Clause).

²³³ See *supra* note 78 and accompanying text.

²³⁴ See *supra* note 131 and accompanying text.

²³⁵ See *supra* note 173 and accompanying text.

²³⁶ See *supra* notes 124–29 and accompanying text.

²³⁷ Cf. William Schinkel, *On the Concept of Terrorism*, 8 CONTEMP. POL. THEORY 176, 178 (2009) ("The main problem in defining or conceptualizing terrorism is political in nature. That is to say that what counts as terrorism and what does not fall under its heading is subject to political pressure and consequence."); see also *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002, 1012 (N.D. Ill. 2001) ("Attempts to reach a fixed, universally accepted definition of international terrorism have been frustrated both by changes in terrorist methodology and the lack of any precise definition of the term 'terrorism.'" (quoting *Flatow v. The Islamic Republic of Iran*, 999 F. Supp. 1, 17 (D.D.C. 1998))).

²³⁸ For example, one can imagine disagreement about whether or not a cyberattack constitutes an "invasion." Cf. Shapiro, *supra* note 8, at 74 (questioning whether Congress could treat illegal immigrants crossing the border from Mexico into the United States as an "invasion").

counts as a “weapon of mass destruction”?²³⁹ How seriously must the public safety be threatened before civil liberties are suspended?²⁴⁰ When a statute is passed months or years in advance of any identifiable crisis, Congress plays no role in making even preliminary factual findings on these questions, thereby leaving unchecked the Executive’s incentive to interpret the statutory definitions aggressively. Certainly, contingent statutes unconnected to an actual (or even imminent) rebellion or invasion would do a better job of restraining the Executive if they contained more detail. But the check on the Executive is still weak when he need not secure congressional authorization for proceeding in any particular case.

While open-ended grants of contingent suspension authority handicap Congress’s ability to check the Executive before a suspension is put in place, they do not in theory undercut Congress’s ability to institute the back-end control of congressional oversight. Recall the statutory report-and-release requirements that the Civil War and Reconstruction Congresses put in place to supervise the President’s exercise of detention power.²⁴¹ In theory, Congress could exercise this sort of oversight function even when a statute is passed far in advance of any crisis. As I explain below, however, Congress’s lack of information about the nature of the threat makes it unlikely to include rigorous report-and-release requirements in statutes containing open-ended grants of contingent suspension authority.²⁴² The effectiveness of oversight mechanisms is thus likely to be a moot point in the case of abstract suspension statutes. But even when report-and-release requirements are present, they take effect after a suspension is in place and preventative arrests have already been made. Congress’s most important role as the gatekeeper of emergency power is to check its unleashing rather than to oversee its exercise. Congress’s ability to impose back-end controls on an open-ended, contingency format suspension does not compensate for its near abandonment of front-end controls on the President’s exercise of authority.

²³⁹ See W. SETH CARUS, DEFINING “WEAPONS OF MASS DESTRUCTION” 6 (2012), available at <http://wmdcenter.dodlive.mil/files/2006/01/OP8.pdf> (asserting that there are “more than 50 definitions [of the term ‘weapon of mass destruction’] with some official standing in the United States and elsewhere”).

²⁴⁰ For example, both Thomas Jefferson and the Senate concluded that the Burr Conspiracy sufficiently threatened the public safety for purposes of the Suspension Clause. The House of Representatives questioned—and ultimately rejected—that judgment. See *supra* note 78 and accompanying text.

²⁴¹ See *supra* notes 82–85, 136 and accompanying text.

²⁴² See *infra* 267–68 and accompanying text.

2. *Transparent, Vigorous, and Representative Debate*

As discussed in Part I, another benefit of allocating suspension authority to Congress is that the legislative process is more likely to generate vigorous, transparent debates that account for a range of views about whether suspension is required to handle a given security crisis. Compare the process of executive decision making. It is unclear how much internal Executive Branch debate preceded Lincoln's unilateral decision to empower military subordinates to suspend the writ shortly after the Civil War's start.²⁴³ Even if he consulted with his closest advisers, that group was both more limited in number than the hundreds of members of Congress and more monolithic in its political views.²⁴⁴ At the end of the day, moreover, Lincoln's judgment was the only one that mattered; he was not bound to accept the counsel of his advisors. By contrast, a decision subjected to the legislative process must command the support of a majority in both houses where both political parties, along with their internal factions, are represented. It is also a process in which regional interests have both a voice and a vote. The first location in which Lincoln unilaterally suspended the writ was Maryland. Shortly thereafter, Senator Kennedy of Maryland complained that he was "not informed of the reasons upon which this writ has been suspended in any particular case in the State of Maryland" and that "[i]n [his] judgment, there was no immediate necessity" for Lincoln's suspension of the writ in his state.²⁴⁵ Many Marylanders surely shared this sentiment, but it was not an argument Kennedy was able to make before the fact.²⁴⁶

The Burr Conspiracy suspension debates were vigorous, representative, and at least partially transparent.²⁴⁷ Indeed, disagreement between the House and Senate about both predicates—whether a rebellion existed and whether the public safety required it—caused

²⁴³ Confederate forces attacked Fort Sumter on April 12, 1861. McPHERSON, *supra* note 124, at 158. Fifteen days later, Lincoln issued an executive order authorizing General Winfield Scott or his officer in command to suspend the writ between Philadelphia and Washington. See 8 MESSAGES AND PAPERS, *supra* note 109, at 3219. David Herbert Donald notes that when Lincoln suspended the writ nationwide on September 24, 1862, "[t]o the President this seemed such a routine matter that he did not even mention it to the cabinet. . . . Lincoln's proclamation was simply designed to codify . . . War Department rules." DAVID HERBERT DONALD, LINCOLN 380 (1995).

²⁴⁴ Even if they were a "team of rivals," see DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN (2005), the members of Lincoln's Cabinet still shared his party affiliation.

²⁴⁵ CONG. GLOBE, 37th Cong., 1st Sess. 42 (1861).

²⁴⁶ Cf. Clark, *supra* note 230, at 1374 (emphasizing that the nondelegation doctrine "not only furthers the separation of powers, but also safeguards federalism" insofar as it ensures that states are represented in the legislative process).

²⁴⁷ The debates were only partially transparent because, while the House proceedings were open to the public, the Senate conducted its discussion in closed session.

the measure to fail.²⁴⁸ The 1863 and 1871 statutes similarly provoked intense debates in which members of Congress voiced a variety of political and regional views about whether suspension was the appropriate constitutional response to the crisis at hand.²⁴⁹ The 1871 debates are a particularly good example because the existence of a presidentially imposed suspension order did not taint them. Members of Congress engaged in a heated argument about whether Klan activity constituted a rebellion, expressing a range of conflicting views on the question.²⁵⁰ They also closely considered whether Klan violence posed a sufficiently serious threat to warrant suspension. Because the statute embodied a preliminary legislative judgment that suspension was likely to be necessary, Grant's suspension orders certainly did not represent "the judgment of one" on the matter.²⁵¹

Again, however, the abstract delegations of authority to the President in the territorial statutes eliminated the benefit of legislative deliberation about whether suspension was an appropriate response to a crisis. At the time Congress enacted the organic statutes, it could have debated (although apparently did not debate) the abstract question whether it is constitutional or even wise to give the President the ability to suspend concomitant with constitutional limits. But that discussion would have resembled one that framers of a constitution might have about whether the executive or the legislature should possess the authority to suspend. It would not have been a deliberation about whether a particular circumstance warranted the exercise of emergency power. Roosevelt's decision to suspend in Hawaii was, for all practical purposes, like Lincoln's judgment in 1861—the judgment of one man.

3. *Legislative Compromise*

A unilateral executive order may reflect a relatively unfiltered policy impulse, but a bill cannot successfully run the gamut of bicameralism and presentment without being subjected to the tempering effect of legislative compromise.²⁵² In the context of suspension, the need for compromise tends to narrow a suspension's scope. Both the Habeas Corpus Act of 1863 and the Ku Klux Klan Act of 1871 reflect this disciplining influence.

²⁴⁸ See *supra* note 78.

²⁴⁹ See Part II.C.2–3.

²⁵⁰ See *supra* note 131 and accompanying text.

²⁵¹ As explained above, however, while enactment at the threshold of a crisis may preserve many of the benefits of the constitutional structure, the language of the Clause nonetheless requires Congress to stay its hand until actual rebellion or invasion occurs. See *supra* notes 224–26 and accompanying text.

²⁵² See *supra* notes 26–30 and accompanying text.

The Habeas Corpus Act of 1863 was a fusion of two bills: H.R. 362 and H.R. 591.²⁵³ As initially introduced, neither bill had a sunset provision, and both bills gave the President the authority to suspend the writ nationwide if he saw fit.²⁵⁴ Efforts to impose temporal and geographic restrictions on the President's suspension authority failed,²⁵⁵ and the enacted statute gave the President the same broad authority to define the contours of the suspension. Thus, the statute reflected no compromise on the scope of the President's authority to suspend, and in this respect it manifested the distorting influence of Lincoln's existing suspension order. If the statute was to avoid condemning Lincoln's asserted authority, it could not give him less than he had already assumed. That said, the 1863 Act reflected some accommodation of competing views insofar as sections 2 and 3 of the Act imposed significant restrictions on the Executive's ability to detain once the writ was suspended. The House appeared ambivalent about the importance of these provisions for prisoner release. On the one hand, the provisions that became sections 2 and 3 of the Act initially appeared in H.R. 362.²⁵⁶ On the other hand, H.R. 591, which contained

²⁵³ Both H.R. 362 and H.R. 591 passed the House and Senate. The Committee of the Conference on H.R. 591 essentially fused the Senate's versions of these two bills into H.R. 591, which, as passed, became the Habeas Corpus Act of 1863. See Sellery, *supra* note 86, at 262. The Senate version of H.R. 362 was close to the House version; it was ultimately reflected in sections 1 to 3 of the 1863 Act, those dealing with the President's suspension and detention power. The Senate version of H.R. 591 differed significantly from the House version insofar as it deleted the suspension provision and rendered the bill exclusively about the regulation of judicial proceedings against federal officers for extraordinary arrests. Sections 4 to 7 of the 1863 Act essentially codified these changes. See *id.* at 262. For a description of the modifications the Senate made to the regulation of such suits, see *id.* at 253–55.

²⁵⁴ H.R. 362 provided, in relevant part:

That during the existence of this rebellion the President shall be, and is hereby, invested with authority to declare the suspension of the privilege of the writ of habeas corpus, at such times, and in such places, and with regard to such persons, as in his judgment the public safety may require.

Id. at 248. H.R. 591 provided, in relevant part:

That it is and shall be lawful for the President of the United States, whenever, . . . in his judgment, by reason of 'rebellion or invasion the public safety may require it,' to suspend by proclamation the privileges of the writ of *habeas corpus* . . . throughout the United States or in any part thereof

Id. at 243–44.

²⁵⁵ For example, Representative Biddle proposed amending H.R. 362 to limit any suspension to "the period of twelve months, or until the next meeting of Congress" and to those areas "wherein the laws of the United States are by force opposed, and the execution thereof obstructed." *Id.* at 241. In the Senate, Senator Cowan proposed amending H.R. 362 to authorize the President to suspend only when Congress was not in session and only until Congress next met. *Id.* at 243–44.

²⁵⁶ See H.R. 362, 37th Cong. §§ 1–2 (1862). The only significant change made to these sections in the enacted statute was the addition of a proviso conditioning release under the act on an oath of allegiance to the United States. See Act of Mar. 3, 1863, ch. 81, § 2, 12 Stat. 755.

no restrictions of any kind on the President's authority, sailed through the House, passing on the same day it was introduced.²⁵⁷ In the Senate, by contrast, Lyman Trumbull, the driving force behind the legislation in that chamber, emphasized the release provisions as an important counterbalance to the suspension provision.²⁵⁸ These significant restrictions on the Executive's detention power did not drop out of the Senate version of the bill despite the fact that a majority of the Republicans in the Senate objected to them on the ground that "political prisoners might secure their liberation too quickly for the good of the country."²⁵⁹ It seems safe to say that these restrictions were a concession necessary to the statute's passage.

The Ku Klux Klan Act of 1871 also reflected compromise, and because a unilateral executive order did not distort the process, this Act provides a better case study for how the legislative process can narrow the scope of a suspension bill. Significantly, the bill was amended to tighten its definition of a rebellion. The bill as reported from the committee provided that the violence must "set at defiance the constituted authorities of such State."²⁶⁰ A House amendment added the requirement that the violence must defy not only state authorities but also federal authorities present in the district. As Representative Shellabarger, the bill's sponsor, explained, this amendment "widen[ed] the state of violence and of danger required before the [suspension provision] can be resorted to"²⁶¹ and accommodated "the views of members desirous of effecting legislation of this kind."²⁶² Another important amendment incorporated the limitations of the section 2 of the 1863 Act—those relating to the discharge of prisoners

²⁵⁷ See Sellery, *supra* note 86, at 251 (recounting that the bill was both introduced and passed on December 8, 1862, making it "the most expeditious passage that a habeas corpus bill ever had during the civil war"). Thaddeus Stevens, a Republican whom Sellery characterized as "the aggressive and radical leader in the House," sponsored H.R. 591. *Id.* at 247.

²⁵⁸ CONG. GLOBE, 37th Cong., 3d Sess. 1092 (statement of Sen. Trumbull) (defending the bill on the ground that the prisoner "is not to be left there without remedy, but is to have an opportunity, at the very first term of the court, to obtain his discharge, unless the facts are such as to warrant further proceedings against him").

²⁵⁹ Sellery, *supra* note 86, at 259. Sellery explains that Senator Collamer moved to strike out the last two sections and that his effort "would have succeeded had not the Democrats and Unionists rallied to the assistance of Trumbull. The motion failed by the close vote of 18 to 20." *Id.* at 260.

²⁶⁰ H.R. 320, 42d Cong. § 4 (1871).

²⁶¹ CONG. GLOBE, 42d Cong., 1st Sess. 478 (1871). Representative Shellabarger went on to observe that the violence "must be so very imposing as to defy both the authority of the State and the authority of the United States; that is, of the marshals of the United States present in the district." *Id.* That same amendment also narrowed the authority conferred by omitting language from the initial bill that would have authorized the President not only to suspend the writ of habeas corpus but also to declare martial law. *See id.*

²⁶² *Id.*

other than prisoners of war—into the current bill.²⁶³ The Reconstruction Congress, like the Civil War Congress before it, recognized that these restrictions significantly curtailed the President's suspension authority but considered their addition crucial to securing the bill's passage.²⁶⁴

The need to ensure majority buy-in drives not only specific concessions made along the way but also how the bill is initially framed. In the context of Reconstruction, where there was no existing suspension order and a vigorous discussion about whether a rebellion existed at all, it would have been impossible to pass a delegation statute as broad as that contained in the 1863 Act. The starting proposal was not, as it had been for the 1863 Act, to give the President the "authori[ty] to suspend the privilege of the writ . . . in any case throughout the United States" for as long as he deemed it necessary.²⁶⁵ Instead, the starting—and ending—point was permitting Grant to suspend only within the limits of the district "under the sway of rebellion," and even then only after commanding insurgents to disperse. His authority to suspend lasted for just over a year.²⁶⁶

Open-ended assignments of contingent decision-making authority, like those in the territorial statutes, are relatively insulated from the narrowing influence of compromise. It is impossible to know why Congress granted such sweeping suspension authority in the territorial statutes. Even though Congress passed them in the abstract, it could still have included a restriction like a sunset clause. More specific compromises, however, like concessions made on the definition of an invasion or a rebellion or the suspension's geographic scope, are difficult to reach in a situation where Congress's goal is to draft legislation broad enough to capture a range of events, some foreseen and some unimagined, that might occur in the future.²⁶⁷ When it comes

²⁶³ On April 6, 1871, the House agreed to an amendment proposed by Representative Garfield of Ohio that would render the section of the 1863 Act relating "to the discharge of prisoners other than prisoners of war, and to the penalty for refusing to obey the order of the court, shall be in full force so far as the same are applicable to the provisions of this section." *Id.* at 521. This language remained in the enacted statute. See Ku Klux Klan Act of 1871, ch. 22, § 4, 17 Stat. 14.

²⁶⁴ Senator Edmunds, explaining the bill after it emerged from the Judiciary Committee, observed that "[i]n substance and fact it leaves a Federal *habeas corpus* in effect, although not in precise form, still operating for a limited time. . . . About all that we do is to authorize him to proclaim that he has suspended it, and then, as soon as he has caught anybody, to report him and hand him over to the Federal judge." CONG. GLOBE, 42d Cong., 1st Sess. 568 (1871). Edmunds himself would have preferred to give the President more power but said that the Committee did not think it prudent to change the House's language. See *id.*

²⁶⁵ Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755.

²⁶⁶ See Ku Klux Klan Act of 1871, ch. 22, § 5, 17 Stat. 14–15.

²⁶⁷ *Cf.* *Boumediene v. Bush*, 553 U.S. 723, 793 (2008) (observing that in the age of terrorist attacks, "[t]he ways to disrupt our life and laws are so many and unforeseen that the Court should not attempt even some general catalogue of crises that might occur").

to compromise, the devil is often in the details. For example, it was knowledge that the rebellion at issue during Reconstruction was aimed at the overthrow of both state and federal authority that enabled those desirous of a narrower suspension to successfully "widen[] the state of violence and of danger required before the . . . [suspension provision] can be resorted to."²⁶⁸ It is also unclear that Congress would have included report-and-release provisions in either the Civil War or Reconstruction statutes if it had lacked information about the nature of the threat. Understanding the threat permits Congress to determine whether publicly disclosing the names of the detained would compromise national security; the wisdom of requiring the quick release of those not charged similarly depends upon the kind of danger they pose. For example, Congress may be less willing to order the release of a member of a sophisticated organization intent on further attack than someone from a looser-knit group with members whose loyalty is more easily broken. Nor is compromise on the geographic limits of a suspension, like that reached in the Reconstruction statute, possible when the nature and location of an invasion or a rebellion are unknown.²⁶⁹ In sum, compromise is far less likely to narrow the scope of a statute passed in the abstract than one passed in response to a specific event. And because the scope of an order issued pursuant to a suspension statute tends to track the authority granted by the statute itself,²⁷⁰ the consequence of a more

²⁶⁸ See *supra* note 261 and accompanying text.

²⁶⁹ That said, the Philippines Organic Act contained at least a soft geographic restriction insofar as its language authorized suspension "wherever during such period the *necessity* for such suspension shall exist." See Philippines Organic Act, ch. 1369, § 5, 32 Stat. 691, 692 (1902) (emphasis added). While this language left room for a territory-wide order (as opposed to the stricter district-by-district limitation of the Reconstruction statute), it did instruct the territorial governor and the President to consider carefully the regional scope of any suspension imposed.

²⁷⁰ The delegation to Lincoln was extraordinarily broad and so was the suspension order issued under it: nationwide and of indefinite duration. Johnson finally withdrew it more than three years after Congress had passed the Act and more than a year after the rebellion had been suppressed. See *supra* note 127 and accompanying text. President Franklin D. Roosevelt approved a suspension in Hawaii that was as broad as the statute permitted it to be: it covered the whole Hawaiian territory and was of indefinite duration, ultimately lasting almost three years. See *supra* notes 169–72 and accompanying text. The Philippines Organic Act, by contrast, was more restrictive and accordingly yielded a narrower executive order. The Act permitted suspension "wherever during such period the *necessity* for such suspension shall exist," see Philippines Organic Act, 32 Stat. 691, 692 (emphasis added), and the order approved by Roosevelt suspended the writ in only two provinces. See *supra* notes 160–62 and accompanying text. The Reconstruction statute was even more specific insofar as it contained a sunset clause and authorized suspension only in districts where the Klan had effectively taken control. Consistent with the statute, Grant suspended the writ in nine counties, and those orders stayed in place no longer than nine months because that is when their statutory authority expired. See *supra* notes 133, 144 and accompanying text. This is not to say that the Executive never shows self-restraint: Grant revoked one of his suspension orders two weeks after issuing it. See *supra* note 147 and accompanying text. The historical pattern nonetheless strongly suggests that the prospect

broadly worded statute is a broadly worded order and thus a greater infringement upon civil liberty.

4. *Structural Benefits the Constitution Forgoes*

Those who defended delegation during the Civil War and Reconstruction debates asserted that giving the decision to the President preserved the effectiveness of emergency power. They echoed many of the same arguments made by those who supported Lincoln's assertion of inherent suspension authority. Defenders of delegation argued that it would be impractical for Congress to assess the public safety because the President was better situated to gather and respond to that information.²⁷¹ They pointed out that quick action may be necessary to contain a crisis and the Executive can act more quickly than the legislature. And while Congress is not always in session, the Executive is always available.²⁷² In short, they maintained that empowering the Executive in advance to suspend the privilege of the writ arms him with the authority that national security may demand as soon as a crisis hits.

Congress's hands are not tied as firmly as this argument suggests. Those in the antidelegation camp insisted that Congress alone could make the decision about what the public safety required. The Clause, however, allows Congress some flexibility. Congress need only decide that the public safety "may require" suspension; the Clause permits Congress to leave the final decision in that regard to the President.²⁷³ Thus, Congress can capture at least some of the Executive's speed and proximity to the crisis by delegating contingent authority on that question. Nonetheless, it is undeniable that requiring Congress to decide that an invasion or a rebellion has occurred and to reach a tentative conclusion about the seriousness of the threat to public safety does make for a slower process than one entrusted entirely to the Executive. Given that the Executive's institutional capacity for speed is the most compelling argument in favor of giving the President a leading role, it should be taken seriously.

The primary—though perhaps to some unsatisfactory—response is that the Constitution does not place a premium on speed in the decision to suspend the civil rights of those within the protection of U.S. law. Rendering the decision legislative reflects a constitutional preference for the constraints of the legislative process despite the at-

of a limited suspension order is far greater when limitations are imposed by statute, as Executives are prone to exercise the full authority granted them.

²⁷¹ See *supra* note 104–05 and accompanying text.

²⁷² See *supra* note 104 and accompanying text.

²⁷³ See *supra* notes 220–22 and accompanying text.

tendant delay.²⁷⁴ The point is to check the Executive, and loosening his hand runs at cross-purposes to that aim. Congress may be able to give the Executive open-ended contingent authority—or he may possess inherent authority—to use other tools, like the deployment of troops, to respond immediately to an attack on American soil.²⁷⁵ Suspending civil liberties, however, falls into a different category.²⁷⁶

History blunts at least somewhat the concern about the consequences of this choice, for experience does not indicate that committing the decision to the legislature inevitably stymies resort to emergency power. We can surmise that Parliament in the seventeenth and eighteenth centuries and founding-era state legislatures acted with sufficient speed in suspending the writ, as there was apparently no discussion of reallocating the power to the king or governor to preserve suspension's effectiveness. On the contrary, there was firm resolve during that period to reserve the power entirely to the legislature. We also know that Congress has demonstrated the ability to quickly refuse a suspension request. Jefferson asked the Senate for a suspension on January 23, 1807, to address the Burr Conspiracy. The Senate passed a bill on the same day, and the House roundly rejected it three days later.²⁷⁷ One might be tempted to point to the two-year debate about whether to authorize Lincoln to suspend the writ as evidence of Congress's excessive slowness. Given, however, that the President had already suspended the writ of his own accord, there was no particular reason for Congress to rush. The Reconstruction Congress, which was not acting in the shadow of an existing suspension order, moved much faster. Grant requested emergency legislation on March 23.²⁷⁸ A bill including a suspension provision was introduced in the House five days later,²⁷⁹ and the resulting statute, the Ku Klux Klan Act of 1871, became law on April 20.²⁸⁰ The process took twenty-eight days from start to finish, and given that Grant did not exercise the suspension authority for another six months, swifter action was presumably unnecessary. Of course, it is impossible to say how quickly

²⁷⁴ See *supra* notes 20–35 and accompanying text.

²⁷⁵ See, e.g., Act of May 2, 1792, ch. 28, §§ 1–2, 1 Stat. 264 (authorizing the President to call forth the state militia “whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe”).

²⁷⁶ Cf. Hamburger, *supra* note 56, at 1911 (noting that historically, “even in the most alarming circumstances, an executive could not detain persons who were within protection unless it had legislative authorization and suspension”).

²⁷⁷ See *supra* notes 75–80 and accompanying text.

²⁷⁸ 9 MESSAGES AND PAPERS, *supra* note 109, at 4081–82 (Letter from Ulysses S. Grant to the Senate and House of Representatives, March 23, 1871). He did not ask explicitly for a suspension; he asked for “such legislation as in the judgment of Congress shall effectually secure life, liberty, and property and the enforcement of law in all parts of the United States.” *Id.* at 4081.

²⁷⁹ H.R. 320, 42d Cong. (1871).

²⁸⁰ Ku Klux Klan Act of 1871, ch. 22, § 4, 17 Stat. 14.

Congress would have acted if Grant had asked for an immediate suspension, just as it is impossible to say how quickly Congress would have responded to a similar report from Roosevelt during World War II. Legislatures may have responded effectively in the past to occasions warranting emergency power, but there is no guarantee that they will always do so.

In the end, one can say only that as between the risks of infringing civil liberties too easily and not easily enough, the Constitution assumes the latter risk. In considering the extent of that risk, it is worth observing that the President might not be wholly without recourse during an emergency when Congress is unable to meet. He may have the option of acting first and asserting a necessity defense or seeking indemnity later.²⁸¹

C. Summary

The Suspension Clause curbs Congress's ability to give the President contingent power. Both the historical backdrop of the Clause and the structural values at stake militate in favor of interpreting it to permit Congress to pass a suspension statute only when an invasion or rebellion actually occurs. The core role of Congress is that of making the preliminary judgment whether suspending the privilege of the writ is a necessary response in the circumstances surrounding a *particular* instance of alleged invasion or rebellion. Sweeping contingent delegations like those found in the territorial statutes undercut every structural benefit that the constitutional allocation of authority is designed to achieve.

To be sure, this means that the Suspension Clause stands as an exception to the nondelegation doctrine, which emphasizes the extremely broad leeway that Congress enjoys in assigning responsibilities to the Executive Branch. The lion's share of both cases and academic debate about that broad leeway, however, has occurred in the context of statutes that charge administrative agencies with executing routine

²⁸¹ See *supra* note 10; see also J. G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 147 (rev. ed. 1951) ("If a commander disregards the usual guarantees, making summary seizures, arrests, and imprisonments, his proceedings may, indeed, ultimately be held justifiable, but he takes a risk. His action is reviewable by the courts, and in case of any infringement upon private rights beyond the point reasonably warranted by the necessities of the situation, he may be held liable in a civil or even in a criminal action."); cf. *Moyer v. Peabody*, 212 U.S. 78, 85–86 (1909) (holding that necessity excused a governor from civil liability for preventatively detaining suspects in order to put down an insurrection); *Ex parte Milligan*, 71 U.S. 2, 36–37 (1866) (argument of counsel) (maintaining that whenever any person, including a military commander, invokes necessity to justify otherwise illegal acts, "[t]he correctness of his conclusion must be judged by courts and juries, whenever the acts and the alleged necessity are drawn in question"); Shapiro, *supra* note 8, at 72 n.53 (expressing "little doubt" that the President would act in the face of necessity when Congress was not in session and that "Congress would later seek to ratify his action").

social or economic policies.²⁸² The Court's reluctance to second-guess Congress's judgment about how much authority to grant the Executive in the formation of social and economic policy is similar to its reluctance to second-guess Congress's judgment about the content of social or economic policy. In the context of the Due Process and Equal Protection Clauses, rationality review reflects the Court's conclusion that so long as a statute does not employ suspect classifications or restrict fundamental rights, the choice of legislative means and ends belongs almost entirely to Congress.²⁸³ In the delegation context, Congress's freedom to act on a contingent basis²⁸⁴ and the notoriously lax "intelligible principle" test²⁸⁵ reflects the Court's conclusion that the decision of how to carry out routine social and economic policy belongs almost entirely to Congress. Taken together, these two lines of cases underscore that the Constitution generally entrusts Congress with the primary responsibility not only for formulating social and economic policy but also for deciding how much to rely on other branches for its implementation.

Yet the fact that Congress enjoys broad leeway in most cases does not mean that this freedom applies across the board. The analogy to due process and equal protection review is instructive. In that context, certain types of laws—namely those restricting fundamental rights or employing suspect classifications—merit heightened scrutiny because of the particular constitutional guarantees they implicate. Just as the Fifth and Fourteenth Amendments (among others) limit Congress's otherwise expansive power to shape the content of legislation, certain constitutional provisions might limit Congress's otherwise expansive power to implement legislation as it sees fit.²⁸⁶

²⁸² Representative cases in this line address the regulation of foreign trade, *see* *Field v. Clark*, 143 U.S. 649, 690–92 (1892), setting war-time price ceilings for commodities, *see* *Yakus v. United States*, 321 U.S. 414, 421, 426–27 (1944), promulgating sentencing guidelines for federal criminal offenses, *see* *Mistretta v. United States*, 488 U.S. 361, 413–15 (1989), and setting national ambient air quality standards for ozone and particulate matter, *see* *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 475–76 (2001).

²⁸³ *See* *Manning*, *supra* note 29, at 2447–48 (describing the “very strong presumption of validity” that the Court applies to such statutes and its refusal either to question legislative ends or to “insist[] on a substantial means-ends fit”).

²⁸⁴ *See* *The Brig Aurora*, 11 U.S. 382, 388 (1813) (“[W]e can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct.”).

²⁸⁵ *See* *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 407 (1928). The Court has held statutes unconstitutional for violating the nondelegation doctrine only twice. *See* *Diller*, *supra* note 20, at 588 (referencing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935) and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1935)).

²⁸⁶ Arguments for a more demanding nondelegation doctrine have been made in a variety of contexts, including Congress's power to declare war, *see* *N.J. Peace Action v. Obama*, 379 F. App'x 217, 220 (3d Cir. 2010), to render conduct criminal, *see* *Touby v. United States*, 500 U.S. 160, 165–66 (1991), and to develop an adequate substitute for habeas review of executive detention, *see* *Diller*, *supra* note 20, at 588. The Court has re-

The Suspension Clause is such a provision. As recounted in Part I, the Constitution allocates suspension authority to Congress both out of fear that the Executive would abuse it and because the gravity of a suspension's impact upon civil liberty renders the safeguards of the legislative process particularly important. The Constitution's wariness of executive power, combined with the relatively exacting approach traditionally taken to statutes affecting fundamental rights, support a more demanding application of the nondelegation doctrine in this context than in the vast field of social and economic legislation in which the Necessary and Proper Clause gives Congress the authority to implement its Article I powers as it sees fit. This approach to the Clause does not challenge the premise of the nondelegation doctrine; rather, it fits into the well-established distinction between routine legislative policy choices and legislation affecting fundamental rights.

V

SUSPENSION AND SPECIFICITY

The Suspension Clause severely limits the circumstances under which Congress can initiate a regime of emergency power. Part IV argued that this limit is partly expressed in the Clause's requirement that Congress act only "when *in* Cases of Rebellion or Invasion" rather than in anticipation of them.²⁸⁷ One might also insist, as many did in the nineteenth century, that the unique nature of emergency power requires Congress to give the President relatively detailed guidance with respect to a suspension's scope. This argument is not directed at

jected the claim that taxing authority is an area in which a more demanding standard should govern delegation. See *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 221 (1989). It has reserved the question whether "something more than an 'intelligible principle' is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions" because "regulations of this sort pose a heightened risk to individual liberty." See *Touby*, 500 U.S. at 165–66. It has not addressed arguments pressed in other areas. The Court has, however, expressly held that a more lenient standard applies when the delegation coincides with an area in which the Executive possesses some inherent authority. See, e.g., *Loving v. United States*, 517 U.S. 748, 768–69 (1996) (holding that the President's authority as Commander in Chief made it permissible for Congress to give him unusually wide discretion in the context of a court martial); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 324 (1936) (holding that where foreign affairs are concerned, Congress may "either leave the exercise of the power to [the President's] unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs"). If the scale can slide down in areas in which the Constitution renders the Executive particularly powerful, it might slide up in areas in which the Constitution's allocation of authority reflects particular wariness of executive power; cf. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801*, at 247 (1997) (opining that "it may be that delegation is more suspect, and must accordingly be more narrowly defined, when the authority in question is one the Framers specifically meant to keep out of executive hands"). But cf. Diller, *supra* note 20, at 635 ("The intriguing notion of a sliding scale of delegable powers, with some powers ranking lower on the scale of delegability, has received only limited attention.").

²⁸⁷ U.S. CONST. art. I, § 9, cl. 2 (emphasis added).

Congress's ability to legislate on a contingent basis. It is instead a claim that something more than the standard "intelligible principle"²⁸⁸ must confine the Executive's discretion in this context, regardless whether a statute suspends the writ outright or in advance. This Part argues that no such heightened standard applies.

At the outset, it bears emphasis that the standard "intelligible principle" test does impose some limit, even if a modest one, upon the scope of suspension legislation. Delegations as sweeping as those found in the territorial statutes—delegations passed outside the context of any particular crisis and that gave the President literally no guidance in deciding when the prerequisites for suspension were met—likely fail even that forgiving test.²⁸⁹ In other words, these statutes should trouble even those who reject Part IV's argument for a timing requirement. The breadth of such legislation has the effect of resetting the constitutional baseline by statute. The Constitution gives Congress the authority to suspend the writ in the event of a rebellion or an invasion when the public safety requires it. A delegation like those in the territorial statutes effectively says the opposite: that the President shall have the authority to suspend the writ in the event of a rebellion or an invasion when the public safety requires it. Such a statute is the equivalent of one that says, in total, "the President shall have the power to regulate commerce among the several states"²⁹⁰ or

²⁸⁸ See *supra* note 187 and accompanying text.

²⁸⁹ Gary Lawson has argued that the nondelegation doctrine does not apply to Congress in its regulation of territories and federal property because the separation of powers principle enforced by that doctrine derives from Article I's requirement that legislation passed under it be not only necessary but also proper. See Lawson, *supra* note 183, at 392–93. Article IV imposes no requirement that legislation enacted pursuant to it be proper; thus, it does not incorporate the background norms of constitutional structure into territorial legislation, *id.*, instead giving Congress "a free hand with respect to the structure of the territorial governments it creates." Lawson, *supra* note 180, at 876. Congress's freedom in this regard means, among other things, that it can pass "laws instructing executive agents to make rules unconstrained by meaningful standards." Lawson, *supra* note 183, at 393; see also DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 187 (1993) (suggesting that Article IV's location "outside the first three Articles of the Constitution, which focus on separation of powers," provides some support for the proposition that the Constitution does not impose the same limits on Congress's ability to delegate when acting under the Territories and Property Clause). A full exploration of the nature of Congress's unique authority over territories, federal property, and the District of Columbia is beyond the scope of this Article. For present purposes, it is sufficient to flag the issue and to observe that the "intelligible principle" test would limit Congress's ability to enact similarly sweeping delegations of authority to suspend the writ within the boundaries of the fifty states. It is also worth noting that even if the standard nondelegation doctrine does not constrain Congress in its regulation of federal territories, the Suspension Clause does. See *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (holding that the Suspension Clause "has full effect at Guantánamo Bay"). Thus, the Clause's proscription of suspension legislation in the absence of actual invasion or rebellion, see *supra* Part IV, applies to federal territories and property.

²⁹⁰ See U.S. CONST. art. I, § 8, cl. 3.

“the President shall have the power to declare war.”²⁹¹ Despite its leniency, the nondelegation doctrine does not maintain that Congress can change the constitutional allocation of power by shifting the sum of its power in a particular area to the Executive.²⁹² This legislation is problematic, therefore, even assuming that Congress’s ability to legislate on a contingent basis is unfettered.²⁹³

Assume, however, a statute that would survive a standard nondelegation analysis. Does the Suspension Clause require Congress to curb the President’s discretion in ways that the bare separation of powers principle would not? Specific questions surfaced repeatedly in congressional debates. Must Congress confine the President’s suspension decision (and concomitantly his detention authority) by imposing a sunset clause or geographic limits?²⁹⁴ Must it prohibit the President from subdelegating the authority to declare a suspension effective?²⁹⁵ Must it limit the grant of preventative detention authority under a suspension statute to the President and members of his cabinet, or may it permit any executive official, state or federal, to detain prisoners indefinitely on mere suspicion?²⁹⁶ Of the seven federal statutes, only the one passed during Reconstruction contained a sunset clause, and only that statute and the Philippines Organic Act contained any geographic restriction on the President’s power to proclaim and exer-

²⁹¹ See *id.* at art. I, § 8, cl. 11.

²⁹² See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (stating that the Constitution “permits no delegation of [legislative] powers”). To be sure, the words “invasion,” “rebellion,” and “public safety” might be thought to give the President at least some guidance. But even apart from the fact that they confer the sum total of Congress’s constitutional power, the scope of these statutes is reason to expect substantial guidance from Congress. See *id.* at 475 (“[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred. While Congress need not provide any direction to the EPA regarding the manner in which it is to define ‘country elevators’ . . . it must provide substantial guidance on setting air standards that affect the entire national economy.” (internal citations omitted)).

²⁹³ The Supreme Court has observed that context can render permissible even a broadly worded statute. See, e.g., *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943) (summarily rejecting the contention that a public interest standard was so “vague and indefinite” as to violate the nondelegation doctrine given that it was modified by the purposes, requirements, and context of the statute); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 25 (1932) (upholding the “public interest” standard because it “is not a concept without ascertainable criteria, but has direct relation” to the purposes, requirements, and context of the act). This is no less true in the case of suspension. For example, the suspension provision in the 1871 Act did not expressly connect Klan activities to the “rebellion” with which the statute was concerned. But the statute’s popular title (“The Ku Klux Klan Act”) and the context in which Congress passed it (hearings about Klan violence in the South) made clear that the power granted to the President was to address that particular uprising. Proximity to a crisis can be important, therefore, even in a standard nondelegation analysis.

²⁹⁴ See *supra* notes 99, 108 and accompanying text.

²⁹⁵ See *supra* notes 119, 140 and accompanying text.

²⁹⁶ See *supra* notes 76, 120–22 and accompanying text.

cise emergency detention authority.²⁹⁷ None of the statutes prevented subdelegation of either the suspension or detention power. These omissions were controversial, but they are only fatal if the Suspension Clause requires their presence. And in contrast to the timing requirement, which has textual support,²⁹⁸ the Clause is devoid of any language requiring any of them.

Eighteenth-century parliamentary and state suspension statutes almost always included sunset clauses.²⁹⁹ The Massachusetts Constitution, the first to contain a Suspension Clause, memorialized this requirement by providing that the writ could be suspended "for a limited time, not exceeding twelve months."³⁰⁰ Despite the fact that it was modeled on the Massachusetts provision,³⁰¹ the federal Suspension Clause contains no such limitation.³⁰² That is not to say that Article I, Section 9 of the Constitution permits indefinite suspension. When either the invasion or rebellion ends or the threat to public safety ceases, the warrant to suspend does as well.³⁰³ It permits suspension only during a rebellion or an invasion and while the public safety requires it; thus, once the rebellion or invasion ends, or the threat to public safety diminishes, the warrant for suspension ceases. Indeed, even if an outright suspension contained a sunset clause, Congress would be obligated to rescind the statute if any of the conditions justifying suspension ceased before the statute expired. A sunset clause might be a prudent measure insofar as a statutory cap sets the force of inertia against rather than for suspension—inaction, the course of least resistance, results in expiration. But regardless

²⁹⁷ The bill proposing suspension in response to the Burr Conspiracy contained no geographic restriction but did expire after three months. See *supra* note 75 and accompanying text.

²⁹⁸ See *supra* note 209 and accompanying text.

²⁹⁹ See *supra* notes 52, 62 and accompanying text. The 1777 Maryland statute is an exception. See *supra* note 65 and accompanying text.

³⁰⁰ MASS. CONST. pt. II, ch. VI, art. VII.

³⁰¹ See Neuman, *supra* note 188, at 564.

³⁰² The Framers considered and rejected a proposal that the Suspension Clause contain a time limit. 1 1787 DRAFTING THE U.S. CONSTITUTION 976 (Wilbourn E. Benton ed., 1986). When asked why the Suspension Clause in the United States Constitution did not have a time limitation like that of the Massachusetts clause, Judge Dana responded that "he did not see the necessity or great benefit of limiting the *time*" because Congress, like the state legislature, could renew the suspension year after year. The Massachusetts Convention, *supra* note 215, at 1359. The "safest and best restriction," he pronounced, was empowering Congress to suspend only in cases of rebellion or invasion. *Id.* For "whenever these shall cease to exist, the suspension of the writ must necessarily cease also." *Id.*

³⁰³ The endpoint of suspension under the Clause is unclear. Many have assumed, both at the Convention, see *supra* note 302 and accompanying text, and the years since, see *supra* note 173 and accompanying text, that the Clause itself permits suspension only so long as rebellion or invasion lasts. One might also argue, however, that the Clause permits suspension so long as the threat to public safety lasts, even once the rebellion or invasion has ended. It is unnecessary to resolve that issue here. Thanks to Sai Prakash for drawing the question to my attention.

whether it is wise to omit an expiration date, Article I, Section 9 does not prevent Congress from doing so. Congress can direct the President to gauge the lifespan of his authority according to a standard (such as the phrase “during the present rebellion”) rather than by a firm date.

There is a similar lack of textual basis for geographic restrictions. One strand of the argument for geographic limits maintains that a suspension must be confined to location of the rebellion or invasion.³⁰⁴ As David Currie observes, however, this argument “miss[es] the mark.”³⁰⁵ “Rebellion” and “invasion” are conditions that trigger the possibility of emergency power, not descriptions of the power’s geographic reach. The Clause permits suspension “when the public Safety may require it,” and it is sensible to interpret this phrase as permitting suspension wherever the public safety requires it, even if that means detention in an area outside the battle zone.³⁰⁶ That is not to say that the public safety prong of the Clause itself requires a suspension statute to specify where the President may exercise emergency power. The Suspension Clause speaks to when the writ may be suspended,³⁰⁷ but it is silent as to where. That is perhaps because it does not always make sense to think of emergency power in terms of fixed geographic limits. The danger to public safety lies with those intent on inflicting harm, and their location will not necessarily coincide with the region hit. For example, the architects of an attack may have worked remotely, and those who are on location can move quickly to avoid detection or strike a new area. Preventative detention is aimed at people, not places. It is instructive in this regard that early state suspension statutes, as well as the bill proposed during the Burr Conspiracy, defined the Executive’s emergency power according to the category of people he could detain rather than the place where he was likely to find them.³⁰⁸ To be sure, Congress can include a geo-

³⁰⁴ See *supra* note 107; see also Shapiro, *supra* note 8, at 94 (suggesting that the Clause authorizes suspension only in the location where a rebellion or an invasion occurs); Tyler, *supra* note 2, at 692 (opining that “the existence of a rebellion in one part of the country is not . . . a justification for suspending the writ in another part of the country”).

³⁰⁵ David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1161 (2006).

³⁰⁶ See *id.* (asserting that “so long as an insurrection [is] in progress, the Constitution permit[s] suspension whenever and wherever the public safety require[s],” not only in the areas where rebellion is occurring). Consider, for example, that damage inflicted by a terrorist attack on Manhattan might render a larger geographic area unstable, endangering the public safety in, say, New Jersey or Connecticut.

³⁰⁷ See U.S. CONST. art. I, § 9 cl. 2 (prohibiting suspension “unless *when* in Cases of Rebellion or Invasion the public Safety may require it” (emphasis added)).

³⁰⁸ Some defined the category as those suspected of treason; others defined it as anyone dangerous to the state. See *supra* notes 63, 69, 72, 75 and accompanying text. The English suspensions enacted between 1689 and 1747 did not contain geographic restrictions, but the Revolutionary War suspension did: it applied only to those taken for treason or piracy in America or on the high seas. See 17 Geo. 3 c. 9 (1777); HALLIDAY, *supra* note

graphic restriction in a suspension statute, just as it can include a sunset clause. It did so in the Ku Klux Klan Act, which authorized the President to suspend the writ only “within the limits of the district which shall be so under the sway [of rebellion].”³⁰⁹ Such a provision is protective of civil liberty insofar as it cabins the President’s emergency power, and its inclusion may be prudent when the risk to public safety is concentrated in a particular area. But the Clause does not *require* Congress to impose geographic limits upon either the power to detain or the authority to declare a suspension effective. It is agnostic on the question, thereby leaving the matter to the political process.³¹⁰

As to whether subdelegation is permissible with respect to the decisions to suspend or arrest: the parliamentary and state suspension acts almost always provided that only the king or chief executive and the equivalent of cabinet-level officials could sign warrants issued pursuant to the emergency power granted by the legislation.³¹¹ The reasons for such a limitation are clear. It is, first and foremost, a means of quality control: high-ranking executive officials are more accountable to the public for abuses of the power, and their selection for office is at least some indication that they possess good judgment. It is also a means of quantity control: when fewer people have the power to preventatively detain, fewer arrests will be made. Notwithstanding the long tradition of including such a restriction in suspension statutes, however, none of the proposed or enacted federal statutes included it. To be sure, that omission was controversial. The fact that the suspension statute proposed during the Burr Conspiracy did not so limit exercise of the detention power was one of the stated reasons for its rejection.³¹² During both the Civil War and Reconstruction, critics insisted that the President should not be able to delegate either the decision to suspend or the decision to detain to low-ranking officers.³¹³ But the Clause does not address the matter either expressly

47, at 249 (“Until 1777, suspensions made no distinction among law’s subjects by nationality or by place of capture or detention.”). This geographic restriction was one of the more controversial aspects of the act. See Halliday & White, *supra* note 16, at 646–51. Some claimed that the regional limitation protected liberty by reducing the number affected, *see id.* at 645, but others, including Edmund Burke, thought it better to suspend uniformly, for “[p]eople without much difficulty admit the entrance of that injustice of which they are not to be the immediate victims.” *See id.* at 650 (quoting *A Letter from Edmund Burke, Esq. . . on the Affairs of America* 15 (2d ed. London 1777)); *see also id.* (“Liberty, if I understand it all, is a *general* principle, and the clear right of all the subjects within the realm, or of none.”).

³⁰⁹ See Ku Klux Klan Act of 1871, ch. 22, § 4, 17 Stat. 13. (1871).

³¹⁰ During that process, regional interests can lobby for the inclusion of such restrictions. *See supra* note 32 and accompanying text.

³¹¹ *See supra* notes 51, 64 and 66. The suspension enacted and repeatedly extended by Parliament during the Revolutionary War did not include such a limitation. *See supra* note 55 and accompanying text.

³¹² *See supra* note 76 and accompanying text.

³¹³ *See supra* notes 119–22, 150 and accompanying text.

or impliedly. The default presumption in administrative law, captured by statute, is that the President can enlist the aid of subordinates in the discharge of his statutory duties.³¹⁴ While Congress can clip that authority by statute,³¹⁵ it is difficult to argue that such a limit is constitutionally required. Like sunset clauses and geographic restrictions, any prohibition of subdelegation is a matter of prudence rather than constitutional constraint.

CONCLUSION

The Necessary and Proper Clause grants Congress broad authority to implement legislation as it sees fit. In the normal course, Congress may pass statutes that are effective on a contingent basis, leaving the President to determine when conditions triggering the statute are satisfied. The Suspension Clause, however, creates an important exception to that rule. Its command that “[t]he Privilege of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it,” describes not only the circumstances under which Congress can authorize emergency power but also the time at which Congress can enact the authorization. Congress cannot pass any suspension statute until it concludes that an invasion or a rebellion exists and that the accompanying threat to public safety *may* require it. Only at that point may it capitalize upon the President’s ability to react quickly by charging him to make the ultimate determination whether and when maintaining security requires the exercise of emergency power. While Congress has significant leeway to act independently of triggering events in the context of social and economic regulation and in areas of inherent executive authority, the Suspension Clause limits Congress’s freedom to do so when it suspends civil liberties.

This approach to the Suspension Clause captures more precisely what it means for the suspension power to be legislative. Giving the power to the legislature means more than that the President’s power to act must derive from a statute. It means that Congress must assess a current security crisis to determine whether it requires the exercise of emergency power. There are times of “extreme emergency” in which

³¹⁴ See 3 U.S.C. § 301 (2012) (authorizing the President to “empower the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform without approval, ratification, or other action by the President . . . any function which is vested in the President by law”); see also 3 U.S.C. § 302 (2012) (acknowledging that the President may have an “inherent right . . . to delegate the performance of functions vested in him by law”).

³¹⁵ Cf. 1 RICHARD J. PIERCE, JR. ADMINISTRATIVE LAW TREATISE § 2.7 at 126 (5th ed. 2010) (“Sometimes [Congress] chooses [to prohibit or limit subdelegation] because it considers a function so important that it wants that function performed only by a high ranking official.”).

“the nation parts with its liberty for a while, in order to preserve it forever.”³¹⁶ Entrusting the legislature with the power to determine when those times arrive is one of the safeguards of our liberty, and its role in that regard is embedded in the Clause itself.

³¹⁶ 1 BLACKSTONE, *supra* note 217, at *132.

Precedent and Jurisprudential Disagreement

Amy Coney Barrett*

Introduction

Over the years, some have lamented the Supreme Court's willingness to overrule itself and have urged the Court to abandon its weak presumption of stare decisis in constitutional cases in favor of a more stringent rule.¹ In this Article, I point out that one virtue of the weak presumption is that it promotes doctrinal stability while still accommodating pluralism on the Court. Stare decisis purports to guide a justice's decision whether to reverse or tolerate error, and sometimes it does that. Sometimes, however, it functions less to handle doctrinal missteps than to mediate intense disagreements between justices about the fundamental nature of the Constitution.² Because the justices do not all share the same interpretive methodology, they do not always have an agreed-upon standard for identifying "error" in constitutional cases. Rejection of a controversial precedent does not always mean that the case is wrong when judged by its own lights; it sometimes means that the justices voting to reverse rejected the interpretive premise of the case. In such cases, "error" is a stand-in for jurisprudential disagreement.

The argument proceeds in three parts. After Part I explains the general contours of stare decisis, Part II develops the thesis that, at least in controversial constitutional cases, an overlooked function of stare decisis is mediating jurisprudential disagreement. Identifying this function of stare decisis offers a different way of thinking about what the weak presumption accomplishes in this category of precedent. On the one hand, it avoids entrenching particular resolutions to methodological controversies. This reflects respect for pluralism on and off the Court, as well as realism about the likelihood that justices will lightly let go of their deeply held interpretive commitments. On the other hand, placing the burden of justification on those justices who would reverse precedent disciplines jurisprudential disagreement lest it become too disruptive. A new majority cannot impose its vision with only votes. It must defend its approach to the Constitution and be sure enough of that approach to warrant unsettling reliance interests. Uncertainty in that regard counsels retention of the status quo.

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1. See *infra* notes 22–24 and accompanying text.

2. Cf. Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 537 (1999) ("Anyone who cares about constitutional law confronts a large and proliferating number of constitutional theories, by which I mean theories about the nature of the United States Constitution and how judges should interpret and apply it.").

Insofar as it keeps open the prospect of overruling, the weak presumption undeniably comes at a cost to continuity. Part III observes, however, that less rides on the strength of stare decisis than is commonly supposed. Discussions of stare decisis tend to proceed as if horizontal stare decisis—the Court’s obligation to follow its own precedent—is the only mechanism for maintaining doctrinal stability. Other features of the system, however, also serve that goal, and may well do more than horizontal stare decisis to advance it. In particular, the prohibition upon advisory opinions, the obligation of lower courts to follow Supreme Court precedent, the Court’s certiorari standards, its rule confining the question at issue to the one presented by the litigant, and the fact that the Court is a multimember institution whose members have life tenure are all factors that work together to contribute to continuity in the law. To be sure, overruling precedent is disruptive. But some instability in constitutional law is the inevitable byproduct of pluralism. Were there greater agreement about the nature of the Constitution—for example, whether it is originalist or evolving—we might expect to see greater (although of course still imperfect) stability. In the world we live in, however, that level of stability is more than we have experienced or should expect in particularly divisive areas of constitutional law.

I. The Doctrine of Stare Decisis

Stare decisis is a many-faceted doctrine. It originated in common law courts and worked its way into federal courts over the course of the nineteenth century.³ By the twentieth century, the doctrine had become a fixture in the federal judicial system.⁴ That is not to say that its shape was then or is now fixed. On the contrary, the strength of stare decisis is context dependent.

Stare decisis has two basic forms: vertical stare decisis, a court’s obligation to follow the precedent of a superior court, and horizontal stare decisis, a court’s obligation to follow its own precedent.⁵ Vertical stare decisis is an inflexible rule that admits of no exception.⁶ Horizontal stare decisis, by contrast, is a shape-shifting doctrine. For one thing, its strength

3. See Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1065 (2003) (describing the development of stare decisis in the federal judicial system).

4. See Michael J. Gerhardt, *The Irrepressibility of Precedent*, 86 N.C. L. REV. 1279, 1283 (2008) (asserting that “by 1900 the Supreme Court had settled into the practice of citing and relying upon its precedents as modalities of argumentation and sources of decision”).

5. Barrett, *supra* note 3, at 1015.

6. See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”).

varies according to the court in which it is invoked.⁷ It is virtually nonexistent in district courts, which do not consider themselves bound to follow their own prior decisions.⁸ It is a virtually absolute rule in courts of appeals, which prohibit one panel from overruling another, allowing only the rarely seated en banc court to overrule precedent.⁹ In the Supreme Court, stare decisis is a soft rule; the Court describes it as one of policy rather than as an “inexorable command.”¹⁰ The strength of horizontal stare decisis varies not only by court, but also by the subject matter of the precedent. The Supreme Court has divided precedent into three categories, and courts of appeals have generally followed suit.¹¹ Statutory precedents receive “super-strong” stare decisis effect, common law cases receive medium-strength stare decisis effect, and constitutional cases are the easiest to overrule.¹² Its rationale for giving constitutional precedent only a weak presumption of validity is that while Congress can correct erroneous statutory interpretations by passing legislation, the onerous process of constitutional amendment makes mistaken constitutional interpretations difficult for the People to correct.¹³

As this discussion reflects, there is nothing inevitable about the shape of stare decisis. It is a judge-made doctrine that federal courts have given varied force in varied contexts. This Article is concerned with the force that stare decisis should have in one particular context: when a Supreme Court justice confronts constitutional precedent with which she disagrees. To be sure, stare decisis does far more than simply constrain judging. Precedent influences the decision in every case insofar as it gives a justice a way of thinking about the problem she must decide.¹⁴ Justices can more easily apply

7. Barrett, *supra* note 3, at 1015. In addition to the variations described in the text, both vertical and horizontal stare decisis are dependent upon jurisdictional lines. District courts need only obey decisions of the court of appeals in the circuit in which they sit, and courts of appeals are not bound by the decisions of their sister circuits. See John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 516–18 (2000).

8. See Barrett, *supra* note 3, at 1015 & n.13 (“As a general rule, the district courts do not observe horizontal stare decisis.”).

9. See *id.* at 1015 (suggesting that courts of appeals feel the restrictions imposed by horizontal stare decisis more strongly than do district courts or the Supreme Court).

10. *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991).

11. See Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 321 & nn.20–22 (2005). As I have discussed elsewhere, the categories make much less sense at the circuit level, whatever their merit at the Supreme Court. *Id.* at 327–51.

12. *Id.* at 321 & n.22.

13. See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting) (“[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.”).

14. See Barrett, *supra* note 3, at 1068 (“[J]udges do not decide cases in a vacuum; rather, precedent always affects the way they view the merits.”). In this regard, stare decisis promotes efficiency. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (plurality opinion) (citing BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921), for

the Constitution's broad language because precedent offers them a framework for doing so; Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*¹⁵ is a notable example. Decided cases enable the justices to reason by analogy, and the doctrine itself is a reference for arguments grounded in other modalities like text, structure, ethics, prudence, and history.¹⁶ Because of these and many other contributions, stare decisis can fairly be characterized as the workhorse of constitutional decisionmaking.¹⁷ The doctrine has its greatest bite, however, when it constrains a justice from deciding a case the way she otherwise would.¹⁸ In this situation, a justice must decide, to paraphrase Justice Brandeis, whether it is better for the law to be settled or settled right.¹⁹ This is the decision upon which this Article will focus.

Scholars have a range of views about how the Court should behave when deciding whether to overrule constitutional precedent. Those who favor weak stare decisis tend to do so because of their methodological commitments. Thus, some living constitutionalists have argued for freedom to overrule lest precedent hinder progress,²⁰ and some originalists have argued for freedom to overrule lest doctrine trump the document.²¹ Those

the proposition that "no judicial system could do society's work if it eyed each issue afresh in every case that raised it").

15. See 343 U.S. 579, 634–38 (1952) (Jackson, J., concurring) (articulating a three-part framework for evaluating presidential assertions of power).

16. Cf. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7 (1982) (describing the modalities of constitutional argument).

17. See MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 65 (2008) ("The extreme frequency with which the justices cite, or ground their opinions in, precedent establishes precedent as a, if not the, principal mode of constitutional argumentation."). For an excellent catalogue of the many contributions other than constraint that stare decisis makes to constitutional law, see *id.* at 147–76.

18. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 139 (1997) ("The whole function of the doctrine is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability."); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 570 (2001) ("The force of the doctrine . . . lies in its propensity to perpetuate what was initially judicial error or to block reconsideration of what was at least arguably judicial error.").

19. See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.").

20. For example, Justin Driver argues that common law theories of constitutional adjudication risk overemphasizing the importance of stare decisis, for judges should feel free to "cast aside their predecessors' outmoded thinking." Justin Driver, *The Significance of the Frontier in American Constitutional Law*, 2011 SUP. CT. REV. 345, 398 (2012); see also *id.* ("Living constitutionalism, properly conceived, must create significant leeway for judicial interpretations that deviate from even well-settled precedents.").

21. Some originalists insist that the Court may never follow precedent that conflicts with the Constitution's original meaning. See, e.g., Randy E. Barnett, Response, *It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1233 (2006) (describing himself as a "fearless originalist[]") because he is willing to reject stare decisis when it would require infidelity to the text); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 25–28 (1994) (arguing that it is unconstitutional to

who favor more robust stare decisis tend to do so because of the values the doctrine serves, including judicial restraint,²² the rule of law,²³ and the legitimacy of judicial review.²⁴ Here, I develop an account of weak stare decisis, but it is not grounded in the claim that any particular methodological commitment demands that approach. Instead, I argue that the variety of such commitments on the Court makes a more relaxed form of constitutional stare decisis both inevitable and probably desirable, at least in those cases in which methodologies clash.

Before I develop this argument, a word of clarification is in order. Studies of stare decisis sometimes describe the way the doctrine restrains the Court as an institution,²⁵ but I will view the problem from the perspective of an individual justice. Each justice doubtless takes into account the interests of the institution in deciding whether overruling is appropriate. At least before it issues a decision, however, the Court does not have an institutional view about whether the precedent under consideration is right or wrong. Assessment of a precedent's consistency with the Constitution can depend upon a justice's interpretive commitments; the question for a justice who disagrees with a prior decision is whether the constraint of precedent overrides those commitments. Thus, while stare decisis serves institutional interests, this Article treats its tether as operating upon the individuals rather than the entity.

adhere to precedent in conflict with the Constitution's text). Other originalists concede that the Court may do so in rare circumstances. See, e.g., John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 834 (2009) ("Under our consequentialist approach, the goal is to use the original meaning when it produces greater net benefits than precedent and to use precedent when the reverse holds true."); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (characterizing himself as a "faint-hearted originalist" because of his willingness to follow some precedents that may conflict with the Constitution's text).

22. See, e.g., Thomas W. Merrill, *The Conservative Case for Precedent*, 31 HARV. J.L. & PUB. POL'Y 977, 981 (2008) ("A judiciary that stood firm with a strong theory of precedent would rechannel our nation back toward democratic institutions and away from using the courts to make social policy.").

23. See Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 159 (2006) (advancing a neoformalist argument as to why "the Supreme Court should abandon adherence to the doctrine that it is free to overrule its own prior decisions").

24. See Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 752 (1988) (arguing that the Court should follow precedent even when overruling it would not unduly disrupt societal expectations or institutions in order "to demonstrate—at least to elites—the continuing legitimacy of judicial review").

25. See, e.g., *id.* at 755 n.184 (explaining that the author "focuses on stare decisis in terms of the Court rather than in terms of the obligation of an individual member of the Court towards precedent").

II. Errors and Jurisprudential Disagreement

The classic formulation of *stare decisis* asks a justice to weigh the benefits of error correction against the costs of overruling.²⁶ In many cases, the justices will have a shared sense of how a prior case should be judged. *Arizona v. Gant*²⁷ is a good example. There, the Court addressed the question whether to overrule *New York v. Belton*,²⁸ which held it categorically permissible for police to search the interior of a car after arresting someone who had recently been in it.²⁹ The decision whether to overrule *Belton* turned on the same issue that the Court considered in *Belton* itself: whether the rationale of *Chimel v. California*³⁰ permits the search of an automobile incident to arrest after the scene has been secured.³¹ The *Gant* Court thought that its predecessor had misapplied that governing precedent.³²

26. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 362 (2010) (“Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error.”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 858 (1992) (plurality opinion) (“Even on the assumption that the central holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection”); *Payne v. Tennessee*, 501 U.S. 808, 842–43 (1991) (Souter, J., concurring) (“[W]hen this Court has confronted a wrongly decided, unworkable precedent calling for some further action by the Court, we have chosen not to compound the original error, but to overrule the precedent.”); *Oregon v. Mitchell*, 400 U.S. 112, 218 (1970) (Harlan, J., concurring in part and dissenting in part) (“I think it my duty to depart from [these cases], rather than to lend my support to perpetuating their constitutional error in the name of *stare decisis*.”).

27. 556 U.S. 332 (2009).

28. 453 U.S. 454 (1981).

29. See *Gant*, 556 U.S. at 341 (characterizing this as the dominant view of *Belton*); see also *id.* at 357 (Alito, J., dissenting) (asserting that the categorical rule established by *Belton* “could not be clearer”).

30. 395 U.S. 752 (1969).

31. See *id.* at 763 (maintaining that the Fourth Amendment permits a warrantless search of the area “‘within [an arrestee’s] immediate control’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence”); see also *Belton*, 453 U.S. at 460 (extending *Chimel* to hold that “when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile” (footnote omitted)).

32. *Gant*, 556 U.S. at 350 (criticizing *Belton*’s assumption that articles inside a passenger compartment are typically “within the area into which an arrestee might reach” (internal quotation marks omitted)). The *Gant* dissenters would have reaffirmed *Belton* because of both the merits and *stare decisis*. *Id.* at 358–65 (Alito, J., dissenting). Justice Breyer noted that he would have chosen a new rule had the case been one of first impression, but he did not think that the existing rule caused enough harm to justify overruling it. *Id.* at 354–55 (Breyer, J., dissenting). In this regard, Justice Breyer apparently viewed the *Belton* rule as lying within the prior Court’s discretion to adopt, even if he would have exercised that discretion differently. See *id.* This is the kind of situation in which Caleb Nelson has persuasively argued, by way of analogy to the “second step” of *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), that the presumption against overruling makes the most sense. Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 7 (2001) (“Before we let current judges substitute their discretionary choices for the discretionary choices made by their predecessors, we may well want to require a ‘special justification’ (such as the proven unworkability of the prior judges’ chosen rules).”). Cases representing discretionary choices are particularly well-suited to the application of *stare decisis* considerations like whether a precedent is workable, has been undermined by changed circumstances or subsequent case law, or would be

Justices may disagree about whether a rule like *Belton*'s is necessary to protect police safety and preserve evidence, but that disagreement does not flow in any strong way from a justice's fundamental approach to the Constitution. In other words, it is not the kind of case that turns on issues like the weight given original public meaning, the relevance of foreign law, or whether constitutional meaning evolves.

There are other cases, however, that do turn on such disagreements. In these cases, the calculation of "error" may greatly depend upon the eye of the beholder. Randy Kozel has observed that "[p]recedents are neither good nor bad; it is interpretive method that makes them so,"³³ and there is no doubt that there are some questions of constitutional interpretation upon which members of the Court are sharply divided.³⁴ These differences surface early. Nominees to the Court are routinely asked to describe their judicial philosophies, reflecting the public's expectation that they have one and keen interest in what it is.³⁵ However cagey a justice may be at the nomination stage, her approach to the Constitution becomes evident in the opinions she writes. For example, it would be difficult for a modern justice to avoid revealing her position on whether the original public meaning of the Constitution controls its interpretation.³⁶ Justices must decide whether function can trump form,³⁷ and whether the content of the Equal Protection and Due Process Clauses is static or evolving.³⁸ They must decide whether

costly to change. See, e.g., *Gant*, 556 U.S. at 358 (Alito, J., dissenting) (identifying factors relevant to deciding whether to overrule).

33. Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEXAS L. REV. 1843, 1846 (2013).

34. See Fallon, *supra* note 2, at 561 ("In practice, the demand that everyone should actually coalesce on a constitutional theory, and accept it as justifying constitutional outcomes, is too stringent to be realistic; reasonable disagreement is endemic to free societies." (citation omitted)). Fallon identifies a rough division between "text-based theories," which focus on the written Constitution, and "practice-based theories," which try to account for "a constitutional 'practice' in which judges sometimes decide cases based on considerations that go beyond the constitutional text." *Id.* at 538. He draws another rough distinction between theories that "seek to identify substantive values that constitutional adjudication ought to advance" and formalist theories that prescribe interpretive methodology rather than values. *Id.*

35. See, e.g., Sheryl Gay Stolberg, *Kagan Promises 'Modest' Approach*, N.Y. TIMES, June 28, 2010, <http://www.nytimes.com/2010/06/29/us/politics/29kagan.html> (describing Elena Kagan's judicial philosophy as a "core theme" of her confirmation hearings).

36. Compare *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3062 (2010) (Thomas, J., concurring) ("I believe the original meaning of the Fourteenth Amendment offers a superior alternative [to the Court's atextual, ahistorical approach] . . ."), with *id.* at 3117 (Stevens, J., dissenting) ("Even when historical analysis is focused on a discrete proposition, such as the original public meaning of the Second Amendment, the evidence often points in different directions.").

37. Compare *INS v. Chadha*, 462 U.S. 919, 959 (1983) (holding that the one-house veto violated the formal requirements of bicameralism and presentment), with *id.* at 999 (White, J., dissenting) (insisting that the separation of powers doctrine is not only about form, but also about "accommodation and practicality").

38. Compare *Michael H. v. Gerald D.*, 491 U.S. 110, 122–30 (1989) (plurality opinion) (emphasizing the centrality of history and tradition in identifying "fundamental rights" protected by

the laws and traditions of foreign countries are fair game or out of bounds in the interpretation of our Constitution.³⁹ And these, of course, are just a few of the general issues upon which a justice must take a position. Even apart from opinions, justices particularly passionate about their philosophies take them on the road. Justice Brennan praised living constitutionalism in speeches and articles.⁴⁰ Justice Scalia has made the case for originalism in books, articles, and public appearances,⁴¹ and Justice Breyer has energetically made the case for his constitutional philosophy of “active liberty.”⁴² Other justices, too, have taken their views about the Constitution to the court of public opinion.⁴³

When the evaluation of precedent turns on a question on which the justices are sharply divided, it is difficult to say that there is an agreed-upon means of identifying error.⁴⁴ An erroneous precedent is one that reflects the “wrong” constitutional philosophy: a judge espousing an approach of active liberty may judge an originalist precedent mistaken, not because it incorrectly determined the relevant provision’s original public meaning, but

the Due Process Clause), *with id.* at 137–41 (Brennan, J., dissenting) (disputing the role of tradition in substantive due process decision making).

39. *Compare* *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005) (extensively considering international opinion regarding the execution of juveniles), *with id.* at 622–28 (Scalia, J., dissenting) (vehemently objecting to the majority’s reliance upon foreign law). *Compare also* *Lawrence v. Texas*, 539 U.S. 558, 573, 576–77 (2003) (considering the views of foreign countries with respect to consensual homosexual conduct), *with id.* at 598 (Scalia, J., dissenting) (maintaining that the laws of foreign countries are irrelevant to the interpretation of our Constitution and insisting that “this Court . . . should not impose foreign moods, fads, or fashions on Americans” (citing *Foster v. Florida*, 537 U.S. 990, 990 n. (2002) (Thomas, J., concurring in denial of certiorari))).

40. *See, e.g.*, Justice William J. Brennan, Jr., Address at the Text and Teaching Symposium, Georgetown University: Constitutional Interpretation (Oct. 12, 1985), *available at* <http://teaching.americanhistory.org/library/index.asp?document=2342>. Describing his approach to constitutional interpretation, Justice Brennan said:

We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time[?] For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.

Id.

41. *See generally, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012); SCALIA, *supra* note 18.

42. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005). Justices Breyer and Scalia have publicly debated their competing philosophies. *See, e.g.*, Stephen Breyer & Antonin Scalia, Remarks at the U.S. Association of Constitutional Law Discussion at American University Washington College of Law: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005), *available at* <http://www.freerepublic.com/focus/f-news/1352357/posts>.

43. *See, e.g.*, Earl Warren, *The Law and the Future*, *FORTUNE*, Nov. 1955, at 106, 224 (“[I]t is the spirit and not the form of law that keeps justice alive.”).

44. *See* Kozel, *supra* note 33 (describing how different approaches to interpretation can lead to different analyses of precedent and how these differences have led to dissonance in constitutional adjudication).

because it treated that meaning as dispositive. *Lawrence v. Texas*⁴⁵ is an example of a case reflecting both jurisprudential disagreement and rejection of a precedent on its own terms. *Lawrence* overruled *Bowers v. Hardwick*⁴⁶ to hold unconstitutional a Texas statute criminalizing certain forms of sexual conduct between two persons of the same gender.⁴⁷ In reaching a contrary conclusion about a statute criminalizing homosexual sodomy, *Bowers* had relied heavily on the fact that the country had a long tradition of such statutes.⁴⁸ *Lawrence* challenged *Bowers*'s historical account—i.e., finding the case wanting on its own terms—but said that in any event, current attitudes, rather than tradition, should control—i.e., that *Bowers* took the wrong approach to the Due Process Clause.⁴⁹ The case thus turned on a flashpoint in Fourteenth Amendment jurisprudence: whether history and tradition control the definition of protected rights. Disagreement on this point was also the primary reason that the *Lawrence* dissenters defended the merits of *Bowers*.⁵⁰

Consider other situations in which overruling represents a clash of jurisprudential commitments.⁵¹ *Roper v. Simmons*⁵² overruled *Stanford v.*

45. 539 U.S. 558 (2003).

46. 478 U.S. 186 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003).

47. *Lawrence*, 539 U.S. at 578.

48. *Bowers*, 478 U.S. at 192 (denying the existence of “a fundamental right . . . to engage in acts of consensual sodomy” because “[p]roscriptions against that conduct have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights” (citation omitted)); *id.* at 193 n.6 (cataloging state criminal sodomy laws in existence when the Fourteenth Amendment was ratified).

49. On the former point, see *Lawrence*, 539 U.S. at 571 (“[T]he historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate.”). On the latter, see *id.* at 571–72 (“In all events we think that our laws and traditions in the past half century are of most relevance here ‘[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.’” (alteration in original)).

50. See *id.* at 598 (Scalia, J., dissenting) (asserting that “an ‘emerging awareness’ does not establish a ‘fundamental right’”). The dissenters also objected to the majority’s use of foreign law in determining current attitudes about homosexual conduct. See *id.* (“Much less do [constitutional entitlements] spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct.”).

51. My focus here is on jurisprudential rather than political disagreement. *But see* SAUL BRENNER & HAROLD J. SPAETH, *STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946–1992*, at 110 (1995) (contending that the choice to overturn precedent is driven by “the personal policy preferences” of the justices). I conceive of justices as being driven by first-order commitments to constitutional methods rather than solely by partisan political preference. To be sure, a justice’s first-order jurisprudential commitments tend to break down along political lines, with conservative justices tending toward originalism and liberal justices tending toward a more evolutionary approach. That does not mean, however, that votes are driven by partisan political preferences for particular results rather than by different starting points on the nature of the Constitution. *Cf.* Richard H. Fallon, Jr., Keynote Address, *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1116–17 (2008) (“[A]lthough lawyers, judges, and law professors need to reckon with findings that Supreme Court Justices typically vote consistently with their ideological values in the contested cases on their

*Kentucky*⁵³ to hold that the Eighth Amendment prohibited capital punishment for juveniles.⁵⁴ While the Court criticized *Stanford* on that case's own terms,⁵⁵ its decision was driven by a disagreement with the *Stanford* majority about whether the "Court is required to bring its independent judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders."⁵⁶ *Payne v. Tennessee*,⁵⁷ another Eighth Amendment case, similarly rejected the very premises of controlling precedent.⁵⁸ There, the Court overruled two cases that held unconstitutional the admission of victim impact evidence in a capital sentencing hearing because it refused to accept the "two premises" on which the precedent rested: that victim impact evidence "do[es] not in general reflect on the defendant's 'blameworthiness,' and that only evidence relating to 'blameworthiness' is relevant to the capital sentencing decision."⁵⁹ *Adarand Constructors, Inc. v. Pena*⁶⁰ overruled *Metro Broadcasting, Inc. v. Federal Communications Commission*⁶¹ because of disagreement about the deeply contested question whether racial classifications drawn in affirmative action statutes should be subject to strict scrutiny.⁶² *Mapp v. Ohio*⁶³ overruled *Wolf v. Colorado*⁶⁴ to hold the Fourth Amendment's exclusionary rule applicable to the states, a decision that flowed from the *Mapp* majority's fundamentally different position on incorporation.⁶⁵ *Seminole Tribe v. Florida*⁶⁶ overruled *Pennsylvania v.*

docket, it does not follow that the Justices do not adhere to legal norms."). If one is cynical enough to think that votes are driven almost entirely by partisan preference, there is very little reason to give precedent significant weight—or, for that matter, to believe judicial review legitimate. *See infra* notes 108–11 and accompanying text.

52. 543 U.S. 551 (2005).

53. 492 U.S. 361 (1989), *overruled by* *Roper v. Simmons*, 543 U.S. 551 (2005).

54. *Roper*, 543 U.S. at 578–79.

55. *See id.* at 574 (asserting that *Stanford* incorrectly counted the number of states prohibiting juvenile capital punishment and explaining that while *Stanford* properly focused on attitudes in 1989, the proper focus for the *Roper* Court was attitudes in 2004).

56. *Id.*

57. 501 U.S. 808 (1991).

58. *Id.* at 827–30 (overruling *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989)).

59. *Id.* at 819; *see also id.* at 819–27 (discussing the use of victim impact evidence).

60. 515 U.S. 200 (1995).

61. 497 U.S. 547 (1990), *overruled by* *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

62. *Adarand*, 515 U.S. at 227.

63. 367 U.S. 643 (1961).

64. 338 U.S. 25 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

65. *Compare* *Wolf*, 338 U.S. at 27–28, 33 (holding that the right to privacy is implicit in the Fourteenth Amendment's concept of "ordered liberty," but refusing to hold the Fourth Amendment applicable to the states (internal quotation marks omitted)), *with* *Mapp*, 367 U.S. at 657 (treating the applicability of the exclusionary rule to the states as "an essential part of both the Fourth and Fourteenth Amendments").

66. 517 U.S. 44 (1996).

*Union Gas Co.*⁶⁷ to hold Congress incapable of abrogating state sovereign immunity in reliance upon its commerce power, a view resting upon an interpretation of the Eleventh Amendment that has long been a matter of heated dispute.⁶⁸

In cases like these, *stare decisis* seems less about error correction than about mediating intense jurisprudential disagreement. Asking whether a prior case is in “error” according to a shared standard does not generally require a justice to relinquish her fundamental interpretive commitments. But when a justice rejects the premises of a precedent rather than its conclusion, affirming it requires her to let those commitments go. Seen in this light, it is unrealistic to think that the Court should give its constitutional precedent more weight than it currently does, at least in those cases that strike at a justice’s core positions. (Indeed, the fact that statutory and common law cases more rarely involve fundamental commitments may be one reason why more robust *stare decisis* is easier to sustain in those contexts.) Justices are unlikely to set aside easily their most closely held jurisprudential commitments; in fact, history shows that they have been unwilling to do so. They express the hope that “the intelligence of a future day” will turn their dissents into majorities.⁶⁹ And sometimes they cling to dissents repeatedly in future cases, steadfastly refusing to give *stare decisis* effect to a precedent with which they disagreed at the time it was decided.⁷⁰

67. 491 U.S. 1 (1989), *overruled by* *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

68. See James E. Pfander, *History and State Suability: An “Explanatory” Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1352–56 (1998) (describing the debate).

69. See CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS: AN INTERPRETATION* 68 (1928) (“A dissent in a court of last resort is an appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.”); see also, e.g., Scalia, *supra* note 21, at 864 (expressing the hope that “at least some of [my] dissents will be majorities”); Ruth Bader Ginsburg, Remarks at the 20th Annual Leo and Berry Eizenstat Memorial Lecture: The Role of Dissenting Opinions (Oct. 21, 2007), available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_10-21-07.html (expressing the hope that a future majority of the Court will adopt her dissenting position in *Gonzales v. Carhart*, 550 U.S. 124 (2007)).

70. Allison Orr Larsen calls this the practice of “perpetual dissent.” See generally Allison Orr Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447 (2008). The consistent dissent of Justices Brennan and Marshall to the death penalty is perhaps the best known, but by no means the only, example. See *id.* at 451 (asserting that after the Court upheld the constitutionality of the death penalty, Justices Brennan and Marshall registered more than 2,100 dissents to that view); see also, e.g., *Tennard v. Dretke*, 542 U.S. 274, 293 (2004) (Scalia, J., dissenting) (“I have previously expressed my view that this ‘right’ to unchanneled sentencer discretion has no basis in the Constitution. I have also said that the Court’s decisions establishing this right do not deserve *stare decisis* effect.” (citation omitted)); *McConnell v. FEC*, 540 U.S. 93, 326 (2003) (Kennedy, J., concurring in part and dissenting in part) (“I dissented in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), and continue to believe that the case represents an indefensible departure from our tradition of free and robust debate.”); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (Thomas, J., dissenting) (“I would affirm the judgment below because I continue to believe that the Constitution does not constrain the size of punitive damage awards.” (internal quotation marks omitted)); *United States v. Morrison*, 529 U.S. 598, 662 (2000)

One function of *stare decisis* is to keep these kinds of disagreements in check. In hot-button cases where differences in constitutional philosophy are in the foreground, the preference for continuity disciplines jurisprudential disagreement. Absent a presumption in favor of keeping precedent, and absent the system of written opinions on which *stare decisis* depends, new majorities could brush away a prior decision without explanation. If only the votes mattered, and neither deference to precedent nor a reason for departing from it was required, a reversal would represent an abrupt act of will more akin to a decision made by one of the political branches. But in a system of precedent, the new majority bears the weight of explaining why the constitutional vision of their predecessors was flawed and of making the case as to why theirs better captures the meaning of our fundamental law.⁷¹ Justifying an initial opinion requires reason giving, particularly if the majority is challenged by a dissent. Justifying a decision to overrule precedent, however, requires both reason giving on the merits *and* an explanation of why its view is so compelling as to warrant reversal.⁷² The need to take account of reliance interests forces a justice to think carefully about whether she is sure enough about her rationale for overruling to pay the cost of upsetting institutional investment in the prior approach.⁷³ If she is not sure enough, the preference for continuity trumps. *Stare decisis* protects

(Breyer, J., dissenting) (continuing to reject the interpretation of the Commerce Clause advanced in *United States v. Lopez*, 514 U.S. 549 (1995)); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 97 (2000) (Stevens, J., concurring in part and dissenting in part) (“Despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent.”); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 699 (1999) (Breyer, J., dissenting) (“I am not yet ready to adhere to the proposition of law set forth in *Seminole Tribe*.”); *Shaw v. Hunt*, 517 U.S. 899, 918 (1996) (Stevens, J., dissenting) (“As I have explained on prior occasions, I am convinced that the Court’s aggressive supervision of state action designed to accommodate the political concerns of historically disadvantaged minority groups is seriously misguided.”).

71. William Cranch praised the connection between *stare decisis*, opinion writing, and accountability in the preface to his Supreme Court reports, where he observed that a judge “can not decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public.” William Cranch, *Preface to 5 U.S.* (1 Cranch) iii, iii–iv; *see also* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 664 (1999) (citing Cranch, *supra* at iii). In this regard, deference to precedent encourages both humility and respect for other justices. *Cf.* Gerhardt, *supra* note 4, at 1295 (asserting that “fidelity to precedent generally . . . constitutes an indispensable feature of ‘judicial modesty’ . . . that calls upon Justices and judges to be respectful of the opinions of others to the fullest extent possible and not to decide more than is required in any given case”).

72. *See Payne v. Tennessee*, 501 U.S. 808, 848–49 (1991) (Marshall, J., dissenting) (stating that the Supreme Court has “never departed from precedent without ‘special justification’”).

73. *See 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.”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992) (“But even when justification [for overruling precedent] is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute.”); *see also Arizona v. Gant*, 556 U.S. 332, 354–55 (2009) (Breyer, J., dissenting) (observing that while he would “look for a better rule” than that established by precedent if the case were “one of first impression,” *stare decisis* counseled the Court to stay the course).

reliance interests by putting newly ascendant coalitions at an institutional disadvantage. It doesn't prohibit them from rejecting a predecessor majority's methodological approach in favor of their own, but it makes it more difficult for them to do so. The doctrine thus serves as an intertemporal referee, moderating any knee-jerk conviction of rightness by forcing a current majority to advance a special justification for rejecting the competing methodology of its predecessor.⁷⁴ It also channels disagreements into the less disruptive approach of refusing to extend precedent—an approach that maintains better continuity with the past than does the abrupt turn of getting rid of it altogether.

Although it was not fashioned with this goal in mind, the traditionally weak presumption of *stare decisis* in constitutional cases is both realistic about, and respectful of, pluralism. And it accommodates not only a pluralistic Court, but also a pluralistic society.⁷⁵ In hard cases, Americans largely look to the Court to flesh out the terms of our compact.⁷⁶ We accept the Court's opinions as contingent resolutions of disputes about the content of the Constitution; we abide by them unless and until they are changed. That said, challenges to precedent reflect a general unwillingness to permit a process short of constitutional amendment to articulate the terms of our fundamental law in a permanent way. Challenges to precedent generally originate with litigants⁷⁷ and are a means of pushing back against the proposition that the Constitution embodies the principles the Court says it does—for example, that the right to terminate a pregnancy is a fundamental one⁷⁸ or that Congress's power to regulate interstate commerce does not support statutes like the Gun-Free School Zones Act.⁷⁹ That is not to say that every such challenge should succeed.⁸⁰ But the weak presumption permits disputes like these to be aired. Robert Post and Reva Siegel have argued that “[b]acklash to judicial decisions interpreting [the Fourteenth, Eighth, and First Amendments] demonstrates that for some constitutional questions,

74. See Barrett, *supra* note 3, at 1018–19 (emphasizing that even if a court has the authority to overrule precedent, it will not do so absent “special justification,” which requires more than a mere showing that the prior case is erroneous (internal quotation marks omitted)).

75. See Sanford Levinson, *Law as Literature*, 60 TEXAS L. REV. 373, 386 (1982) (describing competing ways of understanding the Constitution as “the result of a genuine plurality of ways of seeing the world, rather than of the obdurate recalcitrance of those who refuse to bend to superior argument”).

76. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (referring to the Court's duty “to say what the law is”).

77. See *infra* notes 117 & 124–26 and accompanying text.

78. *Roe v. Wade*, 410 U.S. 113, 164 (1973).

79. *United States v. Lopez*, 514 U.S. 549, 567 (1995).

80. Cf. *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955) (“[I]t should go without saying that the vitality of the[] constitutional principles [announced in *Brown v. Board of Education*, 347 U.S. 483 (1954)] cannot be allowed to yield simply because of disagreement with them.”).

authoritative settlement is neither possible nor desirable.”⁸¹ There is insufficient space here to explore the claim that authoritative settlement through judicial decisions is normatively undesirable. But as a descriptive matter, Post and Siegel’s claim rings true. Soft stare decisis helps the Court navigate controversial areas by leaving space for reargument despite the default setting of continuity.

It is probably true that justices who subscribe to text-based theories are more likely than others to encounter conflict between precedent and jurisprudential commitment. Caleb Nelson has observed that “the more determinate one considers the underlying rules of decision in a particular area, the more likely one may be to conclude that a past decision in that area is ‘demonstrably erroneous.’”⁸² It makes sense that one committed to a textualist theory would more often find precedent in conflict with her interpretation of the Constitution than would one who takes a more flexible, all-things-considered approach.⁸³ Indeed, Michael Gerhardt has said that, at least as of 1994, “no two justices in this century have called for overruling more precedents than Justices Black and Scalia,”⁸⁴ both of whom were textualists, even though Black was a liberal and Scalia a conservative. Gerhardt’s more recent statistics show that each of the two self-identified originalists, Justices Thomas and Scalia, urged and joined in overruling precedents more than any other justice during the last eleven years of the Rehnquist Court,⁸⁵ although Gerhardt also points out that one must be careful

81. Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 378 (2007). This is consistent with Michael Gerhardt’s observation that reversals of constitutional precedent are concentrated in a few areas:

[T]he areas in which the Court has overruled itself six or more times are criminal procedure (forty), Fourteenth Amendment Due Process Clause (nineteen), the Commerce Clause (eighteen), Fourteenth Amendment Equal Protection Clause (eight), Eleventh Amendment (seven), Article I other than Commerce Clause (six), and freedom of expression or speech (six). The Court has overruled itself fewer than six times in other areas of constitutional law.

Gerhardt, *supra* note 4, at 1282 (footnote omitted).

82. Nelson, *supra* note 32, at 50. “Demonstrably erroneous” is the standard that Nelson would apply to the determination of whether precedent should be overruled. *See generally id.*

83. *Cf. The Nomination of Elena Kagan to be An Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 89 (2010), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg67622/html/CHRG-111shrg67622.htm> (“I think in general judges should look to a variety of sources when they interpret the Constitution, and which take precedence in a particular case is really a kind of case-by-case thing.”); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 159 (2005) (“I have said I do not have an overarching judicial philosophy that I bring to every case, and I think that’s true.”).

84. Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 33 (1994).

85. GERHARDT, *supra* note 17, at 12. Gerhardt gives the following statistics for the average number of times a Justice called for the overruling of precedent per year during this period: “2.07 for Justice Thomas, 1.84 for Justice Scalia, 1.74 for Chief Justice Rehnquist, 1.78 for Justice Kennedy, 1.75 for Justice O’Connor, 1.45 for Justice Stevens, 1.4 for Justice Souter, 1.27 for Justice Breyer, and 1.0 for Justice Ginsburg.” *Id.*

in the inferences one draws from the numbers, which “do not indicate either why or on what basis the justices urged overruling.”⁸⁶ Even assuming, however, that the higher numbers for textualists are driven by methodological commitment, Gerhardt’s statistics also show that calls for overruling are not confined to that quarter.⁸⁷ As discussed above, the tension between jurisprudential commitment and precedent is one experienced by justices across the spectrum,⁸⁸ even if some may experience it more frequently than others.

III. Institutional Legitimacy and Reliance Interests

Because *stare decisis* is relatively weak in constitutional cases, the moderating function is the main contribution of the constraint against overruling in cases involving deep-seated jurisprudential disagreement. It forces the Court to proceed cautiously and thoughtfully before reversing course, but it does not force the Court to retain precedent. Yet while this may be consistent with the Court’s actual practice, it is contrary to the arguments of those who have argued in favor of a significantly stronger role for *stare decisis* in constitutional cases.⁸⁹ It also arguably gives short shrift to the risks associated with departures from precedent—in particular, preservation of the Court’s institutional legitimacy and the protection of reliance interests.⁹⁰ This Part considers those concerns in turn and concludes that even a weak system of constitutional *stare decisis* protects institutional legitimacy and reliance interests more than is commonly supposed.

A. Institutional Legitimacy

Leaving room for new majorities to overrule old ones allows changed membership to change what the Court says the Constitution means. One of the stated goals of *stare decisis*, including *stare decisis* in constitutional cases, is institutional legitimacy, both actual and apparent.⁹¹ If the Court’s opinions change with its membership, public confidence in the Court as an institution

86. *Id.* at 13.

87. *See supra* note 85.

88. *See supra* notes 45–70 and accompanying text.

89. *See supra* notes 22–24 and accompanying text.

90. *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (“*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”).

91. *See Solorio v. United States*, 483 U.S. 435, 466 (1987) (Marshall, J., dissenting) (“[B]edrock principles are founded in the law rather than in the proclivities of individuals.” (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986))); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970) (suggesting that *stare decisis* preserves the perception of “the judiciary as a source of impersonal and reasoned judgments”); *see also Suzanna Sherry, The Eleventh Amendment and Stare Decisis: Overruling Hans v. Louisiana*, 57 U. CHI. L. REV. 1260, 1262–63 (1990) (arguing that strong precedent rules are justified because they protect the Court’s institutional legitimacy).

might decline.⁹² Its members might be seen as partisan rather than impartial⁹³ and case law as fueled by power rather than reason.⁹⁴

Others have challenged the view that protecting the Court's reputation is a valid reason to retain precedent.⁹⁵ Akhil Amar captures the criticism well: "[I]t does not seem to me that when the Supreme Court has made a mistake, it ought to respond by not telling the citizenry because it fears that the American people cannot handle the news."⁹⁶ But even assuming that the Court should make decisions with an eye toward its reputation, there is little reason to think that reversals would do it great damage. *Stare decisis* is not a hard-and-fast rule in the Court's constitutional cases, and the Court has not been afraid to exercise its prerogative to overrule precedent.⁹⁷ Still, public

92. See *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) (arguing that "[a] basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government" and contending that "[n]o misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve"); *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting) (contending that the Court's institutional strength is weakened when it views its decisions as little more than a "restricted railroad ticket, good for this day and train only"); Earl M. Maltz, Commentary, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 484 (1980) (insisting that adhering to precedent is necessary because the public will not accept the Supreme Court's authority unless it believes that "in each case the majority of the Court is speaking for the Constitution itself rather than simply for five or more lawyers in black robes"); Monaghan, *supra* note 24, at 753 n.170 (describing Judge Posner's opinion that "a general failure to adhere to precedent in constitutional cases would weaken the legitimacy of the federal judiciary by weakening the popular acceptance of judicial decisions").

93. See Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 288 (1990) ("[E]limination of constitutional *stare decisis* would represent an explicit endorsement of the idea that the Constitution is nothing more than what five Justices say it is").

94. See *Payne*, 501 U.S. at 844-45 (Marshall, J., dissenting) (lamenting that "[p]ower, not reason, is the new currency" of the majority that believes "itself free to discard any principle of constitutional liberty" that it has the votes to overrule).

95. See, e.g., *id.* at 834 (Scalia, J., concurring) (arguing that "the notion that an important constitutional decision with plainly inadequate rational support *must* be left in place for the sole reason that it once attracted five votes" undermines the Court's legitimacy); *Flood v. Kuhn*, 407 U.S. 258, 293 n.4 (1972) (Marshall, J., dissenting) (contending that "[t]he jurist concerned with 'public confidence in, and acceptance of the judicial system' might well consider that, however admirable its resolute adherence to [precedent], a decision contrary to the public sense of justice as it is, operates . . . to diminish respect for the courts" (quoting Peter L. Szanton, *Stare Decisis: A Dissenting View*, 10 HASTINGS L.J. 394, 397 (1959))); see also John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 834 n.114 (2009) (arguing that the "institutional legitimacy" rationale "is troubling because it suggests that hiding and perpetuating errors is superior to acknowledging and correcting them"); Nelson, *supra* note 32, at 72-73 ("[T]he legitimacy argument may well strike [some] as a giant ruse: It concedes that the public's acceptance of court decisions rests on the idea that judges act like scientists rather than politicians, but it tells courts to act like politicians in order to preserve that idea.").

96. Akhil Reed Amar, *On Text and Precedent*, 31 HARV. J.L. & PUB. POL'Y 961, 967 (2008).

97. Consider just a few of the well-known fluctuations in the Court's constitutional case law. The Court has flipped twice on the question whether Congress can regulate state governments with respect to prescribing wage and hour limitations for state employees. Compare *Maryland v. Wirtz*, 392 U.S. 183, 201 (1968), with *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985), and *Nat'l League of Cities v. Usery*, 426 U.S. 833, 840 (1976). The Court has also changed course on the question of incorporation, compare *Adamson v. California*, 332 U.S. 46, 51 (1947),

confidence in the Court remains generally high.⁹⁸ Moreover, members of the public (and particularly elites) regularly argue that the Court should overrule certain of its cases.⁹⁹ If anything, the public response to controversial cases like *Roe* reflects public rejection of the proposition that *stare decisis* can declare a permanent victor in a divisive constitutional struggle rather than desire that precedent remain forever unchanging. Court watchers embrace the possibility of overruling, even if they may want it to be the exception rather than the rule.

The “protecting public confidence” argument seems to assume that the public would be shaken to learn that a justice’s judicial philosophy can affect the way she decides a case and that justices do not all share the same judicial philosophy.¹⁰⁰ This, however, is not news to the citizenry. Americans understand that there is a difference between Justice Scalia’s originalism and Justice Breyer’s “active liberty”; that is why Supreme Court nominations are an issue in presidential elections.¹⁰¹ Many Americans are informed enough

and Palko v. Connecticut, 302 U.S. 319, 323 (1937), with *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961); the protection given by the Free Exercise Clause, compare *Sherbert v. Verner*, 374 U.S. 398, 410 (1963), with *Emp’t Div., Dep’t of Human Res. of State of Or. v. Smith*, 485 U.S. 660, 672 (1988); the scope of the Commerce Clause, compare *Adkins v. Children’s Hosp. of D.C.*, 261 U.S. 525, 561–62 (1923), and *Lochner v. New York*, 198 U.S. 45, 58 (1905), with *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398–400 (1937); the lawfulness of segregation, compare *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896), with *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954); and the freedom of corporations to engage in political speech, compare *McConnell v. FEC*, 540 U.S. 93, 170 (2003), and *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 655 (1990), with *Citizens United v. FEC*, 558 U.S. 310, 319, 365–66 (2010).

98. See *Supreme Court: Gallup Historical Trends*, GALLUP, <http://www.gallup.com/poll/4732/supreme-court.aspx> (showing that a majority of Americans have approved of the way the Supreme Court has handled its job in the past decade).

99. See, e.g., Monaghan, *supra* note 24, at 761 (describing how elites in the 1950s believed that the Court should end segregation despite *stare decisis* principles); Doug Kendall, *Citizens United, President Obama, and His Liberal Naysayers*, HUFFINGTON POST (Nov. 2, 2012, 10:04 AM), http://www.huffingtonpost.com/doug-kendall/citizens-united-president_b_2064049.html (describing President Obama’s hope that the Supreme Court will overrule *Citizens United* and his support for a constitutional amendment overruling the case if the Court does not).

100. See *Payne v. Tennessee*, 501 U.S. 808, 853 (1991) (“[T]his Court can legitimately lay claim to compliance with its directives only if the public understands the Court to be implementing ‘principles . . . founded in the law rather than in the proclivities of individuals.’” (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986))); see also Monaghan, *supra* note 24, at 752 (arguing that adhering to contested precedent “demonstrate[s]—at least to elites—the continuing legitimacy of judicial review” by sending the message that “the law is impersonal in character”).

101. See Abby Livingston & Mark Murray, *Context of Obama’s ‘Empathy’ Remark*, FIRST READ, NBC NEWS.COM (May 1, 2009, 4:58 PM), http://firstread.nbcnews.com/_news/2009/05/01/4430634-context-of-obamas-empathy-remark (reporting on President Obama’s commitment to appoint Supreme Court justices who interpret the Constitution in favor of the powerless rather than in a “cramped and narrow way”); Jeffrey Rosen, *Can Bush Deliver a Conservative Court?*, N.Y. TIMES, Nov. 14, 2004, http://www.nytimes.com/2004/11/14/week_inreview/14jeff.html (reporting on President Bush’s pledge to appoint Supreme Court justices who would be “strict constructionists”).

to have a general preference for one or the other,¹⁰² and while each side undoubtedly suspects the other of being motivated by politics rather than sincere jurisprudential commitment, judicial supremacy is alive and well. That Americans—and thus Supreme Court justices—disagree about how to interpret the Constitution is a fact of our political culture. These disagreements not only look forward at what the Court should do in cases it has yet to confront, but also backward in critiques of cases the Court has already decided.

The above speaks to the Court's *apparent* legitimacy. The question remains whether overruling precedent affects the Court's *actual* legitimacy. Does the Court act lawlessly—or at least questionably—when it overrules precedent? I tend to agree with those who say that a justice's duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it.¹⁰³ That itself serves an important rule-of-law value.¹⁰⁴ Of course, constant upheaval in the law would disserve rule-of-law values insofar as it would undermine the consistency—and therefore the predictability—of the law.¹⁰⁵ But constant upheaval is not what a weak presumption of *stare decisis* has either promised or delivered. The Court follows precedent far more often than it reverses precedent.¹⁰⁶ And even though overruling is exceptional, it is worth observing that the Court's longstanding acceptance of it lends legitimacy to the practice. Our legal culture does not, and never has, treated the reversal of precedent as out-of-bounds.¹⁰⁷ Instead, it treats departing from precedent as a permissible move,

102. See Jamal Greene et al., *Profiling Originalism*, 111 COLUM. L. REV. 356, 414 (2011) (describing “the collapsing wall between methodological and popular discourse”).

103. While originalists are best known for making this point, see, e.g., Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 27–28 (1994), nonoriginalists too express fidelity to their best understanding of the Constitution when they choose to overrule precedent, see, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 895 (1996) (arguing that “[i]f one is quite confident that a practice is wrong—or if one believes, even with less certainty, that it is terribly wrong—this conception of traditionalism permits the practice to be eroded or even discarded”).

104. Cf. Kozel, *supra* note 33, at 1862 (observing that “[e]xcessive deference to flawed constitutional precedents can . . . create systemic concerns for the rule of law” insofar as “society is forced to endure pervasive misapplications of its most important document”).

105. *Id.* at 1857 (asserting that “adherence to precedent advances the rule of law . . . by fostering a sense of uniformity, consistency, and reliability”).

106. See Gerhardt, *supra* note 4, at 1282 (arguing from statistics that most of constitutional law is stable because, historically, reversals have been concentrated in a few areas of doctrine).

107. By way of contrast, imagine if the Court began deciding all cases without opinion. It is very unlikely that opinion writing is constitutionally required. The early Court did not always issue opinions, and when it did, it often issued them *seriatim* rather than as a majority. See Lee, *supra* note 71, at 670 n.117 (describing John Marshall's “rejection of ‘the custom of the delivery of opinions by the Justices *seriatim*,’ in favor of the new practice of ‘announcing, himself, the views of that tribunal’” (quoting 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL: CONFLICT AND CONSTRUCTION 1800–1815*, at 16 (1919))). Opinion writing is such an entrenched practice, however, that the legal community would likely view its elimination as illegitimate, even if not unconstitutional.

albeit one that should be made only for good reason. Because there is a great deal of precedent for overruling precedent, a justice who votes to do so engages in a practice that the system itself has judged to be legitimate rather than lawless.

Critics sometimes suggest that reversals occur because new appointments make new political preferences dominant.¹⁰⁸ It is surely true that reversal is more likely to result from a new justice's heretofore unexpressed opinion than from an existing justice's change of mind.¹⁰⁹ But the criticism is framed to suggest that overruling is driven by—and therefore tainted by—partisan political preferences. To be sure, partisan politics are not a good reason for overturning precedent. But neither are they a good reason for deciding a case of first impression. One who believes that an overruling reflects votes cast based on political preference must believe that all cases (or at least all the hot-button ones) are decided that way, for there would be no reason for politics to taint reversals but not initial decisions. If all such decisions are based on politics, there is no reason why the precedent—itself thus tainted—is worthy of deference. (Nor, for that matter, would there be reason to accept the legitimacy of judicial review.) Basic confidence in the Supreme Court requires the assumption that, as a general matter, justices decide cases based on their honestly held beliefs about how the Constitution should be interpreted. If one is willing to make that assumption about the decision of cases of first impression, one should also be willing to make it about the decision to overrule precedent. A change in personnel may well shift the balance of views on the Court with respect to constitutional methodology. Yet the fact that a reversal flows from a disagreement between the new majority and its predecessors about constitutional methodology does not itself render the overruling illegitimate, as criticisms of overruling sometimes suggest.¹¹⁰ Reversal because of honest jurisprudential disagreement is illegitimate only if it is done without adequate consideration of, and due deference to, the arguments in favor of letting the precedent stand.¹¹¹

108. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting) (“Neither the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this Court did.”); BRENNER & SPAETH, *supra* note 51, at 110 (contending that the changed membership of the Court explains reversals, for the choice to overturn precedent is driven by the “personal policy preferences” of the justices); cf. CARDOZO, *supra* note 14, at 150 (arguing that a court’s changed composition should not occasion changed precedent).

109. See *infra* note 128 and accompanying text.

110. See *supra* notes 92–94 and accompanying text.

111. See *supra* notes 71–73 and accompanying text.

B. Reliance

Reliance interests are one of the classic concerns of *stare decisis*.¹¹² Indeed, while the doctrine serves many goals, the protection of reliance interests is paramount.¹¹³ Treating the Supreme Court's constitutional precedent as always subject to revision risks undermining the stability of constitutional law. People must be able to order their affairs, and they cannot do so if a Supreme Court case is a "restricted railroad ticket, good for this day and train only."¹¹⁴ It is inescapably true that a weak presumption of validity protects reliance less than a virtual rule against overruling.

Horizontal *stare decisis*, however, is not the only—or necessarily even the primary—mechanism for protecting reliance interests in the Supreme Court's constitutional cases. Indeed, other features of the federal judicial system, working together, do more than the constraint of horizontal *stare decisis* to keep the Court's case law stable.

1. *Vertical Stare Decisis*.—Even when a Supreme Court opinion reflects sharp disagreement on the Court, and even when the public is divided in its views about the opinion, lower courts are forbidden to revisit it.¹¹⁵ Vertical *stare decisis* locks in the holding of a Supreme Court case in lower courts, and this is a significant stabilizing force in constitutional law.

2. *Advisory Opinions*.—The Court cannot choose to revisit precedent simply because it disagrees with it. Article III requires that a controversy exist.¹¹⁶ Litigants must bring cases in lower courts and take their losses to the Supreme Court in order for the question to be on the table. If litigants have no interest in questioning the continued validity of a precedent, the

112. See, e.g., *Payne*, 501 U.S. at 827 ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, *fosters reliance on judicial decisions*, and contributes to the actual and perceived integrity of the judicial process." (second emphasis added)).

113. See *id.* at 828 (arguing that *stare decisis* should have the most force in cases in which reliance interests are particularly strong).

114. *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

115. See *supra* note 6. To be sure, some may argue that a lower court judge should be free to follow her best judgment about what the Constitution requires rather than a Supreme Court opinion in conflict with that judgment. The federal judicial hierarchy and the Supreme Court's authority to review state court judgments make this a different question than the one posed by a Supreme Court justice confronted with her Court's own precedent. See generally Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994) (offering constitutional and prudential rationales to justify the system of judicial hierarchy). For present purposes, it suffices to make the descriptive observation that federal and state judges do not consider themselves free to depart from Supreme Court precedent and that vertical *stare decisis* thus serves as a stabilizing force.

116. U.S. CONST. art. III, § 2. For a discussion of the foundations of the rule against advisory opinions, see generally Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEXAS L. REV. 73, 129–30 (2007).

Court will have no opportunity to decide it.¹¹⁷ The ban on advisory opinions prevents a justice from roaming through the Court's cases to remake them all in her own interpretive image.

3. *Certiorari Standards*.—It takes not only litigants, but also lower courts and the justices themselves to put an issue on the Court's agenda. In contrast to the lower federal courts, which must take all comers, discretionary jurisdiction permits the Court to pick and choose the questions it hears. One way in which the Court maintains stability in the case law is by *not* granting certiorari to revisit well-settled questions.¹¹⁸ Indeed, even if an individual justice thinks some well-settled case wrongly decided (to use the classic example, the constitutionality of paper money), the certiorari process permits her to avoid confronting the question whether it should be overruled.

As a general rule, the Court takes cases presenting an important question upon which lower courts are divided.¹¹⁹ This rule protects reliance interests by putting a challenge to precedent on the Court's agenda only when disagreement below signals to the Court that reconsideration of the precedent may be timely.¹²⁰ This disagreement does not typically express

117. Henry Monaghan identifies the constitutionality of remittitur practice as an example of an issue that is off the Court's agenda because it is one "about which there is no current interest." Monaghan, *supra* note 24, at 746 n.133. Monaghan identifies horizontal stare decisis as the force keeping such issues off the Court's agenda. *Id.* at 744. I tend to agree with Max Radin, however, that it is "estoppel or the force of custom" rather than the force of stare decisis that performs this agenda-limiting function. *See id.* at 757 & n.189 (internal quotation marks omitted) (describing Radin's position and noting that "[o]n this view, Radin would certainly deny that my agenda-limitation illustrations are examples of stare decisis at all" (citation omitted)). Once the legal system widely acquiesces in a holding, reliance interests give it a force that derives from something other than the Court's relatively weak commitment not to depart from its precedents. *See infra* notes 129–48 and accompanying text.

118. *See* GERHARDT, *supra* note 17, at 45 ("[I]n the certiorari process, the justices often demonstrate their desire to adhere to or accept precedents they might not have decided the same way in the first place.").

119. *See* SUP. CT. R. 10(a) (identifying conflict between federal courts of appeals as a reason for granting certiorari); *id.* R. 10(b) (identifying conflict between state courts of last resort or between state courts of last resort and a United States court of appeals as a reason for granting certiorari). The Court is also willing to grant certiorari when the issue is "an important question of federal law that has not been, but should be, settled by this Court," or when a lower court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." *Id.* R. 10(c). The Court rarely takes a case seeking only the correction of an error below. *Id.* R. 10. In addition to the above guidelines, the Court will not take a case that has jurisdictional or factual quirks that would complicate the Court's consideration of the merits. *See* Stephen M. Shapiro, *Certiorari Practice: The Supreme Court's Shrinking Docket*, APPELLATE.NET (1999), <http://www.appellate.net/articles/certpractice.asp> (noting that the Court screens out cases containing issues that might prevent a clean ruling on the merits of a cert-worthy question). The need to wait for the right case is a further limitation upon the Court's ability to revisit precedent.

120. Some have stressed stare decisis's role in "conserving and perpetuating shared values" as a virtue of the doctrine. Monaghan, *supra* note 24, at 751; *see also* Merrill, *supra* note 22, at 981 (maintaining that "a strong theory of precedent in constitutional law . . . would reduce the prospects for change through constitutional interpretation"). *But see* Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 637 (2006) (observing that

itself by some courts of appeals or state supreme courts flouting precedent; vertical stare decisis prevents that.¹²¹ But lower courts can resist the extension of a holding by distinguishing it.¹²² The emergence of splits about the scope of a holding may reflect significant dissatisfaction with the holding itself.¹²³ If, moreover, affected litigants and judges below have not overwhelmingly acquiesced in a decision, that itself is a signal that its resolution may not be permanent and that interested parties should rely upon it advisedly.

4. *Question Presented.*—Generally speaking, the Court will not reach out to decide a question that a petitioner has not proposed.¹²⁴ This is not a

while self-professed Burkeans argue in favor of retaining precedent as a means of preserving tradition, “there is actually a well-established Burkean practice and tradition of venerating the text and first principles of the Constitution and of appealing to it to trump both contrary caselaw and contrary practices and traditions”). It is undoubtedly true that the large body of precedent that is never disturbed contributes to this aim. But the kinds of cases that the Court reverses are often ones implicating values on which society is divided. See *supra* note 81 and accompanying text.

121. See Caminker, *supra* note 115, at 824–25 (outlining the duty of lower courts to obey precedents of those courts that have “revisory jurisdiction” over them).

122. See NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* 16 (2008) (“Where judges do not wish to follow a precedent it is commonly assumed that they will either distinguish the precedent from the present case or overrule the precedent on the basis of an especially compelling reason or set of reasons.”).

123. While not a constitutional case, *Pearson v. Callahan*, 555 U.S. 223 (2009), illustrates well the way in which dissatisfaction can prompt overruling above. The Court observed that “[l]ower court judges . . . have not been reticent in their criticism of [*Saucier v. Katz*, 533 U.S. 194 (2001)]” and that “application of the rule has not always been enthusiastic.” *Id.* at 234. That fact, combined with separate opinions in other cases from members of the Court, spurred reconsideration, and ultimately reversal, of the Court’s holding in that case. *Id.* at 235–36; see also, e.g., *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (“The chorus that has called for us to revisit [*New York v. Belton*, 453 U.S. 454 (1981)] includes courts, scholars, and Members of this Court who have questioned that decision’s clarity and its fidelity to Fourth Amendment principles.”). *Gregg v. Georgia*, 428 U.S. 153 (1976), also illustrates this phenomenon. After *Furman v. Georgia*, 408 U.S. 238 (1972), held unconstitutional all of the death penalty statutes before the Court in that case, “at least 35 States . . . enacted new statutes that provide[d] for the death penalty for at least some crimes.” *Gregg*, 428 U.S. at 179–80 (plurality opinion). Reviewing one of these statutes in *Gregg*, the Court retreated from *Furman* and permitted the death penalty when safeguards were present. *Id.* at 206–07. Pushback from the states caused the Court to change course, even though it did not overrule *Furman* outright. See *id.* at 180–81, 186–87 (finding important that “capital punishment itself has not been rejected by the elected representatives of the people” and invoking “[c]onsiderations of federalism” in deciding that capital punishment is not per se unconstitutional).

124. See SUP. CT. R. 14.1(a) (“Only the questions set out in the petition, or fairly included therein, will be considered by the Court.”). The certiorari petition thus generally gives the Court notice of what it is getting into. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 376–77 (2010) (Roberts, C.J., concurring) (asserting that the Court had not considered whether to overrule precedent in other corporate speech cases because “[n]ot a single party in any of those cases asked us to . . . , and as the dissent points out, the Court generally does not consider constitutional arguments that have not properly been raised” (citation omitted)); *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (noting that the petition granted had expressly sought the overruling of *Bowers v. Hardwick*, 478 U.S. 186 (1986)). To be sure, the request is not always express in the petition for certiorari, for the Court considers itself free to entertain issues “fairly included” within the questions presented in the petition. See EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 456–58 (9th

firm constraint, for the Court can order supplemental briefing on a question raised by neither the petition for certiorari nor the merits brief, and it has exercised this power on occasion to order the parties to address whether precedent should be overruled.¹²⁵ Such orders are controversial, however, and issue only with the support of multiple justices.¹²⁶ The general rule of confining the issues to those pressed by the litigants, along with the need for multiple votes to exercise an exception to this rule, is another check on a justice ready to continue a disagreement that the litigants who sought review or the justices who granted certiorari on a specific question are not ready to reopen. The rule discourages—though does not forbid—the Court from stretching too far. And like the certiorari process, it provides the justices with a way of avoiding the question whether a troublesome precedent should be overruled. A justice who thinks precedent wrongly decided is not necessarily eager to confront that question. As I will discuss below, this is particularly true for so-called superprecedents.

5. *Multi-member Court*.—The Court's composition of nine is another factor promoting stability. It takes more than one vote to reverse course. It takes four votes for a grant of certiorari and five votes for a majority on the merits.¹²⁷ Thus, at least four justices must be willing to entertain a question that could provoke an overruling, and the existing resolution will not be disturbed unless at least five justices are certain enough of their own approach to assume the risk of disturbing reliance interests.

6. *Life Tenure*.—Life tenure gives the Court relatively stable membership. The slow rate at which seats turn over itself encourages continuity in case law. Justices do change their minds, but overruling is more likely when fresh eyes see a case. Indeed, Michael Gerhardt notes that

ed. 2007) (describing circumstances in which the Court has deemed questions “fairly included” with those on which it granted certiorari).

125. See, e.g., *Montejo v. Louisiana*, 556 U.S. 778, 792, 797 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625 (1986) after calling for supplemental briefing on the question whether it should be overruled); *Payne v. Tennessee*, 498 U.S. 1076 (1991) (ordering supplemental briefing on the question whether two controlling precedents should be overruled). This practice has been sharply criticized. See, e.g., *Citizens United*, 558 U.S. at 396 (Stevens, J., dissenting) (asserting that ordering the parties to address whether precedent should be overruled is “unusual and inadvisable for a court”). The Court has also occasionally reconsidered precedent without even asking the parties to argue the point, a practice which is also criticized. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 673–74 (1961) (Harlan, J., dissenting) (criticizing the Court for having “reached out” to decide whether to overrule precedent when the issue was neither raised nor briefed by the parties (internal quotation marks omitted)).

126. The number of justices required to order briefing or reargument on a question not raised by the parties appears to be a question of internal practice, for it is not addressed in the Supreme Court Rules. Given that the practice is controversial and has been done over dissent, it is unlikely that it can be done without the support of at least five justices. See *supra* note 125.

127. See Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975, 981 (1957) (discussing the origins of the “rule of four,” which requires four votes to grant certiorari).

in the Supreme Court's history, only four constitutional precedents have been reversed in the absence of any change to the Court's composition.¹²⁸

* * * * *

These factors operate in all of the Court's cases, but their effect is particularly acute when it comes to so-called superprecedents.¹²⁹ Superprecedents are cases that no justice would overrule, even if she disagrees with the interpretive premises from which the precedent proceeds.¹³⁰ Michael Gerhardt offers the following explanation:

[T]he point at which a well-settled practice becomes, by virtue of being well-settled, practically immune to reconsideration is the point at which that precedent has become a superprecedent. Nothing becomes a superprecedent, at least in my judgment, unless it has been widely and uniformly accepted by public authorities generally, including the Court, the President, and Congress.¹³¹

The following cases are included on most hit lists of superprecedent¹³²: *Marbury v. Madison*,¹³³ *Martin v. Hunter's Lessee*,¹³⁴ *Helvering v. Davis*,¹³⁵ the *Legal Tender Cases*,¹³⁶ *Mapp v. Ohio*,¹³⁷ *Brown v. Board of Education*,¹³⁸

128. GERHARDT, *supra* note 17, at 11.

129. See generally Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204 (2006) (identifying the origin of the term superprecedent and the role of such decisions in the Senate judicial confirmation process). The term was popularized by Senator Arlen Specter, who asked John Roberts during his confirmation hearing whether he agreed that there were "super-duper precedents" in constitutional law. *Id.* at 1204 (internal quotation marks omitted). Other commentators have debated the strength of superprecedent. Compare Fallon, *supra* note 51, at 1116 ("[T]he claim that there are superprecedents immune from judicial overruling seems basically correct."), and Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1180–82 (2006) (endorsing the proposition that some bedrock precedents are so entrenched that they cannot be overruled), with Barnett, *supra* note 21, at 1233 (arguing that no case should be immune from overruling if it conflicts with the Constitution's text).

130. See Gerhardt, *supra* note 129, at 1221 ("Super precedent is a construct employed to signify the relatively rare times when it makes eminent sense to recognize that the correctness of a decision is a secondary (or far less important) consideration than its permanence.").

131. Gerhardt, *supra* note 4, at 1293. Cf. McGinnis & Rappaport, *supra* note 95, at 836–37 (arguing that an originalist should follow nonoriginalist precedent rather than overrule it when, *inter alia*, the costs of overruling would be borderline catastrophic—as they would be with respect to paper money—or when the principles would be supported by constitutional amendment in the absence of the cases—as they would be with respect to race and gender discrimination).

132. See, e.g., Gerhardt, *supra* note 129, at 1208–11, 1213–16 (identifying several "superprecedent" cases); Farber, *supra* note 129, at 1180 (citing New Deal-economic and twentieth-century Bill of Rights-incorporation cases as examples of "bedrock precedents").

133. 5 U.S. (1 Cranch) 137 (1803) (holding constitutional the exercise of judicial review).

134. 14 U.S. (1 Wheat.) 304 (1816) (holding constitutional the exercise of Supreme Court review of state court judgments).

135. 301 U.S. 619 (1937) (holding constitutional the Social Security Act).

136. *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1870) (holding constitutional the issuance of paper money).

137. 367 U.S. 643 (1961) (holding the Fourth Amendment incorporated against the states through the Fourteenth Amendment).

138. 347 U.S. 483 (1954) (holding that the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools).

and the *Civil Rights Cases*.¹³⁹ These opinions are invoked as evidence that there are at least some occasions on which stare decisis undeniably and absolutely constrains the Court.

In my view, however, “superprecedents” do not illustrate a “super strong” effect of stare decisis at all. Stare decisis is a self-imposed constraint upon the Court’s ability to overrule precedent. The force of so-called superprecedents, however, does not derive from any decision by the Court about the degree of deference they warrant. Indeed, *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁴⁰ shows that the Court is quite incapable of transforming precedent into superprecedent by *ipse dixit*.¹⁴¹ The force of these cases derives from the people, who have taken their validity off the Court’s agenda. Litigants do not challenge them. If they did, no inferior federal court or state court would take them seriously, at least in the absence of any indicia that the broad consensus supporting a precedent was crumbling. When the status of a superprecedent is secure—e.g., the constitutionality of paper money—a lawsuit implicating its validity is unlikely to survive a motion to dismiss. And without disagreement below about the precedent, the issue is unlikely to make it onto the Court’s agenda.¹⁴²

To be sure, even if they are not challenged, some of these foundational cases lie in the background of the decisions that the Court makes each term. No one would question the vitality of *Marbury v. Madison* in a petition for certiorari, but that case underlies every exercise of judicial review. The legitimacy of incorporation is water under the bridge, but a case reviewing whether a particular state action was consistent with the Fourth Amendment is premised upon it. Again, however, it is the mechanisms described above rather than stare decisis itself that insulate these precedents from reconsideration. Unless a justice wants to pick a fight with a superprecedent—and can persuade four others to go along with her—the rule confining the Court to addressing issues raised in the petition for certiorari and briefs keeps the question of overruling off the table.¹⁴³ Not even originalists claim a responsibility to exhume and rectify every nonoriginalist

139. 109 U.S. 3 (1883) (holding the Fourteenth Amendment applicable only to state action).

140. 505 U.S. 833 (1992).

141. In an op-ed in *The New York Times*, Senator Specter characterized *Roe v. Wade* as a superprecedent. Arlen Specter, Op-Ed., *Bringing the Hearings to Order*, N.Y. TIMES, July 24, 2005, <http://www.nytimes.com/2005/07/24/opinion/24specter.html>. Scholars, however, do not put *Roe* on the superprecedent list because the public controversy about *Roe* has never abated. See, e.g., Fallon, *supra* note 51, at 1116 (“[A] decision as fiercely and enduringly contested as *Roe v. Wade* has acquired no immunity from serious judicial reconsideration, even if arguments for overruling it ought not succeed.”); Gerhardt, *supra* note 129, at 1220 (asserting that *Roe* cannot be considered a superprecedent in part because calls for its demise by national political leaders have never retreated).

142. See *supra* notes 119–23 and accompanying text.

143. See *supra* notes 124–26 and accompanying text.

precedent in the United States Reports.¹⁴⁴ Assuming *arguendo* that a justice thinks any particular superprecedent was wrongly decided,¹⁴⁵ the question of its soundness is not one that she will be asked—or likely want—to decide.¹⁴⁶ It thus seems inapposite to phrase the question as whether *stare decisis* forecloses the justice from reversing such a case. With no question on the table, there is no opportunity for the real constraint of *stare decisis* to kick in. Indeed, the justice would only face the question of overruling if the precedent lost its “super” status.¹⁴⁷

That is not to say that the concept of widespread public acceptance of Supreme Court precedent is unimportant to constitutional theory. On the contrary, it is central. In particular, it provokes the question whether the behavior of nonjudicial actors can transform constitutional law outside of the Article V process. That is a difficult question, but it is one focused more on factors external to the Court than upon the Court’s internal horizontal *stare decisis* doctrine. Once a case like *Brown v. Board of Education* achieves superprecedent status, its vitality is out of the Court’s hands for as long as the widespread buy-in continues. Public support does not immunize these cases from overruling; it immunizes them from being challenged in the first place.¹⁴⁸ The phenomenon that scholars call superprecedent thus does not

144. Indeed, Justice Scalia has argued precisely the opposite. See SCALIA, *supra* note 18, at 138–39 (“[O]riginalism will make a difference . . . not in the rolling back of accepted old principles of constitutional law but in the rejection of usurpatious new ones.”).

145. Superprecedent is most often raised as a challenge to originalism. If many of the Court’s foundational cases are inconsistent with the Constitution’s original public meaning, the argument goes, originalism is unsustainable. See Gerhardt, *supra* note 129, at 1224 (“Originalists . . . have difficulty in developing a coherent, consistently applied theory of adjudication that allows them to adhere to originalism without producing instability, chaos, and havoc in constitutional law.”). Originalists have resisted the premise of the challenge, at least in part. See, e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 948–53, 962–71 (1995) (arguing that *Brown v. Board of Education* is consistent with the original meaning of the Fourteenth Amendment); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 900–07 (2009) (arguing that *Brown*, the *Legal Tender Cases*, and cases validating the administrative state are consistent with an originalist understanding of the Constitution). To the extent any long-standing precedent is in fact inconsistent with the Constitution’s meaning, some originalists have attempted to justify adhering to it, while others would let go of the precedent in favor of the text. See *supra* note 21.

146. Sometimes a challenge may be to a new application of a foundational precedent rather than to the precedent itself. For example, an originalist may be deeply skeptical that the Due Process Clause protects substance as well as procedure, but the basic existence of substantive due process doctrine is no longer subject to challenge. The system requires the justice to respect that starting point; she cannot pick a fight that litigants (and other justices) have not. The justice may, however, respond by refusing to read that foundational precedent expansively, thereby simultaneously protecting reliance interests and the integrity of the Constitution on the question she has been asked to decide.

147. Cf. Gerhardt, *supra* note 4, at 1294–95 (“The larger the constituency—the more public authorities who are persuaded to reconsider some question of constitutional law—the more public and social support there would be to allow a heretofore well-settled issue to be reopened.”).

148. This is not to say that such a case should be overruled if public acceptance wanes and a challenge makes its way to the Court. See *supra* note 80 and accompanying text. It is simply to say

have much to tell us about the strength that the Court ought to accord its constitutional precedent that the mine-run of constitutional cases does not. While superprecedent is important to constitutional theory, it has much less to contribute to a theory of stare decisis.

Discussions of reliance on precedent sometimes proceed as if everything depends on horizontal stare decisis. The gravitational pull of horizontal stare decisis is one means—and an important one—of encouraging stability. Even apart from that presumption, however, the system has features that temper the risk of swings in the Court's case law. These features also work toward ensuring that the law does not fluctuate simply because of the will of one justice, or even five, but because of an emerging sense among litigants and lower court judges that it might be time for the Court to change course.

Conclusion

The Court did not adopt the weak presumption in constitutional cases because it wanted to accommodate pluralism, but the presumption serves that end. Rather than extinguishing disagreement, constitutional stare decisis moderates it. The doctrine enables a reasoned conversation over time between justices—and others—who subscribe to competing methodologies of constitutional interpretation.

Because disagreement about the right way to interpret the Constitution is focused most sharply upon the Supreme Court, stare decisis does not necessarily serve this same mediating function in the constitutional cases decided by lower courts. And because fights about the content of our fundamental law are different in kind than debates about how to interpret more transitory statutes, the thesis developed here is not necessarily applicable to statutory stare decisis. But in the Supreme Court's constitutional cases, recognition of the doctrine's role in tempering disagreement offers insight into one of the functions it serves and one of the reasons why the Court may be unwilling to give constitutional precedent more force.

that the case lacks the superprecedent status that immunizes it from overruling by removing it from the Court's docket.

Symposium

The Interpretation/Construction Distinction in Constitutional Law: Annual Meeting of the AALS Section on Constitutional Law

INTRODUCTION

*Amy Barrett**

One of the most interesting developments in the constitutional theory of new originalism is its exploration of the distinction between interpretation and construction in constitutional law. Within this framework, “interpretation” refers to the process of determining a text’s linguistic meaning, and “construction” refers to the process of giving the text legal effect.¹ The distinction plays out in the new originalist approach to the Constitution as follows. The defining characteristic of new originalism is its argument that the original public meaning of the Constitution’s text should control its interpretation.² Yet new originalists do not contend that the Constitution’s original public meaning is capable of resolving every constitutional question.³ The Constitution’s provisions are written at varying levels of generality. When the original public meaning of the text establishes a broad principle rather than a specific legal rule,

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1. Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 95–96 (2010).

2. The “old originalism,” by contrast, treated the original intentions of the Constitution’s drafters as the gauge of the Constitution’s meaning. For accounts of new originalism, see Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U.L. REV. 923 (2009); Keith Whittington, *The New Originalism*, 2 Geo. J.L. & Pub. Pol’y 599 (2004).

3. See Barnett, *supra* note 2, at 645 (“Due to either ambiguity or generality, the original meaning of the text may not always determine a unique rule of law to be applied to a particular case or controversy.”).

interpretation alone cannot settle a dispute.⁴ In that event, the need for construction arises.⁵ The First Amendment is a classic example. As Larry Solum observes, that amendment “provides for ‘freedom of speech’ and forbids its ‘abridgement,’ but this does not create a bright line rule, and as a consequence most of the interesting work in free speech doctrine must be done by construction rather than interpretation.”⁶ Many, though not all, new originalists accept constitutional construction as a means of dealing with constitutional ambiguity and vagueness.⁷

4. Old originalists often relied heavily upon the framer’s expected applications to resolve questions occasioned by ambiguity or vagueness. See Whittington, *supra* note 2, at 603 (describing the beliefs of old originalists in this regard). New originalists largely reject that approach. See, e.g., Barnett, *supra* note 2, at 622–23 (distinguishing between “semantic” originalism and “expectations” originalism (citing Ronald Dworkin, *Comment*, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutman ed., 1997))); Whittington, *supra* note 2, at 610–11 (asserting that the founders’ expectations about how a constitutional provision would be applied do not control the determination of that provision’s meaning, for the “founders could be wrong about the application and operation of the principles that they intended to adopt”). But see John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 378–82 (2007) (contending that original expected applications can play an important role in the determination of the Constitution’s original public meaning).

5. See KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, & JUDICIAL REVIEW* 7 (1999) (“Regardless of the extent of judicial interpretation of certain aspects of the Constitution, there will remain an impenetrable sphere of meaning that cannot be simply discovered. The judiciary may be able to delimit textual meaning, hedging in the possibilities, but after all judgments have been rendered specifying discoverable meaning, major indeterminacies may remain. The specification of a single governing meaning from these possibilities requires an act of creativity beyond interpretation This additional step is the construction of meaning.”). Solum contends that insofar as a text’s linguistic and legal meaning conceptually differ and construction involves giving a text legal effect, construction technically occurs even when a text is precise. Solum, *supra* note 1, at 102 n.18 and accompanying text. Nonetheless, Solum concedes that “[c]onstruction . . . grabs our attention in cases in which the linguistic meaning of a text is vague.”) *id.* at 106.

6. Lawrence B. Solum, *A Reader’s Guide to Semantic Originalism and a Reply to Professor Griffin* (June 19, 2008) (unpublished manuscript, available at <http://papers.ssrn.com/abstract=1130665>).

7. John McGinnis and Michael Rappaport have been the most vocal dissenters to what they describe as “constructionist originalism.” See John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case against Construction*, 103 NW. U.L. REV. 751, 752 (2009). Whether courts—as opposed to political actors—can legitimately engage in constitutional construction is a distinct question, but also a point of disagreement among originalists. Some—for example, Jack Balkin, Randy Barnett and Larry Solum—see constitutional construction as central to judicial review. See Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U.L. REV. 549 (2009); RANDY BARNETT, *RESTORING THE LOST CONSTITUTION* (2003); Solum, *supra* note 2. Others see constitutional construction as primarily the province of the political branches. See, e.g., Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not To)*, 115 YALE L.J. 2037, 2057 (2006) (implicitly rejecting judicial construction, at least in any strong form, by arguing that judges should defer to the political branches when the Constitution’s meaning is “indeterminate (or

The new originalist move toward the interpretation-construction distinction has opened space for agreement between originalists and nonoriginalists. The old originalism was not known for an emphasis upon the role of factors such as values, purposes and precedent in the exercise of judicial review.⁸ But insofar as constructing constitutional doctrine requires consideration of factors other than the text, it invites reliance upon some of the interpretive modalities that originalism had traditionally been understood to de-emphasize or even exclude.⁹ The existence of this “construction zone”¹⁰ has prompted some self-proclaimed “living constitutionalists” to defect to originalism on the rationale that the two theories are not, in fact, polar opposites.¹¹

Originalism’s embrace of this two-function model of constitutional decisionmaking also opens potential common ground for originalists and those nonoriginalists who employ a similar model. At roughly the same time that some new originalists began to focus on the interpretation-construction distinction,¹² some leading nonoriginalist scholars, spurred by

under-determinate) as to the specific question at hand”); KEITH WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 15 & 16 n.43 (1999) (not denying some role for the judiciary in constructing the Constitution, but emphasizing the primary role of the political branches in undertaking what he describes as an essentially political activity).

8. See Whittington, *supra* note 2, at 600–03 (describing the concern of early originalists about decisions made according to subjective value choices and their related resistance to Warren Court precedent).

9. Philip Bobbitt identifies six “modalities” of constitutional argumentation: historical, textual, structural, doctrinal, ethical, and prudential. See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–22 (1991). New originalists do not deny the relevance of these modalities even at the point of determining the Constitution’s original public meaning. See Whittington, *supra* note 2, at 611 n.59 (“Certainly originalists would be willing to draw inferences based on the constitutional structure, for example, or employ arguments based on precedent, though such arguments would ultimately be harnessed to some claim about the original meaning of the Constitution.”). Yet insofar as the text recedes in importance at the stage of construction, those modalities other than original meaning of the text, which are the ones that nonoriginalists tend to emphasize, play a larger role. Cf. WHITTINGTON, *supra* note 7, at 6 (asserting that in the process of constitutional construction, “[s]omething external to the text—whether political principle, social interest, or partisan consideration—must be alloyed with it in order for the text to have a determinate and controlling meaning within a given governing context.”).

10. This phrase belongs to Larry Solum. Solum, *supra* note 6, at 6.

11. See, e.g., Balkin, *supra* note 7, at 551 (arguing that “original meaning originalism and living constitutionalism are not only not at odds, but are actually flip sides of the same coin.”); Barnett, *supra* note 2, at 617–20 (discussing how the new originalism accommodates the values of political progressives).

12. Keith Whittington is credited with launching discussion of the interpretation/construction distinction in the new originalist literature. See WHITTINGTON, *supra* note 5; WHITTINGTON, *supra* note 7.

Richard Fallon's *Foreword* in the 1997 Harvard Law Review,¹³ began writing about the distinction between interpretation and implementation in constitutional law. Fallon pointed out that while we talk about the Court engaging in "constitutional interpretation," much constitutional doctrine does not even purport to interpret the Constitution's "meaning." He argued that the Court's practice in this regard is reflective of the fact that, "[i]dentifying the 'meaning' of the Constitution is not the Court's only function. A crucial mission of the Court is to implement the Constitution successfully. In service of this mission, the Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution's meaning precisely."¹⁴ Others, including Mitch Berman and Kim Roosevelt, have followed Fallon's focus on the Court's dual functions of interpretation and implementation to offer rich accounts of how we should understand what the Court does.¹⁵ Not everyone in the nonoriginalist camp has accepted this "two output thesis" about judicial review;¹⁶ notably, both Rick Hills

13. Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997) [hereinafter Fallon, *Supreme Court*]; See also RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001) [hereinafter FALLON, *IMPLEMENTING*]. Of course, even before the more recent discussions about constitutional construction and constitutional implementation, scholars had pointed out that constitutional doctrine does not always mirror—or even pretend to mirror—what the document itself requires. See, e.g., Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975) (distinguishing between judicial decisions actually interpreting the demands of the Constitution and the rules of "constitutional common law" that "draw[] their inspiration and authority from, but [are] not required by, various constitutional provisions."); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221 (1978) (asserting that judicial doctrines often stop short of enforcing constitutional norms to their full conceptual limits, and thus cannot be said to represent the "meaning" of those norms). This earlier work laid the foundation for contemporary theories.

14. Fallon, *Supreme Court*, *supra* note 13, at 57. Professor Fallon identifies the "rational basis" test under the Equal Protection Clause, the "actual malice" standard under the First Amendment, and the four-part test for evaluating First Amendment protection for commercial advertising as examples of implementing doctrine. FALLON, *IMPLEMENTING*, *supra* note 13 at 5.

15. Mitchell Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 36 (2004) [hereinafter Berman, *Rules*] (distinguishing between "constitutional meanings" and "constitutional rules."); Kermit Roosevelt, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1655–58 (2005) (describing the "decision rules" model of constitutional law). See also Mitchell N. Berman, *Constitutional Constructions and Constitutional Decision Rules: Thoughts on the Carving of Implementation Space*, 27 CONST. COMMENT. 39, 41 n.3 [hereinafter Berman, *Constitutional Constructions*] (collecting citations to other scholars who have employed the interpretation/implementation model).

16. The term "two output thesis" belongs to Mitch Berman. See Mitchell Berman, *Aspirational Rights and the Two-Output Thesis*, 119 HARV. L. REV. F. 202, 220–21 (2006)

and Daryl Levinson have rejected it.¹⁷ Thus, the interpretation-construction distinction gives new originalists something in common with many nonoriginalists that even the latter's fellow travelers do not share.¹⁸

The papers in this issue, which are the product of a panel hosted by the Constitutional Law Section at this year's annual meeting of the American Association of Law Schools, explore the implications of the interpretation-construction distinction for debates about constitutional theory. They reveal that despite the above-described points of convergence between originalism and its rivals, debates about originalism are alive and well. In particular, the interpretation-construction distinction does not eliminate long-running disputes about originalism's approach to interpretation. The new originalist commitment to original public meaning privileges semantic meaning over other factors and historical over modern understanding.¹⁹ As such, this approach sometimes yields different results in hard cases than nonoriginalist approaches, even those that subscribe to the two-output thesis. It will sometimes exclude interpretations that a nonoriginalist would prefer, and because originalists treat a text's fixed semantic meaning as defining the permissible bounds of construction,²⁰ it will sometimes also rule out implementing

(defining the "two output thesis" as "the claim 'that there exists a conceptual distinction between two sorts of judicial work product each of which is integral to the functioning of constitutional adjudication,' namely judge-interpreted constitutional meaning and judge-crafted tests bearing an instrumental relationship to that meaning"). See also Berman, *Rules*, *supra* note 15, at 41 (emphasizing that constitutional operative propositions are 'logically and perhaps normatively prior to' constitutional decision rules).

17. See Roderick M. Hills, Jr., *The Pragmatist's View of Constitutional Implementation and Constitutional Meaning*, 119 HARV. L. REV. 173, 175 (2006) (objecting to the interpretation/implementation construct because "pragmatically speaking, the meaning of a constitutional provision is its implementation"); Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) (challenging a "rights essentialism" that attempts to separate a "pure constitutional value" from its "remedial apparatus").

18. For example, despite their many differences, Mitch Berman and Larry Solum both insist that a two-output model of constitutional decisionmaking is conceptually valuable. See Berman, *Constitutional Constructions*, *supra* note 15, at 60–68 (asserting, contrary to skeptics like Hills and Levinson, that the two-output thesis is conceptually valuable); Solum, *supra* note 6, at 42 ("[C]ollapsing this distinction [between interpretation and construction] can create practical confusion that is every bit as pernicious as the theoretical confusion that infects arguments over originalism.").

19. That is not to say that originalists exclude the possibility that other factors, such as precedent, may occasionally trump the original public meaning. See, e.g., Solum, *supra* note 2, at 938–39.

20. See Barnett, *supra* note 2, at 647 (asserting that the original public meaning of a text, even when ambiguous or vague, "still provides a 'frame'" that excludes some possibilities and permits others).

doctrines that taxonomists like Fallon and Berman would embrace. The interpretation-construction distinction may have broadened the range of factors that originalists will consider in constitutional decisionmaking, giving them something in common with nonoriginalists, and the two-output thesis may have given them something in common with those nonoriginalists who identify themselves as taxonomists. But the foundational originalist commitment to fixed linguistic meaning remains a significant difference between originalism and competing theories of constitutional interpretation.

The articles that follow reflect this disagreement in a lively debate about the nature of interpretation and its role in the two-output thesis. Assuming that one accepts the two-output thesis, what should occur at the first stage of constitutional analysis, the one that both originalists and taxonomist nonoriginalists devote to “interpretation”?²¹ Is the original semantic meaning of constitutional text entitled to significantly more weight than other interpretive considerations?²² Does the interpretation-construction distinction have value for those who reject the originalist approach to interpretation?²³ If the process of interpretation is capacious enough to include considerations other than the text’s semantic meaning, is it meaningful to separate the development of constitutional law into two steps, or should all constitutional decisionmaking be conceptually collapsed into the single step of “interpretation”?²⁴

21. Compare Solum, *supra* note 1, at 95–96, 100–02 (describing the “interpretation” phase of the two-step framework as devoted to the determination of linguistic meaning) with Berman, *Constitutional Constructions*, *supra* note 15, at 45–46, 60–61 (describing the first, “interpretation” phase of the two-step framework as devoted to the determination of legal, not simply linguistic, meaning). See also Berman, *Constitutional Constructions*, *supra* note 15, at 59 (contending that it is “misleading or distracting to assign a particular label—and the label ‘interpretation’ at that!—to what is only one among the several arguments or considerations that, in appropriate cases, contribute to the Constitution’s legal meaning.”).

22. See Ian Bartrum, *Constructing the Constitutional Canon: The Metonymic Evolution of Federalist 10*, at 9, 13–15, 36 (arguing that original semantic meaning is just one consideration among the many that determine constitutional meaning); Berman, *Constitutional Constructions*, *supra* note 15, at 58–60 (denying that “fixed linguistic meaning” has “uniquely privileged status.”).

23. Berman denies the utility of the originalist approach to the two-output thesis while defending the Fallon/Berman/Roosevelt variant of the two-step approach against pragmatist challenges. See Berman, *Constitutional Constructions*, *supra* note 15, at 60–68. Solum argues that separating linguistic from legal effect is conceptually important even for those who take a nonoriginalist approach to the determination of linguistic meaning. Solum, *supra* note 1, at 96, 105–18.

24. Berman resists a collapse of the interpretation-construction distinction as he defines it on the ground that “even if law is determined in ways favored by most theorists who lean ‘pragmatic’ or ‘nonoriginalist,’ it is nonetheless of pragmatic value to recognize

Because it is the privilege of an Introduction to raise questions without answering them, I will conclude by identifying some of the questions about the interpretation/construction distinction that this symposium provokes for future discussion. Perhaps because originalists focus on the document and nonoriginalists on the doctrine,²⁵ originalist work on the two-output thesis has tended to focus heavily on the question of interpretation, while nonoriginalists working with the thesis have more closely considered the factors that inform the implementation stage of constitutional decisionmaking.²⁶ But what of judicial construction for the originalist? A key feature of nonoriginalist work on implementation is the acceptance of doctrines that overenforce the Constitution's operative provisions.²⁷ Does the originalist approach to construction permit judicial overenforcement?²⁸ Underenforcement?²⁹ Even apart

that courts build conceptually separate norms, tests, frameworks—in a word, doctrine—to implement pragmatically determined law.” Berman, *Constitutional Constructions*, *supra* note 15, at 63. Solum resists a collapse of the interpretation-construction as he explains it on the ground that whatever “interpretation” is defined to include, a conceptual difference between the determination of semantic and legal meaning remains. Solum, *supra* note 1, at 110, 115–16.

25. See Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 26–27 (2000) (distinguishing between “documentarians,” who emphasize “the amended Constitution’s specific words and word patterns, the historical experiences that birthed and rebirthed the texts, and the conceptual schemas and structures organizing the document,” and “doctrinalists,” who focus less on the text, history, and structure and more on “synthesiz[ing] what the Supreme Court has said and done, sometimes rather loosely, in the name of the Constitution”).

26. Jack Balkin, who places far more emphasis on construction than interpretation, is an exception. See, e.g., Balkin, *supra* note 7, at 569–83. I am also focusing here on *judicial* construction. Keith Whittington has offered a rich account of the process of political construction of the Constitution. See WHITTINGTON, *supra* note 7.

27. See, e.g., Berman, *supra* note 15, at 18–50; FALLON, IMPLEMENTING, *supra* note 13, at 6; Roosevelt, *supra* note 15, at 1669–72.

28. Originalists insist that constitutional constructions must be consistent with the provisions they enforce. See, e.g., Barnett, *supra* note 2, at 647. But because an overenforcing doctrine supplements rather than contradicts the relevant constitutional provision, an overenforcing doctrine is not necessarily inconsistent with the provision. Moreover, there may be room for overenforcement in originalist theory even if overenforcing doctrines of judicial review are illegitimate. See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 168–77 (2010) (describing Justice Scalia’s rejection of overenforcing doctrines of judicial review, but opining that even originalists may accept some overenforcement of the Constitution through the use of constitutionally based substantive canons of construction).

29. Nonoriginalist scholars have given serious attention to the doctrines of judicial review that underenforce the Constitution’s operative propositions. See Fallon, *Supreme Court*, *supra* note 13, at 64–67; Richard H. Fallon, Jr. *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006); Kermit Roosevelt, *Aspiration and Underenforcement*, 119 HARV. L. REV. F. 193 (supporting judicial underenforcement but expressing serious reservations about nonjudicial underenforcement). See also Sager, *supra* note 13.

from the problem of under and overenforcement, what factors should drive the development of implementing doctrines?³⁰ Is any deference due the political branches on matters of construction, and if so, how much?³¹

It is unrealistic to expect originalists to provide a uniform answer to any of these questions. But as the papers in this symposium illustrate, debate about the interpretation/construction distinction brings new perspectives to age-old disputes about judicial review. Whether you ultimately agree or disagree with the theory, it is one worth reading about.

30. Originalists have offered some thoughts, but it is a topic on which they disagree and on which there is room to say more. See McGinnis & Rappaport, *supra* note 7, at 773 n. 79 (noting disagreement among new originalists about the factors that should guide the process of constitutional construction).

31. As stated above, some originalists conceive of construction as an essentially political activity. See *supra* note 7. But even those originalists who understand construction as also a judicial function must decide whether the political branches are due some measure of deference with respect to their constitutional constructions, as opposed to their constitutional interpretations. Jack Balkin has had the most to say about the interaction of political and judicial constructions. See Balkin, *supra* note 7 at 559–85

SUBSTANTIVE CANONS AND FAITHFUL AGENCY

AMY CONEY BARRETT*

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INTRODUCTION

Federal courts have long employed substantive canons of construction to interpret federal statutes. Some substantive canons express a rule of thumb for choosing between equally plausible interpretations of ambiguous text. The rule of lenity is often described this way: it directs that courts interpret ambiguous penal statutes in favor of the defendant. Other canons are more aggressive, permitting a court to forgo a statute's most natural interpretation in

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favor of a less plausible one more protective of a particular value. For example, a court will strain the text of a statute to avoid deciding a serious constitutional question, and absent a clear statement, it will not interpret an otherwise unqualified statute to subject either the federal government or the states to suit. While courts and commentators sometimes seek to rationalize these and other substantive canons as proxies for congressional intent, it is generally recognized that substantive canons advance policies independent of those expressed in the statute.

The courts' adoption of more aggressive substantive canons poses no problem of authority for dynamic statutory interpreters, who conceive of courts as the cooperative partners of Congress and treat the protection of social values as part of the courts' task in statutory interpretation. It poses a significant problem of authority, however, for textualists, who understand courts to be the faithful agents of Congress. A court applying a canon to strain statutory text uses something other than the legislative will as its interpretive lodestar, and in so doing, it acts as something other than a faithful agent. The application of substantive canons, therefore, is at apparent odds with the central premise from which textualism proceeds. Textualists occasionally note this tension.¹ Nonetheless, they continue to accept substantive canons, and no one has examined whether substantive canons can be reconciled with a theory of statutory interpretation animated by a strong commitment to legislative supremacy.

This Article seeks to answer that question. Part I describes faithful agency, substantive canons, and why the two are in tension. Part II contributes to the important historical debate about the principle of legislative supremacy with a systematic study of the way that eighteenth and nineteenth century federal courts applied substantive canons. Prior historical work has focused on the question whether early federal courts believed "the judicial Power" to include a broad equitable authority to alter statutory text.² Defending the principle of faithful agency, textualists have argued that early federal courts initially asserted, but ultimately abandoned, a claim to such power as their understanding of the constitutional structure sharpened. That argument is compelling, but incomplete. My research shows that even while disavowing a broad equitable authority to contradict statutory text, early federal courts asserted a narrower power to strain it through the application of substantive canons. Indeed, throughout the eighteenth and nineteenth centuries, federal

¹ See *infra* notes 74-75 and accompanying text.

² Compare generally William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990 (2001) (amassing historical evidence designed to convince even originalists that "the judicial Power" includes the power of equitable interpretation), with John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) (interpreting history to support the argument that federal courts are Congress's faithful agents, not its cooperative partners).

courts both created and applied canons that permitted them to exchange the most natural reading of a statute for a bearable one more protective of a judicially specified value. To the extent that they did so, the historical record suggests that early federal courts understood the norm of faithful agency to be qualified in ways that textualists have not acknowledged.

The next two Parts of the Article study whether a qualified norm of faithful agency is consistent with the constitutional structure. Part III begins by rejecting an argument that textualists have advanced to reconcile substantive canons with the Constitution. Textualists have suggested that, in the modern landscape, those principles that we call substantive canons are a closed set of background assumptions justified by their sheer longevity. Many of the substantive canons in use today began as judicial policy choices, but, the argument goes, courts have used them for so long that they are now part of the way that lawyers think about language. Judges can legitimately rely on these once-substantive canons because the canons are now effectively linguistic, but they cannot add new canons to the set. Part III concludes that this explanation is insufficient. If the theory is that federal courts once possessed the power to develop substantive canons, there is no reason to believe that they lost that power as time progressed. If the theory is that federal courts acted outside the bounds of their authority in adopting these canons, then faithful agents must explain their continued reliance upon them. Moreover, the fact that courts historically asserted the authority to make these interpretive policy choices is equally consistent with the proposition that such authority is included within “the judicial Power”³ as with the proposition that the authority is a historical anomaly.

Part IV considers how the structural principles that otherwise constrain the exercise of the judicial power might constrain the application of substantive canons. It begins with the baseline principle that a substantive canon can never be applied to overcome the plain language of a statute. It then turns to a more nuanced problem: the application of canons to reject the most natural interpretation of a statute in favor of a less plausible one that advances a particular value. Insofar as any canon respects the outer limits of statutory language, it is less problematic than those approaches to statutory interpretation – namely, equitable interpretation and the absurdity doctrine – that permit deviation from plain statutory text. But insofar as any canon permits a departure from a text’s most natural meaning, that departure must be reconciled with the constitutional structure. Part IV argues that to the extent a canon is constitutionally inspired, its application does not necessarily conflict with the structural norms that constrain judges from engaging in broad, equitable interpretation. Instead of pursuing undifferentiated social values – however sound and desirable they may be – constitutionally inspired canons draw from an identifiable, closed set of norms. As such, their effect on the legislative bargain is more predictable than the application of open-ended

³ U.S. CONST. art. III, § 1.

doctrines like equitable interpretation and absurdity. Moreover, the connection of such canons to the Constitution provides a potential justification for their deviation from the norm of faithful agency. When a conflict exists between a statute and the Constitution, federal courts are obliged to side with the Constitution, rendering the exercise of judicial review itself a significant exception to the norm of faithful agency. Part IV tentatively concludes that the power of judicial review carries with it a subsidiary power to push – though not force – statutory language in directions that better accommodate constitutional values.

I. FAITHFUL AGENCY AND SUBSTANTIVE CANONS

A. *The Norm of Faithful Agency*

The view that federal courts function as the faithful agents of Congress is a conventional one. Throughout most of the twentieth century, participants in debates about statutory interpretation largely subscribed to it; the disputes centered around how best to implement it. The rival theories in this regard were – and remain – purposivism and textualism. Purposivism, the classical approach to statutory interpretation, claims that a judge should be faithful to Congress's presumed intent rather than to the statutory text when the two appear to diverge.⁴ Textualism, by contrast, maintains that the statutory text is the only reliable indication of congressional intent. The defining tenet of textualism is the belief that it is impossible to know whether Congress would have drafted the statute differently if it had anticipated the situation before the court. The legislative process is path-dependent and riddled with compromise.⁵ A statute's language may be at odds with its broad purpose

⁴ See, e.g., *United States v. Amer. Trucking Ass'n*, 310 U.S. 534, 543 (1940) (asserting that when applying a statute's plain meaning would yield a result "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words" (quoting *Ozawa v. United States*, 260 U.S. 178, 194 (1922))); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) ("It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers."); Richard A. Posner, *Statutory Interpretation – in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) ("The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar.").

⁵ A bill must compete for space and priority on the congressional agenda. It must navigate numerous "vetogates," including committee votes, the threat of Senate filibuster, and the threat of presidential veto. Passage through each of these points requires both strategic choice and compromise. For example, a bill's sponsors – and perhaps even a majority of either or both the House and the Senate – may want the text expressly to include or exclude certain applications, but deciding whether to propose amendments is a strategic choice. See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2409 (2003); see also Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public*

because proponents accept less than they want in order to secure the bill's passage. The language may appear awkward because competing factions agree "to split the difference between competing principles."⁶ To respect the deals that are inevitably struck along the way, the outcome of this complex process – the statutory text – must control. A judge who reshapes statutory language to alleviate its awkwardness risks undoing the very bargains that made the statute's passage possible.⁷

Yet as stated above, this disagreement between textualists and purposivists is about the role of congressional intent in statutory interpretation, not about the principle that federal courts must function as Congress's faithful agents. Toward the end of the twentieth century, the scholarly debate shifted as dynamic statutory interpreters challenged this basic premise.⁸ They argued that while courts owe legislatures respect, they are more than its faithful agents. Courts, like legislators, represent "We the People."⁹ As such, dynamists claimed that courts are empowered – indeed obligated – to enrich statutory law by bringing it into better accord with contemporary public values, even when doing so requires a court to expand or contract the reach of unambiguous statutory text.¹⁰ Dynamic statutory interpretation resembles purposivism insofar as it sanctions departures from statutory text; it differs

Choice Perspective, 107 HARV. L. REV. 1328, 1346-47 (1994) (asserting that statutes "reflect the outcome of a bargaining process among factions (and their representatives)").

⁶ Manning, *supra* note 5, at 2411.

⁷ The textualist unwillingness to set aside concrete text in the service of abstract intention has several logical consequences. One of the most notable is the rejection of legislative history. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990). Legislative history is most often consulted as persuasive evidence of the legislature's subjective intent, and because textualists discount such intent, they have little use for legislative history. See ANTONIN SCALIA, A MATTER OF INTERPRETATION 29 (1997); cf. John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997) (arguing that the treatment of legislative history as authoritative violates the constitutional prohibition on self-delegation). Another consequence is textualism's rejection of the absurdity doctrine, which rests on the premise that Congress could not have intended a statute to apply in ways that contradict widely held social values. As Manning has argued, application of the absurdity doctrine is inconsistent with the intent-skepticism that lies at the foundation of modern textualism. See Manning, *supra* note 5, at 2417-19.

⁸ See Manning, *supra* note 2, at 10-26 (describing evolution of statutory interpretation debate from one about the role of congressional intent to one about the force of the norm of faithful agency).

⁹ Eskridge, *supra* note 2, at 992 ("In my view, Article III judges interpreting statutes are both agents carrying out directives laid down by the legislature and partners in the enterprise of law elaboration, for they (like the legislature) are ultimately agents of 'We the People.'").

¹⁰ For a sampling of commentators urging this position, see generally, for example, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); RONALD DWORIN, LAW'S EMPIRE (1986); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541 (1988).

from purposivism, however, insofar as it roots such departures in an expansive theory of judicial power rather than in assumptions about congressional intent. Dynamic statutory interpretation stands in sharper contrast to textualism, which eschews departures from plain text altogether. Perhaps as a result, the dynamic approach to the judicial role has garnered the particular attention of textualists, who have been the most vocal defenders of the view that the Constitution imposes a strong norm of legislative supremacy. Indeed, the debate between textualists and dynamists about the strength of that norm is a critical one in recent scholarship.¹¹

From a textualist point of view, the most significant evidence that dynamists have offered in support of this claim is historical. Textualists in statutory interpretation tend to be originalists in constitutional interpretation.¹² Meeting textualists on their own turf, William Eskridge has argued that the original understanding of “the judicial Power” supports the dynamic conception of federal judges as Congress’s cooperative partners rather than its faithful agents. English and early American courts, both state and federal, practiced equitable interpretation, which permitted courts to depart from the clear text of a statute when the court thought that equity would be better served by so doing.¹³ Eskridge argues that this evidence ought to convince even originalists that an equitable power to alter statutory text is part of “the judicial Power” conferred by Article III.¹⁴

John Manning, the most prominent academic textualist, has acknowledged the force of this historical evidence, but argued that it ultimately fails to support the “cooperative partner” conception of the judicial role. He agrees that English courts claimed the power to implement the “equity of a statute” rather than its text,¹⁵ and that American judges, steeped in the English legal tradition, initially claimed similar power. But in the years following the

¹¹ See *supra* note 2 and accompanying text.

¹² Manning, *supra* note 2, at 26 & n.110.

¹³ Eskridge, *supra* note 2, at 995-96 (describing how English judges extended, narrowed, and voided statutes in the exercise of this equitable power); *id.* at 999-1009; *id.* at 1009-40, 1058-84 (setting forth detailed evidence of early American practice in both state and federal courts); see also *id.* at 996 n.22 (explaining that “[t]he English doctrine of *lequity de lestatut*” did not originate in English law, but traces its lineage back even further to Roman law). Eskridge also draws support for his thesis from the ratification debates of 1788 and 1789. *Id.* at 1040-58.

¹⁴ *Id.* at 992, 997; see also William N. Eskridge, *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1522-32 (1998); Popkin, *supra* note 10, at 585; Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1095 (1998) (“The ‘judicial power,’ as it would have been understood by those framing the Constitution, included, as part of its power to construe statutes, some power to maintain coherence in the law, which is, inescapably, a law making function . . .”).

¹⁵ Manning, *supra* note 2, at 29 (“[T]he equity of the statute represented a deeply entrenched doctrine of judicial power in England, making it a possible source for understanding the meaning of ‘the judicial Power of the United States.’”); *id.* at 29-36.

founding, Manning argues, federal courts largely abandoned the English practice because of its inconsistency with the way that the United States Constitution distributes governmental power.¹⁶ Manning focuses on two features of the Constitution that render this ancient equitable power incompatible with the “judicial Power of the United States”: (1) separation of powers and (2) bicameralism and presentment.¹⁷ With respect to separation of powers, Manning points out that the United States, rejecting English tradition, “self-consciously separated the judicial from the legislative power and, in so doing, sought to differentiate sharply the functions performed by these two distinct branches.”¹⁸ Manning claims that this separation was designed to “limit[] official discretion and promot[e] the rule of law,” two objectives that would be undermined by according judges the power to vary statutory outcomes on a case-by-case basis.¹⁹ With respect to bicameralism and presentment, Manning says that “it is surely doubtful that one would adopt a highly elaborate system for enacting law if judges had broad independent authority to add to or subtract from the results of that process.”²⁰ Moreover, he observes, bicameralism and presentment enable political minorities to extract compromise from the majority. Permitting judges to alter statutory language risks undoing that compromise, thereby undercutting the power that the constitutional process accords political minorities.²¹ In sum, as Manning interprets the historical record, federal courts, after some initial fits and starts,

¹⁶ *Id.* at 57; *id.* at 79 (“[F]ederal courts sometimes applied the equity of the statute as late as the mid-nineteenth century, but . . . the Supreme Court had taken a decisive turn toward the faithful agent theory as early as the Marshall Court.”); *see also* John Choon Yoo, Note, *Marshall’s Plan: The Early Supreme Court and Statutory Interpretation*, 101 *YALE L.J.* 1607, 1615 (1992) (arguing, similarly, that the early judiciary was divided on the question of equitable interpretation, and that the Marshall Court resolved the issue by rejecting the practice as inconsistent with the “new constitutional order”).

¹⁷ Manning, *supra* note 2, at 58-78.

¹⁸ *Id.* at 57.

¹⁹ *Id.* Consider that when the judiciary makes case-by-case exceptions, Congress saves the political cost of making exceptions in the text of the statute. In *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440 (1989), for example, the Court held that it would be absurd to interpret the Federal Advisory Committee Act as applying to the American Bar Association (“ABA”). In so doing, the Court saved Congress the cost of expressly excluding a politically powerful group like the ABA from the statute. This undermines legislative accountability: “Congress . . . reap[s] the benefits of passing tough, general laws without fully internalizing the consequences of framing laws in unqualified terms.” Manning, *supra* note 5, at 2437.

²⁰ Manning, *supra* note 2, at 57.

²¹ *Id.* at 57-58; *see also* Manning, *supra* note 5, at 2438 (arguing that disrupting the legislative bargain undermines the power of political minorities to “demand compromise as the price of assent”).

embraced the norm of faithful agency as an essential feature of the American constitutional structure.²²

I am persuaded by Manning's argument that the principle of legislative supremacy restrains federal courts from expanding and contracting unambiguous statutes to account for diffuse social values. At the same time, it is unclear how the principle of faithful agency can be reconciled with substantive canons of statutory construction, which textualists – like all interpreters – readily apply. Such canons pose no problem of authority for dynamic statutory interpreters, who understand the judicial role to encompass the power to adjust statutory language to protect public values.²³ Because the very point of a substantive canon is to protect a public value, sometimes at the expense of a statute's best reading, substantive canons fit easily into the dynamic framework.²⁴ The case for substantive canons is more difficult for textualists,²⁵ who maintain that federal judges, as Congress's honest agents, must apply statutes as they are written, not improve upon them.²⁶ A judge

²² This is a description of the textualist position on faithful agency rather than the full debate. For the dynamist response to these arguments, see Eskridge, *supra* note 2, at 1088-105.

²³ William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 321 n.9 (1989) ("Conceptualizing the court's role in statutory interpretation as a protector of public values goes beyond legal process theory to the extent it encourages courts to engage in creating norms.").

²⁴ The question for a dynamic statutory interpreter is not whether federal courts have the authority to adopt substantive canons, but rather which canons they should adopt. See, e.g., William N. Eskridge, Jr. & Philip Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 596-98 (1992) (critiquing Court's choice of certain substantive canons); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 505, 507-08 (proposing canons that would promote deliberative democratic government).

²⁵ The case for substantive canons is also difficult for purposivists, because they too reject the proposition that a judge can deviate from Congress's intent based on her own assessment of desirable public policy. I focus here on textualists for two reasons. First, they have offered the fullest defense of the norm of faithful agency, a defense that I find persuasive. Second, the tension between faithful agency and substantive canons is more evident for textualists, because the application of substantive canons is the only circumstance in which they are willing to depart from the most natural meaning of a statute. Recall that purposivists are willing to depart from the plain meaning of a statute when they believe that Congress would have wanted them to do so. See *supra* note 4 and accompanying text.

²⁶ Frank H. Easterbrook, *The Supreme Court 1983 Term: Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984) (arguing that democratic principles, as well as the constitutional separation of powers, mandate that judges function as the "honest agents of the political branches"); see also SCALIA, *supra* note 7 at 9-10, 22-23 (arguing that democratic principles compel judges to be the legislature's faithful agents); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 63 (1994) (arguing that the exercise of expansive judicial power in the

applying substantive canons often does more than implement the statute as written; she often improves upon it by shading it to account for policies external to the statute. Thus, while application of substantive canons is a natural outgrowth of dynamic statutory interpretation, it is an apparent deviation from textualism. As a result, textualists are harder pressed than their dynamic counterparts to explain their acceptance of substantive canons. The next two Sections explain how canons work and why they challenge the textualist commitment to legislative supremacy.

B. *The Canons*

Canons of interpretation are rules of construction that courts apply in the interpretation of statutes. They are traditionally classified as either linguistic or substantive.²⁷ Linguistic canons apply rules of syntax to statutes. “Inclusio unius est exclusio alterius,” which means “inclusion of the one is exclusion of the other,” is a standard example.²⁸ Linguistic canons pose no challenge to the principle of legislative supremacy because their very purpose is to decipher the legislature’s intent.²⁹

Substantive canons, by contrast, can challenge legislative supremacy insofar as their purpose is to promote policies external to a statute. Some canons serve simply as tie breakers between two equally plausible interpretations of a statute. The rule of lenity, for example, is typically described this way: it

interpretation of statutes “is objectionable on grounds of democratic theory as well as on grounds of predictability”).

²⁷ Some commentators employ different terminology to capture the same concept. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term: Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 68 (1994) (referring to “textual,” “referential,” and “substantive” canons); Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329, 356 (2007) (book review) (adopting distinction between “descriptive” tools used in “the search for a statute’s intended meaning” and “normative canons” reflecting values derived from “our Constitution or other aspects of our legal traditions”).

²⁸ Other examples are “the rule against surplusage” (a statute should not be interpreted in a way that will render a word superfluous), “in pari materia” (words must be construed in the context of the whole statute), the presumption that identical words in a statute have identical meaning, and the rule that words ought to be given their common meaning unless they are terms of art.

²⁹ That is not to say that linguistic canons are always successful in that pursuit. Some claim that linguistic canons do not accurately describe patterns of language and grammar. See, e.g., William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 676 (1999) (“Although [inclusio unius] is one of the most frequently invoked linguistic canons, it strikes me as an unreliable rule of thumb about the ordinary use of language.”). If one could demonstrate, through empirical research or otherwise, that Congress does not write statutes against the backdrop of these supposedly shared conventions, the rationale for their existence would evaporate. Linguistic canons are designed to effectuate legislative intent, and if they do so poorly, there is no reason to employ them.

instructs courts to resolve ambiguities in criminal statutes in favor of the criminal defendant.³⁰ Other canons are more aggressive, directing a judge to forgo the most plausible interpretation of a statute in favor of one in better accord with some policy objective. Standard examples of canons functioning this way include the rule that where one interpretation of a statute raises a serious constitutional question, the court should adopt any other plausible interpretation of the statute (avoidance)³¹ and the rule that where one interpretation of a statute would compromise the international obligations of the United States, the court should adopt any other plausible interpretation (the *Charming Betsy* canon).³² Canons in this category are often expressed as “clear statement rules” that require a court to interpret a statute to avoid a particular result unless Congress speaks explicitly to accomplish it.³³ For example, absent a clear statement to the contrary, the Court will not interpret a statute to waive the federal government’s immunity from suit,³⁴ to abrogate a state’s sovereign immunity from suit in federal court,³⁵ to regulate “core state

³⁰ See, e.g., *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008). Sometimes, however, the rule of lenity is described as a rule of narrow construction, permitting a court to adopt a less plausible but bearable construction that criminalizes less conduct. See Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 582 (1990) (lamenting lenity’s conflict with legislative supremacy insofar as it requires a judge to adopt “not the most plausible meaning [a criminal statute’s] language reasonably conveys, but the meaning that renders the least conduct unlawful – or perhaps the meaning that renders merely *less* conduct unlawful”).

³¹ See, e.g., *Jean v. Nelson*, 472 U.S. 846, 854 (1985) (opining that courts should avoid an interpretation that would provoke a serious constitutional question unless doing so would “press statutory construction ‘to the point of disingenuous evasion’” (quoting *United States v. Locke*, 471 U.S. 84, 96 (1985))); *NLRB v. Catholic Bishop*, 440 U.S. 490, 507 (1979) (holding that the Court would adopt any other plausible interpretation of a statute “in the absence of a clear expression of Congress’ intent” to provoke consideration of “difficult and sensitive” First Amendment questions).

³² See, e.g., *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (invoking canon that “‘an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains’” (quoting *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804))). Some consider *Charming Betsy* a precursor to the avoidance doctrine. See, e.g., Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 73 n.9. Because, however, these canons protect distinct norms and have developed separately in the cases, I treat them separately here.

³³ Part IV explains that canons like avoidance and *Charming Betsy* function in the same way as clear statement rules even though they are not given that label.

³⁴ See, e.g., *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33, 35 (1992); *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95 (1990).

³⁵ See, e.g., *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786 (1991).

functions,”³⁶ to abrogate Indian treaty rights,³⁷ to abrogate the inherent power of a federal court,³⁸ or to apply retroactively.³⁹

It is difficult to isolate a single policy objective behind any substantive canon, for a canon’s purpose often lies in the eyes of the beholder. For example, the rule of lenity is most frequently characterized as one pursuing fairness to the criminal defendant, but it is also characterized as one designed to ensure that Congress, not the judiciary, is the branch to criminalize conduct.⁴⁰ *Charming Betsy* is another example. It is most frequently characterized as a principle designed to respect international law,⁴¹ but it is also described as a rule designed to protect the political branches’ authority over foreign affairs.⁴² The purpose of a canon can also be stated at a high level of generality. For example, David Shapiro has famously argued that all canons reflect a preference for continuity over change insofar as they “increase the likelihood that a statute will not change existing arrangements . . . unless the legislature – the politically accountable body – has faced the problem and decided that change is appropriate.”⁴³ Eskridge has posited that all canons can

³⁶ See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991).

³⁷ See, e.g., *South Dakota v. Bourland*, 508 U.S. 679, 686-87 (1993).

³⁸ See, e.g., *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47-48 (1991); *Link v. Wabash R.R.*, 370 U.S. 626, 630-32 (1962). The Court has applied a similar rule to statutes that infringe upon executive authority. See, e.g., *Dep’t of Navy v. Egan*, 484 U.S. 518, 530 (1988) (“[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”).

³⁹ Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 384 (2005).

⁴⁰ Cf. Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 *FORDHAM L. REV.* 885, 911 (2004). In *United States v. Santos*, Justice Scalia, writing for the Court, identified a cluster of concerns, both constitutional and extraconstitutional, underlying lenity. 128 S. Ct. 2020, 2025 (2008) (“This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress’s stead.”).

⁴¹ Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 *GEO. L.J.* 479, 495-97 (1998) (describing this argument without subscribing to it).

⁴² *Id.* at 526 (arguing that *Charming Betsy* protects the principle that “the political branches should decide when and how the United States violates international law”); see also Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 *COLUM. L. REV.* 1, 63-64 (2009) (arguing that the *Charming Betsy* canon honors the fact that “the Constitution allocates to the political branches, not courts, the powers to recognize foreign nations and to risk bilateral conflict with such nations by interfering with their perfect rights”).

⁴³ David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 *N.Y.U. L. REV.* 921, 944 (1992); see also Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 *NW. U. L. REV.* 1389, 1422 (2005) (describing canons as “buffering devices” designed

be justified on rule of law grounds to the extent that they make the law more predictable and objective.⁴⁴ The relevance of a canon's purpose to its legitimacy is a matter to which I will return in Part IV. For now, the important point is that substantive canons serve a variety of purposes, all of which are external to the statute before the court.⁴⁵

The distinction between linguistic and substantive canons is not always crisp, for canons that ostensibly advance substantive values are sometimes rationalized as functionally linguistic. It is easy to see a faithful agent's motivation for making this move: linguistic canons, which pose no challenge to legislative supremacy, are preferable to substantive canons, which do. With just such a concern in mind, Justice Scalia has suggested:

Some of the rules, perhaps, can be considered merely an exaggerated statement of what normal, no-thumb-on-the-scales interpretation would produce anyway. For example, since congressional elimination of state sovereign immunity is such an extraordinary act, one would normally expect it to be explicitly decreed rather than offhandedly implied – so something like a “clear statement” rule is merely normal interpretation. And the same, perhaps, with waiver of sovereign immunity.⁴⁶

Similar explanations have been offered for many of the substantive canons. Avoidance, for example, has been justified on the ground that Congress does not usually intend for its statutes to provoke serious constitutional questions,⁴⁷ and some have justified *Charming Betsy* on the ground that Congress intends its statutes to honor customary international law.⁴⁸

Yet attempts to classify canons such as lenity, avoidance, and the clear statement rules as linguistic have been largely rejected.⁴⁹ Indeed, even those who advance arguments in favor of linguistic treatment do so only half-heartedly. For example, Justice Scalia's suggestion that clear statement rules

less to enforce the values associated with any particular canon than to avoid “unnecessary interbranch and intergovernmental friction”).

⁴⁴ See Eskridge, *supra* note 29, at 678-82.

⁴⁵ I am concerned here with the interpretation of statutes by federal courts, and I put aside the questions that arise when members of the executive branch interpret statutes.

⁴⁶ SCALIA, *supra* note 7, at 29.

⁴⁷ Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 397, 446 (2005).

⁴⁸ See *supra* note 41 and accompanying text.

⁴⁹ See, e.g., Bradley, *supra* note 41, at 507, 517-18; Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 545 (1983) (“The ‘clear statement’ principle usually fails as a useful tool of construction because it cannot demonstrate why the legislature would have wanted the court to hesitate just because the subject matter of the law is ‘sensitive.’ Likely it thinks that making hard decisions in sensitive areas is what courts are for.”); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1586 (2000).

reflect the ordinary use of language comes at the end of a long passage characterizing them as “dice-loading rules” that pose “a lot of trouble” for the “honest textualist.”⁵⁰ As Eskridge has observed, “Most of the substantive canons are hard if not impossible to defend on ordinary-use-of-language or this-is-what-the-legislature-would-want grounds.”⁵¹ These criticisms notwithstanding, the argument that substantive canons capture what ordinary language means or what Congress would want surfaces repeatedly in the cases and literature. The temptation to rationalize ostensibly substantive canons on this ground almost surely reflects discomfort with the application of substantive canons in a legal climate where a strong vision of legislative supremacy is the dominant view.

C. *The Tension Between Substantive Canons and Faithful Agency*

Textualists routinely bring canons to bear on the interpretation of statutes. They are probably the biggest proponents of linguistic canons.⁵² Textualists, however, also embrace substantive canons, which, rather than capturing ordinary language patterns, often require judges to depart from a statute’s most natural interpretation.⁵³ That is not to say that textualists accept all canons of this sort. For example, they reject the canons that statutes in derogation of the

⁵⁰ See, e.g., SCALIA, *supra* note 7, at 27-29.

⁵¹ Eskridge, *supra* note 29, at 682. State legislatures have sometimes been quite clear that canons do not represent what they would want. Numerous state legislatures have passed statutes attempting to do away with the rule of lenity, but the highest courts in those states have continued to apply the rule anyway. See Price, *supra* note 40, at 902; cf. John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 834 (“The legislative supremacy concern becomes even greater when Congress routinely displays less concern for the value that courts are so eager to protect with a clear statement rule.”).

⁵² See, e.g., SCALIA, *supra* note 7, at 25-27 (praising linguistic canons as common-sense formulations). Because linguistic canons are rules of thumb about how English speakers use language, textualists find them valuable to the project of determining how a statutory provision would be understood by a skilled user of the language.

⁵³ Stare decisis can cause similar conflicts with faithful agency: federal courts permit the institutional interest in stability to trump the obligation of faithful agency every time that they employ stare decisis to adhere to a prior erroneous interpretation of a statute. This conflict would be eliminated if courts abandoned their current rule giving statutory decisions “super strong” stare decisis effect in favor of a weaker presumption that prior interpretations are valid if they are reasonable. See generally Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011 (2003) (arguing that the application of a strict rule of stare decisis in any case is in significant tension with the constitutional guarantee of due process); Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317 (2005) (arguing that “super strong” statutory stare decisis is unwarranted particularly when applied by the courts of appeals).

common law should be narrowly construed,⁵⁴ that remedial statutes should be broadly construed,⁵⁵ and that express preemption provisions should be narrowly construed.⁵⁶ But textualists embrace avoidance,⁵⁷ the rule of lenity,⁵⁸ *Charming Betsy*,⁵⁹ clear statement sovereign immunity rules,⁶⁰ clear statement federalism rules,⁶¹ the Indian canon,⁶² the presumption against extraterritorial

⁵⁴ SCALIA, *supra* note 7, at 29 (“The rule that statutes in derogation of the common law will be narrowly construed seems like a sheer judicial power-grab”).

⁵⁵ *Id.* at 28 (rejecting the canon that remedial statutes are to be broadly construed as one used “to devastating effect”).

⁵⁶ *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 558 (2008) (Thomas, J., dissenting); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 544-48 (1992) (Scalia, J., dissenting) (arguing that the presumption against preemption has no place in the construction of an express preemption clause).

⁵⁷ *See, e.g., Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 345-46 (1998) (Thomas, J.) (accepting canon); *id.* at 356 (Scalia, J., concurring in the judgment); *Almendarez-Torres v. United States*, 523 U.S. 224, 270 (1998) (Scalia, J., dissenting) (“The doctrine of constitutional doubt does not require that the problem-avoiding construction be the *preferable* one,” for that “would deprive the doctrine of all function”).

⁵⁸ *See, e.g., United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (Scalia, J.) (endorsing and applying rule of lenity); *Pasquantino v. United States*, 544 U.S. 349, 382 (2005) (Thomas, J.) (“We have long held that, when confronted with ‘two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.’” (quoting *McNally v. United States*, 483 U.S. 350, 359-60 (1987))).

⁵⁹ *See, e.g., F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 176 (2004) (Scalia, J., with Thomas, J., concurring in the judgment) (endorsing “the principle that statutes should be read in accord with the customary deference to the application of foreign countries’ laws within their own territories”); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814-21 (1993) (Scalia, J., dissenting) (endorsing and applying the *Charming Betsy* canon).

⁶⁰ *See, e.g., United States v. Williams*, 514 U.S. 527, 541 (1995) (Scalia, J., concurring) (“I acknowledge the rule requiring clear statement of waivers of sovereign immunity and I agree that the rule applies even to determination of the scope of explicit waivers.”); *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 35 (1992) (Scalia, J.) (applying canon to hold that the Bankruptcy Code does not waive the sovereign immunity of the United States from an action seeking monetary relief in bankruptcy); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786 (1991) (Scalia, J.) (applying the canon to hold that a statute granting federal jurisdiction over suits brought by Indian tribes did not abrogate the states’ sovereign immunity from suit).

⁶¹ *See, e.g., Fla. Dep’t of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2336-38 (2008) (Thomas, J.) (maintaining that Congress’s intent must be clearly expressed before the Court will interpret a federal statute to exempt a debtor from state taxation); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (Scalia, J.) (refusing to interpret a statute “[t]o displace traditional state regulation” unless Congress’s intent to do so was clear from the statute).

⁶² *See, e.g., South Dakota v. Bourland*, 508 U.S. 679, 686-87 (1993) (Thomas, J.) (asserting that the Court will not interpret a statute to abrogate the treaty rights of Indians

application of the law,⁶³ and the presumption against retroactivity.⁶⁴ Textualists also read statutes against certain background assumptions that function much like substantive canons: they read mens rea requirements and common law defenses into “otherwise unqualified criminal statutes” and they assume that all federal statutes of limitation, even if unqualified, are subject to equitable tolling.⁶⁵

Substantive canons are in no tension with faithful agency insofar as they are used as tie breakers between equally plausible interpretations of a statute. Textualists have no difficulty taking policy into account when language is ambiguous. Statutory ambiguity is essentially a delegation of policymaking authority to the governmental actor charged with interpreting a statute.⁶⁶ When Congress has delegated resolution of statutory ambiguity to the courts, it is no violation of the obligation of faithful agency for a court to exercise the discretion that Congress has given it.⁶⁷ In this situation, a judge applying a canon like lenity to implement unclear text is not deviating from her best understanding of Congress’s instructions; the best understanding of Congress’s instructions is that Congress left the problem to her. There is no reason that judges should be foreclosed from relying on extra-statutory policies like fairness to the accused in exercising their discretion.

Substantive canons are in significant tension with textualism, however, insofar as their application can require a judge to adopt something other than

unless “Congress clearly express[es] its intent to do so”); *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (Scalia, J.) (“When we are faced with . . . two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court’s Indian jurisprudence: “[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.” (quoting *Montana v. Blackfoot Tribe*, 471 U.S. 759, 766 (1985)) (alteration in the original)).

⁶³ See, e.g., *Small v. United States*, 544 U.S. 385, 399 (2005) (Thomas, J., dissenting); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in the judgment).

⁶⁴ *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946 (1997) (Thomas, J.) (applying this “time honored presumption”); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 286 (1994) (Scalia, J., concurring in the judgment) (“I of course agree with the Court that there exists a judicial presumption, of great antiquity, that a legislative enactment affecting substantive rights does not apply retroactively absent *clear statement* to the contrary.”); *Diaz v. Shallbetter*, 984 F.2d 850, 853 (7th Cir. 1993) (Easterbrook, J.) (applying canon to preclude “retroactive change of a time limit” that would alter the rules for pending cases).

⁶⁵ Manning, *supra* note 5, at 2465-67.

⁶⁶ Cf. *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 843-44 (1984) (treating statutory ambiguity as a delegation of gap-filling authority to an administrative agency).

⁶⁷ Cf. *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (“[A] certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine – up to a point – how small or large that degree shall be.”).

the most textually plausible meaning of a statute.⁶⁸ Textualists cannot justify the application of substantive canons on the ground that they represent what Congress would have wanted, because the foundation of modern textualism is its insistence that congressional intent is unknowable.⁶⁹ And while textualists do not believe that language should be pushed for any meaning it can bear,⁷⁰ many substantive canons require judges to do just that. A judge applying a substantive canon often exchanges the best interpretation of a statutory provision for a merely bearable one. In doing so, she abandons not only the usual textualist practice of interpreting a statute as it is most likely to be understood by a skilled user of the language, but also the more fundamental textualist insistence that a faithful agent must adhere to the product of the legislative process, not strain its language to account for abstract intention or commonly held social values.⁷¹

Judges who depart from the most textually plausible interpretation of statutory language function as something other than faithful agents of Congress. Depending on the purpose served by a particular canon, a judge might function as a promoter of constitutional values (as she may in applying the federalism canons), a protector of international law (as she may in applying the *Charming Betsy* canon), or as a guardian of fairness (as she may in applying the rule of lenity). But whatever role she assumes, it is not that of the faithful agent. Her loyalty runs not only to Congress, but also to the values that the particular substantive canon seeks to promote.

⁶⁸ Because this Article focuses on the federal courts' role as faithful agents of Congress, it does not consider the distinct issues raised by the federal courts' application of substantive canons in the interpretation of state statutes. Cf. William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 836 n.14 (2001) (questioning whether federal courts have the authority to apply the avoidance canon in the interpretation of state statutes).

⁶⁹ See *supra* notes 5-7 and accompanying text.

⁷⁰ SCALIA, *supra* note 7, at 23 ("A text should not be construed strictly, and it should not be construed leniently; rather, it should be construed reasonably, to include all that it fairly means."). Justice Scalia's dissent in *Smith v. United States*, 508 U.S. 223 (1993), is an example of the textualist approach to language. There, Justice Scalia protested that a statutory prohibition on "us[ing] a firearm" did not apply to a defendant who uses a firearm for any purpose, including trading an unloaded firearm for drugs. While the dictionary definition of "use" would permit this broad reading, Justice Scalia argued that the word should be read in context rather than pushed for any meaning it could bear. He said that, understood in context, the statute prohibited using a gun as it is normally used: as a weapon. *Id.* at 241-42 (Scalia, J., dissenting); see also Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 61 (1988) ("Meaning comes from the ring the words would have had to a skilled user of words at the time, thinking about the same problem.").

⁷¹ Cf. Manning, *supra* note 2, at 124 ("If textualists believe, moreover, that statutes mean what a reasonable person would conventionally understand them to mean, then applying a less natural (though still plausible) interpretation is arguably unfaithful to the legislative instructions contained in the statute.").

Substantive canons push textualists to think harder about the judicial role in statutory interpretation.⁷² Why are judges authorized to employ any substantive canon?⁷³ Assuming they possess such power, why are they authorized to employ some canons (like avoidance) but not others (like construing remedial statutes broadly)? If the Constitution, properly interpreted, dictates that a judge's only role in statutory interpretation is to implement congressional commands, then textualists should conclude that substantive canons are inconsistent with the constitutional structure and discard them. Alternatively, if the Constitution leaves room for judges, in certain circumstances, to function as something other than Congress's faithful agents, then textualists must identify the constitutional basis of this power and explain why it permits the application of some canons but not others.

Thus far, textualists have noted the problem but reserved it. For example, Manning has expressed appreciation for the way in which avoidance and clear statement rules "mitigate the textualists' strict focus on the conventional meaning of the enacted text," but he has simultaneously acknowledged that "it is unclear how comfortably they fit with the most basic textualist assumptions."⁷⁴ Justice Scalia is more openly skeptical. He laments:

But whether these dice-loading rules are bad or good, there is also the question of where the courts get the authority to impose them. Can we really just decree that we will interpret the laws that Congress passes to mean more or less than what they fairly say? I doubt it.⁷⁵

The remainder of this Article examines whether this doubt is warranted.

II. SUBSTANTIVE CANONS IN HISTORY

History has been a focal point in the debate about faithful agency. Dynamists have argued that early federal courts, following the practice of their English forebears, exercised a broad equitable power to expand and contract the reach of otherwise plain statutory text. Textualists have responded that early federal courts broke from the English practice and embraced the norm of

⁷² As discussed above, the application of substantive canons poses a similar dilemma for purposivists. See *supra* note 25.

⁷³ Cf. Bradley, *supra* note 41, at 484 (asking, with respect to *Charming Betsy*, "[W]hy U.S. courts try to construe statutes to avoid inconsistencies with international law. Where do they get the authority to apply such a rule? And why this rule and not others – for example, a rule that federal statutes should be construed so as not to be inconsistent with French law, or Talmudic law, or Plato's 'Laws'?"); Nagle, *supra* note 51, at 804 (observing that the Court has explained neither the "source of its power to establish clear statement rules" nor "the source of its power to announce any rules of statutory interpretation").

⁷⁴ Manning, *supra* note 2, at 125; see also *id.* at 123.

⁷⁵ SCALIA, *supra* note 7, at 28-29; see also *id.* at 28; cf. Eskridge, *supra* note 2, at 1088 ("From a new textualist perspective the malleability and evolution of the canons ought to be alarming.").

faithful agency.⁷⁶ As stated in Part I, I find the latter account of the history more persuasive. Yet historical work remains. Even while disavowing a broad authority to disregard statutory text, early federal courts may have asserted a narrower authority to shade it through the application of substantive canons. The question whether they did so is an important one. Federal judges plainly assert such authority today, even while simultaneously and overwhelmingly characterizing themselves as Congress's faithful agents. If early federal judges behaved similarly, that is evidence that our judicial system has long tolerated the uneasy relationship between substantive canons and legislative supremacy – a matter of interest not only to those inclined to weigh history heavily in constitutional interpretation, but for all who value the insights that tradition can provide in that enterprise.⁷⁷

This Part contributes to the historical debate about legislative supremacy and judicial power with a systematic study of the way that early generations of judges deployed substantive canons. It is important to be clear at the outset that this Part does not aim to describe the original public meaning of “the judicial Power” as it related to statutory interpretation in 1787. Previous historical work has uncovered no evidence that there was any settled view about acceptable norms of interpretation at the time of the Constitution's ratification.⁷⁸ Nor was the scope of the judicial power to interpret statutes settled immediately after federal courts opened their doors. Federal dockets were small and federal statutes were few. The relationship between the federal courts and Congress in matters of statutory interpretation was one worked out over time as judges “liquidated” the meaning of the open-ended term “the judicial Power.”⁷⁹ The prior studies of faithful agency upon which I build have not limited themselves to the period before 1800,⁸⁰ and I do not do so here. Instead, I focus on the period between 1789 and 1840 – a sufficient amount of time for patterns to develop with respect to norms of statutory interpretation.

⁷⁶ See *supra* note 17 and accompanying text.

⁷⁷ Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (Frankfurter, J., concurring) (“It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.”).

⁷⁸ John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1670-71 (2001) (“[N]either Professor Eskridge nor I have been able to find significant discussion of the norms of interpretation in the ratifying conventions as such. . . . The hard reality is that neither the framers nor the ratifiers systematically addressed, much less decisively resolved, the question of appropriate interpretive norms.”).

⁷⁹ See Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 521 (2003) (arguing that the founders “did not consider the Constitution's meaning to be fully settled at the moment it was written,” but that they expected subsequent interpreters to settle its meaning).

⁸⁰ See Manning, *supra* note 2, at 89-102 (tracing the Marshall Court's invocations of faithful agency and the equity of the statute); Yoo, *supra* note 16, at 1615-29.

A description of my methodology follows. I read every case decided during this period by any federal court in which the court applied any kind of canon of interpretation.⁸¹ In addition to reading the cases, I consulted pre-founding English and post-founding American treatises on statutory interpretation to determine how canons were perceived outside of the courts. After reading the materials, I chose to focus on six canons: the rule of lenity, *Charming Betsy*, avoidance, the presumption against retroactivity, the sovereign immunity clear statement rules, and the Indian canon.⁸² I chose these canons for several reasons: they figure prominently in modern debates about statutory interpretation; they are among the canons that textualists embrace; and they are among the canons identified by federal judges during the first fifty years of the Republic.⁸³ Some of the substantive canons discussed in this Part surfaced in the early nineteenth century but evolved over time, either by shifting in formulation, being applied to new situations, or becoming significantly more entrenched in the legal system.⁸⁴ To better understand the canons as courts apply them today, I traced them, where relevant, beyond 1840 to determine when they took their current form.

The historical record reveals that federal courts willingly applied substantive canons. Many of these canons, like the “equity of the statute” doctrine they ultimately abandoned, had their roots in the English common law. In contrast to what happened to the equity of the statute doctrine, however, federal courts did not retreat from substantive canons. On the contrary, they not only transplanted canons from the English common law, but also adopted new ones to deal with challenges faced by the young nation. While there were debates

⁸¹ I did not include state cases in this study because state constitutions often distribute power differently than does the United States Constitution, making the behavior of state judges a less reliable gauge of the scope of federal judicial power.

⁸² For the sake of completeness, the end of Section A briefly describes other substantive canons commonly discussed today that appear in the federal reporters between 1789 and 1840. *See infra* Part II.A.7.

⁸³ I have deliberately omitted the absurdity doctrine and the “equity of the statute” doctrine from this historical survey, given the exhaustive study of those doctrines already undertaken by others. *See* sources cited *supra* notes 2, 47. Because my project concerns substantive canons, I also put to one side the many cases during this period in which federal courts employed linguistic canons.

⁸⁴ For example, the *Charming Betsy* canon surfaced in the early 1800s but was not applied with any regularity until the twentieth century. *See infra* Part II.A.2. The avoidance canon surfaced in the 1800s, most clearly in the opinions of Justice Story, but was not solidified in the interpretive lexicon until the late nineteenth century. *See infra* Part II.A.3. The Indian canon emerged in the interpretation of treaties and did not shift to the statutory context until the late nineteenth century. *See infra* Part II.A.6. The basic principle that the sovereign is exempt from its own statutes is of ancient origin, but was not applied to waivers and abrogations of sovereign immunity until the twentieth century. *See infra* Part II.A.5. Of the six canons discussed, the rule of lenity and the presumption against retroactivity have remained the most consistent over time. *See infra* Parts II.A.1, II.A.4.

about the legitimacy of the practice of equitable interpretation, there were none about the legitimacy of deploying substantive canons. All parties – the courts, those who argued before them, and informed observers – assumed that courts could and should employ substantive canons to assist their interpretation of federal statutes.

To be sure, the historical acceptance of substantive canons does not settle the question of their legitimacy. There are ambiguities in the record, and in any event, while history can inform the resolution of constitutional questions, it does not by itself decide them. One must also consider whether the use of substantive canons is consistent with the constitutional structure.⁸⁵ That said, history casts valuable light on the problem of substantive canons, for their long pedigree makes it difficult to dismiss their use as fundamentally inconsistent with the limits that the Constitution imposes upon the exercise of judicial power.

Section A of this Part recounts how early federal courts employed an array of substantive canons, and continued to do so even after a sharpened understanding of the constitutional structure caused them largely to abandon the practice of equitable interpretation. Section B explores some of the implications of the historical evidence for the textualist approach to substantive canons.

A. *Stories of Well-Known Substantive Canons*

This Section traces the history of six substantive canons in the post-founding era: the rule of lenity, *Charming Betsy*, avoidance, the presumption against retroactivity, the sovereign immunity clear statement rules, and the Indian canon. It identifies the origin of each; the extent to which early federal courts applied it; the rationale, if any, they identified for it; and the degree to which courts used it to deviate from what they otherwise characterized as the best interpretation of the text.

1. Lenity

The maxim that penal statutes should be narrowly construed is one of the oldest canons of interpretation. It appears, for example, in the sixteenth century treatise *A Discourse upon the Exposition and Understandinge of Statutes*, a book described by its editor as “the earliest treatise yet brought to light on the interpretation of statutes in England.”⁸⁶ Penal statutes should be

⁸⁵ See *infra* Part III.

⁸⁶ Samuel E. Thorne, *Preface* to A DISCOURSE UPON THE EXPOSITION AND UNDERSTANDINGE OF STATUTES, at v (Samuel E. Thorne ed., Lawbook Exchange, Ltd. 2003) (1942) [hereinafter DISCOURSE]. The Thorne edition is based upon two copies written early in Queen Elizabeth’s reign, which extended from 1558 until 1603. According to Thorne, “the history of statutory interpretation begins in the sixteenth century, after the Year Books had come to a close and the great outburst of legislation that marks the reign of Henry VIII had been concluded.” Samuel E. Thorne, *Introduction* to DISCOURSE, *supra*, at

construed strictly, the *Discourse* explains, “for the lawe alwaies favoureth hym that goeth to wracke, nor it will not pulle him on his nose that is on his knees.”⁸⁷ As this explanation reveals, the rule of lenity was not grounded in any fiction about Parliament’s presumed intent; rather, it was unabashedly grounded in a policy of tenderness for the accused. In fact, lenity is commonly acknowledged to have been a mechanism that English judges employed to counter the brutality of then-existing criminal law.⁸⁸ Blackstone explains the way the maxim was used to thwart Parliament:

[B]y the statute . . . stealing sheep, *or other cattle*, was made felony without benefit of clergy. But these general words, “or other cattle,” being looked upon as much too loose to create a capital offence, the act was held to extend to nothing but mere sheep. And therefore, in the next sessions, it was found necessary to make another statute . . . extending the former to bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs, by name.⁸⁹

Insofar as judges applied the rule of lenity to relieve defendants from harsh punishments that Parliament clearly intended to impose, the rule was in significant tension with parliamentary supremacy. Nonetheless, the rule became an entrenched part of the English approach to statutory interpretation.

Schooled in the English tradition, American judges applied the principle of lenity from the start.⁹⁰ Federal judges cited it as early as 1794,⁹¹ and as federal dockets increased, so did references to lenity.⁹² Notably, the courts did not

3. He claims that the *Discourse* was written prior to 1571, and probably prior to 1567, when the separation of judicial and parliamentary power was bringing the problem of statutory interpretation into focus. “This short tract,” he claims, “thus represents perhaps the earliest attempt to deal with a difficulty that was then presenting itself only vaguely but was to become increasingly sharper and more troublesome – the preservation of a balance between parliamentary authority and the administration of justice.” *Id.* at 11.

⁸⁷ DISCOURSE, *supra* note 86, at 154-55.

⁸⁸ See Price, *supra* note 40, at 897 (recounting lenity’s origins); see also G.A. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES § 329, at 452 (Jersey City, N.J., Frederick D. Linn & Co. 1888).

⁸⁹ 1 WILLIAM BLACKSTONE, COMMENTARIES *88.

⁹⁰ Indeed, a review of early federal case law leaves one with the distinct impression that lenity was the most commonly applied substantive canon of construction. My searches yielded far more cases applying the rule of lenity than any other canon.

⁹¹ The earliest case invoking the doctrine of lenity appears to be *Bray v. The Atalanta*, 4 F. Cas. 37, 38 (D.S.C. 1794) (No. 1819) (“[I]t is a penal law and must be construed strictly.”).

⁹² The rule was applied not only to criminal statutes, but also to civil statutes considered penal by virtue of their stiff penalties. For example, the rule of lenity was routinely applied to forfeiture statutes. *E.g.*, *Schooner Paulina’s Cargo v. United States*, 11 U.S. (7 Cranch) 52, 67-68 (1812); *Shipp v. Miller’s Heirs*, 15 U.S. (2 Wheat.) 316, 325 (1817); *Carver v. Astor*, 29 U.S. (4 Pet.) 1, 92-93 (1830); *Ronkendorff v. Taylor’s Lessee*, 29 U.S. (4 Pet.) 349, 357, 359 (1830); *United States v. Eighty-Four Boxes of Sugar*, 32 U.S. (7 Pet.) 453,

generally justify lenity with reference to presumed legislative intent – i.e., they did not claim to be applying lenity because they believed that Congress would have wanted them to do so.⁹³ Instead, they justified lenity as had their English forebears: on grounds of fairness to the accused.⁹⁴ Justice Livingston, riding circuit, explained one aspect of this policy:

For although ignorance of the existence of a law be no excuse for its violation, yet if this ignorance be the consequence of an ambiguous or obscure phraseology, some indulgence is due to it. It should be a principle of every criminal code, and certainly belongs to ours, that no person be adjudged guilty of an offence unless it be created and promulgated in terms which leave no reasonable doubt of their meaning.⁹⁵

Fairness, in other words, demands that the accused be on clear notice of what the law proscribes.

While early federal courts embraced the rule of lenity, they were nonetheless at pains to identify its limits. As Chief Justice Marshall put it:

The maxim, that penal laws are to be construed strictly, has never been understood, by me at least, to imply, that the intention of the legislature, as manifested by their words, is to be overruled; but that in cases where the intention is not distinctly perceived, where, without violence to the words or apparent meaning of the act, it may be construed to embrace or exclude a particular case, where the mind balances and hesitates between the two constructions, the more restricted construction ought to prevail;

462-63 (1833); *The Enterprise*, 8 F. Cas. 732, 734 (Livingston, Circuit Justice, C.C.D.N.Y. 1810) (No. 4499); *Six Hundred and Fifty-One Chests of Tea v. United States*, 22 F. Cas. 253, 257 (Thompson, Circuit Justice, C.C.S.D.N.Y. 1826) (No. 12,916); *United States v. Open Boat*, 27 F. Cas. 354, 356 (Story, Circuit Justice, C.C.D. Me. 1829) (No. 15,968); *Swift v. The Happy Return*, 23 F. Cas. 560, 561 (D. Pa. 1799) (No. 13,697); *Knagg v. Goldsmith*, 14 F. Cas. 740, 742 (E.D. Pa. 1831) (No. 7872); see also ENDLICH, *supra* note 88, § 331, at 456 (“It is immaterial, for the purpose of the application of the rule of strict construction, whether the proceeding prescribed for the enforcement of the penal law be criminal or civil.”).

⁹³ For an exception, see *Schooner Paulina’s Cargo*, 11 U.S. (7 Cranch) at 67-68 (“What follows [in the statute] is expressed with some confusion and would not seem to constitute the most essential part of the sentence. It cannot be believed that the legislature could intend to inflict so heavy a forfeiture under such cloudy and ambiguous terms.”).

⁹⁴ See, e.g., *United States v. Mann*, 26 F. Cas. 1153, 1157 (Story, Circuit Justice, C.C.D.N.H. 1812) (No. 15,718); *United States v. Wilson*, 28 F. Cas. 699, 709 (Baldwin, Circuit Justice, C.C.E.D. Pa. 1830) (No. 16,730) (“[The rule of lenity] is founded on the tenderness of the law for the rights of individuals . . .”). For the suggestion that lenity also serves to reinforce the constitutional separation of powers, see *infra* note 103.

⁹⁵ *The Enterprise*, 8 F. Cas. at 734; see also *United States v. Thirty-One Boxes, etc.*, 28 F. Cas. 56, 59 (S.D.N.Y. 1833) (No. 16,465a) (“It is believed no sound administration of penal law can permit a range so unlimited and hazardous to language of a very equivocal import.”).

especially in cases where the act to be punished is in itself indifferent, and is rendered culpable only by positive law.⁹⁶

This insistence upon legislative supremacy is a constant refrain in the case law regarding the canon. Courts repeatedly emphasized that lenity could never overcome the ordinary meaning of a statute;⁹⁷ on the contrary, the principle applied only in the event of ambiguity.⁹⁸ Moreover, saying that ambiguity justified the application of lenity did not mean that a court had recourse to the rule whenever a narrower interpretation was plausible. Over and over again, courts stressed that they were obliged to choose the best, not the narrowest, interpretation of a statute.⁹⁹ The upshot is that although lenity was almost

⁹⁶ *The Adventure*, 1 F. Cas. 202, 204 (Marshall, Circuit Justice, C.C.D. Va. 1812) (No. 93).

⁹⁷ *Ronkendorff*, 29 U.S. (4 Pet.) at 361; *The Hawke*, 26 F. Cas. 233, 234-35 (D.S.C. 1794) (No. 15,331); *The Enterprise*, 8 F. Cas. at 734 (“When the sense of a penal statute is obvious, consequences are to be disregarded; but if doubtful, they are to have their weight in its interpretation.”); *Wilson*, 28 F. Cas. at 709; *The Nymph*, 18 F. Cas. 506, 508 (Story, Circuit Justice, C.C.D. Me. 1834) (No. 10,388).

⁹⁸ *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820); *see also* *Prescott v. Nevers*, 19 F. Cas. 1286, 1288-89 (Story, Circuit Justice, C.C.D. Me. 1827) (No. 11,390) (applying lenity to choose between two interpretations, “one of which satisfies the terms, and stops at the obvious mischief provided against, and the other goes to an extent, which may involve innocent parties in its penalties”); *United States v. Shackford*, 27 F. Cas. 1038, 1039 (Story, Circuit Justice, C.C.D. Me. 1830) (No. 16,232) (asserting that when “either of the two constructions may be adopted, and each tallies with the language, and interferes with no known policy of the act, that ought to be adopted which is most liberal to the citizen, and burthens him with the least restraints”).

⁹⁹ *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 628-29 (1818) (refusing to apply lenity when the best construction of the statute included the offense, even though the defendant’s proposed narrower construction was grammatically possible); *The Emily*, 22 U.S. (9 Wheat.) 381, 388 (1824) (“In construing a statute, penal as well as others, we must look to the object in view, and never adopt an interpretation that will defeat its own purpose, if it will admit of any other reasonable construction.”); *Am. Fur Co. v. United States*, 27 U.S. (2 Pet.) 358, 367 (1829) (maintaining that lenity does not justify the adoption of the most lenient interpretation the language will bear, for “even penal laws . . . ought not be construed so strictly as to defeat the obvious intention of the legislature”); *United States v. Bailey*, 34 U.S. (9 Pet.) 238, 256 (1835) (choosing the best construction of a statute over a narrower, plausible one); *The Industry*, 13 F. Cas. 35, 36 (Story, Circuit Justice, C.C.D. Mass. 1812) (No. 7028) (refusing to apply lenity where narrow construction was a plausible, but not the best, interpretation of a statute); *United States v. Hare*, 26 F. Cas. 148, 156 (C.C.D. Md. 1818) (No. 15,304) (maintaining that even in the face of ambiguity, when lenity applies, it cannot be applied to undermine the statutory scheme); *United States v. Moulton*, 27 F. Cas. 11, 14 (Story, Circuit Justice, C.C.D. Mass. 1830) (No. 15,827) (“The natural sense of the terms of the act ought to be adopted unless the context affords clear proof of some more restrictive application of them.”); *United States v. Winn*, 28 F. Cas. 733, 734 (Story, Circuit Justice, C.C.D. Mass. 1838) (No. 16,740) (“The most restricted sense, then, is not as a matter of course to be adopted as the true sense of the statute, unless

surely the most frequently discussed canon during the first fifty years of the federal courts, its use did not often change the result of a case.¹⁰⁰

This vehement insistence on the importance of legislative intent to the interpretation of even penal statutes likely reflects an attempt on the part of early federal courts to distance themselves from lenity's rebellious reputation. While lenity began as an open effort on the part of English courts to curb parliamentary harshness, the courts of the United States denied such ambition. In *United States v. Wiltberger*, the Court explained that while common law courts may have subverted legislative intent in the interests of lenity, federal courts took a different view:

It is said, that notwithstanding [the rule of lenity], the intention of the law maker must govern in the construction of penal, as well as other statutes. This is true. But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction.¹⁰¹

it best harmonizes with the context, and stands best with the words and with the mischiefs to be remedied by the enactment."); *The Harriet*, 11 F. Cas. 588, 589 (Story, Circuit Justice, C.C.D. Me. 1840) (No. 6099) (maintaining that lenity did not justify the court in choosing the narrower, though plausible, interpretation over the best interpretation).

¹⁰⁰ Writing in 1857, Theodore Sedgwick observed that the rule of lenity

has in modern times been so modified and explained away, as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment; the courts refusing on the one hand to extend the punishment to cases which are not clearly embraced in them, and on the other, equally refusing by any mere verbal nicety, forced construction, or equitable interpretation, to exonerate parties plainly within their scope.

THEODORE SEDGWICK, *A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW* 326 (New York, J.S. Voorhies 1857).

¹⁰¹ *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820). Consider also the argument of the United States in *United States v. Moulton*:

In the United States, where the laws are not written in blood, and where the people are governed by a mild and merciful system established by themselves, there has been less disposition in the courts than in England, to favour fanciful constructions of penal statutes enabling offenders to elude justice. . . . In the supreme court of the United States, as well as in this court, it has been declared, that though penal laws are to be construed strictly, they are not to be construed so as to defeat the obvious intention of the legislature.

In other words, the principle of lenity had been modified to render its use consistent with faithful agency. In fact, some courts characterized lenity as a tool for curbing themselves, rather than as a tool for curbing Congress. As some judges told it, the point of lenity was to prevent courts from expanding penal statutes beyond their terms to further the statute's apparent purpose. "[W]hile it is said that penal statutes are to receive a strict construction," Justice Livingston explained, "nothing more is meant than that they shall not, by what may be thought their spirit or equity, be extended to offences other than those which are specially and clearly described and provided for."¹⁰² The

27 F. Cas. at 13. Justice Story, who decided the case on circuit, accepted the United States' argument, emphasizing that

[C]ourts of law, in cases of capital felonies, have been very astute, perhaps unjustifiably so, to escape from the literal meaning of the words, and to create conjectural exceptions. Such a proceeding, if it may be properly allowed in cases affecting life, is wholly inapplicable to cases of mere misdemeanors, and to other cases not capital.

Id. at 14; *see also* United States v. Chaloner, 25 F. Cas. 392, 393 (D. Me. 1831) (No. 14,777).

¹⁰² *The Enterprise*, 8 F. Cas. at 734; *see also* Schooner Paulina's Cargo v. United States, 11 U.S. (7 Cranch) 52, 61 (1812) (maintaining that while courts must effect legislative intention in construing penal statutes, they may not extend the reach of a penal statute "for the purpose of effecting legislative intention"); *Wiltberger*, 18 U.S. (5 Wheat.) at 96 ("It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."); *United States v. Morris*, 39 U.S. (14 Pet.) 464, 475 (1840); *United States v. Mann*, 26 F. Cas. 1153, 1157 (Story, Circuit Justice, C.C.D.N.H. 1812) (No. 15,718) ("We cannot assume a jurisdiction to moderate the promulgated sentence of the legislature, neither ought we to increase its severity by enlarging doubtful expressions."); *United States v. Open Boat*, 27 F. Cas. 354, 357 (Story, Circuit Justice, C.C.D. Me. 1829) (No. 15,968) (asserting that lenity prevents courts from usurping legislative authority by extending a penal statute to encompass crimes within its mischief but outside of its text); *Wilson*, 28 F. Cas. at 709 (explaining that lenity does not defeat legislative intent, but it does prevent a court from extending the law to encompass crimes within the mischief, but beyond the provisions, of a law); *The Nymph*, 18 F. Cas. at 507 (claiming that lenity constrains a court from "enlarg[ing] penal statutes by implication," but does not permit a court "to fritter [legislative intent] upon metaphysical niceties"); *Winn*, 28 F. Cas. at 734 (describing the "true and sober sense" of lenity as meaning not that the narrower construction always prevails, but that "penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport"); *Taber v. United States*, 23 F. Cas. 611, 613 (Story, Circuit Justice, C.C.D. Mass. 1839) (No. 13,722) (applying the doctrine in order to construe the meaning of "a vessel bound on a foreign voyage"). *But see* *United States v. Fairclough*, 25 F. Cas. 1037, 1039 (Washington, Circuit Justice, C.C.E.D. Pa. 1823) (No. 15,068) (holding that a court could depart from the literal meaning of a penal statute "when the evident intention of the legislature is different from the literal import of the words employed to express it in").

initial motivation for the rule of lenity was turned on its head as federal courts applied the rule to reinforce, not undermine, the separation of powers.¹⁰³

2. *Charming Betsy*

In *Murray v. Charming Betsy*, John Marshall famously stated that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”¹⁰⁴ Marshall applied that principle to a federal statute rendering subject to forfeiture “[a]ny vessel owned, hired, or employed . . . by any person residing within the *United States*, or by any citizen thereof residing elsewhere” that, inter alia, was “voluntarily carried . . . or permitted to proceed to any port within the *French Republic*.”¹⁰⁵ The question was whether this statute applied to Jared Shattuck, an American citizen who had spent almost his entire life on Danish soil and who had taken an oath of allegiance to the king of Denmark.¹⁰⁶ Marshall observed that, while the statute applied to American citizens, it applied only to citizens “under [the United States’] protection.”¹⁰⁷ Even if he retained his citizenship, Shattuck had relinquished the protection of the United States by swearing allegiance to the Danish king.¹⁰⁸ Presumably in part because extension of the act to persons in Shattuck’s position would “affect neutral commerce, further than is warranted by the law of nations,”¹⁰⁹ the Court held Shattuck exempt from the act.¹¹⁰ The opinion was careful to emphasize, however, that the best reading of the statutory language supported the result.¹¹¹

Although this rule of interpretation is popularly known as the *Charming Betsy* canon, that case was actually not the first to articulate it. At least two earlier federal cases stated the same rule. In the 1800 case *Jones v. Walker*, Chief Justice Jay, riding circuit, argued that it would be “contrary to the laws and practice of civilized nations” to construe a Virginia statute to prohibit British subjects from bringing suit in the courts of Virginia even after the United States and Britain were at peace, and he would not so construe the act if a construction “more consonant to reason and the usage of nations can be

¹⁰³ *Wilson*, 28 F. Cas. at 709 (describing lenity as rooted both in tenderness to the accused and the principle that “it is the legislature and not the court which is to define a crime and ordain the punishment”).

¹⁰⁴ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

¹⁰⁵ *Id.* at 118-19.

¹⁰⁶ *Id.* at 65-66.

¹⁰⁷ *Id.* at 118.

¹⁰⁸ *Id.* at 120.

¹⁰⁹ *Id.* at 118.

¹¹⁰ *Id.* at 120.

¹¹¹ *Id.* (“Indeed the very expressions of the act would seem to exclude a person under the circumstances of Jared Shattuck. He is not a person under the protection of the *United States*.”).

found.”¹¹² Fortunately for Jay, what he described as “a very obvious” construction consistent with both the statute’s text and the law of nations was available.¹¹³ In *Talbot v. Seeman*, decided in 1801, Marshall presaged his own *Charming Betsy* opinion, maintaining that “the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law.”¹¹⁴ *Talbot* is significant because the canon’s application in that case, unlike its application in *Jones* or *Charming Betsy*, required the Court to strain against the statutory language.

Talbot was an American captain who recaptured a Hamburg vessel from French control and claimed that he was entitled to one-half the value of the ship and cargo under a federal statute regulating the salvage payable on ships owned by, inter alia, “citizens or subjects of any nation in amity with the United States, re-taken from the enemy.”¹¹⁵ Because America was at war with France but at peace with Hamburg, Talbot argued that the situation was squarely within the statute, and Marshall agreed that “[t]he words of the act would certainly admit of this construction.”¹¹⁶ The owners of the vessel protested that their country was at peace with France and that the statute should be limited to the recapture of vessels belonging to a nation engaged with the United States against a *common* enemy.¹¹⁷ Chief Justice Marshall’s opinion for the Court adopted the latter construction because, among other considerations, it rendered the statute consistent with the law of nations, pursuant to which “a neutral is generally to be restored without salvage.”¹¹⁸ Marshall observed:

The expression used is *the enemy*. A vessel re-taken from the enemy. The enemy of whom? The court thinks it not unreasonable to answer, of both parties. By this construction the act of congress will never violate

¹¹² *Jones v. Walker*, 13 F. Cas. 1059, 1064 (Jay, Circuit Justice, C.C.D. Va. 1800) (No. 7507). *Jones* is different from the other cases discussed in this subsection because the federal court was construing a *state* statute. Even in that context, however, the law of nations canon might be deployed to promote substantive values like the law of nations itself or the role of the political branches of the *federal* government in determining when to breach it.

¹¹³ *Id.* Jay held that British subjects were not altogether precluded from bringing suit in Virginia courts; rather, they were precluded from recovering on debts that they had fraudulently assigned to citizens during the war. This construction “left British subjects precisely under the same, and no other disabilities, than the laws of war and nations had already placed them – the object of the act being only to provide against the evils of fraudulent and collusive assignments.” *Id.*

¹¹⁴ *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* (reasoning that if the statute did not apply, then Talbot was entitled to the lower rate of salvage authorized by the law of nations).

¹¹⁸ *Id.*

those principles which we believe, and which it is our duty to believe, the legislature of the United States will always hold sacred.¹¹⁹

The Court effectively read the phrase “the enemy” as if it said “their enemy” – a plausible, but not necessarily the most natural, reading of the language. *Talbot*, therefore, is a case in which the “law of nations” canon appears to have influenced, and perhaps even driven, the result.¹²⁰

Unlike the rule of lenity, the *Charming Betsy* canon seems to be an American creation. The only pre-1800 case articulating the rule is *Rutgers v. Waddington*, a well-known 1784 case in which the New York Mayor’s Court “construed a state trespass statute [so] as to avoid a conflict with the Treaty of Paris and the law of nations.”¹²¹ The rule does not appear to derive from England, as the earliest English cases clearly stating the maxim post-date *Charming Betsy*.¹²² To be sure, because the law of nations was considered to be part of the common law, *Charming Betsy* could be rationalized as a specific

¹¹⁹ *Id.* at 44.

¹²⁰ The same is true of Chief Justice Marshall’s opinion for the Court in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), where he read an otherwise unqualified jurisdictional grant impliedly to exempt public ships of war belonging to countries at peace with the United States. Marshall argued that “until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise.” *Id.* at 146. It is important to emphasize, however, that when a statute was susceptible to no other interpretation other than one conflicting with the law of nations, the Court considered itself bound to enforce the statute as written. See *The Schooner Adeline*, 13 U.S. (9 Cranch) 244, 287 (1815) (enforcing a statute departing from the law of nations because “the statute is expressed in clear and unambiguous terms”); *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 39-40 (1826) (maintaining that “whatever may be the responsibility incurred by the nation to foreign powers, in executing such laws, there can be no doubt that Courts of justice are bound to obey and administer them”).

¹²¹ See Bradley, *supra* note 41, at 487 (hypothesizing that Marshall may have had *Rutgers* in mind when he decided *Charming Betsy*). In *Rutgers*, the court said that “[t]he repeal of the law of nations, or any interference with it, could not have been in contemplation, in our opinion, when the Legislature passed this statute; and we think ourselves bound to exempt that law from its operation.” 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 417 (Julius Goebel ed., 1964).

¹²² Bradley, *supra* note 41, at 487-88. The absence of the canon in English treatises addressing statutory interpretation indicates its absence from English practice. Neither the sixteenth century *Discourse* nor Blackstone’s *Commentaries* (either in his list of interpretive maxims or in his chapter devoted to the law of nations) mentions anything resembling the rule applied in *Charming Betsy*. See 1 BLACKSTONE, *supra* note 89, at *58-92; DISCOURSE, *supra* note 86. Nor is the canon discussed in Giles Jacob’s dictionary. 6 GILES JACOB & T.E. TOMLINS, LAW-DICTIONARY: EXPLAINING THE RISE, PROGRESS, AND PRESENT STATE, OF THE ENGLISH LAW 118-23 (Philadelphia, P. Byrne 1811) (devoting a significant section to statutory interpretation). Jacob published the first edition of this book in 1729, and the book was frequently republished thereafter. The 1811 Philadelphia edition is the first American edition.

application of the general maxim that “statutes are to be construed, if possible, not to override the common law.”¹²³ The early American cases, however, do not associate the law of nations canon with the more general common law maxim, nor do the pre-founding English sources discuss the application of the common law maxim to the law of nations.¹²⁴ Understood in context, the canon was an innovation upon existing interpretive practice occasioned by the international situation then confronting the young nation.¹²⁵ This conclusion is underscored by the fact that *Charming Betsy* has taken on an existence entirely independent of the more general maxim on which it may be modeled.

Neither Jay in *Jones* nor Marshall in *Talbot* and *Charming Betsy* was entirely clear about the canon’s rationale. In particular, neither specified whether the canon is supposed to approximate what Congress would have wanted or whether it is designed to further desirable policy. On the one hand, both invoked the language of faithful agency insofar as they cast the canon as a means of effecting legislative intent. As Marshall put it in *Talbot*, avoiding conflict with the law of nations protects “those principles which we believe, and which it is our duty to believe, the legislature of the United States will always hold sacred.”¹²⁶ On the other hand, even *Talbot* itself seems driven as much by the prudence of avoiding conflict with the law of nations as with discerning what the legislature intended. For example, rather than stating that the court should always presume that Congress intended to be consistent with the law of nations, Marshall announced the maxim by asserting that “it has been urged, and we think with great force, that the law of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations.”¹²⁷ The emphasis, then, is on the importance of judicial restraint, whether out of respect for the law of nations itself or for the role of the political branches in deciding whether to breach it. The assumption about what Congress would want is almost an afterthought.¹²⁸ The bottom line is that these early treatments of the law of nations canon reflect the

¹²³ Bradley, *supra* note 41, at 488; *see also id.* at 488 n.44 (describing the argument that the canon might instead derive from the maxim “that the legislature does not intend to exceed its jurisdiction”).

¹²⁴ *See supra* note 122.

¹²⁵ *See* Frederick C. Leiner, *The Charming Betsy and the Marshall Court*, 45 AM. J. LEGAL HIST. 1, 18 (2001) (“To the Marshall court, the importance of the *Charming Betsy* case was not the rule of construction generations of lawyers have come to cite . . . but the reinforcement of international law norms at a time when a militarily weak neutral nation with extensive mercantile interests at stake desperately wanted the law respected.”).

¹²⁶ *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43-44 (1801); *see also Jones v. Walker*, 13 F. Cas. 1059, 1064 (Jay, Circuit Justice, C.C.D. Va. 1800) (No. 7507) (asserting that “[i]t would be odious to presume that the design of the [Virginia] act” was in conflict with the law of nations).

¹²⁷ *Talbot*, 5 U.S. (1 Cranch) at 43.

¹²⁸ *Id.* at 44.

same ambivalence about classifying a canon as substantive or linguistic that we see in statutory interpretation discussions today.¹²⁹

The *Charming Betsy* doctrine did not become deeply entrenched in American law the moment Marshall announced it. On the contrary, searches of the federal case law between 1789 and 1840 yield few cases articulating the principle.¹³⁰ It was not discussed in nineteenth century treatises that addressed statutory interpretation.¹³¹ Its elusiveness in the eighteenth and nineteenth century case law is consistent with Roger Alford's claim that the canon did not "come into its own" until the 1950s.¹³²

3. Avoidance

John Nagle has traced two versions of the avoidance canon in the case law: the "unconstitutionality" canon and the "doubts" canon.¹³³ The unconstitutionality canon maintains that when one interpretation of a statute would render it unconstitutional, the court should adopt any plausible interpretation that would save it.¹³⁴ The doubts canon maintains that when one interpretation of a statute would raise a serious constitutional question, the court should adopt any plausible interpretation of the statute that would avoid

¹²⁹ See *supra* notes 46-51 and accompanying text.

¹³⁰ I found only two cases other than those described above: *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) and *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 39-40 (1826). See *supra* note 120.

¹³¹ Nor did James Wilson mention the doctrine in his discourse on the law of nations. 1 JAMES WILSON, *THE WORKS OF JAMES WILSON* 148-67 (Robert Green McCloskey ed., Belknap Press 1967) (1804). Story's *Conflict of Laws* does not mention the maxim. JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, ESPECIALLY IN REGARD TO MARRIAGES, WILLS, SUCCESSIONS, AND JUDGMENTS* (Boston, Hilliard, Grey, and Co. 1834). Near the end of the nineteenth century, some treatises were reporting the maxim. See, e.g., ENDLICH, *supra* note 88, § 174, at 239. Henry Campbell Black refers to the principle that "[i]n case of doubt, a statute should be so construed as to harmonize and agree with the rules and principles of international law, and to respect rights and obligations secured by treaties, rather than to violate them." HENRY CAMPBELL BLACK, *HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS* 106-07 (2d ed. 1911). Black does not, however, cite *Charming Betsy*; he focused more on treaties.

¹³² Roger P. Alford, *Foreign Relations as a Matter of Interpretation: The Use and Abuse of Charming Betsy*, 67 OHIO ST. L.J. 1339, 1352 (2006). And even while the canon has "come into its own," modern federal courts apply it less often than canons like lenity and avoidance. Alford, for example, says that "the Supreme Court has expressly relied upon the *Charming Betsy* doctrine in approximately a dozen cases in the last one hundred years." *Id.* at 1353. That statistic, however, may be more a function of the frequency with which federal courts interpret statutes arguably infringing upon international law than a measure of judicial devotion to the canon.

¹³³ John Copeland Nagle, *Delaware & Hudson Revisited*, 72 NOTRE DAME L. REV. 1495, 1496 (1997).

¹³⁴ *Id.* at 1496.

that question.¹³⁵ The unconstitutionality canon has the longer pedigree; as I will detail below, the canon seems to have emerged in 1814 and matured by the late nineteenth century. The doubts canon surfaced more recently; Nagle identifies the 1909 decision *United States v. Delaware & Hudson*¹³⁶ as its genesis and Justice Brandeis's 1936 concurrence in *Ashwander v. TVA*¹³⁷ as the opinion that popularized it.¹³⁸

Unsurprisingly, the avoidance canon developed alongside the power of judicial review. As courts solidified this power, they gave assurances that they would exercise it only when they had no alternative. Because the avoidance canon is a consequence of judicial review, it, like *Charming Betsy*, is more an American creation than an English hand-me-down. To be sure, antecedents of the avoidance canon do exist in the English common law. For example, Charles Viner's treatise on English law, first published sometime between 1742 and 1757, provides that "[w]ords of a statute ought not to be interpreted to *destroy natural justice*."¹³⁹ Insofar as English courts occasionally – most notoriously, in *Bonham's Case* – asserted the power to void acts of parliament on the ground that they were inconsistent with natural justice, one might consider this maxim a forerunner of modern avoidance.¹⁴⁰ But in a system with neither a written constitution nor an entrenched tradition of judicial review, there was little need for a canon of interpretation instructing judges to construe statutes so as to avoid striking them down for inconsistency with the nation's constitutive law. The avoidance canon was fashioned by American courts to cope with the power they possessed as a consequence of the newly adopted United States Constitution.¹⁴¹

It is important to emphasize that not all early pronouncements that courts should avoid judicial review articulate a canon of statutory interpretation. Consider Justice Chase's observation in 1796:

¹³⁵ *Id.* at 1496-97.

¹³⁶ 213 U.S. 366 (1909).

¹³⁷ 297 U.S. 288, 348 (1936) (Brandeis, J. concurring).

¹³⁸ Nagle, *supra* note 133, at 1497 (citing *Ashwander*, 297 U.S. 288).

¹³⁹ 19 CHARLES VINER, GENERAL ABRIDGMENT OF LAW AND EQUITY, ALPHABETICALLY DIGESTED UNDER PROPER TITLES; WITH NOTES AND REFERENCES TO THE WHOLE 528 (London, 1793) (1744). Indeed, at some level, any maxim instructing a court to avoid an undesirable interpretation of a statute might be thought a forerunner of the avoidance canon. For example, courts were instructed to avoid interpretations that rendered a statute absurd or retroactive. FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES; AND THEIR RULES OF CONSTRUCTION 80 (Philadelphia, John S. Littell 1835). But while such canons illustrate a common interpretive technique of avoiding the undesirable, none is an effort to avoid the particular undesirable consequence, namely conflict with the Constitution, with which the avoidance canon is concerned.

¹⁴⁰ *Bonham's Case*, (1610) 8 Co. Rep. 133 b, 77 Eng. Rep. 646, 652 (K.B.).

¹⁴¹ *Cf.* ENDLICH, *supra* note 88, § 178, at 246 (describing avoidance canon as “[a] presumption of much importance in this country, but, of course unknown in England, where the courts cannot question the authority of Parliament, or assign any limits to its power”).

As I do not think the tax on carriages is a *direct* tax, it is unnecessary, *at this time*, for me to determine, whether the court *constitutionally* possesses the power to declare an act of Congress *void*, on the ground of its being made contrary to, or in violation of, the constitution; but if the court have such power, I am free to declare, that I will never exercise it, *but in a very clear case*.¹⁴²

A “very clear case” might mean when a statute is susceptible to none but the unconstitutional interpretation, when the Constitution is susceptible to no other interpretation but the one condemning the statute, or both. In any event, the explanation is as much a theory of constitutional as statutory interpretation. Explanations similar to Justice Chase’s abound in the early cases.¹⁴³ Indeed, the “very clear case” rationale is the most common formulation of the general proposition that courts should avoid striking down statutes for unconstitutionality.

It appears to have been Justice Story who first and most clearly articulated avoidance as a canon of statutory interpretation. The earliest statement of the canon appears to be in a case decided on circuit in 1814 involving a potential conflict between a New Hampshire statute and the New Hampshire Constitution.¹⁴⁴ He said: “But there is a construction, which although not

¹⁴² *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796).

¹⁴³ *See, e.g., Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (“[A]s the authority to declare [a statute] void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case.”); *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 19 (1800) (Paterson, J.) (“[T]o authorise this court to pronounce any law to be void, it must be a clear, unequivocal breach of the constitution; not a doubtful and argumentative implication.”); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810) (“But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.”); *Ogden v. Saunders*, 25 U.S. (2 Wheat.) 213, 294 (1827) (Thompson, J.) (articulating a “clear conflict” rule); *Adams v. Storey*, 1 F. Cas. 141, 142 (Livingston, Circuit Justice, C.C.D.N.Y. 1817) (No. 66) (“If, then, by any fair and reasonable interpretation, where the case is at all doubtful, the law can be reconciled with the constitution, it ought to be done, and a contrary course pursued only, where the incompatibility is so great as to render it extremely difficult to give the latter effect, without violating some provision of the former.”); *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. 821, 827-28 (Baldwin, Circuit Justice, C.C.D.N.J. 1830) (No. 1617) (requiring a “clear conviction” that the law in question is in conflict with the constitution of the state); *United States v. The William*, 28 F. Cas. 614, 616-20 (D. Mass 1808) (No. 16,700) (defending the power of judicial review, but providing that it ought to be exercised to hold a law void only in cases of exceedingly clear conflict).

¹⁴⁴ *Soc’y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 769 (Story, Circuit Justice, C.C.D.N.H. 1814) (No. 13,156). There are earlier cases that, while not stating the avoidance canon directly, do generally caution that courts should, where possible, construe statutes to be consistent with the Constitution. *See, e.g., Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800) (“[T]he 11th section of the judiciary act can, and

avored by the exact letter, may yet well stand with the general scope of the statute, and give it a constitutional character. . . . In deference to the legislature, this construction ought to be adopted, if by law it may.”¹⁴⁵ Over a decade later, Justice Story wrote opinions reflecting the same reasoning. In *United States v. Coombs*, he said that if “a just interpretation of the terms” reveals that Congress has exceeded its authority, the Court must hold the statute unconstitutional.¹⁴⁶ But where,

the section admits of two interpretations, one of which brings it within, and the other presses it beyond the constitutional authority of congress, it will become our duty to adopt the former construction; because a presumption never ought to be indulged, that congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the Court by language altogether unambiguous.¹⁴⁷

Both of these opinions illustrate Justice Story’s belief that while a court may not twist the text beyond what it will bear,¹⁴⁸ a judge ought to eschew the best,

must, receive a construction, consistent with the constitution.”); *see also* *United States v. Schooner Betsey and Charlotte, and Her Cargo*, 8 U.S. (4 Cranch) 443, 448 (1808) (argument of counsel) (“The 9th section of the judiciary act is to be construed with a reference to the meaning of those expressions in the constitution; and if it cannot, consistently with the force of its terms, be reconciled with the constitution, it must yield to the superior obligation of that instrument.”).

¹⁴⁵ *Wheeler*, 22 F. Cas. at 769.

¹⁴⁶ *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 75 (1838).

¹⁴⁷ *Id.* at 76; *see also* *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 448-49 (1830) (“No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution.”); *Ex parte Randolph*, 20 F. Cas. 242, 254 (Marshall, Circuit Justice, C.C.D. Va. 1833) (“No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of a legislative act. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other points, a just respect for the legislature requires, that the obligation of its laws should not be unnecessarily and wantonly assailed.”).

¹⁴⁸ The Court similarly emphasized that the plain meaning controls when it applied the English maxim, *see supra* note 139, that statutes should be construed so as to avoid injustice. For example, in *Evans v. Jordan*, Chief Justice Marshall opined:

That an act ought so to be construed as to avoid gross injustice, if such construction be compatible with the words of the law, will not be controverted; but this principle is never to be carried so far as to thwart that scheme of policy which the legislature has the power to adopt. To that department is confided, without revision, the power of deciding on the justice as well as wisdom of measures relative to subjects on which they have the constitutional power to act. Wherever, then, their language admits of no doubt, their plain and obvious intent must prevail.

8 F. Cas. 872, 873 (Marshall, Circuit Justice, C.C.D. Va. 1813) (No. 4564). When the case went before the Supreme Court on appeal, Justice Washington wrote an opinion similarly expressing the view that it was beyond the power of the Court to alter the plain language of the statute, however just such an alteration might be. *Evans v. Jordan*, 13 U.S. (9 Cranch)

but unconstitutional interpretation in favor of a less plausible, but constitutional one. The opinions also reflect the general belief that Congress would prefer that a court adopt a saving construction.¹⁴⁹ In both respects, avoidance differs from lenity, which neither permitted a court to deviate from the best construction of statutory language nor purported to justify itself with reference to presumed legislative intent.¹⁵⁰

The trajectory of the avoidance canon in nineteenth century legal treatises tracks the case law. The canon is not discussed in the earliest treatises that American lawyers consulted for guidance in statutory interpretation.¹⁵¹ Just as Justice Story appears to have been the vehicle for the canon's entry into the case law, he appears to have been the vehicle for its entry into secondary sources. The canon is memorialized in his *Commentaries to the Constitution*, first published in 1833,¹⁵² and it appears in legal treatises published thereafter.¹⁵³ By the end of the nineteenth century, the avoidance canon – at

199, 202-04 (1815); *see also* *Minge v. Gilmour*, 17 F. Cas. 440, 444 (Iredell, Circuit Justice, C.C.D.N.C. 1798) (No. 9631) (arguing that a court should construe an act consistently with natural justice, “but, if the words are too plain to admit of more than one construction, and the provisions be not inconsistent with any articles of the constitution, I am of opinion, for the reason I have given, that no court has authority to say the act is void because in their opinion it is not agreeable to the principles of natural justice”).

¹⁴⁹ *See* BLACK, *supra* note 131, at 114; ENDLICH, *supra* note 88, § 178, at 246 (describing avoidance canon as rooted in legislative intent); *cf. Minge*, 17 F. Cas. at 444 (urging courts to construe acts to be consistent with natural justice, “it being most probable that, by such construction, the true design of the legislature will be pursued”).

¹⁵⁰ *See supra* notes 96-100 and accompanying text.

¹⁵¹ Because the avoidance canon was not a feature of English common law, *see supra* note 141, it obviously does not appear in commonly used eighteenth century English treatises like Blackstone, Charles Viner, and Giles Jacob. *See* BLACKSTONE, *supra* note 89; 6 JACOB & TOMLINS, *supra* note 122; VINER, *supra* note 139. As for American treatises, no discussion of avoidance appears in St. George Tucker's editorial notes to his edition of Blackstone. *See* BLACKSTONE'S COMMENTARIES, ST. GEORGE TUCKER (Philadelphia, William Young Birch & Abraham Small 1803). James Wilson's *Works* offers only a few observations on statutory interpretation, and none is directed to the principle of avoidance. WILSON, *supra* note 131. Kent's *Commentaries* contains a defense of judicial review, but no discussion of the avoidance canon. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW *243 (Boston, Little, Brown & Co. 1873).

¹⁵² JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1772 (1891) (Boston, Hilliard & Gray 1833).

¹⁵³ The 1835 American republication of the original 1831 London edition of Dwarrris's widely used *Treatise on Statutes* does not include the maxim, *see* DWARRIS, *supra* note 139, but it is significant that the first American edition of the treatise, edited by Platt Potter and published in 1871, does include it. *See* FORUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES; AND THEIR RULES OF CONSTRUCTION 111 n.8 (Platt Potter ed., 1871); *see also* JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION § 90 (Boston, Little, Brown & Co. 1882); BLACK, *supra* note 131, at 110-18; ENDLICH, *supra* note 88, § 178, at 246; SEDGWICK, *supra* note 100, at 312-13.

least the “unconstitutionality” version of it – was a fixture in both case law and commentary.¹⁵⁴ It is notable that all of these treatise writers, like Justice Story himself, described the maxim as a means of effecting the legislature’s desire that its laws be constitutional.

4. The Presumption Against Retroactivity

The presumption against the retroactive application of new liability has deep roots, appearing in venerable English sources such as Bracton, Coke, and Blackstone.¹⁵⁵ Distaste for retroactive laws crossed the Atlantic, and in criminal cases, the United States elevated the principle to a constitutional guarantee of freedom from ex post facto laws.¹⁵⁶ In the vast majority of civil cases, protection at the federal level came from the traditional statutory presumption rather than from the Constitution.¹⁵⁷ Federal courts affirmed the canon’s validity almost immediately,¹⁵⁸ and it remains a settled interpretive rule today.¹⁵⁹

The canon’s common characterization as a presumption fits insofar as the canon sets a default answer for a question that must be answered with respect to every statute: its temporal scope.¹⁶⁰ That said, early federal courts did more than plug in this presumption to answer a question left open by statutory silence. Federal courts claimed that Congress would have to speak with particular clarity to achieve retroactive application. For example, they asserted that a court must interpret the words of a statute prospectively “unless they are

¹⁵⁴ See Nagle, *supra* note 133, at 1498-99 n.17.

¹⁵⁵ 1 BLACKSTONE, *supra* note 89, at *46; 3 HENRICI DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 181 (George E. Woodbine ed., Samuel E. Thorne trans., Harvard Univ. Press 1968-1977) (1569), available at <http://hls15.law.harvard.edu/bracton>; 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 95 (London, E & R Brooke 1797). Civil law writers such as Puffendorf also endorsed the maxim. See SEDGWICK, *supra* note 100, at 188-89.

¹⁵⁶ See U.S. CONST. art. I, § 9, cl. 3 (forbidding Congress to pass any ex post facto law); *id.* § 10, cl. 1 (providing that no state shall “pass any . . . ex post facto Law”).

¹⁵⁷ *Calder v. Bull* put to rest arguments that the Ex Post Facto Clauses applied to civil, as well as to criminal, cases. 3 U.S. (3 Dall.) 386, 390-91, 399-400 (1798). The only constitutional protection against ex post facto laws in civil cases comes from the Contracts Clause. U.S. CONST. art. I, § 10, cl. 1 (forbidding any state to pass a “Law impairing the Obligation of Contracts”).

¹⁵⁸ For what appear to be the two earliest references to the rule, see *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (asserting in dicta that “a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties”), and *Ogden v. Witherspoon*, 18 F. Cas. 618, 619 (Marshall, Circuit Justice, C.C.D.N.C. 1802) (No. 10,461).

¹⁵⁹ See, e.g., *Landgraf v. USI Film Prods.*, 511 U.S. 244, 287-88, 290-94 (1994) (Scalia, J., concurring).

¹⁶⁰ Cf. *Reynolds v. M’Arthur*, 27 U.S. (2 Pet.) 417, 434-35 (1829) (identifying the temporal scope of a statute as a threshold question to its application).

so clear, strong, and imperative, that no other meaning can be annexed to them”¹⁶¹ or “unless [the law] contained express words to that purpose.”¹⁶² In this respect, the canon functions more like a clear statement rule, which lays down a strong presumption that Congress must overcome. It is difficult to say how far early federal courts were willing to push statutory language to escape a retroactive interpretation. It is worth observing, though, that federal courts issued their strongest statements about the canon in cases in which they did not actually apply it.¹⁶³ In cases in which they actually applied the canon, courts relied as much on the language of the statute as on the canon in explaining the result.¹⁶⁴

Federal courts discussing the presumption in the first fifty years of the Republic did not identify a rationale for it. On the one hand, courts may have treated the canon as a proxy for legislative intent insofar as they assumed it to be a background principle against which Congress legislated – it was, after all, an ancient maxim. In this vein, consider Justice Story’s characterization of the

¹⁶¹ *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413 (1806) (Paterson, J.).

¹⁶² *Id.* at 414 (Cushing, J.); *see also Schooner Peggy*, 5 U.S. (1 Cranch) at 110 (asserting that a court should “struggle hard” against a retroactive interpretation); *Prince v. United States*, 19 F. Cas. 1331, 1332 (Story, Circuit Justice, C.C.D. Mass. 1814) (No. 11,425) (“It is a general rule, that statutes are to be construed to operate in futuro, unless from the language a retrospective effect be clearly intended.”); *Blanchard v. Sprague*, 3 F. Cas. 648, 650 (Story, Circuit Justice, C.C.D. Mass. 1839) (No. 1518) (opining that “[retroactive] interpretation is never adopted without absolute necessity; and courts of justice always lean to a more benign construction”).

¹⁶³ *See Schooner Peggy*, 5 U.S. (1 Cranch) at 110 (implying that the canon counsels a court to deviate from the best interpretation to avoid retroactivity, but holding the canon inapplicable to the present case); *Witherspoon*, 18 F. Cas. at 619 (“I will not say at this time that a retrospective law may not be made; but if its retrospective view be not clearly expressed, construction ought not to aid it. That however is not the objection to this act.”); *Blanchard*, 3 F. Cas. at 650 (insisting that a retroactive interpretation should “never [be] adopted without absolute necessity,” but holding that retroactive application was not at issue in that case); *see also Watson v. Mercer*, 33 U.S. (8 Pet.) 88, 105, 110 (1834) (refusing to address counsel’s argument that the canon requires prospective interpretation “even when [a statute’s] language would have borne a different construction” and holding itself bound by state court interpretation).

¹⁶⁴ *See, e.g., Heth*, 7 U.S. (3 Cranch) at 409 (Johnson, J.) (indicating that even apart from the canon, words of the act “point to a future operation”); *id.* at 411 (Washington, J.) (interpreting the act prospectively in reliance only upon language with no reference to the canon); *id.* at 413 (Paterson, J.) (treating the canon as a tie breaker for ambiguous language); *id.* at 414 (Cushing, J.) (describing prospective application as the “general and true intent” of the statute); *see also Reynolds*, 27 U.S. (2 Pet.) at 434-35 (acknowledging the canon but determining that “the language of the statute is entirely prospective”); *Prince*, 19 F. Cas. at 1332 (Story, J.) (applying canon, but also emphasizing that “there is nothing in the wording of this act, which points to a retrospective operation, and the whole intent may be satisfied by restraining it to future cases”).

canon as taking words “in the sense which they naturally bear on their face.”¹⁶⁵ On the other hand, some explained the rule as a judicial effort to temper laws “objectionable in principle and unjust in practice.”¹⁶⁶ Even in the unlikely event that early federal courts had a relatively uniform understanding of why they were applying the canon, the evidence is too scant to justify any conclusion as to what that rationale was.

5. The Sovereign Immunity Clear Statement Rules

Justice Iredell’s opinion in *Chisholm v. Georgia*¹⁶⁷ contains an early expression of the canon requiring a clear statement before interpreting a federal law (in that case, the Constitution) to override state sovereign immunity. In considering whether Article III authorizes federal courts to entertain citizen suits against the states, Justice Iredell asserted that “nothing but express words, or an insurmountable implication (neither of which I consider, can be found in this case) would authorise the deduction of so high a power.”¹⁶⁸ Two of the other opinions in *Chisholm* seem implicitly to acknowledge the principle insofar as each found the necessary “clear expression” in Article III.¹⁶⁹ The

¹⁶⁵ 3 STORY, *supra* note 152, § 401, n.a. Indeed, for Story, the prospective operation of legislation is an example of the situation where the words are so clear that “there is generally no necessity to have recourse to other means of interpretation.” *Id.* § 401.

¹⁶⁶ SEDGWICK, *supra* note 100, at 202; *see also* *Watson*, 33 U.S. (8 Pet.) at 105 (argument of counsel) (“In England, where the liberty and security of the subject has no other basis to rest upon than the common law, retrospective legislation is uniformly rejected by her courts of justice.”); WILLIAM P. WADE, A TREATISE ON THE OPERATION AND CONSTRUCTION OF RETROACTIVE LAWS, AS AFFECTED BY CONSTITUTIONAL LIMITATIONS AND JUDICIAL INTERPRETATIONS 40 (1880) (describing the rule as “founded upon the recognized injustice of a method of making laws by which the legislature looks backward to discover past errors to be corrected and past grievances to be remedied”).

¹⁶⁷ 2 U.S. (2 Dall.) 419 (1793), *superseded by* U.S. CONST. amend. XI.

¹⁶⁸ *Id.* at 450. On the one hand, Article III might be viewed as a federal law abrogating state sovereign immunity. On the other hand, Article III might be viewed as a waiver of state sovereign immunity insofar as states might have consented to defending citizen-suits in federal court by ratifying the Constitution. Either way, modern doctrine would require a clear statement before holding a state amenable to suit in federal court.

¹⁶⁹ *See id.* at 464-66 (Wilson, J.) (“The next question under this head, is, – *Has* the Constitution done so? Did those people mean to exercise this, their undoubted power? These questions may be resolved, either by fair and conclusive deductions, or by direct and explicit declarations. . . . Fair and conclusive deduction, then, evinces that the *people* of the *United States* did vest this Court with jurisdiction over the State of *Georgia*. . . . But, in my opinion, this doctrine rests not upon the legitimate result of fair and conclusive deduction from the Constitution: It is confirmed, beyond all doubt, by the *direct* and *explicit* declaration of the Constitution itself.”); *id.* at 467 (Cushing, J.) (“The judicial power, then, is expressly extended to ‘*controversies between a State and citizens of another State*.’”).

remaining two made no mention of it and indeed interpreted Article III in ways that belied the canon's existence.¹⁷⁰

Apart from *Chisholm*, I found no federal case decided before 1840 mentioning the canon as it applied to either state or federal sovereign immunity. And the discussion of the canon in *Chisholm* primarily involved construction of the Constitution.¹⁷¹ I found no federal case addressing the question whether a generally applicable *statute* should be interpreted either to waive the sovereign immunity of the United States or abrogate the sovereign immunity of a state. The dearth of case law is not surprising, however, because such questions did not arise during that time period. As John Harrison has explained, "It was taken for granted that the sovereign could not be sued [in its own courts], so the questions that actually came up mainly involved the boundary between impermissible suits against the government and permissible suits against officers and other agents."¹⁷² Litigants simply did not try to sue the federal government qua government, and Congress did not enact statutory waivers of sovereign immunity until the latter half of the nineteenth century.¹⁷³

¹⁷⁰ Rather than focusing on the showing necessary to overcome sovereign immunity, Justice Blair was at pains to show that legislative policy arguments could not overcome plain text. *See id.* at 451 (Blair, J.) (asserting that the argument against jurisdiction based on the potential unenforceability of the judgment might be deserving of weight in "the construction of doubtful Legislative acts, but can have no force, I think, against the clear and positive directions of an act of *Congress* and of the Constitution"). Chief Justice Jay not only failed to mention the canon, but he applied a competing principle to construe Article III broadly. *See id.* at 476 (Jay, C.J.) ("This extension of power is *remedial*, because it is to settle controversies. It is therefore, to be construed liberally. It is politic, wise, and good that, not only the controversies, in which a State is *Plaintiff*, but also those in which a State is *Defendant*, should be settled; both cases, therefore, are within the reason of the remedy; and ought to be so adjudged, unless the obvious, plain, and literal sense of the words forbid it.").

¹⁷¹ *See id.* at 430. The question whether the Constitution enables private litigants to sue the states is settled by the Eleventh Amendment. *See* U.S. CONST. amend. XI. The question whether Congress possesses the power to abrogate this baseline immunity in reliance upon its Article I authority, or only in reliance upon its enforcement power under the Reconstruction Amendments, did not arise until much later. *See* *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 15 (1989) (Brennan, J., plurality opinion), *overruled by* *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-56 (1976).

¹⁷² John Harrison, *Sovereign Immunity and Congress's Enforcement Powers*, 2006 SUP. CT. REV. 353, 358. Any question about whether a state was suable in its own courts would have been discussed in state cases, and this study concerns only federal cases. State courts, however, operated on the same assumption. *Id.*

¹⁷³ The first significant statutory waiver of federal sovereign immunity occurred in 1855, when Congress created the United States Court of Claims for the adjudication of contract disputes with the federal government. Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 530-31 (2008). It was ninety more years before Congress passed the Federal Tort Claims Act, which subjected the federal government to tort liability. *Id.* at 534.

Nor did anyone at the time pay much attention to Congress's power to abrogate the sovereign immunity of a state. According to Harrison, the question "whether Congress could create a cause of action for a private person against a nonconsenting state, seems not to have arisen in the nineteenth century."¹⁷⁴

That said, eighteenth and nineteenth century courts did face the question whether generally worded statutes applied to the government outside the context of sovereign immunity. In interpreting such statutes, federal courts relied upon an established maxim of English law that Blackstone described as follows:

I shall only further remark, that the king is not bound by any act of parliament, unless he be named therein by special and particular words. The most general words that can be devised ("any person or persons, bodies politic or corporate, etc.") affect not him in the least, if they may tend to restrain or diminish any of his rights or interests.¹⁷⁵

This principle by no means originated in Blackstone's time; it appears in, among other sources, Bacon's *Abridgement of the Law*, Bracton's treatise, and the sixteenth century *Discourse upon the Exposition and Understandinge of Statutes*.¹⁷⁶ Writing from an American standpoint, Justice Story articulated the maxim this way: "It is a general rule in the interpretation of legislative acts not to construe them to embrace the sovereign power or government, unless expressly named or included by necessary implication."¹⁷⁷ Relying on this principle, federal courts held the United States exempt from statutes of limitation,¹⁷⁸ the jurisdictional limitations of the Judiciary Act of 1789,¹⁷⁹ and a

¹⁷⁴ Harrison, *supra* note 172, at 358.

¹⁷⁵ 1 BLACKSTONE, *supra* note 89, at *262.

¹⁷⁶ 8 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 81-83 (Philadelphia, Thomas Davis 1845) ("[T]he king is not under the coercive power of the law The king, in regard to decency and order, cannot suffer a common recovery"); 2 BRACTON, *supra* note 155, at 33 ("[N]o writ runs against [the king]."); DISCOURSE, *supra* note 86, at 161 (arguing that "statutes that doe abridge the kynges prerogative" must be narrowly construed); *id.* at app. II ("The king is not bound when the statute is general and at the time it is made the king will have right or prerogative; he is not bound unless it is specially provided as Magna Carta . . . does not bind the king."). Appendix II of the *Discourse*, titled "When the king will be bound by statute," goes on to give a fairly detailed description of the principle. *Id.*; see also DWARRIS, *supra* note 139, at 50 ("The rights of the crown can never be taken away by doubtful words, or ambiguous expressions, but only by express terms.").

¹⁷⁷ United States v. Greene, 26 F. Cas. 33, 34 (Story, Circuit Justice, C.C.D. Me. 1827) (No. 15,258). For state cases that federal courts often cited for this same principle, see *Inhabitants of Town of Stoughton v. Baker*, 4 Mass. (3 Tyng) 522, 528 (1808) (invoking the maxim to hold that laches does not run against the state); *People v. Herkimer*, 4 Cow. 345 (N.Y. Sup. Ct. 1825) (invoking the maxim to hold that insolvent acts did not extinguish claims of the state).

¹⁷⁸ United States v. Hoar, 26 F. Cas. 329, 329-30 (Story, Circuit Justice, C.C.D. Mass. 1821) (No. 15,373).

¹⁷⁹ *Greene*, 26 F. Cas. at 34.

bankruptcy law.¹⁸⁰ American treatise writers, likewise, identified this sovereign exemption as an important principle of statutory interpretation.¹⁸¹ Thus during the eighteenth and nineteenth centuries, the government was read out of otherwise unqualified statutes unless the text, either expressly or by “necessary implication,” stated otherwise.¹⁸²

Courts and commentators offered multiple rationales for the rule. At English common law, the rule was grounded in the sovereignty of the king, and American courts argued that the sovereign federal and state governments enjoyed this same benefit.¹⁸³ Given, however, that the sovereign prerogatives of the Crown did not pass unfiltered through the American constitutional structure,¹⁸⁴ other uniquely American rationales were also advanced in support of the maxim. The rule was defended upon a “policy of preserving the public rights, resources, and property from injury and loss by the negligence of public officers.”¹⁸⁵ Justice Story insisted that “[i]ndependently of any doctrine

¹⁸⁰ *United States v. Hewes*, 26 F. Cas. 297, 299 (E.D. Pa. 1840) (No. 15,359).

¹⁸¹ DWARRIS, *supra* note 153, at 151 (“[T]he general words of a statute do not include the government or affect its rights, unless such intention be clear and indisputable, upon the face of the act.”); *see also* 1 KENT, *supra* note 151, at 3; SEDGWICK, *supra* note 100, at 36 (indicating that the English rule “is recognized also in this country”).

¹⁸² *See Greene*, 26 F. Cas. at 34. It is worth emphasizing that this canon of construction was not inviolate. Summarizing exceptions recognized in the cases, Henry Campbell Black observed that the sovereign is not exempt when “neither its prerogative, rights, nor property are in question.” BLACK, *supra* note 131, at 98. Thus, the Court interpreted general procedural statutes to bind the United States as litigant. *See, e.g., United States v. Knight*, 39 U.S. (14 Pet.) 301, 315-16 (1840) (“[W]e feel satisfied, that when, as in this case, a statute which proposes only to regulate the mode of proceeding in suits, does not divest the public of any right, does not violate any principle of public policy; but on the contrary, makes provisions in accordance with the policy which the government has indicated by many acts of previous legislation . . . we shall best carry into effect the legislative intent, by construing the executions at the suit of the United States, to be embraced within the act of 1828.”); *Green v. United States*, 76 U.S. (9 Wall.) 655, 658 (1869) (holding that an evidentiary statute binds the United States because “[w]e do not see why this rule of construction should apply to acts of legislation which lay down general rules of procedure in civil actions”).

¹⁸³ *See, e.g., Hoar*, 26 F. Cas. at 329-30 (identifying sovereign prerogative as a justification for the doctrine); *Greene*, 26 F. Cas. at 34; *Hewes*, 26 F. Cas. at 301; *see also* *People v. Herkimer*, 4 Cow. 345, 348 (N.Y. Sup. Ct. 1825) (holding that “the same rule must prevail” in New York for “the People of the state being the sovereign, have succeeded to the rights of the King”).

¹⁸⁴ Theodore Sedgwick argued that the rule was primarily a relic of “old feudal ideas of royal dignity and prerogative” and that it should be abandoned in this country. SEDGWICK, *supra* note 100, at 36. Sedgwick was not opining about the wisdom of this rule when applied specifically to questions of sovereign immunity, for, as was described above, the rule was not applied in that context until the twentieth century. *See supra* notes 172-74 and accompanying text.

¹⁸⁵ SEDGWICK, *supra* note 100, at 105-06.

founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon legislative intention.”¹⁸⁶ In other words, the government rarely intends to subject itself to its own regulations, and courts should interpret statutes accordingly.

Federal courts continued to apply this maxim throughout the nineteenth and twentieth centuries.¹⁸⁷ When suits in federal courts against the federal and state governments became an issue in the twentieth century, federal courts applied the canon in that context.¹⁸⁸ The Supreme Court held that it would only interpret a statute to waive federal sovereign immunity where the express language or necessary implication of the statute evidenced Congress’s intent to

¹⁸⁶ *Hoar*, 26 F. Cas. at 330; *see also Greene*, 26 F. Cas. at 34-35 (rationalizing governmental exemption based primarily on legislative intent with the maxim as a secondary consideration); *Hewes*, 26 F. Cas. at 298 (“[I]f it be the settled law, it must be presumed that congress knew it to be so, and had it on their minds in passing the act in question.”). Writing early in the twentieth century, Henry Campbell Black explained it this way:

It is said that laws are supposed to be made for the subjects or citizens of the state, not for the sovereign power. Hence, if the government is not expressly referred to in a given statute, it is presumed that it was not intended to be affected thereby, and this presumption, in any case where the rights or interests of the state would be involved, can be overcome only by clear and irresistible implications from the statute itself.

BLACK, *supra* note 131, at 94-95.

¹⁸⁷ *See, e.g.*, *Dollar Sav. Bank v. United States*, 86 U.S. (19 Wall.) 227, 239 (1873) (applying the maxim to hold that a statutory limitation on remedies did not apply to the United States); *United States v. Herron*, 87 U.S. (20 Wall.) 251, 261 (1873) (applying the maxim to hold that discharge under the Bankruptcy Act did not extinguish the federal government’s ability to collect taxes owed); *United States v. Nashville, Chattanooga & St. Louis Ry. Co.*, 118 U.S. 120, 125 (1886) (applying the maxim to hold that the statute of limitations did not run against the federal government); *United States v. Am. Bell Tel. Co.*, 159 U.S. 548, 554 (1895) (applying the maxim to hold that a limitation on the Court’s appellate jurisdiction did not apply when the United States is the petitioner); *United States v. United Mine Workers*, 330 U.S. 258, 273 (1947) (applying the maxim to hold that a provision of the Norris-LaGuardia Act divesting federal courts of jurisdiction to issue injunctions in a specified class of cases did not apply to the United States).

¹⁸⁸ *See* 3 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 62:01 (Chicago, Callaghan & Co. 1891) (identifying the modern sovereign immunity clear statement rule, as applied to both waivers and abrogations, as a specific application of the old English maxim exempting the government from generally applicable statutes). Students of English statutory interpretation have observed that English courts have similarly applied the old maxim to the relatively new problem of interpreting statutory waivers of sovereign immunity. *See* H. Street, *The Effect of Statutes on the Rights and Liabilities of the Crown*, 7 U. TORONTO L.J. 357, 381-83 (1948). Because the Crown only began to waive its sovereign immunity in the twentieth century, it was only then that English courts began fleshing out the effect of the traditional presumption on statutes dealing with sovereign immunity. *Id.* at 357.

accomplish that result.¹⁸⁹ The Court held that it would interpret a state statute to waive the state's sovereign immunity only when the state legislature had been clear.¹⁹⁰ And the Court held that it would not interpret a federal statute to abrogate the states' sovereign immunity unless the statute's express language or necessary implication required it to do so.¹⁹¹

Given the age of the general presumption of exemption, it would be inaccurate to characterize the sovereign immunity clear statement rule as having been fashioned from whole cloth in the twentieth century. It is better understood as a conscious application of a time-honored rule of sovereign exemption to a new kind of incursion on sovereignty.¹⁹²

¹⁸⁹ See *Schillinger v. United States*, 155 U.S. 163, 166 (1894) ("Beyond the letter of such consent [to be sued] the courts may not go, no matter how beneficial they may deem, or in fact might be, their possession of a larger jurisdiction over the liabilities of the government."); *Price v. United States*, 174 U.S. 373, 376 (1899) (finding that the government's "liability in suit cannot be extended beyond the plain language of the statute authorizing it"); *E. Transp. Co. v. United States*, 272 U.S. 675, 686 (1927) ("The sovereignty of the United States raises a presumption against its suability, unless it is clearly shown; nor should a court enlarge its liability to suit conferred beyond what the language requires.").

¹⁹⁰ See *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909) (holding that interpreting a state statute to relinquish the state's property rights in a manner that essentially waived the state's sovereign immunity was warranted only in the face of "the most express language of overwhelming implication from the text" to indicate that the state intended to accomplish that result); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944) (asserting that a state statute must contain "a clear declaration of the state's intention to submit [to being sued] to other courts than those of its own creation"); *Cooper S.S. Co. v. Michigan*, 194 F.2d 465, 468 (6th Cir. 1952) (claiming that "a strict rule of construction is applicable" in determining whether a state statute waives the state's immunity from suit in a particular court).

¹⁹¹ See *Employees of Dep't of Health & Welfare of Mo. v. Dep't of Pub. Health & Welfare of Mo.*, 411 U.S. 279, 285 (1973) (refusing to infer that a federal statute authorized suits against states where the statute's text and legislative history were silent on the point); *Edelman v. Jordan*, 415 U.S. 651, 674 (1974) (holding that a federal statute authorizing "suits against a general class of defendants" did not authorize suits against states); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99-100 (1984) (holding that court will not interpret a statute to abrogate a state's sovereign immunity absent "unequivocal expression" of congressional intent to accomplish that result); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985) ("[I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment."); cf. *Thebo v. Choctaw Tribe of Indians*, 66 F. 372, 375-76 (8th Cir. 1895) ("The intention of congress to confer . . . jurisdiction [over the Choctaw] upon any court would have to be expressed in plain and unambiguous terms.").

¹⁹² See *supra* note 188.

6. The Indian Canon

Philip Frickey describes the Indian canon – the maxim that statutes dealing with the Indians must be construed in their favor – as the legacy of John Marshall.¹⁹³ It is, therefore, like avoidance and *Charming Betsy*, another uniquely American invention. In *Patterson v. Jenks*, Chief Justice Marshall, interpreting a treaty between the state of Georgia and the Creek Indians, noted that in a contest between those two parties, ambiguity should be resolved in a manner “favourable to the pretension of the less powerful and less intelligent or skilful [sic] party to the compact.”¹⁹⁴ That was the first mention of the canon, but the case that really launched it was *Worcester v. Georgia*, which interpreted a treaty between the Cherokee Indians and the United States.¹⁹⁵ Marshall’s opinion favors the Indians in construing the treaty,¹⁹⁶ but it is the starker language from Justice M’Lean’s concurrence that has been quoted by later cases: “The language used in treaties with the Indians should never be construed to their prejudice. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.”¹⁹⁷

After *Worcester*, the Indian canon lay dormant in federal case reports until the Supreme Court invoked it again thirty-four years later in *In re Kansas Indians*, where the Court applied the canon to a treaty exempting certain Miami Indian lands from taxation.¹⁹⁸ I found only two other nineteenth century cases invoking the canon.¹⁹⁹ Given the paucity of nineteenth century cases applying the canon, twentieth century courts perhaps overstated the case

¹⁹³ Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 386 (1993).

¹⁹⁴ *Patterson v. Jenks*, 27 U.S. (2 Pet.) 216, 229 (1829). Because the dispute in that case was between two private parties claiming title under Georgia, Marshall did not actually apply the canon. *Id.*

¹⁹⁵ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 541 (1832). The case is famous less for its invocation of the Indian canon than for the way that both the state of Georgia and President Jackson resisted the Court’s disposition of the case. See Amy Coney Barrett, *Introduction*, 83 NOTRE DAME L. REV. 1147, 1154-55 (2008).

¹⁹⁶ Unlike Justice M’Lean’s opinion, Marshall’s opinion contains only a short and relatively oblique discussion of the Indian canon. *Worcester*, 31 U.S. (6 Pet.) at 552-53 (construing treaty language from the perspective of “the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language”); see also Frickey, *supra* note 193, at 402 (commenting that Marshall “found some reason to work hard to counter the ordinary textual meaning of the fourth article” where “the principles or motivations for doing so are not evident in his discussion of the article”).

¹⁹⁷ *Worcester*, 31 U.S. (6 Pet.) at 582 (M’Lean, J., concurring).

¹⁹⁸ *In re Kansas Indians*, 72 U.S. (5 Wall.) 737, 760 (1866).

¹⁹⁹ *Choctaw Nation v. United States*, 119 U.S. 1, 27-28 (1886); *Jones v. Meehan*, 175 U.S. 1, 11 (1899). Both of these cases invoked the canon in the context of treaty construction.

when they described the canon as “well-settled law”²⁰⁰ and a “rule of construction [that] has been recognized, without exception, for more than a hundred years.”²⁰¹

The Indian canon is unique among the substantive canons discussed in this Part because it began in the treaty context as essentially a rule of contract interpretation. Insofar as it instructs courts to construe treaties in favor of the less sophisticated party to them, the rule resembles the approach that courts take in the construction of adhesion contracts.²⁰² What is interesting about the Indian canon for present purposes is that it jumped without discussion from the interpretation of treaties to the interpretation of statutes. Treaty making with the Indians ceased in 1871 in response to demands from the House of Representatives for a role in the making of federal Indian policy.²⁰³ Thereafter, relations between the United States and Indian tribes were governed by statute. When courts began interpreting these statutes in the early 1900s, they assumed, without reflection, that the canon should continue to apply. For example, without considering the potential impact of the structural differences between statutes and treaties, the Circuit Court of Nevada asserted that the canon should apply to statutes dealing with Indians simply because statutes had replaced treaties as the mechanism by which Indian policy was made.²⁰⁴ The Supreme Court’s first application of the canon to a statute did not even acknowledge the shift from treaty to statute.²⁰⁵

That is not to say that federal courts have been wrong to apply the Indian canon to statutes.²⁰⁶ The point for present purposes is not the validity of the canon, but the utility of the historical evidence for revealing the attitudes of early federal courts toward substantive canon-making. And the peculiar circumstances surrounding the emergence of this canon – particularly its grounding in treaty interpretation, where a court enforces an agreement reached by multiple parties rather than functioning solely as Congress’s faithful agent – make its history of limited utility notwithstanding its presence on the list of old canons that modern courts continue to apply.

²⁰⁰ *Conway v. United States*, 149 F. 261, 265-66 (C.C.D. Neb. 1907).

²⁰¹ *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

²⁰² Frickey, *supra* note 193, at 406-08.

²⁰³ *Id.* at 421 n.164.

²⁰⁴ *Conway*, 149 F. at 265.

²⁰⁵ *Choate*, 224 U.S. at 675.

²⁰⁶ Frickey has made powerful arguments as to why the “difference in form should not . . . substantially alter judicial methodology,” Frickey, *supra* note 193, at 421-22, including the argument that the canon can be understood as an outgrowth of the “sovereign-to-sovereign, structural relationship” between Indian nations and the United States. *Id.* So understood, the canon might be rationalized with reference to the Constitution rather than to a contract analogy. See *infra* Part IV.C.

7. Other Canons

Between 1789 and 1840, federal courts employed more substantive canons than the six described above. For example, *Cohens v. Virginia* can be read as an early statement of the presumption against preemption.²⁰⁷ There, the Court held that a federal statute regulating lotteries in the District of Columbia did not permit the sale of lottery tickets in Virginia where state law prohibited them.²⁰⁸ In interpreting the statute, the Court explained:

To interfere with the penal laws of a State . . . is a very serious measure, which Congress cannot be supposed to adopt lightly, or inconsiderately. The motives for it must be serious and weighty. It would be taken deliberately, and the intention would be clearly and unequivocally expressed. An act, such as that under consideration, ought not, we think, to be so construed as to imply this intention, unless its provisions were such as to render the construction inevitable.²⁰⁹

Cohens thus reflects an impulse to proceed cautiously when a federal statute arguably displaces a state's control of her penal laws – in modern parlance, when a federal statute arguably displaces a state's historic police power.²¹⁰ Notwithstanding *Cohens*, the presumption against preemption of state law seems not to have become an established part of the interpretive lexicon until the latter half of the nineteenth century.²¹¹ In 1859, the Court asserted that “the repugnance or conflict should be direct and positive, so that the two acts could

²⁰⁷ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 443 (1821).

²⁰⁸ *Id.* at 447.

²⁰⁹ *Id.* at 443.

²¹⁰ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

²¹¹ Early cases confronting preemption analyzed the issue without discussing any special interpretive rule. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 220-21 (1824) (finding preemption without discussion of presumption); *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 138-39 (1837) (finding no preemption without discussion of presumption); *id.* at 145-46 (Thompson, J., concurring). Notably, I found no discussion of any canon applicable to questions of preemption in nineteenth century legal treatises. The canon does seem to resemble, however, the canon historically applied when a statute appears to conflict with one passed earlier by the same legislature. In that circumstance, courts applied a presumption against repeal of the earlier statute. See, e.g., DWARRIS, *supra* note 139, at 54-55 & n.4. Analogously, when Congress enacts a statute that arguably displaces a state's preexisting regulatory scheme, the presumption against preemption might be understood as a presumption against supersession or repeal of that preexisting scheme. This canon disfavoring implied repeal strongly resembles the concept of field preemption in federal-state relations. See ENDLICH, *supra* note 88, § 241, at 320-21 (“[I]n order to constitute a repeal of a statute by implication, such later act must not only refer to the same subject, and also have the same object in view as the earlier, but it must cover the whole subject matter of the same.”); cf. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000) (arguing that the presumption against preemption derives from the presumption against implied repeals; the Supremacy Clause functions as a non obstante provision, which, under that classic approach, instructed courts to set aside the presumption).

not be reconciled or consistently stand together” if a federal statute was to supersede state law.²¹² This principle was repeated and ultimately expanded thereafter.²¹³

The courts also applied a grab bag of other interpretive rules. The Supreme Court applied a presumption against the extraterritorial application of the law.²¹⁴ It opined that if a statute was ambiguous, it would defer to the executive’s construction of it.²¹⁵ Courts also invoked the canon that remedial statutes should be broadly construed,²¹⁶ and at least when they were construing state statutes, courts invoked the canon that statutes in derogation of the common law should be narrowly construed.²¹⁷

²¹² *Sinnot v. Davenport*, 63 U.S. (22 How.) 227, 242-43 (1859).

²¹³ *See, e.g., Reid v. Colorado*, 187 U.S. 137, 148 (1902). The Court’s modern cases also apply the presumption to construe even express preemption provisions narrowly. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518, 523 (1992). This application of the presumption is controversial. *See supra* note 56.

²¹⁴ *See, e.g., Bond v. Jay*, 11 U.S. (7 Cranch) 350, 353 (1813) (“It is so unusual for a legislature to employ itself in framing rules which are to operate only on contracts made without their jurisdiction, between persons residing without their jurisdiction, that Courts can never be justified in putting such a construction on their words if they admit of any other interpretation which is rational and not too much strained.”). The canon does not appear to have been widely applied by early nineteenth century courts. It is, however, recognized by modern courts. *See, e.g., EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (“[L]egislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949))); *see also* Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT’L L. 505, 513-16 (1997); William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT’L L. 85, 92-93 (1998).

²¹⁵ *United States v. Vowell & M’Clean*, 9 U.S. (5 Cranch) 368, 372 (1810).

²¹⁶ *Ross v. Doe*, 26 U.S. (1 Pet.) 655, 667 (1828); *Fisher v. Consequa*, 9 F. Cas. 120, 121 (Washington, Circuit Justice, C.C.D. Pa. 1809) (No. 4816); *Dougherty v. Edmiston*, 7 F. Cas. 962, 962 (Todd, Circuit Justice, C.C.D. Tenn. 1812) (No. 4025); *Whittemore v. Cutter*, 29 F. Cas. 1120, 1120 (Story, Circuit Justice, C.C.D. Mass. 1813) (No. 17,600). It is worth noting the occasions on which courts identified the plain language of a statute as a limit to the canon’s application. *See, e.g., Denn v. Reid*, 35 U.S. (10 Pet.) 524, 527 (1836); *Lodge v. Lodge*, 15 F. Cas. 781, 781 (Story, Circuit Justice, C.C.D. Mass. 1829).

²¹⁷ *See, e.g., Brown v. Barry*, 3 U.S. (3 Dall.) 365, 367 (1797) (maintaining that a Virginia statute regarding the effect of a repealing act on the act first repealed, “being in derogation of the common law, is to be taken strictly”); *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. (7 Cranch) 603, 623 (1812) (refusing to read a Virginia statute to abolish the common law “inquest of office” requirement because “the common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose”); *cf. Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 657-61 (1834) (refusing counsel’s argument that the canon should apply to the construction of the Copyright Act because the majority thought there was no federal common law of copyright). While federal courts did not apply the canon to the construction of federal statutes, they did apply it to measure compliance with federal statutes. *See, e.g., Bell v. Morrison*, 26 U.S. (1 Pet.) 351, 355

B. *The Implications of History for Textualism*

The evidence described in Section A confirms that federal courts have been developing and applying substantive canons for as long as they have been interpreting statutes. While federal courts may have debated and ultimately dropped their claim to the power of equitable interpretation, my research has uncovered no evidence that they ever even questioned their power to develop and apply specific substantive canons of interpretation.²¹⁸ Early federal courts did not maintain that any particular substantive canon could trump the plain language of a statute; on the contrary, even where a statute infringed upon an area that courts guarded with a substantive canon, courts held that the express language of the statute controlled.²¹⁹ But history validates the general proposition that the use of substantive canons has long been thought legitimate. The problem remains of determining exactly what light this history sheds on the original understanding of the scope of “the judicial Power.”

Some of the history reflects what would be, even for the textualist, an uncontroversial use of substantive canons. Lenity is a particularly good example. Textualists have expressed skepticism about lenity’s legitimacy on the ground that the canon permits a court to depart from a statute’s most natural interpretation.²²⁰ To the extent that textualists have indicated a belief that such departures are part of the historical tradition of lenity in America,²²¹ that belief is mistaken. To be sure, an effort to undermine the text was part of the tradition of lenity as applied by the English courts that invented the canon. But as Section A.1 recounts, federal courts modified the canon, emphasizing that the best interpretation of a penal statute should always trump a more lenient but less plausible one. For early courts, lenity served as a tie breaker between two equally plausible interpretations of statutory text,²²² and as Part I explains, this use of a canon is perfectly consistent with faithful agency.

(1828) (“The authority to take testimony in [the manner permitted by the Judiciary Act of 1789], being in derogation of the rules of the common law, has always been construed strictly; and, therefore, it is necessary to establish, that all the requisites of the law have been complied with, before such testimony is admissible.”); *Jones v. Neale*, 13 F. Cas. 995, 995-96 (C.C.D.N.C. 1796) (No. 7483) (refusing to admit testimony taken by deposition *de bene esse*, as permitted by the Judiciary Act of 1789, unless all of the requirements of the act were strictly observed, because when a statute is in derogation of the common law, “[t]o fail in one iota of the ceremonies prescribed by it is to fail in the whole”).

²¹⁸ See Eskridge, *supra* note 2, at 1100 (asserting that his study of early interpretive practice revealed “no thinker questioning the canons as a methodology”).

²¹⁹ In addition to the cases described in each section of this Part, see, for example, *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 661-62 (1829) (“Every technical rule, as to the construction or force of particular terms, must yield to the clear expression of the paramount will of the legislature.”).

²²⁰ See Scalia, *supra* note 30, at 582-83.

²²¹ *Id.*

²²² Recall too that in addition to justifying lenity on grounds of fairness to the accused, federal courts described the canon as a check upon themselves insofar as it prevented them

More troubling for the textualist are the cases in which federal courts invoked substantive canons to justify a departure from a statute's most natural reading. Courts identified an outer limit to the judicial power by disavowing the ability to adopt an interpretation that contravened the plain text. But they claimed substantial leeway to work within meanings that the statute could bear. Recall that in *Charming Betsy*, Marshall argued that "an act of Congress ought never to be construed to violate the law of nations if *any other possible construction remains*."²²³ In describing the avoidance canon, Justice Story opined that to avoid an unconstitutional interpretation of a statute, a court should adopt a construction "*which although not favored by the exact letter, may yet well stand with the general scope of the statute, and give it a constitutional character*."²²⁴ Courts applying the presumption against retroactivity explained that they would "*struggle hard*" against a retroactive interpretation,²²⁵ refusing to adopt it "unless it contained *express words* to that purpose."²²⁶ Courts applying the government-exemption rule read an exception into otherwise unqualified text absent a clear statement to the contrary.²²⁷ Courts also read treaties with the Indians in favor of the Indians, rather than as Congress may have understood or intended, but the contractual origins of the Indian canon make it a less enlightening gauge of how federal courts understood the scope of their power to interpret statutes.²²⁸

It is unclear how seriously statements like the ones recounted above represent a qualification of the obligation of faithful agency. For one thing, the evidence is spotty. Many of these canons were only rarely applied during the first fifty years of the federal courts' existence,²²⁹ and even when they were applied, there is no clear pattern of courts using them to deviate from the most

from expanding penal statutes through equitable interpretation. *See supra* notes 102-03 and accompanying text. To the extent that federal courts applied the canon to this end, they applied it to reinforce, rather than undermine, their role as faithful agents.

²²³ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (emphasis added); *see also* *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801).

²²⁴ *Soc'y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 769 (Story, Circuit Justice, C.C.D.N.H. 1814) (No. 13,156) (emphasis added).

²²⁵ *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (emphasis added).

²²⁶ *United States v. Heth*, 7 U.S. (3 Cranch) 399, 414 (1806) (Cushing, J.) (emphasis added).

²²⁷ *See supra* Part II.A.5.

²²⁸ *See supra* Part II.A.6.

²²⁹ For that matter, the fact that there were relatively few federal statutes – and that federal courts possessed no general federal question jurisdiction – means that the overall number of statutory interpretation decisions in the early federal courts is low. It was not until what Guido Calabresi describes as the late-nineteenth century "orgy of statute making" that federal courts more fully entered the business of interpreting statutes. CALABRESI, *supra* note 10, at 86. The 1875 grant of general federal question jurisdiction surely also contributed to this development.

natural interpretation of text. The *Charming Betsy* canon was invoked in only a handful of cases during this time period, and only two used the canon to justify what was arguably a departure from the best reading of the text.²³⁰ References to the avoidance canon are similarly sparse in early reporters; that canon did not crystallize until late in the nineteenth century.²³¹ The presumption against retroactivity was, by contrast, widely acknowledged, but the cases actually applying it, as opposed to simply describing it, did not deviate from what the courts presented as the most natural reading of the statute.²³² That leaves the clear statement sovereignty rule as the starkest example of early courts both describing and applying a maxim justifying an interpretation other than the most natural reading of the statute.²³³

Moreover, a departure from the best reading of a statute casts light on a court's understanding of its power to deviate from the obligation of faithful agency only to the extent that the court justifies the departure with reference to a policy or policies external to the statute. To the extent that any of these canons justifies a departure from text in the service of legislative intention, its application affirms rather than undercuts a strong norm of faithful agency.²³⁴ Textualists do not maintain that early federal courts approached statutory language as would modern textualists; on the contrary, they freely admit that nineteenth century judges often took a purposivist approach to the task of deciphering acts of Congress.²³⁵ The insights of public choice theory – stemming from mid-twentieth century work in political science and economics – have prompted textualists to challenge the proposition that focusing upon the legislature's subjective intention is the best (or even a coherent) way of discharging the judicial role as Congress's faithful agent.²³⁶ But as Part I explains, the disagreement between textualists and traditional intentionalists

²³⁰ See *supra* note 120 and accompanying text.

²³¹ See *supra* notes 151-54 and accompanying text.

²³² See *supra* notes 163-64 and accompanying text.

²³³ See *supra* Part II.A.5.

²³⁴ Cf. Yoo, *supra* note 16, at 1616-18 (arguing that Chief Justice Marshall often invoked canons as a means of serving legislative intent, and that such invocations reflect his commitment to legislative supremacy).

²³⁵ Manning explains:

Modern textualists . . . do not, and could not, maintain that the faithful agent theory historically embraced all of the specific premises of modern textualism. Rather, textualism is premised on the idea that the faithful agent theory represents a deeply rooted general principle of judicial fidelity to legislative commands, and that modern insights about the legislative process suggest that textualism offers a superior means of implementing that theory.

John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1653 n.28 (2001).

²³⁶ See *supra* notes 5-6 and accompanying text.

lies in their respective approaches to language, not in their baseline commitment to the norm of faithful agency.²³⁷

With the exception of the Indian canon, which counseled courts to construe statutes *against* Congress,²³⁸ courts offered legislative intention as a justification for each of the canons that arguably authorized a departure from the statute's best reading.²³⁹ Significantly, courts treated lenity, the canon most clearly justified on grounds other than legislative intent, as a tie breaker applicable only when two equally plausible interpretations of a statute were available. If Congress would not want to violate the Constitution or customary international law, a court arguably does no disservice to Congress by privileging its intent over its apparently ill-chosen words. Similarly, if Congress would want its legislation to be prospective and the government to be exempt from generally applicable regulations, reading statutes to accomplish those goals is an attempt to realize the legislative will. The court may be mistaken about its ability to know what Congress would want,²⁴⁰ but its allegiance to legislative intent is allegiance to Congress.

Yet at the same time that courts justified these canons with reference to legislative intent, they invoked other, substantive rationales. Part I explained that the modern treatment of substantive canons reveals that a canon's purpose often lies in the eyes of the beholder,²⁴¹ and the same is true of the canon's historical treatment. The evidence suggests that the avoidance canon was couched exclusively in the language of legislative intent. But courts offered alternative rationales for *Charming Betsy* (respect for customary international law and the role of the political branches in determining whether to breach it),²⁴² retroactivity (mitigating harsh results),²⁴³ and the clear statement government exemption (protecting the public from the negligence of government officials).²⁴⁴ To the extent that courts departed from the most plausible reading of a statute on grounds other than legislative intent, these cases are in tension with an unqualified version of faithful agency.

In sum, the historical record clearly establishes that federal courts believed themselves empowered to deploy a substantive canon like lenity for the purpose of clarifying truly ambiguous language. It also offers support for, but does not establish, the proposition that federal courts believed themselves

²³⁷ See *supra* Part I.B.2.

²³⁸ See *supra* note 202 and accompanying text.

²³⁹ See *supra* notes 126-29 and accompanying text (*Charming Betsy*); notes 147-49 and accompanying text (avoidance); note 165 and accompanying text (retroactivity); note 186 and accompanying text (clear statement sovereignty rules).

²⁴⁰ See *supra* Part I.B.2.

²⁴¹ See *supra* Part I.B.

²⁴² See *supra* notes 126-29 and accompanying text.

²⁴³ See *supra* note 166 and accompanying text.

²⁴⁴ See *supra* notes 183-86 and accompanying text.

empowered to deploy substantive canons to choose less plausible interpretations of statutory language to advance policy goals.

Notwithstanding the ambiguity in the record, textualists should take seriously the fact that it is suggestive of such power. Moreover, to the extent that textualists themselves apply substantive canons to forgo the best interpretation of a statute in favor of a less plausible one, the constitutional legitimacy of this practice merits a closer look. If the pursuit of legislative intention is the sole justification for these canons, then the intent-skepticism that is a hallmark of textualism would presumably be reason for textualists to abandon them. If, however, the obligation of faithful agency is qualified by a judicial power to take other policy concerns into account, then modern textualists may be justified in applying substantive canons – but in so doing, they need to explain why this qualification of faithful agency is consistent with the constitutional structure.

III. BACKGROUND ASSUMPTIONS IN A MATURE LEGAL SYSTEM

This Part briefly examines a rationale that textualists have offered as a means of reconciling the use of substantive canons with the demands of faithful agency: the proposition that substantive canons comprise a “closed set” of background assumptions against which Congress legislates. Manning has hypothesized:

[T]o the extent that either the canon of avoidance or any particular clear statement rule is well settled, its application would perhaps follow from the textualists’ practice of reading statutes in light of established background conventions. As Justice Scalia has explained, once such rules of construction “have been long indulged, they acquire a sort of prescriptive validity, since the legislature presumably has them in mind when it chooses its language.”²⁴⁵

The Court often asserts that Congress legislates against the background of the canons.²⁴⁶ To the extent that these canons are well-established, they are conventions with which the interpretive community of lawyers is conversant.²⁴⁷ Thus, on this view, Congress’s failure to spell out that a particular statute does not subject the federal government to suit does not reflect the failure of that exemption to run the legislative gamut from policy impulse to enacted law. Rather, it reflects a congressional assumption that

²⁴⁵ Manning, *supra* note 2, at 125 (quoting Scalia, *supra* note 30, at 583).

²⁴⁶ *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991); *see also Cannon v. Univ. of Chi.*, 441 U.S. 677, 699 (1979) (“[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with . . . unusually important precedents . . . and expected its enactment to be interpreted in conformity with them.”).

²⁴⁷ *See* Manning, *supra* note 2, at 113 (“Using such extra-textual conventions, provided that they are firmly established, does not offend textualist premises. . . . Interpreters must apply the same set of assumptions that any ‘reasonably diligent lawyer’ would bring to a statute in context.” (footnotes omitted)).

anyone conversant in American legal conventions would understand the government to be exempt.

Whether the canons of construction are background assumptions against which the interpretive community of lawyers reads statutes is an empirical question beyond the scope of this paper.²⁴⁸ Answering it would require study of whether members of Congress, among others, perceive these norms to be embedded in the language they employ.²⁴⁹ Regardless whether any of these interpretive principles can legitimately claim the status of a linguistic convention, the “background assumptions” justification is an incomplete explanation for the role of substantive canons in a system that embraces faithful agency. If the premise of the argument is that substantive canons were invalid *ab initio*, it does not explain why textualists continue to rely on them. If, on the other hand, its premise is that federal courts once possessed the power to develop substantive canons, it does not explain why that power subsequently dissipated.

Textualists acknowledge that all of these canons-cum-background assumptions represent long-ago judicial choices to advance certain substantive policies.²⁵⁰ Manning offers the entrapment defense as an example: when the Supreme Court thought it unfair for authorities to punish someone whom they had enticed to violate the National Prohibition Act, the Court adopted an

²⁴⁸ For a study suggesting that legislative drafters rely less on rules of statutory interpretation than judges commonly assume, see Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 583-605 (2002).

²⁴⁹ Even though this Article does not explore the empirical question, the cases suggest that textualists may have overestimated the degree to which at least some of the background assumptions they read into statutes are entrenched. For example, textualists have singled out the existence of equitable exceptions as a background assumption of every statute of limitations. Manning, *supra* note 5, at 2465-67. Yet historically, the legitimacy of such exceptions was disputed. See, e.g., SEDGWICK, *supra* note 100, at 277; see also *Sherwood v. Sutton*, 21 F. Cas. 1303, 1307-08 (Story, Circuit Justice, C.C.D.N.H. 1828) (No. 12,782) (finding the weight of authority in favor of tolling the statute of limitations for fraudulent concealment, but acknowledging that American authorities were not entirely in accord on the question). DeSloovere’s collection of statutory interpretation cases includes several state cases rejecting the notion that courts have the authority to create equitable exceptions to statutes of limitation. FREDERICK JOSEPH DESLOOVERE, *CASES ON THE INTERPRETATION OF STATUTES* 496-502 (1931); see also, e.g., *Reynolds v. Hennessy*, 23 A. 639, 640 (R.I. 1891) (“The question whether the fraudulent concealment of the existence of a cause of action will hinder the operation of the statute of limitations is one which has been much discussed, and upon which there has been a radical difference of opinion.”). If the availability of an equitable defense like fraudulent concealment was unsettled as late as the end of the nineteenth century, it is at least questionable whether the availability of that defense is an unstated premise of every limitation statute enacted today.

²⁵⁰ See Manning, *supra* note 5, at 2466 (“[M]odern textualists unflinchingly rely on legal conventions that instruct courts, in recurrent circumstances, to supplement the bare text with established qualifications designed to advance certain substantive policies.”).

entrapment defense, and that the availability of that defense has now become part of the background against which Congress legislates.²⁵¹ The same might be true of a canon like avoidance: initially adopted as a tool of judicial restraint, it is now a baseline rule understood by those conversant in the language of the law.²⁵² Textualists have been unclear about whether the initial adoption of canons to advance substantive policies was permissible as part of the maturing that any legal system must undergo as it develops,²⁵³ or whether it was an unjustified exercise of judicial power.²⁵⁴ But whether they are with us as legitimate exercises of a power whose time has passed or as mistakes now clothed with “prescriptive validity,”²⁵⁵ textualists maintain that the canons are now a “closed set” to which judges cannot add.²⁵⁶

But why is the set closed? One explanation is that the set of substantive canons, once open, closed as the legal system matured. In other words, it may be a legitimate part of a legal system’s evolution to develop substantive background norms that inform and temper the language of legislative commands, but the power to develop such norms dissipates once the legal system is mature. Why, however, would such power exist and subsequently dissipate? It seems odd that the constitutionally granted scope of judicial power would contract over time. Moreover, how would one determine when the system is sufficiently mature that the development of canons must cease? It is peculiar to conceive of Article III as containing an implicit sunset

²⁵¹ See *id.* at 2467-68.

²⁵² See Manning, *supra* note 2, at 125 (“And, to the extent that either the canon of avoidance or any particular clear statement rule is well settled, its application would perhaps follow from the textualists’ practice of reading statutes in light of established background conventions.”).

²⁵³ *Id.* at 113 (“In a developed legal system, this premise gives judges a way to supply many terms that, in a nascent system, might owe their existence to the equity of the statute. In a new legal system, for example, interpreters might rely on the equity of the statute to develop defenses to otherwise unqualified criminal or tort statutes. Modern legislatures however, pass such statutes against deeply embedded ‘norms of interpretation and defense,’ which frame the social understanding of such statutes, just as rules of grammar and diction do.” (quoting Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1913, 1914 (1999))).

²⁵⁴ This view of substantive canons is implicit in Justice Scalia’s explanation of lenity as a canon justified only by its sheer antiquity. See Scalia, *supra* note 30, at 583 (arguing that canons like lenity are illegitimate, but claiming that “[o]nce they have been indulged, they acquire a sort of prescriptive validity, since the legislature presumably has them in mind when it chooses its language – as would be the case, for example, if the Supreme Court were to announce and regularly act upon the proposition that ‘is’ shall be interpreted to mean ‘is not’”); see also Manning, *supra* note 5, at 2475 (characterizing many of the currently existing “background norms” as “hav[ing] been singled out based on the accident of prior judicial developments”).

²⁵⁵ Scalia, *supra* note 30, at 583.

²⁵⁶ Manning, *supra* note 5, at 2474.

provision activated at some undetermined point in time. If textualists are willing to concede that the development of substantive canons was once permissible, it is difficult to see the principled argument for contending that the power subsequently disappeared.

The other, more persuasive explanation for the presence of once-substantive canons in the legal lexicon is essentially a theory of the constitutional second best. Judges may have acted outside the bounds of their authority when they adopted these presumptions in the first place,²⁵⁷ but they have now become part of the way that lawyers think about statutory language. It would unsettle congressional expectations to stop reading statutes against these background norms, so courts should keep doing it. But, the argument runs, that does not justify the invention of new canons. Federal courts must hold the line where it is, enjoying the benefits of canons that mitigate the harshness of language, but not adding any more to the list.

There are two problems with this argument. As an initial matter, it is unclear why textualists would hold the line where it is rather than rolling it back. In other areas in which the Court has found entrenched interpretive practices to be illegitimate, it has applied new rules going forward, while continuing to interpret older statutes in light of old rules. For example, in *Cannon v. University of Chicago*,²⁵⁸ the Court said that while it would generally apply “the strict[er] approach” to implied rights of action announced in *Cort v. Ash*, its “evaluation of congressional action in 1972 must take into account [the more generous pre-*Cort*] legal context.”²⁵⁹ Unless textualists view canons like avoidance and the federalism rules to be so entrenched as to be irreversible, there is no reason for them to follow a different course in this context. For example, textualists could abandon the federalism canons going forward, but continue to apply those canons to statutes passed when Congress may have relied upon those interpretive rules.

The more significant problem with this argument, though, is that it is difficult to impeach as illegitimate a practice that has persisted since the early nineteenth century. Why assume that the initial adoption of any of these canons was a mistake? If the Marshall Court thought itself empowered to adopt the *Charming Betsy* and avoidance canons, that is evidence that it believed that “the judicial Power” encompassed the authority to do so. Moreover, the practice of adopting new canons – or at least adjusting old ones

²⁵⁷ This criticism would not hold for background assumptions that pre-date the founding. For example, if, by virtue of English practice, courts understood general statutory language to exclude the sovereign, this understanding was a background assumption of our legal system from the beginning even if it began as a substantive canon in the English system.

²⁵⁸ 441 U.S. 677 (1979).

²⁵⁹ *Id.* at 698-99 (citing *Cort v. Ash*, 422 U.S. 66 (1975)); see also Manning, *supra* note 5, at 2474 n.318 (expressing approval of *Cannon*'s approach); cf. *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (Scalia, J.) (refusing to apply pre-*Cort* approach to even a statute passed when that approach prevailed).

to meet new situations – has persisted over time. For example, when statutes replaced treaties as the means by which the federal government made Indian policy, federal courts began applying the Indian canon to statutes. When Congress began to exercise its power to waive federal sovereign immunity and abrogate state sovereign immunity, the federal courts began applying the governmental exemption canon to such waivers and abrogations. That is not to say that the historical evidence compels the conclusion that federal courts have consistently believed themselves to possess such power. As explained in Part II, the founding-era evidence leaves room for doubt on this score because the cases are few and courts were unclear about the role of legislative intent in the cases they decided. But just as it does not rule in the perception of such power, neither does it rule it out. It seems as likely that canon-making has long been considered part of “the judicial Power” as that it is a historically sanctioned bad habit.

If ostensibly substantive canons cannot be explained away as linguistic background norms, the question whether “the judicial Power” includes the power to develop and apply them must be answered. The next Part turns to that task.

IV. THE JUDICIAL POWER AND SUBSTANTIVE CANONS

If federal courts possess the authority to develop and apply substantive canons, they possess it as a consequence of the “judicial Power of the United States” granted them by Article III.²⁶⁰ As Part I explained, in the context of statutory interpretation, the Constitution’s structure – in particular, the separation of powers and the bargaining process protected by the requirement of bicameralism and presentment – establish the outer limits of the notoriously nebulous “judicial Power.” A court’s power to interpret statutes as it decides cases is limited by its obligation to function as the legislature’s faithful agent.

This Part considers whether the structural features that preclude federal courts from departing from clear statutory text in the service of equity similarly preclude them from departing from the most plausible interpretation of statutory text in the service of the more specific values protected by substantive canons. It tentatively concludes that the power to develop and apply substantive canons is consistent with the constitutional structure, subject to important limitations. Section A emphasizes that invocation of a specific substantive canon does not justify a departure from a statute’s plain language any more than does the invocation of a more general concern for equity. Section B posits that the Constitution affords federal courts the ability to depart from the best interpretation of a statute in favor of one that is less plausible yet

²⁶⁰ U.S. CONST. art. III, § 1; cf. Eskridge, *supra* note 2, at 1030; Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 652 n.308 (1995) (“[C]anons of construction of any type – constitutional or otherwise – can be justified in separation of powers terms as inherent or ancillary aspects of a court’s interpretive and lawmaking power under Article III.”).

still bearable, but because this power derives from the power of judicial review, a court may exercise it only in pursuit of constitutional values. Canons promoting extraconstitutional values may be employed only as presumptions guiding the choice between equally plausible interpretations of a statute. Section C identifies some guidelines for distinguishing between constitutional and extraconstitutional canons: language-pushing canons must be tied to relatively specific constitutional norms and they must be consistent with the constitutional values they purport to promote.

A. *A Statute's Plain Language*

The bedrock principle of textualism, and the basis on which it has distinguished itself from other interpretive approaches, is its insistence that federal courts cannot contradict the plain language of a statute, whether in the service of legislative intention or in the exercise of a judicial power to render the law more just.²⁶¹ Thus, those canons that permit a court to qualify clear text run headlong into the obligation of faithful agency and are inconsistent with the constitutional structure.

The "governmental exemption" canon, which treats the sovereign as exempt from generally applicable statutes, is an example.²⁶² Consider the objections that textualists have raised to the exemption of particular groups from generally applicable legislation. Legislators enacting a burdensome law must choose between "explicitly exempting specific interests, revealing a politically costly form of favoritism," and "tolerat[ing] judicial application of a generally framed law" to even the legislature's favored interests.²⁶³ Exempting such groups on a case-by-case basis "allows Congress to reap the benefits of passing tough, general laws without fully internalizing the consequences of framing those laws in unqualified terms."²⁶⁴ That undercuts the discretion-limiting function of the rule of law norm as well as the bargaining required by the requirement of bicameralism and presentment. On these grounds, textualists have objected to the Court's exemption of the American Bar Association ("ABA") from the burdensome requirements of the generally worded Federal Advisory Committee Act and the exemption of ministers from a generally worded prohibition on the recruitment of foreign laborers.²⁶⁵ The United

²⁶¹ See *supra* Part I.A.

²⁶² This argument assumes that the canon is properly treated as substantive. See *supra* notes 46-48 and accompanying text.

²⁶³ See Manning, *supra* note 5, at 2436.

²⁶⁴ *Id.* at 2437.

²⁶⁵ See *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 451, 467 (1989) (interpreting the Federal Advisory Committee Act to exclude the ABA even though the ABA satisfied the statute's definition of a "'group . . . utilized by one or more agencies in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government'" (quoting Federal Advisory Committee Act, 5 U.S.C. App. § 3(2) (1972))); *Church of the Holy Trinity v. United States*, 143 U.S.

States government is surely a politically powerful interest subject to legislative favoritism, and there would be a political cost to exempting the federal government from laws by which private parties and state governments must abide. Yet the governmental exemption canon relieves the United States from burdens imposed by generally applicable statutes without forcing Congress to accept that political cost. It seems no more permissible to exclude, say, debts owed the United States from the debts discharged under the Bankruptcy Act than to exclude the ABA from the category of “committees” or ministers from the category of “those who provide labor or service of any kind.”²⁶⁶

The exceptions that textualists are willing to read into criminal prohibitions and statutes of limitations are similarly flawed.²⁶⁷ A congressional failure to spell out criminal defenses or grounds for relief from statutes of limitation might be attributable to any number of things. The legislative process sometimes yields overinclusive statutes.²⁶⁸ As Manning has explained, “legislators may sometimes craft statutory language very broadly or very narrowly to elide or avoid disagreements over specific applications.”²⁶⁹ The failure to include exceptions to criminal liability or statutes of limitations may be the result of compromise. It may be the result of time and space limitations on the legislative agenda. It may be the result of a congressional choice to avoid the political cost of choosing which criminal defenses to permit and which to forbid, or of subjecting powerful, frequently sued interests to suit for open-ended periods of time. Whatever the reason that a statute emerged from the legislative process in unqualified form, reading qualifications into it after the fact risks disturbing the very compromise that made its passage possible.

Canons that permit outright alterations to text are exceptional, however, for most interpretive canons honor the baseline rule that text controls. Scores of cases, both historical and modern, insist that plain language trumps a canon. Thus the Court has emphasized that the avoidance canon applies only “*in the absence of a clear expression of Congress’ intent*” to provoke consideration of

457, 458, 472 (1892) (interpreting a statute to exclude ministers from the category of those who “perform labor or service” (quoting Act of Feb. 26, 1885, ch. 364, 23 Stat. 332)); Manning, *supra* note 5 at 2426-27 & nn.153-54 (identifying the political costs Congress would have incurred by explicitly excluding ministers from the statute); *id.* at 2437 n.184 (criticizing *Public Citizen* on this ground).

²⁶⁶ See *United States v. Herron*, 87 U.S. 251, 253, 263-64 (1873) (holding that a debt due the United States is not discharged by a certificate of bankruptcy even though the Bankruptcy Act provided that such a certificate discharged the bankrupt “from all debts, claims, liability, and demands, which were or might have been proved against his estate in bankruptcy”); *supra* note 265.

²⁶⁷ Again, this critique assumes that these exceptions are properly treated as substantive. See *supra* notes 47-51 and accompanying text.

²⁶⁸ For a brief description of the process considerations that drive textualism, see *supra* notes 5-6 and accompanying text.

²⁶⁹ Manning, *supra* note 5, at 2409.

“difficult and sensitive” constitutional questions.²⁷⁰ *Charming Betsy* does not apply when the text leaves no room for doubt about whether Congress acted contrary to the law of nations.²⁷¹ The Court will not invoke lenity unless there is a “grievous ambiguity” in the statute.²⁷² Unambiguous language similarly precludes the application of, among other canons, the presumption against retroactivity and the presumption against extraterritorial application of a statute.²⁷³

Those canons designated as clear statement rules are often thought to be particularly destructive of legislative supremacy, but even they generally observe this “plain language” limitation. By definition, such rules do not apply in the face of a “clear statement” of congressional intent to accomplish a particular result. To be sure, courts are sometimes accused of requiring Congress to use magic words to accomplish a particular result,²⁷⁴ and such an

²⁷⁰ *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 507 (1979) (emphasis added); see also *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Jean v. Nelson*, 472 U.S. 846, 854 (1985).

²⁷¹ *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982).

²⁷² *Chapman v. United States*, 500 U.S. 453, 463 (1991).

²⁷³ See, e.g., *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909) (“The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.”); *Bond v. Jay*, 11 U.S. (7 Cranch) 350, 353 (1813) (Marshall, J.) (“It is so unusual for a legislature to employ itself in framing rules which are to operate only on contracts made without their jurisdiction, between persons residing without their jurisdiction, that Courts can never be justified in putting such a construction on their words if they admit of any other interpretation which is rational and *not too much strained*.” (emphasis added)); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (asserting that a clearly retroactive law must control); see also, e.g., *Choate v. Trapp*, 224 U.S. 665, 675 (1912) (asserting that “doubtful expressions” are to be resolved in favor of the Indians).

²⁷⁴ See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 333-34 (2001) (Scalia, J., dissenting) (asserting that “clear statement [of congressional intent to strip habeas jurisdiction] has never meant the kind of magic words demanded by the Court today”); *Dellmuth v. Muth*, 491 U.S. 223, 239 (1989) (Brennan, J., dissenting) (arguing that “the Court in the Eleventh Amendment context insists on setting up ever-tighter drafting regulations that Congress must have followed . . . in order to abrogate immunity”); *Library of Congress v. Shaw*, 478 U.S. 310, 327 (1986) (Brennan, J., dissenting) (arguing that the majority’s approach requires Congress to use a “talismanic formula” to waive sovereign immunity for interest on attorney’s fees); *Esckridge & Frickey*, *supra* note 24, at 617 (criticizing *Japan Whaling Assoc. v. Am. Cetacean Soc’y*, 478 U.S. 221 (1986), as a case “transform[ing] the . . . rule permitting Congress to abrogate traditional presidential powers only through a clear statement in the statutory text into a super-strong clear statement rule requiring the statutory clear statement to target the specific issue unmistakably”). Characterization of a canon’s application as a “magic words” requirement is always pejorative; the Court itself disclaims the authority to so discipline Congress. See, e.g., *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 112 (1992) (Kennedy, J., concurring) (“[W]e have never required any

aggressive use of clear statement rules violates the baseline rule of legislative supremacy. But in the normal course, clear statement rules function no differently from other canons that permit a court to forsake a more natural interpretation in favor of a less natural one that protects a particular value.²⁷⁵ Indeed, canons like avoidance and *Charming Betsy* can be rephrased as clear statement rules: absent a clear statement, a court will not interpret a statute to raise a serious constitutional question, and absent a clear statement, a court will not interpret a statute to abrogate customary international law.²⁷⁶ The choice to denominate a canon as a “clear statement” rule is of little consequence; what matters is the effect of the canon on the statutory text.

There is no justification for departing from the plain text of a constitutional statute. But as the cases discussed in this Section illustrate, many canons operate in a grey area, respecting the outer limits of a text but not its most natural interpretation. The next Section considers the more difficult question of whether choosing a less plausible but still bearable interpretation of a statute is consistent with the constitutional structure.

particular magic words in our express pre-emption cases.”); *Carlson v. Green*, 446 U.S. 14, 19 n.5 (1980) (denying that its approach requires Congress to use “magic words” to render a statutory remedy exclusive of a *Bivens* action).

²⁷⁵ See, e.g., *United States v. Nordic Vill., Inc.*, 503 U.S. 30 (1992) (applying rule requiring clear waivers of federal sovereign immunity when the statute “is susceptible of at least two interpretations that do *not* authorize monetary relief”); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786 & n.4 (1991) (refusing to interpret general jurisdictional grant as abrogating the state’s sovereign immunity from suit in federal court on grounds that language authorizing federal courts to hear “all civil actions” did not abrogate all defenses to such actions); *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991) (applying clear statement rule where the Age Discrimination in Employment Act left room to question whether it reached state judges).

²⁷⁶ Indeed, the Court itself sometimes phrases these canons as clear statement rules. See, e.g., *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 507 (1979) (holding that the Court would adopt any other plausible interpretation of a statute “in the absence of a clear expression of Congress’ intent” to provoke consideration of “difficult and sensitive” First Amendment questions); *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 312-13 (1970) (Harlan, J., dissenting) (refusing to interpret a statute “to override the well-settled principle [of customary international law] that the law of the country whose flag a ship flies governs shipboard transactions, absent some ‘clear expression’ from Congress to the contrary”); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963) (“[F]or us to sanction the exercise of local sovereignty under such conditions in this ‘delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed.’” (quoting *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957))); see also *Clark v. Martinez*, 543 U.S. 371, 397 (2005) (Thomas, J., dissenting) (“[T]he rule of lenity is a constitutionally based clear statement rule.”).

B. *Canons as Constitutional Implementation*

Textualists describe themselves as “enthusiasts of canons that reflect constitutionally derived values.”²⁷⁷ That enthusiasm does not tell the whole story, for textualists apply extraconstitutional canons as well.²⁷⁸ Still, their particular attraction to constitutionally inspired canons suggests an intuition that such rules are more consistent with the principle of faithful agency than extraconstitutional canons. Textualists have made quite clear that extraconstitutional values like fairness and equity do not justify departures from the most natural reading of a statute. The connection between constitutionally inspired canons and higher law, however, makes colorable the claim that these canons moderate the baseline commitment to legislative supremacy.

Consider the way in which a canon’s connection to the Constitution distinguishes it from statutory exceptions made in the name of equity: constitutionally inspired canons do not disturb the results of the legislative process in pursuit of an undifferentiated notion of fairness. As such, they are more consistent with the rule of law norm reflected in the Constitution’s separation of powers than more freewheeling interpretive approaches.²⁷⁹ Making exceptions either to achieve greater equity or avoid absurdity offends the rule of law norm because “[o]nce the court provisionally identifies a statute’s (otherwise clear) meaning, the absurdity doctrine invites the court to make adjustments based on social values whose content and method of derivation are both unspecified *ex ante*.”²⁸⁰ Constitutionally inspired canons, by contrast, have the virtue of promoting an identifiable (and, short of constitutional amendment, closed) set of norms that have been sanctioned by a super-majority as higher law.²⁸¹ They do less violence to the legislative bargain because legislators can anticipate their potential effect on statutory interpretation and modify their language accordingly.²⁸² The grounding of

²⁷⁷ John F. Manning, *Legal Realism and the Canons’ Revival*, 5 GREEN BAG 2d 283, 292 n.42 (2002); *see also* Manning, *supra* note 235, at 1655 (“In the realm of constitutional values, moreover, many textualists will accept a less natural (though textually plausible) interpretation of a statute in order to avoid a conflict with serious constitutional questions or, for that matter, with the policies underlying an array of constitutionally inspired clear statement rules.”).

²⁷⁸ *See supra* notes 57-67 and accompanying text.

²⁷⁹ *See* Manning, *supra* note 5, at 2433; *supra* notes 16-22 and accompanying text.

²⁸⁰ Manning, *supra* note 5, at 2471.

²⁸¹ *See* Manning, *supra* note 2, at 125 (“In any case, when judges promote constitutional values by shading statutory meaning (within a range that the statutory language will bear), their action surely has a firmer basis than the equity of the statute, which draws upon more open-ended conceptions of external moral principles.”); Nagle, *supra* note 51, at 808-09 (asserting that federal courts are more justified in applying clear statement rules to promote constitutional, as opposed to extraconstitutional, values).

²⁸² *Cf.* Manning, *supra* note 5, at 2472 (“[I]f legislators can realistically evaluate legislative bargains *ex ante* only in terms of a statute’s social meaning . . . then the absurdity

these canons in the Constitution thus renders their effect on statutes both more predictable and more democratically legitimate than that of open-ended doctrines like absurdity and equitable interpretation.

Moreover, a canon's grounding in the Constitution provides a potential justification for the way in which its application causes a judge to deviate somewhat from her ordinary obligation of faithful agency by departing from the most plausible interpretation of a statute. Constitutionally inspired canons might be explained as an outgrowth of the power of judicial review. Judges do not act as faithful agents of Congress in exercising judicial review; they act as faithful agents of the Constitution. In the context of judicial review, the judicial duty to enforce the Constitution entirely trumps the judicial duty to enforce legislative commands faithfully. In the context of statutory interpretation, one might reason that the judicial duty to enforce the Constitution qualifies, though it does not trump, the obligation of faithful agency. In other words, the duty to enforce the Constitution may empower a judge not only to invalidate congressional actions that violate constitutional norms, but also to resist congressional actions that threaten those norms.²⁸³ The judge need not serve exclusively as Congress's faithful agent because she serves a higher law.

If constitutionally inspired substantive canons are legitimate, it is because courts – at least in the context of statutory interpretation – are empowered to do what Richard Fallon describes as “implementing the Constitution.”²⁸⁴ In

doctrine disturbs the bargain struck through the constitutionally mandated legislative process.”). To be sure, if the Court puts Congress on notice that it will apply a specific extraconstitutional canon – like, for example, the presumption against retroactivity – legislators could anticipate that canon's effect on future applications of the statute. Even if those canons are more determinate, however, the fact that they are not grounded in the Constitution limits the ability of the judiciary to rely upon them to deviate from a statute's most natural meaning for the reasons described in the remainder of this Section.

²⁸³ Cf. Young, *supra* note 49, at 1594 (arguing that the traditional way of thinking about judicial review as an all-or-nothing proposition overlooks the middle ground, which Young calls “the resistance norm”).

²⁸⁴ RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001); *see also* Richard H. Fallon, Jr., *The Supreme Court 1996 Term: Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 61 (1997). Other scholars have advocated similar views of constitutional decision-making. *See, e.g.*, KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 1-19 (1999) (distinguishing between constitutional interpretation and constitutional construction in the political realm); Mitchell Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 36 (2004) (distinguishing between “constitutional meanings” and “constitutional rules”); Henry P. Monaghan, *The Supreme Court 1974 Term: Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975) (distinguishing between judicial decisions actually interpreting the demands of the Constitution and the rules of “constitutional common law” that “draw[] their inspiration and authority from, but [are] not required by, various constitutional provisions”); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes*

the context of judicial review, Fallon has rejected the proposition that the judicial role is limited to determining what the Constitution “means.”²⁸⁵ He argues: “Identifying the ‘meaning’ of the Constitution is not the Court’s only function. A crucial mission of the Court is to *implement* the Constitution successfully. In service of this mission, the Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution’s meaning precisely.”²⁸⁶ On this view of constitutional decisionmaking, there need be no “conceptual identity between constitutional mandates and judicial rulings;”²⁸⁷ rather, “a gap frequently, often necessarily, exists between the meaning of constitutional norms and the tests by which those norms are implemented.”²⁸⁸ The gap may be the result of the court’s choice to underenforce a constitutional norm by developing a doctrinal test that leaves the responsibility for interpreting the meaning of that norm primarily in the hands of another branch of government.²⁸⁹ The “judicially manageable standards” branch of the political question doctrine, which leaves other branches with the responsibility for drawing constitutional lines in areas not easily susceptible to judicial enforcement, is an example.²⁹⁰ Or, the gap may be the result of the court’s choice to overenforce a constitutional norm by developing prophylactic doctrines that go beyond constitutional meaning.²⁹¹ The *Miranda* doctrine, which inevitably excludes from evidence even some confessions freely given, is an example.²⁹² The essential point of Fallon’s theory is that federal courts are not limited to determining whether executive or legislative action falls inside or outside the precise boundaries of constitutional meaning. They may implement the Constitution through the development of constitutional

What the Court Does, 91 VA. L. REV. 1649, 1655-58 (2005) (describing the “decision rules” model of constitutional law).

²⁸⁵ FALLON, *supra* note 284, at 43.

²⁸⁶ Fallon, *supra* note 284, at 57. Fallon identifies the “rational basis” test under the Equal Protection Clause, the “actual malice” standard under the First Amendment, and the four-part test for evaluating First Amendment protection for commercial advertising as examples of implementing doctrine. FALLON, *supra* note 284, at 5.

²⁸⁷ FALLON, *supra* note 284, at 39.

²⁸⁸ Fallon, *supra* note 284, at 60.

²⁸⁹ *Id.* at 64 (“[S]ome constitutional tests reflect an implicit judgment that it would be too costly or unworkable in practice for courts to enforce all constitutional norms to ‘their full conceptual limits.’” (citing Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221 (1978))).

²⁹⁰ Fallon points out that “perhaps more than any other constitutional doctrine, this one recognizes explicitly that a gap can exist between the meaning of constitutional guarantees, on the one hand, and judicially enforceable rights, on the other.” Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1276 (2006).

²⁹¹ FALLON, *supra* note 284, at 6.

²⁹² See *Dickerson v. United States*, 530 U.S. 428, 437 (2000); FALLON, *supra* note 284, at 6; Berman, *supra* note 284, at 19-29; Monaghan, *supra* note 284, at 20.

doctrines that may over- or underenforce the norms with which they are concerned.²⁹³

The scholarship dealing with constitutional implementation is primarily concerned with developing a theoretical basis for the doctrinal tests that comprise so much of the law applied in the exercise of judicial review. But the framework easily describes constitutionally inspired canons as well. While such canons “draw[] their inspiration” from the Constitution,²⁹⁴ they do not purport to interpret its meaning. Instead, they represent both the under- and over-enforcement of the Constitution.

Eskridge and Frickey have highlighted the role that substantive canons play in the underenforcement of constitutional norms.²⁹⁵ They have observed that the Court sometimes deploys constitutional clear statement rules to protect values that it has decided not to protect vigorously through judicial review.²⁹⁶ For example, the Court may underenforce the norm of federalism by leaving its protection primarily to “political safeguards,”²⁹⁷ but the federalism canons compensate somewhat for that by increasing the political cost of enacting statutes that intrude upon the states.²⁹⁸ Or, the Court may underenforce the First Amendment to avert confrontation with the political branches in a tense political climate, but employ the avoidance canon to make it more difficult for Congress to trample upon the rights of free speech and association.²⁹⁹ Because Congress can overcome the effect of the canons by employing clear language,

²⁹³ Note that there are different views about whether Congress can override such doctrines. Compare Monaghan, *supra* note 284, at 3 (describing “constitutional common law” as “subject to amendment, modification, and even reversal by Congress”), with Berman, *supra* note 284, at 101-05 (arguing that such doctrines can be beyond Congress’s reach), and Rosenkranz, *supra* note 284, at 2156 (arguing that there are limits to Congress’s authority to modify or overrule constitutionally inspired substantive canons).

²⁹⁴ Cf. Monaghan, *supra* note 284, at 3.

²⁹⁵ William N. Eskridge, Jr. & Philip Frickey, *Clear Statement Rules as Quasi-Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992); see also Eskridge & Frickey, *supra* note 24, at 597, 631-33 (characterizing many constitutionally inspired canons as performing this function).

²⁹⁶ Eskridge & Frickey, *supra* note 24, at 632-33.

²⁹⁷ Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); see also Eskridge & Frickey, *supra* note 24, at 630-31.

²⁹⁸ For example, Eskridge and Frickey observe that the Court invigorated federalism clear-statement rules “during a period in which the Court was abandoning any role in enforcing federalism values through constitutional interpretation.” See Eskridge & Frickey, *supra* note 24, at 619. In the case of federalism values, underenforcement resulted from the Court’s determination that it could not articulate judicially manageable standards to enforce guarantees like the Tenth Amendment and the Commerce Clause. *Id.* at 633.

²⁹⁹ See Frickey, *supra* note 47, at 401 (arguing that the Court did just that during the McCarthy era).

the argument goes, protecting constitutional values through canons rather than judicial review is more protective of the political process.³⁰⁰

The fact that a canon is tied to an underenforcing doctrine of judicial review does not mean that the canon itself underenforces the relevant constitutional principle. On the contrary, a court can overprotect a norm through statutory interpretation even if it underprotects that norm through judicial review.³⁰¹ That is so because no canon purports to mirror the rule that would have been applied in an exercise of judicial review; a court applying a canon does not simply articulate what would have been a hard constitutional limit in the softer form of statutory interpretation.³⁰² On the contrary, the content of a constitutionally inspired canon is typically independent of the perceived conceptual limits of the underlying constitutional norm.³⁰³ For example, the clear statement federalism rule may complement the Court's decision to underenforce the Tenth Amendment through judicial review.³⁰⁴ At the same time, it may overenforce the federalism norm by increasing the costs of

³⁰⁰ See Eskridge & Frickey, *supra* note 24, at 631 (“[S]uper-strong clear statement rules . . . provide significant protection for constitutional norms, because they raise the costs of statutory provisions invading such norms; and ultimately such rules may even be democracy-enhancing by focusing the political process on the values enshrined in the Constitution.”). *But see* Berman, *supra* note 284, at 43 n.140 (arguing, in the context of judicial review, that underenforcing doctrines are less democratic than fully enforcing doctrines to the extent that they permit state actors to override the supermajority protections of the Constitution).

³⁰¹ As Eskridge and Frickey observe, “judicial restraint at the constitutional level” does not preclude “judicial activism at the interpretive level.” Eskridge & Frickey, *supra* note 24, at 621. They charge the Rehnquist Court with engaging in this sort of activism. *Id.* at 637; *see also* Berman, *supra* note 284, at 40-43 fig.2 (pointing out that norms can be simultaneously under- and overenforced).

³⁰² Even though the content of a canon does not purport to mimic the hard constitutional test that the court would have applied in an exercise of judicial review, the application of a canon does sometimes represent a conscious judicial choice to use interpretation to avoid invalidation. That is true of the old “unconstitutionality” version of the avoidance canon. When the most natural reading of a statute would render it unconstitutional, the court would adopt any other plausible interpretation instead. In doing so, it exchanged a hard for a soft limit on Congress. Note, however, that the court's choice to do so in no way depended on its assessment that the underlying constitutional value was underenforced.

³⁰³ That is not to say that they would never overlap. For example, the “doubts” version of the avoidance canon may sometimes avoid constitutional interpretations and sometimes avoid unconstitutional ones, thereby functioning as an overenforcing doctrine in some cases but not others. *Miranda* reflects the same overlap in the context of judicial review: it is widely recognized to be a prophylactic doctrine, not because it always invalidates action that would otherwise be constitutional, but because it sometimes, perhaps often, captures such conduct.

³⁰⁴ See *supra* note 298 and accompanying text; *see also* Nagle, *supra* note 51, at 812 (characterizing the Tenth Amendment's federalism norm as underenforced).

regulating the states in ways that the Tenth Amendment, interpreted to its full conceptual limits, would permit.

In many cases, the Court's adoption of a clear statement rule has more to do with its determination that some constitutional principle merits heightened protection than with a decision to underenforce a norm through judicial review. Consider the canon requiring a clear abrogation of state sovereign immunity. The Court has acknowledged that Congress has the power to abrogate state sovereign immunity under Section Five of the Fourteenth Amendment. At the same time, the Court's refusal to find an abrogation absent a clear congressional statement makes it more difficult for Congress to exercise power that the Constitution indisputably grants it. The Court has admitted as much. In *Dellmuth v. Muth*, the Court explained the rationale for its clear-statement abrogation rule as follows:

To temper Congress' acknowledged powers of abrogation with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure, we have applied a simple but stringent test: "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."³⁰⁵

Thus, the clear statement abrogation rule does not rest upon any doubt that Congress possesses the power to abrogate state sovereign immunity, but rather on the Court's sense that Congress should proceed carefully before exercising its "acknowledged power[]" to accomplish this result.³⁰⁶

Other canons similarly overenforce the Constitution by handicapping Congress in the exercise of powers that it legitimately possesses. The modern "doubts" version of the avoidance canon is an example. Commentators have repeatedly observed that avoiding questionable, though not necessarily unconstitutional, interpretations makes it difficult for Congress to enact policies that do not actually cross any constitutional line.³⁰⁷ *Charming Betsy* and the federal sovereign immunity canons illustrate the same phenomenon. Both canons may be described as constitutionally inspired: *Charming Betsy* may be described as protecting the Constitution's allocation of foreign policymaking authority to the political branches, and the federal sovereign immunity rule can be justified as protecting the sovereignty that the federal

³⁰⁵ *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). Note that Justice Scalia both joined Justice Kennedy's opinion for the Court and subsequently quoted this language approvingly in *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786 (1991) (quoting *Dellmuth*, 491 U.S. at 227-28).

³⁰⁶ *Dellmuth*, 491 U.S. at 227.

³⁰⁷ Some comment that result as a valuable means of selecting important norms for overprotection. See, e.g., Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1966-69 (1997); Young, *supra* note 49, at 1594. Others condemn it as violative of legislative supremacy. See, e.g., Kelley, *supra* note 68, at 846-60; Schauer, *supra* note 32, at 92-95.

government possesses by virtue of the constitutional structure. No one disputes that Congress has the authority both to abrogate the law of nations and to waive federal sovereign immunity.³⁰⁸ Nonetheless, a federal court will not interpret a statute as having done either if the court can identify any other plausible interpretation. Each of these canons may be thought to protect a constitutional value, but at the cost of making it difficult for Congress to act even where the Constitution undeniably leaves it free to do so.³⁰⁹

It is the tendency of constitutionally inspired canons to overenforce the Constitution that places them in greatest tension with the constitutional structure. In the context of judicial review, originalists – which most statutory textualists are – have emphatically rejected the proposition that federal courts may adopt doctrinal tests that overenforce the Constitution by imposing limits on state actors that go beyond those set by the document itself.³¹⁰ The dispute over the constitutional status of *Miranda* warnings is the most well-known example. In *Dickerson v. United States*,³¹¹ Justice Scalia's fundamental disagreement with the majority was over the notion that "this Court has the power, not merely to apply the Constitution but to expand it, imposing what it regards as useful 'prophylactic' restrictions upon Congress and the States."³¹² If this objection extends to overenforcing through statutory interpretation, then most, if not all, of the constitutionally inspired canons of construction would fall under its weight.

Yet overenforcing doctrines of statutory interpretation function differently from overenforcing doctrines of judicial review. Overprotection in the context of statutory interpretation is more respectful of Congress's prerogative to exert

³⁰⁸ See, e.g., *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 145-46 (1812) (applying *Charming Betsy* to honor customary international law principle that "national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction," while simultaneously acknowledging that "[w]ithout doubt, the sovereign of the place is capable of destroying" this principle).

³⁰⁹ See *South Dakota v. Bourland*, 508 U.S. 679, 686-87 (1993) (Thomas, J.) ("Congress has the power to abrogate Indian treaty rights, though we usually insist that it make clear its intent to do so.").

³¹⁰ See, e.g., *Dickerson v. United States*, 530 U.S. 428, 457-59 (1999) (Scalia, J., dissenting) (acknowledging that the Court has adopted doctrinal tests to implement, inter alia, the Takings Clause, the Confrontation Clause, and the First Amendment, but arguing that such rules are designed to enforce constitutional limits rather than set prophylactic protections).

³¹¹ *Id.* at 432 (majority opinion) (holding that Congress may not legislatively overrule *Miranda v. Arizona*, 384 U.S. 436 (1966)); see also Berman, *supra* note 284, at 25-32 (describing Justice Scalia's *Dickerson* dissent as a notable rejection of the view that courts may enforce the Constitution through the adoption of prophylactic rules); Roosevelt, *supra* note 284, at 1669-70.

³¹² *Dickerson*, 530 U.S. at 446 (Scalia, J., dissenting); see also *id.* ("That is an immense and frightening antidemocratic power, and it does not exist.").

the full extent of its constitutional powers insofar as it (in contrast to overenforcing doctrines of judicial review) does not wholly invalidate legislation that remains within the boundaries set by the Constitution. That is not to say that there are no constraints upon Congress's ability to override a statutory interpretation decision. A statutory misconstruction can become entrenched when one of the relevant actors – the House, Senate, or President – prefers that it stay in place.³¹³ That said, Congress does override statutory interpretation decisions with some frequency,³¹⁴ and even if the ability to override is somewhat compromised, Congress still has the option.³¹⁵ Indeed, in light of this difference, one could view overenforcing statutory canons as a better way of accounting for the concerns that animate overenforcing doctrines of judicial review. Prophylactic rules are a valuable tool for ensuring that political actors do not inadvertently cross constitutional lines or inadvertently exercise extraordinary constitutional powers. They go too far when they invalidate such action, for then they function as permanent constitutional constraints. But when framed as interpretive rules, they function as “stop and think” measures that discipline Congress to consider carefully the constitutional implications of its policies.³¹⁶ This discipline is relatively restrained insofar as it refrains both from permanently glossing the Constitution and from overenforcing constitutional norms at the expense of plain language. It is also relatively respectful of legislative supremacy because Congress can free itself of potentially offending interpretations by legislatively overriding them – a power it lacks in the context of overenforcing doctrines of judicial review.

To the extent that overenforcing canons of construction are legitimate, one might say that they exploit open space in the constitutional structure: they have some basis in the judicial power and are not squarely foreclosed by the important structural limitations that otherwise cabin that power. The application of canons like avoidance and the clear statement federalism rules is admittedly in tension with the structural limitations upon statutory interpretation. But so long as courts honor the plain language of a statute and act only in service of values enshrined in the Constitution, they do not act in direct conflict with the rule of law norm that prohibits departures from text in

³¹³ See JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 105 (1997).

³¹⁴ See William Eskridge, *Overriding Supreme Court Statutory Interpretations*, 101 *YALE L.J.* 331, 338 (1991) (collecting data on congressional overrides).

³¹⁵ Nagle, *supra* note 51, at 821-22 (“[T]he admittedly imperfect ability to overcome a clear statement rule presents an alternative that is not available to Congress when the Court strikes down a statute as unconstitutional.”).

³¹⁶ Cf. Young, *supra* note 49, at 1608-09 (arguing that clear statement rules “make clear to all participants in the political process that constitutional values are at stake, by highlighting the aspects of legislation that implicate those values”; in addition, they “add to the hurdles that any legislation must pass, increasing the political costs that proponents must incur in order to achieve their objectives”).

the service of undifferentiated social values. The application of substantive canons typically overenforces the Constitution. But because overenforcement in the context of statutory interpretation clips congressional prerogatives much less than overenforcement in the context of judicial review, the application of substantive canons is not in direct conflict with the limitations upon judicial review. In other words, the Constitution's structure does not definitely rule out the application of language-pushing canons, and that may leave federal courts some room to act.

To be sure, this argument is not rock solid. Constitutionally inspired canons neither impose a bar on Congress nor entirely override the product of the legislative process, but they constrain Congress more than the Constitution does. It would be reasonable, and as a formal matter, perhaps more satisfying, to take the position that overenforcing canons of construction exceed the limits of judicial power.

Notwithstanding the appeal of this position, there are good reasons to reject it. The federal courts have long asserted the power to employ language-pushing substantive canons.³¹⁷ The pedigree of this practice gives it a stronger claim to legitimacy than overenforcing doctrines of judicial review, which took their place in constitutional law more recently and have yet to be openly defended by those justices willing to apply them.³¹⁸ And that pedigree is not only reason for thinking that the more expansive approach to judicial power is right, but for adhering to that approach even if it is wrong. However one might have resolved the tension between substantive canons and faithful agency as an initial matter, the practice of employing such canons has been with us for so long that the sheer force of precedent counsels against abandoning it.³¹⁹

Substantive canons also make sense from a functional perspective. It would be a rigid approach to statutory interpretation that denied the ability of the federal courts to guard against the inadvertent congressional exercise of extraordinary constitutional powers. The messiness of the legislative process may make it impossible to discern whether the exercise of such power was part of the legislative bargain. But when constitutional values are at stake, it seems

³¹⁷ See *supra* Part II.A.

³¹⁸ See Roosevelt, *supra* note 284, at 1672 (pointing out that no justice has defended the practice of over- or underenforcing the Constitution through decision rules that deviate from the Constitution's provisions).

³¹⁹ Treating the legitimacy of substantive canons as settled by *stare decisis* is different from treating any individual canon as a background assumption of the language employed by the interpretive community of lawyers and lawmakers. The "background assumption" argument evades the constitutional difficulty by treating the substantive canon as effectively linguistic. See *supra* Part III. The argument from *stare decisis*, by contrast, recognizes many canons as substantive and offers a prudential reason for tolerating them notwithstanding the constitutional difficulty they pose. Moreover, the argument I develop here is that *stare decisis* counsels in favor of interpreting "the judicial Power" broadly enough to encompass a limited authority to deploy substantive canons, not that longstanding acceptance is a reason for accepting any particular canon.

prudent to interpret the Constitution as flexible enough to permit federal courts to press Congress on the point.³²⁰

C. *The Limits of Canon-Making Power*

If the Constitution is what qualifies the obligation of faithful agency, then the obligation of faithful agency is unqualified when the values at stake are extraconstitutional. That is not to say that canons protecting extraconstitutional values are illegitimate. On the contrary, such interpretive principles are a useful way of specifying the social values that should influence judges in resolving statutory ambiguity. Assume, for example, that the rule of lenity promotes the extraconstitutional value of fairness to the criminal defendant.³²¹ If a statute is susceptible to multiple, equally plausible interpretations, the rule of lenity represents a consensus view that a judge should account for this value in choosing among them. But as this formulation suggests, pursuit of an extraconstitutional value does not justify forgoing the best interpretation of a statute in favor of a merely plausible one. Canons promoting such values can serve only as presumptions, tie breakers that help judges choose among competing interpretations.³²² When employed as presumptions, extraconstitutional canons are entirely consistent with the norm of faithful agency.³²³ When employed, however, to stretch plain language, as, for example, the canons counseling narrow construction of statutes in derogation of the common law and broad construction of remedial statutes purport to do, they conflict with the obligation of faithful agency.³²⁴

The objection to this line between constitutional and extraconstitutional values is that it is illusory. As Part I explains, a canon's purpose lies in the

³²⁰ See Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 780 (1992) (emphasizing the importance of interbranch dialogue). The ways in which overprotecting canons interfere with the majority will, however, are good reasons for siding with those who argue that Congress has the power to overrule such canons when it disagrees with the Court's assessment that a particular constitutional value is worth overprotecting. See *supra* note 293.

³²¹ I say "assume," for lenity can be understood to protect other policies as well, including the due process value of notice. See *supra* note 40. For a discussion of the difficulty of deciding whether a canon protects constitutional or extraconstitutional values, see *infra* note 325 and accompanying text.

³²² See *U.S. v. Santos*, 128 S. Ct. 2020, 2025 (2008).

³²³ See *supra* notes 30-67 and accompanying text. The Court could choose to protect constitutional values through presumptions rather than clear statement rules, and that too would be consistent with faithful agency.

³²⁴ Note that the canon counseling narrow construction of statutes in derogation of the common law is objectionable not only because it conflicts with the structural principles that otherwise constrain statutory interpretation, but also because it cuts against the principle that legislation is hierarchically superior to common law, rather than the other way around. Canons rooted in the Constitution, by contrast, push the text to accommodate values embodied in law that is hierarchically superior to legislation.

eyes of the beholder. Lenity may have traditionally been justified as a means of protecting a general concern for fairness, but both early federal courts and modern commentators have also characterized it as a means of protecting the separation of powers by ensuring that Congress is the branch to criminalize conduct.³²⁵ *Charming Betsy* may be most often described as protecting international law for its own sake, but it has also been justified as guarding the constitutional allocation of foreign affairs authority to the political branches. If almost any canon can be rationalized on constitutional grounds, the distinction between constitutional and extraconstitutional canons is one without a difference.

While the distinction between the two is not sharp, neither is it meaningless. At least two factors bear on the question whether a canon can properly be classified as constitutional for purposes of justifying its language-stretching effect. First, the canon must be connected to a reasonably specific constitutional value. Second, the canon must actually promote the value it purports to protect.

As to the first factor: central to the constitutional rationale for the obligation of faithful agency are the arguments that (1) ad hoc alterations to statutes violate the rule of law norm permitting exceptions to statutes only if they run the gamut of the legislative process and that (2) statutory alterations made in the name of undifferentiated social values risk undoing the legislative bargain because Congress cannot anticipate their effect on statutory applications.³²⁶ Section B observed that both of these concerns are minimized in the context of constitutionally inspired canons insofar as they do not make exceptions to plain text and because they draw on specific values selected for protection in higher law.³²⁷ These structural features also bear, however, on the selection of the constitutional values that a court can overprotect. The more specific the value, the more even its application will be across a range of cases – lessening the concern that a court will invoke it to tweak legislative bargains in the case-by-case fashion that the rule of law norm counsels against.³²⁸ In addition, the more specific the value, the better Congress can anticipate its effect on a statute's subsequent interpretation.

³²⁵ See *supra* notes 40, 102, 103 and accompanying text. Justice Thomas has suggested that lenity may have more bite if it is constitutionally based. See *Clark v. Martinez*, 543 U.S. 371, 397-98 (2005) (Thomas, J., dissenting) (pointing out that lenity might function as a “constitutionally based *clear statement rule*” or a “nonconstitutionally based *presumption* about the interpretation of criminal statutes” (emphasis added)).

³²⁶ See *supra* Part I.C.

³²⁷ See *supra* Part I.B.

³²⁸ The limitation that the avoidance canon be applied to avoid *serious* constitutional questions can be understood to respect this specificity requirement. Cf. *Marozsan v. United States*, 852 F.2d 1469, 1495 (7th Cir. 1988) (Easterbrook, J., dissenting) (“Construction to avoid unconstitutionality or a serious question, must be distinguished from revising statutes to avoid any questions at all. What with the proliferation of constitutional ‘questions,’ courts could do anything they pleased.” (citations omitted)).

Contrast a canon protecting “fairness” and the canon requiring clear statements to abrogate state sovereign immunity. At some point, fairness rises to the level of a constitutional concern, so even a canon like absurdity has a claim to constitutional connection: it can be justified as a means of overprotecting the rationality requirement that the Constitution imposes on statutes that do not implicate suspect classes or fundamental rights.³²⁹ “Fairness” is a nebulous value susceptible to many different interpretations and applicable across a wide range of legislation.³³⁰ “State sovereignty,” by contrast, is far more concrete, and applicable to a narrow category of legislation. Its specificity ameliorates the rule of law concern about uneven, ad hoc statutory applications. Moreover, even if Congress could not have initially predicted that the Supreme Court would deem state sovereignty to be worthy of extra protection, the articulation of the canon in the case law has put Congress on notice of how this value will affect the interpretation of its legislation. By contrast, the absurdity doctrine, even once stated in case law, cannot, by its very nature, provide Congress with that kind of clear direction.³³¹

As to the second factor: the Constitution provides the most important limit on the canons that courts can apply to deviate from a statute’s most natural reading. A canon cannot moderate the obligation of faithful agency unless it actually advances the constitutional value it purports to protect. The absurdity doctrine is again a good example.³³² One could cast the absurdity doctrine as constitutionally inspired by characterizing it as a means of overprotecting the norm of rationality required by the Due Process and Equal Protection Clauses. The rational basis standard of review maintains that a statute passes constitutional muster if the court can imagine *any* rational basis for it. Yet a statutory application can seem unreasonable to the court even if it would survive the rational basis test. For example, Manning points out that while applying a “no vehicles in the park” regulation to an ambulance is widely considered absurd, it would almost surely survive rational basis review. It is

³²⁹ Cf. Manning, *supra* note 5, at 2479-81.

³³⁰ See *supra* Part I.C.

³³¹ Similarly, a canon designed to protect the constitutional separation of powers – a function that can be attributed to a host of canons – is probably stated at too great a level of generality to justify departures from a text’s most natural meaning. See *supra* note 43 and accompanying text (describing how all canons can be conceived of as “buffering devices” between the courts and Congress). By contrast, a canon designed to protect a particular allocation of power – like the allocation of foreign affairs authority to the political branches – may be concrete enough to put Congress on notice of the way this specific constitutional concern could affect the interpretation of a statute. For a discussion of why putting Congress on notice that it will enforce a specific extraconstitutional value does not justify departure from a text’s most natural interpretation, see *supra* note 282.

³³² The absurdity doctrine is objectionable on the ground that it permits outright alterations to the text of a statute. See *supra* notes 17-21 and accompanying text. Even if, however, the absurdity doctrine permitted a court to forgo a statute’s most natural meaning in favor of a less plausible one, it would fail for the reasons discussed above.

rational (even if a debatable policy choice) for the legislature to prohibit all vehicles, including ambulances, as a means of protecting children from speeding vehicles.³³³ Insofar as the absurdity doctrine picks off applications that the Constitution would leave intact, it can be understood as overenforcing the due process rationality requirement. It is a resistance norm that forces Congress to speak clearly if it wishes to tread close to the line of reasonableness.

Overenforcement of the rationality requirement, however, undercuts rather than advances the balance struck by the Due Process and Equal Protection Clauses.³³⁴ Rational basis review represents more than the Court's prudential judgment that Congress is better suited than the courts to determine what the Due Process and Equal Protection Clauses require in any particular context. Rational basis review also reflects the Supreme Court's judgment that the Constitution requires the courts to defer to reasonable legislative judgments.³³⁵ Overprotecting the rational basis norm is thus at odds with the deferential posture that the Court has interpreted the Constitution to mandate. In the context of legislation that does not implicate fundamental rights or a suspect class, faithful enforcement of the Constitution requires a court to hew as closely as possible to the norm of faithful agency by enforcing the text unadulterated by judicial tweaking.³³⁶ The rationality requirement of the Due Process and Equal Protection Clauses is not susceptible to overenforcement because the whole point of rationality review is to emphasize that courts must defer to, not police, the legislature.

The faithful agent must evaluate whether the same is true of other substantive canons. For example, the presumption against preemption is commonly justified as protecting the norm of federalism. Some have criticized it as illegitimate, however, on the ground that the Supremacy Clause is not

³³³ Manning, *supra* note 5, at 2391.

³³⁴ *Id.* at 2446-47 (arguing that insofar as "the absurdity doctrine permits judges to displace legislation that would easily survive rationality review, that doctrine threatens to disturb the careful balance between legislative and judicial power struck by the modern rational basis test").

³³⁵ *See id.* at 2433. Some interpret the post-New Deal cases as underenforcing the Due Process and Equal Protection Clauses rather than enforcing those clauses to their full conceptual limits. *See, e.g.*, Sager, *supra* note 289, at 1216-18. Even if rationality review represents a prudential judgment rather than an assessment of actual constitutional constraints upon the judicial power, overenforcement of the rationality requirement undercuts that prudential calculation.

³³⁶ Again, this is not to say that it is illegitimate for a court to rely on its own sense of reasonableness in choosing between equally plausible interpretations of a statute. *See supra* note 324 and accompanying text. It is only to say that a court would not be justified in adopting a less plausible (but bearable) interpretation of a statute in ostensible service of due process and equal protection.

biased against the exercise of federal power.³³⁷ If the Constitution is best understood as neutral or favorable to federal preemption of state law, then a canon enforcing a supposed constitutional value reflecting the opposite bias cannot legitimately qualify the obligation of faithful agency. The same might be true of the rule requiring abrogations of state sovereign immunity to be clear. If Section Five of the Fourteenth Amendment is a narrow exception to a general rule that Congress lacks the power to abrogate state sovereign immunity, then the clear statement rule can be understood as a means of underscoring the constitutional norm that abrogations are exceptional. If, by contrast, Congress possesses broad power to abrogate state sovereign immunity under Article I, there might be less warrant for treating abrogation as an extraordinary power. One's approach to this problem (and other similar ones), then, depends upon one's view of the substantive meaning of the provision involved.

There would surely be as much disagreement about the consistency of canons with constitutional norms as there is about the underlying norms themselves. The point here is not to evaluate the compatibility of every canon purporting to be constitutionally inspired with the underlying principle it ostensibly implements. The point is simply to say that such an inquiry must be undertaken. It ought not be assumed that identifying a constitutional hook is enough to justify treating a canon as one that advances a constitutional value. While some canons satisfy this requirement, others undoubtedly do not, and the faithful agent must carefully consider the category to which a particular canon belongs.

CONCLUSION

The conflict between substantive canons and faithful agency pushes textualists to think hard about whether the judicial obligation of faithful agency is unqualified. This Article has argued that the obligation is not necessarily absolute. At least when a substantive canon promotes constitutional values, the judicial power to safeguard the Constitution can be understood to qualify the duty that otherwise flows from the principle of legislative supremacy. On this view, courts are not limited to a black-and-white, yes-or-no choice about a statute's constitutionality; they possess a limited power to push a statute in a direction that better accommodates constitutional values.

Even so, the obligation of faithful agency is modified, not overcome. A court cannot advance even a constitutional value at the expense of a statute's plain language; the proposed interpretation must be plausible. Moreover, a canon does not justify even a limited deviation from the norm of faithful

³³⁷ See, e.g., Eskridge & Frickey, *supra* note 24, at 624 ("The supremacy clause is an exception to our basic system of federalism, rather than a foundational premise upon which the Constitution replaced the Articles of Confederation?"); see also Nelson, *supra* note 211, at 256 ("[T]he [Supremacy Clause] does caution against straining the meaning of a federal law to avoid a contradiction with state law.").

agency simply because it can be connected to some constitutional norm. A court must carefully consider the specificity of the norm at stake and whether deviation from the statute's best reading actually advances it. When the power is exercised within these limits, the deployment of a substantive canon does not directly clash with the structural limitations on statutory interpretation and judicial review. When statutory language implicates an important constitutional value and leaves room for an alternate interpretation, it makes sense for a court to demand greater clarity from Congress by pushing the statute in ways that its language will permit. At the same time, the limits placed upon the exercise of this power adequately accommodate the norm of legislative supremacy.

This understanding of substantive canons of statutory interpretation is consistent with historical practice, as federal courts have crafted and applied substantive canons from the very start. To be sure, the historical rationale for substantive canons was not always clear. Early federal courts sometimes described them as proxies for congressional intent and sometimes as a means of promoting policies external to the statute. Even so, their application then has something to tell us about their validity today. Nineteenth century faithful agents enriched the positive law through assumptions made about congressional commitments to shared values. That practice reflects the judgment that shared values ought to influence the interpretation of the law, occasionally in ways that require departures from a text's most natural meaning. Assumptions about legislative intent cannot justify that enterprise for a modern textualist. Nonetheless, our structural commitments leave room for it, and insofar as a substantive canon is constitutionally grounded, it shapes the text with an eye toward values that are truly shared.

WEDNESDAY, AUGUST 26, 2009

Hiring Chairs for 2009-10: Announce Yourself Here Please

N.B. This has been bumped to the front, and will be every couple weeks or so.

As is customary around this time of year, we are hoping law schools will use this space to share some relevant information regarding hiring for the coming year. Specifically, if you're a prawf, please share the following information related to the Fall 2009 and/or spring 2010 hiring season:

a) your school,
b) who's the chair and who are the members of your appointments committee (please also identify whether entry levels are separated from laterals, etc)

and, c) if there are any special areas you're looking to fill.

If you're on the market, or a prawf, please [check out this thread here](#) so you can share information regarding whether a particular school has begun making appointments for first-rounds or callbacks.

To get things started, Manuel Utset (mutset at law.fsu.edu) is chairing Florida State Law's unified committee (consisting of Jim Rossi, Beth Burch, Gregg Polsky, and Adam Hirsch). We are looking to hire both laterals and rookies across a range of fields and invite people who are interested to contact Manuel (or me, and I'll happily forward along your interest and CV).

The comments on the first page of this post only go to 50. Thus, if you are trying to get to the next page of comments, you have to click on the >>.

Posted by Administrators on August 26, 2009 at 12:01 AM in [Getting a Job on the Law Teaching Market](#) | [Permalink](#)

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COMMENTS

Our hiring chair this year at the University of San Diego is Don Dripps, after he chaired a very successful recruitment year last year (we hired Avi Bell, Ted Sichelman and Jordan Barry, and a three year visit of Michael Perry).

We are still defining our needs so I will update soon, but keep us posted about your files. It is also a good idea to send materials to associate deans as someone recently suggested on a Leiter comment, as teaching visits can turn out to be matching opportunities.

Good luck to all!

Posted by: Orly Lobel | Jun 17, 2009 12:43:48 PM

I am the hiring chair at IU -- Indianapolis. The other members of the committee are Susie Mead, Antony Page, George Edwards, Andy Klein, and Shawn Boyne. We are planning to hire up to four people and are looking for (among other things): Criminal Law, Criminal Procedure, Property, Trusts and Estates, Commercial Law, Land Use, Administrative Law, Corporate Finance, and Tax. (I'm sure I've left some off the list, but the gist is that we are looking at a broad portfolio.)

Posted by: Gerard N. Magliocca | Jun 17, 2009 1:53:20 PM

I'm the chair at St. Thomas (Minnesota). Our most pressing hiring needs are in criminal law, civil procedure, evidence, environmental law, and business-related courses.

Posted by: Rob Vischer | Jun 17, 2009 2:35:10 PM

I am the appointments chair at the University of Illinois. We welcome applications in all areas, but have particular interest in constitutional law, administrative law, legislation, private international law, intellectual property, tax, corporate finance, and professional responsibility.

Posted by: Dan Hamilton | Jun 17, 2009 3:41:30 PM

I'll be doing the Chair-ing duties at Stanford, but other committee members and hiring goals not set yet.

bw

Posted by: bob weisberg | Jun 18, 2009 10:20:26 AM

I am the chair of the appointments committee at the University of Iowa. We have particular interest in corporations, intellectual property, and tax, but are open to other areas.

Posted by: Jim Tomkovicz | Jun 18, 2009 10:23:05 AM

I am the chair of appointments at the University of Colorado Boulder. We are looking to fill two chaired positions (business & a chair in experiential learning) and at the entry level. We're interested in all areas, with some focus on environmental and business candidates.

Posted by: [Scott Peppet](#) | Jun 18, 2009 11:04:05 AM

Beth Eisler (beth.eisler@utoledo.edu) will be the chair of the unified committee at the University of Toledo.

Posted by: Geoff Rapp | Jun 18, 2009 11:20:54 AM

Leslie Yalof Garfield (lgarfield@law.pace.edu) will be the chair of the Appointments Committee at Pace Law School in White Plains, NY. Same chair for both entry-level and lateral candidates.

Posted by: Bridget Crawford | Jun 18, 2009 11:25:45 AM

I am the incoming chair at Michigan State University. The other (unified) committee members are Daniel Barnhizer, Adam Candeub, Catherine Grosso, Dean Joan Howarth, Mae Kuykendall, and Charles Ten Brink. We are looking for a director for our intellectual property program; for a teacher-scholar in business enterprises; and a director for our rental housing clinic. We also need to hire a leader for our new academic support program, though that is being handled by a separate committee chaired by Mary Bedikian. More opportunities might open up too, if other needs emerge.

Posted by: Brian Kalt | Jun 18, 2009 11:56:20 AM

Stephen Bainbridge and I are the co-chairs of the external appointments committee at UCLA for this upcoming year. The other members are Iman Anabtawi, Jonathan Varat, Jonathan

Zasloff, and Noah Zatz. We have not yet identified our hiring priorities.

Posted by: Katherine Stone | Jun 18, 2009 12:49:02 PM

Timothy Glynn is the chair of the Appointments Committee (entry level) and Charles Sullivan is the chair of Lateral Hiring at Seton Hall Law School. We are looking to hire in a number of areas next year but haven't determined our priorities yet.

Posted by: Solangel Maldonado | Jun 18, 2009 1:02:42 PM

I will be serving as chair of the Faculty Appointments Committee at the University of Alabama School of Law during the 2009-2010 academic year. We hope to make two chair-level lateral hires this year and have look/see visitors lined up for both positions. If either look/see visitor declines a permanent offer, however, the committee will review applications and nominations for these positions (including those held over from the 2008-2009 academic year). In addition, we will be seeking a new director for the law school's clinical programs (the formal title for the position is "Associate Dean for Skills Programs") and the committee would welcome applications and nominations for this position. We do not anticipate entry level hiring this year, although it is very early and this could change.

Ron Krotoszynski, Jr.
University of Alabama School of Law

Posted by: Ron Krotoszynski, Jr. | Jun 18, 2009 3:41:58 PM

I will be serving as chair of the UC-Davis King Hall School of Law Appointments Committee for the upcoming year. The other members of the committee are: Anupam Chander, Elizabeth Joh, John Oakley and Madhavi Sunder. Associate Dean Vik Amar is an ex officio member. We have not yet identified our priority areas.

Posted by: Keith Aoki | Jun 18, 2009 3:52:30 PM

I will be chair of the Faculty Appointments Committee at the University of Maine School of Law for the 2009-2010 academic year. The other committee members are David Owen and Charles Norchi. We will be hiring one person, and have not yet identified priority areas. The same committee will deal with this hire whether it is an entry-level or a lateral hire.

Posted by: Jennifer B. Wriggins | Jun 18, 2009 4:06:59 PM

I was the chair (vice-chair, technically) of Notre Dame's Appointments Committee last year. (We hired Stephen Smith laterally from the University of Virginia, and Dan Kelly from the entry-level market.) I will be on the Committee again during the upcoming year, along with my colleagues Mark McKenna, Amy Barrett, John Nagle, and Dean Nell Newton. We have not yet designated the (vice) chair. Curricular / research areas of particular (but not exclusive) interest include Commercial / Bankruptcy, IBT, Torts, IP / Patent, and Legal History.

Posted by: Rick Garnett | Jun 18, 2009 5:55:56 PM

I am hiring chair this year at Drake (jerry.anderson@drake.edu), for both entry-level and laterals. We haven't defined needs yet, but should be hiring for at least one open position.

Posted by: Jerry Anderson | Jun 18, 2009 6:34:16 PM

Our appointments chair at St. John's is Rosemary Salomone, and our committee is divided into two subcommittees: Entry-Level (Rosemary Salomone, Anita Krishnakumar, Chris Borgen, and myself) and Lateral (Vince Alexander, Ray Warner, Elaine Chiu, and Len Baynes). All inquiries can be sent to lawfac@stjohns.edu. We are poised to significantly enhance our faculty this year, and are looking for strong scholars in all areas, with particular interest in the areas of Administrative Law, Constitutional Law, International Business Transactions, Patent Law, Property, Torts, and Trusts and Estates.

Posted by: [Jeremy Sheff](#) | Jun 19, 2009 7:34:05 AM

The appointments chair at Southwestern Law School is our dean, Bryant Garth. We haven't finalized the committee yet, but I'll be on it. Areas of particular interest include (but are not limited to) business associations, contracts, property, health care, and trademark. Send inquiries to Doreen Heyer (dheyer@swlaw.edu), and you can contact me (dfagundes@swlaw.edu) with general questions about Southwestern too.

Posted by: Dave Fagundes | Jun 21, 2009 12:03:38 PM

I'll be the hiring chair at Wayne Law this year, and Steve Winter will be vice-chair focusing on lateral hiring; the other committee members haven't been named yet. We're especially interested in folks working in the areas of corporate/securities law, criminal law, environmental law, labor law, trial advocacy, and civil procedure.

Posted by: Jon Weinberg | Jun 21, 2009 2:17:02 PM

The Hastings Committee is as follows:

Bisharat, Chair
Barrett
Leshy
Piomelli
Shanske

I'd guess this will be a tight year for hiring in light of the California budget crisis and how it is affecting public schools. But our strongest needs have been in IP, Corps, and tax.

Posted by: Ethan Leib | Jun 22, 2009 3:15:33 PM

NKU-Chase's committee is not yet finalized and our hiring needs are not yet pinned down, but we will be hiring this year. Feel free to send apps and questions to me: Jennifer Anglim Kreder, krederj1@nku.edu

Posted by: [Jennifer Kreder](#) | Jun 23, 2009 10:53:12 PM

Jack Beermann is Appointments Chair at Boston University. We are looking at entry-level and lateral hires. We have a unified committee. Gary Lawson will be coordinating lateral hiring for the committee, which also includes Hugh Baxter, Daniela Caruso, Stacey Dogan, Alan Feld and Ken Simons, as well as Associate Dean Ward Farnsworth ex officio. We are especially interested in civil procedure, securities and corporate law, criminal law, commercial law and bankruptcy, but we are not constrained to only those subject matter areas.

We encourage candidates to contact us directly.

Posted by: Jack Beermann | Jun 24, 2009 11:12:19 AM

I am chairing the faculty appointments committee at Lewis & Clark again this year. The committee also includes Ed Brunet, Janet Steverson, Jan Neuman, Jeff Jones and Melissa Powers. We have several subject matter need, but, alas, likely only one slot. Our highest priorities include business associations, torts, estates and trusts, land use and property. We may also be looking to make an environmental hire with a separate budgetary strategy.

Candidates can feel free to contact me directly.

Posted by: Craig Johnston | Jun 24, 2009 1:03:36 PM

Professor Robert Spoo is the Chair of the Appointments Committee at the University of Tulsa. The other members of the committee are

myself (Tamara Piety), Lyn Entzeroth, Patience Crowder and Carrie Basas. We will be looking to fill 2-3 positions, 1 or more of which will be a lateral. Although we are interested in talking to excellent candidates in any area, we have particular needs in environmental and resource law and in any business related courses including, business associations, secured transactions, securities, antitrust, tax and bankruptcy.

Posted by: Tamara Piety | Jun 25, 2009 4:50:49 PM

I am the Chair of the Faculty Appointments Committee at Loyola University Chicago School of Law this year. The other members of the committee are John Breen, Jennifer Brendel, Stacy Platt, Anne-Marie Rhodes and Neil Williams. We are attempting to fill two positions -- one is a tenure-track position for which our primary curricular needs are real property and trusts & estates. The second position is a clinical position in health law where we are seeking a candidate to develop a live client clinic with the Beazley Health Law Institute.

Posted by: Jeffrey Kwall | Jun 29, 2009 2:04:49 PM

Chris Johnson is chairing the Appointments Committee at Franklin Pierce Law Center this year. Other members include Susan Richey (Associate Dean), Mitchell Simon, Dana Irwin and me. We are looking to make tenure-track appointments in up to 3 areas: IP/business, IP litigation and environmental regulation. For the latter 2 positions, we'd prefer someone who's able also to teach 1st year civ pro, and for all 3 positions practice experience would be a significant advantage. We welcome entry level as well as lateral applications. Feel free to apply directly to Chris (cjohnson@piercelaw.edu) or me (mwong@piercelaw.edu).

Posted by: Mary Wong | Jun 30, 2009 10:00:10 AM

The Chair of the Appointments Committee this coming year at the Case Western Reserve University School of Law will be Michael Scharf. I will be on the committee as well. I don't know whether all other members of the committee have been announced. As for needs, in my opinion we have definite needs in the the BA and commercial law areas, though I suspect the committee will identify additional interests once we've had the chance to meet.

JHA

Posted by: [Jonathan H. Adler](#) | Jun 30, 2009 4:18:34 PM

I will be the Appointments Chair at Drexel next year. We anticipate making several hires. We continue to seek faculty in a wide variety of areas, including (but not limited to): family law, civil procedure, federal courts, evidence, corporate law, and our clinic. In addition, we remain interested in adding faculty to teach first year courses.

Posted by: [Dan Filler](#) | Jun 30, 2009 4:46:42 PM

Oops! In my list of needs at Drexel, I forgot to include international law and professional responsibility.

Posted by: [Dan Filler](#) | Jul 2, 2009 10:53:25 AM

I am Appointments Committee chair at Penn for 2009-10.

Posted by: Polk Wagner | Jul 3, 2009 8:43:03 AM

The faculty appointments committee for the LSU Law Center for 2009-10 is composed of the following members:

Bill Corbett, Chair

Jack Weiss

Glenn Morris

Andrea Carroll

Robert Lancaster

Ray Diamond

Christina Sautter

The committee will address both entry-level and lateral hires. Areas of particular interest include civil law, international and comparative law, energy law, and clinical.

Posted by: William Corbett | Jul 3, 2009 11:30:36 AM

The full appointments committee at Case Western has been announced. Here it is:

Michael Scharf, Chair

Jonathan Adler

Sharona Hoffman

Laura McNally

Cassandra Robertson

Calvin Sharpe

Jacqui Lipton, ex officio

As I noted in my prior post, we have a definite interest in BA and commercial law, but will be looking at some other things as well.

JHA

Posted by: [Jonathan H. Adler](#) | Jul 8, 2009 7:43:28 AM

I am chair of the Appointments Committee at Saint Louis University. We are looking to hire in a number of areas next year but haven't determined our priorities yet. We are interested in both entry-level and lateral candidates.

Elizabeth Pendo
Saint Louis University School of Law

Posted by: Elizabeth Pendo | Jul 9, 2009 4:57:54 PM

The SUNY Buffalo appointments committee this year is:

Errol Meidinger, Chair

Guyora Binder

Rick Su

Tico Tassig-Rubbo

Jim Wooten

Ruqaijah Yearby

We hope to hire several people this year and will be looking in a variety of areas including administrative, civil rights, commercial, criminal, environmental, and tax.

Posted by: [Errol Meidinger](#) | Jul 12, 2009 12:41:18 PM

At Penn State, Catherine Rogers is the chair. The other members are David Kaye, Kit Kinports, Zak Kramer, John Lopatka, Carla Pratt, and Marie Reilly.

We are interested in both entry-level and lateral hiring and we will be meeting soon to determine our needs for the coming hiring season.

Posted by: Zak Kramer | Jul 13, 2009 12:41:14 AM

The University of Richmond School of Law is interested in making one or two entry level appointments in international law, wills, property/land use, corporate (transactional), tax, and/or advocacy. We are also looking to fill the E. Claiborne Robins Distinguished Chair in Law. The Robins Chair recognizes a faculty member who has demonstrated outstanding achievement in his or her field, and is not limited by subject matter. The appointments committee includes Dan Murphy, Clark Williams, Carl Tobias, Jim Gibson, Shari Motro, and myself.

Posted by: Jessica Erickson | Jul 15, 2009 2:20:22 PM

Rich Friedman (rdfrdman@umich.edu) will chair a single unified hiring committee for Michigan in 2009-10. The other members of

the committee are Peggy Radin, Steve Croley, Steve Ratner, Alicia Davis and me.

Posted by: [Jessica Litman](#) | Jul 17, 2009 10:08:02 AM

Brooklyn Law School's Entry Level Appointments Committee is chaired by Bailey Kuklin, and includes Ed Cheng, Steven Dean, Claire Kelly, Nelson Tebbe and myself. Our Lateral Level Appointments Committee is chaired by Marsha Garrison, and includes Bill Araiza, Roberta Karmel, Rebecca Kysar and Jason Mazzone.

We are looking to hire in several areas, including business and securities, health, tax, trusts and estates, torts, criminal, and international law.

Posted by: Miriam Baer | Jul 17, 2009 2:33:00 PM

The chair of the hiring committee at Goznaga Law School is Gerry Hess. The other committee members are me, Ann Murphy, Vickie Williams, and Amy Kelley. We're still determining our precise hiring needs, but we may fill as many as five positions this year.

Posted by: Brooks Holland | Jul 17, 2009 4:20:02 PM

At Vanderbilt, Chris Slobogin (c.slobogin@vanderbilt.edu) is chair of this year's lateral committee, which will try to fill up to four positions, and Nancy King (nancy.king@law.vanderbilt.edu) is chair of the entry level committee, which will be filling two positions. Members of the lateral committee are Mark Brandon, Tracey George, Terry Maroney, Amanda Rose, Randall Thomas and Ingrid Wuerth. Members of the entry level committee are Lisa Bressman, Nita Farahany, and Dan Sharstein.

Posted by: Christopher Slobogin | Jul 20, 2009 8:43:30 AM

The ASU hiring chair is Milton Schroeder. The Committee members are Dennis Karjala, Carissa Hessick, Myles Lynk, Rebecca Tsosie, Tamara Herrera and Doug Sylvester. We do not, generally, hire only in specific "needs" but we are interested in people (entry level or lateral) with the following areas of expertise: business/commercial law, land use/sustainability, intellectual property (patents and high technology), criminal procedure, administrative, and transnational.

Posted by: Doug Sylvester | Jul 20, 2009 1:34:31 PM

I am the chair of the appointments committee at the University of Nebraska College of Law. Other members of the committee are

Interim Dean Anna Shavers and Professors Steve Bradford, Colleen Medill, and Eric Berger. We are looking to fill up to four tenure-track positions. Areas of particular interest include torts, professional responsibility, corporations, corporate finance and governance, alternative dispute resolution, family law, and space law and telecommunications law. (Courses in space and telecommunications law are offered to J.D. students as well as LL.M. students in the College of Law's new Space and Telecommunications Law program that began in 2008.)
Richard Moberly

Posted by: [Richard Moberly](#) | Jul 22, 2009 7:46:09 AM

At New York Law School, the appointments committee this year is co-chaired by Deborah Archer and Arthur Leonard. Other members of the committee are Gerald Korngold, Rebecca Roiphe, Ruti Teitel, Dan Hunter, Dean Rick Matasar, Associate Dean Carol Buckler. Also prominently involved in the hiring process this year will be Anne Goldstein, director of our first year Legal Skills program.

Our first priority this year is to hire three experienced full-time instructors for our new first-year Legal Skills program, which will be implemented for one section of our day division during 2010-2011, and will then be expanded to the full first year class the following academic year. This program will consolidate first-year instruction in legal method, writing, lawyering skills and legal research.

Our subject matter priorities for tenure track hiring include commercial law & bankruptcy; trusts & estates (with an interest in tax); and civil procedure and litigation-oriented courses. We have an unoccupied chair to fill in the T&E area, and are particularly interested in hearing from highly accomplished teachers and scholars in that area who might want to relocate to a chaired position in New York City.

Posted by: Art Leonard | Jul 23, 2009 5:45:29 PM

Update on Vanderbilt: We are also hiring a Legal Writing Director this year, and I (Suzanna Sherry) am chairing that committee. Other members of the committee are Martin Cerjan, Brian Fitzpatrick, Steve Hetcher, Alex Hurder, and Yoli Redero.

Posted by: Suzanna Sherry | Jul 27, 2009 1:52:43 PM

Cardozo's (Non-Clinical) Appointments Committee will be chaired by Myriam Gilles; the other members are Michael Herz, Melanie Leslie, Alex Reinert, and Jeanne Schroeder. Although we have a

unified committee for entry-level and lateral hires, we have a separate Clinical Appointments Committee which also will be chaired by Myriam Gilles; the other members are Toby Golick, Michael Herz, Jonathan Oberman, and Jeanne Schroeder.

Posted by: [Alex Reinert](#) | Jul 27, 2009 7:46:17 PM

I'm chairing the appointments committee at Temple. Other members are Greg Mandel, Don Harris, Jaya Ramji-Nogales, and Ellie Margolies. We have yet to set our needs for tenure-track hiring, but torts, corporate tax, and commercial law are likely priorities. Inquiries welcome at lawfsc@temple.edu.

Posted by: Peter Spiro | Jul 31, 2009 10:36:40 AM

Linda Keller is Chair of the Faculty Appointments Committee at Thomas Jefferson School of Law in San Diego. Other members include Dean Rudy Hasl, Professors Julie Greenberg, Kevin (K.J.) Greene, Marybeth Herald, and Anders Kaye. This committee handles both entry-level and lateral hiring. Applicants from all subject areas are welcome. At this point, we anticipate the following needs, but this is not an exhaustive list: constitutional law, evidence, legal writing, patent and tax law. We also anticipate hiring for the TJSJ Teaching Fellowship; for more details, please see the AALS Placement Bulletin or contact Linda Keller at lkeller@tjssl.edu (in the subject line, specify "FAC" for inquiries for tenure-track positions or indicate "Fellowship").

Posted by: [Linda Keller](#) | Jul 31, 2009 7:37:39 PM

Update on Notre Dame's hiring committee: I am this year's vice-chair (our dean formally chairs the committee). As Rick said in his earlier post, the Committee includes Rick Garnett, Mark McKenna, John Nagle, and Dean Nell Newton. Our needs include Commercial/Bankruptcy, IP/Patent, IBT, legal history, and jurisprudence. In addition, we are looking for a clinician.

Posted by: [Amy Barrett](#) | Aug 1, 2009 9:43:28 AM

At the University of Florida, Kenneth Nunn (nunn@law.ufl.edu) is the chair of the lateral hiring committee, which also includes Elizabeth Lear, Michael Wolf, Stuart Cohn, and me. Mike Seigel (seigel@law.ufl.edu) is the chair of the entry-level hiring committee, which also includes Mary Jane Angelo, Alyson Flournoy, Elizabeth Rowe, and Mark Fenster. We'll be looking to hire in corporate law, family law, and international business transactions.

Posted by: Bill Page | Aug 2, 2009 2:06:46 PM

Stanford Commitete for 2009-10: Bob Weisberg (Chair), Rich Ford, Pam Karlan, Mike Klausner, Larry Kramer (ex officio), Jenny Martinez

Posted by: robert weisberg | Aug 2, 2009 3:41:33 PM

Thomas Mitchell is the chair of the Appointments Committee at the University of Wisconsin Law School. The other members of the committee are Associate Dean Heinz Klug, Howie Erlanger, John Ohnesorge, Allison Christians, Darian Ibrahim, Pilar Ossorio, and Stephanie Tai.

We are considering lateral and entry-level candidates in the areas of commercial law/bankruptcy and tax law. With respect to tax law, we are seeking to hire someone with expertise in business taxation, including corporate and partnership tax.

Posted by: Thomas Mitchell | Aug 2, 2009 9:10:28 PM

I am chairing the appointments committee this year at Cornell. Other members are Sherry Colb, Ted Eisenberg, Eduardo Peñalver, Jeff Rachlinski, and Laura Underkuffler. We will have an entry-level subcommittee, members TBA. Our hiring needs, as well as the number of available slots, are fairly flexible.

Posted by: Brad Wendel | Aug 4, 2009 9:51:34 AM

Tony Reese is the chair of the unified hiring committee at UC Irvine for 2009-10. Other committee members include Mario Barnes, Carrie Hempel, Christopher Lelsie, and Ann Southworth. They will be reviewing lateral and entry-level candidates in nearly all subject areas, although there will be particular interest in corporate law, international law, and clinical instruction.

Posted by: [Dan L. Burk](#) | Aug 4, 2009 10:34:29 AM

George Taylor is the Chair of our Committee at Pittsburgh this year. we are particularly interested in entry level Evidence and Professional Responsibility.

Posted by: John Burkoff | Aug 4, 2009 2:13:17 PM

I am the Entry-Level Appointments Chair at Columbia for 2009-2010.

Posted by: [Gillian Metzger](#) | Aug 5, 2009 11:59:16 AM

At Cleveland-Marshall Kevin O'Neill is chairing the tenure/tenure-track hiring committee that includes me, Dena Davis, Browne

Lewis and Alan Weinstein. We are looking to fill two slots, with one dedicated to health law. We will be looking at both new hires and laterals.

Posted by: Brian Ray | Aug 5, 2009 8:59:01 PM

I'd like to make one addendum to our areas of interest at the University of Wisconsin Law School. For the commercial law/bankruptcy slot I mentioned before, we are also interested in considering people who are contracts scholars.

Posted by: Thomas Mitchell | Aug 6, 2009 11:55:47 AM

I am the chair of the entry level appointments committee at Loyola Law School Los Angeles. Alexandra Natapoff is chairing our laterals committee.

Posted by: [Michael Waterstone](#) | Aug 6, 2009 3:06:33 PM

Professor Nancy Zisk is the chair of the Faculty Recruitment Committee at the Charleston School of Law. We will be looking to fill at least two positions, with Trusts and Estates, and Business Associations being our biggest needs.

Posted by: [Richard Gershon](#) | Aug 7, 2009 12:42:08 PM

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*Encyclopedia of the Supreme Court
of the United States*

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Encyclopedia of the Supreme Court of the United States

David S. Tanenhaus, Editor in Chief

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Matthew C. Cordon

FEDERAL JURISDICTION

Federal jurisdiction is the authority of a federal court to adjudicate a case. Federal courts are courts of limited jurisdiction, which means that they are presumed to lack the authority to hear a case unless that authority is specifically granted. State courts, by contrast, are courts of general jurisdiction, which means that they are presumed to possess the authority to hear a case unless that authority is specifically withdrawn. State courts, then, are the default adjudicators in the American judicial system. Any grant of federal jurisdiction is exceptional, reflecting the judgment that a particular class of cases is particularly suited for resolution by federal courts. Federal jurisdiction is sometimes exclusive of, but more often concurrent with, state jurisdiction.

Article III of the U.S. Constitution specifies the matters subject to federal jurisdiction. For example, Article III identifies cases arising under federal law and controversies between citizens of different states as matters within federal judicial power. It is important to recognize that Article III does not itself authorize federal courts to hear all cases falling within the power it describes. On the contrary, the Supreme Court is the only federal court that derives its jurisdiction directly from Article III. The jurisdiction of the inferior federal courts is dependent upon statutory grant. In other words, Article III defines the range of federal judicial power, and Congress decides how much of that power to grant. Congress has never vested federal courts with the full amount of jurisdiction available under Article III.

THE JURISDICTION OF THE SUPREME COURT

The Supreme Court is the only federal court created by the Constitution itself, and, as stated above, it is the only federal court that derives its jurisdiction, both original and appellate, directly from the Constitution. The degree to which Congress can modify these constitutional grants of jurisdiction is a difficult and contested question of constitutional law.

Original Jurisdiction Original jurisdiction is the authority to adjudicate a suit in the first instance. Article III grants the Court original jurisdiction over "all Cases affecting

Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party." In *Marbury v. Madison*, 5 U.S. 137 (1803), the Supreme Court squarely held that Congress cannot expand its original jurisdiction. It is less clear whether Congress can contract it. From the beginning, Congress has acted on the assumption that it can.

In the Judiciary Act of 1789, the first legislation regarding the federal court system, Congress specified the original jurisdiction of the Supreme Court in a manner that fell short of the constitutional grant. For example, the statute described the Court's original jurisdiction as extending to suits in which ambassadors were parties, even though the constitutional grant sweeps more broadly, granting the Court jurisdiction over cases merely "affecting" ambassadors. The modern statute governing the Supreme Court's original jurisdiction (28 U.S.C. § 1251) similarly falls short of the constitutional grant. It gives the Supreme Court original jurisdiction of controversies between two or more states; all actions or proceedings to which ambassadors and other specified foreign dignitaries are parties; controversies between the United States and a state; and all actions or proceedings brought by a state against citizens of another state or aliens. Conspicuously missing from this list are some suits that would be within the Article III grant, such as private suits against a state. The Supreme Court has never passed on the constitutionality of these statutory limitations on its original jurisdiction. It has suggested in dicta, however, that they are unconstitutional (see, e.g., *California v. Arizona*, 440 U.S. 59 [1979]).

While the Court has expressed doubts about Congress's ability to contract its original jurisdiction, it has held that Congress may make that jurisdiction concurrent with the jurisdiction of inferior federal courts or state courts. And Congress has done just that. While it has given the Supreme Court exclusive jurisdiction of all controversies between two or more states, it has made all other cases within the Court's original jurisdiction subject to adjudication by other courts.

Appellate Jurisdiction Appellate jurisdiction is the authority to review the judgment of a lower court for error. Article III, Section 2 provides that in all cases outside the Supreme Court's original jurisdiction and within the federal judicial power, "the supreme Court shall have appellate Jurisdiction . . . with such exceptions, and under such Regulations as the Congress shall make." While this clause vests the Supreme Court with appellate jurisdiction, it also explicitly gives Congress the power to withdraw that jurisdiction. In *Darousseau v. United States*, 10 U.S. 307 (1810), the Court chose to construe all statutes affirmatively describing its appellate jurisdiction as implicitly withdrawing any appellate jurisdiction that they did not describe. As a practical matter, then, the Court treats its appellate jurisdiction as dependent upon statutory grant.

From the beginning, Congress has given the Supreme Court jurisdiction to review the judgments of inferior federal courts. The Judiciary Act of 1789 gave the Supreme Court jurisdiction to review the civil judgments of federal circuit courts when the judges of the circuit court were divided on a question and the amount in controversy exceeded \$2,000. Notably, the Court had no appellate jurisdiction over criminal cases. The Court's jurisdiction over inferior federal courts has increased over time; it now has jurisdiction over both criminal and civil appeals from inferior federal courts, and its jurisdiction exists without regard to the amount of money at stake. The bulk of the Court's docket is devoted to the review of judgments rendered by inferior federal courts.

The Supreme Court also reviews judgments from state courts insofar as those judgments pass on questions of federal law. Section 25 of the Judiciary Act of 1789 gave the Supreme Court jurisdiction to review judgments of the highest state court in which review could be had that held against a federal claimant, and in 1914 Congress expanded the Court's jurisdiction to permit it to review cases in which the highest state court held in favor of a federal claimant. This basic jurisdictional scheme remains in place today (codified at 28 U.S.C. § 1257). In the eighteenth and nineteenth centuries, many states objected to the proposition that the Supreme Court could review their judgments, but in *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), the Court interpreted Article III to permit it to exercise such jurisdiction.

A major change to the Supreme Court's docket over time has been the move from mandatory to discretionary appellate jurisdiction. The Judiciary Act of 1789 obliged the Court to hear all appeals within its jurisdiction. Over time, Congress rendered more and more of the Court's jurisdiction discretionary, and in 1988 it almost entirely eliminated the Court's mandatory jurisdiction. As a result, the Court now has substantial control over both the size and subject matter of its docket.

A persistent controversy regarding the Supreme Court's appellate jurisdiction is the degree to which Congress can abrogate it. The Constitution expressly gives Congress the authority "to make Exceptions" to the Supreme Court's appellate jurisdiction. Congress has frequently proposed exceptions that would remove controversial topics like abortion and school prayer from the Court's docket. In response to such jurisdiction-stripping proposals, critics have insisted that Congress does not have unlimited power over the Supreme Court's appellate jurisdiction. For example, Professor Leonard Ratner argues that any "exceptions" to the Court's appellate jurisdiction cannot "negate" its Court's "essential constitutional functions of maintaining the uniformity and supremacy of federal law" (1960, pp. 201–202).

THE JURISDICTION OF THE INFERIOR FEDERAL COURTS

The Constitution does not establish inferior federal courts. Instead, Article I, Section 8 gives Congress the discretion to create them. Just as the Constitution does not mandate the existence of inferior federal courts, neither does it require that they possess any particular jurisdiction once they are created. The jurisdiction of inferior federal courts, like their existence, is generally left to Congress. That is not to say that Congress's power over the jurisdiction of the inferior courts is entirely unbounded. Doubts exist about whether Congress can deprive some federal claimants of any opportunity for federal review by withholding all federal jurisdiction, both original and appellate, over a particular class of claims. In *Martin*, Justice Joseph Story advanced an argument that has been echoed many times since: He claimed that "the whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority." In the normal course, however, where Supreme Court appellate jurisdiction exists, Congress is recognized to possess wide authority to define jurisdiction of the lower courts.

Historical Foundations The jurisdiction of the inferior federal courts was relatively narrow when the Judiciary Act of 1789 first established them. Among other things, that act gave inferior federal courts exclusive jurisdiction over federal crimes, matters of admiralty and maritime, and suits against consuls and vice consuls. It gave them jurisdiction concurrent with the state courts over cases brought by the United States, and cases in which an alien sued in tort for a violation of the law of nations or a U.S. treaty. And it gave inferior federal courts diversity jurisdiction over suits in which an alien was a party, and suits between a citizen of the state in which a suit was brought and a citizen of another state. The Judiciary Act of 1789 did not, however, give federal courts the branch of federal jurisdiction considered most important today: general federal question jurisdiction, which is the authority to decide all cases arising under federal law. Under the scheme established by the act, the interpretation and application of federal law was left largely to the state courts.

For most of the nineteenth century, Congress made no significant modifications to this basic jurisdictional scheme. The Civil War, and the surge of national feeling accompanying it, provided an impetus for change. In the 1860s, Congress began slowly expanding the jurisdiction of the federal courts, and in the Judiciary Act of 1875, it radically enlarged their jurisdiction. That act granted general federal question jurisdiction to the inferior federal courts. Congress had finally decided that federal courts should have a central role in the interpretation and application of federal law. This judgment fundamentally shaped the history of the federal courts; today, the

interpretation and application of federal law is their most important role.

Federal Question and Diversity Jurisdiction The most important modern sources of original federal jurisdiction are the federal question statute (28 U.S.C. § 1331), which is the descendant of the grant of federal question jurisdiction in the Judiciary Act of 1875, and the diversity statute (28 U.S.C. § 1332), which is the descendant of the diversity grant in the Judiciary Act of 1789. While the importance of these two grants should not be underestimated, it is important to recognize that both fall well short of the federal jurisdiction authorized by the Constitution.

The federal question statute implements Article III, Section 2 of the Constitution, which provides that “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.” In *Osborn v. United States*, 22 U.S. 738 (1824), the Supreme Court interpreted this portion of Article III quite broadly, holding that it empowers Congress to authorize federal jurisdiction whenever federal law is an “ingredient” of the case. Even though the federal question statute uses language nearly identical to that of Article III, Section 2, the Supreme Court has interpreted the statutory grant far more narrowly. In *Louisville & Nashville Railroad v. Mottley*, 211 U.S. 149 (1908), the Court held that a case only “arises under” federal law for purposes of the statute if federal law is part of the plaintiff’s “well-pleaded complaint.” In other words, the statute does not authorize a federal court to assume jurisdiction over a case in which a federal question is asserted only as a defense, even though a federal defense would constitute an “ingredient” of the case for purposes of Article III. For many years, Congress limited the federal question jurisdiction of the federal courts still further, providing that they could only hear such cases when the amount in controversy exceeded \$500. It dropped that requirement in 1980.

The diversity jurisdiction of the federal courts reflects a similar gap between the constitutionally permissible and the statutorily granted. For one thing, Congress has always imposed an amount-in-controversy limitation on diversity jurisdiction, even though the Constitution imposes no such limit. The Judiciary Act of 1789 limited diversity jurisdiction to those suits in which the amount in controversy exceeded \$500; the diversity statute sets that amount at \$75,000.

More limiting than this amount-in-controversy requirement, however, is the limitation that the Supreme Court has interpreted the statute to impose upon diversity of citizenship. Article III extends federal jurisdiction to “controversies . . . between citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.” In *State Farm v. Tashire*, 386

U.S. 523 (1967), the Supreme Court interpreted this language to require only minimal diversity: For purposes of the Constitution, at least one plaintiff and one defendant must be citizens of different states. By contrast, in *Strawbridge v. Curtiss*, 7 U.S. 267 (1806), the Court interpreted the similar language of the diversity statute to require complete diversity: each plaintiff must be a citizen of a different state than each defendant. Thus, for purposes of the diversity statute, jurisdiction is destroyed if any of the plaintiffs is a citizen of the same state as any of the defendants. The statutory requirement of complete diversity renders the diversity jurisdiction of the federal courts significantly narrower than that permitted by Article III itself.

THE MODERN DEBATE ABOUT FEDERAL JURISDICTION

Crowded federal dockets have generated a debate about whether federal jurisdiction should be restructured in a way that would ease the workload of the federal courts. The most common proposal in this regard is for Congress to narrow significantly or even entirely abolish the diversity jurisdiction of the federal courts. There is wide agreement that federal courts should be open to entertain federal questions. There is less agreement that federal courts are needed to adjudicate suits between citizens of different states. Diversity jurisdiction is designed to offer a neutral federal forum to litigants who might face prejudice in a court of the opponent’s state. Many claim that while the risk of regional bias may have been real when the Constitution and the Judiciary Act of 1789 were adopted, that risk no longer exists today. Others argue that bias, or at least the fear of it, persists, and that without diversity jurisdiction businesses may be unwilling to invest in other parts of the country for fear of facing litigation in state courts that are hostile to outsiders. Thus far, critics have not been able to persuade Congress to abolish or even significantly limit the diversity jurisdiction of the federal courts. Nonetheless, the debate about whether Congress should do so is likely to continue.

SEE ALSO *Appellate Jurisdiction; Article III; Diversity Jurisdiction; Federalism; Judiciary Act of 1789; Original Jurisdiction*

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Amy Coney Barrett

FEDERAL SOVEREIGN IMMUNITY

The rule of sovereign immunity provides that one cannot sue the government without its consent. The concept originated in England to prevent suits against the Crown. Sovereign immunity is not mentioned in the Constitution, but in a number of early nineteenth-century decisions the U.S. Supreme Court held that the federal government enjoyed the immunity.

In *United States v. Lee*, 106 U.S. 196 (1882) the Court appeared to limit the application of sovereign immunity when it held that the doctrine did not bar a suit against a federal government official, rather than the United States itself. The majority found that a federal official who possessed land taken in violation of the Fifth Amendment was not immune from suit because the action was against the official, not the government. However, subsequent twentieth-century Supreme Court decisions affirmed the viability of sovereign immunity and limited application of the *Lee* decision. In *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949) the Court recognized that the federal government can only act through its agents. For this reason, it held that a suit against a federal official relating to the performance of the official's duties was considered to be a suit against the United States, and thus barred by sovereign immunity. The only exceptions were if the official was acting outside the scope of congressional authority or if the official's acts were unconstitutional. Despite criticism that sovereign immunity is an outdated concept and that the federal government should be answerable for injuries it causes, the Supreme Court has shown no inclination to abrogate the rule.

Although the federal government enjoys sovereign immunity, Congress has enacted statutes waiving the immunity for a wide variety of cases. The Tucker Act (1887) authorizes suits against the United States for certain money claims. This statute and its antecedents cover cases where the United States is being sued for breach of contract. The Suits in Admiralty Act (1920) allows for suits against the federal government relating to maritime issues. The Federal Tort Claims Act (1946) waived sovereign immunity for many types of tort actions against the federal government. Employment discrimination claims against the United States were authorized by a 1972 amendment to Title VII. A 1976 amendment to the Administrative Procedures Act waived sovereign immunity in cases where plaintiffs are seeking specific relief.

This amendment authorizes certain nonmonetary suits against government agencies and departments. It effectively overrules the limitation on suits against federal officials in relation to their official duties established in *Larson*. Under the amendment, a plaintiff challenging an agency or department action now may name the United States as a defendant. In addition to these broad waivers of sovereign immunity, other statutes permit suits against the federal government in more discrete cases.

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Philip L. Merkel

FEDERAL TRADE COMMISSION V. KEPPEL & BROTHERS, INC., 291 U.S. 304 (1934)

How does one define the phrase "unfair methods of competition"? In answering this question in an expansive manner, the U.S. Supreme Court massively broadened the powers of the Federal Trade Commission (FTC) at a time when the Court was often seeking to limit the federal government. A clear victory for those who advocated the use of legislative intent in statutory interpretation, the FTC was granted the ability to look at practices that were directed not only toward fellow competitors, but also toward consumers.

FTC v. Keppel & Brothers, Inc., 291 U.S. 304 (1934) involved the use of "break-and-take" packaging in the penny candy industry, a practice employed by more than forty companies. While most candy companies offered candy for a standard price, such as one piece for a penny (referred to as "straight goods" packaging), Keppel Brothers included elements of chance, such as packaging a penny within the wrapper of a limited number of pieces, as part of their pricing structure in an attempt to entice consumers. Including these elements of chance enabled Keppel Brothers and other manufacturers of break-and-take candy packages to sell inferior products, either in size or quality, in comparison to straight goods manufacturers.

According to the FTC, this practice encouraged children to take part in a form of lottery or gambling, an immoral practice. While it was true that other manufacturers could employ the same tactics in marketing their goods, the FTC determined that it would be against public policy to encourage more companies to engage in tactics that they may consider reprehensible; indeed, some companies who had employed these tactics did so reluctantly because

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LAWYER



Fall 2008

Living a Vocation:
Why *Notre Dame*
Law School Matters

 UNIVERSITY OF
NOTRE DAME
The Law School

EDITOR'S NOTE



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We want to hear from you. Send us your letters and e-mails pertaining to material printed in the magazine. The editor reserves the right to determine the suitability of letters for publication and to edit them for accuracy and length.

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Dear Reader,

Notre Dame in the fall is a beautiful place.

There's the gorgeous foliage, the crisp air, and the excitement of a new football season.

There's the bustle of students getting back to class and the fun of reconnecting with friends separated over the summer.

As always, there is the peal of the Basilica church bell offering an audible reminder that we are living and working in a place steeped in faith and tradition, and the roar of the omnipresent construction machines reminding us that we are, at the same time, part of something modern and progressive.

You just know you are somewhere special when you set foot on campus.

Those already associated with Notre Dame understand that well. The 1Ls just dipping their toes in the water will very quickly learn what makes Notre Dame a different kind of Law School.

Perhaps that's the best part about this season—it's an opportunity to welcome a new group of future lawyers into the fold, expanding the Notre Dame Law School family even further. It's an opportunity to educate women and men in a way that only Notre Dame can: by teaching students to think critically and act compassionately through the integration of faith and reason.

At the same time, many alums return to campus to participate in meetings of the Notre Dame Law Association and the Law Advisory Council. Others drop by the Law School after football games to reconnect with one another and to say "hello" to a former professor. Notre Dame Law School is a place to which alums want to return and with which they want to remain connected.

Yes, Notre Dame in the fall is a beautiful place. I hope to see you here.

Regards,

A handwritten signature in black ink that reads "Melanie McDonald". The signature is fluid and cursive.

Melanie McDonald

NOTRE DAME LAWYER



SPRING 2008

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FROM THE DEAN



This fall our students returned to find campus awash in autumn colors and our magnificent new building near completion. No longer merely an architect's rendering, it stands as the gateway to the University's academic quadrangles and makes a signal statement about the Law School's continuing commitment to be premier within the legal academy while remaining faithful to our religious identity. We will move into Eck Hall of Law in January. We then will begin renovation of our existing building, which we are proud to rename Biolchini Hall of Law in recognition of the wonderful \$15 million gift of University trustee, Robert Biolchini, and his wife, Frances.

Our new and renovated buildings will provide an outstanding platform for the remarkable teaching, research, and service that goes on within our community. It is the people who populate our buildings, however—our faculty and students—who tell our story.

With that thought in mind, this issue of our magazine focuses on our five most recently promoted faculty members: Amy Barrett, Anthony J. Bellia, Jr., Patricia Bellia, Nicole Garnett, and Richard Garnett. These outstanding teachers and prolific scholars bring an intellectual vitality to their work that only the best law schools can attract and, perhaps more importantly, retain.

These young faculty members are committed to conducting their teaching and research at Notre Dame Law School because they are committed to our unique mission: to be Catholic, with a wide spectrum of philosophical viewpoints that eschews a narrow parochialism, and to be a great law school. You will read the reasons they chose to come and why they choose to stay at this special place. You will read about the emphasis placed on both scholarship and teaching, and the way in which the two reciprocally inform and improve each other. You will read about the importance of offering a legal education within a community of faith, a community that sees itself as called to harness our gifts to build the kingdom of God. You will read about the value placed on leading an integrated life.



Great faculty attract great students. Thus, with deep gratitude, we close this issue with the story of how Frank Eck found yet one more way to challenge the Law School even as he left us last December. Beyond the \$21 million gift to underwrite Eck Hall of Law, Mr. Eck left a \$5 million incentive match in his estate to raise new endowed fellowship dollars to fill the corridors of the building that bears his name with some of the very best students in the country.

These are exciting times at the Law School. We begin this new academic year with hearts filled with thanks—thanks to all those who have gone before us and thanks to all of you—for bringing us to this moment, and for supporting our quest to be a premier law school rooted in the Catholic intellectual tradition.

A handwritten signature in black ink that reads "Patricia A. O'Hara". The signature is written in a cursive, flowing style.

Patricia A. O'Hara
The Joseph A. Matson Dean and Professor of Law

Hispanic Law Students Association Bestows Award

BY NATALIE ESCUDERO '09

Each year, Notre Dame Law School's Hispanic Law Students Association (HLSA) bestows an award upon a Hispanic lawyer or judge who best exemplifies Graciela Olivarez's commitment to community service and high ethical and moral standards. This prestigious award is named for Olivarez, the first woman and the first Hispanic student to graduate from Notre Dame Law School (in 1970).



Judge Cecilia M. Altonaga

To her colleagues and friends in the Notre Dame community, Olivarez was known as "Amazing Grace," a fitting epithet for a woman who was a champion of civil rights and a beacon of justice—nothing short of extraordinary. Through this annual award, Notre Dame Law School and HLSA commemorate Olivarez's legacy and great contributions by honoring those who strive for justice with the same passion and zeal as she once did. Olivarez broke down barriers that existed for both women and minorities—not only at Notre Dame, but nationally—and the annual Graciela Olivarez Award seeks to recognize individuals who continue that effort.

On April 19, 2008, HLSA celebrated the Thirteenth Annual Graciela Olivarez Award Ceremony by honoring Judge Cecilia M. Altonaga. Altonaga was the first Cuban-American woman appointed as a federal judge to the U.S. District Court Southern District of Florida after she was nominated by President George W. Bush in 2003. Prior to that time, she served as a circuit judge in the juvenile and criminal divisions, and has handled appeals from the County Court. As a county judge,

she served in the civil, criminal, and domestic violence divisions. Altonaga is a member of the Florida International University Law School Advisory Board and the Eleventh Judicial Circuit Professionalism Committee. She has also served as a member of the National Advisory Committee for Cultural Considerations in Domestic Violence Cases and the First Family Law American Inns of Court. Altonaga's legal experiences have demonstrated a commitment to service and justice. She connects with the Hispanic community, and she encourages young Hispanic lawyers and law students to do the same.

Members of HLSA as well as faculty and staff from Notre Dame Law School and the Institute for Latino Studies gathered to honor Altonaga. The attendees also had the privilege of listening to the remarks of two renowned law faculty, Professor Emeritus Thomas L. Shaffer and Professor Robert E. Rodes, Jr., who personally knew Olivarez, and who shared their fond memories of her as a student and "a different kind of lawyer."

Altonaga's remarks upon her receipt of the award focused on what the term "Hispanic" means and what it means to be identified as a Hispanic. She noted, "[w]hen we gather to recognize someone as extraordinary as Olivarez, what we should be celebrating as Hispanics is the freedom to each have our own definitions of Hispanic, and our own views on the need or desirability of celebrating the life of a great Hispanic woman. To celebrate the life of a Hispanic woman like Olivarez, you law students and aspiring lawyers should take the time to learn to speak the language well, for otherwise, of what value is it if you cannot be that bridge between Spanish-speaking clients and our Anglo-legal system? Just to be another statistic . . . ?"

The purpose of HLSA is to foster an environment supportive of mutual understanding and fellowship within the University of Notre Dame and the Law School community, and to promote awareness of the achievements and concerns of the Hispanic community. HLSA is also a forum for expression and support for the student body. Together, as an organization and through the Graciela Olivarez Award, we remember what it means to be a Hispanic and how we can forge ahead in the quest for justice.



Natalie Escudero

Summer Stipend Program Supports Public Service

BY SUSIE WINE '10

The Summer Stipend Program is a comprehensive, collaborative program through which alumni, students, legal employers, and various friends provide stipends for NDLS students performing otherwise unpaid legal public interest work around the world. Susie Wine, who began her 2L year in August, describes her summer 2008 experience.

On December 27 of last year, it was a chilly 28 degrees in my hometown of Columbia, Mo. In America's Finest City, however, it was a balmy 59 degrees. During my long-distance interview with San Diego Volunteer Lawyer Program (SDVLP) Managing Attorney Dawn Davis, I could almost smell the sunblock and avocados through the phone line. The amazing description of SDVLP's work that Dawn provided made me very excited to receive one of three summer stipend fellowships provided by the Notre Dame Alumni Club of San Diego and Ross, Dixon & Bell . . . and the enticing, albeit imaginary, aromas of summer in December didn't hurt, either. On May 19, fellow 1L Andrew Smith and I began work at SDVLP.

SDVLP has been in existence since 1983. With a mission of providing free legal services to those who can't afford them, the nonprofit firm reaches a group of San Diegans that tourists rarely see—not those who are seeking handouts on C Street, but those who are living independently on a very meager income, those who are in a rehabilitation facility, and those who are struggling to keep a family together. I worked on the team addressing the unique needs of those members of the San Diego community living with HIV or AIDS. At any one time, our team had over 200 files open—mostly in the areas of estate planning, landlord/tenant relations, and medical benefits. Two SDVLP employees supervise this department—Staff Attorney Cynthia Han and Legal Assistant Evelyn Torres—but well over half of the hours of work spent on these cases is done by volunteers, either in the office or at a clinic.



Susie Wine

By far my favorite part of the work we did was interviewing clients at the Monday night clinic in Hillcrest, which is one of six clinics run by our team throughout the area. This clinic is staffed almost entirely by volunteers: Attorneys, paralegals, notaries, and law students who met with clients in the Sunday school rooms of a church. The setting (teensy chairs, pictures of Bible All-Stars like Noah and Moses) must be very different from the conference rooms at a firm, but the same volunteers come back time after time because they know that they are truly helping someone. Throughout the rest of the week, the other interns and I worked on following up with these clients by doing research, writing letters, making phone calls, and writing more letters. I felt well-prepared for the research and writing aspects of the job (Thank you, Professors Bowers and Edmonds!), and some of the issues presented by the clients were familiar ones from class (The Implied Warranty of Habitability! Misrepresentation!). However, a vast majority of the difficulties presented by clients were totally unfamiliar to me. The clients didn't care if I got an A in Contracts—which I didn't—or if I could successfully

identify a fee simple subject to an executory limitation—which I can. The client cared about getting her disability benefits reinstated or making sure his landlord doesn't go through his belongings.

Working with SDVLP and learning about the other free legal services provided by the Legal Aid Society of San Diego, the Bar Association, and others have made me proud to be a small part of the legal community here in San Diego. Now, as I begin my second year of law school at Notre Dame, I carry with me a wider perspective on the things I learn in class, as well as an undying appreciation for enchiladas verdes.



Notre Dame Law School alumnus Jock Smith delivers the keynote address at the Black Law Students Association anniversary dinner.



Members and guests of the Black Law Students Association mingle before dinner in the Notre Dame Stadium Press Box.

Black Law Students Association's 35th Anniversary

Notre Dame Law School's African American students have been organized as a chapter of the National Black Law Students Association (BLSA) for 35 years. To celebrate this milestone, BLSA hosted events for BLSA members and friends throughout the weekend of April 4–6. The anniversary theme was "The Power to Change," a theme evident throughout the weekend in events ranging from a reception at Judge Roland and Dean Angie Chamblee's home to informational lectures and the annual banquet—held in the Notre Dame Stadium Press Box—which featured keynote speaker and Notre Dame alumnus Jock Smith. Smith is an original founder of The Cochran Firm, named for and founded by the late, famed attorney Johnnie L. Cochran, Jr. Smith upholds Cochran's legacy as the firm's national president.

As an organization, BLSA strives to "articulate and promote the professional needs and goals of black American law students; to foster and encourage professional competence; to focus upon the relationship of the black attorney to the American legal structure; and to instill in the black attorney and law student a greater awareness of and commitment to the needs of the black community."

Hispanic Law Students Association Confers Graciela Olivarez Award

On Saturday, April 19, the Hispanic Law Students Association (HLSA) presented the 13th annual Graciela Olivarez Award to United States District Judge Cecilia M. Altonaga of the Southern District of Florida. Altonaga, a Yale Law School graduate, is the first Cuban-American woman to be appointed as a federal judge in the United States. The Graciela Olivarez Award is given in honor of the award's namesake, the first woman and first Hispanic to graduate from Notre Dame Law School. For more on HLSA and this award, please read "Dateline NDLS" by Natalie Escudero on page 4.

NDLS Tailgater This Fall

The Notre Dame Law Association and NDLS Office of External Relations invite all Notre Dame Lawyers to a tailgate party before the Stanford game on Saturday, Oct. 4. Please mark your calendars! Details are forthcoming.

NBC to Feature Prof. Gurulé in Halftime Spot

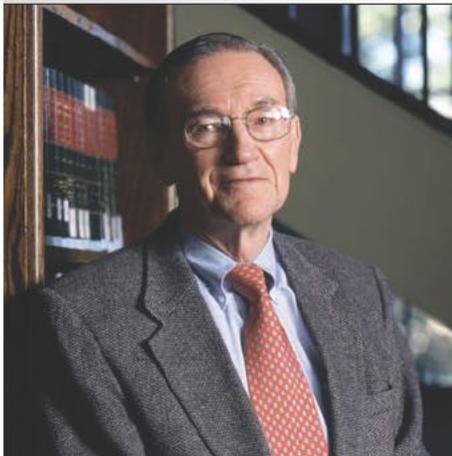
Professor Jimmy Gurulé will appear in a two-minute spot on NBC this fall during halftime of a Notre Dame football game. The tentative air date is Sept. 27. Gurulé's is one of five spots scheduled over the course of the season that spotlight various Notre Dame faculty. Gurulé is an internationally known expert in the field of international criminal law—specifically, terrorism, terrorist financing, and anti-money laundering.



Jimmy Gurulé as he will appear on NBC television this fall.

International Conference Honors Prof. Kommers

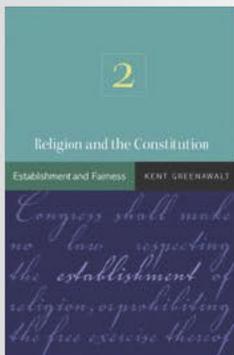
The Law School and various other units of the University of Notre Dame are sponsoring an international conference in recognition and celebration of NDLS Professor Donald Kommers' scholarly contributions to the University. Kommers also teaches political science, and closed out the past school year by moving to emeritus status after 45 years on the faculty. The conference is titled Church-State Relations and Religious Liberty: Comparative Perspectives, and will be held Sept. 22–23.



Prof. Emeritus Donald Kommers

Prof. Richard Garnett to Host Academic Conference

On October 10, 2008, Professor Richard Garnett will host a conference on Kent Greenawalt's recently published *Religion and the Constitution: Volume 2: Establishment and Fairness* (Princeton University Press). Law and religion scholars from across the country will convene at NDLS to discuss the



book, which focuses on the Establishment Clause of the First Amendment to the federal Constitution. Greenawalt, a professor at Columbia Law School, will participate in the conference.

From left to right: Judge Kazuhisa Kondo, Prof. J. Eric Smithburn, and Yuka Kondo



Japanese Judge, Lawyer Visit NDLS

The Honorable Kazuhisa Kondo, judge of the Tokyo District Court, and his wife Yuka Kondo, an attorney, were guests of the Law School during the 2007–08 school year. The Kondos enrolled in two of Professor J. Eric Smithburn's courses, and he arranged several visits for them in the local courts.

CCHR Celebrates 35th Anniversary

This year, the Center for Civil and Human Rights celebrates 35 years at Notre Dame Law School. It is the oldest human rights center associated with an American law school, and now has an alumni network of more than 275 lawyers in more than 75 countries. The Center was founded in 1973 by the Reverend Theodore M. Hesburgh, C.S.C., then-president of Notre Dame and a member of the U.S. Commission on Civil Rights from its inception during the Eisenhower Administration until 1973. Father Ted was able to launch the Center, with a grant from the Ford Foundation, as an institute for advanced research and teaching. While never losing sight of its initial civil rights focus, the Center was inspired by Father Ted's global vision to expand its work to include international human rights.

Symposium Featured Hesburgh and Former Apartheid Prisoner

Notre Dame Law School's *Journal of Legislation* presented "Tilted Scales: Pursuing Justice Amidst Unjust Legislation" on Thursday, April 17 in the Law School Courtroom. The symposium featured Rev. Theodore Hesburgh, C.S.C., former President of Notre Dame and charter member of the U.S. Commission on Civil Rights; Thulani Mabaso, former prisoner in apartheid South Africa; Bridgette Carr, associate clinical professor of law at Notre Dame; and Paolo Carozza, associate professor of law at Notre Dame and chairman of the Inter-American Commission on Human Rights.

Following opening remarks from moderator Carozza, Father Hesburgh delivered an address and participated in a Q&A session. Mabaso addressed the audience with his story about 16 years of imprisonment and torture by South Africa's apartheid government. "We need to make sure that what happened to us never happens to future generations," said Mabaso.

LIVING A VOCATION

Why Notre Dame Law School Matters

On the pages that follow, Notre Dame Law School's five newly promoted faculty members offer their reflections on why they choose to teach and pursue scholarship at Notre Dame. Each has also selected an excerpt from published research, offering a glimpse into the minds of those shaping modern legal debates and educating the next generation of "a different kind of lawyer."

EDITOR'S NOTE: Learn more about these and other outstanding NDLS faculty under the "Faculty/Staff Index and Profiles" tab on the Law School's website, law.nd.edu.



Amy Barrett

*promoted to associate professor
with tenure*

Reflection Bishop Rino Fisichella, the rector of Pontifical Lateran University, has said that the mission of Catholic universities is to help students “discover their lives as a vocation and [give them] the necessary tools to approach their professional careers in the most coherent way, to fulfill society’s needs wherever their professions lead them. Therefore, that which our universities are asked to fulfill is the intelligent synthesis between study and life, the search for the truth and its existential experience. No discipline that exists within our walls lies outside this responsibility.”

Certainly, the discipline of law does not lie outside this responsibility. I joined the faculty of Notre Dame Law School because it takes this responsibility seriously. We equip our students with the tools they need to practice law at the highest levels. At the same time, we emphasize that this profession is not an end in itself, but rather an instrument to be used for building the kingdom of God. We do this in quite practical ways. Our mission is evident in the curriculum, which offers courses such as Catholic Social Thought and Canon Law alongside courses such as Constitutional Law and Contracts. Our mission is evident in the classroom, where both students and faculty feel free to ask how religious beliefs might bear on matters of law. Our mission is also evident in the community of faith that the faculty works to establish. One of my colleagues leads daily Morning Prayer for interested students. Another, a priest, offers



weekly Mass and counsels countless students on all manner of subjects. Our faculty meetings, like many of our classes, begin with prayer, making manifest our commitment to the integration of faith and reason.

In short, the Notre Dame faculty seeks to do more than train its students in a profession. It seeks, as Bishop Fisichella puts it, to help students “discover their lives as a vocation.” And that is an effort in which I am proud to take part.

AMY BARRETT

Scholarship: PROCEDURAL COMMON LAW

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Footnotes omitted

There has been no shortage of efforts to justify the common lawmaking powers of the federal courts. In the course of these efforts, it is commonplace to underscore three features of the common law that federal courts develop without congressional authorization. First, this law “is truly federal law in the sense that it is controlling in . . . actions in state courts as well as in federal courts.” Second, to the extent that the federal courts proceed without congressional authorization, federal common law is “specialized.” It is confined, at least as a matter of doctrine, to several well-recognized enclaves, such as interstate disputes, international relations, admiralty, and proprietary transactions of the United States. Third, Congress can always abrogate it.

Despite the consistent emphasis on these characteristics of federal common law, a large body of federal common law exists that does not embody them. This body of law can be characterized as “procedural common law”—common law that is concerned primarily with the regulation of internal court processes rather than substantive rights and obligations. With few exceptions, this body of law falls outside of the traditional definitions of federal common law. Procedural common law does not generally bind state courts. Though developed without congressional authorization, it falls outside of the traditionally recognized enclaves of federal common law, and Congress’s ability to abrogate it is often called into question. While the sources of and limits upon federal court power to develop substantive common law have received serious and sustained scholarly attention, the sources of and limits upon federal court power to develop procedural common law have been almost entirely overlooked.

This article analyzes whether the Constitution grants federal courts the authority to develop a common law of procedure. It first develops a theory that tracks the conventional justification for federal common law to include procedure. Federal

procedure, like the traditional enclaves addressed by substantive federal common law, is a matter that the constitutional structure places beyond the authority of the states. Both the Inferior Tribunals Clause and the Sweeping Clause grant Congress the authority to regulate the procedure of the federal courts. If Congress fails to exercise its authority over procedure, the federal courts can regulate procedure in common law fashion. They can only do so, however, until Congress steps in. If Congress chooses to legislate, conflicting federal procedural common law must give way to federal statute.

This explanation has force, but it tells only part of the story. In treating the procedural common lawmaking authority of the federal courts as derivative of and subservient to that of Congress, it fails to account for the fact that power might be distributed differently between the courts and Congress on matters of procedure than on matters of substance. In particular, it fails to account for the possibility that the federal courts’ authority over procedure might sometimes, even if rarely, exceed that of Congress.

Another theory would account for that possibility: the proposition that Article III itself empowers federal courts to adopt procedural rules in the course of adjudication. Article III’s references to “courts” and “judicial power” have long been understood to carry with them certain powers incident to all courts. Authority to regulate procedure, at least in the form of judicial decisions rather than prospective court rules, is assumed to be one of those powers. If federal courts indeed possess inherent authority over procedure, that authority presumably empowers them to adopt procedural measures in common law fashion. This power is not exclusive; on the contrary, Congress has wide authority to regulate it. Nonetheless, there is likely some small core of inherent procedural authority that Congress cannot reach.

This explanation captures the widely felt intuition that federal courts possess some power over procedure in their own right. Inherent procedural authority, however, is limited. As I have argued in prior work, any procedural authority conferred by Article III is entirely local. In other words, Article III empowers a court to regulate its own proceedings, but it does not empower a reviewing court to supervise the proceedings of a lower court by prescribing procedures that the lower court must follow. Instead, Article III vests “the judicial Power” in *each* Article III court. As a result, inherent procedural authority does not enable the development of procedural doctrines that are uniform across jurisdictions.

Standing alone, then, neither the traditional explanation for federal common law nor the argument from inherent authority fully explains the procedural common lawmaking powers of the federal courts. Taken together, however, they provide a fairly complete explanation for what federal courts actually do and have done since 1789. The inherent procedural authority of courts supplements the common lawmaking authority that they can otherwise claim over procedure. The straightforward analogy to the substantive common lawmaking power of federal courts is right, so far as it goes. In the area of federal judicial procedure, as in the substantive areas of constitutional preemption, federal courts can develop uniform federal rules when Congress fails to do so. This procedural common law differs from substantive common law only in that it (like the old federal general common law) does not bind state courts. Federal court power over procedure, however, does not end there. In addition to this common law power to adopt uniform federal rules, each federal court possesses inherent authority to regulate its own proceedings. The resulting body of law is a mix of uniform doctrines largely drawn from general law (much like the law of admiralty or interstate relations) and narrower rules and discretionary measures associated with the inherent authority of individual courts.

These dual strands of judicially crafted procedural regulation are evident in both early and modern cases. In the eighteenth and nineteenth centuries, uniform procedural doctrines were drawn from the general law, which courts understood themselves to apply rather than make. When there were matters that neither the enacted law nor general law governed, courts relied on inherent procedural authority to regulate the proceedings before them. Cases from the twentieth and twenty-first centuries contain the same two threads. The uniform procedural doctrines applied by modern courts are the descendants of the procedural doctrines of the old general common law. Preclusion and abstention, both of which have long historical roots, are good examples. These doctrines resemble the old general procedural common law in both their content—which has, in the main, stayed constant over time—and their development—which now, as then, is mediated by tradition and consensus. Even though modern, positivist federal courts understand themselves to make these doctrines, innovations in them (for example, the abandonment of preclusion’s mutuality requirement) are not usually abrupt departures from traditional principles. Rather, they are usually responses to emergent consensus about the need for change. And when neither tradition, emergent consensus, nor the enacted law governs a particular procedural matter—in other words, when the content of the rule is entirely in the discretion of the adopting court—modern federal courts, like their predecessors, typically treat any action they take as an exercise of inherent procedural authority. Such rules tend to address narrow, isolated topics. For example, the early Supreme Court relied upon its inherent procedural authority to adopt a rule setting forth the procedure for serving process; more recently, the Supreme Court acknowledged the authority of a federal court to adopt a rule governing the time in which a case must be brought.



Anthony J. Bellia, Jr.

promoted to full professor

Reflection Notre Dame Law School occupies a special place in American legal education. It is a preeminent research and teaching institution, uniquely enabled by its Catholic roots to enhance the richness of legal learning and the fullness of legal knowledge.

The Law School physically stands at the center of the University of Notre Dame—a prominent reminder of the central place that law occupies among academic disciplines. The discipline of law stands as an interface between, on the one hand, the demands of reason and the presence of faith, and, on the other, the problems of human persons that warrant authoritative solutions. Our faculty, like any preeminent faculty, comprises a range of scholars—from those with one foot in the Law School and one foot in other academic departments, to those with one foot in the Law School and one foot in the courtroom. Current research involves the legal challenges posed by new information technologies, the potential of law to alleviate problems of urban land use and wealth disparity, the place of international law in the American federal system, the role of religious freedom in a pluralistic society, and the relationship between positive and natural law—to name just some. Through research and classroom instruction, our faculty systematically engages our students in questions of legal method and normative justification. The study of law at Notre Dame implicates the best learning of all academic disciplines—and contributes to it—ever enriching the discipline of law itself. Each year, our faculty bears great fruit in student minds and on academic pages.

In student minds and on academic pages are words that warrant special emphasis: At Notre Dame Law School, teaching and research are complementary, not players in a zero-sum game. The strength of the research program feeds the strength of classroom learning. The strength of classroom learning feeds the strength of the research program. Our faculty's unwavering commitment to teaching excellence continues to attract exceptional students to Notre Dame, indeed some of our nation's (and world's) most exceptional. Incoming students find classmates gifted in intellect and steeped in integrity and sound judgment. The student body of the Law School is a valuable treasure and great hope for the legal profession.

Notre Dame Law School has long provided one of the most rigorous legal educations in the nation—in the most supportive and spirited community that exists in higher education. Our students leave Notre Dame as persons truly learned in law, yet schooled in the practical demands of a practical profession. They are well positioned to practice law with great competence and deep integrity. They take real pride in this institution, and we aspire that they always will. The Law School will continue to strive to integrate the demands of reason with the presence of faith, the realities of practice with the ideals of truth, and the rigors of learning with the blessings of friendship. The Law School has never been content to rest upon the successes of the past, nor is it content to do so now. Today, as it prepares to move into a world-class facility, grow its faculty, and welcome classes as strong as ever, the Notre Dame Law School is well positioned to continue setting the highest standards for integrated legal education for decades to come.

ANTHONY J. BELLIA, JR.

Scholarship: THE ORIGINS OF ARTICLE III “ARISING UNDER” JURISDICTION

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Footnotes omitted

Article III of the Constitution provides that the “judicial Power” of the United States extends to all cases “arising under” the Constitution, laws, and treaties of the United States. Courts have long regarded Article III not as providing the judicial power that each federal court *must* have, but rather as specifying a limit on the jurisdiction that Congress *may* give. Since 1875, Congress has given federal courts original jurisdiction of cases “arising under” federal law. Courts have long interpreted the federal statute conferring “arising under” jurisdiction upon federal district courts to require that a federal question be part of the plaintiff’s “well-pleaded complaint,” not a question anticipated or raised as a defense. In several cases, the Supreme Court has attempted to explain the nature of a federal question that must be part of the well-pleaded complaint for a federal district court to have statutory “arising under” jurisdiction. The Court has provided less clarification of what it means for a case to “arise under” federal law for purposes of Article III. The Court has explained that “arising under” in Article III encompasses more cases than “arising under” in the congressional grant of jurisdiction. It has declined, however, in several cases, to provide any more fulsome explanation of Article III “arising under” jurisdiction than that. The scope of Article III “arising under” jurisdiction has long confounded judges and scholars alike.

In 1824, in *Osborn v. United States*, the Supreme Court held in an opinion by Chief Justice John Marshall that a case arises under federal law for purposes of Article III if federal law “forms an ingredient of the original cause.” Some judges and scholars have read *Osborn* to mean that “Congress may confer on the federal courts jurisdiction over any case or controversy that *might* call for the application of federal law.” Others have questioned this reading, arguing that it has no meaningful limits, or that it simply miscomprehends *Osborn*.

In the 1980s, the Supreme Court expressly refrained on two occasions from defining the breadth of Article III “arising under” jurisdiction. In 1983, in *Verlinden B.V. v. Central Bank of Nigeria*, the Court had to resolve whether actions against foreign states are cases “arising under” federal law for purposes of Article III. Rather than “decide the precise boundaries of Article III jurisdiction,” the Court resolved that such actions arise under federal law because a court necessarily must determine in each one the federal question of whether the foreign

state has immunity. Six years later, in *Mesa v. California*, the Court confronted the question of whether Congress may give federal courts removal jurisdiction over claims brought against federal officers for actions taken within the course of performance of official duties as cases “arising under” federal law for Article III purposes. Noting the “grave constitutional problems” and “serious constitutional doubt” surrounding the meaning of Article III “arising under” jurisdiction, the Court interpreted the federal officer removal statute to authorize removal only when a defendant federal officer raises an actual federal defense. By invoking the canon of constitutional avoidance, the Court refrained from attempting to define the scope of Article III “arising under” jurisdiction.

Neither courts nor scholars have comprehensively examined the origins of Article III “arising under” jurisdiction. This article undertakes such an examination. The Supreme Court has been mindful of historical understandings in determining the scope of Article III judicial power. Accordingly, the analysis that this article presents is of both historical interest and doctrinal relevance. Even if one does not deem historical practice to be determinative of or relevant to the meaning courts should ascribe to Article III “arising under” jurisdiction, historical practice holds insights into what functions such jurisdiction may effectively serve.

This article argues that early federal courts, invoking principles of English law, limited their function under the Arising Under Clause to enforcing the supremacy of actual federal laws. They did not recognize Article III “arising under” jurisdiction over cases that implicated federal interests but that did not implicate actual federal laws. This article chronologically develops the evidence that bears out this conclusion. First, it describes jurisdictional principles of English law that provide necessary context for understanding early American judicial opinions on the scope of Article III “arising under” jurisdiction. Specifically, it describes how under English law, a party invoking the jurisdiction of a court of limited jurisdiction had to affirmatively demonstrate that the court had jurisdiction over the case. Second, it explains that a key purpose of Article III “arising under” jurisdiction, evident in its framing and the ratification debates that surrounded it, was to enforce the supremacy of federal law. Finally, it explains how the Marshall Court came to rely upon English jurisdictional principles as a means

of limiting Article III “arising under” jurisdiction to cases implicating the supremacy of actual federal laws. Contrary to conventional characterizations of its opinions, the Marshall Court did not deem any case that might involve a federal question one “arising under” federal law. Rather, the Supreme Court explicated the Arising Under Clause in the first few decades following ratification to mean that a federal court may exercise jurisdiction over cases in which an actual federal law was determinative of a right or title asserted in the proceeding before it.

[Early Article III courts came to invoke principles of English jurisdictional law to determine their own jurisdiction.] English law distinguished courts of general jurisdiction from courts of limited jurisdiction. To bring an action in the original jurisdiction of an English court of limited jurisdiction, the plaintiff affirmatively had to plead, as part of the right or title asserted, facts sufficient to show that the court had jurisdiction. English courts of general jurisdiction, however, presumed themselves to have jurisdiction unless the defendant specifically proved otherwise. The distinction between courts of general and limited jurisdiction subsisted in the structures of colonial judicial systems. When Article III courts came to describe themselves as courts of limited jurisdiction, they imported English jurisdictional practice into their own practices. So imported, this was not English practice that the Court deemed inconsistent with the principles of the American Revolution and the Constitution. As John Jay expressed it in 1793, “The English practice . . . [is] more necessary to be observed here than there” in light of the federal structure that the Constitution established.

[The federal structure, as framed and ratified in the Constitution, provided various means to secure the supremacy of enacted federal law.] The proceedings of the Federal Convention demonstrate that the delegates settled on “arising under” jurisdiction as a limited mechanism—more limited than a congressional negative on state laws—to ensure the supremacy of federal law. In ratification debates, participants attributed certain meanings to “arising under” jurisdiction and offered various reasons to justify it. In general, they explained “arising under” jurisdiction as a means of enabling federal courts to enforce and settle the meaning of federal law.

[Post-ratification, federal courts, relying on English jurisdictional principles, used “arising under” jurisdiction only to enforce the dictates of determinative federal law.] By invoking

English jurisdictional principles, federal courts effectuated the founding period vision of “arising under” jurisdiction as a limited means of ensuring the supremacy of federal law. Early federal courts explained that because they were courts of limited rather than general jurisdiction in the sense of English law, they could not take original jurisdiction of Article III cases or controversies unless the party invoking the court’s jurisdiction asserted facts sufficient to demonstrate the court had jurisdiction. For “arising under” jurisdiction, this meant that a party invoking federal court jurisdiction had to aver that a federal law was determinative of a right or title asserted. The Supreme Court applied this principle not only to plaintiffs in original actions but also to plaintiffs in error in appellate actions seeking review of state court judgments.

By 1824, when it decided *Osborn v. United States*, the Marshall Court had resolved that a federal court had Article III “arising under” jurisdiction if the party seeking federal court jurisdiction properly demonstrated that federal law was determinative of a right or title asserted in that proceeding. This applied both to the original jurisdiction of federal courts and the appellate jurisdiction of the Supreme Court to review state court judgments. When, over a century later, the Supreme Court and scholars came to characterize the Marshall Court as reasoning that a federal court constitutionally may hear any case that might involve a federal law question, they misconstrued the effect that, in historical context, the Marshall Court gave to Article III “arising under” jurisdiction. By employing English jurisdictional principles, the Marshall Court limited federal courts to enforcing the supremacy of actual federal laws. The Marshall Court did not assume for federal courts a constitutional jurisdiction to vindicate federal interests divorced from the governing requirements of an identifiable federal law.

* * *

By observing rules derived from English law, federal courts embraced a practice that at once enabled them to ensure the supremacy of federal law but checked the extent to which they would encroach upon the jurisdiction of state courts. There is no question that the breadth of “arising under” jurisdiction, as explained by the Marshall Court, was coterminous with the breadth of congressional power to create and protect justifiable rights and titles. The Marshall Court did not, however, contrary to twentieth-century accounts, assume for itself an “arising under” jurisdiction to protect federal interests unmoored from the governing requirements of an identifiable federal law.

Patricia Bellia

promoted to full professor



Notre Dame Law School provides the space and support for each student to develop a sharp competence and refined conscience. It is well known that Notre Dame is one of the most famous institutions in the world. It is more worth knowing, however, the reality of legal learning at this institution. The Law School draws one of the most national and selective student bodies

Reflection Legal education at Notre Dame has long reflected an enduring yet visionary commitment—a commitment to educating the whole person, a commitment that stems from the very nature of law itself.

Law is a profession *of* persons *for* persons. When people make laws regarding the structure of government or the rights of individuals, the strictures of war or the terms of peace, the investigation of crime or the protection of privacy, they make laws for the good of persons. Those who shape and use law—lawyers, public officials, legal scholars—are called to be thoroughly competent and thoroughly attuned to what is good for persons, systemically and individually. The hallmark of Notre Dame Law School is to take both seriously. It is to recognize that legal competence and developed conscience are not separable traits in a legal mind; they are, rather, complementary and defining characteristics of what a lawyer should be.

in American legal education. Each class is small, carefully admitted on the basis of intellect, judgment, and integrity. Students do not merely hail from diverse places and backgrounds; they genuinely realize the rich experiences and aspirations of their classmates in a supportive student culture. The growing law faculty holds a wealth of experience, a profound array of research programs, and an unwavering commitment to achieve the best learning outcomes in legal education. Notre Dame's roots in the Catholic faith have proven to be a key determinant of its success by any measure. These roots frame and enrich academic discussion to encompass the full realm of faith and reason, enhancing the breadth of competence and depth of conscience.

Notre Dame Law School has never been in a better place—committed to educating the whole person, buoyed by the remarkable achievement of its graduates, and enabled to strengthen its renown by building upon a foundation of values both enduring and visionary.

PATRICIA BELLIA

Scholarship: THE MEMORY GAP IN SURVEILLANCE LAW

Excerpted from 75 UNIVERSITY OF CHICAGO LAW REVIEW 137 (2008)

Footnotes omitted

In March 2007, Google announced a change in its data retention policy: that it would “anonymize” search data in its server logs after eighteen to twenty-four months. For many observers, the policy change was more significant for the past practice it confirmed than for the future practice it heralded. The policy change underscored that since it first launched its search service, Google had stored its users’ search queries, along with the search results on which the users clicked, indefinitely, and had done so in such a way that this data could be tied to the particular computers from which the queries were made.

Although Google’s privacy policy has long stated what kinds of information the company collects and discloses, that policy has never mentioned Google’s data retention practices. Nor does U.S. law significantly constrain data retention practices, whether by the data subject herself or by a third party (such as Google) that transacts business with the data subject. Our surveillance and information privacy laws, in short, contain a “memory gap”: they regulate the collection and disclosure of certain kinds of information, but they say little about its retention. In addition, much of what the law does say about collection and disclosure provides incentives for indefinite data retention.

The law’s memory gap has ever-increasing significance for the applicability of the Fourth Amendment’s warrant requirement to government surveillance activities. When government agents’ direct, ongoing observations of a target’s activities would invade a reasonable expectation of privacy, agents ordinarily must obtain a warrant before engaging in those observations. The reasonable expectation of privacy test derives from *Katz v. United States*, a case dealing specifically with surveillance to collect the contents of communications, but the test applies to other surveillance activities as well. In *Kyllo v. United States*, for example, the Supreme Court applied *Katz* to invalidate agents’ use of thermal imaging technology to acquire details about heat patterns inside a home.

Current Fourth Amendment doctrine, however, takes a dramatically different approach to government agents’ indirect, surveillance-like activities, even when those activities yield precisely the same information as—or more information than—direct observation. More specifically, in its “business records” cases, the Supreme Court has held that the warrant

requirement is not implicated when a third party collects information (even under a statutory mandate) and the government then obtains that information from the third party. In *United States v. Miller*, for example, the Court held that the government did not violate the Fourth Amendment by presenting a subpoena rather than a warrant to compel a bank to disclose records concerning the defendant’s bank accounts—records that the bank was statutorily required to collect.

Because the government can only compel disclosure of that which is retained, the scope of the business records “exception” to *Katz* is deeply dependent on data storage practices, and thus on the legal, technological, and economic forces that drive those practices. Current and developing data retention practices threaten to convert many of the government surveillance activities now subject to a warrant requirement into the sort of “indirect” surveillance at issue in—and unprotected by—*Miller*. This threat is perhaps easiest to see in the context of communications surveillance, where shifts in information storage trends may render *Katz* itself (and the statutes built on its foundation) a dead letter. But other data trends are equally significant. Stand-alone products that generate no data are increasingly giving way to third-party services that do; such services will yield a profile of behavior that could otherwise only be assembled with direct surveillance activities. Similarly, the trend toward “pervasive” computing will produce vast amounts of data that is capable of being stored by third parties and that mirrors data government agents could otherwise obtain only via direct observation.

Information held by third parties has always flowed to government agents in some measure, and so it may be tempting to argue that evolving patterns of data storage raise no new doctrinal or normative concerns. From a doctrinal perspective, *Miller* and its progeny hold that one lacks a reasonable expectation of privacy in items that one voluntarily surrenders to a third party, and so the conclusion that data stored in digital form with third parties is outside of the Fourth Amendment’s protective core is fairly straightforward. From a normative perspective, if one accepts the business records doctrine (either on first principles or on the view that the doctrine is well entrenched), a principled basis on which to distinguish data in digital form from data in other forms is not readily apparent, particularly if one believes that the law should be neutral as to modes or forms of communication and storage.

I argue that the significance of current and developing data storage trends lies in the shift toward an architecture of increasingly “perfect” memory. Fourth Amendment doctrine has always permitted data to flow from third parties to the government. Importantly, however, that doctrine and the laws that supplement it have also coexisted with technological and economic factors that produce surveillance gaps. The dominant architecture of the predigital era was an architecture of forgetting: data about most of our activities could not be captured at all, could be memorialized only imperfectly, or could be retained long term only at significant cost. As these constraints on memory erode, so too will the zones of information privacy they have supported.

* * *

How should we evaluate these trends, and how, if at all, should the law respond to them? . . . [D]ramatic changes in the architecture of memory require that courts applying the Fourth Amendment to surveillance technique controversies and legislatures seeking to implement or supplement the Fourth Amendment attend to the results of communications surveillance as much as to the methods used. Predigital constitutional baselines for communications surveillance serve as a useful starting point . . .

Contents of Communications. [The federal statutes governing prospective and retrospective acquisition of the contents of communications—Title III and the Stored Communications Act (SCA)—treat] such information quite differently. . . . By qualitative measures, however, there is no distinction between communications gathered prospectively and the same communications gathered in one or a series of retrospective collections.

* * *

Communications Attributes. Turning to communications attributes, if we analyze the type of information agents can collect regarding electronic communications, we see that it is a much more expansive category than the phone numbers at issue in *Smith v. Maryland* [which upheld a government agent’s warrantless acquisition from the telephone company of the phone numbers a suspect dialed]. Qualitatively, some information associated with electronic communications may be similar in that it performs the same function of allowing the provider to direct the communication. . . . [I]f service providers can store communications attributes indefinitely, law enforcement officials can draw data from a larger pool and at any time, rather than simply as the communications occur. In quantitative terms, then, communications attributes involve a significant move away from the constitutional baseline of *Smith*.

Transactional Data. Transactional data presents difficulties similar to those presented by communications attributes. Here the constitutional baseline is *Miller*, which at a minimum suggests that business records produced in a customer’s relationship with a transactional partner are not subject to a reasonable expectation of privacy. In terms of whether transactional data is qualitatively equivalent to the records at issue in *Miller*, some such data clearly is analogous. For example, purchase of an item online will generate a record of a credit transaction similar to that generated with a brick-and-mortar store. The record, however, may also include data giving rise to inferences that are simply not otherwise available without direct physical observation. For example, a record of a customer’s interaction with an online bookseller will include not only the items purchased, but also the items browsed. And to the extent that lower standards might be justified on the theory that the data subject has some control over the data trail—for example, by limiting a site’s use of cookies to link information across pages and visits—that control proves to be elusive. Once created or collected, data is treated as being “owned” by the transactional partner, and any ability to control its disposition depends on the data retention and destruction policies that the transactional partner chooses to implement. . . . Finally, the sort of passive data that pervasive computing applications can produce, particularly about events inside the home, will be qualitatively equivalent to direct observations by government agents that are treated as searches under the Fourth Amendment.

* * *

The changing architecture of memory raises fundamental questions about the application of well-entrenched rules for communications surveillance. An underdeveloped conception of societal privacy expectations and narrowly drafted statutes essentially encourage government agents to exploit the new architecture. The law thus underprotects communications that are functionally equivalent to communications that receive the highest protection under our surveillance law regime. And despite the weak constitutional baselines for communications attributes and transactional data, there are strong reasons, related both to the quantity of information available and the inferences that can be drawn from it, to tweak our current surveillance law regimes to provide heightened protection. I do not contend that the changing architecture of memory counsels in favor of high-level and Fourth Amendment–based protection in all cases. Rather, I argue that courts and legislatures cannot gain a full picture of the surveillance law landscape without accounting for the changing architecture of memory, and that the changing architecture of memory should affect that landscape.

Nicole Garnett

promoted to full professor



Reflection

Notre Dame tells prospective students that we educate a “different kind of lawyer.” Given the reputation of the bar

these days, I hope that we hold true to our promise. But, I think that it might be more accurate to say that Notre Dame strives to be a different kind of law school. We begin, as all great law schools, with a commitment to providing the high-caliber legal education that our students need to excel professionally. And, we aim for excellence in scholarship. We have assembled a great group of scholars here who are productive and energetic, and who really enrich and enliven our intellectual environment. Interacting with my colleagues makes me a better teacher and scholar.

But these things are, at Notre Dame, only the beginning. Here, I hope, we are different at the core: Notre Dame Law School is striving to be truly unique. Our faculty cares intensely about the mission and identity of Notre Dame—that is to be both truly great and distinctively Catholic. For us, excellence in teaching and research is necessary, but not sufficient. For example,

imparting the knowledge that my students will need to be good lawyers is only the beginning of my job as a teacher.

Notre Dame’s unique mission demands that I do more—asking me to engage difficult, first-order questions with my students: What are its moral foundations? Is it just? Does it serve the common good? It also asks me to do what I can, inside and outside of the classroom, to encourage my students to view the law as a vocation, and not just a career, and also to exceed their own expectations for themselves, as students, as lawyers, and—most importantly—as people.

At Notre Dame, we also are called to understand scholarly excellence as the beginning, not the end, of our academic aspirations. I am a better scholar because I interact each day with colleagues who share my commitment to the University’s mission. We seek to build a distinctive scholarly community where intellectual inquiry is truly open to all questions, and our shared commitments form a foundation of understanding that enables us to engage important issues more completely than we might elsewhere.

NICOLE GARNETT

Scholarship: SUBURBS AS EXIT, SUBURBS AS ENTRANCE

Excerpted with permission from 106 MICHIGAN LAW REVIEW 277 (2007)

Footnotes omitted

Most academic discussions of “suburban sprawl” assume that suburbs are places of exit. According to the conventional account, suburbanites abandoned cities in favor of an isolated, privatized realm. Municipal incorporation laws shield suburbs from city governments that might otherwise annex them; suburban land-use policies exclude otherwise mobile, poor, urban residents who would like to be their neighbors. The exit story is a foundation of land-use and local-government law. Not only is exit considered a primary cause of intra-metropolitan inequality, but growth-control proponents argue that former urban dwellers who exit for the suburbs remain, in important respects, part of the urban polity. Exiters’ historical, social, and economic connections to their center cities are used to justify limiting further suburban expansion.

The exit story accurately describes much of the history of American suburban development. The suburbanization-as-exit phenomenon began as early as the late nineteenth century and reached its zenith after World War II, previously stable urban enclaves finally unraveled. In recent years, minorities have become exiters as well. During the 1990s, in fact, minorities were responsible for the bulk of suburban population gains in many major metropolitan areas. A majority of Asian Americans, half of Hispanic Americans, and nearly forty percent of African Americans are now suburbanites.

The exit story, however, has reached its denouement. For a majority of Americans, suburbs have become points of entrance to, not exit from, “urban” life. Suburbs are the only “urbanized” areas most Americans have ever known. Most suburbanites are “enterers”—people who were born in, or migrated directly to, suburbs, and who have not spent time living in any central city. By the 1960s, more Americans lived in suburbs than in central cities; the employment balance shifted to the suburbs by the 1980s. By 1990, the United States had become a majority

suburban nation. As a result, many suburban residents likely are second- or third-generation exiters. Perhaps their parents or grandparents left the old neighborhood, but their own experience is an entirely suburban one. Others lack any historical connection with the center city closest to their suburban homes. For example, the nation’s fastest-growing suburbs—on the fringes of “New Sunbelt” cities—benefit from domestic migration from other parts of the country. In other words, they may absorb more Rust Belt than hometown exiters. Finally, two groups of suburbanites—new immigrants who increasingly bypass city centers for new immigrant gateways, and domestic migrants from depopulating rural areas—lack social and historical connections with any major U.S. urban center.

By tying the fortunes of center cities to the selfish actions of surrounding suburbs and their residents, the “exit story” provides a powerful normative justification for growth limits. Demands to remedy the “inequitable” distribution of fiscal resources within a metropolitan area are most powerful if those benefiting from the inequities helped create them by abandoning their former neighbors. Similarly, proponents of regional government can most plausibly assert that a metropolitan region is, in reality, a single polity when the residents of outlying areas share social, economic, and historical connections to the region’s anchor city and to one another. When the exit account is stripped away, however, regional-government and growth-control proponents must fall back on utilitarian arguments: Our system of fragmented local government is inefficient, suburban fortunes stand or fall with the fortunes of center cities, and so on. Not only are these arguments challenged by economists who argue that metropolitan fragmentation is efficiency enhancing, but they may also ring hollow with suburban enterers who have little or no affinity for (or connection to) urban life.

Moreover, and in my view, most importantly, efforts to curb suburban growth raise distributional and transitional fairness questions that are especially acute because the final chapter of the exit story is a minority success story. The debate over the distributional consequences of growth-management strategies is a familiar one: Skeptics' concerns stem from a very simple economic calculus—restricting land for development will increase its price. And if the price of land rises, the price of things built on it—including, importantly, housing—will rise as well. Michael Schill succinctly summarized the problem as follows: “[t]he Achilles’ heel of the ‘smart growth’ movement is the impact that many of the proposals put forth by its advocates would have on affordable housing.” Regional government proponents respond that centralizing control over development policy might actually increase the affordability of regional housing, both by curtailing local governments’ exclusionary tendencies and by incorporating planning tools designed to increase the supply of affordable housing.

While empirical evidence on the price effects of existing regional planning programs is mixed, the transitional fairness questions raised by suburban growth restrictions are not limited to concerns about regional housing affordability. Even if a regional development strategy succeeded in holding constant the overall cost of housing, most affordable housing will likely continue to be found in center cities and older suburbs. After all, comprehensive growth-management strategies aim to channel new development into built-up areas. Yet, as Robert Bruegmann highlights in his recent history of suburban sprawl, urban life has always been most difficult for the poor. Today, smokestacks and overcrowding are no longer poor city dwellers’ primary concerns—crime, education and employment are. As a result, suburbs still represent the urban poor’s hope for a better life, as suburbs have throughout the modern industrial

age. The reality is that suburbs offer the good schools, economic opportunities, and environmental amenities that wealthy urban dwellers can afford to purchase and poorer ones cannot.

Moreover, and in my view, most importantly, there is something slightly unseemly about dramatically curtailing suburban growth at a time when racial minorities are responsible for most new suburban population gains. For example, anti-immigration groups have jumped on the anti-growth band wagon, some going so far as to run ads linking immigration with sprawl (and suggesting immigration limits might solve the sprawl problem). Efforts to channel development into the urban core could also jeopardize the promising trends toward suburban racial diversity. It is difficult to avoid concluding that changing the rules of the development game at this time is tantamount to pulling the suburban ladder out from under those late exiters who previously were excluded from suburban life by economic circumstance, exclusionary zoning, and intentional discrimination. A new regime may directly benefit many individuals who have perpetrated, or at least benefited from, this past exclusion: that is, current suburban homeowners will enjoy the economic and environmental amenities that attend growth management.

None of this is to suggest that the entrance story requires unfettered suburban growth. Municipal boundaries are arbitrary, intra-metropolitan inequality is troubling, and self-interested suburbanites do impose externalities on their neighbors. The exit story, however, is an outdated rhetorical flourish that tends to oversimplify the case for, and camouflage the complexities of, suburban growth controls. There remain strong reasons to worry about our patterns of development, but a recognition of the entrance story, and a more nuanced understanding of modern suburban demographics, demands careful consideration of both the benefits and costs of suburban sprawl.

Richard Garnett

promoted to full professor



Among my goals as a scholar and teacher is to encourage my students to value and to live not only a “balanced” life but also an *integrated* life. As we all know, there are many unhappy lawyers. And while there’s no silver-bullet solution to the problem, surely one cause is a tendency—or, perhaps, the pressure—to disintegrate our lives in the law, to separate too sharply what we do from what we care about. It seems to me, though, that a “Notre Dame

Reflection Since joining the faculty of Notre Dame Law School, I have been blessed with inspiring mentors, stimulating colleagues, and gifted students. With their help, I have pursued the goals of enriching and shaping those conversations of which I am a part, contributing to the administration of justice and my fellow citizens’ understanding of the nature of the legal enterprise, and helping this University become what the world needs it to be.

It is worth remembering that, at the end of the day, most law schools and most universities—indeed, most institutions—don’t *really* matter. Many do very good work, of course, but they are, for the most part, fungible and replaceable. The University of Notre Dame, though, is different; it does matter, and it matters because it aspires to do and be something interesting and distinctive: a university that is engaged, open, critical, and great precisely by being Catholic. It is a good thing for the academy, for society, for the Church, and for the legal profession that Notre Dame has taken on the challenge of mattering.

lawyer” should try to hold together, in a rich and reinforcing way, his or her work, neighborhood, polity, family, and faith community. And so, I try to challenge my students to live their lives in the law as *whole persons*. Inspired by the work of my colleague Tom Shaffer, I urge them to resist the temptation to “check at the door” their commitments, histories, ideals, relationships, and identities. I propose to my students that they regard being a lawyer as a *vocation*, and not merely as a well-paid occupation. This way of framing the legal enterprise has, I believe, profound implications: Students are pushed to evaluate their own practices and goals in light of the common good, not just their own status or advancement; to regard the law’s substantive content not simply as a given set of tools, but as the manifestation of the larger and continuing human project of trying to order well our lives together; and to take up the challenge of being teachers themselves, by instructing their friends, families, and fellow citizens about those principles and values that are essential to the health of a community that aspires to live under the rule of law.

Where better to do all this than at Notre Dame?

RICHARD GARNETT

Scholarship: RELIGION, DIVISION, AND THE FIRST AMENDMENT

Excerpted from 94 *GEORGETOWN LAW JOURNAL* 1667 (2006)

Footnotes omitted

Nearly thirty-five years ago in *Lemon v. Kurtzman*, Chief Justice Warren Burger declared that state programs or policies could excessively—and, therefore, unconstitutionally—entangle government and religion, not only by requiring or allowing intrusive public monitoring of religious institutions and activities, but also through what he called their “divisive political potential.” Government actions burdened with such “potential,” he reasoned, pose a “threat to the normal political process” and “divert attention from the myriad issues and problems that confront every level of government.” Chief Justice Burger asserted also, and more fundamentally, that “political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.” And from this Hobbesian premise about the intent animating the First Amendment, he proceeded on the assumption that the Constitution authorizes courts to protect our “normal political process” from a particular kind of strife and to purge a particular kind of disagreement from politics and public conversations about how best to achieve the common good.

This article provides a close and critical examination of the argument that observations or predictions of “political division along religious lines” should supply the enforceable content or inform the interpretation of the First Amendment’s Establishment Clause. The examination is timely, not only because of the sharp polarization that is said to characterize contemporary politics, but also because of the increasing prominence of this “political division” argument. Justice Breyer, for example, in his crucial concurring opinion in one of the recent Ten Commandments cases, identified “avoid[ing] that divisiveness based upon religion that promotes social conflict” as one of the “basic purposes of [the Religion] Clauses.” He then voted to reject the First Amendment challenge to the public display at issue in part because, in his view, to sustain it “might well encour-

age disputes” and “thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.” Justice Stevens went even further, referring to “Government’s obligation to avoid divisiveness and exclusion in the religious sphere.” In another arena, a prominent young scholar has offered both a diagnosis of and a cure for our “church-state problem”—namely, that we are “Divided by God.” This problem, he warns, poses a “fundamental challenge to the project of self-government.” In a similar vein, the religion-related cover story of a recent issue of one of our leading newsmagazines reported, “Divided, We Stand.” It appears that the political-divisiveness argument is and will for some time remain at the heart of our discussions about religious freedom and the First Amendment.

But what, exactly, is “religiously based social conflict”—or, as the Court put it in *Lemon*, “political . . . divisiveness on religious lines”? What, exactly, is the relevance of such conflict to the wisdom, morality, or constitutionality of state action? How plausible, and how normatively attractive, are the political-divisiveness argument and the “principle” it is thought to vindicate? How well do this argument and this principle cohere with the relevant text, history, traditions, and values? And what does the recent resurfacing of this argument in the Establishment Clause context reveal and portend about the state and trajectory of First Amendment theory and doctrine more generally?

Working through these questions, I am mindful of John Courtney Murray’s warning that we should “cherish only modest expectations with regard to the solution of the problem of religious pluralism and civic unity.” Accordingly, while I hope this article will contribute to our conversations about the role of religious expression, belief, believers, and institutions in public life, my more specific goal is to identify and analyze—critically, carefully, and contextually—a specific and salient line of constitutional argument.

At the end of the day, this article offers a reminder that—again, in Murray’s words—“pluralism [is] the native condition of American society” and that the unity toward which Americans have aspired—*e pluribus unum*—is a “unity of a limited order.” Those who crafted our Constitution believed that both authentic freedom and effective government could and should be secured through checks and balances, rather than standardization, and by harnessing, rather than homogenizing, the messiness of democracy. It is both misguided and quixotic, then, to employ the First Amendment to smooth out the bumps and divisions that are an unavoidable part of the political life of a diverse and free people and, perhaps, best regarded as an indication that society is functioning well. It is, after all, not a failure, but—as Justice Brennan observed—a “function of free speech under our system of government to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”

* * *

Few epithets in contemporary discourse are as wounding, yet tedious and vacuous, as the charge that a person, claim, argument, proposal, or belief is “divisive.” The term—like “controversial,” “extremist,” and “partisan”—often does little more than signal the speaker’s disapproval, and his desire that the offending target either be quiet, or change his tune. The point of this article, again, is to investigate, in a precise way, the claim being made about the relation between what is asserted or assumed to be a real-world fact—that is, “political fragmentation on sectarian lines”—and the constitutionality of challenged state action.

James Madison acknowledged, in *The Federalist No. 10*, that “[t]he instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished,” and he conceded that the “violence of faction” was such governments’ “dangerous vice.” The solution, though, was not and could not be the suppression or elimination of disagreement and faction. He explained:

The diversity in the faculties of men . . . is . . . an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors ensures a division of the society into different interests and parties. . . .

The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society.

The widely discussed and regretted divisions that run through our politics and communities make appealing to many a more managerial approach to politics and public life. But division and disagreement about important things is, this side of Heaven, a fact. In any event, Madison’s warning remains as powerful as ever: “Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.”



\$5 Million Law Fellowship Challenge

“This can really make a difference.”

—Frank Eck, Jr.

Of those who aspire to attend law school, many of the world’s best and brightest aim for admission to Notre Dame Law School. “It is a shame that some of those prospects can’t attend Notre Dame because they can’t afford it,” says Frank Eck, Jr., who just announced that his late father, Frank Eck, Sr.—through his estate—designated \$5 million for student fellowships. The benefaction challenges Law School alumni, parents, and friends to contribute \$5 million as well. Until December 31, 2009, the Eck Estate will match, dollar-for-dollar up to a total of \$5 million, all new gifts and pledges designated for endowed law fellowships.

In 2005, Frank Eck, Sr. gave \$21 million to finance construction of the Eck Hall of Law, a world-class facility that almost will double the size of the existing law school. After making this historic gift, Eck, Sr. delivered an inspirational address to

the Law School Advisory Council during which he challenged council members to provide the remaining funding needed to bring the new building to fruition. His speech proved to be a critical catalyst. Funding for the project was completed during the following year, due in large measure to council members generously answering the call for assistance.

“The funny thing is that my father was never that fond of attorneys,” says Eck, Jr., who graduated from Notre Dame Law School in 1989 and currently serves on the Law School Advisory Council. “In his own personal experience as a businessman, he found that lawyers could be more of a hindrance than a help. But Notre Dame’s model—educating a different kind of lawyer—resonated with him, and he wanted to be a part of bringing those into the profession who would make society a better place.”

As delighted as Eck, Sr. was to participate in the groundbreaking for the new building in July 2007, he emphasized that much work remained to be done on the Law School's behalf during the *Spirit of Notre Dame* campaign. In articulating this belief, he drew upon an earlier experience in his remarkable philanthropic journey with Notre Dame.

In 1994, as the result of a significant gift from Eck, Sr. and Advanced Drainage Systems, Inc., Frank Eck Stadium opened its gates on the Notre Dame campus. While this sparkling new facility furnished the foundation for the baseball team to pursue its competitive aspirations, it was only part of that gift. Eck, Sr. understood that additional resources were needed to create scholarships that would bring talented student-athletes to Notre Dame. Consequently, he also funded grants-in-aid for the baseball program that enabled it to recruit top-echelon players. The combination of a first-rate facility and scholarships proved to be a winning formula, as evidenced by the baseball team's numerous Big East championships, consistent appearances in the NCAA tournament, and a trip to the College World Series.

With the fellowship challenge, Eck, Sr. and his family have reprised the approach that fostered a championship baseball program at Notre Dame. By providing a compelling incentive for members of the Law School community of alumni and friends to make gifts for law fellowships, the Eck family has helped to ensure that for years to come, deserving students of modest means will get the financial help they need to attend Notre Dame. Earlier this month, Eck, Jr. spoke to the Law School Advisory Council. In a moment that was reminiscent of his father's moving appeal in 2005, he encouraged the council and the entire Notre Dame Law School family to participate in the challenge by supporting law fellowships to the greatest extent possible. His remarks were an eloquent testimony to the Eck family's continuing commitment to Notre Dame's quest to be a premier law school that never loses sight of its distinctive Catholic identity.

Eck, Sr. graduated from Notre Dame in 1944 with a chemical engineering degree, and earned his MBA at Harvard. He

worked for more than 20 years in the petrochemical industry before joining Advanced Drainage Systems in Columbus, Ohio, in 1973 as vice president for sales and marketing. He soon was appointed president of the firm and took it from a small regional manufacturer serving the agriculture market to the world's largest producer of plastic drainage pipe used primarily in the civil engineering industry.

"The sad thing is that he won't be here to see the end result of his gifts to the Law School," says Eck, Jr. of his dad, who died December 13, 2007, at the age of 84. "He has given money for so many other buildings and programs at Notre Dame, but he took particular pride in his gifts to the Law School because of the tremendous potential they have to really make a difference in the educational experience of students."



Frank Eck, Sr.

"He took particular pride in his gifts to the Law School because of the tremendous potential they have to really make a difference in the educational experience of students."

— Frank Eck, Jr.

On learning of the \$5 million Eck fellowship challenge, Dean O'Hara remarked: "When Mr. Eck died last December, I stated that his many benefactions to Notre Dame, including Eck Hall of Law, would stand as a concrete testament to his legacy, but that no building could ever capture the breadth of his spirit, the depth

of his commitment, or the transforming effect of his generosity. In speaking these words, I never anticipated that in addition to the magnificent structure currently taking shape that will bear his name, Mr. Eck would find a way to help us fill the building with

outstanding students seeking our distinctive legal education for generations to come. In death as in life, Mr. Eck continues to smile on us, while at the same time challenging us to be a premier law school grounded in the Catholic intellectual tradition. He was truly a giant. We will work hard to make our efforts match his generosity and double the impact of his estate gift for our students."

For more information about the fellowship challenge, contact Glenn Rosswurm, 574-631-7609, Glenn.J.Rosswurm.3@nd.edu, or Jill Donnelly, 574-631-7609, Jill.E.Donnelly.18@nd.edu.

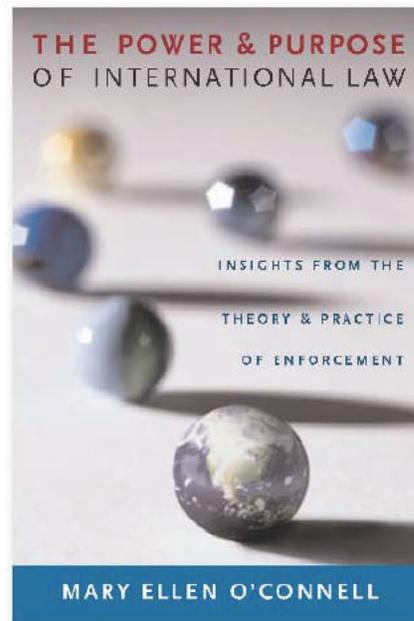
Two Notre Dame Law School professors have written books, each one tackling timely and controversial subjects: international law and global terrorism.

Here is an excerpt from Mary Ellen O'Connell's *The Power and Purpose of International Law* followed by an abstract from Jimmy Gurulé's *Unfunding Terror: The Legal Response to the Financing of Global Terrorism*.

The Power and Purpose of International Law (Oxford University Press, August 2008), Mary Ellen O'Connell

This book has been written at a time of transition for the United States and the world. Many Americans want the United States to recover its standing, to again be a leader in responding to the globe's most pressing problems. O'Connell believes that the way forward will be found in a renewed commitment to international law, by the United States and all states. She concludes in the *Introduction* (pp. 14–16):

International law has deficits, yet it persists as the single, generally accepted means to solve the world's problems. It is not religion or ideology that the world has in common, but international law. Through international law, diverse cultures can reach consensus about the moral norms that we will commonly live by. As a result, international law is uniquely suited to mitigate the problems of armed conflict, terrorism, human rights abuse, poverty, disease, and the destruction of the natural environment. It is the closest thing we have to a neutral vehicle for taking on the world's most complex issues and pressing problems. International law has been attacked by post-modern critics for failing to be inclusive and for perpetuating the very power advantages that hegemonic realists say it thwarts. Other critical scholars point to the meaninglessness of all law owing to the meaninglessness of the words we use to try to express legal concepts. These criticisms, like those of the ... realists, weaken international law and our best means of creating a better world for all.



Such overwhelming critiques can lead to despair and retreat until we realize that the critique is exaggerated and inauthentic. People everywhere believe in law, both domestic and international. We *are* able to communicate across and within cultures. We can search for the ways to do this more effectively ... The revolutionary moments in international law have typically come from the ideas of scholars such as Grotius, Lauterpacht, Kelsen, and Henkin. They have often been inspired to write in response to those who would tear down international law out of a false sense of promoting the national interest.

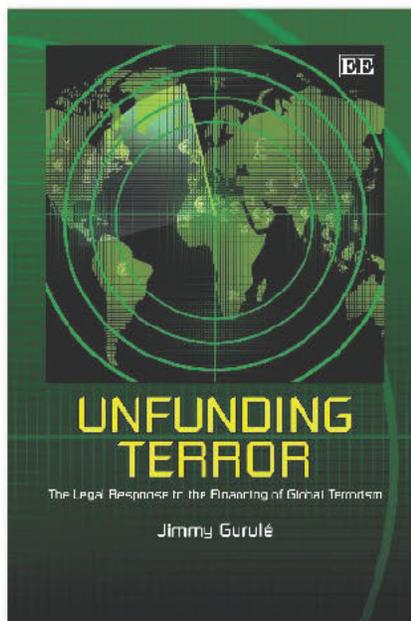
... Th[is] book's general conclusion is that sanctions play a significant—if not essential—role in why international law has power to bind both nations and individuals. The real basis of international law's authority is not the sanction *per se*, but the international community's acceptance of law regardless of

sanctions. Sanctions play a role in signaling and reinforcing acceptance, but we fundamentally accept the binding power of international law for the same reason we accept all law as binding. Our acceptance of law is part of a tradition of belief in higher things. To this tradition we have added positivist and legal process theory. We can now see the emergence of a new classical theory of international law that revives the best of what has come before, adapted to the needs of the international community today. It is a theory that supports not the hegemony of a few, but the flourishing of all of humanity.*

*Footnotes omitted.

Unfunding Terror: The Legal Response to the Financing of Global Terrorism (Edward Elgar Publishing, December 2008), Jimmy GURULÉ

According to the FBI, the September 11, 2001 terrorist attacks against the World Trade Center and the Pentagon that claimed the lives of 2,973 innocent civilians required as much as \$500,000 to stage. At the time, al Qaeda, the jihadi terrorist organization responsible for the mass killings, was operating on an annual budget estimated at between \$30 and \$50 million. However, despite the obvious fact that terrorists need money to support their terrorist operations and organizational infrastructure, prior to 9/11, preventing the financing of ter-



rorism was not a priority for the United States or the international community.

Unfunding Terror: The Legal Response to the Financing of Global Terrorism (*Unfunding Terror*) makes the case for the importance of following the money trail and dismantling the financial network of foreign terrorist organizations. *Unfunding Terror* further examines the legal framework that has evolved following the 9/11 terrorist attacks. The principal legal components of that strategy include: (1) freezing the assets, both domestically and internationally, of terrorists, terrorist organizations, and their financial sympathizers; (2) implementing regulatory measures to prevent terrorists from using banks and other financial

institutions as a conduit to facilitate terrorist financing; (3) international standards to prevent the financing of terrorism; (4) criminal prosecution of terrorist financiers and their front entities; and (5) private civil actions against the financial aiders and abettors of terrorism, including banks and corrupt charitable organizations. The book further analyzes whether the legal regime has been effective in disrupting and depriving al Qaeda, the Taliban, and affiliated terrorist organizations of funding. Specifically, *Unfunding Terror* identifies important successes in the global counter-terrorist financing campaign such as the designation and order to freeze the assets of over 40 Islamic charities suspected of providing financial assistance to al-Qaeda and affiliated terrorist organizations, and the implementation of federal regulations making it more difficult for terrorists to transfer money globally using the international financial system. At the same time, the book highlights several disappointing and embarrassing Department of Justice prosecutions that resulted in jury acquittals or a hung jury, and the declining relevance of the United Nations economic sanctions program to deprive terrorists of funding. Finally, *Unfunding Terror* proposes several recommendations to strengthen the legal framework to shut down the flow of money needed to wage a global jihad, acquire weapons of mass destruction, and launch a major terrorist attack on a scale of what occurred on 9/11.

Ximena MedellÀn

Center for Civil and Human Rights Postdoctoral Research Associate

BY MELANIE McDONALD



It's not often that a transplant from a major metropolitan city—especially one in a warm climate—thinks South Bend is an ideal destination. "It's nice to take a break from the big city," explains Ximena MedellÀn of Mexico City, Mexico, a postdoctoral research associate in the Law School's Center for Civil and Human Rights (CCHR). "I would spend three hours in the car getting to and from work each day. Now, it takes eight minutes," she says with a contented smile.

MedellÀn gives the impression that she could be happy just about anywhere as long as she is doing the work she loves—human rights law. She chose Notre Dame to pursue her LL.M. in International Human Rights Law because "it was very clear that Notre Dame valued me as an individual. I got calls from Sean [O'Brien, CCHR assistant director], and he could converse with me about the work I was doing. It was important for me to be recognized and appreciated for my scholarship."

MedellÀn earned a Licentiate in Law from the Universidad Iberoamericana in Mexico City in 2004, and her LL.M. from Notre Dame Law School in 2007. Before pursuing her law degree at Notre Dame, she was an associate professor of human rights law at the Universidad Iberoamericana. In addition to teaching, she was a full-time researcher

"I believe we are born as lawyers," says MedellÀn of those who choose the profession. "It is demanding on so many different levels, but it's in our blood, and we have to pursue it."

“I am convinced that this is the only [LL.M. program] that, after you graduate, you really feel like you belong to something important.”

at the Human Rights Program of the Universidad, leading their International Criminal Justice and International Humanitarian Law Programs.

Currently, Medellán is the lead researcher on a book commissioned by the Due Process of Law Foundation and the United States Institute for Peace titled *Compiling Latin American National Jurisprudence on International Crimes*. A number of Notre Dame LL.M. students will have the opportunity to assist Medellán in her research and contribute to the project.

“The book will identify, systematize, and analyze national jurisprudence issued by Latin American Courts concerning crimes under international law, such as genocide and war crimes, and other related topics like immunities, statutory limitations, and universal jurisdiction,” explains Medellán. “Through this research, the CCHR joins a concrete effort to strengthen national judicial systems around Latin America, which is one of the most effective tools for fighting crimes against humanity and ensuring the protection of human beings,” she adds.

In addition to her research, Medellán is responsible for advising LL.M. students. “I am devoted to helping them in any way, whether advising them on their thesis or offering help networking, getting an internship or a job, etc.,” she says. “It has come full circle for me, and I want to give the same level of attention to my students as my advisor gave to me.”

Medellán comes by her work naturally. “When I was 11 years old, I told my parents that I wanted to be a lawyer,” she says. “They said, ‘sure, sure, we’ll talk about that later,’ as if it was just something kids say,” she recalls with a laugh. “But I believe we are born as lawyers,” says Medellán of those who choose the profession. “It is demanding on so many different levels, but it’s in our blood, and we have to pursue it.”

Growing up, Medellán says, she had a privileged education and a great deal of family support, but learned through her parents that others had much less. “My dad and mom have devoted their lives to working with people in rural communities outside of Mexico City who were struggling to make ends meet,” says

Medellán. “I joined them on their trips to these communities as a child, and it impacted me.”

As a teenager, Medellán joined a group of young “civil missionaries” who worked within impoverished Mexican communities for a few weeks each year. “I became very close to a family that made shoes for a living,” remembers Medellán. “They were victims of fraud and had to start over again with nothing. Some of the other student volunteers and I wrote messages to the mother in a Bible and gave it to her. She later told us that when things were hard, she would read our writing ‘because it made me realize there are good people out there.’ It was then that I understood how one person really can make a difference.”

Professionally, Medellán has consulted for the Mexican government on a report regarding the status of civil and political rights in Mexico to be presented before the United Nations Human Rights Committee in Geneva. She has also had the opportunity to closely collaborate with international institutions such as the International Committee of the Red Cross, and has trained academics, journalists, diplomats, and military personnel in international criminal justice. In addition, Medellán has worked directly with victims of human rights violations in Latin America. Particularly significant was her participation on the legal team advising Argentinean victims of a military dictatorship in the 1970s and 1980s. The case resulted in the first-ever successful extradition of a military official to stand trial based on the legal principle of universal jurisdiction.

Her overarching areas of interest include international criminal justice, humanitarian law, the inter-American system for the protection of human rights, national implementation of human rights, and national cooperation with international bodies. “Last October, I went to Washington, D.C., with NDLS Professor Paolo Carozza for a meeting of the Inter-American Commission on Human Rights, and there were Notre Dame LL.M. alumni from seven different graduating classes there, working in various capacities for the commission. It was amazing and impressive,” says Medellán.

“There are lots of great LL.M. programs out there, but I am convinced that this is the only one that, after you graduate, you really feel like you belong to something important: a large family, an important mission,” says Medellán.

FACULTY SCHOLARSHIP AND HONORS



Amy Coney Barrett published *Protesting the Court*, 83 *NOTRE DAME LAW REVIEW* 1147 (2008), and *Procedural Common Law*, 94 *VIRGINIA LAW REVIEW* 813 (2008). *Federal Jurisdiction*, an

entry in *THE ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES*, is forthcoming in 2008.



Matthew J. Barrett published *Sarbanes-Oxley, Kermit the Frog, and Competition Regarding Audit Quality*, 3 *JOURNAL OF BUSINESS & TECHNOLOGY LAW* 207 (2008), and the combined 2008 supplement to the unabridged and concise versions of the fourth edition of Barrett's *ACCOUNTING FOR LAWYERS* casebook (co-authored with David R. Herwitz, published by Foundation Press).

Barrett also worked closely with Ellen Aprill, the associate dean for academic programs and the John E. Anderson Professor of Tax Law at Loyola Law School (Los Angeles) and attended a meeting at the Treasury Department in Washington in order to discuss a request for guidance that ultimately led to Revenue Ruling 2008-34. The ruling holds that loans under law school Loan Repayment Assistance Programs generally meet the requirements in section 108(f)(1) of the Internal Revenue Code, such that participants can exclude from gross income any amount that a law school discharges because the participant worked for a certain period of time in a qualifying law-related public service position.

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Anthony J. Bellia, Jr. has two forthcoming publications: *The Federal Common Law of Nations*, 109 *COLUMBIA LAW REVIEW* (2009) (with Bradford R. Clark), and a book titled *FEDERALISM* (Aspen Publishers, 2009).



Geoffrey Bennett published *Criminal Procedure and Sentencing*, *ALL ENGLAND LAW REPORTS ANNUAL REVIEW 2007* (London: Butterworths, 2008): 145-165, and *DAVIES ON CONTRACT*, 10th edition, with R.V. Upex, (London: Sweet & Maxwell, 2008).

Bennett also delivered a talk titled "The Law Relating to References" at the European Network for Ombudsmen Annual Conference, London, 2008.



Margaret Brinig published *Are All Contracts Allike?*, 43 *WAKE FOREST LAW REVIEW* 533 (2008). *Legal Status and Effects on Children*, *EMORY LAW JOURNAL*, is forthcoming in October.

Brinig presented the Legal Status paper about the well-being of kids in formal status relationships with their parents to the Federalist Society at Case Western Reserve Law School and at the American Law and Economics Association annual meeting at *COLUMBIA LAW REVIEW*. She also presented two papers—*Is Marriage a Contract or a Covenant?* and *Are Parents Fungible?*—at the University Pompeu Fabra in Barcelona, Spain, in April, and gave a presentation on joint custody to Louisiana Judges at their annual educational conference in Sandestin, Fla., in June.



Alejandro Camacho published *Learning from Glen Canyon Dam: The Challenges of Adaptive and Collaborative Ecosystem Management*, 8 *NEVADA LAW JOURNAL* 101 (invited) (2008), and *Can Regulation Evolve? Lessons from a Study in Maladaptive Management*, 55 *UCLA LAW REVIEW* 293 (2007).

Camacho presented "Smart Growth and Public Participation in Regulatory Decisionmaking" at Tulane Law School's International Legislative Drafting Institute on June 20, 2008 in New Orleans, and "Adapting Governance: Climate Change and the Great Lakes" at the Michigan State University College of Law symposium titled *A Climate of Disruption: Legal Measures for Adaptations and Mitigation* on Feb. 15, 2008.

Camacho presented "Smart Growth and Public Participation in Regulatory Decisionmaking" at Tulane Law School's International Legislative Drafting Institute on June 20, 2008 in New Orleans, and "Adapting Governance: Climate Change and the Great Lakes" at the Michigan State University College of Law symposium titled *A Climate of Disruption: Legal Measures for Adaptations and Mitigation* on Feb. 15, 2008.

In addition, Camacho is chair-elect of the American Association of Law Schools' Section on Natural Resources; a member scholar at the Center for Progressive Reform; a peer reviewer for *LAND USE AND ENVIRONMENTAL REVIEW*; and a member of the Assisted Migration Working Group (funded by the National Science Foundation and Cedar Tree Foundation).



Paolo Carozza published *La comunità sovranazionale dei giudici e il significato del diritto*, in *LA VERITÀ, IL NOSTRO DESTINO* (Giorgio Vittadini, ed., Mondadori, 2008).

He also delivered the following talks: "They are our Brothers": the Origins of the Human Rights Tradition in Latin

America" at the conference on Latin America and The International Human Rights Project: Yesterday, Today And Tomorrow, in Rome, Italy, May 2008; *Constitutional Traditions, Democracy, and International Human Rights Law: Accounting for American Differences*, a paper presented at a George Washington University Law School faculty colloquium, March 2008; and *The "Art" of Democracy and the "Taste for Local Freedom": International Human Rights and American Constitutional Difference*, a paper presented at a Georgetown Law School faculty colloquium, March 2008.

Alexander L. Edgar (adjunct faculty) was selected as a 2008 Indiana Super Lawyer by *INDIANAPOLIS MONTHLY AND LAW AND POLITICS*. Only five percent of Indiana lawyers earn this distinction, which is based on peer recognition and professional achievement. Also, Edgar earned recertification in business and consumer bankruptcy law in February 2008 by the American Board of Certification.



Barbara Fick published *Apportioning the Burden of Proof for "Reasonable Factors Other than Age" in an Age Discrimination Lawsuit: An Analysis of Meacham v. Knolls Atomic Power Laboratory*, 35 *PREVIEW OF*

SUPREME COURT OF THE UNITED STATES CASES, 348 (April 14, 2008); and *A Case of Statutory Interpretation: Does 42 U.S.C. §1981 Prohibit Retaliation? An Analysis of CBOCS West, Inc. v. Humphries*, 35 *PREVIEW OF SUPREME COURT OF THE UNITED STATES CASES*, 204 (Feb. 19, 2008).

Fick was also a panel member for the Evaluation of ILAB Matrix for Monitoring International Labor Standards, conducted by the Institute of Labor and Industrial Relations, University of Michigan, pursuant to a grant from the Department of Labor (March-May 2008).



Nicole Garnett presented *The Order-Maintenance Agenda as Land Use Policy* (draft book chapter) at the 2008 Property Works in Progress Conference, University of Colorado Law School, June 14, 2008.

She was also a visiting scholar at Stanford University's Hoover Institution, June 2-6, 2008.



Rick Garnett

published the following articles:

Do Churches Matter? Toward an Institutional Understanding of the Religion Clauses, 13 *VILANOVA LAW REVIEW* 101

(2008); *Students, Speech, and the "Mission" of Public Schools*, 12 *LEWIS AND CLARK LAW REVIEW* 45 (2008); *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 *ST. JOHN'S JOURNAL OF LEGAL COMMENTARY* 515 (2007).

He also published the following book notes:

Briefly Noted, *FIRST THINGS* (March 2008) (reviewing PHILIP BESS, *TILL WE HAVE BUILT JERUSALEM: ARCHITECTURE, URBANISH, AND THE SACRED* 2006).

Briefly Noted, *FIRST THINGS* (Oct. 2007) (reviewing PATRICK M. GARRY, *WRESTLING WITH GOD: THE COURTS' TORTUOUS TREATMENT OF RELIGION* (2007)).

Garnett also presented the following:

"Recent Constitutional Controversies Over Religious Liberty," Law and Religion Conference, Program in Law and Public Affairs, Princeton University (May 29, 2008) (Invited speaker);

"Judicial Interference with Community Values," Federalist Society Student Symposium, University of Michigan Law School (March 7, 2008) (invited presenter);

"Religion, Citizenship, and Multiculturalism," Harvard Law School (Feb. 29-March 1, 2008) (invited participant).

Garnett was also named to the National Board of Academic Advisors for the William H. Rehnquist Center on the Constitutional Structures of Government.



Jimmy Gurulé

was recently appointed by Chief Judge Frank H. Easterbrook, U.S. Court of Appeals for the Seventh Circuit, to the Seventh Circuit's Committee on Pattern Criminal Jury Instructions. Gurulé

lectured in March 2008 on "The International Response to Financing Terrorism" at Ave Maria Law School. On April 11, 2008, he spoke at the World Conference on Combating Terrorist Financing, sponsored by Case Western Reserve University School of Law. On April 22, 2008 Gurulé delivered a digital video lecture on globalization and terrorism that was broadcast in Algiers, Algeria. The audience included leading government financial contacts, journalists, law-enforcement officials, and policy makers.

Gurulé was also invited by the Manhattan Institute for Policy Research to speak to a group of

senior-level Los Angeles police officers about terrorist financing. His talk was sponsored by the Center for Policing Terrorism, recently established by the Manhattan Institute to educate and assist state and local law enforcement.

This fall, he will be the subject of a two-minute television feature on NBC during halftime of a home Notre Dame football game, tentatively scheduled for Sept. 27.



Sandra Klein

served as a panel moderator for the Acquisitions Forum at the 16th Annual Innovative Users Group Conference, April 27-30, 2008 in Washington, DC.



Lloyd Mayer

published *What Is This 'Lobbying' That We Are So Worried About?*, 26 *YALE LAW & POLICY REVIEW* 485 (2008). He also presented the following: "The Participation by Nonprofits in Democ-

racry," as part of a panel at the American Association of Law Schools' annual meeting on January 5, 2008; "Electing Faith: The Intersection of Law and Religion in Politics Around the World" at the Boston College Law School Law & Religion Program Symposium on March 18, 2008; and "Public Benefits, Private Benefits, and Charities" at a Harvard University Nonprofit and Philanthropy seminar on March 19, 2008, and at a faculty colloquium at University of Illinois College of Law on April 9, 2008.



Jennifer Mason McAward

's article *Congress's Power to Block Enforcement of Federal Court Orders* is forthcoming in 93 *IOWA LAW REVIEW* (2008).



Mark McKenna

presented a paper titled *Modern Trademark Law and the Right to Make Derivative Works* in August at Stanford Law School's Eighth Annual Intellectual Property Scholars Conference.



John Nagle

served as a Fulbright Distinguished Scholar at the University of Hong Kong Faculty of Law (HKU) during the spring 2008 semester. Nagle taught and lectured at numerous venues through-

out Hong Kong, China, and southeast Asia. At HKU, he presented several guest lectures to classes studying international environmental law and sustainable development. Elsewhere in Hong Kong, he was the featured speaker for two meetings hosted by the American Chamber of Commerce's sections on intellectual property and environmental law issues, and he was invited to speak at events hosted by the two other law schools in Hong Kong. Nagle gave ten lectures to students and faculty at six universities in China, discussing topics ranging from climate change to Internet pornography to election law. At the Universiti of Malaysia Sarawak, Nagle talked about the role of the law in protecting biodiversity, and he interviewed four governmental and NGO officials in Hanoi about wildlife preservation and pollution control in Vietnam. Nagle also spent three days helping to teach poor Cambodian children about environmental health in villages near Phnom Penh.

In addition, Nagle published two casebooks this year: the second edition of his *PROPERTY LAW* with Aspen Press, and the first edition of *THE PRACTICE AND POLICY OF ENVIRONMENTAL LAW* with Foundation Press.



Sean O'Brien

published *The United Nations and Multinational Corporate Responsibility: Legally Binding Standards or 'Principled Pragmatism'?* (co-authored with Douglass Cassel), in Oliver F. Wil-

liams, ed., *PEACE THROUGH COMMERCE: RESPONSIBLE CORPORATE CITIZENSHIP AND THE IDEALS OF THE U.N. GLOBAL COMPACT*, University of Notre Dame Press (forthcoming 2008); and *Defending Pakistan's Constitution* in *NOTRE DAME MAGAZINE* (spring 2008).

O'Brien presented the following:

"Assessing the Roles of the International Criminal Court and the U.S. in Darfur" at a May 1, 2008 Law Day panel called The International and the United States Response to the Crisis in Darfur at John Marshall Law School. The panel was sponsored by the John Marshall Law School, the Illinois State Bar Association, and the Decalogue Society of Lawyers.

O'Brien traveled to Guatemala on a fact-finding mission in March 2008 to follow-up on the

FACULTY SCHOLARSHIP AND HONORS

Investigation into the assassination of Bishop Juan Gerardi, and to Colombia in June 2008 to represent the CCHR at the General Assembly of the Organization of American States.

O'Brien was named vice-chairman of the Illinois State Bar Association's Human Rights Section Council by the president of the Illinois State Bar Association in May 2008, and was named legislative liaison for the Illinois State Bar Association's Human Rights Section Council.

Lastly, O'Brien serves as counsel for a Nepalese teenager seeking political asylum in the United States, and is co-counsel for the following:

Twenty-five former United States diplomats as *Amici Curiae* in *Boumediene v. Bush* and *Al Odah v. United States*, Nos. 06-1195 and 1196 in the Supreme Court of the United States, 2007. Cases were orally argued in December 2007, and were decided in June of this year; the Gómez Paquiyauri family in *Gómez Paquiyauri v. Peru*, before Inter-American Court of Human Rights, 2006 (involving compliance with reparations judgment of the court, in the torture and murder of two brothers); and certain prisoners in the case of *Hugo Juarez Cruzatt et al. v. Peru*, before the Inter-American Court of Human Rights, 2005 to date, Judgment on Merits, Nov. 25, 2006 (involving military massacre of unarmed prisoners). The case is now at compliance stage.



Mary Ellen O'Connell published *THE POWER AND PURPOSE OF INTERNATIONAL LAW*, Oxford University Press 2008. She also presented the following:

"The Power and Purpose of International Law," Roundtable in Public International Law and Theory, Jan. 18-19, 2008, Washington University in St. Louis;

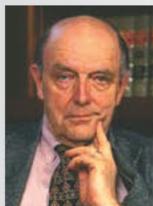
"International Law: Natural Law, Positive Law and Process, Is There a Higher Law? Does It Matter?" Feb. 21-22, 2008, Pepperdine University School of Law;

"Responsibility to Peace," Panel on Just Peace Governance, International Studies Association, San Francisco, March 27-28, 2008;

"Medellín v. Texas," sponsored by the Notre Dame International Law Students Association and Human Rights Association, April 17, 2008;

"Sovereignty, International Law, and Christianity," International Law and Theology Working Group, Center for Theological Inquiry, Princeton Theological Seminary, May 29-30, 2008.

In addition, O'Connell was chosen as one of the *Irish Voice's* "Legal 100," which celebrates the top 100 lawyers of Irish heritage in America.



Robert Rodes

published *On Lawyers and Moral Discernment*, 46 *JOURNAL OF CATHOLIC LEGAL STUDIES* 259 (2007); *On Marriage and Metaphysics*, *NATIONAL CATHOLIC BIOETHICS QUARTERLY*, (Winter

2007); and *The Heart and the Wall, Courty Love and Christian Courtship*, 34 *COMMUNIO* 535 (2008). *On Marriage and Metaphysics*, a critique of same sex marriage, won the Catholic Press Association's award for the Best Scholarly Essay of 2007.



Tom Shaffer

published *Business Lawyers, Baseball Players, and the Hebrew Prophets*, 42 *VALPARAISO LAW REVIEW* 1063 (2008). He presented "On Being a Business Lawyer"

on March 27, 2008 at Valparaiso University as part of a program called A Look at How People and Institutions Help Businesses Fulfill Their Ethical Obligations; "On Being a Christian and a Lawyer" at the spring luncheon series on Law and Christianity at the University of Chicago, May 17, 2008; and "Fighting Over the Pickle Crock: Mediation in Estate Planning" with Michael Jenuwine during Reunion 2008 at Notre Dame Law School. In addition, Shaffer was awarded an honorary doctoral degree (LL.D.) by Valparaiso University in May 2008.



Joseph W. Thomas

was awarded the 2008 Renee D. Chapman Memorial Award for Outstanding Contributions in Technical Services Law Librarianship at the American Association of Law Libraries

annual meeting on July 13, 2008 in Portland, Oregon.



Jay Tidmarsh

published *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 *WESTERN STATE UNIVERSITY LAW REVIEW* 193 (2007).



STAFF NOTES



Terri Welty, administrative assistant to Associate Dean for Library and Information Technology Ed Edmonds, celebrates 30 years with the Law School on September 11, 2008.



Melissa Fruscione has been named assistant director of admissions, a new permanent position, after serving in that position for two years under a term contract. A graduate of the University of Notre

Dame, Fruscione earned her bachelor's degree in history. She earned her juris doctor degree from the University at Buffalo Law School with a concentration in criminal law. Fruscione is admitted to the New York Bar. Prior to joining the Notre Dame Admissions staff, she served as the director of recruitment in the Office of Admissions at the University at Buffalo Law School.



Carly Nasca has recently joined the Law School as assistant director of the Career Services Office. Nasca is a 2003 graduate of the Law School and has an undergraduate degree from

Washington and Lee University. After law school, she spent three years working as assistant corporate counsel for the New York City Law Department and then served as a trial attorney for the United States Department of Justice.



A Confession

BY GREGORY M. SHUMAKER, PRESIDENT, NOTRE DAME LAW ASSOCIATION

I have a confession to make—I did not grow up liking Notre Dame. That's right. As a youngster, I did not dream of attending class under the Golden Dome. I did not think about getting married in the Basilica. I did not walk around in a Joe Montana jersey. I did not beg my parents to go to a game in The House That Rockne Built. And, no, I did not know the words to the fight song.

To some (perhaps many) reading this, that is blasphemy. Why would someone who had so little affection for Notre Dame as a child and young adult choose to attend law school there? And perhaps more importantly, why would someone like that ever become president of the Notre Dame Law Association?

Fair questions. And I have the same answer for both: I chose Notre Dame, and got involved with the NDLA, because of people like you. People who read the Law School's magazine twice a year to see what's going on at the school; people who stay in touch with their classmates; people who proudly wear their ND sweatshirt in the fall no matter what the football team's record might be. Sure, there were, and still are, other variables—the majesty of the Notre Dame campus, its outstanding academics, the University's sense of purpose. But the deciding factor was and continues to be the passion of the Notre Dame alumni. In my mind, any institution whose alumni base has such conviction about its alma mater is one I want to be a part of.

This palpable sense of pride in being a part of the Notre Dame family is what makes us as alums so different. This pride binds us—and indeed brands us—as “Domers.” It prompts others at times to challenge us. It motivates us to look out for each other—at sporting events, on campus, in crowded bars, and in the business world. Think of the reaction you often receive when someone you're speaking with finds out you went to Notre Dame. The conversation instantly turns into a dialogue about going to Catholic grade school, or a discussion about the merits of *Rudy*, or a referendum on what's wrong or what's right with the football team. It's this visceral response the mention of Notre Dame provokes that makes me so proud to be a part of it.



And it is this pride that can make a profound difference in the lives of so many prospective and current Notre Dame law students and graduates. The Notre Dame Law Association is about this passion, providing a convenient vehicle for all of us to remain involved with our Law School. We can stay connected in so many ways: Making the Law School aware of outstanding applicants for admissions; reaching out to NDLS students with advice or a job tip; urging the hiring partners at our firms to participate in on-campus interviewing; interviewing and hiring NDLS graduates; mentoring NDLS students at our workplace; passing on information about job opportunities, public interest positions, and judicial internships and externships to our NDLA regional representatives; supporting the Law School with financial contributions, large and small; joining the St. Thomas More Society; and, yes, even just sharing our enthusiasm about the place when someone asks “what was it like to go to Notre Dame?”

On behalf of the entire NDLA board of directors, thank you for all you do on the Law School's behalf and in particular for your continued enthusiasm as alums. You never know when that enthusiasm will convert another Saul on the way to Damascus. If you don't believe me, feel free to ask one of my kids. And don't be surprised if, when you do, they also sing you the fight song. Because they know all the words. By heart.

“Cheer, cheer for old Notre Dame . . .”

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Board Presents McCafferty Award

Prof. "Tex" Dutile "Deeply Touched"



On April 25, 2008, the Notre Dame Law Association (NDLA) presented Professor Fernand N. "Tex" Dutile with the Rev. Michael D. McCafferty, C.S.C., Award. The award is presented to Notre Dame lawyers, or members of the Notre Dame Law School faculty or administration, who have rendered distinguished service to the University. Because this is a very special award, it is not presented on an annual basis, but only on those occasions when the NDLA Board deems someone worthy of receiving this award.

Board President Frank Julian presented Dutile with a plaque and a Waterford crystal lighthouse. The plaque reads: "For his extraordinary and special service to the University of Notre Dame, the Notre Dame Law School and the hundreds of students whom he has taught and mentored." The lighthouse symbolizes three things: Father Mike, who always liked Waterford; Dutile's home state of Maine, which put a lighthouse on the back of its state quarter; and Dutile's service to Notre Dame, which has served as a guiding light to so many people at Our Lady's University and Her Law School for 37 years.

EXCERPTS FROM 2007–08 BOARD PRESIDENT FRANK JULIAN'S AWARD PRESENTATION TO TEX DUTILE

...Tex's distinguished professional career began shortly after his graduation from the Law School. In 1965 and 1966, he worked for the Civil Rights Division of the U.S. Justice Department, investigating civil rights violations in racially troubled Alabama and Mississippi. One of the cases on which he worked was the murder of three civil rights workers, a case made famous by the movie *Mississippi Burning*. In fact, upon his arrival in Mississippi, Tex was told by Sheriff Cecil Ray Price that he would "be OK as long as he behaved." I'm sure Tex "behaved" in the only way he knew—to ensure that justice was done.

In 1971, Tex returned to Notre Dame to join the Law School faculty as an associate professor. During the past 37 years, Tex has taught criminal law, criminal procedure, and the law of education to hundreds of students. But his service to the Law School and to the University goes well beyond the classroom.

Tex served as associate dean from 1976 to 1979, and assistant dean from 1988 to 1991 and 1993 to 1999. He codirected the London Programme in 1991 and, from 1991 to 1993 was acting dean of the Law School.

Tex has served on the Law School Dean Search Committee, the Provost Search Committee, the Executive Committee of the University Academic Council, the University Promotions Committee, the Provost's Advisory Committee, and as chair of the Law School Committee on Faculty Status.

He served as the faculty editor of the *Journal of College & University Law* from 1986 to 1994, and has been a member of that publication's editorial board for 22 years.

In 1982, a very wise third-year class voted to award Tex the Distinguished Law School Professor Award. He delivered a fantastic acceptance speech. In 1990, then-First Lady Barbara Bush was asked to give the commencement address at Wellesley College. Ed McNally, a member of the Class of '82, was a White House speechwriter at the time, and was assigned the task of writing Mrs. Bush's speech. With Tex's permission, Ed reworked Tex's 1982 speech into Mrs. Bush's Wellesley address. The speech received wide national acclaim. In its Millennium Edition, *USA Today* listed the 100 greatest speeches of the 20th century, and it ranked this speech as number 47!

It is fitting that we present the McCafferty Award to Tex. Tex and Mike were colleagues on the faculty for many years. Tex always remembered Father Mike for having discriminating and elegant taste in all areas of life, and was the only priest Tex knew who might, at Mass, send back the wine!

On behalf of the Notre Dame Law Association, it gives me great pleasure to present the Rev. Michael D. McCafferty, C.S.C., Award to Tex Dutile.

EXCERPTS FROM DUTILE'S ACCEPTANCE SPEECH

Receiving the McCafferty Award is, for me, a giant thrill, and in large part because the award associates my name with Father Mike's. In his too-brief tenure at Notre Dame, Father Mike established himself as a real presence in the Law School. Father Mike's deep faith, intelligence, charisma, dedication to students, and self-effacing humor remain imbedded in the memories of all of us who knew him. Father Mike taught, of course, many areas of the law. But most of all, he taught us how to live and, still more impressively, how to die. The courage and faith he displayed during the lengthy and awful illness that so prematurely took his life continue to edify us beyond measure. So I am deeply touched to receive an award named after him.

A great philosopher—I think it was Lou Holtz—once said that in choosing a career you should determine what you really enjoy doing, and then find someone who will pay you to do it. I did just that! How incredibly lucky I have been to spend virtually my entire career at Notre Dame—doing work I love for an employer I love. Where else but at Notre Dame would I have been able to work with such good students—and I use the

word "good" here not only, or even primarily, in the academic sense. My colleagues here, administrators, faculty, alumni, and staff make this a warm, friendly place to work.

As I have said before, Notre Dame is truly unique. To be sure, there are other great educational institutions, but all have their rough counterparts. For Harvard, there is Stanford; for Michigan there is Cal-Berkeley; for Army there is Navy. But no other place delivers Notre Dame's uncanny combination of spiritual focus, academic excellence, athletic prowess, and national appeal.

It has been said of some true Notre Dame giants that "their blood is in the bricks." Despite my many ties to Notre Dame, and despite having spent so much of my life here, it would be wildly presumptuous of me to claim that *my* blood is in the bricks. But I can confidently say that these bricks are in my blood. Thanks so much for this wonderful honor. It's one that I will treasure always.

Commencement 2008

Law School Dean Patricia O'Hara awarded diplomas to 210 graduates on an unseasonably chilly afternoon on Sunday, May 18 at 4:00 p.m. in front of the Hesburgh Library reflecting pool. Faculty and staff were on hand to celebrate the major milestone with the graduates and their families and friends.

Preceding the diploma ceremony, an ecumenical prayer service and hooding ceremony took place in the

Basilica of the Sacred Heart. Rev. John J. Coughlin, O.F.M., professor of law at Notre Dame, presided. Notre Dame's President, Rev. John I. Jenkins, C.S.C., also attended.

During the diploma ceremony, Anthony J. Bellia, Jr., selected by the Class of 2008 as Professor of the Year, shared some of his wisdom and advice with those in attendance. An excerpt of the talk is on the next page.





AN EXCERPT FROM
“Reflect a Great Light”

NOTRE DAME LAW SCHOOL
DIPLOMA CEREMONY ADDRESS

*Anthony J. Bellia, Jr.,
Teacher of the Year*

May 18, 2008

You will find many ways in your professional lives to reflect brightly the same light that Notre Dame aspires to reflect, pointing the way for others to do the same. Some ways are grand, and you have rightly been reminded today of the noblest aspirations of the profession. Some ways, however, are more modest, and it is worth reflecting on them as well.

When you recognize the value of doing a task right rather than valuing the need for recognition, you reflect a great light.

When you embrace the tedium that can mark aspects of this profession, rather than despairing of it, acknowledging the systemic benefits to society from the ordered processes you are performing, you reflect a great light.

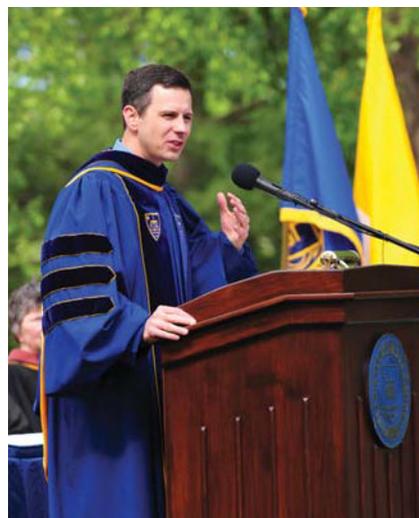
When you realize that you have the power to make the work of others more fulfilling and worthwhile, and you make it so, without realizing any gain to yourself, you reflect a great light.

When you discern that you have been called to something in life other than

what you are currently doing—that there is another good toward which you could more fruitfully direct your energies—and you pursue that calling, perhaps a humbler one, rather than lament complexities that keep you from doing so, you reflect a great light.

These are small things, to be sure. For many, however, these small things mark the difference between a satisfying and an unsatisfying professional life.

Of course, no matter what you do professionally, you will have multifaceted callings, rich lives of which the law is only some measure. The physical arrangement of this very event is beautifully symbolic of this richness. You have in front of you the faculty of the Law School, symbolic of your pursuits in law that lie ahead. You have behind you people who have always been behind



you—families and friends. Especially those among you who are first-generation lawyers: Do not ever leave behind the wisdom and goodness of those who have lived to serve your well-being.

When you appreciate what many of those behind you well appreciate—that there will always be people above and below you on the ladder of career success, but that as far as your children are concerned, you (and perhaps only you) hold the very ladder of their lives—you reflect a great light.

When you do not allow your shine in the legal field and with the jury box to sanitize you from the grime of the soccer fields and the sandbox, you reflect a great light.

When you do not allow your trials as first chair to insulate you from the trials of a parent confined to a wheelchair, you reflect a great light.

When you lack the kinds of relationships that you presumed you always would have—with parents, children, spouse, or other loved ones—because of death or other all too real circumstances of life, and you replace despair with a love and commitment that enables you to live a life that transcends in value anything you initially envisioned for yourself, you reflect a great light.

Read this speech in its entirety by visiting law.nd.edu/news/518-professor-of-the-year-commencement-address



2008 Commencement Awards

ALI-ABA Scholarship and Leadership Award

David Timothy Raimer
San Mateo, California

Edward F. Barrett Award

Joseph George Fiorino
Winnipeg, Manitoba, Canada

Kyle David Smith
Elk Grove, California

Joseph Ciralo Memorial Award, Jessup International Moot Court Award

Benjamin Capen Runkle
South Bend, Indiana

The Farabaugh Prize

Andrew James Soukup
Holland, Michigan

The Colonel William J. Hoynes Award

Joshua D. Dunlap
Vassalboro, Maine

International Academy of Trial Lawyers Award

George Franklin McDonnell, Jr.
Leawood, Kansas

Jessup International Moot Court Award, The Judge Joseph E. Mahoney Award

Krishna Anita Thomas
South Bend, Indiana

Conrad Kellenberg Award, Dean Konop Legal Aid Award, David T. Link Award

Daniel P. Cory
South Bend, Indiana

William T. Kirby Award

Eric Parker Babbs
West Lafayette, Indiana

Matthew Robert Dornauer
Tiffin, Ohio

Clinical Legal Education Association Outstanding Student Award

Geoffrey Francis Gasperini
Richmond, Virginia

The Jon E. Krupnik Award

Annabelle Mary Therese Pereira
Charlotte, North Carolina

The Arthur A. May Award

Nicole Renee Tlachac
Grand Haven, Michigan

Captain William O. McLean Law School Community Citizenship Award

Connor M. O'Brien
Seattle, Washington

The Dean Joseph O'Meara Award

Aaron James Rogers
Rockwall, Texas

The A. Harold Weber Moot Court Awards

Sherene Walid Awad
Jerusalem, Palestine

Akia Aisha Haynes
Indianapolis, Indiana

Jeffery Robert Houin
Plymouth, Indiana

Matthew James Morrison
West Hartford, Connecticut

The A. Harold Weber Writing Award

Nicholas James Nelson
Owatonna, Minnesota

Reunion 2008, May 29–June 1

From five years out to 55 years out, NDLS alums both young and, well, not as young, converged on campus to reminisce, enjoy camaraderie with fellow alums, and marvel at the changes taking shape on campus, including progress on construction of the Eck Hall of Law, scheduled to open for classes in January 2009.

Among the many weekend activities were a Mass for Law School alumni on Friday—celebrated by NDLS alum Rev. John Riley, C.S.C.—followed by a lively reception, dinner, and program, including a moving toast by Ann Merchlewitz on behalf

More Than 100 in Attendance

of the class of 1983 to Patricia O'Hara for her nine years of service as dean. On Saturday, professors Charlie Rice, Bob Jones, Jr., Tom Shaffer, and Mike Jenuwine engaged groups of CLE participants in lectures on natural law, representing clients with diminished capacity, and mediation in estate planning, and alumni and their families enjoyed a continental breakfast and open house in the Law School.

The offices of External Relations and Law School Development wish to

thank each of the class secretaries for volunteering their time to help make this a successful reunion by promoting attendance and contributions to the class gift.





CLASS OF 2003

“Walking back into the Law School, it was hard to believe that it has been five years since we graduated. I still have such vivid memories of our three years together. With the addition to the building in progress, next time I’m back, I’m sure it will seem like an entirely different school. So, it was good to relive memories one last time in the old building. The campus was gorgeous as always and has undergone a dramatic facelift of its own. It was great to reconnect with friends, meet new faces, and talk with some class favorites, including Professors (now Dean) Robinson and Dutile! This was also our son Luke’s first trip to Notre Dame and it was so great to experience the weekend with him. Highlights for Luke included a trip to the Grotto, where he heard an owl, and a visit to the Notre Dame Fire Department! Leaving campus, I knew that coming back for the Reunion was time well spent. Go Irish!”

—LAWRENCE A. WARD, III, SEATTLE, WASHINGTON

In Their Own Words

CLASS OF 1953

“There is a sense of awe about being on the campus of Notre Dame. The University and the Holy Cross order make it special. I had a great time being together with other alums, especially my roommate Dick Hodges and friend Bob Barry, and enjoying so many memories and seeing what’s going on with the growth of the Law School ... it’s overwhelming. Reunion was, for me, a really significant event. I feel very lucky for having been admitted to the Law School. I think I’ve done well being a Notre Dame Lawyer.”

—THOMAS MEANEY, EUCLID, OHIO



CLASS NOTES

1950s

A. Samuel Adelo, '47 B.A., '54 J.D., was named among the "Men Who Matter" by *The New Mexican* for his work helping Spanish-speaking people navigate the courts, understand the charges against them, and make their case.

Carl Elberger, '52 B.S., '54 J.D., received the Lifetime Achievement Award from the Denver Notre Dame Club for his 60 years of service to the University, the Law School, and the local ND Club.

1960s

Russell Lovell, '66 B.B.A., was honored by Iowa Legal Aid with the Excellence in Service Award for his work "to promote justice and ensure that society becomes more hospitable to low-income people."

Robert J. Sidman, '68 J.D., was recognized as one of the top practitioners in the country for bankruptcy and restructuring by the publication *Chambers USA: America's Leading Lawyers for Business*.

1970s

Nelson "Nelle" Vogel, Jr., '71 J.D., a partner in the South Bend office of Barnes & Thornburg LLP, has been named a Fellow of the American College of Tax Counsel for 2008.

Jerry Fenzel '72 B.A., founded AIRTIME-Manager, a business that develops software applications for PDAs that capture billable hours for attorneys working on a Blackberry or other similar device.

John Suthers, '74 B.A., attorney general for the State of Colorado, received the Distinguished Service Award from the Denver Notre Dame Club.

John T. Sperla, '75 J.D., a member of the Grand Rapids, Mich., law firm of Mika Meyers Beckett & Jones PLC, was recently appointed to serve on the Cascade Township Board Planning Commission. Sperla litigates in the areas of land use and zoning, personal injury (with special emphasis in auto negligence

and premises liability matters), general commercial litigation, construction, and criminal law.

Judge Ann Claire Williams, '75 J.D., was honored by the American Bar Association's Commission on Women with the Margaret Brent Women Lawyers of Achievement Award. The award was presented at the 18th annual Margaret Brent awards luncheon on Sunday, August 10, 2008 in conjunction with the ABA's annual meeting in New York City.

Patrick A. Salvi, '78 J.D., purchased the Gary SouthShore RailCats, a minor league baseball team, with his wife, Lindy. Salvi, who practices law in Chicago, is an adjunct professor at NDLS and sits on the Law Advisory Council.

Dean A. Calland, '79 J.D., of Babst, Calland, Clements and Zomnir, P.C., was named by *Pennsylvania Super Lawyers* magazine as one of the top lawyers in Pennsylvania for 2008.

Margaret (Peggy) M. Foran, '76 B.A., '79 J.D., has been appointed executive vice president, general counsel, and corporate secretary of the Sara Lee Corporation.

1980s

Bruce Baty, '82 J.D., joined the Kansas City office of Sonnenschein Nath & Rosenthal LLP as a partner in the firm's Insurance Regulatory Practice Group on June 24, 2008.

Paul Lewis, '80 B.A., '83 J.D., was appointed director of the Office of Legislative Counsel (OLC) at the Department of Defense and promoted into the Senior Executive Service on June 22, 2008. OLC is the interface in the Pentagon for all legal issues affecting Capitol Hill. Lewis is also an adjunct professor of ethics at Georgetown University.

Anne Marie Finch, '86 B.A., '89 J.D., serves as the chair of the Labor and Employment Section, is vice-chair of the Intellectual Property Section, and has been named to the Executive Committee of Godwin Pappas Ronquillo, LLP in Houston, Tex.

John Eustermann, '87 B.A., '89 M.B.A., is favorably ranked in the category "Natural Resources and Environment" in the new edition of *Chambers USA: Guide to America's Leading Lawyers for Business*.

Don C. A. Parker, '88 J.D., of Spilman Thomas & Battle, PLLC in Charleston, was named a Super Lawyer in West Virginia in Insurance Coverage Law. *Law & Politics*, a publication of Key Professional Media, Inc., performs polling, research, and selection. The methodology includes a statewide nomination process, peer review by practice area, and independent research.

Michael J. Whitton, '89 B.B.A., '92 J.D., managing partner of the San Diego office of the law firm Ross, Dixon & Bell, was quoted in the *San Diego Daily Transcript* regarding a story about the firm's upcoming merger with Troutman Sanders.

Judith A. Hagley, '90 J.D., was awarded the prestigious Arthur S. Flemming Award for Exceptional Federal Service for 2008. Hagley is a trial attorney with the Tax Division of the Department of Justice. Past recipients of this award include Neil Armstrong and Elizabeth Dole.

1990s

Eileen M. Martin, '91 J.D., was promoted to partner in the Buffalo, N.Y., office of Hodgson Russ LLP. Martin is a member of the firm's Immigration Practice Group.

Mark Wattley, '91 J.D., former vice president and legal counsel of human resources for Walgreens Health Services, has been promoted to divisional vice president for Walgreens.

Susan W. Gelwick, '94 J.D., was promoted to partner at the Boston office of Seyfarth Shaw LLP, where she concentrates on commercial and business litigation.

Zhidong Wang, '94 J.D., recently traveled to China at the official invitation of the All-China Federation of Returned Overseas Chinese meeting with high-level Chinese officials.

Elizabeth VanDersarl, '95 J.D., has been named vice president of government affairs for The American Forest & Paper Association. VanDersarl will manage the Association's advocacy efforts in Washington, D.C., state capitals around the country, and international venues.

Matthew Schechter, '96 J.D., was named senior counsel at McManis Faulkner & Morgan in San Jose, Calif., where he practices employment law and business litigation.

Diana von Glahn, '96 J.D., is hosting and producing a new travel show, *The Faithful Traveler*, concentrating on Catholic shrines and places of pilgrimage throughout the United States.

Jerrl Ryan, '94 B.A., '97 J.D., is now a partner with Thorp Reed & Armstrong, LLP in their Commercial and Corporate Litigation Practice Group.

Jeff R. Heck, '91 B.B.A., '98 J.D., has rejoined Baker & Daniels LLP as counsel in the firm's litigation practice. He spent the last two years at Tuesley Hall Konopa LLP, after practicing the first eight years of his law career at Baker & Daniels.

Tom Johnston, '98 J.D., was promoted to partner at Porzio Bromberg & Newman, PC in Morristown, N.J. Johnston represents public- and private-sector clients for labor and employment law matters.

Ha Kung Wong, '99 J.D., has been elected partner at Fitzpatrick, Cella, Harper & Scinto's New York office, practicing general intellectual property law.

2000s

Timothy Connors, '00 J.D., is director of the Manhattan Institute's Center for Policing Terrorism, recently established to educate and assist state and local law enforcement in securing their cities post-9/11.

Scott R. Williams, '00 J.D., is now a partner with Sidley & Austin LLP in their Chicago office, practicing corporate law.

Xiaosheng Huang, '00 LL.M., recently traveled to China at the official invitation of the All-China Federation of Returned Overseas Chinese and led the Overseas Chinese Lawyers Delegation in Beijing.

Youn-Jae, '01 LL.M., accepted a position as legal team leader for AIG Investments in their Seoul, Korea, office.

David P. Krupski, '02 J.D., has joined Lewis and Rocca LLP's Phoenix office as an associate in their Product Liability Department.

Christopher R. Zorich, '91 B.A., '02 J.D., returns to Notre Dame Athletics as manager of student welfare and development.

Mark Juba, '03 J.D., and his wife, Nicole, '03 J.D., are happy to announce the birth of their first child, Benedict Charles Juba, born May 2, 2008.

Barton Christian Walker, '04 J.D., and his wife, Dr. Robina Walker, are pleased to announce the birth of their second child, Robina Josephine Walker, born Feb. 23, 2008.

Jason Prince, '05 J.D., has been appointed by U.S. Secretary of Commerce Carlos M. Gutierrez to serve a four-year term on the Idaho District Export Council.

Julie Reinos, '08 J.D., begins work in September as a junior staff attorney for the Inter-American Court of Human Rights in San José, Costa Rica.

Walter Neyerlin '53, a resident of Niagara Falls, N.Y., died on June 19, 2008. He was active in the practice of law until he was hospitalized in May 2008. Neyerlin is survived by his wife, Jean, six children, and several grandchildren.

Henry M. Shine, Jr., '51 J.D., died on June 20, 2008 at the age of 87. Shine, who attained the rank of captain in the Judge Advocate General's Corps of the U.S. Navy Reserve, became an Eagle Scout in 1938 and was a life member of the National Eagle Scout Association. Shine held numerous positions over the course of his career, in both the government and civilian realms. He was assistant staff director for the U.S. Commission on Civil Rights, legislative director of the National Association of Home Builders, and executive director of the California Bankers Association. He was a world traveler and visited all 50 American states. His last role was as a member of the Secretary of the Navy's 2008 Retiree Council.

Andrew "Andy" Steffen, '48 B.A., '50 J.D., passed away on April 4, 2008 at the age of 83. Steffen worked as an attorney with the Indianapolis law firm McHale, Cook and Welch from 1988 until his retirement in 2003. Prior to that, he was a senior vice president at Ameritech's headquarters in Chicago. An active Indianapolis philanthropist and volunteer, Steffen was honored as a Sagamore of the Wabash by three Indiana governors: Matthew Welsh, Evan Bayh, and Joseph Kernan. Steffen served in the U.S. Army Infantry during World War II, and was awarded the Bronze Star Medal for Heroic Achievement while in France in 1944. At NDLS, Steffen served as editor-in-chief of the Notre Dame Law Review.

James R. Sweeney, '50 B.S., died on July 10, 2008, of complications from Alzheimer's disease. Sweeney was 80 years old. He practiced patent and intellectual property law for nearly 50 years, and for five years oversaw the teaching and study of law at John Marshall Law School. Sweeney, who lived in Chicago, was president of the Patent Law Association of Chicago in 1974 and held various posts with the Chicago and American Bar Associations. His wife, Rhonda Sweeney, is a Cook County judge.

Existing Law School Building to be Renamed Biolchini Hall

\$15 Million Gift Paves the Way for Renovation



Robert F. Biolchini, a member of the University of Notre Dame Board of Trustees and partner in the Tulsa, Okla., law firm Stuart, Biolchini & Turner, and his wife, Frances, have made a \$15 million gift to the University to help underwrite the renovation of the current Notre Dame Law School building.

Announcing the gift immediately prior to the spring trustees meeting, University President Rev. John I. Jenkins, C.S.C., said, "This magnanimous benefaction will play an integral role in our concerted and strategic plan to enhance in every

way the legal education that is distinctive to Notre Dame. Bob and Fran have contributed their valued time, counsel, and resources for more than 25 years, and we are tremendously grateful for this latest and most extraordinarily generous gift."

After a comprehensive renovation, the existing Law School building will be renamed Biolchini Hall. It will house an expanded Kresge Law Library, two 50-seat classrooms, new space for *Notre Dame Law Review*, and new offices and work space for admissions and career services. The exterior of the building, including masonry, windows, and roofing, also will be restored.

A covered archway will link Biolchini Hall to the adjacent Eck Hall of Law, a three-story, 85,000-square-foot building that is currently under construction on the site of the former campus post office. Eck Hall is scheduled for completion in January 2009. At that time, all Law School operations will move into Eck Hall, and renovation of the existing Law School building will begin. The entire project is expected to be complete in June 2010.

"The combination of Biolchini and Eck Halls will give Notre Dame one of the outstanding law school facilities in the country," said Dean O'Hara. "On behalf of all Law School faculty,

students, and alumni, I want to offer my deepest thanks to Bob, Fran, and their family."

A 1962 Notre Dame graduate, Biolchini has served on the Notre Dame Board of Trustees since 2001. He was a member of the Law School Advisory Council for the previous 19 years, and he and Frances endowed the University's Biolchini Family Chair in Law in 1995. Their combined gifts to Notre Dame now exceed \$18 million.

Biolchini earned his law degree from George Washington University. He is a member of the Oklahoma and Michigan bar associations and has served since 1981 as a temporary appeals judge for the Oklahoma Supreme Court.

Active in the Catholic Church, Biolchini is a Knight of the Sovereign Military Order of Malta and of the Holy Sepulchre and recently served as chair of the Diocese of Tulsa's Fund for the Future. He also served as chair of the board of trustees of Gilcrease Museum and Monte Casino School in Tulsa.

Biolchini serves as president and chief executive officer of PennWell Corp., a privately owned, Tulsa-based media company founded in 1910 that publishes 75 international weekly and monthly business-to-business magazines and conducts more than 60 business-to-business conferences and exhibitions on six continents. He is chief executive officer of Bancshares of Jackson Hole (Wyo.), Valley National Bank, Lake Bancshares, and Ameritrust, and is a director of American Business Media. He also has served and currently serves on several private and public corporations in the oil and gas and electronics industries, and is a member of Lloyds of London.

Frances Biolchini, a graduate of Trinity College, is active in several Tulsa community organizations, including the Girl Scouts, the Gilcrease Museum, Catholic Charities, and other civic and charitable projects.

The Biolchinis are the parents of six children, five of whom are Notre Dame graduates. Their gift is a component of the \$1.5 billion *Spirit of Notre Dame* capital campaign, the largest such endeavor in the history of Catholic higher education.

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SEPTEMBER 6

8:00 a.m.

Judith Fox, Associate Clinical Professor of Law,
Emerging Topics Related to Mortgage Lending

9:00 a.m.

Thomas L. Shaffer, Robert and Marion Short Professor Emeritus of Law,
Lawyers and Randy Cohen's "Everyday Ethics"

SEPTEMBER 13

8:00 a.m.

Ed Edmonds, Associate Dean for Library and Information Technology Professor of Law, **The NFL and Broadcasting—An Antitrust Perspective**

9:00 a.m.

Christine M. Venter, Director, Legal Writing Program
Part I: How Writing and Arguing the Standard of Review Can Make a Difference in the Outcome of Your Case
Part II: Retaining Women Associates: What Recent Studies can Teach Us About Women in the Law

Note: No ethics credits are offered on this date.

SEPTEMBER 27

8:00 a.m.

Charles E. Rice, Professor Emeritus of Law, **Natural Law**

9:00 a.m.

Jill R. Bodensteiner, Associate Vice President and Senior Counsel, Office of the General Counsel, **Title IX**

NOVEMBER 1

8:00 a.m.

Timothy J. Flanagan, Associate Vice President and Counsel, Office of the General Counsel, **Tag—You're IT: Current Legal Issues Related to Information Technologies**

9:00 a.m.

Michael Jenuwine, Associate Clinical Professor of Law,
Abuse of Statistics in Legal Settings: Overview of Basic Tenets

Note: No ethics credits are offered on this date.

NOVEMBER 22

8:00 a.m.

Michelle Shakour, Director, Gift Planning, University of Notre Dame, and Adjunct Professor, **Charitable Remainder Trusts**

9:00 a.m.

Rev. John J. Coughlin, O.F.M., Professor of Law,
Professional Responsibility/Legal Ethics

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ARTICLES

PROCEDURAL COMMON LAW

*Amy Coney Barrett**

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* Associate Professor, Notre Dame Law School. Thanks to Jesse Barrett, A.J. Bellia, Tricia Bellia, Stephen Burbank, Paolo Carozza, Gary Lawson, Maeva Marcus, John Nagle, Caleb Nelson, Kim Roosevelt, Jim Pfander, and Jay Tidmarsh for helpful comments on earlier drafts. I also received many helpful comments from participants in faculty workshops at Notre Dame and the University of Virginia. Brian Foster, David Gilbert, Jason Rawnsley, and Jessica Tannenbaum provided excellent research assistance. Errors are mine.

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INTRODUCTION

THERE has been no shortage of efforts to justify the common lawmaking powers of the federal courts. In the course of these efforts, it is commonplace to underscore three features of the common law that federal courts develop without congressional authorization. First, this law “is truly federal law in the sense that it is controlling in . . . actions in state courts as well as in federal courts.”¹ Second, to the extent that the federal courts proceed without congressional authorization, federal common law is “specialized.”² It is confined, at least as a matter of doctrine, to several well-recognized enclaves, such as interstate disputes, international relations, admiralty, and proprietary transactions of the United States.³ Third, Congress can always abrogate it.

Despite the consistent emphasis on these characteristics of federal common law, a large body of federal common law exists that does not embody them. This body of law can be characterized as “procedural common law”—common law that is concerned primarily with the regulation of internal court processes rather than sub-

¹ 19 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4505 (2d ed. 1996).

² Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 *N.Y.U. L. Rev.* 383, 405 (1964).

³ See, e.g., *Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 641 (1981) (listing enclaves of federal common law).

stantive rights and obligations. With few exceptions, this body of law falls outside of the traditional definitions of federal common law. Procedural common law does not generally bind state courts;⁴ though developed without congressional authorization, it falls outside of the traditionally recognized enclaves of federal common law; and Congress's ability to abrogate it is often called into question.⁵ While the sources of and limits upon federal court power to develop substantive common law have received serious and sustained scholarly attention, the sources of and limits upon federal court power to develop procedural common law have been almost entirely overlooked.

This Article will offer an account of the federal common law of procedure. Part I will introduce the problem. After giving a brief account of the law and scholarship addressing the power of the federal courts to develop substantive common law, it will draw attention to the existence of procedural common law by describing five representative doctrines: abstention, forum non conveniens, stare decisis, remittitur, and preclusion. While each of these doctrines is a familiar piece of federal law, Part I will point out that the courts developing these doctrines have not addressed the question of their authority to do so.

Part II will address this question of authority. After concluding that no statute generally authorizes the federal courts to develop a common law of procedure, it will explore potential constitutional justifications for that authority. It will first develop a theory that tracks the conventional justification for federal common law to include procedure. Federal procedure, like the traditional enclaves addressed by substantive federal common law, is a matter that the constitutional structure places beyond the authority of the states. Both the Inferior Tribunals Clause and the Sweeping Clause grant Congress the authority to regulate the procedure of the federal courts. If Congress fails to exercise its authority over procedure, the federal courts can regulate procedure in common law fashion. They can only do so, however, until Congress steps in. If Congress

⁴ See Michael G. Collins, Article III Cases, State Court Duties, and the Madisonian Compromise, 1995 Wis. L. Rev. 39, 178–81 (observing that state courts need not “mimic federal courts procedurally,” even when they hear cases involving federal law).

⁵ See *infra* notes 59–65 and accompanying text.

chooses to legislate, conflicting federal procedural common law must give way to federal statute.

This explanation has force, but it tells only part of the story. In treating the procedural common lawmaking authority of the federal courts as derivative of and subservient to that of Congress, it fails to account for the fact that power might be distributed differently between the courts and Congress on matters of procedure than on matters of substance. In particular, it fails to account for the possibility that federal court authority over procedure might sometimes, even if rarely, exceed that of Congress.

Part II will then explore a theory that would account for that possibility: the proposition that Article III empowers federal courts to adopt procedural rules in the course of adjudication. Article III's references to "courts" and "judicial power" have long been understood to carry with them certain powers incident to all courts. Authority to regulate procedure, at least in the form of judicial decisions rather than prospective court rules, is assumed to be one of those powers. If federal courts indeed possess inherent authority over procedure, that authority presumably empowers them to adopt procedural measures in common law fashion. This power is not exclusive; on the contrary, Congress has wide authority to regulate it. Nonetheless, there is likely some small core of inherent procedural authority that Congress cannot reach.

This explanation captures the widely felt intuition that federal courts possess some power over procedure in their own right, but it encounters a threshold difficulty. Although both scholars and judges treat the proposition that federal courts possess inherent authority over procedure as self-evidently true, close study of the cases casts some doubt upon it. The inherent authority of the federal courts has been most fully explored in connection with a court's ability to sanction misbehavior and regulate those who serve it; federal courts have long asserted inherent authority to hold in contempt, impose sanctions, vacate judgments for fraud, dismiss cases for failure to prosecute, regulate the bar, and regulate jurors.⁶ The tradition of directly claiming inherent authority to prescribe procedural regulations, by contrast, is relatively weak, and it is doubtful whether the list of well-recognized inherent powers can

⁶ See *infra* notes 95–98 and accompanying text.

be understood as recognizing a broad power to control any matter related to internal judicial administration.

Because courts treat the existence of inherent authority as turning on history, Part III will carefully examine the historical record, focusing on the period between 1789 and 1820. It will canvass the framing and ratification debates, the history surrounding the adoption of the early judiciary and process acts, the case law, and contemporary treatises, all with a view toward determining whether federal courts in this period understood themselves to possess inherent procedural authority. It will conclude that while the historical record is mixed, the record is strong enough to support the proposition that Article III itself authorizes courts to regulate procedure in the absence of congressional authorization.

Inherent procedural authority, while important, is limited. Part IV will point out that any procedural authority conferred by Article III is entirely local.⁷ In other words, Article III empowers a court to regulate its own proceedings, but it does not empower a reviewing court to supervise the proceedings of a lower court by prescribing procedures that the lower court must follow. That is so because Article III vests “the judicial Power” in *each* Article III court. To the extent that “the judicial Power” carries with it the power to regulate procedure in the course of adjudicating cases, each court possesses that power in its own right. To be sure, an appellate court can set aside a rule adopted by a lower court on the ground that the rule exceeds the bounds of the lower court’s authority. But, the content of any procedure adopted pursuant to inherent procedural authority lies fundamentally within the discretion of the adopting court. As a result, inherent procedural authority does not enable the development of procedural doctrines that are uniform across jurisdictions.

Standing alone, then, neither the traditional explanation for federal common law nor the argument from inherent authority fully explains the procedural common lawmaking powers of the federal courts. Taken together, however, they provide a fairly complete explanation for what federal courts actually do and have done since 1789. The inherent procedural authority of courts supple-

⁷ See *infra* notes 203–04 and accompanying text. See generally Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 *Colum. L. Rev.* 324 (2006).

ments the common lawmaking authority that they can otherwise claim over procedure. The straightforward analogy to the substantive common lawmaking power of federal courts is right, so far as it goes. In the area of federal judicial procedure, as in the substantive areas of constitutional preemption, federal courts can develop uniform federal rules when Congress fails to do so. This procedural common law differs from substantive common law only in that it (like the old federal general common law) does not bind state courts. Federal court power over procedure, however, does not end there. In addition to this common law power to adopt uniform federal rules, each federal court possesses inherent authority to regulate its own proceedings. The resulting body of law is a mix of uniform doctrines largely drawn from general law (much like the law of admiralty or interstate relations) and narrower rules and discretionary measures associated with the inherent authority of individual courts.

These dual strands of judicially crafted procedural regulation are evident in both the early and modern cases. In the eighteenth and nineteenth centuries, uniform procedural doctrines were drawn from the general law, which courts understood themselves to apply rather than make. When there were matters that neither the enacted law nor general law governed, courts relied on inherent procedural authority to regulate the proceedings before them. Cases from the twentieth and twenty-first centuries contain the same two threads. The uniform procedural doctrines applied by modern courts are the descendants of the procedural doctrines of the old general common law. Preclusion and abstention, both of which have long historical roots, are good examples. These doctrines resemble the old general procedural common law in both their content—which has, in the main, stayed constant over time—and their development—which now, as then, is mediated by tradition and consensus. Even though modern, positivist federal courts understand themselves to make these doctrines, innovations in them (for example, the abandonment of preclusion's mutuality requirement) are not usually abrupt departures from traditional principles. Rather, they are usually responses to emergent consensus about the need for change. And when neither tradition, emergent consensus, nor the enacted law governs a particular procedural matter—in other words, when the content of the rule is entirely in the

discretion of the adopting court—modern federal courts, like their predecessors, typically treat any action they take as an exercise of inherent procedural authority. Such rules tend to address narrow, isolated topics. For example, the early Supreme Court relied upon its inherent procedural authority to adopt a rule setting forth the procedure for serving process;⁸ more recently, the Supreme Court acknowledged the authority of a federal court to adopt a rule governing the time in which a case must be brought.⁹

These two strands of procedural common law hardly fall within watertight categories. On the contrary, they are sometimes independent and sometimes overlapping, and that renders this body of law complex. Nonetheless, they reflect a longstanding practice in the federal courts of permitting flexibility and creativity to stand alongside uniform doctrines mediated by tradition and consensus. Recognizing these two strands of authority not only sheds light on the different ways in which federal courts regulate procedure through the case law method, but it also clarifies the role of federal courts vis-à-vis Congress with respect to procedure. Claims of exclusive authority are rooted in inherent authority; thus, to the extent that there are any matters insulated from congressional control, they fall within the category of matters that each court has the authority to self-regulate. There can be no claim of exclusivity, by contrast, with respect to procedural doctrines that bind the judicial branch as a whole. Uniform federal procedural common law, like all federal common law, is wholly subject to congressional abrogation.

I. PROCEDURAL AND SUBSTANTIVE COMMON LAW

Substantive common law is the lens through which the common law powers of the federal courts are generally viewed. This Part thus begins with a brief account of the power that federal courts possess to develop substantive common law. It then develops in more detail the propositions that procedural common law exists and that it exists outside of the traditional account of common law. To that end, this Part introduces five doctrines representative of procedural common law: abstention, *forum non conveniens*, *stare*

⁸ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 480 (1793).

⁹ *Barker v. Wingo*, 407 U.S. 514, 530 n.29 (1972).

decisis, remittitur, and preclusion. As this Part explains, each of these doctrines is “procedural” insofar as it is concerned with regulating court processes, and each is “common law” insofar as it is judge-made rather than the product of textual interpretation. If federal courts are generally at pains to identify a justification for proceeding when they develop substantive common law, the opposite is true when they develop procedural common law. While all of the doctrines described below are rooted in the fabric of federal law, the basis of the courts’ authority to develop them is almost entirely unexplored.

A. Substantive Common Law

Discussions of federal common law typically begin with a reference to *Erie Railroad Co. v. Tompkins* and its famous holding that “[t]here is no federal general common law.”¹⁰ *Erie* marked a sea change in the way federal courts approached their common law powers. Before *Erie*, one might have described the common law powers of the federal courts as broad but shallow: federal courts freely articulated common law on a broad range of matters, but the principles they articulated applied only in federal courts. After *Erie*, one might describe the common law powers of the federal courts as narrow but deep: federal courts make common law in instances “few and restricted,”¹¹ but the principles they articulate bind state as well as federal courts. *Erie* (and its progeny) thus gave something to both state and federal courts. On the one hand, state courts received the benefit of a general rule rendering state common law (or, more precisely, “the unwritten law of the State as declared by its highest court”¹²) controlling even in federal courts. On the other hand, federal courts received the reciprocal benefit of that rule’s exception. Federal courts make common law only rarely, but when they do, it has preemptive bite.¹³

¹⁰ 304 U.S. 64, 78 (1938).

¹¹ *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726 (2004) (noting that after *Erie*, federal courts dropped their claim of general common lawmaking competence and “withdrew to havens of specialty”).

¹² *Erie*, 304 U.S. at 71.

¹³ See Friendly, *supra* note 2, at 405 (“*Erie* led to the emergence of a federal decisional law in areas of national concern that is truly uniform because, under the supremacy clause, it is binding in every forum, and therefore is predictable and useful as

The Supreme Court has said that unless Congress authorizes it, “federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.”¹⁴ The justification for common law made without statutory authorization is that certain enclaves of federal interest are “so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts.”¹⁵ In other words, the enclaves identified by the Court are areas in which the structure of our federal system prohibits state law from controlling.¹⁶ If a case or controversy arises in one of these areas and Congress fails to articulate a uniform federal standard that would decide it, the federal courts must supply a federal standard in the form of a common law rule. As Professor Alfred Hill put it, “[t]he silence of Congress [in an area committed to federal control], far from silencing the federal courts, is precisely what calls upon them to speak.”¹⁷ In doing so, however, the judiciary functions only as a placeholder for Congress. If Congress subsequently adopts conflicting regulation, federal common law must give way to federal statute.

its predecessor, more general in subject matter but limited to the federal courts, was not.”); see also Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa*, Customary International Law, and the Continuing Relevance of *Erie*, 120 Harv. L. Rev. 869, 878–79 (2007) (describing this preemptive bite as the “basic animating principle of post-*Erie* federal common law”).

¹⁴ *Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 641 (1981).

¹⁵ *Boyle v. United Techs.* 487 U.S. 500, 504 (1988); see also Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 Colum. L. Rev. 1024, 1025 (1967) (“[T]here are areas of federal preemption, created by force of the Constitution, in which the federal courts formulate rules of decision without guidance from statutory or constitutional standards . . .”).

¹⁶ To be sure, this explanation of federal common law is neither perfect, see Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 Nw. U. L. Rev. 585, 623–27 (2006) (describing strengths and weaknesses of the preemption theory), nor uniformly accepted, see, e.g., Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 119–48 (2d ed. 1990) (advocating a narrower view); Louise Weinberg, *Federal Common Law*, 83 Nw. U. L. Rev. 805, 805 (1989) (advocating a broader view). I do not here engage the debate regarding the proper justification for the federal courts’ power to make substantive federal common law. For present purposes, I assume the correctness of the traditional explanation.

¹⁷ Hill, *supra* note 15, at 1042.

Federal common law exists, of course, outside of the above-described enclaves. As the Supreme Court's doctrinal formulation suggests, federal common law also exists pursuant to congressional authorization. Federal statutes may explicitly or implicitly authorize the creation of federal common law, and, as one might imagine, determining whether a statute implicitly authorizes such creation is frequently a difficult and contested question of statutory interpretation. It is also the case that it can be difficult to distinguish federal common law made in the shadows of federal statutes from interpretation of the statutory text itself. As a result, scholars frequently point out that when all is said and done, it can be hard to tell whether a given decision effects congressional intent or advances a judicial policy choice.¹⁸ This criticism is far more salient when federal common law is made in the interstices of federal statutes than when it is made in the enclaves of federal common law.¹⁹ When federal common law is made in the enclaves, there is no text giving the courts even a general sense of the direction in which they should go; hence, there is no real argument that courts are engaging in interpretation rather than making common law. The enclaves of federal common law thus present federal common law in its starkest, most recognizable form. Doctrinally, they also present the most difficult question regarding the source of federal court power: courts claiming the mantle of statutory authorization are on firmer ground than courts striking out on their own to articulate common law rules.

B. Contrasting Procedural Common Law

The standard account of federal common law described above neither acknowledges nor justifies the considerable amount of procedural common law articulated by the federal courts. "Procedure" is not included on the laundry list of enclaves in which federal common lawmaking is justified. While Congress's ability to overrule substantive common law is widely recognized, its ability to overrule procedural common law is frequently questioned.²⁰ And

¹⁸ See Note, An Objection to *Sosa*—And to the New Federal Common Law, 119 Harv. L. Rev. 2077, 2083 (2006) (describing this phenomenon).

¹⁹ Id.

²⁰ See *infra* notes 59–65.

procedural common law, unlike substantive common law, does not replace contrary state law.²¹

Before exploring the implications of these differences, however, it is necessary to answer a threshold question: what is “procedural common law”? This Section highlights the existence of this overlooked body of law by briefly describing five doctrines representative of it: abstention, forum non conveniens, stare decisis, remittitur, and preclusion. Each of these doctrines is “procedural” insofar as it is primarily concerned with the regulation of court processes and in-courtroom conduct.²² Each is “common law” insofar as it is judge-made; these five doctrines resemble those developed in the traditional enclaves of common law insofar as none pretends to interpret any provision of the enacted law.²³ If interpretation and common lawmaking run along a spectrum, each of these doctrines falls squarely on the “common law” end of it. As a result, the common law I describe below, much like that developed in the traditional enclaves of federal common law, presents the question of judicial authority with particular crispness. When a federal court proceeds without any pretense of interpreting the requirements of enacted law, it forces to the forefront the question of whether federal courts possess freestanding authority to develop a federal common law of procedure.

It is important to be clear that these five doctrines are an illustrative rather than exhaustive list of procedural common law. Moreover, in asserting that they qualify as both “procedural” and

²¹ See *infra* notes 55–58 and accompanying text.

²² Cf. Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 *Colum. L. Rev.* 1433, 1474–75 (1984) (defining substantive rules as those “concerned principally with policies extrinsic to litigation” and procedural rules as those designed “to enhance the fairness, reliability, or efficiency of the litigation process”). The status of these five doctrines as “procedural” can also be defended by the circular argument that procedural common law is the only kind of common law that does not bind the states, and none of these doctrines, as a rule, applies in state courts. While this argument does not conclusively establish that any of these doctrines is procedural, it does illustrate that both state and federal courts treat them as such.

²³ The fact that these doctrines are “judge made” does not mean that judges have made them up out of whole cloth. On the contrary, judges fashion much federal common law, including procedural common law, by drawing from norms generally accepted by the legal community. See generally Caleb Nelson, *The Persistence of General Law*, 106 *Colum. L. Rev.* 503 (2006).

“common law,” I am not offering restrictive definitions of those terms. “Procedure” and “common law” are both difficult to define,²⁴ and I do not here attempt a definition that conclusively determines whether marginal cases can be accurately described as either “procedural” or “common law.”²⁵ The doctrines that I describe below are ones conventionally treated as “procedural” and that should qualify as “common law” under even the most grudging definition of the phrase.

I. Abstention

One area in which the federal courts have developed a significant body of procedural common law is abstention. The abstention doctrines identify the circumstances in which federal courts deem it appropriate to refrain from adjudicating a case to permit some other body—typically a state court—to adjudicate it first. There are five doctrines that permit district courts to abstain from statu-

²⁴ On the difficulty of defining “procedure,” see, for example, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 559 (1949) (Rutledge, J., dissenting) (“Suffice it to say that actually in many situations procedure and substance are so interwoven that rational separation becomes well-nigh impossible.”). For competing definitions of “common law,” compare Hill, *supra* note 15, at 1026 (defining “common law” narrowly by excluding from its reach all rules traceable to some statutory or constitutional text, no matter how tangentially), with Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 5 (1985) (defining common law broadly to include any rule not appearing on the face of some constitutional or statutory provision, “whether or not that rule can be described as the product of ‘interpretation’ in either a conventional or an unconventional sense”).

²⁵ There are many doctrines whose status as procedural common law is contestable. For example, people might agree that a rule excluding involuntary confessions is a common law rule, but disagree about whether that requirement is procedural or substantive. Compare *McNabb v. United States*, 318 U.S. 332, 340 (1943) (treating such a rule as procedural), with Beale, *supra* note 22, at 1475–76 (treating it as substantive). Similarly, people might agree that the well-pleaded complaint rule, see *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152–53 (1908), is procedural, but disagree about whether it results from common lawmaking or statutory interpretation. Compare Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 Colum. L. Rev. 1291, 1333 (1986) (treating rule as one of common law because the text of 28 U.S.C. § 1331 does not so restrict federal question jurisdiction), with Hill, *supra* note 15, at 1026 (adopting a narrower definition of common lawmaking under which the well-pleaded complaint rule would be treated as statutory interpretation).

torily granted jurisdiction—*Colorado River*, *Younger*, *Thibodaux*, *Burford*, and *Pullman* abstention.²⁶

Because the abstention doctrines guide the litigation process rather than out-of-courtroom conduct, they are “procedural.” Because they are prescribed by judicial decision rather than enacted law, they are a species of “common law.”²⁷ Indeed, one might say that the common law status of the abstention doctrines is particularly clear because they exist not only in the absence of explicit regulation by the enacted law but in spite of explicit jurisdictional grants in the enacted law. It is, in fact, the tension between doctrines emanating from judicially developed guidelines and enacted law arguably charging federal courts to assume jurisdiction that has made the abstention doctrines particularly controversial.²⁸ Those who defend the abstention doctrines, however, do not do so on the ground that the doctrines are constitutionally or statutorily required. Those who defend abstention, like those who criticize it, treat abstention as a form of common law.²⁹ Neither those who defend it nor those who criticize it have focused on the source of the

²⁶ See *Colo. River v. United States*, 424 U.S. 800, 817 (1976); *Younger v. Harris*, 401 U.S. 37, 43–44 (1971); *La. Power & Light Co. v. Thibodaux*, 360 U.S. 25, 27–29 (1959); *Burford v. Sun Oil Co.*, 319 U.S. 315, 332–33 (1943); *R.R. Comm’n v. Pullman Co.*, 312 U.S. 496, 500–01 (1941).

²⁷ See Gene R. Shreve, *Pragmatism Without Politics—A Half-Measure of Authority for Jurisdictional Common Law*, 1991 *BYU L. Rev.* 767, 797 (1991) (dubbing the doctrines a kind of “jurisdictional common law”); see also *Colo. River*, 424 U.S. at 817 (grounding propriety of dismissal in “[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation”) (citations omitted); *Younger*, 401 U.S. at 43 (grounding abstention from issuing injunctions against state criminal prosecutions in the policies reflected generally in certain statutes and in equitable tradition); *Thibodaux*, 360 U.S. at 28 (holding that concerns of comity justify abstention in certain circumstances even in suits at law, as opposed to suits at equity); *Burford*, 319 U.S. at 333 n.29 (grounding the power to abstain in the powers traditionally exercised by courts sitting in equity and the guidelines for its exercise in federalism); *Pullman*, 312 U.S. at 500–01 (justifying abstention with reference to both the traditional powers of equity courts and regard for the “harmonious relation between state and federal authority”).

²⁸ See *Colo. River*, 424 U.S. at 825–26 (Stewart, J., dissenting); *Thibodaux*, 360 U.S. at 31–34 (Brennan, J., dissenting); *Burford*, 319 U.S. at 336, 347–48 (Frankfurter, J., dissenting); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 *Yale L.J.* 71, 76–79 (1984).

²⁹ See *Matasar & Bruch*, supra note 25, at 1337–42 (1986); Redish, supra note 28, at 80–84; David L. Shapiro, *Jurisdiction and Discretion*, 60 *N.Y.U. L. Rev.* 543, 547–52, 574–75, 579–85 (1985); Shreve, supra note 27, at 769–72, 796–98.

federal courts' authority to develop a procedural common law of abstention.

2. *Forum Non Conveniens*

The doctrine of forum non conveniens, a close cousin of abstention, addresses a district court's power to dismiss a suit so that the suit may be adjudicated in a "more convenient" forum. In determining whether another forum is better suited to adjudicate a claim, the court considers factors of public interest, such as the chosen forum's interest in the controversy, as well as factors of private interest, such as the relative ease of access to proof, the relative availability of compulsory process, and the relative cost of obtaining the attendance of witnesses.³⁰ When the balance of factors strongly favors adjudicating the case elsewhere, the district court can override the plaintiff's choice of forum by dismissing the case.³¹

Insofar as forum non conveniens addresses the circumstances in which a federal court will adjudicate a suit, it is procedural. Insofar as it is judicially developed rather than the product of enacted law, it is common law.³² In fact, as is the case with abstention, forum non conveniens might be said to exist not only in the absence of enacted law on point but in spite of it: forum non conveniens exists in spite of jurisdiction and venue statutes that arguably instruct a district court to adjudicate.³³

While the courts have made clear that forum non conveniens is a common law doctrine, they have not made clear the source of their authority to develop it. For example, in *Gulf Oil v. Gilbert*, the case widely regarded as first sanctioning a federal doctrine of forum non conveniens, the Supreme Court did not point to any specific statu-

³⁰ See *Gulf Oil v. Gilbert*, 330 U.S. 501, 508-09 (1947).

³¹ *Id.* at 508. The doctrine only applies when the more convenient forum is foreign because 28 U.S.C. § 1404, enacted in 1948, governs transfers between United States district courts.

³² See *Gulf Oil*, 330 U.S. at 507 (describing forum non conveniens as a common law doctrine); *id.* at 505 n.4 (asserting that "[t]he doctrine did not originate in federal but in state courts"); *id.* at 507 (observing that "[t]he federal law contains no . . . express criteria to guide the district court in exercising [the forum non conveniens] power" but that "the common law [has] worked out techniques and criteria for dealing with it").

³³ See *id.* at 513 (Black, J., dissenting) (protesting forum non conveniens on this ground).

tory or constitutional provision that granted federal courts the power to dismiss suits on this basis, nor did it identify the principle that generally empowered it to create procedural common law, of which *forum non conveniens* is but a part.³⁴ Since *Gulf Oil* was decided, judges and scholars have occasionally justified *forum non conveniens* with reference to the inherent authority of federal courts.³⁵ Even then, however, the fundamental proposition that federal courts possess inherent procedural authority is assumed rather than explored.

3. *Stare Decisis*

Stare decisis, a doctrine adopted by courts to govern their decisionmaking processes, has two forms: “horizontal” and “vertical.” Horizontal *stare decisis* refers to the principle that a court will follow its own precedent, and vertical *stare decisis* refers to the principle that a court will follow the precedent set by a higher court. In what follows, I consider only the doctrine of horizontal *stare decisis*, which is a more nuanced doctrine and therefore a richer example of procedural common law.

Consider some of the rules comprising the doctrine of horizontal *stare decisis*. The fundamental rule of horizontal *stare decisis* is that holdings bind and dicta do not. Subsidiary rules, however, dictate the strength a holding carries in particular circumstances. Some holdings are virtually set in stone. For example, every court of appeals forbids one panel of the court from overturning decisions made by another.³⁶ Even those holdings open to reconsideration, however, such as those presented to a court of appeals sitting en banc or to the Supreme Court, vary in strength. The Supreme Court and many courts of appeals have adopted a three-tiered system in which constitutional cases carry the weakest precedential force, common law cases carry average precedential force, and

³⁴ *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947).

³⁵ See, e.g., *Chambers v. NASCO*, 501 U.S. 32, 44 (1991) (including in a list of inherent judicial powers the power to dismiss a case on grounds of *forum non conveniens*); Elizabeth T. Lear, Congress, the Federal Courts, and *Forum Non Conveniens*: Friction on the Frontier of Inherent Power, 91 *Iowa L. Rev.* 1147 (2006) (treating *forum non conveniens* as an exercise of the judiciary’s inherent power).

³⁶ See Amy Coney Barrett, *Stare Decisis and Due Process*, 74 *U. Colo. L. Rev.* 1011, 1017–18, 1018 n.20 (2003).

statutory cases carry particularly strong precedential force.³⁷ Before overruling a common law or constitutional case (statutory cases are rarely overruled), the Supreme Court and the courts of appeals balance reliance interests in the precedent against arguments that the precedent has become unworkable or has been undercut by intervening law.³⁸ None of these factors, however, is applicable in the district courts. District courts, in contrast to the Supreme Court and courts of appeals, generally do not observe horizontal stare decisis.³⁹

Courts do not purport to interpret any statutory or constitutional text in the development of stare decisis doctrine. As both the rules of stare decisis and their variance in the district and appellate courts suggest, stare decisis is a doctrine comprised of judicial policy choices, and both courts and scholars characterize it as such.⁴⁰ Even though the doctrine is generally regarded as a species of common law, the question of the courts' authority to develop it is rarely raised. Scholars have sometimes analogized the federal courts' authority to develop the doctrine of stare decisis to their authority to develop other areas of federal common law, such as admiralty or interstate disputes.⁴¹ Others have contended that the power to regulate decisionmaking by adopting doctrines like stare decisis is part of "the judicial Power" that Article III confers.⁴² The

³⁷ See Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 *Geo. Wash. L. Rev.* 317, 319–21 (2005).

³⁸ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–69 (1992) (plurality opinion).

³⁹ Barrett, *supra* note 36, at 1015 & n.13.

⁴⁰ See, e.g., *Agostini v. Felton*, 521 U.S. 203, 235 (1997) ("[S]tare decisis is not an inexorable command, but instead reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right.") (citations and internal quotation marks omitted); *Adarand Constructors v. Peña*, 515 U.S. 200, 231–35 (1995) (opinion of O'Connor, J.) ("[S]tare decisis is a principle of policy" (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940))); see also John Harrison, *The Power of Congress over the Rules of Precedent*, 50 *Duke L.J.* 503, 525–29 (2000) (characterizing norms of precedent as "federal common law"); Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 *Const. Comment.* 191, 212 (2001) (characterizing stare decisis as judicially determined); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 *Yale L.J.* 1535, 1548 (2000) ("The point is that stare decisis is a policy judgment, *not* a rule of law specified in the Constitution or clearly implicit in its provisions or overall structure.").

⁴¹ See, e.g., Harrison, *supra* note 40, at 525–29.

⁴² See, e.g., Lawson, *supra* note 40, at 202–04, 207.

question of the courts' authority to articulate rules of stare decisis, however, is tangential to the issues occupying scholars of the doctrine; there is, therefore, no settled consensus regarding the source of federal court power to develop these rules.

4. Remittitur

Wright & Miller's well-known treatise on federal practice and procedure describes remittitur practice as "[a]n excellent example of what might be called 'federal common law of procedure'—that is, judge-made rules of practice and procedure."⁴³ When a district court determines that a jury verdict is excessive, the court can either order a new trial or give the plaintiff the option of a remittitur—a denial of a motion for a new trial conditioned upon the plaintiff's acceptance of a reduced amount of damages.⁴⁴ While the grant of a new trial is governed by Federal Rule of Civil Procedure 59, the order of a remittitur is not governed by any federal rule or statute. The first case ordering a remittitur was decided by Justice Story in 1822,⁴⁵ and the federal courts have condoned the practice ever since.⁴⁶ They have also developed common law rules guiding its exercise. For example, in settling on the amount to be deducted from the verdict, the majority rule is that the district court can reduce the verdict only to the highest amount that the jury properly could have awarded.⁴⁷ I have been unable to find any case or academic work discussing the source of the federal courts' authority to develop a doctrine of remittitur.

5. Preclusion

Sometimes known by the traditional terminology "collateral estoppel" and "res judicata," preclusion doctrine is the body of rules

⁴³ 19 Wright et al., *supra* note 1, § 4505 n.61.

⁴⁴ See *Dimick v. Schiedt*, 293 U.S. 474, 483 (1935).

⁴⁵ *Blunt v. Little*, 3 F. Cas. 760, 762 (C.C.D. Mass. 1822) (No. 1578) (ordering that the case be "submitted to another jury, unless the plaintiff is willing to remit \$500 of his damages," though noting that in entering this order, "I believe that I go to the very limits of the law").

⁴⁶ See *Dimick*, 293 U.S. at 483 (noting longevity of practice and collecting cases).

⁴⁷ 11 Wright et al., *supra* note 1, § 2815. There are some courts, however, that reduce the award to the minimum amount the jury could have awarded, and still others that reduce the verdict to whatever amount the court thinks is fair. *Id.*

governing the relitigation of issues and claims. Under the rules of claim preclusion, the existence of a judgment that is “valid,” “final,” and “on the merits” extinguishes a claimant’s ability to press any other claims arising out of the same transaction or occurrence.⁴⁸ Under the rules of issue preclusion, a party in a current suit cannot relitigate any issue already resolved in a prior suit to which she was a party, so long as resolution of that issue was “essential” to a judgment that is “valid,” “final,” and “on the merits.”⁴⁹ Claim preclusion generally applies only to those asserting claims, not to those defending against them; issue preclusion, by contrast, applies to both those asserting claims and those defending against them. Claim preclusion reaches claims that could have been litigated in the first suit as well as claims that were actually litigated in the first suit; issue preclusion, by contrast, reaches only those issues that were actually litigated in the first suit. Both claim and issue preclusion extend the reach of a judgment to those “in privity” with a party bound by a judgment.

Preclusion’s status as a common law doctrine is clear.⁵⁰ The rules of preclusion satisfy my definition of “procedural” rules because, in

⁴⁸ See 18A Wright et. al., *supra* note 1, § 4406; see also *id.* §§ 4428–47.

⁴⁹ *Id.* § 4416. Note that the doctrine of offensive nonmutual issue preclusion provides a limited exception to this rule insofar as it limits the circumstances under which those who were not parties to a prior suit can assert issue preclusion against those who were. See *Parklane Hosiery v. Shore*, 439 U.S. 322, 331–32 (1979).

⁵⁰ See, e.g., *Semtek Int’l v. Lockheed Martin*, 531 U.S. 497, 508 (2001) (holding that “federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity”); *United States v. Stauffer Chem.*, 464 U.S. 165, 176 (1984) (White, J., concurring) (referring to the “flexible, judge-made doctrine” of collateral estoppel); *United States v. Mendoza*, 464 U.S. 154, 158 (1984) (referring to the “judicially developed doctrine of collateral estoppel”); *Allen v. McCurry*, 449 U.S. 90, 96 (1980) (“[F]ederal courts may look to the common law or to the policies supporting *res judicata* and collateral estoppel in assessing the preclusive effect of decisions of other federal courts.”). With respect to preclusion’s common law pedigree, it is also worth noting that the federal courts have not drawn the content of federal preclusion from any statutory or constitutional provision; rather, in fashioning preclusion law, the federal courts have drawn heavily from secondary sources and the practice of state courts. See, e.g., *Montana v. United States*, 440 U.S. 147, 153–55 (1979) (relying heavily on *Restatement (Second) of Judgments*, *Moore’s Federal Practice*, and law review articles in identifying the fundamental precepts of preclusion); *id.* at 164 (Rehnquist, J., concurring) (recognizing influence of secondary sources on majority decision); *Blonder-Tongue Labs. v. Univ. of Ill. Found.*, 402 U.S. 313, 322–27 (1971) (relying heavily on state cases and secondary sources in abandoning mutuality requirement for defensive issue preclusion).

determining the effect of federal judgments on later litigation, they are concerned with the regulation of court processes rather than out-of-courtroom conduct. That said, of the doctrines described in this Section, preclusion is the one whose status as “procedural” is most open to doubt. In *Semtek International v. Lockheed Martin*, a case dealing with the peculiar problem of interjurisdictional preclusion, the Supreme Court wavered between characterizing preclusion as procedural and characterizing it as substantive.⁵¹ The Court’s indecision is a reflection of the fact that preclusion, like so many ostensibly procedural doctrines, has substantive effects. Despite the uncertainty surrounding preclusion’s procedural status, I have chosen to include it here for two reasons. First, preclusion is typically treated as procedural—witness the fact that it is a staple of the first-year Civil Procedure class.⁵² Second, and more important, preclusion shares relevant characteristics with the other doctrines herein described: it falls outside of the traditionally recognized enclaves of federal common law, and it does not generally bind the states, which, outside of the context of interjurisdictional preclusion, are free to set their own rules governing the finality of judgments.

There has been almost no discussion in the cases of where courts derive the authority to develop a common law of preclusion.⁵³ In

⁵¹ 531 U.S. 497 (2001). In *Semtek*, the Supreme Court held that federal common law governs the preclusive effect given all federal judgments, including judgments rendered by federal courts sitting in diversity. *Id.* at 507–08. On the one hand, the Court suggested that preclusion is procedural. See, e.g., *id.* at 501 (positing that the Conformity Act, which required federal courts to follow state procedure, would have required federal courts to follow state preclusion law); *id.* at 509 (suggesting that federal preclusion law is shaped by “federal courts’ interest in the integrity of their own processes”). On the other hand, the Court also suggested that preclusion is substantive. See *id.* at 503 (opining that if Fed. R. Civ. P. 41(b) governed the preclusive effect that state courts must give federal court judgments, it might violate the Rules Enabling Act prohibition on rules that “abridge, enlarge or modify any substantive right”) (citations omitted).

⁵² Cf. Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 *Cornell L. Rev.* 733, 747–48 (1986) (describing—and criticizing—the traditional account, which treats preclusion as “largely a reflex of procedural law”).

⁵³ There have, however, been academic efforts to justify preclusion in its interjurisdictional form. See, e.g., Burbank, *supra* note 52, at 764, 770 (arguing that interjurisdictional preclusion is a substantive doctrine justified by the need for uniform federal rules); Ronan E. Degnan, *Federalized Res Judicata*, 85 *Yale L.J.* 741, 769 (1976) (ar-

Semtek, the Supreme Court hinted that its power to formulate federal rules of preclusion rests on the same ground as its power to formulate substantive common law: the lack of congressional guidance in an area of clearly federal concern.⁵⁴ The Court did not develop this suggestion, however, and its other preclusion cases have said nothing about the source of its authority. As it stands, it is fair to say that the rules of preclusion are well understood, but the courts' authority to make them is not.

C. The Divergence Between Common Law Theory and Procedural Common Law

As these five doctrines illustrate, federal courts make common law in ways for which traditional common law theory does not account. Current theories of the common lawmaking powers of the federal courts are informed exclusively by substantive common law. But procedural common law exists, and it differs from substantive common law in at least two significant respects.

First is the fact that procedural common law, unlike substantive common law, is confined in its application to federal courts.⁵⁵ The states are not required to mimic, for example, the federal procedural common law of *forum non conveniens* or *remittitur*. Neither the rule that federal procedural common law is confined to federal courts nor the reason for it, however, is explicit in the case law.⁵⁶ Consequently, it is not clear whether the Supreme Court can impose rules of procedural common law upon the states if it so chooses⁵⁷ or whether the Constitution limits the procedural power

guing that interjurisdictional preclusion is a procedural doctrine that federal courts have the inherent authority to adopt).

⁵⁴ *Semtek*, 531 U.S. at 507–08; see also Burbank, *supra* note 52, at 753–97.

⁵⁵ See *Harris v. Rivera*, 454 U.S. 339, 344–45 (1981) (*per curiam*) (“Federal judges . . . may not require the observance of any special procedures [in state courts] except when necessary to assure compliance with the dictates of the Federal Constitution.”). But see *supra* note 51.

⁵⁶ It is probably rooted in the choice-of-law principle that the procedure of the forum generally controls. Restatement (First) of Conflict of Laws § 585 (1934) (“All matters of procedure are governed by the law of the forum.”).

⁵⁷ The Supreme Court has occasionally displaced state procedure without explaining its deviation from the general rule that federal judges cannot control state procedure. For example, in *Semtek*, the Supreme Court held that federal rather than state law controls the preclusive effect that a state court must give a federal diversity judgment. 531 U.S. at 508. While this result may well be correct, in the course of reaching it, the

of the federal courts to the federal system.⁵⁸ While this is an important and difficult question, it is not one that this Article will explore.

A second difference between substantive and procedural common law lies in the degree to which Congress can abrogate it. No one doubts Congress's power to abrogate substantive common law.⁵⁹ Congress's power to abrogate procedural common law, by contrast, is open to doubt. There is substantial agreement that Congress possesses wide authority to regulate judicial procedure. But there is also substantial agreement that Congress's authority to regulate judicial procedure is subject to some limit. In other words, the disagreement centers less on the existence of a limit than on its boundaries. Some scholars have taken a fairly restrictive view of Congress's power to regulate procedure. For example, Professor Gary Lawson has argued that *stare decisis*, burdens of proof, and evidentiary rules, among other things, are matters within the exclu-

Supreme Court did not identify, much less resolve, the tension between this holding and the general rule of non-displacement. Another example is the adequate and independent state grounds doctrine. The doctrine, which is typically characterized as procedural common law, see, e.g., Kermit Roosevelt III, *Light from Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered*, 103 *Colum. L. Rev.* 1888, 1892–93 (2003), indirectly regulates state procedure insofar as it rejects some state procedures as inadequate. Again, the Supreme Court has not reconciled this doctrine with the general rule that federal procedural common law regulates only federal courts. *Id.* (describing the theoretical confusion surrounding the question whether the Court has the power to displace state judicial procedure).

⁵⁸ The Court's failure to identify the boundaries of federal procedural common law vis-à-vis the states is not unique; the Court has been equally unclear about the extent of Congress's authority to regulate state judicial procedure. See Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 *Yale L.J.* 947, 949 (2001) ("The bounds of federal authority over the way state courts conduct their business have remained undefined for over 200 years."). In the context of congressional regulation of state judicial procedure, Professor Bellia has drawn from traditional conflict-of-laws principles to conclude that the Tenth Amendment reserves to the states exclusive control over judicial enforcement of state law. See *id.* at 972–73. If he is correct, the Tenth Amendment would not only limit the ability of Congress to regulate state judicial procedure, but it would also limit the ability of federal courts to regulate state judicial procedure. That is not to say, however, that judicial power to regulate state procedure would necessarily be coextensive with that of Congress.

⁵⁹ Cf. Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 *Mercer L. Rev.* 697, 708 (1995) ("[N]o one could seriously doubt that a legislature has the authority to supersede common law rules by appropriate legislative action.").

sive control of the judicial branch.⁶⁰ Similarly, Professor David Engdahl has argued that Congress lacks the power to “curtail or delimit judicial abstention”⁶¹ and that the Rules Enabling Act is “subject to serious constitutional doubt” insofar as it permits Congress to postpone and even prohibit judicial rulemaking in certain areas.⁶² Other scholars take a more expansive view of congressional power than do Professors Lawson and Engdahl. For example, both Professor John Harrison and Professor Michael Paulsen have claimed, contrary to Professor Lawson, that Congress possesses the authority to abrogate *stare decisis*.⁶³ Even scholars taking a more expansive view, however, stop short of characterizing Congress’s power as unbounded. Professor Paulsen acknowledges that a congressional attempt to, say, forbid concurrences, dissents, or the citation of prior opinions may well transgress the limits of Congress’s authority.⁶⁴ Similarly, the Supreme Court, while typically acquiescing in congressional regulation, has deliberately left open the question whether some procedural matters lie wholly within the judiciary’s discretion.⁶⁵ Whatever the limits of congressional authority,

⁶⁰ Lawson, *supra* note 40, at 212–14, 220.

⁶¹ David E. Engdahl, *Intrinsic Limits of Congress’ Power Regarding the Judicial Branch*, 1999 BYU L. Rev. 75, 168 (1999).

⁶² *Id.* at 172–73. Cf. Michael M. Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence*, 57 Tex. L. Rev. 167, 178–79, 182–84 (1979) (arguing that Congress can prescribe rules of evidence for the federal courts, but federal courts possess the power to supersede those rules if they prefer others). Engdahl also challenges Congress’s power to regulate prudential standing doctrine, *supra* note 61, at 165–66, the choice of appropriate relief, *id.* at 170–71, burdens of proof, *id.* at 173, and the time within which cases must be decided, *id.* at 173–74. Like Gary Lawson, Engdahl argues that the Anti-Injunction Act is unconstitutional. *Id.* at 169.

⁶³ See Harrison, *supra* note 40, at 504 (“Congress has substantial authority to legislate concerning the rules of precedent in federal court.”); Paulsen, *supra* note 40 (arguing that Congress can abrogate *stare decisis* by statute).

⁶⁴ Paulsen, *supra* note 40, at 1590, 1591 n.154.

⁶⁵ Because Congress has not generally imposed onerous procedural regulation on the judiciary, the Supreme Court has had little occasion to address the question of whether particular regulations transgress Congress’s authority. It has repeatedly implied, however, that limits exist. See *Miller v. French*, 530 U.S. 327, 350 (2000) (reserving the question of whether “there could be a time constraint on judicial action that was so severe that it implicated . . . separation of powers concerns”); *Herron v. S. Pac. Co.*, 283 U.S. 91, 94–95 (1931) (implying that Congress lacks the power to require federal courts to follow state statutes “which would interfere with the appropriate performance of [the function of a federal court],” such as regulations regarding what materials jurors can take into deliberations, whether a jury must answer a special ver-

the widely shared sense that some limit exists reflects an implicit judgment that judicial authority over procedure is different in kind than its authority over substance. The next Part turns to the question of authority.

II. THREE POSSIBLE SOURCES OF PROCEDURAL AUTHORITY

This Part explores three potential justifications for the authority of the federal courts to develop procedural common law. It first considers whether any statute generally confers upon federal courts procedural common lawmaking authority. It then considers whether, in the absence of statutory authority, any constitutional justification exists for this form of common law. Two constitutional arguments might justify procedural common law. First, one might draw a straightforward analogy to the substantive common lawmaking powers of the federal courts by arguing that procedure, like other areas of federal common law, is an enclave in which federal interests are so strong that common lawmaking is justified in the absence of congressional regulation. Second, one might treat Article III's grant of "the judicial Power" as imbuing courts, either directly or indirectly, with authority to fashion rules of procedure.

A. Potential Statutory Justifications

A threshold question in analyzing the legitimacy of federal procedural common law is whether Congress has authorized its creation, for if it has, the question of whether a constitutional justifica-

dict, and whether a judge has recourse to the device of a directed verdict); *McDonald v. Pless*, 238 U.S. 264, 266 (1915) (questioning whether a statute like the Conformity Act could reach the power of federal courts to regulate the conduct of jurors); *Indianapolis & St. Louis R.R. v. Horst*, 93 U.S. 291, 300 (1876) (noting that the question of whether Congress could trench upon the powers of a judge in certain matters of judicial administration is "open to doubt"); *Nudd v. Burrows*, 91 U.S. 426, 441-42 (1875) (implying that a statute regulating "[t]he personal administration by the judge of his duties while sitting upon the bench" would raise a constitutional question); see also *United States v. Horn*, 29 F.3d 754, 760 n.5 (1st Cir. 1994) ("It is not yet settled whether some residuum of the courts' [inherent] power is so integral to the judicial function that it may not be regulated by Congress (or, alternatively, may only be regulated up to a certain point)."). State legislatures have gone further than Congress in their attempts to regulate judicial procedure, and state courts have invalidated some of those attempts as beyond the legislative authority. See A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rulemaking: A Problem in Constitutional Revision*, 107 U. Pa. L. Rev. 1, 30 (1958) (cataloguing examples).

tion exists recedes in importance. Part I explained that no specific statutory authorization exists for any of the five doctrines therein described; in other words, none of those doctrines elaborates a particular statute or proceeds from a specific statutory grant in the relevant area. It might be the case, however, that some general statutory authority exists, even if the courts articulating such doctrines do not invoke it.

The broadest grant of statutory rulemaking authority to the federal courts is found in 28 U.S.C. Section 2071(a), which provides, "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business."⁶⁶ One might be tempted to construe this language as giving federal courts the power to prescribe common law as well as prospective court rules. That temptation, however, is immediately dispelled by the direction in Section 2071(b) that rules prescribed pursuant to this grant "shall be prescribed only after giving appropriate public notice and an opportunity to comment," as well as Section 2071(d)'s requirement that copies of such rules be distributed to various bodies.⁶⁷ These directions clearly do not contemplate rules worked out on a common law basis. Thus, read in light of the subsections that follow it, Section 2071(a)'s statutory grant clearly authorizes federal courts to "prescribe rules" through the process of rulemaking, not adjudication.

There are, to be sure, federal rules implementing 28 U.S.C. Section 2071 that might be read to expand this statutory grant. Federal Rule of Civil Procedure 83 and Federal Rule of Appellate Procedure 47 detail the means by which district courts and courts of appeals, respectively, may promulgate local rules. At the end of each rule is a safety-valve provision, granting a district judge or court of appeals the power to adopt procedures in the absence of a federal statute, federal rule, or local rule on point. The language of these provisions is fairly broad. Federal Rule of Civil Procedure 83(b) provides that when there is no law controlling, "[a] judge may regulate practice *in any manner* consistent with federal law."⁶⁸ In the same vein, Federal Rule of Appellate Procedure 47(b) provides

⁶⁶ 28 U.S.C. § 2071(a) (2000).

⁶⁷ *Id.*

⁶⁸ Fed. R. Civ. P. 83(b) (emphasis added).

that in the absence of controlling law, “[a] court of appeals may regulate practice in a particular case *in any manner* consistent with federal law.”⁶⁹ Thus, both of these rules might be read to grant the federal courts a power that 28 U.S.C. Section 2071 does not: the power to regulate procedure by the development of common law.⁷⁰

Despite the breadth of the language, it is not at all clear that either Federal Rule of Civil Procedure 83(b) or Federal Rule of Appellate Procedure 47(b) authorizes procedural common law in the sense of generally applicable rules worked out by judges on a case-by-case basis.⁷¹ Even assuming that they do, these rules fall under the weight of an objection raised by Professor Stephen Burbank. To the extent that these rules themselves purport to confer common lawmaking power on federal judges, they are invalid.⁷² Congress can confer common lawmaking power on federal judges, but federal judges cannot confer such power on themselves. Neither Federal Rule of Appellate Procedure 47 nor Federal Rule of Civil Procedure 83 is a federal statute; both are products of the statutorily authorized rulemaking process supervised by the Supreme Court. Both Rules 47 and 83 implement the grant of local rulemaking authority conferred by 28 U.S.C. Section 2071, but that grant, as discussed above, is not a grant of common law authority. The Federal Rules cannot give power that Congress has not. Thus, even assuming that Federal Rule of Appellate Procedure 47(b) and Federal Rule of Civil Procedure 83(b) refer to the development of procedural common law, they are best understood as provisions simply clarifying the judiciary’s view that neither these provisions authorizing local rulemaking nor the Enabling Act itself stamps out any common law power over procedure that the judiciary otherwise possesses.

⁶⁹ Fed. R. App. P. 47(b) (emphasis added).

⁷⁰ See Burbank, *supra* note 52, at 773–74 & n.192 (assuming that these rules purport to confer upon federal courts the power to make procedural common law).

⁷¹ The Advisory Committee Notes to Federal Rule of Civil Procedure 83(b) reveal that its drafters did not necessarily expect that regulation in a form other than local rules would be in the form of traditional common law doctrine. The Notes refer only to “internal operating procedures, standing orders, and other internal directives.” Fed. R. Civ. P. 83.

⁷² See Burbank, *supra* note 52, at 773–74.

B. Constitutional Preemption and Procedural Common Law

In the absence of statutory authority to develop procedural common law, it is necessary to consider whether some constitutional justification exists. It makes sense to begin with a theory that tracks the justification for federal substantive common law.⁷³ As described in Part I, the standard account of the substantive common lawmaking powers of the federal courts identifies certain enclaves in which the Constitution impliedly prohibits state law from controlling. In these enclaves, some federal law must govern. The prerogative to specify federal law belongs to Congress, but if Congress does not act, the theory goes, the federal courts must.⁷⁴ One can see how this logic might apply to the area of procedure.

It is well established that the procedure observed by the federal courts is a matter that the Constitution commits exclusively to federal control. The first and most forceful statement of this principle appeared in *Wayman v. Southard*:

That [the power to regulate federal court procedure] has not an independent existence in the State legislatures, is, we think, one of those political axioms, an attempt to demonstrate which, would be a waste of argument not to be excused. The proposition has not been advanced by counsel in this case, and will, probably, never be advanced. Its utter inadmissibility will at once present itself to the mind, if we imagine an act of a State legislature for

⁷³ This approach is suggested, though not fleshed out, in some of the literature and case law. See, e.g., Matasar & Bruch, *supra* note 25, at 1323–25 (drawing an analogy between the substantive and procedural common lawmaking powers of the federal courts); William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. Rev. 761, 778 (1997) (hypothesizing that procedural common law might be conceptualized as “specialized federal common law,” analogous to the other forms of federal common law that survived *Erie*). This also appears to be the view expressed by the Supreme Court in *Semtek*, where the Court’s approach to the articulation of a common law rule—invocation of a federal interest—resembled the approach it takes when articulating rules within the enclaves of federal common law. See *supra* note 54 and accompanying text. See also Tidmarsh & Murray, *supra* note 16, at 594, 610–14 (opining that *Semtek* effectively added preclusion to the existing enclaves of federal common law).

⁷⁴ See *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) (“When Congress has not spoken to a particular issue, however, and when there exists a ‘significant conflict between some federal policy or interest and the use of state law,’ the Court has found it necessary, in a ‘few and restricted’ instances, to develop federal common law.”) (citations omitted).

the direct and sole purpose of regulating proceedings in the Courts of the Union, or of their officers in executing their judgments. No gentleman, we believe, will be so extravagant as to maintain the efficacy of such an act.⁷⁵

The *Wayman* Court went on to argue that the states could not do indirectly what they could not do directly, and thus that it was almost equally extravagant to maintain that state laws regulating the procedure of state courts somehow extended of their own force to federal courts as well.⁷⁶ The regulation of federal judicial procedure belongs to the federal government.

Given that federal judicial procedure is an area of constitutional preemption, one can analogize the federal courts' power to articulate procedural common law to their power to articulate substantive common law. State law cannot govern federal procedure—just as the Court has held that it cannot govern admiralty, interstate disputes, certain cases involving the rights and obligations of the federal government, and certain matters of foreign affairs. Congress possesses authority to regulate federal judicial procedure pursuant to both the Inferior Tribunals Clause and the Sweeping Clause.⁷⁷ If Congress has not exercised its power to regulate some

⁷⁵ 23 U.S. (10 Wheat.) 1, 49 (1825). The insistence that the federal government has exclusive control over the procedure of its own courts is presumably the flip side of the principle that each state has nearly exclusive control over its own judicial procedure. See *supra* note 58 and accompanying text.

⁷⁶ 23 U.S. at 49–50. See also *Fullerton v. Bank of the United States*, 26 U.S. (1 Pet.) 604, 607 (1828) (asserting that state legislatures can have no control, direct or indirect, over federal court process). That is not to say, of course, that Congress cannot direct the federal courts to observe state procedure, and Congress has done just that on a number of occasions. For example, the Process and Conformity Acts, described *infra* Subsection III.B.2, both directed federal courts to apply state procedure. But in that situation, state procedure applies to federal courts by virtue of a federal law, much like the situation in which federal courts choose state law as the operative rule of federal common law. See *Beers v. Haughton*, 34 U.S. (9 Pet.) 329, 359 (1835) (“The whole efficacy of such laws in the courts of the United States, depends upon the enactments of congress. So far as they are adopted by congress they are obligatory. Beyond this, they have no controlling influence.”).

⁷⁷ See *Hanna v. Plumer*, 380 U.S. 460, 472 (1964) (“[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts . . .”). In addition to empowering Congress to make laws “necessary and proper” to the execution of Congress’s own enumerated powers, the Sweeping Clause empowers Congress to make laws “necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United

aspect of federal court procedure, federal courts may develop common law rules to fill the void. In other words, as is the case with respect to substantive federal common law, Congress's failure to act in an area of exclusively federal concern effectively empowers federal courts to do so.⁷⁸

But this account rings only partly true, because it fails to account for a potentially significant difference between procedural and substantive federal common law: the fact that power may be distributed differently between Congress and the federal courts on matters of procedure than on matters of substance. Congress's power clearly dominates that of the federal courts in the traditional enclaves of federal common law.⁷⁹ When federal courts make common law on matters of admiralty, international relations, interstate disputes, or the rights and obligations of the United States, they are not speaking on matters within their particular competence. They cannot claim expertise superior to that of Congress in any of these areas, nor can they claim that the Constitution grants them regulatory authority superior to that of Congress in any of these areas.⁸⁰

States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18. By its terms, this portion of the Sweeping Clause enables Congress to make laws carrying into execution the judicial power.

⁷⁸ See *supra* note 17 and accompanying text. To be sure, procedural common law would still differ from substantive common law in that it does not—and likely cannot—replace contrary state law.

⁷⁹ The accompanying text describes the conventional view regarding the balance of congressional and judicial authority in the enclaves of federal common law. Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and The Federal System* 735 (5th ed. 2003) ("Federal statutes, of course, prevail over contrary federal common law . . ."). There have been, however, occasional suggestions that in the areas of admiralty and interstate disputes, the lawmaking authority of the federal courts might exceed that of Congress. See *id.* at 732–35 & n.5 (noting this argument with respect to admiralty); *id.* at 738–39 n.11 (noting this argument with respect to interstate disputes). The theory is that because the courts' lawmaking authority in these two areas derives at least in part from jurisdictional grants in Article III, it might be slightly broader than that of Congress. *Id.*; see also Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 *Harv. L. Rev.* 1214, 1230–35 (1954) (describing ultimately defeated arguments to this effect in the context of admiralty). If this is the case, there may be at least a narrow slice of the common law of admiralty and interstate disputes, respectively, that Congress cannot abrogate, and it would therefore be incorrect to describe all common lawmaking authority in the traditional enclaves as derivative of or subservient to that of Congress.

⁸⁰ See *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) ("Nothing in this process [of common lawmaking] suggests that courts are better suited to develop national policy in areas governed by federal common law than they are in other areas, or that

On the contrary, within each of the traditional enclaves of federal common law, Congress is widely acknowledged to be the preferred regulator. This understanding is reflected in the deferential posture that federal courts assume relative to Congress on matters of substantive common law. In making substantive common law, the judiciary effectively functions as a placeholder for Congress. Judicial authority exists only because Congress has left a statutory void, and if Congress subsequently chooses to fill that void, judicial authority over it dissipates. Substantive common law is wholly subject to congressional override.

The assertion that Congress's power dominates that of the federal courts in matters of procedure is far less certain. When federal courts make procedural common law, they are speaking on a matter within their particular competence—indeed, with respect to matters of procedure, federal courts can credibly claim that their expertise exceeds that of Congress. Even apart from expertise, which does not itself confer power, the federal courts have a stronger claim to constitutional authority in matters of procedure than in matters of substance.⁸¹ The precise limits of Congress's authority to regulate federal court procedure are a matter of dispute, but as discussed above, courts and scholars have repeatedly argued that there are some procedural matters that Congress cannot regulate.⁸² Whether or not any of these particular arguments is sound, the fact that they are often raised reflects an intuition that at least some aspects of federal court procedure lie beyond congressional control. A complete theory of procedural common law must account for the source of judicial authority to act in those areas where Congress lacks the authority to regulate. If a federal court adopts procedures for itself that Congress could not impose upon it, the court's power to do so necessarily derives from something more than congressional inaction in an area of federal concern. In

the usual and important concerns of an appropriate division of functions between the Congress and the federal judiciary are inapplicable.”).

⁸¹ Consider that in *Wayman v. Southard*, Chief Justice Marshall denied that Congress could delegate to the courts “powers which are strictly and exclusively legislative.” 23 U.S. (10 Wheat.) 1, 42–43 (1825). Marshall went on, however, to uphold Congress's delegation to the courts of the authority to promulgate court rules; thus, he necessarily viewed authority over procedure as a matter over which Congress and the courts share authority. *Id.* at 43.

⁸² See *supra* notes 59–65 and accompanying text.

other words, the power would have to be something that the court possesses in its own right, rather than something that accrues to it solely by default.⁸³

None of this is to say that authority over procedure is the exclusive province of the courts. It is simply to say that the relationship between Congress and the courts in the area of procedure is probably more complicated than the relationship between Congress and the courts in matters of substance, and that in the area of procedure, there must be more to the story. The next Section explores whether Article III confers inherent procedural authority upon federal courts.

C. Inherent Authority over Procedure

A long and well-established tradition maintains that some powers are inherent in federal courts simply because Article III denominates them "courts" in possession of "the judicial power."⁸⁴ In other words, inherent powers are those so closely intertwined with a court's identity and its business of deciding cases that a court possesses them in its own right, even in the absence of enabling legislation. The inherent powers of a federal court are not beyond congressional control; on the contrary, there is a large area of shared space in which the courts can act in the absence of enabling legislation but must acquiesce in the face of it.⁸⁵ Nonetheless, there are limits to what Congress can do in regulating the courts' inherent power. For example, Congress can impose some procedural requirements upon the exercise of the contempt power, which is an inherent power of every court.⁸⁶ It cannot, however, wholly with-

⁸³ Similarly, if one were to take the view that judicial power exceeds congressional power in the areas of admiralty and interstate disputes, see *supra* note 79, one would emphasize that judicial power in these areas arises from a combination of structural inference and jurisdictional grant, rather than from structural inference alone.

⁸⁴ See, e.g., *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) ("Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. . . . To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others . . .").

⁸⁵ See *Thomas v. Arn*, 474 U.S. 140, 148 (1985) (asserting that procedural rules adopted pursuant to inherent authority cannot conflict with statutory or constitutional provisions).

⁸⁶ *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873).

draw that power or, even short of that, impose regulations that would cripple courts in its exercise.⁸⁷

In a significant number of cases, the Supreme Court has identified procedure as a matter over which federal courts possess inherent authority.⁸⁸ Almost all of the Court's claims to inherent procedural authority occur in the context of the so-called "supervisory power" doctrine.⁸⁹ There are, however, a handful of cases in which the Court has claimed inherent procedural authority for federal courts even outside the context of that doctrine. In some of these

⁸⁷ *Michaelson v. United States*, 266 U.S. 42, 65–66 (1924) (acknowledging congressional power to regulate judicial contempt power but asserting that "the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative").

⁸⁸ As others have observed, see, e.g., Stephen B. Burbank, *Procedure, Politics, and Power: The Role of Congress*, 79 *Notre Dame L. Rev.* 1677, 1681 (2004), the cases and scholarship often fail to distinguish between initiating authority (the ability to act in the absence of congressional regulation) and exclusive authority (the ability to act in the face of contrary congressional direction); between authority that is local (empowering a court to regulate the proceedings before it) and authority that is supervisory (empowering a court to regulate the proceedings of a lower court); and between procedural regulation in the form of court rules and procedural regulation in the form of judicial decisions. In light of the uncertainty that often surrounds this issue, let me be clear here: both this Section and the next Part are concerned with the question of whether the judiciary possesses an initiating, local authority to regulate procedure in the form of judicial decisions.

⁸⁹ See, e.g., *Thomas*, 474 U.S. at 146 ("[C]ourts of appeals have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation."); *United States v. Hasting*, 461 U.S. 499, 505 (1983) ("[I]n the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress."); *Rosales-Lopez v. United States*, 451 U.S. 182, 190 (1981) (asserting supervisory authority to adopt a rule requiring certain questions to be asked on voir dire); *United States v. Nobles*, 422 U.S. 225, 231 (1975) (acknowledging the judiciary's inherent power to adopt rules regarding discovery in criminal cases); *Barker v. Wingo*, 407 U.S. 514, 530 n.29 (1972) (acknowledging supervisory power of a federal court to adopt a rule governing the time in which cases must be brought); *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) (asserting authority to prescribe a rule regulating qualifications for jury service in the absence of congressional or constitutional authorization); *McNabb v. United States*, 318 U.S. 332, 340–41 (1943) (holding that the Court has inherent supervisory power to fashion rules of evidence). Courts asserting "supervisory power" sometimes use it to refer to a court's authority over its own proceedings and sometimes use it to refer to a court's authority to supervise the proceedings of inferior courts. See *Barrett*, *supra* note 7, at 330 (describing varied use of term). The cases cited here are of both sorts. For present purposes, I am not concerned with whether a federal court adopts a rule for itself or a lower court but rather with the variety of topics that courts have claimed the inherent authority to regulate.

cases, the Court has explicitly asserted that federal courts possess inherent authority to formulate rules of procedure in the course of adjudication.⁹⁰ In others, the Court has addressed not so much the authority to prescribe procedural rules as the authority to take actions related to the progress of a suit.⁹¹ Perhaps because of these cases, and perhaps because the idea makes good sense, scholars have echoed these assertions.⁹²

In light of these cases, the argument grounding authority to make procedural common law in the inherent authority of the federal courts is straightforward: Federal courts have inherent author-

⁹⁰ See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 472–73 (1965) (identifying “matters which relate to the administration of legal proceedings, [as] an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules” (quoting *Lumbermen’s Mutual Casualty Co. v. Wright*, 322 F.2d 759, 764 (5th Cir. 1963))); *Funk v. United States*, 290 U.S. 371, 382 (1933) (asserting that courts, “by right of their own powers,” can formulate rules of evidence); *In re Hien*, 166 U.S. 432, 436–37 (1897) (“The general rule undoubtedly is that courts of justice possess the inherent power to make and frame reasonable rules not conflicting with express statute . . .”); *Mitchell v. Overman*, 103 U.S. 62, 64 (1880) (referring to the “rules of practice which obtain in courts of justice in virtue of the inherent power they possess”); *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 98 (1861) (“[I]n all cases where original jurisdiction is given by the Constitution, this court has authority to exercise it without any further act of Congress to regulate its process . . .”).

⁹¹ See, e.g., *Clinton v. Jones*, 520 U.S. 681, 706 (1997) (“The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket.”); *Melkonyan v. Sullivan*, 501 U.S. 89, 101 (1991) (“[N]ormally courts have inherent power, among other things, to remand cases . . .”); *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984) (“Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the district court’s inherent authority to manage the course of trials.”); *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy . . .”); *Enelow v. N.Y. Life Ins. Co.*, 293 U.S. 379, 381–82 (1935) (asserting that a federal court can stay proceedings “by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice”); *Ex parte Peterson*, 253 U.S. 300, 312 (1920) (“Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties.”); *Logan v. Patrick*, 9 U.S. (5 Cranch) 288, 288–89 (1809) (recognizing equitable discretion to stay proceedings).

⁹² See, e.g., *Barrett*, *supra* note 7, at 334–35; *Beale*, *supra* note 22, at 1468–73 (asserting that federal courts have implied constitutional authority to regulate procedure); *Engdahl*, *supra* note 61, at 83–86 (arguing that Article III’s vesting of judicial power vests courts with power over, *inter alia*, procedure); *Merrill*, *supra* note 24, at 24 (asserting that courts have inherent authority to adopt procedures for themselves in the absence of congressional authorization).

ity to adopt procedures governing litigation before them; thus, they have the authority to develop procedural common law. Their inherent power over procedure authorizes them to act in the absence of enabling legislation, but if Congress acts, the courts must generally give way. There are, nonetheless, limits to what Congress can do. It cannot wholly withdraw the courts' power over procedure, and there are some—albeit few—procedural matters that are entirely beyond congressional regulation. Article III, in sum, allocates to federal courts a special role in regulating this area committed to exclusive federal control.

This argument thus fits neatly with prevailing assumptions about federal court power insofar as it treats procedure, unlike substance, as an area in which federal courts can assert authority in their own right. That said, it encounters a threshold difficulty: despite the relative consensus on the point, it is not so clear that power over procedure can fairly be treated as an inherent power of federal courts. The proposition that federal courts possess inherent authority over procedure is treated as self-evident.⁹³ Closer examination, however, reveals that the concept of inherent judicial authority has been almost entirely fleshed out in contexts other than procedural regulation. Inherent judicial authority has received the most sustained attention in the context in which it was first asserted: contempt.⁹⁴ In addition to the contempt power, courts have asserted inherent authority to vacate judgments for fraud,⁹⁵ to dismiss cases for failure to prosecute,⁹⁶ and to impose other sorts of sanctions on undesirable behavior.⁹⁷ They have also asserted inherent authority

⁹³ See, e.g., Barrett, *supra* note 7, at 335.

⁹⁴ The first case to recognize explicitly the inherent authority of federal courts is *United States v. Hudson & Goodwin*, which asserted in dicta that federal courts possess inherent authority to punish contempt. 11 U.S. (7 Cranch) 32, 34 (1812). The federal courts have consistently reasserted that authority. See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 795 & n.7 (1987) (collecting cases recognizing inherent judicial authority to punish contempt).

⁹⁵ See, e.g., *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944).

⁹⁶ See, e.g., *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629–31 (1962).

⁹⁷ See, e.g., *Chambers v. NASCO*, 501 U.S. 32, 46–51 (1991) (holding that federal courts possess inherent authority to shift attorneys' fees for bad-faith conduct); *Roadway Express v. Piper*, 447 U.S. 752, 766 (1980) (holding that a court has inherent power to shift attorney's fees as a sanction for failing to comply with discovery orders and a court-ordered briefing schedule).

to regulate court personnel like jurors and lawyers.⁹⁸ In short, the overwhelming majority of cases dealing with inherent judicial authority are those asserting either a semi-punitive power or the power to control those who serve the court. By comparison, the cases in which the Supreme Court has recognized an inherent power to prescribe procedural rules or otherwise manage the process of litigation are relatively few.⁹⁹ Thus, while modern scholarship and case law support the proposition that federal courts possess inherent authority over procedure, that proposition is not as solid as it initially appears. The next Part tests the frequently asserted but rarely developed proposition that federal courts possess some inherent authority over procedure.

III. INHERENT AUTHORITY OVER PROCEDURE

A. *Constitutional Text and Structure*

The Constitution does not, on its face, grant federal courts power over procedure. Nonetheless, it is a well-established principle of constitutional law that Congress, the Executive, and the judiciary each possess certain powers granted by, though not expressly mentioned in, the Constitution. Thus, for example, Congress is acknowledged to possess the power to punish contempts of its authority, even though no such power is expressly conferred by Article I.¹⁰⁰ The Executive is acknowledged to possess the power to function as the country's sole spokesperson in dealings with foreign nations, even though no such power is explicitly

⁹⁸ For the regulation of jurors, see, for example, *McDonald v. Pless*, 238 U.S. 264, 266 (1915) (asserting inherent power of court "to inquire into the conduct of jurors"), and *Nudd v. Burrows*, 91 U.S. 426, 441-42 (1875) (asserting inherent authority to decide what materials jurors may take into deliberations). For the regulation of lawyers, see, for example, *In re Snyder*, 472 U.S. 634, 643 (1985) ("Courts have long recognized an inherent authority to suspend or disbar lawyers."), and *Ex parte Wall*, 107 U.S. 265, 273 (1883) ("It is laid down in all the books in which the subject is treated, that a court has power to exercise summary jurisdiction over its attorneys . . .").

⁹⁹ The clearest assertions of the inherent authority to prescribe procedural regulations in the course of adjudication are also fairly recent. Most cases asserting inherent procedural authority occur in the context of the "supervisory power" doctrine, which dates to 1943. See *McNabb v. United States*, 318 U.S. 332 (1943) (first articulating the doctrine). There are few cases directly asserting inherent authority to prescribe procedure outside this line of authority.

¹⁰⁰ See *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 229 (1821).

conferred by Article II.¹⁰¹ And the judiciary is acknowledged to possess the power to regulate the bar practicing before it, even though no such power is expressly conferred by Article III.¹⁰²

At least two kinds of textual and structural constitutional arguments are advanced in support of nonexpress constitutional power. One kind of argument focuses on the relevant vesting clause, asking what informed observers at the time of the Founding would have understood that grant of power to include. For example, Professors Saikrishna Prakash and Michael Ramsey have argued that Article II directly vests the President with the power to conduct foreign affairs because informed observers at the time of the Founding understood “the executive power” to encompass such authority.¹⁰³ In the context of Article III, Professor Scott Idleman has maintained that,

[m]ore than a mere synonym for jurisdiction, the ‘judicial Power’ encompasses those prerogatives and obligations that have customarily attended the judicial function, particularly the Anglo-American common law courts at the time of the framing, whether or not such attributes are elsewhere expressly conferred by the Constitution or affirmed by statute.¹⁰⁴

The term “inherent authority” is often used broadly to refer to any power granted by, but not mentioned expressly in, the Constitution. When used in its narrowest sense, however, “inherent authority” refers specifically to the kind of authority claimed by this first kind of constitutional argument: power inhering in that expressly granted.¹⁰⁵

Another kind of argument is an instrumental one, focusing less on cataloguing specific powers implicitly contained within the primary grant than on the more general claim that the Constitution implicitly grants each branch the incidental authority it needs to

¹⁰¹ Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *Yale L.J.* 231, 243 (2002) (describing wide agreement on this point despite the lack of any explicit textual grant of the power).

¹⁰² See *supra* note 98 and accompanying text.

¹⁰³ Prakash & Ramsey, *supra* note 101, at 252–65.

¹⁰⁴ Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 *Cornell L. Rev.* 1, 47–48 (2001).

¹⁰⁵ See, e.g., Martin, *supra* note 62, at 179–82 (describing judicial power over some rules of evidence as “inherent” in the judicial power itself).

get its job done.¹⁰⁶ As James Madison wrote in Federalist No. 44, “No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included.”¹⁰⁷ The classic judicial articulation of this principle appears in *McCulloch v. Maryland*, which argued that each of Article I’s enumerated powers carries with it the incidental authority to take actions designed to facilitate its exercise.¹⁰⁸ Like the term “inherent authority,” the term “implied authority” is sometimes used broadly to refer to any power granted by, but not expressly mentioned in, the Constitution.¹⁰⁹ When used in its narrowest sense, however, the term “implied authority” refers to the kind of power claimed by this second kind of constitutional argument: power impliedly conferred by the constitutional structure as instrumentally necessary, or even simply useful, to that expressly granted.¹¹⁰

There is little or no overlap between these two arguments when the power at issue is more fairly characterized as an end in itself rather than as a means of executing an enumerated power. In this circumstance, the obviously better of these two arguments is that the relevant vesting clause directly—albeit implicitly—confers the power at issue. Because, for example, the foreign affairs power is more fairly characterized as an end in itself rather than a means of

¹⁰⁶ Cf. Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 Iowa L. Rev. 735, 825 n.478 (2001) (“Implied constitutional powers must be distinguished from powers that are expressly granted in the Constitution, but not defined.”).

¹⁰⁷ The Federalist No. 44, at 285 (James Madison) (Clinton Rossiter ed., 1961).

¹⁰⁸ 17 U.S. (4 Wheat.) 316, 421 (1819). *McCulloch* itself did not ground Congress’s possession of implied powers exclusively in the Sweeping Clause, although some have argued that it should have done so. See, e.g., William W. Van Alstyne, *Implied Powers*, in 2 *Encyclopedia of the American Constitution* 964–65 (Leonard W. Levy et al. eds., 1986). Because *McCulloch*’s argument does not depend upon the Sweeping Clause, its reasoning appears to extend to the executive and judicial branches, which, like Congress, impliedly possess the power to employ means directed toward achieving the ends with which they are charged.

¹⁰⁹ See, e.g., Patricia L. Bellia, *Executive Power in Youngstown’s Shadows*, 19 Const. Comment. 87, 91 n.17 (2002) (using term broadly to refer to powers either implicit in specific constitutional grants or inferred from the constitutional structure).

¹¹⁰ See, e.g., Beale, *supra* note 22, at 1468–73 (using term “implied authority” to refer only to the ancillary authority the Constitution affords each branch to employ means directed toward accomplishing the ends with which it is expressly charged).

accomplishing an explicitly conferred power, Professors Prakash and Ramsey do not press the instrumental argument. Instead, they examine only whether informed observers at the time of the Founding would have understood “the executive power” to include the power to direct foreign affairs.¹¹¹

There can be significant overlap between these two arguments, however, when the power at issue is both instrumental and closely related to the expressly granted authority it supports. This overlap is evident in most, if not all, judicial claims to nonexpress power. For example, it is well established that courts possess the power to punish contempt even in the absence of enabling legislation. Does that power exist because Article III directly confers it—in other words, because informed observers at the time of the Founding understood it to be an attribute of “the judicial Power?” Or does the contempt power exist on an instrumental rationale—in other words, because it is a power courts need to adjudicate cases effectively? The judicial contempt power can be (and has been) justified on either rationale.¹¹² And not only can each of these rationales independently support the contempt power, but consider that the instrumental rationale can be put in the service of the argument that the contempt power is directly conferred by Article III as an inherent attribute of all courts. Those powers, which, like contempt, are thought “necessary” to functioning as a court and exercising judicial power, are often those so closely associated with the terms “court” and “judicial power” that they are understood to be part and parcel of them.¹¹³ Thus, where a claimed power is both suppor-

¹¹¹ See generally Prakash & Ramsey, *supra* note 101.

¹¹² Some cases strongly imply that Article III directly vests the contempt power in every federal court. See, e.g., *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873) (“The power to punish for contempts is inherent in all courts The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.”). Others treat the power as instrumental. See, e.g., *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 562–63 (3d Cir. 1985) (suggesting that the contempt power is one implied from “strict functional necessity”). Still others invoke both grounds. See *infra* note 113 and accompanying text.

¹¹³ See, e.g., *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (“Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. . . . To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others”). It is important to emphasize, however, that powers thought “necessary” to the exercise of expressly

tive of and closely associated with an expressly granted power, the instrumental rationale for implied power and the "direct vesting" rationale for inherent power can function either as different routes to the same end or complementary arguments along the same route.

The authority to articulate procedure in the course of adjudication is a case in point. It is, on the one hand, authority that arguably lies at the heart of the business of courts. It is, on the other hand, instrumental to deciding cases. It is, therefore, susceptible to the confusion that can result when arguments for "inherent" and "implied" authority overlap. This confusion is evident in the lack of consensus with respect to whether the Constitution directly or indirectly grants the courts procedural authority. Some scholars treat the power as directly conferred by Article III;¹¹⁴ others treat it as inferred from the constitutional structure.¹¹⁵ Most often, those as-

granted power are not always closely associated with the power they support. For example, the Supreme Court has held that Congress possesses the power to punish contempt, but it has not done so on the ground that such power has long been considered an inherent attribute of any legislature worthy of the name. Instead, the Court has recognized a congressional contempt power on the purely instrumental rationale that in some situations Congress cannot accomplish its job without the ability to punish contempt. See *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 225-26 (1821) (justifying congressional contempt power on the ground that every express grant of power in the Constitution "draw[s] after it others, not expressed, but vital to their exercise").

¹¹⁴ See, e.g., Engdahl, *supra* note 61, at 81-89 (characterizing power over procedure, among other inherent powers, as directly vested in federal courts by virtue of Article III); Idleman, *supra* note 104, at 47-52 (strongly implying that inherent judicial power, including inherent power over procedure, derives directly from Article III's grant of judicial power); Martin, *supra* note 62, at 179-86 (arguing that judicial power to develop at least some rules of evidence is directly conferred by Article III as an inherent attribute of judicial power); Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 *Tex. L. Rev.* 1805, 1805 (1995) (characterizing inherent judicial power, including inherent procedural power, as "that inher[ing] in the very nature of a judicial body").

¹¹⁵ See, e.g., Beale, *supra* note 22, at 1466-73 (explicitly rejecting argument that Article III directly infuses federal courts with inherent procedural authority in favor of argument that authority is indirectly conferred as instrumentally useful to the discharge of the judicial function); Pushaw, *supra* note 106, at 846-47 & n.576 ("In my opinion, the function of deciding cases should be treated as the express 'judicial power' conferred by Article III. What the Court calls 'inherent powers' are the implied ones that flow from the exercise of judicial power."); William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, *Law & Contemp. Probs.*, Spring 1976, at 102, 107-11 (treating judicial authority over proce-

serting the existence of nonexpress procedural authority simply fail to specify which constitutional argument supports the claim.¹¹⁶

The analytical confusion surrounding claims of nonexpress judicial authority, including authority over procedure, is unsatisfying, but it has persisted for so long that it would be difficult, if not impossible, to untangle. Consider, for example, the difficulty this confusion poses for the problem at hand. Determining whether Article III directly confers power over procedure requires analysis of whether the Founding generation perceived power over procedure to be an attribute of “judicial Power” exercised by all courts. But Founding-era sources addressing *any* aspect of nonexpress judicial authority, much less procedural authority, tend to be as ambiguous as modern ones with respect to the question of whether the power is directly or indirectly conferred.¹¹⁷ Thus, to the extent that any of these sources address nonexpress procedural authority, it is difficult to say which of the two constitutional arguments they support.

Fortunately, it is possible to evaluate the claim of nonexpress procedural authority without untangling these two arguments. At least insofar as nonexpress *judicial* power is concerned, the distinction between inherent and implied incidental authority seems relatively unimportant because the distinction does not, at least in this context, give rise to a difference in methodology. As described

ture as an incidental power implied by necessity without addressing the direct vesting argument).

¹¹⁶ The cases in which federal courts broadly claim “inherent authority” over procedure without specifying the constitutional argument supporting that claim are legion. For just a few examples, see *Calderon v. Thompson*, 523 U.S. 538, 549–50 (1998), *United States v. Hasting*, 461 U.S. 499, 505–07 (1983), and *Hanna v. Plumer*, 380 U.S. 460, 472–73 (1965). See also Lear, *supra* note 35, at 1159–66 (using both the terms “inherent” and “implied” to describe the federal courts’ power to create procedural devices and failing to specify whether power is directly or indirectly conferred); Ryan, *supra* note 73, at 776 (similar).

¹¹⁷ *Hudson*, the flagship case regarding inherent judicial authority, illustrates the point nicely. Because the case describes the federal courts’ contempt power as arising “from the nature of their institution,” 11 U.S. (7 Cranch) at 34, one might read the case as supporting the notion that Article III vests the contempt power directly in all federal courts simply by denominating them “courts” in possession of “judicial Power.” On the other hand, *Hudson* also points out that contempt is a power “necessary to the exercise of all others.” *Id.* That observation might be read simply as support for the “direct vesting” argument, or it might be read as support for the argument that the judiciary, like the other two branches, can employ the means necessary to get its job done.

above, the argument for outright grant requires a historical inquiry: the relevant question is whether the Founding generation would have perceived power over procedure as a part of the expressly granted judicial power itself.¹¹⁸ Consider, though, that federal courts treat *all* their claims to nonexpress authority as dependent upon history. In other words, even to the extent a federal court appears to characterize power as incidental, it still will not claim it unless it is one traditionally asserted by courts.¹¹⁹ Thus, regardless of whether one approaches procedural authority as a problem of inherent or incidental authority, it is necessary to determine whether history supports the claim.¹²⁰

B. Historical Arguments for Inherent Procedural Authority

This Section investigates whether the historical record from the late eighteenth and early nineteenth centuries supports the claim that the Constitution, either by outright grant or implication, authorizes a federal court to articulate procedural rules in the context of adjudication and in the absence of enabling legislation. To that end, it canvasses the Framing and Ratification debates, the early congressional record, contemporary treatises, and early federal court opinions, all with a view to discerning whether informed observers during this period understood federal courts to possess inherent authority to regulate procedure. In keeping with the ten-

¹¹⁸ See *supra* note 104 and accompanying text.

¹¹⁹ See *Missouri v. Jenkins*, 515 U.S. 70, 124 (1995) (Thomas, J., concurring) (“As with any inherent judicial power . . . we should exercise [the Court’s remedial powers] in a manner consistent with our history and traditions.”); *Chambers v. NASCO*, 501 U.S. 32, 58 (1991) (Scalia, J., dissenting) (explaining that once established, Article III courts have “the authority to do what courts have traditionally done in order to accomplish their assigned tasks”); *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 252–57 (1891) (rejecting claim that federal courts possess inherent authority to order medical exams of plaintiffs on the ground that such authority has never been claimed by common law courts); see also *Idleman*, *supra* note 104, at 49 (“[T]he first criterion [in evaluating a claim to inherent authority] is whether a given power is one that courts, within the Anglo-American judicial tradition, have historically possessed.”); *Pushaw*, *supra* note 106, at 741 (contending that the arsenal of implied judicial powers is limited to those “rooted in historical Anglo-American practice”).

¹²⁰ To be sure, one might want to see stronger historical evidence before concluding that power is implicitly contained within the grant of “the judicial Power” than one would before concluding that a power is one traditionally exercised by courts. In evaluating the historical evidence, Section III.C accounts for this.

dency of the literature and cases, I will refer to the judiciary's supposed power over procedure as "inherent," without distinguishing between the distinct constitutional arguments that might support a claim to such authority.

1. Framing and Ratification

The record of the debates surrounding the Constitution's drafting and ratification neither directly refutes nor directly supports the proposition that federal courts possess inherent authority to make rules of procedure and evidence in the absence of enabling legislation.¹²¹ At least two procedural issues surfaced repeatedly during the debates. One was the fear that the Supreme Court's appellate jurisdiction "both as to Law and Fact" would permit the Court to retry cases on review, thereby undercutting the jury right and requiring citizens to travel to the Court itself to litigate their cases.¹²² The other was the concern that the Constitution, by not explicitly requiring jury trials in civil cases, impliedly abolished them.¹²³ Particularly in the course of debating these two issues, although occasionally in other contexts as well, participants in these debates acknowledged the power of Congress to regulate federal

¹²¹ I reached this conclusion after reviewing *The Records of the Federal Convention of 1787* (Max Farrand ed., 1911), *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Jonathan Elliot ed., 1836) [hereinafter Elliot's Debates], *The Federalist Papers*, supra note 107, and *The Complete Anti-Federalist* (Herbert J. Storing ed., 1981).

¹²² See, e.g., Thomas M'Kean, Speech in the Pennsylvania Ratifying Convention (Dec. 11, 1787), in 2 Elliot's Debates, supra note 121, at 539–40 (defending provision); James Wilson, Speech in the Pennsylvania Ratifying Convention (Dec. 11, 1787), in 2 Elliot's Debates, supra note 121, at 518–19 (identifying issue as contentious); Edmund Pendleton, Speech in the Virginia Ratifying Convention (June 18, 1788), in 3 Elliot's Debates, supra note 121, at 519–20 (reflecting concern in Virginia legislature about appellate review as to law and fact); Editorial, *The Impartial Examiner*, Va. Indep. Exam'r (Richmond), Feb. 27, 1788 ("Or what is an appeal to enquire into facts after a solemn adjudication in any court below, but a trial *de novo*?").

¹²³ See, e.g., *The Federalist* No. 83 (Alexander Hamilton), supra note 107, at 495 (identifying this objection to the Constitution as the one "which has met with most success in [New York], and perhaps in several of the other States"); *The Impartial Examiner*, supra note 122 ("[C]onsider whether you will not be in danger of losing this inestimable mode of trial in all those cases, wherein the constitution does not provide for its security.").

court procedure.¹²⁴ The power of the federal judiciary to generate procedures of its own, by contrast, was neither acknowledged nor denied.¹²⁵

¹²⁴ For example, in addressing fears that the proposed Constitution abolished trial by jury in civil cases, James Wilson assured the citizens of Philadelphia that “no danger could possibly ensue,” despite the Constitution’s silence on the question, “since the proceedings of the supreme court are to be regulated by the congress.” James Wilson, *Speech on the Federal Constitution, Delivered in Philadelphia (Oct. 6, 1787)*, in *Pamphlets on the Constitution of the United States, Published During Its Discussion by the People, 1787–1788*, at 157 (Paul Leicester Ford ed., 1888); see also Abraham Holmes, *Speech in the Massachusetts Ratifying Convention (Jan. 30, 1788)*, in *2 Elliot’s Debates*, supra note 121, at 111 (lamenting that the Constitution, in failing to specify certain rules of procedure and evidence in criminal cases, left Congress virtually unchecked power to prescribe such rules); James Madison, *Speech in the Virginia Ratifying Convention (June 20, 1788)*, in *3 Elliot’s Debates*, supra note 121, at 534 (referring to Congress’s power to “prescribe such a mode as will secure the privilege of jury trial”); Patrick Henry, *Speeches in the Virginia Ratifying Convention (June 20, 1788; June 23, 1788)*, in *3 Elliot’s Debates*, supra note 121, at 544–45, 577–78 (asserting that in civil cases, it would be up to Congress to decide whether a jury trial was guaranteed); William Maclaine, *Speech in the North Carolina Ratifying Convention (July 29, 1788)*, in *4 Elliot’s Debates*, supra note 121, at 175–76 (referring to Congress’s power to prescribe the mode of proceeding in inferior federal courts, including the mode by which trial by jury in civil cases would be had); *The Federalist No. 83* (Alexander Hamilton), supra note 107, at 496 (asserting that Congress possessed “a power to prescribe the mode of trial,” and that consequently the constitutional silence with respect to juries in civil cases left Congress “at liberty either to adopt that institution or to let it alone”).

¹²⁵ Professor Robert Pushaw has asserted that Edmund Pendleton made remarks during the ratification debates reflecting the belief that federal courts possessed some inherent authority over procedure. Pushaw, supra note 106, at 833 n.518. The basis for this suggestion is Pendleton’s observation that inferior courts would decide questions regarding the admissibility of evidence and the competency of witnesses. See Edmund Pendleton, *Speech in the Virginia Ratifying Convention (June 18, 1788)*, in *3 Elliot’s Debates*, supra note 121, at 519–20. In my judgment, these remarks do not bear on any belief Pendleton may have had regarding the inherent procedural authority of courts. Pendleton made these comments in the course of allaying fears that the Supreme Court’s jurisdiction both “as to law and to fact” would permit the Supreme Court to retry cases at the appellate level, thereby forcing citizens to travel, often great distances, to litigate in the Supreme Court itself. See *id.* at 517–21. His assertion that inferior courts would decide whether to admit evidence was intended to underscore that inferior courts, rather than reviewing courts, made such determinations and that this well-established division of authority, combined with Congress’s power to make exceptions and regulations to the Supreme Court’s appellate jurisdiction, would render “appeals, as to law and fact, proper, and perfectly inoffensive.” *Id.* at 520. Pendleton did not indicate what standards inferior courts would apply in making these evidentiary determinations, and his remarks are as consistent with a belief that inferior courts would make these evidentiary determinations according to the common law or legislation as they are with a belief that inferior courts would make these

This recognition of congressional authority over procedure and the lack of any corresponding recognition of judicial authority does cut slightly against the conclusion that informed observers believed the latter authority to exist. It is difficult, however, to make this inference do too much work. To the extent that they focused on judicial procedure at all, participants in these debates were largely arguing about whether Congress would protect or undermine the practice of employing juries in civil cases. This focus on Congress's role in regulating procedure (or at least this aspect of it) reflects an assumption that any uniform regulation in this regard would come from Congress; it also reflects an assumption that Congress would have the last word on at least this aspect of federal court procedure. But it does not say much about the inherent power of the federal courts to regulate the use of juries or any other procedural device in the absence of congressional action. To be sure, the lack of focus on the role of the federal courts in regulating procedure likely reflects a belief that the federal courts would play an insignificant role relative to Congress in regulating procedure—a belief that has proven true over the succeeding two centuries. But belief in an insignificant role does not translate to a belief in no role, nor does it address the question of whether some small core of procedural issues lies beyond congressional control.

On the whole, then, the debates surrounding the Constitution's drafting and ratification are relatively unhelpful in determining whether Article III courts possess inherent authority to regulate litigation before them.

2. Early Judiciary and Process Acts

There were four pieces of legislation passed by the First and Second Congresses that significantly affected the structure of the federal judiciary and the procedures it followed: the Judiciary Act of 1789,¹²⁶ the Process Act of 1789,¹²⁷ a 1792 amendment to the Process Act,¹²⁸ and a 1793 amendment to the Judiciary Act.¹²⁹ These

evidentiary determinations according to standards established pursuant to their own inherent authority.

¹²⁶ Judiciary Act of 1789, ch. 20, 1 Stat. 73.

¹²⁷ Process Act of 1789, ch. 21, 1 Stat. 93.

¹²⁸ Process Act of 1792, ch. 36, 1 Stat. 275.

¹²⁹ Judiciary Act of 1793, ch. 22, 2 Stat. 333.

statutes provided numerous and detailed procedural regulations. Most relevant for present purposes are two.¹³⁰ Section 17 of the Judiciary Act of 1789 provided that “all the said courts of the United States shall have power . . . to make and establish all necessary rules for the orderly conducting business in the said courts.”¹³¹ Section 2 of the Process Act of 1789 directed federal courts to follow the modes of proceeding prescribed by the civil law in equity and admiralty suits; in common law suits, federal courts were to follow, *inter alia*, the “modes of process” used in the supreme court of the state in which the federal court sat.¹³² A 1792 replacement of the Process Act and a 1793 amendment to the Judiciary and Process Acts changed these statutes slightly but did not alter them in substance.¹³³ Between them, the Judiciary and Process Acts provided a

¹³⁰ In addition to the two provisions discussed in the text, there were numerous other provisions that regulated federal court procedure. For just a few examples, see Judiciary Act of 1789, ch. 20, § 15, 1 Stat. 73, 82 (granting all federal courts the power “to require the parties to produce books or writings in their possession or power, which contain [pertinent] evidence”); § 30, 1 Stat. at 88 (authorizing depositions “*de bene esse*”); Process Act of 1789, ch. 21, § 1, 1 Stat. 93, 93 (providing that all writs and process issuing from a federal court “shall be under the seal of the court from whence they issue”).

¹³¹ Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83.

¹³² Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93–94. The phrase “modes of process” could have been interpreted to oblige federal courts to mimic only the form of the processes issuing from the court. From the start, however, federal courts interpreted the Process Act to oblige them to mimic state courts not only in the form of the processes they issued but also in the procedures they employed. See Julius Goebel, Jr., *Antecedents and Beginnings to 1801*, at 514, 575 (1971). In 1792, Congress amended the Process Act to make this understanding explicit: the 1792 amendment to that Act substituted the phrase “modes of proceeding” for the arguably narrower phrase “modes of process.” See Process Act of 1792, ch. 36, 1 Stat. 275, 276.

¹³³ The 1793 amendment to § 17 of the original Judiciary Act made the grant of rulemaking authority more detailed, thereby arguably strengthening it. The amendment granted federal courts the power

to make rules and orders for their respective courts directing the returning of writs and processes, the filing of declarations and other pleadings, the taking of rules, the entering and making up judgments by default, and other matters in the vacation and otherwise in a manner not repugnant to the laws of the United States, to regulate the practice of the said courts respectively, as shall be fit and necessary for the advancement of justice.

Judiciary Act of 1793, ch. 22, § 7, 2 Stat. 333, 335. The 1792 Process Act repealed the Process Act of 1789, which had been temporary, and replaced it with a substantially similar, but permanent, statute. The new act deleted the original Process Act’s reference to the civil law and directed federal courts to follow the “principles, rules and usages which belong to courts of equity and to courts of admiralty respectively,” and

fairly complete procedural system for courts in the United States, at least in civil cases: federal courts were generally to observe the procedure required by either state or civil law, and, if there were procedural matters that state or civil law did not address, federal courts could regulate them pursuant to the power granted in Section 17 of the Judiciary Act. With respect to criminal cases, the law regulating procedure was more open ended. While federal courts construed Section 17(b) of the Judiciary Act as permitting rule-making in both criminal and civil cases, they construed the Process Act as inapplicable to criminal cases. Except in the relatively rare instances in which Congress prescribed a specific criminal procedure to the contrary,¹³⁴ the federal courts followed common law rules of criminal procedure, rather than the variations to those rules made by any particular state.¹³⁵

The debate surrounding these provisions does not reveal any discussion about whether, in the absence of this legislation, federal courts would have possessed inherent authority to govern their own procedure.¹³⁶ For example, the enactment of the Process Act

it rendered all of the Act's instructions "subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient." Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276. It is not clear whether the latter proviso simply extended the scope of the federal courts' authority to adopt rules under § 17 or whether it functions itself as a rulemaking grant.

¹³⁴ Professor Julius Goebel notes that the first Congress gave the federal courts "only a few directions relating to [criminal] procedure"; he observes that the first federal criminal statute "was drawn on the assumption that common law methods of trial would be followed." Goebel, *supra* note 132, at 609.

¹³⁵ The same was true with respect to rules of evidence in criminal cases. The Supreme Court construed the Rules of Decision Act as inapplicable to criminal cases, and for over sixty years, federal courts observed common law rules of evidence rather than modifications to the common law adopted by any particular state. See Barrett, *supra* note 7, at 375 & n.197. In 1851, the Supreme Court changed this practice by construing the Judiciary Act of 1789 as implicitly requiring, in criminal cases, adherence to state evidence law, as that law existed on the date of the state's admission to the Union. *Id.*

¹³⁶ The first three volumes of the *Annals of Congress* cover the enactment of all four of these statutes. A review of those volumes revealed no discussion about the inherent authority of the federal courts (or lack thereof). Nor did the inherent authority (or lack thereof) of federal courts over procedure appear to be a topic of debate among informed onlookers of the time. See generally 4 *The Documentary History of the Supreme Court of the United States, 1789-1800* (Maeva Marcus ed., 1992) [hereinafter *Documentary History*] (collecting letters, diary and journal entries, newspaper items, and notes of speeches and debates that cast light upon the enactment of the Judiciary and Process Acts of 1789); Goebel, *supra* note 132, at 457-551 (describing history of

apparently generated no discussion—or at least no recorded discussion—about what federal courts would have done in the absence of an instruction about the procedure they were to follow. Similarly, the enactment of the rulemaking grant contained in Section 17 of the Judiciary Act apparently generated no discussion as to whether this provision affirmed a power that otherwise existed or whether it granted a new power that courts did not otherwise possess. That said, it is worth observing that the other powers granted by Section 17—the powers to grant new trials, administer oaths or affirmations, and punish contempt—were powers that Founding-era lawyers apparently treated as inherent in all courts.¹³⁷ The inclusion of procedural rulemaking on that list might be thought evidence that power over procedure also falls in that category. On the whole, though, the record regarding the adoption of the Judiciary and Process Acts, like the record surrounding the Constitution's drafting and ratification, reflects both a belief in extensive congressional authority and a lack of concern with any inherent judicial authority to adopt procedures in areas the legislature left open.¹³⁸

Judiciary and Process Acts of 1789). It must be acknowledged, however, that claiming a negative here (that is, that the inherent power was *not* discussed) is complicated by the fact that the records from this period, particularly of debates in the Senate, are not complete. The Annals of Congress were reconstructed in the 1820s–40s based on contemporary newspaper accounts of coverage of the House. Because the Senate did not allow reporters to observe its proceedings until February 20, 1794, the only records of its proceedings in the first two Congresses and part of the third are the official journal (which consists of roll calls and parliamentary entries) and individual Senators' notes. Thus, as a general matter, the lack of discussion regarding inherent power in the House during this period is more meaningful than the similar silence in the Senate.

¹³⁷ The contempt power was clearly treated as one inherent in all courts. See *infra* note 158 and accompanying text. There is less evidence regarding the powers to grant new trials and to administer oaths, but state cases offer reason to believe that both of these powers were thought to be inherent as well. See *infra* note 169 (new trials); see also *Prentiss v. Gray*, 4 H. & J. 192, 197 (Md. 1816) (“Courts of justice have essentially, and as appertaining to their very nature, authority to administer oaths in all cases of which they have jurisdiction.”); *Montgomery v. Snodgrass*, 2 Yeates 230, 231–32 (Pa. 1797) (“[W]e disclaim all affinity whatever to that [Board of Property]; they are no court in any sense of the word; they are not vested with *the powers essentially necessary to such a tribunal*; they can neither *administer an oath*, enforce the attendance of witnesses, nor punish contempts . . .”) (emphasis added).

¹³⁸ It is worth noting that the congressional record surrounding the adoption of the Judiciary and Process Acts is silent with respect to more than just inherent judicial authority over procedure. Legislators never discussed inherent judicial authority of

Failed congressional proposals from this period reveal similarly little about whether federal courts were perceived to possess inherent authority—even authority generally subordinate to congressional authority—over procedure. In the drafting of the Process Act of 1789, the first Senate Judiciary Committee proposed a bill aimed toward establishing a largely uniform procedure for the new federal courts; the Process Act as ultimately enacted represented a rejection of this proposal in favor of having each federal court follow the procedure of the state in which it sat.¹³⁹ Roughly two years later, on January 29, 1790, Congressman Smith of South Carolina introduced a resolution to direct the Supreme Court to report to the House “a plan for regulating the Processes in the Federal Courts, and the fees to the Clerks of the same.”¹⁴⁰ That resolution was tabled and never discussed. In 1793, the House of Representatives proposed an amendment to the rulemaking grant in the Judiciary Act that would have withdrawn the grant of local rulemaking authority to all federal courts and replaced it with an exclusive grant of supervisory rulemaking authority to the Supreme Court.¹⁴¹ There was no discussion of inherent local authority surrounding either the proposal or its rejection, even though one might expect to see some discussion on the question of whether withdrawing the local rulemaking authority of the federal courts infringed upon or even entirely removed procedural authority they would otherwise possess. In any event, the record of failed proposals, like that of enacted legislation, ultimately reveals more about Congress’s estimation of its own authority than about its views on the authority of the federal courts.

The single exception to this silence in the early congressional record lies in a report submitted to the House of Representatives on

any sort, including well-established inherent authority like the authority to punish contempt of court.

¹³⁹ See Goebel, *supra* note 132, at 510–37 (describing Judiciary Committee’s proposal to regulate federal procedure in detail and Senate’s rejection of it). As the struggle between those who favored uniform federal procedure and those who favored state procedure suggests, it was the interests of the states relative to the federal government, rather than the interests of federal courts relative to Congress, that occupied legislative attention. *Id.* at 510–11, 539–40 (arguing that the legislative history of the Process Act reveals a struggle between those who favored a consolidated national government and those who favored resting more control with the states).

¹⁴⁰ 1 *Annals of Cong.* 1141–43 (Joseph Gales ed., 1834).

¹⁴¹ Goebel, *supra* note 132, at 549–51. The Senate rejected the proposal.

December 31, 1790, by Edmund Randolph, then Attorney General of the United States.¹⁴² The House had commissioned Randolph to identify and propose remedies for any deficiencies he perceived in the federal judicial system.¹⁴³ Randolph's response to the House, in addition to addressing various other perceived weaknesses in the Judiciary and Process Acts, proposed that Congress replace reliance on the procedure of the various states with a uniform code of federal procedure.¹⁴⁴ He argued that Congress should grant the Supreme Court authority to prescribe supervisory rules binding throughout the federal courts.¹⁴⁵ In defending the propriety of such a grant, Randolph wrote as follows: "Rules of practice belong to the authority of every court, and their other incidental powers add to that authority. The transition from these to the superintending of the whole course of proceedings, will not therefore be considered as too great."¹⁴⁶ The House did not consider the report after receiving it.¹⁴⁷

Randolph's report gives some small indication that the power to develop rules of practice was one considered inherent in every court. Randolph apparently believed, and assumed his audience to believe, that every court possessed this power. In evaluating the significance of Randolph's belief, it is worth noting that he had been a member of the Constitutional Convention's Committee of Detail; he had also presented the Virginia Resolutions to the Constitutional Convention in his capacity as Virginia's then-governor. Randolph was, therefore, a particularly well-informed observer of the Constitution's drafting and implementation. Nonetheless, the fact that his is the sole suggestion of inherent procedural authority appearing in the early congressional record renders it evidence of limited weight.

¹⁴² Edmund Randolph, Report of the Attorney-General to the House of Representatives (Dec. 27, 1790), in 4 Documental History, *supra* note 136, at 127-67.

¹⁴³ *Id.* at 122.

¹⁴⁴ *Id.* at 151-53, 166.

¹⁴⁵ *Id.* at 151.

¹⁴⁶ *Id.* at 166.

¹⁴⁷ *Id.* at 122.

3. Treatises

At least two treatises reflecting the practice of the period address, if only implicitly, the question whether power over procedure is incident to every court. Tidd's *Practice*, a treatise on English practice widely consulted by the early American bench and bar, implicitly affirms such power;¹⁴⁸ Story's *Commentaries on the Constitution* implicitly denies it.¹⁴⁹ The apparent conflict between these two treatises, combined with the silence of so many other treatises on the subject,¹⁵⁰ renders the treatises of the period a relatively unilluminating source of information for this study. A brief discussion of the treatment of power over procedure in the works of both William Tidd and Joseph Story follows below.

¹⁴⁸ 1 William Tidd, *The Practice of the Court of King's Bench in Personal Actions*, at xi–xii (London, E. Brooke et al., 2d ed. 1799). The first edition of Tidd's treatise was published in two parts, with the first part appearing in 1790 and the second in 1794. The *Oxford Dictionary of National Biography* observes that “[f]or a long period it was almost the sole authority for common-law practice, going through nine editions by 1828. . . . The work was also extensively used in America, where one edition with notes by Asa I. Fish appeared as late as 1856.” E.I. Carlyle & Jonathan Harris, Tidd, William, in *54 Oxford Dictionary of National Biography* 763 (H.C.G. Matthew & Brian Harrison eds., 2004).

¹⁴⁹ 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1752 (Boston, Hilliard, Gray, & Company 1833).

¹⁵⁰ In addition to Tidd's *Practice* and Story's *Commentaries*, I reviewed the following treatises, all of which were silent on the question whether federal courts possess inherent authority to regulate procedure: Alfred Conkling, *A Treatise on the Organization, Jurisdiction and Practice of the Courts of the United States* (Albany, Wm. & A. Gould & Co. 1831); 6 Nathan Dane, *A General Abridgment and Digest of American Law* (Boston, Cummings, Hilliard & Co. 1823); Peter S. Du Ponceau, *A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States* (Phila., Abraham Small 1824); David Hoffman, *A Course of Legal Study* (Balt., Coale & Maxwell 1817); 1 James Kent, *Commentaries on American Law* (N.Y., O. Halsted 1826); Thomas Sergeant, *Constitutional Law* (Phila., P.H. Nicklin & T. Johnson, 2d ed. 1830); 1 Blackstone's *Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States; and of the Commonwealth of Virginia* (St. George Tucker ed., Phila., William Young Birch & Abraham Small 1803); 1 James Wilson, *The Works of the Honourable James Wilson* (Phila., Lorenzo Press 1804). I also consulted the following secondary sources: Goebel, *supra* note 132; 2 George Lee Haskins & Herbert A. Johnson, *Foundations of Power: John Marshall, 1801–15* (1981); Robert Wyness Millar, *Civil Procedure of the Trial Court in Historical Perspective* (1952); William E. Nelson, *Americanization of the Common Law, 1760–1830* (1975); Mary K. Bonsteel Tachau, *Federal Courts in the Early Republic: Kentucky 1789–1816* (1978); 3–4 G. Edward White, *The Marshall Court and Cultural Change, 1815–35* (1988).

Tidd's *Practice* does not explicitly address the question whether authority to regulate procedure inheres in every court. In discussing the sources of procedural rules, however, Tidd strongly implies that such authority exists. In the introduction to his lengthy summary of the procedures controlling various suits in the Courts of King's Bench and Common Pleas, Tidd identifies the sources of procedural regulation. Throughout, he emphasizes that the courts themselves, through both orders and judicial decisions, are an important source of procedural regulation. For example, Tidd writes: "The practice of the court, by which the proceedings in an action are governed, is founded on ancient and immemorial usage, regulated from time to time by rules and orders, acts of parliament, and judicial decisions."¹⁵¹ To be sure, Tidd does not explicitly identify the inherent authority of the court as the justification for the rules and judicial decisions that regulate the practice in each court. Because, however, Parliament did not confer general rulemaking authority upon English courts until 1833, courts regulating procedure before then necessarily did so on their own authority rather than in reliance on legislative warrant.¹⁵²

Joseph Story's renowned *Commentaries* can be read as taking a contrary view on the question, and, as an American treatise, it is entitled to more weight. Story writes as follows:

¹⁵¹ 1 Tidd, *supra* note 148, at xi; see also *id.* at xii ("[A]s questions arise respecting the regularity of the proceedings, the courts are called upon to settle, by judicial decisions, the course of their own practice, or to fix the construction of the rules or acts of parliament which have been made respecting it.").

¹⁵² The Civil Procedure Act of 1833 contained the first parliamentary grant of rule-making power to judges. R.J. Walker & M.G. Walker, *The English Legal System* 26 (2d ed. 1970). Walker and Walker note that "[b]efore the nineteenth century each court regulated its own internal procedure with very little intervention by Parliament." *Id.* at 60. See also Millar, *supra* note 150, at 27 (asserting that English procedure historically derived from the courts rather than from any legislative source); Samuel Rosenbaum, *The Rule-Making Authority in the English Supreme Court* 4 & n.8 (1917) (describing English civil procedure as entirely judge-made until the Civil Procedure Act of 1833). The same, incidentally, is true of English criminal procedure, which judges developed with very little parliamentary oversight until the mid-nineteenth century. See David Bentley, *English Criminal Justice in the Nineteenth Century* 1, 19, 22, 297 (1998) (noting that the "overwhelming majority" of criminal defendants were tried summarily and that procedure upon such prosecutions was wholly at the magistrate's discretion until at least 1848); Patrick Devlin, *The Criminal Prosecution in England* 11-13, 28, 38, 42-45 (1958) (describing English criminal procedure as developed entirely at the instigation of courts themselves).

[I]n all cases, where the judicial power of the United States is to be exercised, it is for *congress alone* to furnish the rules of proceeding, to direct the process, to declare the nature and effect of the process, and the mode, in which the judgments, consequent thereon, shall be executed.¹⁵³

Insofar as Story describes power over procedure as belonging to “congress alone,” this passage denies that any other body, including federal courts, shares in that power. The conclusion that Story viewed authority over procedure as exclusively legislative is reinforced by a later passage in which Story acknowledges the inherent authority of the federal courts but does not explicitly include power over procedure on the list. He writes:

[W]hile the jurisdiction of the courts of the United States is almost wholly under the control of the regulating power of congress, there are certain incidental powers, which are supposed to attach to them, in common with all other courts, when duly organized, without any positive enactment of the legislature. Such are the power of the courts over their own officers, and the power to protect them and their members from being disturbed in the exercise of their functions.¹⁵⁴

Story’s description of inherent powers is consistent with that found in the cases described below: it emphasizes the court’s inherent ability to control those who serve it and to punish behavior disruptive to the judicial process. To be sure, the use of the phrase “such are” indicates that the list is not exhaustive; further, there is reason to believe, based on Story’s judicial opinions, that he believed that the common law vested courts with some procedural powers not conferred by statute.¹⁵⁵ Even if, however, Story’s *Commentaries* do not entirely foreclose the notion that Story perceived courts to possess inherent authority to regulate procedure, the treatise surely casts significant doubt upon it.

¹⁵³ 3 Story, *supra* note 149, § 1752 (emphasis added).

¹⁵⁴ *Id.* § 1768; see also Sergeant, *supra* note 150, at 29 (similarly identifying a court’s power over its own officers and its power to punish contempt as incidental powers, and similarly failing to include power over procedure on the list).

¹⁵⁵ See, e.g., *Sears v. United States*, 21 F. Cas. 938, 938–39 (Story, Circuit Justice, C.C.D. Mass. 1812) (No. 12,592) (relying on common law to establish the authority of the court to amend a variance).

4. Cases

As described in the preceding Sections, the question of whether federal courts possess inherent procedural authority apparently did not occupy either treatise writers or those who debated the Constitution and the legislative output of the first and second Congresses. One might expect this question to have occupied those it most concerned: the federal courts themselves. To discern whether early federal courts believed themselves to possess inherent procedural authority, I surveyed all Supreme Court, circuit court, and district court cases from the period between 1789 and 1820 that dealt with either the concept of inherent authority or any matter of procedure, which I defined as including civil procedure, criminal procedure, and evidence.¹⁵⁶ This Section describes the results of this research.

It is clear, both in the arguments of counsel and the reports of early judicial opinions, that federal courts and the lawyers who practiced before them believed federal courts to possess certain inherent powers.¹⁵⁷ Unfortunately, however, federal courts and counsel only rarely addressed the question of whether courts possessed inherent authority over procedure. A review of federal cases de-

¹⁵⁶ I employed the following method of gathering the relevant cases. My research assistant culled all the cases from the Federal Cases reporter that satisfied the criteria; I did the same for the Supreme Court reporter. We then categorized the cases into the following categories: admiralty, equity, civil procedure, criminal procedure, and evidence. I read all of the cases in each of these categories to determine how the early federal courts treated the regulation of procedure, particularly in the absence of legislative guidance. In addition to reading the cases reported in the Supreme Court reporter, I also reviewed *The Documentary History of the Supreme Court of the United States, 1789–1800*, an eight-volume set collecting documents regarding the business of the Supreme Court, as well as its justices riding circuit, in that period. 1 Documentary History, supra note 136, at xli–xlii.

¹⁵⁷ See, e.g., *Forrest v. Hanson*, 9 F. Cas. 455, 455 (C.C.D.C. 1801) (No. 4942) (suggesting that the powers of courts can derive from either statutes or from “principle[s] of the common law, extending, generally, to all judicial bodies”). Of course, early federal courts did not only address the authority they claimed. They also addressed an inherent authority they ultimately—and famously—disclaimed: inherent jurisdictional authority. See, e.g., *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (denying that the exercise of criminal jurisdiction is within the powers implied in all courts “from the nature of their institution”); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93–94 (1807) (denying that the authority to issue writs of habeas corpus is inherent in every court). *Contra id.* at 79–80 (argument of counsel) (asserting that federal courts do possess inherent authority to issue writs of habeas corpus).

cided between 1789 and 1820 reveals that in large part, early discussions of inherent authority track their modern counterparts: then, as now, most explicit discussions of inherent authority occur in the contexts of contempt,¹⁵⁸ regulation of the bar,¹⁵⁹ and regulation of jurors.¹⁶⁰ Explicit discussions of inherent authority over procedure occur in only a handful of older cases.

In theory, analyzing whether early federal courts believed themselves to possess inherent authority over procedure need not depend only on whether they explicitly embraced or disclaimed it. Regardless of what federal courts *said* about inherent authority over procedure, one ought to be able to glean information by studying what they *did*. If federal courts adopted procedural rules in the course of adjudication and in the absence of statutory authorization, that would be circumstantial evidence that federal courts believed themselves to possess inherent authority over pro-

¹⁵⁸ See, e.g., *Hudson*, 11 U.S. (7 Cranch) at 34; *United States v. Duane*, 25 F. Cas. 920, 922 (C.C.D. Pa. 1801) (No. 14,997) (claiming that, in holding defendant in contempt, “[w]e confine ourselves within the ancient limits of the law, recently retraced by legislative provisions and judicial decisions”); *Hollingsworth v. Duane*, 12 F. Cas. 359, 363–64 (C.C.D. Pa. 1801) (No. 6616) (argument of counsel). State courts similarly asserted inherent authority to punish contempt. See, e.g., *State v. Johnson*, 3 S.C.L. (1 Brev.) 155, 158 (S.C. 1802) (per curiam) (“Justices of peace have a power derived from the common law, and necessarily attached to their offices, of committing and confining for gross misbehaviour in their presence . . .”).

¹⁵⁹ See, e.g., *King of Spain v. Oliver*, 14 F. Cas. 577, 578 (C.C.D. Pa. 1810) (No. 7814) (characterizing the right to inquire by what authority an attorney acted on his purported client’s behalf as one “inherent in all courts,” but acknowledging that this inherent power “may be taken away, or qualified by express statute; or additional cautions may be superadded”). State courts similarly asserted authority over court personnel. See, e.g., *Yates v. New York*, 6 Johns. 337, 372–73 (N.Y. 1810) (argument of counsel) (asserting that courts, including chancery courts, possess inherent authority to direct and control court officers, including clerks, in the discharge of their functions); *Mockey v. Grey*, 2 Johns. 192, 192 (N.Y. 1807) (“The power of appointing a guardian, *ad litem*, is incident to every court . . .”).

¹⁶⁰ See, e.g., *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824) (explaining that “the law has invested Courts of justice with the authority to discharge a jury from giving any verdict” when justice requires it); *United States v. Coolidge*, 25 F. Cas. 622, 623 (Story, Circuit Justice, C.C.D. Mass. 1815) (No. 14,858) (asserting the power to withdraw a juror if, while a party is on trial before a jury, something occurs that “will occasion a total failure of justice if the trial proceed”); *Offutt v. Parrott*, 18 F. Cas. 606, 607 (C.C.D.C. 1803) (No. 10,453) (fining jurors who escaped from the jury room out the window). State courts asserted similar authority. See, e.g., *Commonwealth v. Bowden*, 9 Mass. (9 Tyng) 494, 495 (1813) (recognizing inherent authority of a court to withdraw a juror); *Alexander v. Jameson*, 5 Binn. 238, 242–43 (Pa. 1812) (asserting inherent authority of a court to regulate what jurors take into the jury room).

cedure. Conversely, if they did not adopt procedural rules without statutory authorization, that would be circumstantial evidence that federal courts did not believe that any such authority existed. Because there is a multitude of cases between 1789 and 1820 in which federal courts advanced procedural rules without referencing any statutory authority, the body of relevant case law at first impression offers substantial support for the proposition that early federal courts believed themselves to possess inherent procedural authority.

In fact, however, this body of case law sheds very little light on the question of inherent authority because the study of it is complicated by two factors. First, “common law” in the late eighteenth and early nineteenth centuries had a different meaning than does “common law” today. Today, we understand common law as law created by judges. In the late eighteenth and early nineteenth centuries, however, lawyers and judges did not conceive of common law as something judges fashioned; for the most part, they understood it as something judges applied. As I have discussed in detail elsewhere, federal procedural common law, like most common law, was understood to apply in federal courts of its own force unless Congress prescribed a different rule.¹⁶¹ Thus, Alfred Conkling, in his 1831 treatise on the federal courts, could decline to discuss federal cases related to the execution of judgments on the ground that “they are only declarative of the general common law principles recognized in all courts of common law jurisdiction, or of the laws of the respective states.”¹⁶² Similarly, St. George Tucker, in his American edition of *Blackstone’s Commentaries*, could instruct

¹⁶¹ See Barrett, *supra* note 7, at 376–84.

¹⁶² Conkling, *supra* note 150, at 317; accord *id.* at 233 (explaining that his treatise would not detail the formal parts of the declaration because “[t]he common rules of pleading, except where they have been changed by the laws of the states or by rules of court are in general strictly applicable to proceedings in the national courts,” and the rules of common law pleading are adequately explained in other treatises). Professor Mary Tachau’s study of the Kentucky federal courts from 1789–1816 led her to conclude that “[t]he most distinctive aspect” of the procedures observed by Kentucky federal courts in this period “was their rigorous adherence to the antiquated technicalities of English law.” Tachau, *supra* note 150, at 77. Throughout, Tachau details examples of this phenomenon. See, e.g., *id.* at 84 (relating district judge’s admonishment that “[t]he Latitude contended for by Mr. Attorney goes at once to destroy that System of Good pleading which has stood the test for Ages past and which I hope will continue to be strictly attended to by Judges”).

that the “maxims and rules of proceeding[s] [of the English common law] are to be adhered to, whenever the written law is silent.”¹⁶³ Early nineteenth-century cases from the Supreme, circuit, and district courts reflect the same understanding.¹⁶⁴ Cases, therefore, in which courts articulate procedural rules in the absence of statutory authorization or direction cannot necessarily be interpreted as assertions of inherent judicial authority. One must carefully discern whether, in any given case, the court perceived itself to be exercising discretion or simply applying a settled common rule.

The second and more serious factor complicating an effort to determine whether early federal courts implicitly asserted inherent authority over procedure is that they possessed broad, statutorily granted authority over procedure. Section 17 of the Judiciary Act of 1789 gave each federal court the authority “to make and establish all necessary rules for the orderly conducting business in the said courts.”¹⁶⁵ Despite that provision’s reference to “rules,” the Supreme Court interpreted it to permit the regulation of procedure

¹⁶³ 1 Blackstone’s Commentaries, *supra* note 150, app. at 429; see also 1 Kent, *supra* note 150, at 320 (“If congress should by law authorize the district or circuit courts to take cognizance of attempts to bribe an officer of the government . . . and should make no further provision, the courts would, of course, in the description, definition, prosecution, and punishment of the offence, be bound to follow those general principles and usages, which are not repugnant to the constitution and laws of the United States, and which constitute the common law of the land, and form the basis of all American jurisprudence.”).

¹⁶⁴ See, e.g., *Tatum v. Lofton*, 23 F. Cas. 723, 723–24 (C.C.D. Tenn. 1812) (No. 13,766) (treating common law as controlling the question of whether a witness who voluntarily gained an interest in litigation can rely on that interest as grounds for refusing to testify); *Livingston v. Jefferson*, 15 F. Cas. 660, 664–65 (Marshall, Circuit Justice, C.C.D. Va. 1811) (No. 8411) (asserting that the common law, including procedural common law, applies in federal courts unless Congress says otherwise); *United States v. Johns*, 4 U.S. (4 Dall.) 412, 414, 26 F. Cas. 616, 617 (Washington, Circuit Justice, C.C.D. Pa. 1806) (No. 15,481) (holding that in the absence of contrary instruction from Congress, the number of peremptory challenges permitted in a capital case was a matter governed by the common law, which permitted thirty-five); *Owens v. Adams*, 18 F. Cas. 926, 926 (Marshall, Circuit Justice, C.C.D. Va. 1803) (No. 10,633) (holding that in the absence of any legislative provision, “the rules of the common law” controlled questions regarding the admissibility of evidence, despite the court’s disagreement with the application of the rule in this instance).

¹⁶⁵ Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83.

through either formal court rules or case-by-case adjudication.¹⁶⁶ This interpretation of Section 17 means that one cannot identify exercises of inherent authority simply by identifying cases that avoid the first complication—in other words, by identifying cases in which courts are advancing their own procedural rules rather than applying settled common law principles. Because such cases could as easily represent an exercise of the court's statutory authority as its inherent authority, it is only possible to distinguish one from the other if the deciding court does, and courts rarely did so. Most of the time, courts simply adopted rules in the course of adjudication without addressing the issue of their power at all.¹⁶⁷ Other times, they explicitly proclaimed themselves to possess power to regulate

¹⁶⁶ In *Fullerton v. Bank of the United States*, the Supreme Court rejected a challenge to establishing rules through adjudication. 26 U.S. (1 Pet.) 604, 613–15 (1828). It noted:

Written rules are unquestionably to be preferred, because their commencement, and their action, and their meaning, are most conveniently determined; but what want of certainty can there be, where a Court by long acquiescence has established it to be the law of that Court, that the state practice shall be their practice

Id. at 613; accord *Duncan's Heirs v. United States*, 32 U.S. (7 Pet.) 435, 451 (1833) (“It is not essential that any court in establishing or changing its practice should do so by the adoption of written rules. Its practice may be established by a uniform mode of proceeding, for a series of years . . .”). Although neither *Fullerton* nor *Duncan's Heirs* explicitly invoked § 17 of the Judiciary Act in holding that court rules can be established by the common law method, it seems fairly clear in context that the Court was referring to that provision. Even if it was not, however, its failure to draw a sharp distinction in these cases between procedural regulation by court rule and procedural regulation by adjudication makes it less likely that federal courts drew such a distinction for purposes of § 17. See, e.g., *Arnold v. Jones*, 1 F. Cas. 1180, 1180 (D.S.C. 1798) (No. 559) (explicitly invoking § 17 power to establish a rule, in the course of adjudicating a case, that a motion for a new trial does not suspend judgment after a verdict).

¹⁶⁷ See, e.g., *Sullivan v. Browne*, 23 F. Cas. 348, 348–49 (C.C.D. Pa. 1808) (No. 13,593) (referring both to a previously established “rule of this court” and to an innovation to that rule allowed in the present case, without any reference to the court's authority to adopt either the initial rule or its temporary suspension); *United States v. Burr*, 25 F. Cas. 55, 77 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 14,693) (establishing both the questions to be asked and the grounds to be accepted in determining whether to excuse jurors for cause); *United States v. Burr*, 25 F. Cas. 38, 40–41 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 14,692e) (laying down a rule with respect to the questioning of witnesses); *United States v. Stewart*, 27 F. Cas. 1338, 1339 (C.C.D. Pa. 1795) (No. 16,401) (adopting “a rule in this case, and in all other cases of a similar nature” regarding the time allowed criminal defendants to secure the presence of witnesses for trial); *Thompson v. Haight*, 23 F. Cas. 1039, 1040 (S.D.N.Y. 1820) (No. 13,956) (laying down rules regarding affidavits in certain patent cases).

procedure but did not identify the source of that power—leaving open the question of whether they perceived it to be constitutionally or statutorily granted.¹⁶⁸ It is not, then, that the early case law is silent with respect to federal court authority over procedure. To the contrary, there are hundreds of cases in which federal courts explicitly or implicitly assert such authority. But the cumulative effect of the Supreme Court's broad interpretation of Section 17 and the courts' general failure to identify whether or not they were relying on Section 17 in adopting any particular rule renders the lion's share of these cases useless for purposes of this study. In most, it is impossible to tell whether courts regulating procedure were asserting constitutional or statutory authority.¹⁶⁹

¹⁶⁸ See, e.g., *Patton v. Blackwell*, 18 F. Cas. 1336, 1336 (C.C.D. Tenn. 1809) (No. 10,831) (adopting a rule regarding the imposition of costs in the event of continuance and asserting, without citation, that “[t]his court has the power to establish such rules of practice”); *Anonymous*, 1 F. Cas. 993, 993 (C.C.D. Conn. 1809) (No. 434) (asserting that “this court was perfectly free to establish a better practice” than the English practice regarding particular affidavits but not identifying the source from which this freedom derived).

¹⁶⁹ The courts' failure to distinguish between inherent authority and statutory authority derived from the Judiciary Act causes confusion about the source of several procedural powers. For example, there is evidence that early federal courts believed themselves to possess inherent authority to permit amendments to pleadings. See *Sears v. United States*, 21 F. Cas. 938, 939 (Story, Circuit Justice, C.C.D. Mass. 1812) (No. 12,592) (relying on common law to establish the authority of the court to amend a variance); *Calloway v. Dobson*, 4 F. Cas. 1082, 1083 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 2325) (asserting that courts possessed power, both at equity and at common law, to permit amendments of pleadings). But because § 32 of the Judiciary Act gave federal courts statutory authority to do so and because the courts rarely identified the source of their authority, one cannot treat bare amendments as assertions of inherent, as opposed to statutorily granted, authority. See, e.g., *Smith v. Barker*, 22 F. Cas. 454, 455–56 (C.C.D. Conn. 1809) (No. 13,013) (asserting discretion of the court to permit the plaintiff to amend at any time before the case is actually committed to the jury); *Wigfield v. Dyer*, 29 F. Cas. 1156, 1156 (C.C.D.C. 1807) (No. 17,622) (adopting a rule with respect to conditions upon amendment). Another example is the power of the court to grant new trials. One can make a good case that early courts believed themselves to possess inherent authority to grant new trials. See, e.g., *Bird v. Bird*, 2 Root 411, 413 (Conn. 1796) (asserting that “it is incident to every court, who are authorized to try causes by a jury, to set aside their verdicts for just cause”); *Inhabitants of Durham v. Inhabitants of Lewiston*, 4 Me. 140, 142 (1826) (argument of counsel) (asserting “the inherent power of this court to grant new trials at common law”); Charles Edwards, *The Juryman's Guide Throughout the State of New York* 184 (N.Y., O. Halsted 1831) (“Perhaps the power to grant new trials, for certain just causes . . . is necessarily incident to every court that has power to try.”); see also Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83 (authorizing federal courts to grant new trials “for reasons for which new trials have usually been granted in the courts of

Given the way that both the court's understanding of procedural common law and the procedural grant in Section 17 cloud the evidence, an assessment of the attitudes of the pre-1820 bench and bar to the question of inherent authority over procedure can fairly rely only upon the following kinds of cases: (a) cases that explicitly discuss inherent procedural authority; (b) cases that do not address the concept of "inherent authority" in those terms but nonetheless explicitly address the claim that courts possess a non-statutorily derived authority over procedure; and (c) cases that neither directly nor indirectly address the question of inherent authority but in which federal courts assert a procedural power *not* granted by Section 17 or any other provision in the early Judiciary and Process Acts (for example, the power to grant a continuance). These restrictions dramatically narrow the pool of relevant evidence.

a. Cases that Explicitly Discuss Inherent Authority over Procedure

Chisholm v. Georgia is the only federal case that directly addresses the question of whether a federal court possesses the inherent authority to prescribe modes of process in the absence of controlling legislation. In *Chisholm*, federal statutes were silent with respect to three important procedural matters: the mode of executing a judgment against a state, the mode of serving process on a state, and the steps for compelling an appearance by the state.¹⁷⁰ Attorney General Edmund Randolph argued that, in the absence of statutory prescription, the Supreme Court possessed inherent authority to regulate its process in all three respects.¹⁷¹ With respect to writs of execution, Randolph asked, "[W]hy may not executions even spring from the will of the Supreme Court, as [writs

law"). But because § 17 of the Judiciary Act gave federal courts statutory authority to do so and courts rarely identified the source of their authority, grants of new trials cannot be treated as assertions of inherent authority. See, e.g., *Kohne v. Ins. Co. of N. Am.*, 14 F. Cas. 838, 838–39 (Washington, Circuit Justice, C.C.D. Pa. 1804) (No. 7921) (claiming authority to grant a new trial without identifying its source). Thus, while many cases dealing with amendments and new trials appear at first blush to be assertions of inherent authority, the existence of statutory grants destabilizes that conclusion.

¹⁷⁰ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 420 (1793) (argument of counsel).

¹⁷¹ *Id.* at 426–29. Randolph's arguments in this regard were not met by opposing counsel, as Georgia's lawyers had, per her instructions, declined to argue the case. *Id.* at 419.

enforcing judgments] were originally the creation of Courts?”¹⁷² Drawing an analogy to the courts’ inherent power to punish contempt, he asserted that the “incidental authority” to formulate a writ of execution “is not of a higher tone than that of fine and imprisonment, which belongs to every Court of record, without a particular grant of it.”¹⁷³ Randolph made a similar argument with respect to the Supreme Court’s authority to devise a mode for serving process and the steps for compelling an appearance: “if it be not otherwise prescribed by law, or long usage, [the mode] is in the discretion of the Court”¹⁷⁴ In other words, Randolph made a claim similar to the one advanced by both the Supreme Court and scholars today: federal courts possess inherent authority to fill gaps left open in otherwise controlling procedural law. The difference between Randolph’s claim and the modern one lies only in the fact that Randolph treats procedural common law, rather than enacted law alone, as a source of law deemed controlling.

The *Chisholm* majority did not explicitly address Randolph’s argument regarding its inherent authority. But insofar as the Court’s order in the case provided both a method of serving process and steps for compelling an appearance, the majority appeared to accept it implicitly.¹⁷⁵ It accepted that argument, moreover, over the lone dissent of Justice Iredell, who protested that the authority to devise modes of proceeding is “not one of those necessarily incident to all Courts merely as such,”¹⁷⁶ and that courts receive “all their authority, as to the manner of their proceeding, from the Leg-

¹⁷² Id. at 427.

¹⁷³ Id.

¹⁷⁴ Id. at 428 (describing the Court’s authority to devise service of process); see also id. at 429 (“As to the steps, proper for compelling an appearance; these too, not being dictated by law, are in the breast of the Court.”).

¹⁷⁵ Id. at 480. In contrast to the Court’s approach to service of process and the steps for compelling an appearance, the Court’s view with respect to its inherent authority to issue a writ of execution is unclear. With respect to the latter, Randolph’s claim of inherent authority was made in the alternative. Id. at 426. His primary argument was that the Judiciary Act of 1789 implicitly clothed the Supreme Court with the authority to issue such a writ. Id. Thus, the Supreme Court’s issuance of a writ of execution cannot be taken as an implicit endorsement of the proposition that the Court thought itself to possess inherent authority to do it.

¹⁷⁶ Id. at 433 (Iredell, J., dissenting).

islature only.”¹⁷⁷ His belief in exclusive legislative control was so firm, in fact, that he argued that judges simply could not exercise judicial power in the absence of legislative direction regarding the procedures to be observed.¹⁷⁸ Once *Chisholm* was decided, echoes of Justice Iredell’s argument appeared in the press.¹⁷⁹

Chisholm thus provides some evidence that informed observers in the Founding era believed federal courts to possess inherent authority over procedure. At the same time, Justice Iredell’s dissent provides some evidence that this view was not universally held.¹⁸⁰ And while *Chisholm*’s explicit discussions of inherent authority separate it from other cases of the period in which rules were made and authority unaddressed, it is the case even here that the existence of the Judiciary Act’s Section 17 casts doubt on whether the Court was relying on inherent rather than statutorily granted authority.¹⁸¹ It bears emphasis, however, that both Randolph’s argu-

¹⁷⁷ Id. at 432. Interestingly, Justice Iredell grounded his argument in favor of exclusive legislative control in the same constitutional provision relied upon by some modern proponents of exclusive legislative control: the Sweeping Clause. See *infra* note 197.

¹⁷⁸ *Chisholm*, 2 U.S. at 432 (Iredell, J., dissenting) (“This appears to me to be one of those cases, with many others, in which an article of the Constitution cannot be effectuated without the intervention of the Legislative authority.”). Justice Iredell’s views in *Chisholm* were presaged by the notes that he took while *Oswald v. New York*, 2 U.S. (2 Dall.) 401 (1792), a case between New York and a citizen of another state, was pending before the Court. In reflecting on the case, Iredell denied that Article III empowered the Court to devise “any new mode of proceeding” and emphasized that the power to devise new modes of trial belonged entirely to Congress. James Iredell, *Observations on State Suability*, in 5 Documentary History, *supra* note 136, at 76, 84–85. *Oswald v. New York* was tried by jury before the Supreme Court, and no formal opinion was issued in the case. *Oswald v. New York*, in 5 Documentary History, *supra* note 136, at 57, 59–67 (describing background of the case).

¹⁷⁹ See, e.g., Hampden, *Indep. Chron.* (Boston), July 25, 1793, *reprinted in* 5 Documentary History, *supra* note 136, at 399, 401 (heatedly arguing that the authority to determine the mode of exercising the judicial power, including the mode of proceeding, belongs exclusively to Congress); *The True Federalist* to Edmund Randolph, Number V, *Indep. Chron.* (Boston), Mar. 20, 1794, *reprinted in* 5 Documentary History, *supra* note 136, 270–71 (making same argument).

¹⁸⁰ It is worth noting that Justice Iredell himself was not entirely consistent in his view about inherent procedural authority. In several cases, he granted continuances even in the absence of statutory authorization to do so. See, e.g., *Hurst v. Hurst*, 3 U.S. (3 Dall.) 512, 512, 12 F. Cas. 1028, 1028 (Iredell, Circuit Justice, C.C.D. Pa. 1799) (No. 6929); *Symes v. Irvine*, 2 U.S. (2 Dall.) 383, 384, 23 F. Cas. 591, 592 (Iredell, Circuit Justice, C.C.D. Pa. 1797) (No. 13,714).

¹⁸¹ Consider that in at least two later original jurisdiction cases, the Court devised forms of process and rules of proceeding in explicit reliance on statutory authority

ment (at least with respect to the authority to devise steps for serving process and compelling an appearance) and Iredell's dissent focus exclusively on inherent authority. That fact makes it unlikely that the majority, in siding with Randolph, thought that Section 17 settled the issue. It seems far more likely that the Court believed, as Justice Johnson explicitly stated on circuit several years later, that if Congress gave a court jurisdiction without prescribing any procedure, "would it not follow that the court must itself adopt a mode of proceeding adapted to the exigency of each case?"¹⁸²

It is significant that, even if the federal courts were vague with respect to the question whether federal courts possess inherent authority to regulate procedure, at least some state courts were not. Because so many of the federal cases were practically useless, I expanded my search to include state cases decided between 1789 and 1820.¹⁸³ This search yielded few cases, but the ones it did yield were clear on the question of inherent procedural authority. The Supreme Court of Pennsylvania repeatedly held that "[e]very court of record has an inherent power to make rules for the transaction of its business, provided such rules are not contradictory to the law of the land."¹⁸⁴ The court emphasized the existence of this inherent

and with no reference to inherent authority. See, e.g., *New Jersey v. New York*, 30 U.S. (5 Pet.) 284, 287–88 (1831) (relying only on statutory authority); *Grayson v. Virginia*, 3 U.S. (3 Dall.) 320, 320 (1796) (relying on the Judiciary Act's § 14). But see *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 98 (1861) (explicitly asserting inherent authority to devise process and rules of proceeding), overruled in other respects by *Puerto Rico v. Branstad*, 483 U.S. 219 (1987).

¹⁸² *Gilchrist v. Collector of Charleston*, 10 F. Cas. 355, 362 (Johnson, Circuit Justice, C.C.D.S.C. 1808) (No. 5420). He went on to argue that the power to issue a writ of mandamus is a "mode of proceeding" rather than a distinct branch of jurisdiction, and that the power therefore exists even in the absence of a statutory grant. *Id.* at 363.

¹⁸³ In contrast to the method I pursued with respect to the federal cases, see *supra* note 156 and accompanying text, I did not read all of the relevant state cases decided between 1789 and 1820. For this portion of the study, I instead relied on searches in electronic databases.

¹⁸⁴ *Barry v. Randolph*, 3 Binn. 277, 278 (Pa. 1810) (Tilghman, C.J.); accord *Boas v. Nagle*, 3 Serg. & Rawle 250, 253 (Pa. 1817) (implicitly recognizing inherent power of court to regulate its practice); *Vanatta v. Anderson*, 3 Binn. 417, 423 (Pa. 1811) (noting that despite the absence of a legislative grant, "it is not denied that [the Courts of Common Pleas] have power from the nature of their constitution, to make rules for the regulation of their practice"); *Boyd's Lessee v. Cowan*, 4 U.S. (4 Dall.) 138, 140 (Pa. 1794) ("[T]he Court can alter the *practice*, and institute any rules in an action of ejectment, which they may deem beneficial, or for the furtherance of justice, without legislative aid.").

power, moreover, in the face of a Pennsylvania statute explicitly granting it. It insisted that “[c]ourts possess[] these powers antecedently to any act of the legislature on the subject.”¹⁸⁵ Indeed, the court was quite clear that every court “necessarily possess[e]s the incidental power of establishing rules for the regulation of its practice, independently of [a statutory grant].”¹⁸⁶ The spotty case reporting in states other than Pennsylvania during this period makes it difficult to discern whether other state courts espoused this belief. Both the Court of Appeals of Kentucky and the Supreme Court of New York, however, appear to have shared Pennsylvania’s sentiment.¹⁸⁷

b. Cases that Assert Non-Statutorily Derived Authority over Procedure

There are a few cases in which federal courts indirectly claimed to possess inherent authority over procedure. In these cases, the courts did not claim inherent authority *per se*; they instead claimed that the common law vested courts with discretion to decide certain procedural matters. In *United States v. Insurgents*, no statute governed how many persons should be summoned for a venire; the circuit court held that the common law vested the court itself with

¹⁸⁵ *Barry*, 3 Binn. at 279 (Yeates, J.).

¹⁸⁶ *Dubois v. Turner*, 4 Yeates 361, 362 (Pa. 1807) (Tilghman, C.J.).

¹⁸⁷ See *Kennedy’s heirs v. Meredith*, 6 Ky. (3 Bibb) 465, 466 (1814) (“[C]ourts may adopt rules for the regulation of the practice upon points not provided for by law . . .”). Because I was unable to find any statutory grant of procedural authority on the books at this time, I treat this statement as a reference to the court’s inherent authority rather than authority legislatively granted. See also *Yates v. People*, 6 Johns. 337, 372 (N.Y. 1810) (referring in dicta to “the general powers incident to every court of record of regulating its own practice, and prescribing rules in regard to the form of conducting its proceedings”). There is some evidence that the Virginia courts established rules in the absence of legislative authority from 1784 to 1787. See Pushaw, *supra* note 106, at 821 & n.461. There is also some evidence that colonial courts exercised inherent authority over procedure. See Marilyn L. Geiger, *The Administration of Justice in Colonial Maryland, 1632–1689*, at 14, 233 (1987) (noting that Maryland colonial courts adopted their own procedures when the Assembly was silent); Paul M. McCain, *The County Court in North Carolina Before 1750*, at 39 (1954) (“Without a law to specify a definite procedure for the county court the justices generally arranged matters to suit themselves and the people in attendance.”).

the discretion to choose the number.¹⁸⁸ In *Sears v. United States*, Justice Story, riding circuit, invoked the common law to establish the authority of the court to amend a variance.¹⁸⁹ And in *Calloway v. Dobson*, Chief Justice Marshall, riding circuit, asserted that courts possessed power, both at equity and at common law, to permit amendments of pleadings.¹⁹⁰ These cases are significant because in each, the court assumed itself to possess the powers traditionally possessed by common law courts.

c. Cases that Assert Procedural Power not Granted by the Judiciary and Process Acts

Finally, there are a handful of cases in which federal courts failed to invoke either inherent authority or the authority traditionally possessed by common law courts, but nonetheless asserted the discretion to take actions not expressly authorized by statute. The most prominent example is the right to grant continuances.¹⁹¹ In

¹⁸⁸ 2 U.S. (2 Dall.) 335, 341–42, 26 F. Cas. 499, 514 (C.C.D. Pa. 1795) (No. 15,443); see also *United States v. Fries*, 3 U.S. (3 Dall.) 515, 516, 9 F. Cas. 826, 918 (C.C.D. Pa. 1799) (No. 5126) (argument of counsel).

¹⁸⁹ 21 F. Cas. 938, 939 (*Story*, Circuit Justice, C.C.D. Mass. 1812) (No. 12,592). Section 32 of the Judiciary Act of 1789 authorized courts to amend a variance that was merely a matter of form. Even if the variance at issue in *Sears* was within the purview of § 32, the significant point for present purposes is that in establishing his authority to act, Justice Story explicitly invoked the authority that the common law granted to all courts of error rather than § 32.

¹⁹⁰ 4 F. Cas. 1082, 1083 (*Marshall*, Circuit Justice, C.C.D. Va. 1807) (No. 2325). Again, § 32 of the Judiciary Act authorized the court to permit amendments to pleading. The significant point for present purposes is that Justice Marshall did not rely on the statutory grant but instead explicitly invoked the powers possessed by courts of common law and equity.

¹⁹¹ See, e.g., *King of Spain v. Oliver*, 14 F. Cas. 571, 572 (*Washington*, Circuit Justice, C.C.D. Pa. 1816) (No. 7812) (denying continuance when party knew that witness was about to depart and made no effort to procure his deposition); *United States v. Frink*, 25 F. Cas. 1220, 1221 (C.C.D. Conn. 1810) (No. 15,171) (denying continuance for absent witness when the witness refused to attend); *Hurst v. Hurst*, 3 U.S. (3 Dall.) 512, 12 F. Cas. 1028 (*Iredell*, Circuit Justice, C.C.D. Pa. 1799) (No. 6929) (granting continuance when the adverse party refused to answer a bill for discovery); *Symes's Lessee v. Irvine*, 2 U.S. (2 Dall.) 383, 384, 23 F. Cas. 591, 592 (*Iredell*, Circuit Justice, C.C.D. Pa. 1797) (No. 13,714) (granting continuance when witness broke promise to a party to attend the trial). There is some later authority from a state court explicitly casting the right to grant or refuse a continuance as one "inherent in all courts." See *Wilson v. Phillips*, 5 Ark. 183, 185 (1843); *Burriss v. Wise & Hind*, 2 Ark. 33, 41 (1839). It is worth noting that the federal courts briefly possessed a statutorily granted power to grant continuances. Among other things, § 15 of the Judiciary Act of 1801

addition to granting continuances, federal courts did things like delineating the kind of affidavits they would accept and allocating the expenses associated with the attendance of witnesses.¹⁹² I found no case in which a federal court addressed the source of its authority to do any of these things, but because no statute empowered federal courts to take these procedural measures, those who did necessarily acted on the belief that they possessed procedural powers other than those statutorily granted.

C. *Interpreting the Evidence*

Federal courts can properly claim to possess an initiating authority to adopt procedural rules if such authority is either conveyed as part of “the judicial Power” itself or justified as a means supporting the exercise of judicial power. In either event, the legitimacy of the claim turns largely on historical practice. The former claim turns on whether informed observers in the Founding era understood “the judicial Power” to include authority to regulate procedure in the course of adjudication. The latter turns on whether procedure is a matter over which courts have historically exercised power.

As described in this Part, there is some historical support, albeit far from overwhelming, for the argument that federal courts possess this initiating procedural authority. There is Edmund Randolph’s claim of inherent authority in his proposed bill regulating the business of the judicial branch, and there is the Supreme Court’s implicit acceptance of Randolph’s argument regarding its inherent authority in *Chisholm*. There are the clear assertions of inherent procedural authority by state courts in Pennsylvania, Kentucky, and New York. There is the explicit recognition by federal courts of situations in which the common law vests all courts with the discretion to take certain procedural steps related to the pro-

empowered federal courts “to grant continuances on the motion of either party.” Judiciary Act of 1801, ch. 4, § 15, 2 Stat. 89, 94. That Act was repealed in its entirety almost exactly one year later on March 8, 1802.

¹⁹² See, e.g., *Norwood v. Sutton*, 18 F. Cas. 458, 458 (C.C.D.C. 1806) (No. 10,365) (refusing to receive a supplemental affidavit on the ground that it was a practice leading to perjury); *Ex parte Johnson*, 13 F. Cas. 719, 719 (Washington, Circuit Justice, C.C.D. Pa. 1803) (No. 7366) (requiring United States, rather than the defendant, to pay for attendance of defense witness when the United States was the one to call him).

gress of a suit, and there are those cases in which the courts implicitly claim inherent authority by taking certain procedural steps in the absence of enabling legislation. There are, in addition, few contradictions of the proposition that federal courts possess inherent procedural authority. Justice Iredell's dissent in *Chisholm* does cast procedural regulation as the exclusive province of Congress, but that dissent is, by definition, a minority view; it is also somewhat inconsistent with Iredell's own practice on the bench. Story's *Commentaries* does leave procedural authority off the list of inherent judicial powers, but, at the same time, Story's own practice on the bench is somewhat inconsistent with that belief.

It is worth specifically addressing how, if at all, the *absence* of evidence, particularly in the cases, affects the historical analysis. If lawyers and judges in the late eighteenth and early nineteenth centuries believed courts to possess inherent procedural authority, one would expect to find the most vigorous assertions of inherent procedural authority in the case law, but such assertions appear in only a handful of federal cases. In the normal course, one might view lack of case support as evidence on the other side of the ledger—in other words, as evidence that federal courts were not widely perceived to possess such authority. In this situation, however, the evidence does not easily lend itself to that interpretation. Cases abound in which federal courts assert authority over procedure. The problem is not that procedural authority was never discussed, but instead that the evidentiary value of such discussion is marred by the existence of Section 17 of the Judiciary Act. Just as this ambiguous evidence cannot be used to support a claim of inherent procedural authority, neither can it be used to undercut it.

Thus, as matters stand, the historical record offers some support for the proposition that federal courts possess inherent procedural authority, but the support it offers is undeniably modest. It is so modest, in fact, that if one were pursuing only the argument that the Founding generation understood power over procedure to be directly conferred by Article III, this evidence would probably not be strong enough to support the conclusion that inherent procedural authority exists. Reaching that conclusion presumably requires evidence that “the judicial Power” was widely understood to encompass power over procedure, and it is doubtful that this evidence reflects widespread belief about the content of judicial

power. But the historical evidence necessary to support a claim that procedural authority is a legitimate instrumental power of every federal court is surely less. This argument requires a showing that the power asserted was one traditionally used, and the history described in this Part seems to make that showing. Whatever gaps exist in the historical record, it does show that the claim of judicial power over procedure is not novel; it has historical antecedents. Thus, even though the historical evidence falls short of establishing that power over procedure directly vests in federal courts, it seems sufficient to show that federal courts have long treated it as a means legitimately employed toward the end of deciding cases. This conclusion is strengthened by the persistence of the claim that federal courts possess initiating authority over procedure. While the claim of such procedural authority has never been as vigorous or uniformly accepted as claims of inherent authority to punish contempt and control court personnel, a consistent thread of cases making this claim stretches from the Founding era to today.¹⁹³

That said, even if the historical record supports the conclusion that Article III implicitly grants federal courts power over procedure, it is hard to argue that it compels that conclusion. The evidence is weak enough that one could reject it as aberrational or at least exceptional. One doing so, however, must be prepared to treat judicial procedural authority as entirely derivative of Congress's authority, existing only because Congress has not spoken to an issue.¹⁹⁴ This is not an untenable position, but it does take a far more restrictive view of judicial authority than is characteristic of any of the modern scholarship or case law. Indeed, the assumption that federal courts possess inherent authority over procedure is so deeply held that, as a practical matter, rolling it back likely requires forceful evidence to the contrary. Such evidence does not exist here. Thus, given that the historical record puts the modern claim of inherent procedural authority on reasonably firm ground, and given that the modern claim reflects a sensible approach to inter-branch balance in matters of procedure, Article III is best construed as implicitly granting federal courts procedural authority.

¹⁹³ Subsection III.B.4 considered only those cases decided between 1789 and 1820. For examples of later cases asserting inherent procedural authority, see *supra* notes 89–91 and accompanying text.

¹⁹⁴ See *supra* notes 81–83 and accompanying text.

IV. COMMON LAW POWER AND INHERENT AUTHORITY

The preceding Parts explore two justifications for the ability of federal courts to develop procedural common law in the absence of congressional authorization. The first draws a straightforward analogy to the power of the federal courts to make federal substantive common law: when Congress fails to regulate federal court procedure, an area that the Constitution impliedly commits to exclusive federal control, federal courts may develop federal procedural common law to fill the void. This argument treats judicial authority over procedure, like judicial authority over substance, as entirely derivative of and subservient to that of Congress. The second justification offers a refinement: within this area committed to exclusive federal control, Article III allocates some regulatory power to federal courts by granting them an initiating authority to regulate procedure through judicial decisions. This authority is not exclusive; it must generally give way to contrary congressional regulation. But it is something that a court possesses in its own right rather than something that accrues to it merely by default.

The refinement offered by Article III is crucial to understanding the procedural common lawmaking authority of the federal courts because the existence of inherent procedural authority leaves open the possibility that federal courts possess some core of procedural authority that Congress cannot abrogate. At the same time, Article III plays a limited role in the overall development of judicially crafted procedural regulation, because the inherent procedural authority conferred by Article III is limited. In accepting the existence of inherent procedural authority, it is important not to lose sight of the constraints within which that authority operates.

First, it is necessary to dismiss a phantom constraint. Some scholars and courts have claimed that another limit applies to the inherent authority of federal courts: they have argued that federal courts possess inherent authority, including inherent procedural authority, only to the extent it is strictly necessary to the exercise of judicial power.¹⁹⁵ Such a limit, if applicable, would severely limit the

¹⁹⁵ See, e.g., *Degen v. United States*, 517 U.S. 820, 829 (1996) (“A court’s inherent power is limited by the necessity giving rise to its exercise.”); *Roadway Express v. Piper*, 447 U.S. 752, 764 (1980) (“The inherent powers of federal courts are those which ‘are necessary to the exercise of all others.’” (quoting *United States v. Hudson*

ability of federal courts to fashion procedure in reliance on inherent authority.¹⁹⁶ At least with respect to procedure, however, the argument for a necessity limit does not hold. The strongest argument in favor of such a limit is a long line of cases, beginning with *United States v. Hudson & Goodwin*, in which federal courts have described the exercise of inherent authority as limited by necessity.¹⁹⁷ In *Hudson*, the Court asserted:

Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. . . . To fine for contempt . . . enforce the observance of order, &c. are powers which *cannot be dispensed with* in a Court, because they are *necessary* to the exercise of all others¹⁹⁸

Some treat *Hudson* and its progeny as imposing a necessity limit on all exercises of inherent authority, including inherent procedural authority.¹⁹⁹ That, however, is an overreading of these cases, all of which have arisen in the context of the courts' inherent power to punish contempt and otherwise impose sanctions. Understood in context, the "necessity" limit is designed to preserve a lim-

& Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812)); see also Pushaw, *supra* note 106, at 741–43, 847–49 (arguing that the judiciary possesses only those instrumental powers that are strictly necessary to the exercise of judicial power, as opposed to those that are merely useful to it); Van Alstyne, *supra* note 115, at 111 ("Neither the executive nor the judiciary possess any powers *not essential* (as distinct from those that may be merely helpful or appropriate) to the performance of its enumerated duties as an original matter . . .").

¹⁹⁶ See Pushaw, *supra* note 106, at 851 ("Any claim of 'necessity' [to exercise inherent procedural authority] is further weakened by the fact that Congress has delegated to judges a prominent role in drafting adjective laws."); see also Lear, *supra* note 35, at 1160 ("Few modern forum non conveniens dismissals are necessary for the courts to function.").

¹⁹⁷ Independent of *Hudson* and its progeny, Professor William Van Alstyne has argued that the Sweeping Clause gives Congress the exclusive power to give the executive and the judiciary those powers that are merely beneficial to the exercise of executive and judicial power, thereby limiting any implied powers possessed by the judiciary and the executive to those that are indispensable. See Van Alstyne, *supra* note 115. Professor Sara Sun Beale has persuasively refuted that argument. See Beale, *supra* note 22, at 1471–72. In addition, the Supreme Court implicitly rejected a similar argument made by the dissent in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 432–33 (1793). See *supra* note 177 and accompanying text.

¹⁹⁸ 11 U.S. (7 Cranch) 32, 34 (1812) (emphasis added); accord *Degen*, 517 U.S. at 829 (asserting that inherent power exists only to the extent necessary); *Roadway Express*, 447 U.S. at 764–65 (similar).

¹⁹⁹ See, e.g., Pushaw, *supra* note 106.

ited core of judicial authority from falling within the general prohibition on adjudicating common law crimes, while at the same time preventing a court's power to punish misbehavior from infringing too far on Congress's exclusive power to define federal criminal jurisdiction.²⁰⁰ In other words, the "necessity" limit provides a very limited exception to the rule that only Congress can criminalize conduct. While the Court has never expressly confined the "necessity" limit to cases involving inherent judicial authority to punish misbehavior, it has applied the limit in only that context.²⁰¹ Of par-

²⁰⁰ In distinguishing the Court's inherent power to punish contempt, an authority it claimed, from the inherent authority to punish common law crimes, an authority it disclaimed, the Court was not responding to an argument of counsel, as both the Attorney General and counsel for the defendants declined to argue the case. Nonetheless, the indictment rendered against Hudson and Goodwin invited that distinction. See Indictment, *Hudson*, 11 U.S. (7 Cranch) 32 (denouncing defendants for "offending a *contempt* of the government of the United States against the Peace and dignity of the United States and in violation of the laws thereof" (emphasis added)); see also *id.* (denouncing defendants for inciting in citizens "hatred, *contempt*, and indignation against the President of the United States and the Congress of the United States" (emphasis added)). The Court's contempt power might have been thought to justify federal jurisdiction over common law crimes on the rationale that if a federal court can punish contempt without statutory authorization, so too can it punish other crimes without statutory authorization. Conversely, a holding that a federal court lacks power to punish common law crimes might have been thought to deny that it possesses power to punish contempt. The "necessity" limit advanced by the Court avoided either result.

²⁰¹ See, e.g., *Degen*, 517 U.S. at 829 (holding that district court exceeded the limit of necessity when it struck a defendant's pleadings in a civil forfeiture case on the ground that he remained a fugitive in a related criminal case); *Chambers v. NASCO*, 501 U.S. 32, 43–46 (1991) (emphasizing necessity in the context of inherent power to sanction misconduct); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 821 (1987) (Scalia, J., concurring) (recognizing, in the context of contempt, the "narrow principle of necessity" that empowers each branch to protect itself); *Roadway Express*, 447 U.S. at 766 (emphasizing necessity limit in context of recognizing inherent authority of court to shift attorneys' fees as a sanction for misconduct); *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873) ("The power to punish for contempts is inherent in all courts; its existence is *essential* to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts . . ." (emphasis added)). The Court also invoked a necessity test in *Anderson v. Dunn*, where it recognized Congress's power to punish contempt. 19 U.S. (6 Wheat.) 204, 230–31 (1821) (holding that Congress could claim a "punishing power" on the ground of self-preservation only if the power claimed is "the least possible power adequate to the end proposed"). Because it deals with Congress, rather than the courts, *Anderson* cannot be understood to distinguish contempt from the particular question of common law criminal jurisdiction. It is, however, analogous to *Hudson* insofar as it sets narrow boundaries on the ability of any branch to impose criminal sanctions without the cooperation of the other branches. Indeed, the special consid-

ticular relevance for present purposes, it has never mentioned, much less applied, the limit in the context of inherent procedural authority, and the procedures it has approved as falling within that authority go far beyond what is strictly necessary to the decision of cases.²⁰² To the extent that federal courts possess inherent procedural authority, no necessity limit applies to it.

While inherent authority is not limited to those occasions on which its exercise is absolutely necessary, it is nonetheless circumscribed. It must be recognized that inherent authority is local authority, permitting each federal court to regulate only its own proceedings.²⁰³ Article III vests “the judicial Power” in each Article III

erations surrounding criminal punishment may well be what distinguish *Anderson*'s limited view of Congress's implied authority from *McCulloch*'s expansive one.

²⁰² The Court has not invoked a necessity standard when describing the inherent authority of a federal court to take docket-control measures. See, e.g., *Clinton v. Jones*, 520 U.S. 681, 706 (1997) (“The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket.”); *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (asserting that district court has inherent power to stay proceedings for the sake of “economy of time and effort for itself, for counsel, and for litigants”); *Bowen v. Chase*, 94 U.S. 812, 824 (1876) (describing power of courts to consolidate cases “to prevent any practical inconvenience”). Nor has it invoked a necessity standard when describing its power to frame procedural rules in the course of adjudication. See, e.g., *Thomas v. Arn*, 474 U.S. 140, 146 (1985) (claiming that the courts of appeals possess inherent authority to adopt “procedures deemed *desirable* from the viewpoint of sound judicial practice” (quoting *Cupp v. Naughten*, 414 U.S. 141, 146 (1973)) (emphasis added)); *United States v. Hasting*, 461 U.S. 499, 505 (1983) (claiming that federal courts possess inherent authority to adopt procedures “guided by considerations of justice” (quoting *McNabb v. United States*, 318 U.S. 332, 341 (1943))); *Hanna v. Plumer*, 380 U.S. 460, 472–73 (1965) (describing federal courts' inherent procedural authority as “strong”); *Funk v. United States*, 290 U.S. 371, 383 (1933) (claiming that federal courts possess inherent authority to update common law rules of evidence so as to make them more “useful”); *In re Hien*, 166 U.S. 432, 436 (1897) (explaining that “courts of justice possess the inherent power to make and frame reasonable rules”); *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 98 (1861) (arguing that the Supreme Court “may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice”).

²⁰³ The Supreme Court has claimed to possess an inherent supervisory power to impose procedures upon inferior federal courts. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (“The law in this area is clear. This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals.”). I have argued that this claim is fundamentally flawed. See *Barrett*, *supra* note 7, at 325. The Court's designation as “supreme” likely functions as a limitation on Congress's power to design the federal judiciary rather than as a grant of power to the Supreme Court. *Id.* at 361–65. Moreover, even if it does function as a grant of power to the Court, there is no evidence that power over inferior court procedure would be among the powers granted.

court; thus, to the extent that the judicial power carries with it the power to adopt procedures in the course of adjudicating cases, each court possesses that power in its own right. A reviewing court can set aside a rule on the ground that the inferior court abused its discretion in adopting it but not on the ground that it thought a different rule a better one.²⁰⁴ Thus, Article III may well empower each federal court to develop procedural common law governing the proceedings before it, but it does not permit the Supreme Court to prescribe a unified common law of procedure applicable throughout the federal courts. The implications of this limitation can be illustrated with reference to one of the well-known doctrines discussed in Part I. Were inherent procedural authority the only justification for the authority of federal courts in this area, the Supreme Court could not purport to announce uniform rules of issue and claim preclusion. The content of those doctrines—for example, the decision whether to permit nonmutual issue preclusion—would be left to the discretion of each court.

In fact, however, inherent procedural authority is not the only justification for the authority of federal courts in this area. As Part II explained, federal courts can exercise a common law authority over procedure analogous to their common law authority over substance. In the realm of federal judicial procedure, as in the substantive realms of constitutional preemption, federal courts can develop uniform rules when Congress fails to do so. Inherent procedural authority serves as a supplement to this broader common lawmaking authority. In addition to participating in the development of a uniform procedural common law, each federal court can exercise inherent authority to regulate its own proceedings. The body of law resulting from these dual strands of authority

Id. at 366–84. The basis of any inherent procedural authority granted to the federal courts is Article III’s grant of judicial power, and, as explained in the accompanying text, that power is granted to each court individually.

²⁰⁴ See Meador, *supra* note 114, at 1805 (explaining that the exercise of inherent authority, “as with all matters of trial court discretion—is subject to appellate review for abuse”); see also *Haw. Hous. Auth. v. Midkiff*, 463 U.S. 1323, 1324 (1983) (Rehnquist, J., in chambers) (“Although recalling a mandate is an extraordinary remedy, I think it probably lies within the inherent power of the Court of Appeals and is reviewable only for abuse of discretion.”); *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 531 (1824) (holding that the inherent authority to regulate the bar resides in the discretion of each court and the Supreme Court will consequently review disbarments only for an abuse of discretion).

is a collection of uniform doctrines largely drawn from general law (much like the law of admiralty or interstate relations) and narrower rules and discretionary measures associated with the inherent authority of individual courts.

Each of these strands of procedural common law is evident in the eighteenth and early nineteenth century cases described in Part III. There were the common law doctrines of procedure, like preclusion and abstention, which courts understood themselves to apply rather than make.²⁰⁵ These doctrines were drawn from the general law, which had an identifiable content of rules settled by tradition or emergent consensus. Then there were the discretionary rules, like those governing service of process in *Chisholm*, which courts understood themselves to make in reliance upon inherent authority.²⁰⁶ These rules addressed narrower questions that neither the general nor enacted law governed. They were also invariably local. All of the historical claims to inherent procedural authority discussed in Part III treated that authority as a mechanism by which a federal court regulated its own proceedings.²⁰⁷

The same two strands of procedure are evident in the modern cases. There are the descendants of the general common law rules, like preclusion and abstention, which take the form of uniform doctrine applicable throughout the federal courts.²⁰⁸ Then there are the more discretionary procedural choices, like a rule governing

²⁰⁵ See supra notes 161–64 and accompanying text.

²⁰⁶ See supra notes 170–82 and accompanying text.

²⁰⁷ This evidence supports the proposition, explained above and defended elsewhere, that the inherent authority conferred by Article III is local. See supra notes 203–04 and accompanying text. For further historical evidence in support of this proposition, see Tidd, supra note 148, at xii (“[G]eneral rules are confined in their operation to the court in which they are made Hence we find, that acts of parliament are frequently necessary, to introduce regulations extending to all the courts . . .”).

²⁰⁸ Modern abstention has its roots in a doctrine traditionally employed by courts of equity. See supra note 27. Preclusion is a longstanding principle of general procedural common law. See, e.g., *Stevellie v. Read*, 22 F. Cas. 1336, 1337 (Washington, Circuit Justice, C.C.D. Pa. 1808) (No. 13,389) (“The rule of law is clear, that a judgment is inadmissible in evidence, except between the same parties, or those in privity with them . . .”); *Hurst v. McNeil*, 12 F. Cas. 1039, 1041 (Washington, Circuit Justice, C.C.D. Pa. 1804) (No. 6936) (identifying rule of mutuality in preclusion as “a point completely settled, and at rest”).

the time in which a case must be brought,²⁰⁹ that are best characterized as exercises of inherent procedural authority. It is worthy of note that all of the procedures adopted by modern federal courts in explicit reliance on inherent procedural authority address relatively narrow questions governed by neither the general nor enacted law.²¹⁰ These recent iterations of inherent authority differ from their forebears only in the Supreme Court's occasional (and mistaken) deviance from the principle that inherent authority is local.²¹¹

To be sure, these strands of procedural common law are sometimes intertwined. For example, *forum non conveniens* is often described as an exercise of a federal court's inherent authority,²¹² and insofar as it is an action that courts take related to the progress of a suit, that characterization fits. On the other hand, the standards that the Supreme Court has adopted to guide its exercise emerged from a general consensus reached over time in the state courts, lower federal courts, and scholarly community,²¹³ and in that respect, *forum non conveniens* resembles the general procedural law that courts applied throughout the eighteenth and nineteenth centuries. The same is true of *remittitur*. A grant of *remittitur* appears to be an exercise of inherent authority, but the rules governing the exercise of that authority comprise a settled and uniform doctrine.²¹⁴ *Stare decisis* similarly cuts across categories.²¹⁵ It is an old and widely observed doctrine, which makes it resemble general law; at the same time, it is not uniform. *Stare decisis* varies from

²⁰⁹ See, e.g., *Barker v. Wingo*, 407 U.S. 514, 530 n.29 (1972) (observing that a court may rely on its inherent authority to "establish[] a fixed time period within which cases must normally be brought").

²¹⁰ See *supra* notes 89 (collecting examples of rules adopted in case law in reliance on inherent authority), 91 (collecting examples of managerial measures courts may take in reliance on inherent procedural authority).

²¹¹ See generally Barrett, *supra* note 7.

²¹² See *supra* note 35.

²¹³ See *supra* note 32.

²¹⁴ See *supra* notes 46–47 and accompanying text.

²¹⁵ Compare Harrison, *supra* note 40, at 525–30 (treating *stare decisis* as general law), with Lawson, *supra* note 40, at 212 (treating *stare decisis* as a doctrine developed pursuant to inherent authority). It is the hybrid nature of *stare decisis* that makes Congress's power over it a hard question. Were *stare decisis* only a doctrine of general law, there could be little doubt about Congress's authority to abrogate it. It is the relationship of *stare decisis* to the inherent authority of each court that makes the question much harder.

court to court, with each determining for itself the strength of its precedent,²¹⁶ and this feature is more characteristic of inherent authority.

The variety of this law renders it undeniably complex. Yet the fact that its dual strands span the history of the federal courts reflects a longstanding if implicit judgment that there is value in distinguishing between the widely accepted procedures that every federal court should observe and the discretionary choices that each federal court has authority to make. In this regard, it is noteworthy that even in the twentieth and twenty-first centuries, tradition and consensus have mediated the growth of uniform federal procedural common law. Doctrines like preclusion and abstention do not resemble the traditional doctrines of general procedural common law only in their content; they resemble the general law in their development. To the extent that courts have changed these doctrines, the changes have not been unilateral and abrupt departures from tradition. Rather, they have been responses to emerging consensus about the need for a new approach. For example, in abandoning the mutuality requirement for preclusion, the Supreme Court followed the lead of state courts.²¹⁷ Similarly, in introducing a federal forum non conveniens doctrine, the Supreme Court imported a doctrine that had become well rooted in state practice.²¹⁸ This is not to say that either tradition or consensus invariably guides the development of procedural common law. But it is to say that much procedural common law reflects the same pattern that Professor Caleb Nelson has observed with respect to substantive common law: general law has persisted.²¹⁹ Judges developing uniform procedural common law, like judges developing common law in the substantive enclaves of constitutional preemption, do not, in the main, develop rules through the raw exercise of discretion. Instead, they take account of the consensus reflected in secondary sources and judicial opinions. To the extent that a court understands itself to be exercising raw discretion, its action is better

²¹⁶ See *supra* notes 37–39 and accompanying text.

²¹⁷ See *Blonder-Tongue Lab. v. Univ. of Ill. Found.*, 402 U.S. 313, 322–24 (1971) (recounting rejection of mutuality rule for defensive collateral estoppel by the California Supreme Court, numerous federal and state courts, and commentators).

²¹⁸ See *supra* note 32.

²¹⁹ See Nelson, *supra* note 23.

treated as an exercise of inherent authority. As Edmund Randolph put it in *Chisholm*, “[I]f it be not otherwise prescribed by law, or long usage, [the procedure in question] is in the discretion of the Court.”²²⁰

I would be remiss if I failed to point out that while federal procedural common law has its place, congressional intervention has reduced its importance. The statutory authority of each federal court to adopt local, prospective court rules has always reduced the need to rely on inherent procedural authority to regulate local procedure.²²¹ And since it was passed in 1934, the Rules Enabling Act, not the common law method, has been the primary vehicle for the development of uniform procedure in the federal courts. That Act provides that “[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals.”²²² Consider that the federal rules of civil procedure, criminal procedure, and evidence adopted pursuant to the Act largely replaced the old doctrines of general procedural common law by translating them into uniform court rules—sometimes wholesale and sometimes with significant modifications.²²³ In an important respect, therefore, the doctrines that have lingered on in common law form are anomalies insofar as they attempt uniform regulation of federal procedure outside of the statutorily provided framework. That is probably a good thing. Even though tradition and consensus mediate the development of these doctrines, there is

²²⁰ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 428 (1793); see supra note 175 and accompanying text.

²²¹ Section 17 of the Judiciary Act of 1789 authorized every federal court to adopt local court rules. See supra note 131 and accompanying text. Today, 28 U.S.C. § 2071(a) confers the same power. See supra note 66 and accompanying text.

²²² 28 U.S.C. § 2072(a) (2000). It is worth noting that federal rules adopted pursuant to the Act narrow the range of procedural matters left open to the exercise of inherent authority. See 28 U.S.C. § 2072(b) (2000) (“All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.”).

²²³ The Federal Rules of Civil Procedure continued, with minor changes, many procedural mechanisms long employed by the common law system. For example, motions to dismiss (previously known as demurrers), motions for new trials, and even class actions are procedural devices long employed by courts of common law and equity. At the same time, it made significant changes to the common law by, for example, replacing common law with notice pleading. The Federal Rules of Evidence are similarly modeled upon many longstanding common law doctrines. For example, both the hearsay and character rules largely codify the common law.

reason to think that those involved in the rulemaking process, which solicits the views of the legal community at large, are better equipped than federal judges to gauge whether consensus exists with respect to any particular procedural innovation.²²⁴

CONCLUSION

Federal procedural common law is supported by the twin justifications that federal courts can develop uniform common law rules in enclaves of constitutional preemption and that Article III impliedly grants each federal court power to regulate its procedure in the course of adjudicating cases. These two strands of authority, sometimes distinct and sometimes overlapping, have yielded a body of judicially developed procedure that is a combination of uniform procedural doctrines representing general consensus and isolated procedural rules representing the discretionary choice of the adopting court.

Recognizing that procedural common law derives from two sources clarifies the posture of federal courts vis-à-vis Congress in the regulation of procedure. Congress is free to abrogate or change uniform procedural doctrines, just as it has always been free to modify the content of federal common law. Congress is also free to regulate most matters that federal courts would otherwise regulate themselves in reliance upon their inherent authority. To the extent that there are any matters insulated from congressional control, they are matters of the latter sort. Claims of exclusive judicial authority are rooted in inherent authority; hence, they are claims of local authority. Uniform procedural regulation is ultimately in the control of Congress.

²²⁴ Cf. Richard L. Marcus, *Reform Through Rulemaking?* 80 Wash. U. L.Q. 901, 923–25 (2002) (arguing that federal rulemaking process, rather than procedural common law, is the best vehicle for introducing innovative changes, because the rulemaking process solicits input from the larger legal community).

SYMPOSIUM STARE DECISIS AND NONJUDICIAL ACTORS

INTRODUCTION

*Amy Coney Barrett**

In 2006, the South Dakota legislature passed a statute, since repealed, that rendered all abortion, including first trimester abortion, a crime in the state of South Dakota.¹ At a minimum, this statute reflected South Dakota's judgment that *Roe v. Wade*² was wrongly decided. What more this statute reflected is unclear. It may have reflected South Dakota's judgment that *Roe* was ripe for overruling and its desire to present the United States Supreme Court with an opportunity to do it. Or, it may have reflected less South Dakota's hope for overruling than its belief that *Roe*, even if affirmed, does not constrain the states from acting in accordance with their own interpretation of the Fourteenth Amendment. Whatever South Dakota's beliefs, its action throws a spotlight on the complicated relationship between the Supreme Court and nonjudicial actors. What means can the states, the Congress, the President, and even private citizens legitimately employ to express disagreement with the Supreme Court? If nonjudicial actors register such disagreement, how, if at all, should the Supreme Court take account of it? These are the kinds of questions with which this Symposium grapples.

This Introduction frames these questions by pausing to reflect upon the variety of ways in which nonjudicial actors have, over time,

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

2 410 U.S. 113 (1973).

registered their disagreement with decisions of the United States Supreme Court. Both public officials and private citizens have battled the Court on any number of occasions since its inception, and they have employed a diverse range of tactics in doing so. They have resisted Supreme Court judgments. They have denied the binding effect of Supreme Court opinions. They have sought to overrule the Court by statute or constitutional amendment. They have sought overruling in the Court itself. They have tried to discipline the Court through jurisdictional limitations or onerous procedural regulation. And they have pressured the Court by appealing to public opinion. Some of these means, like constitutional override of a disfavored opinion, are generally consistent with the notion that Supreme Court precedent is the law of the land. Others, like interfering with the enforcement of a Supreme Court judgment, represent a head-on challenge to the Court's authority. In what follows, I will describe some notable examples of each of these kinds of protest, noting, along the way, the problems posed by each.

I. RESISTING SUPREME COURT JUDGMENTS

Most dramatic are those situations in which federal or state officials have either refused to enforce or interfered with the enforcement of Supreme Court judgments. The conventional view is that whatever obligations public officials may have with respect to Supreme Court opinions, they must obey Supreme Court judgments.³ That view, however, has not commanded universal assent. Some academics have provocatively argued that public officials have the freedom to disregard Supreme Court judgments that conflict with their own understanding of what the Constitution requires.⁴ There have been a number of occasions throughout history on which both state and federal actors have evidenced that same belief.

While state resistance to Supreme Court judgments is virtually nonexistent today, it occurred with some frequency during the antebellum period.⁵ By one count, state governments defied federal court

3 See, e.g., Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 146 (1999) (noting that "judgments call for obedience; opinions do not").

4 See, e.g., Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 222-23 (1994) (defending, on grounds of departmentalism, the executive's prerogative to refuse to enforce judgments the executive believes to be unconstitutional).

5 See LESLIE FRIEDMAN GOLDSTEIN, *CONSTITUTING FEDERAL SOVEREIGNTY* app. a, at 170-71 (2001). According to Goldstein, official state resistance to federal authority, including resistance to federal judgments, all but ceased after the Civil War. *Id.* at 19.

orders on at least twenty occasions between 1790 and 1859.⁶ Even apart from these instances of actual defiance, there were threats of such defiance. In 1821, in the midst of public outrage over the Supreme Court's decision in *Cohens v. Virginia*,⁷ the *Richmond Enquirer* proposed that the Virginia legislature pass a bill imposing heavy penalties upon "any person who should enforce within the Commonwealth any judgments of the Supreme Court or any other foreign tribunal which reviews a judgment of the courts of this Commonwealth."⁸ The *Enquirer's* proposal is moderate compared to the Georgia legislature's authorization of the death penalty for anyone who attempted to execute the judgment entered in *Chisholm v. Georgia*.⁹ While contrary

6 See *id.* at 20. Goldstein's tally includes both judicial and nonjudicial resistance and resistance to inferior courts as well as to the Supreme Court. While this Symposium focuses on nonjudicial resistance to the Supreme Court, one ought not forget that judicial actors sometimes resist the Supreme Court as well, and, pertinent to the accompanying discussion, they sometimes do so by disregarding Supreme Court orders. See, e.g., *Tyler v. Magwire*, 84 U.S. (17 Wall.) 253, 281–83 (1873) (describing the refusal of the Missouri Supreme Court to obey a United States Supreme Court mandate with which it disagreed); Charles Fried, *Impudence*, 1992 SUP. CT. REV. 155, 188–90 (characterizing Judge Harry Pregerson of the Ninth Circuit as "impudent" for staying an execution less than one hour after the Supreme Court had rejected a stay in the same case).

7 19 U.S. (6 Wheat.) 264, 351 (1821) (holding that the Supreme Court had appellate jurisdiction over criminal as well as civil cases from the state courts when those suits raised a federal question).

8 Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 18–19 (1913) (quoting the *Richmond Enquirer*). Another example of threatened defiance is the Kentucky legislature's reaction to *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823), a case described in more detail below. See *infra* notes 106–17 and accompanying text. There, the Kentucky legislature invited the governor to consider whether to "call forth the physical power of the State to resist the execution of the decision of the Court, or in what manner the mandates of the said Court should be met by disobedience." See Warren, *supra*, at 22–23 (quoting 29 NILES REC. 228, 229 (1825)).

9 2 U.S. (2 Dall.) 419 (1793); see Warren, *supra* note 8, at 166 (describing the Georgia statute providing that anyone who executed any process of any federal court in the case should be "deemed guilty of felony, and shall suffer death without the benefit of clergy, by being hanged" (quoting the Georgia statute)); see also Introduction to Collected Documents on *Chisholm v. Georgia*, in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 127, 135–36 (Maeva Marcus, ed., 1994) (describing both the legislation and the debate about it); *An Intemperate Resolution of Georgia*, AM. MINERVA, Jan. 15, 1794, reprinted in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, *supra*, at 237, 237–38 (reporting on legislation in Georgia responding to *Chisholm*); *Jack Ketch*, CONN. COURANT, Jan. 27, 1794, reprinted in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, *supra*, at 249, 249 (same); *Proceedings of the Georgia House of Representatives*, AUGUSTA CHRON., Nov. 19, 1793, reprinted in 5

to our modern sensibilities, disregard of Supreme Court judgments was viewed by many during this period as a perfectly legitimate way of fighting the Court.

A particularly colorful example of this kind of protest occurred in 1809, when the State of Pennsylvania actually called out its militia to stymie the enforcement of a Supreme Court order. While Pennsylvania was ultimately forced to acquiesce in the execution of the federal judgment, the story of its effort to avoid the judgment is one worth telling.

The case began with the capture of a British ship, the *Active*, during the Revolutionary War. The *Active* carried four American prisoners, including one Gideon Olmstead, a resident of Connecticut.¹⁰ On September 6, 1778, Olmstead and his companions overcame the *Active*'s master and crew and confined them to the cabin.¹¹ Two days later, as Olmstead sailed the ship into New Jersey's Egg Harbor, the ship was forcibly taken by the captain of an American ship, the *Convention*, owned by the State of Pennsylvania.¹² The *Convention* escorted the *Active* into the port of Philadelphia, where Olmstead and the State of Pennsylvania lodged competing prize claims to the ship in the Pennsylvania Court of Admiralty.¹³ Under the law of prize, the captor of the *Active* was entitled to the proceeds from the sale of the ship and its cargo.¹⁴ The primary question before the court was whether Olmstead or Pennsylvania should be treated as the captor for this purpose.¹⁵ The Pennsylvania Court of Admiralty resolved this

THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, *supra*, at 236, 236–37 (same); Governor George Mathews, Address to the Senators and Representatives of Georgia (Jan. 1, 1794), in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, *supra*, at 237, 237 (commenting on his support of legislation responding to *Chisholm*).

10 See Gary D. Rowe, *Constitutionalism in the Streets*, 78 S. CAL. L. REV. 401, 411–12 (2004).

11 See *United States v. Peters*, 9 U.S. (5 Cranch) 115, 119 (1809).

12 See *id.*

13 See *id.* The captain of the *Convention* and a privateer cruising in concert with the *Convention* also lodged claims for the prize. See *id.* For simplicity's sake, and because the ensuing court dispute involved only the claims of Olmstead and Pennsylvania, I omit these claims from the discussion.

14 See *id.* at 119, 137.

15 Specifically, Olmstead claimed that he had full control of the *Active* when the *Convention* approached, and that he was thus entitled to all of the proceeds. See *id.* at 119. Pennsylvania, by contrast, claimed that Olmstead had only partial control of the ship when it entered Egg Harbor; that the *Convention* had done the lion's share of the work in wresting the ship from British control; and that Pennsylvania was consequently entitled to the lion's share of the proceeds. See Rowe, *supra* note 10, at 412.

question in favor of Pennsylvania,¹⁶ and Olmstead appealed that decision to a federal body: the Court of Commissioners of Appeals in Prize Cases for the United States of America.¹⁷ The court of appeals reversed the Pennsylvania court,¹⁸ and so began a long-running and heated conflict between state and federal authority.

The Pennsylvania Court of Admiralty refused to enforce the federal order on the ground that the court of appeals lacked authority to enter it.¹⁹ The federal court of appeals retorted that Pennsylvania “was bound to pay obedience [to its decree].”²⁰ Nonetheless, it refused to institute contempt proceedings “lest consequences might ensue at this juncture dangerous to the public peace of the United States.”²¹ The judge of the admiralty court turned over Pennsylvania’s share of the proceeds to David Rittenhouse, the state’s treasurer,²² who, like all government officials of the time responsible for disposing of disputed funds, held the money as his personal property pending a conclusive resolution of ownership.²³

After several more years and several more legal permutations, Olmstead took his fight to the newly established federal court for the district of Pennsylvania. In 1803, Judge Richard Peters decreed that the original federal judgment was valid and that David Rittenhouse’s two daughters, now the executors of his estate, must turn over the disputed money to Olmstead.²⁴ Within days, the Pennsylvania General Assembly responded with an act declaring Judge Peters’ ruling to be in violation of the Eleventh Amendment, ordering the Rittenhouse

16 See Rowe, *supra* note 10, at 414 (noting that Olmstead received one-quarter of the proceeds, with the remainder going to the *Convention*).

17 See *Peters*, 9 U.S. (5 Cranch) at 119. This body appears to have been a committee of the Continental Congress. See Rowe, *supra* note 10, at 414.

18 See *Peters*, 9 U.S. (5 Cranch) at 119.

19 See *id.* at 120, 123.

20 *Id.* at 123.

21 *Id.*

22 See *id.*

23 He held the funds as his own because under the then applicable law of agency, he would have been personally liable to Olmstead if a court ultimately awarded Olmstead the proceeds. See Rowe, *supra* note 10, at 431 n.105 (explaining the then governing law). Rittenhouse would have relinquished the funds to Pennsylvania in exchange for Pennsylvania’s promise to indemnify him if Olmstead later asserted a rightful claim to the money. See *Peters*, 9 U.S. (5 Cranch) at 138 (describing a memorandum to that effect in Rittenhouse’s papers). Because Pennsylvania failed to give him an adequate bond of indemnity, Rittenhouse, exercising due caution, held onto the funds. For a detailed explanation of the legal dilemma in which Rittenhouse (and eventually his executors) found themselves, see Rowe, *supra* note 10, at 431 n.105.

24 See *Peters*, 9 U.S. (5 Cranch) at 125–26.

daughters to pay the funds in question into the state treasury, and authorizing the governor to take “‘any further means and measures that he may deem necessary’” to protect Pennsylvania’s interest.²⁵ It specifically authorized the governor to prevent the Rittenhouse daughters from being served with any federal process that might issue as a result of their disobeying Judge Peters’ order.²⁶ Furious, Olmstead asked Judge Peters to force the Rittenhouse daughters to comply by issuing a writ of attachment to enforce the judgment, but, reluctant to “‘embroil[] the government of the United States and that of Pennsylvania . . . on a question which has rested on my single opinion,’” Judge Peters declined to do so.²⁷

Thus, at this point, two federal courts—the old court of appeals in prize cases and the Pennsylvania district court—had hesitated to enforce their judgments for fear of conflict with Pennsylvania. The United States Supreme Court did not so hesitate. In 1809, Olmstead asked the United States Supreme Court to issue a writ of mandamus ordering Judge Peters to issue an attachment executing the judgment. The Supreme Court, directly engaging Pennsylvania, agreed.²⁸ Pennsylvania’s central legal claim resembles one that Professor Paulsen has elsewhere defended: it claimed that it need not acquiesce in a federal court’s interpretation of the United States Constitution.²⁹ On the contrary, Pennsylvania believed itself entitled to its own constitutional opinion, even if that opinion carried it to the point of interfering with the execution of a federal judgment. Pennsylvania did temper its claim with a nod to federal authority; it did not claim a “universal right . . . to interpose in every case whatever,” but only in cases in which it determined that the Constitution deprived federal courts of jurisdiction.³⁰ Here, however, Pennsylvania believed that such a jurisdictional question was at stake. Pennsylvania maintained that the Eleventh Amendment deprived Judge Peters of jurisdiction to enforce

25 *Id.* at 133 (reprinting the Pennsylvania Act).

26 *See id.*

27 *Id.* at 117 (quoting the July 18, 1808 order of Judge Peters).

28 *See id.* at 141.

29 *See* Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2736 (2003) (“[S]tate government officials . . . are not bound to submit docilely to unconstitutional actions of the agencies of the national government. By the logic of *Marbury*, they cannot be bound by the erroneous constitutional views of organs of the national government, but are empowered, even required, to interpret the Constitution directly.”).

30 *Peters*, 9 U.S. (5 Cranch) at 136.

the judgment of the Continental Congress' admiralty court of appeals, and that it could thus treat Judge Peters' judgment as a nullity.³¹

The Supreme Court roundly rejected the notion that Pennsylvania possessed the independent authority to determine what the Eleventh Amendment requires. It held that it alone possessed the right to determine the bounds of federal jurisdiction, and that recognizing any right on the part of any state to annul a federal judgment would be to turn the Constitution into a "solemn mockery."³² After holding that the Eleventh Amendment did not apply, it issued a mandamus to Judge Peters ordering him to issue the process necessary to enforce his judgment.³³

Pennsylvania did not take the Supreme Court's decision lying down. Upon learning of it, the governor of Pennsylvania called out the militia. His aim was to use whatever means necessary to prevent the United States from serving the Rittenhouse daughters with process.³⁴ When the federal marshal arrived at the Rittenhouse home, he was met with a line of bayonets pointed at his chest. After warning both the militia and their commander, General Michael Bright, that they could be prosecuted for treason,³⁵ the marshal began assembling a posse comitatus to aid him in execution of his writ.³⁶ The standoff continued for roughly three weeks, causing much agitation in the city of Philadelphia, and attracting the attention of (but little support from) the other states.³⁷ In large part because the Rittenhouse daugh-

31 Pennsylvania's Eleventh Amendment argument was grounded in its belief that suing Rittenhouse was the equivalent of suing the state, because it was Pennsylvania, not Rittenhouse, who had the real stake in the funds. *See id.* at 138–41.

32 *Id.* at 136.

33 *See id.* at 141. The Supreme Court held the Eleventh Amendment inapplicable because the funds were held by David Rittenhouse in his personal capacity rather than by the State of Pennsylvania. *See id.* at 139.

34 *See Rowe, supra* note 10, at 424. Rowe describes this conflict as the first clash between federal and state forces in the nation's history. *See id.*

35 *See* Letter from Michael Bright to Governor Simon Snyder (Mar. 25, 1809), in MESSAGE OF THE GOVERNOR TOGETHER WITH DOCUMENTS RELATIVE TO THE CASE OF GIDEON OLMSTEAD AND OTHERS, 1809, at 5, 5 (Benjamin Grimler ed., 1809) [hereinafter OLMSTEAD CASE DOCUMENTS] (informing the governor that "[o]ur situation is delicate—The Marshal has noted our men, with a determination to have them indicted for high treason, as well as myself.").

36 *See* Letter from Michael Bright to Governor Simon Snyder (Mar. 31, 1809), in OLMSTEAD CASE DOCUMENTS, *supra* note 35, at 6, 6 ("I have just learned from good authority, that the Marshal is serving summons on the citizens of this state, for the purpose of raising a posse to assist him in the execution of the duties of his office . . .").

37 General Bright, the commander of the militia dispatched to the Rittenhouse home, informed the secretary of the commonwealth that the situation was causing

ters grew tired of being under virtual house arrest, the conflict finally came to an end, and a somewhat comic one at that. A stepson of one of the women tipped off the federal marshal to a way in which he could gain access to an unguarded back door, and “disguised in a new set of clothes and a hat, [the marshal] climbed through the backyards and alleyways” to enter the home through the back door at six in the morning to fulfill his duty.³⁸ Defeated, the governor withdrew the militia and paid Olmstead with the funds that it had, in the interim, extracted from the Rittenhouse daughters.³⁹ The general who led the Pennsylvania militia was convicted of obstructing the service of federal process.⁴⁰

The Olmstead affair serves as an example of a state’s claiming the right to resist a Supreme Court judgment. The states are not alone in making this claim. Two Presidents have openly asserted the right to resist Supreme Court judgments: Andrew Jackson and Abraham Lincoln. Their claims in this regard resonate through all debates about executive obligation (or lack thereof) to the Court. Interestingly, these assertions occurred during roughly the same period as the rash of state resistance to Supreme Court judgments—the antebellum period, and, in Lincoln’s case, the very start of the Civil War.

Jackson’s confrontation with the Court stemmed from the Court’s holding unconstitutional a Georgia statute that, among other things, permitted whites to live among Indians only if they got a license to do so and swore an oath of loyalty to the State of Georgia.⁴¹ Samuel Worcester was convicted for his refusal to do either; the Supreme Court, holding the statute unconstitutional, overturned his conviction and ordered Georgia to release the prisoner.⁴² Georgia

“much alarm in the city.” Rowe, *supra* note 10, at 429 (quoting Letter from Michael Bright to Nathaniel B. Boileau (Mar. 25, 1809), in 4 PENNSYLVANIA ARCHIVES 9th ser. 2773, 2773 (Gertrude MacKinney ed., 1931)); *see also id.* at 427–28 (describing the lack of support from around the country, and even within large segments of Pennsylvania, for Pennsylvania’s position in the controversy).

38 *See id.* at 432 (“The clever disguise of a marshal, not to mention the fatigue of two elderly women, thus resolved a major constitutional dispute.”).

39 *See id.* at 433. Despite the Rittenhouse daughters’ reluctance to relinquish the funds without adequate assurance of indemnification from Pennsylvania, the Pennsylvania General Assembly had passed a statute that gave them little choice but to turn them over. *See id.*

40 *See id.* at 427, 430. President Madison pardoned him a week later. *See id.* at 427.

41 *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 577–78 (1832).

42 *See id.* at 597 (“[I]t is further ordered and adjudged, that the said judgment of the said superior court be, and hereby is reversed and annulled . . . and that all proceedings on the said indictment do for ever surcease; and that the said Samuel A.

refused.⁴³ With a federal judgment at stake, one might have expected Jackson to force Georgia's compliance, but he did not. Instead, tradition has it that Jackson proclaimed, "John Marshall has made his decision, now let him enforce it."⁴⁴ Jackson's failure to intervene, combined with rhetoric decrying the Supreme Court and defending Georgia, left Jackson vulnerable to the charge that he had violated the Constitution by failing to enforce the Court's decree.⁴⁵ Jackson was saved from a direct collision with the Court by the fact that he appeared to lack the authority to act. Timing and a procedural quirk had prevented the Supreme Court from dispatching the federal marshal to execute the judgment, and a federal statute authorized the President to intervene only if the marshal failed.⁴⁶ Thus, notwithstanding Jackson's fairly open approval of Georgia's defiance and his expressed willingness to defy the Court himself, he came only to the brink of refusing to enforce a federal judgment. His conduct nonetheless stands as an important, if symbolic, denial of an unqualified executive obligation to execute Supreme Court judgments.

In contrast to Andrew Jackson, Abraham Lincoln's stand against the binding effect of a Supreme Court judgment was more than rhetorical. Lincoln is the only President who has actually refused to enforce an order of the Court.⁴⁷ Lincoln suspended the writ of habeas corpus during the Civil War because he believed public safety required it.⁴⁸ Union troops took a large number of suspected secessionists into custody after they were attacked by a mob in Baltimore,

Worcester be, and hereby is henceforth dismissed therefrom, and that he go thereof quit without day [sic]. And that a special mandate do go from this court, to the said superior court, to carry this judgment into execution.").

43 See GERARD N. MAGLIOCCA, *ANDREW JACKSON AND THE CONSTITUTION* 49 (2007). Georgia's refusal, of course, makes this case double as an example of state resistance to a Supreme Court judgment. For another example of Georgia's refusing to execute a writ from the Supreme Court at about the same time, see Warren, *supra* note 8, at 167–68 (describing Georgia's execution of a Cherokee Indian in defiance of a Supreme Court writ).

44 MAGLIOCCA, *supra* note 43, at 49. This quote, while often repeated, may be apocryphal. See *id.*

45 See *id.* at 48–50.

46 *Id.* at 49–50; see Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86 (current version at 28 U.S.C. § 1257 (2000)).

47 See Frank Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1989) ("President Lincoln once [ignored an order of the Court] . . . but no other President has followed suit.").

48 Specifically, Lincoln authorized Union officers to suspend the writ if Union troops encountered resistance during a march from Philadelphia and Washington. See Paulsen, *supra* note 4, at 278. He did so with an eye toward Baltimore, which lies between these two cities and was known to be a "hotbed of secessionist activity." *Id.*

and one of them, John Merryman, petitioned Chief Justice Roger Taney for a writ of habeas corpus.⁴⁹ Taney held Lincoln's suspension of the writ unconstitutional and ordered Merryman freed.⁵⁰ Lincoln did not comply.⁵¹ In a speech to Congress shortly after Taney's opinion was issued, he reiterated his view that his suspension of the writ was constitutional, thereby clearly implying that his own constitutional judgment justified his disregard of Taney's order.⁵² The day after Lincoln's speech to Congress, his Attorney General issued an opinion making that claim explicit.⁵³

Historically, the force of a federal judgment has been an occasional flashpoint between the Supreme Court and the states and between the Supreme Court and the President, but not between the Supreme Court and Congress. That may be changing. Over the last several years, Congress has begun exploring whether it has the power to thwart the execution of federal judgments it deems erroneous by refusing to fund their execution.⁵⁴ These measures are a new instance of the same basic claim that animated Lincoln, Jackson, and antebellum Pennsylvania: the claim to the authority to nullify federal

49 *Ex parte Merryman*, 17 F. Cas. 144, 147–48 (C.C.D. Md. 1861) (No. 9487). Professor Paulsen observes that Merryman was “a lieutenant in a secessionist cavalry unit that had burned bridges and ripped down telegraph wires to try to prevent a Massachusetts regiment from passing through Maryland.” Paulsen, *supra* note 4, at 278.

50 See Paulsen, *supra* note 4, at 278.

51 See *id.* at 279 n.225 (“After a seven-week stay in Fort McHenry, Merryman was indicted by a federal grand jury in Maryland, transferred to civil jurisdiction, released on bail, and never brought to trial. The Union did release him much later.”).

52 See Abraham Lincoln, Special Session Message (July 4, 1861), in 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 3221, 3226 (James D. Richardson ed., 1897).

53 See Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att’y Gen. 74, 85 (1861).

54 See generally Jennifer Mason McAward, *Congress’ Power to Block Enforcement of Federal Court Orders*, 93 IOWA L. REV. (forthcoming 2008) (manuscript at 60–63), available at <http://ssrn.com/abstract=997879> (considering the constitutionality and propriety of such attempts). Thus far, these appropriations measures have targeted judgments from the inferior federal courts. For example, the House of Representatives recently proposed defunding the enforcement of the Ninth Circuit’s judgment in *Newdow v. U.S. Congress*, 292 F.3d 597, 612 (9th Cir. 2002), (holding unconstitutional the reference to God in the Pledge of Allegiance), *rev’d on other grounds sub nom.* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004), and the Eleventh Circuit’s judgment in *Glassroth v. Moore*, 335 F.3d 1282, 1297 (11th Cir. 2003) (holding unconstitutional the display of a Ten Commandments monument in the Alabama State Judicial Building).

judgments resting on contested constitutional interpretations.⁵⁵ These measures also underscore that, despite its relatively infrequent assertion in the sweep of history, the claim to this authority has more than theoretical importance.

II. RESISTING SUPREME COURT OPINIONS

Edward Hartnett has reminded us that there is a distinction between the Supreme Court's judgments and its opinions.⁵⁶ While the force of federal judgments is rarely challenged, the force of Supreme Court opinions is a matter of considerable controversy. Unsurprisingly, the Supreme Court itself has taken the position that its opinions are the law of the land.⁵⁷ Predictably, public officials have challenged that position. Many of these instances are well known, as the debate about the force of Supreme Court opinions is well traveled.⁵⁸ Nonetheless, it is worth briefly calling at least a few of them to mind.

The impetus for this Symposium is South Dakota's passage of legislation inconsistent with the Supreme Court's abortion jurisprudence. If South Dakota's action represents a state challenge to the Court's authority to bind it, that challenge is one with historical antecedents. As is the case with resistance to Supreme Court judgments, however, those antecedents are truly historical. During the antebellum period, the states defied the authority of federal court interpretations of law on at least thirty-two occasions.⁵⁹ During the twentieth

55 Cf. McAward, *supra* note 54 (manuscript at 9) (noting that Representative Hostettler defended such measures on the ground that "Congress is obligated and empowered to correct the federal courts' constitutional errors").

56 See Hartnett, *supra* note 3, at 126.

57 See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (asserting that "the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding'").

58 For just a few of the many articles debating this question, see, for example, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347 (1994); Hartnett, *supra* note 3; Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987); Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L. REV. 991 (1987); Paulsen, *supra* note 4.

59 See GOLDSTEIN, *supra* note 5, at 20. One example stems from the Supreme Court's decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). After that case was decided, the Ohio legislature passed resolutions refusing to be bound by the opinion and reasserting its agreement with the Kentucky Resolutions of 1798-1799. See Warren, *supra* note 8, at 16. Another is the controversy surrounding *Ableman v.*

and twenty-first centuries, by contrast, such blatant defiance (as opposed to subtle subversion) has been relatively rare.⁶⁰ The most vivid modern example of blatant defiance is that of Governor Faubus calling out the Arkansas National Guard to prevent the desegregation demanded by *Brown v. Board of Education*.⁶¹ Since the aftermath of *Brown*, states have not launched any real challenge to the Court's interpretive supremacy.⁶² To the extent that South Dakota is firing a shot over the federal-state divide, it is reopening a political debate about federal judicial supremacy that has been basically dormant since the southern showdowns over desegregation.

The President is the nonjudicial actor who has most frequently and consistently asserted the power to disagree with the Supreme Court in matters of constitutional interpretation. There are several

Booth, 62 U.S. (21 How.) 506 (1859). The Wisconsin Supreme Court granted habeas corpus to a newspaper editor convicted in federal court of violating the Fugitive Slave Act on the ground that the Act was unconstitutional, *see id.* at 508, and the United States Supreme Court reversed that decision, holding that the Wisconsin Supreme Court lacked jurisdiction to issue the writ and that, in any event, it was wrong about the constitutionality of the Act, *see id.* at 525–26. The Wisconsin legislature adopted a declaration refusing to accept the Supreme Court's opinion in either respect. *See Wisconsin Defies Federal Courts*, in STATE DOCUMENTS ON FEDERAL RELATIONS 303, 303–05 (Herman V. Ames ed., DeCapo Press 1970).

60 Even when states do not openly deny the binding effect of Supreme Court opinions, they sometimes indirectly do so by failing to comply fully with them. *See, e.g.*, Norman Lefstein et al., *In Search of Juvenile Justice and Its Implementation*, in THE IMPACT OF SUPREME COURT DECISIONS 175, 175–85 (Theodore L. Becker & Malcolm M. Feeley eds., 2d ed. 1973) (presenting data revealing spotty state compliance with *In re Gault*, 387 U.S. 1, 34–41 (1967), which held that juveniles have a right to counsel in delinquency hearings); *cf.* *Staub v. Baxley*, 355 U.S. 313, 318–21 (1958) (asserting that states cannot use procedural devices to avoid vindicating the assertion of federal rights).

61 349 U.S. 294 (1955); *see Cooper*, 358 U.S. at 8–15 (1958) (describing the stand-off). Governor Faubus defied both the Supreme Court's opinion in *Brown* and the district court order implementing it. Although two aspects of federal authority were at stake, Governor Faubus focused primarily on the claim that *Brown* did not bind him, and that was the claim to which the Court gave most attention in *Cooper*. *See id.* at 16–20. Governor Faubus was not alone in his opposition to *Brown*; the decision prompted massive resistance from the southern states. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 394–421 (2004). Albert P. Blaustein and Clarence C. Ferguson, Jr. have observed that until *Brown*, the debates about interposition and nullification had been “[v]irtually dormant for more than eighty years.” Albert P. Blaustein & Clarence C. Ferguson, Jr., *Avoidance, Evasion, and Delay*, in THE IMPACT OF SUPREME COURT DECISIONS, *supra* note 60, at 100, 102.

62 *Cf.* Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1143 (1999) (“Virtually all state courts agree that they are bound by U.S. Supreme Court decisions interpreting federal law.”).

oft-recounted examples of presidential refusal to follow the Court. Once again, Abraham Lincoln and Andrew Jackson loom large in the debate. Abraham Lincoln famously denied the binding effect of the Court's opinion in *Dred Scott v. Sandford*.⁶³ Andrew Jackson vetoed, on constitutional grounds, legislation to recharter the Bank of the United States,⁶⁴ despite the fact that the Supreme Court had already held the Bank to be constitutional.⁶⁵ Neal Devins and Louis Fisher point out that many other Presidents, including Franklin Delano Roosevelt, Richard Nixon, Ronald Reagan, and Bill Clinton have similarly claimed the prerogative to disagree with the Court in matters of constitutional interpretation.⁶⁶ Indeed, Professor Hartnett claims that "executive actions premised on disagreement with Supreme Court opinions are too numerous to count."⁶⁷

Congress has also acted contrary to Supreme Court opinions, although it has done so less frequently than the President. Child labor is probably the best known example of Congress digging in its heels on a matter of constitutional interpretation.⁶⁸ Despite the Supreme Court's repeated holdings that Congress lacked the authority to regulate child labor,⁶⁹ Congress repeatedly regulated child

63 60 U.S. (19 How.) 393 (1857); see Abraham Lincoln, From Sixth Lincoln-Douglas Debate, Quincy, Illinois (Oct. 13, 1858), in *SELECTED SPEECHES AND WRITINGS BY ABRAHAM LINCOLN* 184, 185 (Vintage Books/Library of Am. ed. 1992) (acknowledging the binding effect of the *Dred Scott* judgment, but denying its status "as a political rule which shall be binding on the voter, . . . on the members of Congress or the President.").

64 Andrew Jackson, Veto Message (July 10, 1832), in 2 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897*, at 576, 581-83 (James D. Richardson ed., 1899) (explaining that his veto of the Bank rested on his construing the word "necessary" in Article I more narrowly than the Supreme Court did in *McCulloch*). Of course, Jackson could have vetoed the legislation approving the Bank on any number of grounds, but he went out of his way to note that he was doing so on the constitutional ground.

65 See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 424 (1819).

66 See Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 88-89 (1998) (giving examples).

67 Hartnett, *supra* note 3, at 154.

68 See, e.g., *id.* at 151-52 (recounting the story of the battle between the judiciary and Congress over child labor).

69 See *Hammer v. Dagenhart*, 247 U.S. 251, 276-77 (1918) (holding unconstitutional Congress' attempt to ban from interstate commerce all products made by manufacturers employing children under the age of fourteen), *overruled by* *United States v. Darby*, 312 U.S. 100, 115-17 (1941); see also *Bailey v. Drexel Furniture Co.* (Child Labor Tax Case), 259 U.S. 20, 39 (1922) (holding that Congress lacked the power to impose a ten percent tax on the net income of any manufacturer employing children under fourteen, as such tax was aimed at eliminating child labor, and Congress lacked the power to do so).

labor, until, over twenty years later, the Supreme Court finally acquiesced in Congress' interpretation of the Commerce Clause.⁷⁰ There have been occasions on which Congress has attempted to "overrule" the court legislatively,⁷¹ but, in contrast to its contest with the Court over child labor, it has generally surrendered its position upon the Court's first rebuff.

As this brief narrative reflects, over time there has been a faint but fairly consistent chorus of state and federal actors denying that Supreme Court precedent binds them. There has also been a long-standing debate about whether such claims are legitimate.⁷² It is worth situating this debate in the context of other means of battling Supreme Court precedent. The fight against disfavored precedent is not restricted to head-on challenge; many alternate tools exist. How, if at all, does the availability of alternate means of attack affect bald refusals to abide by Supreme Court precedent? Does the existence of these alternate ways of battling the Court inform the prudence of such outright challenge, even if the power to levy it exists?

III. CONGRESSIONAL OR CONSTITUTIONAL OVERRULING

Unpopular Supreme Court opinions often elicit proposals to "overrule" them by legislation or constitutional amendment.⁷³ It is often difficult to know what to make of such proposals. They may reflect the view that the Supreme Court got it wrong. Or they may reflect the view that the Supreme Court got it right, and thereby exposed some policy defect in the law itself. Whatever their motivation, such responses to unpopular Supreme Court opinions are common, often swift, and have been made since the earliest days of the Court. They are also, at least insofar as constitutional decisions are concerned, rarely successful.

70 *Darby*, 312 U.S. at 116-17.

71 *See infra* notes 83-91 and accompanying text.

72 *See supra* note 58 and accompanying text.

73 The accompanying text discusses legislative responses on the federal level. Interestingly, states have also attempted to override disfavored Supreme Court opinions by passing state statutes or amending state constitutions. For example, in response to *Huidekoper's Lessee v. Douglass*, 7 U.S. (3 Cranch) 1 (1805), the Pennsylvania legislature passed legislation purporting to "overrule" the Court's opinion. *See* I CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 369 (1926). Unsurprisingly, the Supreme Court has greeted these attempts with even less enthusiasm than those made by Congress. *See, e.g.*, GOLDSTEIN, *supra* note 5, app. a, at 169 (describing the Supreme Court's rejection of an Ohio constitutional provision purporting to overrule a Supreme Court opinion).

The story of the Eleventh Amendment, passed in direct response to the Supreme Court's decision in *Chisholm*, is well known.⁷⁴ The successful "overruling" of *Chisholm* ought not give the impression that many other Supreme Court decisions have been overridden in similar fashion. On the contrary, the Eleventh Amendment is one of only five amendments successfully added to the Constitution in direct response to a Supreme Court decision. (The others are the Fourteenth Amendment,⁷⁵ the Sixteenth Amendment,⁷⁶ the Nineteenth Amendment,⁷⁷ and the Twenty-Sixth Amendment.⁷⁸) Far more common are the failed proposals. To name just a few: the Child Labor Amendment⁷⁹, the School Prayer Amendment,⁸⁰ and the Flag Desecration

74 See, e.g., 1 JULIUS GOEBEL, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 728 (1974) (describing the reaction to *Chisholm*).

75 Section 1 of the Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It superseded *Dred Scott*, which held that African Americans were not citizens of the United States and enjoyed none of the privileges and immunities of citizenship. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404–06 (1857).

76 The Sixteenth Amendment provides: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." It was passed in response to *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), which held that a federal income tax enacted in 1894 violated the Constitution because it was a direct tax not apportioned as required by Article I, Section 9 of the Constitution. See *id.* at 555.

77 The Nineteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." It was passed in response to *Minor v. Happersett*, 88 U.S. 162 (1875), which held that suffrage was not a necessary attribute of citizenship and that a state constitution could thus restrict voting to male citizens. See *id.* at 170–78.

78 The Twenty-Sixth Amendment provides: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." It was passed in response to *Oregon v. Mitchell*, 400 U.S. 112 (1970), which held that the federal government did not have the authority to lower the voting age for state and local elections to eighteen. See *id.* at 118 (opinion of Black, J.).

79 See, e.g., David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1475–76 (2001). The Child Labor Amendment would have permitted Congress to regulate or forbid the use of child labor. See *id.* It was proposed in response to *Hammer v. Dagenhart*, 247 U.S. 251 (1918), and the *Child Labor Tax Case*, 259 U.S. 20 (1922), which had struck down previous attempts by Congress to prohibit interstate shipment in goods made by child labor and to regulate such goods via taxation. See *id.* at 39, 44; *Hammer*, 247 U.S. at 275–77.

Amendment.⁸¹ It is unlikely that the large number of failures reflects anything about responses to the Supreme Court in particular. The Constitution is difficult to amend, period.⁸²

Legislation seeking to override or at least circumvent an unpopular constitutional decision is easier to pass than a constitutional amendment and has accordingly been passed more frequently. The Court does not look kindly on such attempts. The Partial-Birth Abortion Ban Act of 2003,⁸³ passed to undermine *Stenberg v. Carhart's*⁸⁴ protection of partial-birth abortion, is a rare example of congressional success in this regard. Despite what some perceived as considerable tension with the Court's earlier opinion, the Court upheld that legislation.⁸⁵ The more common response to congressional incursions into

80 See, e.g., Geoffrey R. Stone, *In Opposition to the School Prayer Amendment*, 50 U. CHI. L. REV. 823, 826–27 (1983). The School Prayer Amendment would have rendered illegal any prohibition on voluntary individual or group prayer in public schools or institutions. See *id.* It was proposed in response to *Engel v. Vitale*, 370 U.S. 421 (1962), and *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), which had invalidated state policies requiring daily prayers and Bible readings in public schools. See *id.* at 205; *Engel*, 370 U.S. at 422–24.

81 See, e.g., George Anastaplo, *Constitutionalism and the Good: Explorations*, 70 TENN. L. REV. 737, 834–35 (2003). The Flag Desecration Amendment would have permitted Congress and the States to forbid the flag's physical desecration. See *id.* It was proposed in response to *Texas v. Johnson*, 491 U.S. 397 (1989), which held that flag burning was protected by the First Amendment. See *id.* at 399.

82 As of 2001, there had been 11,262 proposals to amend the Constitution. 3 PROPOSED AMENDMENTS TO THE U.S. CONSTITUTION 1787–2001, at 1600, 1663 (John R. Vile ed., 2003). This number represents a combination of the Congressional Research Service's count of proposals to amend the Constitution from 1789–1990 and James Vile's count of proposed amendments from 1991–2001. The Constitution contains only twenty-seven amendments—or, by some counts, twenty-six. See generally Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 CONST. COMMENT. 101 (1994) (describing the controversy over the Twenty-Seventh Amendment's validity).

83 Pub. L. No. 108-105, 117 Stat. 1201, 1201–08 (codified at 18 U.S.C. § 1531 (Supp. IV 2004)).

84 530 U.S. 914, 945–46 (2000) (holding unconstitutional a Nebraska statute forbidding partial-birth abortion); see also *Gonzales v. Carhart*, 127 S. Ct. 1610, 1643 n.4 (2007) (Ginsburg, J., dissenting) (“The [Partial-Birth Abortion Ban Act of 2003’s] sponsors left no doubt that their intention was to nullify our ruling in *Stenberg*.”).

85 See *Gonzales*, 127 S. Ct. at 1639 (majority opinion). The Act did not directly override *Stenberg* insofar as it accounted for some of the concerns that the Supreme Court expressed in that opinion. See *id.* at 1630–31 (describing the differences between the Nebraska and the federal statutes). It did, however, severely restrict the reach of the decision insofar as it honored only the narrowest reading of it. Cf. *id.* at 1652–53 (Ginsburg, J., dissenting) (complaining that the majority decision is unfaithful to precedent and essentially permits a “legislative override of our Constitution-based rulings”).

the Court's constitutional case law is rejection. For example, the Court held unconstitutional the Religious Freedom Restoration Act of 1993 (RFRA),⁸⁶ designed to replace outright the Supreme Court's interpretation of the Free Exercise Clause with Congress' own.⁸⁷ It held unconstitutional 18 U.S.C. § 3501, the statute designed to supersede the Court's interpretation of the Fifth Amendment in *Miranda v. Arizona*.⁸⁸ And the Flag Protection Act of 1989,⁸⁹ passed to counteract the Court's decision in *Texas v. Johnson*,⁹⁰ died the very next year with the Court's review of it in *United States v. Eichman*.⁹¹ As this pattern suggests, the Court has made perfectly clear its view that it is the ultimate interpreter of the Constitution, but that has not stopped Congress from continuing to test the limits of that claim.

IV. JUDICIAL OVERRULING

It is typically more fruitful for nonjudicial actors to seek overruling in the Court itself than overruling by constitutional or congressional means.⁹² Stare decisis is not a hard and fast rule, and the Court has shown itself willing on any number of occasions to reverse course entirely in its interpretation of the Constitution. The trick for nonjudicial actors is offering the Court an opportunity to do so. Sometimes, nonjudicial actors can create a test case by putting at issue the con-

86 Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2000)), *invalidated in part by City of Boerne v. Flores*, 521 U.S. 507 (1997).

87 In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that the Free Exercise Clause did not bar the application of neutral, generally applicable laws to religious practices. *See id.* at 885. RFRA, which attempted to restore the pre-*Smith* understanding that state actors cannot burden the free exercise of religion in the absence of a compelling interest, was a "direct response" to this decision. *See Boerne*, 521 U.S. at 512. The Court held RFRA unconstitutional on the ground that Section 5 of the Fourteenth Amendment does not grant Congress the power to define what the Constitution requires, as opposed to the power to remedy violations of it. *See id.* at 519.

88 384 U.S. 436 (1966); *see Dickerson v. United States*, 530 U.S. 428, 444 (2000) (holding that "*Miranda* announced a constitutional rule that Congress may not supersede legislatively").

89 Pub. L. No. 101-131, 103 Stat. 777 (codified at 18 U.S.C. § 700 (2000)).

90 491 U.S. 397, 420 (1989) (holding unconstitutional, on First Amendment grounds, a Texas statute that prohibited desecrating a flag).

91 496 U.S. 310, 319 (1990) (holding that the Flag Protection Act violated the First Amendment).

92 *See Michael Klarman, What's So Great About Constitutionalism?*, 93 Nw. U. L. Rev. 145, 181 (1998) ("Occasionally [judicial interpretations of the Constitution] are overruled by formal Article V methods. More frequently, they are overruled by the course of events or by subsequent judicial decisions.").

duct of others. For example, a private citizen might challenge a state's regime of segregated education, even though the system would be constitutional according to the Court's then-existing jurisprudence.⁹³ Other times, nonjudicial actors can create test cases only by themselves acting in a way that contradicts the Court's then-existing jurisprudence. This might be what South Dakota was doing with its abortion ban: provoking a challenge to its conduct that would give the Supreme Court an opportunity to retroactively justify it. This means of testing precedent presents a sticky problem for the government actor.

Take South Dakota. Assume that the state was perfectly willing to accept the basic proposition that the Supreme Court's interpretations of the Constitution are the law of the land. In other words, assume that South Dakota did not subscribe to Governor Faubus' position that it could treat its own constitutional interpretation as sound even in the face of contrary Supreme Court precedent. It just believed that the Supreme Court would have overruled *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁹⁴ if given the chance. But giving the Supreme Court that chance put South Dakota in a bind. South Dakota could not elicit an advisory opinion from the Supreme Court on the viability of *Roe*. Justiciability requirements mean that the Court can only act when presented with a live case.⁹⁵ Creating a live case, however, required South Dakota to act in a way that contradicted *Roe* and *Casey*. If the Supreme Court is right to characterize its opinions as the functional equivalent of the Constitution itself—supreme law that both state and federal actors are bound by oath to uphold—then South Dakota could only create a test case by deliberately acting unconstitutionally.⁹⁶

The above dilemma underscores that even those who support the Court's interpretive supremacy must confront the question of what it means to say that Supreme Court opinions "bind." Requiring unwavering obedience would leave many opinions susceptible to change only by constitutional amendment—an approach at odds with the

93 See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

94 505 U.S. 833 (1992).

95 See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

96 U.S. CONST. art. VI, cl. 3 (providing that "the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution"); cf. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (interpreting the Article VI oath as requiring state and federal officers to uphold the Court's interpretations of the Constitution).

Court's generally flexible approach to constitutional stare decisis.⁹⁷ At the same time, widespread disobedience would undermine the ostensibly binding effect of these opinions entirely. Should we seek middle ground? If so, where is it?

V. COURT PACKING, JURISDICTION STRIPPING, AND OTHER INDIRECT ATTACKS

With some frequency, nonjudicial actors have registered disagreement with Supreme Court opinions indirectly, by launching an institutional attack on the Court. Jurisdiction-stripping legislation is a common instance of this kind of attack. When the Supreme Court hands down a controversial decision, opponents of it often respond with a proposal to modify the Court's jurisdiction so as to remove future similar cases from the Court's docket (and, for that matter, all federal dockets), typically leaving their resolution to the state courts.⁹⁸ Jurisdiction-stripping measures have been introduced on any number of topics, including school prayer, abortion, busing, and affirmative action.⁹⁹ Most of the time, these proposals die in Congress.¹⁰⁰ Very

97 *Cf. Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting) (asserting that while statutory cases are rarely overruled, stare decisis ought to be more flexible in cases “involving the Federal Constitution, where correction through legislative action is practically impossible”), *overruled in part by Helvering v. Bankline Oil Co.*, 303 U.S. 362 (1938), *and Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938). Note that the qualified immunity standard already goes a long way toward insulating many opinions from change, despite the Court's flexible approach to constitutional stare decisis. That standard deprives government officials of immunity when they violate “clearly established” law. *See Saucier v. Katz*, 533 U.S. 194, 202 (2001) (asserting that an officer loses qualified immunity if the law puts him on notice that his conduct is “clearly unlawful”). Thus, those who execute the law cannot test the strength of any “clearly established” law without risking personal liability.

98 Jurisdiction-stripping proposals have not always left the state courts as the default adjudicators. Sometimes, states or members of Congress have proposed creating an alternative tribunal to handle a subject-specific slice of the Court's workload. For example, in 1819, in response to *McCulloch*, Virginia instructed its senators to propose a constitutional amendment creating a special tribunal for cases addressing questions of federalism. *See* GOLDSTEIN, *supra* note 5, app. a, at 163. In 1871, Kentucky proposed in the Senate a constitutional amendment that would have created a separate tribunal comprised of one member from each state to decide all constitutional questions. *See* Warren, *supra* note 8, at 188.

99 For a description of jurisdiction proposals introduced in Congress over time, see RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 321–22 (5th ed. 2003).

100 *See* Jesse H. Choper & John C. Yoo, *Wartime Process: A Dialogue on Congressional Power to Remove Issues from the Federal Courts*, 95 CAL. L. REV. 1243, 1244 (2007) (noting that before the Detainee Treatment Act of 2005, Congress had only passed two stat-

occasionally, they do become law—as did the Detainee Treatment Act of 2005,¹⁰¹ which, in response to the Court's decision in *Rasul v. Bush*,¹⁰² forbids any federal court to hear a petition for a writ of habeas corpus filed by an enemy combatant held at Guantanamo Bay.¹⁰³

Court opponents do not always set their sights on the Court's docket. Sometimes they try to move the Court away from objectionable precedent through personnel changes. Franklin Delano Roosevelt's court-packing plan is a case in point. Roosevelt, frustrated by Supreme Court opinions holding unconstitutional various New Deal initiatives, proposed retirement ages for the Justices, along with an increase in the number of Justices by the number of those who would not retire once they reached the specified age.¹⁰⁴ The hope, obviously, was that Roosevelt appointees would review sympathetically legislation he favored. Modern confirmation struggles spring from the same well insofar as partisans on all sides desire to control Supreme Court precedent by controlling its personnel.¹⁰⁵

The states lack direct control of the Court's jurisdiction and composition. But they can exert their influence over those who do. In response to the 1823 case *Green v. Biddle*,¹⁰⁶ which held unconstitu-

utes, one during the Reconstruction period and the other during the New Deal, clearly removing cases from the jurisdiction of the federal courts).

101 Pub. L. No. 109-48, div. A, tit. X, 119 Stat. 2739 (codified at 10 U.S.C.A. § 801 note, 28 U.S.C.A. § 2241, and 42 U.S.C.A. §§ 2000dd to 2000dd-1 (West Supp. 2007)).

102 542 U.S. 466, 483 (2004) (holding that the federal habeas statute gave the district court jurisdiction to hear habeas petitions filed by aliens held at Guantanamo Bay).

103 Detainee Treatment Act of 2005 § 1005(e)(1), 119 Stat. at 2742 (codified at 28 U.S.C.A. § 2241).

104 WILLIAM E. LEUCHTENBERG, *THE SUPREME COURT REBORN* 133–34 (1995) (describing the court-packing plan); cf. GOLDSTEIN, *supra* note 5, app. a, at 165 (describing a proposal to make federal judges removeable upon the request of both houses of Congress and presidential consent); Warren, *supra* note 8, at 165 (describing an 1832 proposal to amend the Constitution to limit the term of office of federal judges). Barry Friedman points out that one of the more dramatic efforts to control judicial personnel was the impeachment of Federalist judges by the Republican Congress. See Barry Friedman, "Things Forgotten" in the Debate over Judicial Independence, 14 GA. ST. U. L. REV. 737, 740–41 (1998) (describing the impeachments of Justice Samuel Chase and Judge John Pickering).

105 Cf. Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 381 (2007) ("It is well documented that the Reagan Justice Department self-consciously and successfully used judicial appointments to alter existing practices of constitutional interpretation.").

106 21 U.S. (8 Wheat.) 1 (1823).

tional Kentucky's "occupying claimant" laws,¹⁰⁷ Kentucky tried to engineer all manner of indirect attack on the Court: court packing, jurisdiction stripping, and some heavy-handed procedural regulation for good measure.¹⁰⁸ After the case was handed down, the Kentucky legislature sent Congress a formal remonstrance of the Supreme Court's decision.¹⁰⁹ The document contained a lengthy defense of Kentucky's views on the legal questions at stake as well as a claim that the primary responsibility for determining the constitutionality of any piece of legislation lay with the state itself.¹¹⁰ In making this claim, Kentucky did not altogether deny that the Supreme Court possessed the power of judicial review. Instead, it argued that the Court's right to hold any state law unconstitutional was restricted to those instances in which a state *egregiously* misjudged the constitutional limits upon its power.¹¹¹ To keep the Court so contained, Kentucky asked Congress to pass a law requiring that state laws be held invalid only upon the

107 *Id.* at 17. The "occupying claimant" laws were designed to protect the property rights of those occupying land as against those with competing claims to title. For a description of the conflict between Kentucky's "occupying claimants" and others with claims on land within Kentucky, see Paul W. Gates, *Tenants of the Log Cabin*, 49 *MISS. VALLEY HIST. REV.* 3, 4–10 (1962).

108 *Biddle* was a decision that, according to one Kentucky lawmaker of the time, "convulsed [Kentucky] to its very centre." 41 *ANNALS OF CONG.* 28 (1823) (statement of Sen. Johnson); see also 1823 Ky. Acts 516 (resolving that the Kentucky legislature "do hereby most solemnly protest, in the name and on behalf of the good people of Kentucky, against the erroneous, injurious and degrading doctrines of the Supreme Court of the United States, pronounced at the last session of that Court, in the case of Green and Biddle").

109 A Remonstrance to the Congress of the United States on the Subject of the Decision of the Supreme Court of the United States on the Occupying Claimant Laws of Kentucky, 1824 Ky. Acts 520; see also 42 *ANNALS OF CONG.* 2514 (1824) (statement of Rep. Letcher) (communicating the remonstrance to the House); 41 *ANNALS OF CONG.* 290 (1824) (statement of Sen. Talbot) (communicating the remonstrance to the Senate).

110 1824 Ky. Acts 526 ("It is the high prerogative of the Legislature, to correct whatever errors it may commit, within the legitimate sphere of its action. It is only when it transcends obviously and palpably, the limits assigned by the constitution, to the exercise of its powers, that the judiciary can vacate its enactments."); see also 42 *ANNALS OF CONG.* 2531–32 (1824) (statement of Rep. Wickliffe) (defending occupying claimant laws on the ground that both the Kentucky legislature and the Kentucky Supreme Court believed the laws constitutional).

111 1824 Ky. Acts 526. In this respect, Kentucky's claims resemble those advanced by Pennsylvania in *Peters*. See *supra* notes 29–31 and accompanying text. Both states asserted the right to act on their own interpretation of the Constitution, but neither portrayed that right as unqualified.

concurrence of at least two-thirds of the Court,¹¹² and that in such cases, the Justices be required to produce signed, seriatim opinions.¹¹³ In addition, in a move that foreshadowed Roosevelt's court-packing plan, Kentucky asked Congress "to increase[] the number of the judges, and thereby multiply[] the chances of the states, to escape the like calamities . . . by . . . an increased volume of intellect upon all such questions."¹¹⁴ Kentucky's claim that more Justices were needed to increase the Court's intellectual depth was no more sincere than Roosevelt's claim that more Justices were needed to disperse the Court's workload. The Justices that Kentucky proposed adding were all to come from states with interests similar to Kentucky's.¹¹⁵ Although the Kentucky proposals ultimately failed,¹¹⁶ they were debated in both the House and Senate with considerable passion for several years.¹¹⁷

112 1824 Ky. Acts 527. Once such legislation was proposed in the Senate, it extended the supermajority requirement to the invalidation of federal legislation as well. See 41 ANNALS OF CONG. 28 (1823) (statement of Sen. Johnson) (describing a proposal that, inter alia, required "a concurrence of at least seven judges in any opinion, which may involve the validity of the laws of the United States, or of the States respectively"). Kentucky's proposal in this regard was not the only one of its kind. See, e.g., Warren, *supra* note 8, at 188 (describing a bill introduced in the House in January of 1867 that would have required constitutional questions to be heard by a full bench and decided only upon unanimous consent); *id.* (describing an 1868 bill that passed the House that would have required a two-thirds majority to hold invalid any state law).

113 This portion of Kentucky's proposal was added when it was introduced to the Senate. See 41 ANNALS OF CONG. 32 (1823) (amending the resolution to require that in such cases, "the opinions of the judges should be given separately, and recorded").

114 1824 Ky. Acts 527.

115 Kentucky proposed adding three new judicial circuits, each with a new Justice to match. One circuit was to be composed of Tennessee and Alabama; another of Mississippi and Louisiana; and one of Indiana, Illinois, and Missouri. 41 ANNALS OF CONG. 38 (1823) (describing proposal); see also *id.* at 575-76 (statements of Sens. Johnson and Talbot) (emphasizing the need for the circuit system to represent the interests of western states).

116 For a description of the fate of the various bills that grew from this proposal, see GOLDSTEIN, *supra* note 5, at 187 n.5.

117 The Kentucky legislature's remonstrance was communicated to Congress in 1824. See *supra* note 109. In 1827, Kentucky lawmakers were still pushing to curb the Court's power. See, e.g., 3 REG. DEB. 775-76 (1827) (statement of Rep. Wickliffe) (urging the House to consider, once again, Kentucky's proposal related to the Supreme Court). Kentucky's anger at the Court was further fueled over this time period by the Court's decisions in *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), and *Bank of the United States v. Halstead*, 23 U.S. (10 Wheat.) 51 (1825), cases undermining Kentucky laws that postponed the execution of judgments against debtors.

One question this Symposium addresses is the degree to which the Supreme Court ought to take the views of nonjudicial actors into account.¹¹⁸ In that regard, it is worth considering the effect that both Roosevelt's court-packing plan and Kentucky's post-*Biddle* proposals may have had on the Court. Causation is difficult to establish, but coincidence is easy to observe. Roosevelt's proposed court-packing plan was followed by the proverbial "switch in time that saved nine."¹¹⁹ Similarly, while Kentucky's proposed supermajority requirement was never adopted by Congress, a version of it was ultimately adopted by the Court itself.¹²⁰ Assume arguendo that the Court permitted political pressure to shape its behavior in both of these instances. Should it have done so?

VI. THE COURT OF PUBLIC OPINION

Nonjudicial actors have also registered disagreement with the Court by taking it to task in the court of public opinion. Memorably, when the Supreme Court decided *Bush v. Gore*,¹²¹ 554 law professors took out a full page ad in the *New York Times* condemning the decision.¹²² More commonly, critiques of Court decisions appear on editorial pages and in news magazines.¹²³ They also occur inside the

118 See Thomas Healy, *Stare Decisis and the Constitution: Four Questions and Answers*, 83 NOTRE DAME L. REV. 1171, 1219–24 (2008); Kermit Roosevelt III, *Polyphonic Stare Decisis: Listening to Non-Article III Actors*, 83 NOTRE DAME L. REV. 1303, 1319–31 (2008).

119 Compare LEUCHTENBURG, *supra* note 104, at 142–44 (depicting a causal connection between the court-packing plan and the Supreme Court's jurisprudential turn), with G. Edward White, *Cabining the Constitutional History of the New Deal in Time*, 94 MICH. L. REV. 1392, 1399–416 (1996) (book review) (questioning Leuchtenburg's thesis).

120 See *City of N.Y. v. Miln*, 33 U.S. (8 Pet.) 120, 122 (1834) ("The practice of this Court is, not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in the opinion, thus making the decision that of a majority of the whole court."); see also Warren, *supra* note 8, at 165 ("It is evident that the Supreme Court itself took warning by the character of some of the measures introduced to change its methods.").

121 531 U.S. 98 (2000).

122 Advertisement, *554 Law Professors Say*, N.Y. TIMES, Jan. 13, 2001, at A7. The advertisement was placed by the People for the American Way.

123 See, e.g., Editorial, *The Court's Troubling Term*, N.Y. TIMES, July 3, 2002, at A22 (criticizing, inter alia, *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002), which upheld a school voucher program against an Establishment Clause challenge); John Leo, *The Supreme's Sophistry*, U.S. NEWS & WORLD REP., July 14, 2003, at 7 (criticizing, inter alia, *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003), which held unconstitutional a Texas law criminalizing same-sex sodomy); Editorial, *A Supreme Court Retreat*, WASH. POST, Mar. 29, 1991, at A20 (criticizing *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), which held that the harmless error rule applies to the admission of a

profession, in the law reviews, casebooks, and classrooms that influence the opinions of both lawyers-to-be and the professors who teach them.

Perhaps one of the most interesting forms of public argument about the Court is one that has emerged relatively recently in the Court's history: demonstrating before it. Public protests in front of the Court, at least those of any scale, did not begin in earnest until the 1960s and 70s.¹²⁴ Since then, if newspaper coverage is any gauge, demonstrations before the Court have quickly moved from the exception to the rule, at least in high-profile cases.¹²⁵ For example, in 1987, hundreds of gay men and women attempted to enter the Supreme Court building in protest of the Court's decision in *Bowers v. Hardwick*,¹²⁶ which upheld the enforcement of a Georgia sodomy law against homosexuals.¹²⁷ In 2002, death penalty opponents protested the Court's refusal to hold capital punishment unconstitutional with

coerced confession); Editorial, *An Outrage*, NAT'L REV. ONLINE, June 30, 2006, <http://author.nationalreview.com/?q=MjE1MQ==&p=MjAwNg==> (follow "An Outrage" hyperlink under "June 2006") (criticizing *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2793 (2006), which, inter alia, held the Geneva Conventions applicable to the trial of an alien detained at Guantanamo Bay on terrorism-related charges).

124 An early, and perhaps even the earliest, protest at the Court in response to a Supreme Court opinion occurred on May 29, 1968, when angry demonstrators from the Poor People's Campaign, representing the interests of Indians, stormed the Supreme Court in response to a ruling upholding the State of Washington's right to specify when fishing could take place in the state. See Earl Caldwell, *High Court Building Stormed in Demonstration by the Poor*, N.Y. TIMES, May 30, 1968, at 1. The first "March for Life," the still-continuing annual protest against *Roe v. Wade*, was held on January 22, 1974, the first anniversary of the decision. See Louis J. Palmer, Jr., *March for Life*, in ENCYCLOPEDIA OF ABORTION IN THE UNITED STATES 208, 208 (2002).

125 The popularity of such protests is the fulfillment of the prophecy uttered by Judge MacKinnon of the D.C. Circuit when the law forbidding them was held partially unconstitutional: "What would start as two lonely peaceful pickets today would eventually lead to the hordes of tomorrow, bannering and distributing leaflets . . . on abortion, school busing, prayers in public schools, civil rights . . . and a host of other issues." *Grace v. Burger*, 665 F.2d 1193, 1213 (D.C. Cir. 1981) (MacKinnon, J., dissenting), *aff'd in part, vacated in part sub nom.* *United States v. Grace*, 461 U.S. 171 (1986).

126 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003); see Lena Williams, *600 in Gay Demonstration Arrested at Supreme Court*, N.Y. TIMES, Oct. 14, 1987, at B8 ("Hundreds of gay men and women deliberately subjected themselves to arrest today by attempting to enter the Supreme Court to protest a 1986 decision upholding enforcement of a Georgia sodomy law against homosexuals.").

127 *Bowers*, 478 U.S. at 189.

thirty-foot long banners reading “Stop Executions!”¹²⁸ The annual “March for Life” protesting *Roe v. Wade* has drawn as many as 36,000 abortion foes, and the last three Republican Presidents have participated in the march either by person or by phone.¹²⁹

The Court holds all of these demonstrations at arm’s length. Protesters are permitted to demonstrate on the sidewalk surrounding the Court, but they face arrest if they cross onto the courthouse steps.¹³⁰ The awkward reception the Court gives demonstrators is emblematic of the Court’s relationship with all of its critics. On the one hand, the Court, as an impartial dispenser of justice, is supposed to be governed by legal argument rather than political pressure. As Justice Scalia has argued, “To expect judges to take account of political consequences—and to assess the high or low degree of them—is to ask judges to do precisely what they should not do.”¹³¹ On the other hand, as the late Chief Justice Rehnquist put it, “[I]f these tides of public opinion are sufficiently great and sufficiently sustained, they will very likely have an effect upon the decision of some of the cases decided within the courthouse.”¹³² The Court itself is caught between

128 Arthur Santana, *7 Cleared in Protest at Supreme Court*, WASH. POST, June 29, 2002, at B1 (describing the protest and the subsequent arrest and acquittal of protestors who climbed the steps of the Court building).

129 See Robin Toner, *A Ringing Endorsement from 700 Miles Away*, N.Y. TIMES, Jan. 22, 2003, at A18 (describing the phone calls made by both Presidents Bush to marchers); see also Robin Toner, *Reagan Exhorts Foes of Abortion at Capital Rally*, N.Y. TIMES, Jan. 23, 1986, at D25 (describing President Reagan’s live address to the roughly 36,000 participants in the 1986 March for Life). This Part, like this Symposium, focuses on the effect of Supreme Court decisions already made. It is worth observing, however, that protestors also convene in front of the Court in an attempt to influence Supreme Court decisions in the making. See, e.g., Elaine Sciolino, *On the Street, More Arguments Were Heard*, N.Y. TIMES, Dec. 12, 2000, at A1 (describing the demonstrations outside the Court while the Court was hearing argument in *Bush v. Gore*, 531 U.S. 98 (2000)).

130 Federal law makes it “unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display in the Building and grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement.” 40 U.S.C. § 6135 (Supp. IV 2004). In *Grace*, the Supreme Court held that statute unconstitutional as applied to demonstrations on Supreme Court sidewalks. See *Grace*, 461 U.S. at 180–84. The Court continues, however, to apply it to demonstrators who cross over onto the courthouse steps. See *id.*

131 *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 920 (2004) (mem. of Scalia, J.); see also *Grace*, 461 U.S. at 183 (“Courts are not subject to lobbying, judges do not entertain visitors in their chambers for the purpose of urging that cases be resolved one way or another, and they do not and should not respond to parades, picketing or pressure groups.”).

132 William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 768 (1986); cf. Cass R. Sunstein, *If People Would Be Outraged by Their Rulings*,

these two positions. Belief that the latter one is right is what animates all those who signal their preferences to the Court, whether through live demonstrations or otherwise.

CONCLUSION

These stories depict just a few examples of the occasions on which both private citizens and public officials have protested decisions of the Supreme Court. Their choice to act on their disagreement with the Court and the means they choose to express it raise a host of questions. What are the limits of the Supreme Court's power to bind nonjudicial actors? Should its judgments be obeyed without question? Its opinions? Should we frown upon attempts to create test cases through a sort of "civil disobedience" to Supreme Court opinions? Is it laudable or despicable to launch institutional attacks on the Court in an attempt to engineer substantive results? Do demonstrations in front of the Court represent a fundamental misconception of the Court's role in our polity?

These stories do not make clear the answer to any of these questions, but they do make clear that disagreement with the Court is as old as the institution itself. Both the longevity of the disagreement and the occasional vehemence with which it is expressed may be a sign of vitality rather than dry rot. As Robert Post and Reva Siegel have observed, "So long as groups continue to argue about the meaning of our common Constitution, so long do they remain committed to a common constitutional enterprise."¹³³

Should Judges Care?, 60 STAN. L. REV. 155, 212 (2007) (arguing that there are circumstances in which "judges legitimately consider public outrage because and to the extent that consequences matter, and because and to the extent that outrage provides information about the proper interpretation of the Constitution").

133 Post & Siegel, *supra* note 105, at 427.

WEDNESDAY, APRIL 02, 2008

Statutory Stare Decisis

The Supreme Court often observes that stare decisis ought to have "special force" in the context of statutory interpretations. The Court usually advances one of two rationales for the rule. Sometimes, it claims that congressional silence following a statutory interpretation opinion reflects congressional acquiescence in it. Other times, it claims that even apart from congressional acquiescence, heightened stare decisis effect respects separation of powers by shifting policymaking responsibility back to Congress, where it belongs. (If you are interested in a fuller explanation of both the doctrine and the criticisms of it, I have an [article](#) about this in the GW Law Review.)

Both of these rationales are subject to almost universal scholarly contempt. (See [here](#) for a notable exception.) Despite that contempt, the principle continues to have traction in the Supreme Court, which professed allegiance to it twice in the last three months. (See [LaRue v. DeWolff](#) and [John R. Sand & Gravel](#)). It also continues to have traction in the [courts of appeals](#), where, as my [GW piece](#) argues, it makes even less sense.

So much for the influence of scholarship on the judges . . .

Posted by Amy Barrett on April 2, 2008 at 12:23 PM in [Constitutional thoughts](#) | [Permalink](#)

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TUESDAY, MARCH 25, 2008

Noogiegate

If you're looking for a scandal now that Eliot Spitzer is off the front pages, this might be just the thing for you. About a year ago, three male FBI agents investigating the gangster Whitey Bulger were meeting with a female AUSA in the Boston federal courthouse. As the meeting ended, one of the agents came up behind the AUSA and "gave her a Three Stooges-style noogie." (For those of you who maybe didn't have older brothers, a noogie is given when someone grabs your head and rubs their nuckles into it.)

This raises all the obvious questions: People still give noogies? Who in their right mind gives noogies in an office? How do you spell "noogie"? But the story gets better (or worse). The noogie-er was none other than the supervisor of the FBI's organized-crime squad in Boston. The three agents then lied about the incident in an ensuing investigation, which lasted for a full year. As a result, the three agents may be fired. And the incident has "inflamed tensions between the FBI's Boston office and the U.S. attorney's office."

Surprisingly, the noogie has received comparatively little scholarly treatment. A noogie is also known as a dutch rub, a monkey scrub, and a Russian haircut. A Westlaw search reveals that difficult participants in mediation have been described as "tough noogies," drug dealers have adopted the nickname "Noogie," and school bus drivers have been disciplined for administering noogies to their charges. An open issue is whether a noogie is a show of affection or an act of assault.

Unfortunately, this literature doesn't reveal many obvious grounds for a successful appeal by the FBI agents. Whether intended as an act of affection or assault, lying about a noogie is serious business. Hopefully tensions can die down and the USAO and the FBI can get back to business of noogie-ing the bad guys. And maybe the three agents can parlay their fifteen minutes of fame into a Stooges merchandising deal.

Posted by Amy Barrett on March 25, 2008 at 07:29 AM | [Permalink](#)

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FRIDAY, MARCH 14, 2008

EZ-Pass or EZ-Ticket?

Since coming late to the daylight-savings-time thing (enacted in 2007),

Indiana

is now getting on board with the EZ-Pass electronic toll collection system on the toll road in the northern part of the state. Obviously this should ease traffic and it has long been in place in other parts of the country.

One question I have is how the electronic data collected will be, or can be, used. If a car gets on the toll road, travels 75 miles, and gets off the toll road in less than an hour, why couldn't the driver be ticketed for speeding based on the fact that he must have exceeded the 75-mph speed limit? Couldn't it be utilized like automatic red-light cameras? Googling the issue reveals [concerns about this](#) but provides no evidence of it happening, but surely budget-strapped police departments would be tempted to use it and divert their troopers for other purposes.

Also, how and how long is the data stored? Could law enforcement subpoena a driver's EZ-Pass records to locate a fugitive or use them as evidence in a criminal case, such as against a cross-country drug courier or a smuggler of illegal aliens? What about subpoenas in civil cases? Apparently such records [already been used](#) in divorce cases to show that a spouse "took the off-ramp to adultery." With technological advances, could the in-car component of the system provide real-time tracking similar to a GPS device?

Some have maintained (my technologically-challenged brain can't evaluate its merit) that the EZ-Pass system could be set up to [avoid some of these tracking issues](#). Even if so, though, the technology would still presumably allow police to use the information to ticket drivers.

All that said, I'll probably sign up just to use the quicker toll lanes. As soon as I get a ticket in the mail, though, I'll be kicking myself.

Posted by Amy Barrett on March 14, 2008 at 01:37 PM | [Permalink](#)

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MONDAY, MARCH 10, 2008

Grape Vodka, Anyone?

When my family moved from Virginia to Indiana and I began teaching at Notre Dame, we knew that living in the Midwest would present a cultural change from the D.C. area. We learned of one unanticipated adjustment on a Sunday afternoon when my family was grocery shopping. We wheeled the cart up to the cashier, loaded with vegetables, fruit, cereal, and an innocent-looking bottle of red wine for dinner. The teenaged cashier looked at us in shock and informed us that, of course, we could not buy wine on Sunday. Chastened, my husband returned the bottle to the wine section of the grocery store and we learned our lesson.

Indiana has a variety of temperance-era laws restricting the sale of alcohol. You cannot buy it on Christmas, Sundays, or election days before the polls close. You cannot buy it between 3:00 A.M. and 7:00 A.M. You also cannot buy hard alcohol (but can buy beer and wine) at grocery stores that do not have a pharmacy. Indiana recently enacted daylight savings time, though, and on the day when the time "sprung forward" a few days ago, sales were allowed until 4:00 A.M.

It turns out that around 19 states have so-called "blue laws" that prohibit alcohol sales on Sunday, although advocacy groups estimate that such laws result in lost annual tax revenue of over \$36 million in some states. Alcohol-control laws vary widely from state to state, ranging from Kansas, which only legalized alcohol in 1948, to Louisiana, where I grew up with drive-through daiquiri stores.

The topic of alcohol in Indiana actually has a fascinating history, which intertwines with the Civil War, the early roots of the political parties, splits between religious denominations, fights between the "wets" and the "drys," and the Ku Klux Klan. Indeed, the Prohibition Party had conventions in Indiana until 1959, was on the ballot until 1968 (when it gained .22% of the vote), and had headquarters in Indiana until 1971.

While the temperance laws still exist, views on the topic may be coming full circle. Capitalizing on the microbrew boom, microdistilleries have been developing in the Midwest and some liquor laws are being relaxed. An article in the Times featured the owner of a distillery in southern Indiana who helped draft an Indiana law that allowed the operation of artisanal distilleries. As

he reports, "I can't make whiskey, but can make anything that would come from raw ingredients for wine. I'm experimenting with grape vodka now." The man's distillery and winery attract 500,000 tourists annually.

I haven't heard of any movement in Indiana to repeal the temperance laws. Maybe that's just as well, because I'm in no hurry to buy grape vodka on Sunday or any other day.

Posted by Amy Barrett on March 10, 2008 at 10:05 PM | [Permalink](#)

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THURSDAY, MARCH 06, 2008

Student Note Title Hall of Shame: YouTube Edition

Overtly cutesy article titles annoy me. It's a particularly severe problem with student notes. Yes, it may have been Bluebooked top-to-bottom and back-to-front. But why didn't anyone ever pull the author aside and say, "Kid, about that title ... ?" I keep a file of terrible article titles, a file full of bad puns, out-of-context song lyrics, and failed jokes. Lately, I've noticed a worrying trend of ill-considered titles for articles about the YouTube copyright litigation. That YouTube's defenses are in part based on the Section 512 "safe harbor" from copyright liability has inspired not just the usual bad names, but some truly regrettable nautical puns:

- Jason C. Breen, *YouTube or YouLose: Can YouTube Survive a Copyright Infringement Lawsuit?*, 16 Tex. Intell. Prop. L.J. 151 (2007)
- Amy R. Mellow, ... *And the Ruling on the Field is Fair: A Fair Use Analysis of Uploading NFL Videos onto YouTube and Why the NFL Should License Its Material to the Website*, 17 S. Cal. Interdis. L.J. 173 (2007)
- Michael Driscoll, *Will YouTube Sail into the DMCA's Safe Harbor or Sink for Internet Piracy?*, 6 J. Marshall Rev. Intell. Prop. L. 550 (2007)
- Lauren Brittain Patten, *From Safe Harbor to Choppy Waters: YouTube, the Digital Millennium Copyright Act, and a Much Needed Change of Course*, 10 Vand. J. Ent. & Tech. L. 179 (2007)
- Kurt Hunt, *Copyright and YouTube: Pirate's Playground or Fair Use Forum?*, 14 Mich. Telecomm. Tech. L. Rev. 197 (2007)
- Jonathan J. Darrow & Gerald R. Ferrera, *Social Networking Web Sites and the DMCA: A Safe-Harbor from Copyright Infringement Liability or the Perfect Storm?*, 6 Nw. J. Tech. & Intell. Prop. 1 (2007) (Messrs. Darrow and Ferrera are actually professors, and ought therefore to know better.)
- Trevor Cloak, *Note: The Digital Titanic: The Sinking of YouTube.com in the DMCA's Safe Harbor.*, 60 Vand. L. Rev. 1559 (2007) ("At its current heading, YouTube, The Digital Titanic, is drifting towards an iceberg and will soon be leaving the placid safe harbor of the DMCA and entering the rocky seas of copyright liability.")

Titles like these do authors no favors. Even when the article itself is solid scholarship, using such a silly title is like starting off a lecture by hitting yourself in the face with a cream pie. It's hard to take what follows seriously.

Posted by James Grimmelmann on March 6, 2008 at 12:37 AM in [Teaching Law](#) | [Permalink](#)

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Listed below are links to weblogs that reference [Student Note Title Hall of Shame: YouTube Edition](#):

COMMENTS

I think the obligatory title pun has been well-established as part and parcel of the student note genre.

Posted by: Miriam Cherry | Mar 6, 2008 4:22:51 AM

The cute title wasn't invented by students. It was invented by professors. Yet, somehow you don't seem to have any ire directed towards them.

Posted by: [S.cotus](#) | Mar 6, 2008 6:00:24 AM

How 'bout the title of a student paper recently submitted to me in a statutory interpretation seminar: "Textual Healing."

Posted by: Amy Barrett | Mar 6, 2008 8:48:28 AM

Actually, my "ire," as S.cotus puts it, is directed primarily at the editors and advisors who stand silently by while these clunkers see print. The student-note writers are new to this game and can be forgiven. It's the professors whom I think "ought . . . to know better." Also, while I haven't done a careful empirical study, it's my sense that the incidence of puns is higher in student article titles, and the incidence of failed puns is much higher.

Posted by: [James Grimmelmann](#) | Mar 6, 2008 9:04:57 AM

I like "Textual Healing." I object to the strained jokes and the ones with no readily apparent connection to the subject of the paper.

Posted by: [James Grimmelmann](#) | Mar 6, 2008 9:07:31 AM

I think you can understand WHY this happens, though: you want your note to jump out at the Westlaw searcher who is trying to

decide which of the 200 or so search results so articles they should actually spend time reading.

But the point you've made in this last comment is the key one -- the pun or joke MUST have some connection to the actual article or else it's just silly.

Posted by: Jason | Mar 6, 2008 9:14:56 AM

Once I had occasion to look into how many law review articles had been published about the First Amendment rights of the homeless to solicit money from passers-by. It occurred to me before I conducted the search that at least one of them would have the expression "beggars' banquet" in the title, even though that expression had nothing to do with the subject matter. IIRC, there were at least two such articles.

Posted by: alkali | Mar 6, 2008 10:43:57 AM

"I keep a file of terrible article titles, a file full of bad puns, out-of-context song lyrics, and failed jokes."

Why?

Posted by: [dave hoffman](#) | Mar 6, 2008 2:11:02 PM

Good blog-post material doesn't just grow on trees.

Posted by: [James Grimmelmann](#) | Mar 6, 2008 4:10:30 PM

Some article title has a full sentence or so from that "Bye Bye Miss American Pie" song.

I'm surprised there's no "perfect storm" in any of the titles:
<http://laughlines.blogs.nytimes.com/2008/01/01/throw-these-under-the-bus/>

Anyway, thanks for pointing out this bizarre trend. Titles like these might make it in a cultural studies journal, but are not exactly going to win over policymakers.

Posted by: Frank | Mar 6, 2008 6:54:34 PM

By the way, I think Dave Hoffman commented on one-word article titles. I guess this formula goes to the opposite extreme:

title = Question presented with metaphorical flourishes designed to give an impression of the thematic unity of the possibilities the article raises

as in: Will the Inducement Liability Hurricane Sweep Into the DMCA Safe Harbor, or Will a Gulf Stream of Popular Support for the Good Ship YouTube Help Protect it (Though its Umbrella of Lawyers May Still Worry About a Waterspout of Inducement Liability or a Freak Hailstorm of Copyright Office Rulemaking)?

Posted by: Frank | Mar 6, 2008 6:59:52 PM

In my defense, my note deals entirely with fair use, not the safe harbor. There was no nautical pun intended. I was merely trying to present the two basic opinions about YouTube, and used "pirate" because it's a word that tends to be favored by those who see collaborative media as a threat to content owners.

Of course, if you're condemning my title for being silly rather than punny, that's perfectly fair (no pun intended).

Posted by: Kurt Hunt | Mar 12, 2008 10:05:00 PM

I had to laugh when I saw your (quite appropriate) criticism of my and Professor Ferrera's article title. The reality is that there is a marketplace for law review articles, with around 1,500 English-language law journals in the world that in the aggregate publish well over 10,000 legal articles per year. Just like any other consumable, articles must be marketed and compete for attention, and titles help to serve that function. It is arguably unfortunate that the result is sometimes overly-cute titles. On the other hand, some of those article titles (and I don't claim that mine is one of them) lend a measure of levity to the sometimes staid field of law.

--Jonathan J. Darrow

Posted by: Jonathan Darrow | Feb 11, 2009 5:13:40 AM

THURSDAY, MARCH 06, 2008

Bobby Jindal and Ethics Reform in LA

As a New Orleans native whose family still lives there, the months since Hurricane Katrina have been full of one heartbreak after another. The devastation of the storm has been followed by disappointment at the failure at all levels of government, particularly state and local, to at least restore the city and state to what it was, or at best, to utilize the opportunity to create something better. Then came Bobby Jindal and the campaign against Ruth's Chris.

Jindal was elected governor in the wake of Katrina. The 36-year-old son of Indian immigrants, a graduate of Brown University and a Rhodes Scholar, has had a fairly remarkable career trajectory. He was secretary of Louisiana's department of health and hospitals, president of a national council on reforming medicare, president of Louisiana's university system, and assistant secretary at HHS. He then ran unsuccessfully for Louisiana governor but, after his loss, was elected to the House of Representatives.

When Jindal was inaugurated in January he became the youngest governor in the country and Louisiana's first non-white governor since Reconstruction. While Rush Limbaugh's endorsement of Jindal as "the next Ronald Reagan" could be a positive or the kiss of death, depending on your viewpoint, as one who cares about Louisiana and removed from any political leanings, I am heartened by his actions since becoming governor. Which brings me to Ruth's Chris.

A prominent plank in Jindal's platform is widespread ethics reform; he campaigned heavily on this topic and called a special session of the legislature to create new ethics rules. Arguing that Louisiana's tawdry reputation for less-than-above-board politics curtailed outside investment, he pushed bills through the legislature that would force most political officials statewide to disclose all sources of income, real estate holdings, and significant debts. State officials can no longer get contracts for various state projects, and lobbyists' expenditures on meals for officials will be capped at \$50.

These reforms sound fairly basic, but the reaction in Baton Rouge -- particularly to the cap on meals -- illustrates the cultural change this could cause. [The Times highlighted](#) the impact this will have on the capitol's Ruth's Chris, and reported that one legislator "said

the limit would force her and her colleagues to dine at Taco Bell, and urged that it be pushed to \$75 per person, to give them 'wiggle room.'" Whether the outside investment spurred by the ethics overhaul will compensate for the reduction in profits for the restaurant industry is, I guess, an outstanding issue.

These changes are certainly timely. As of late 2007, the former governor (Edwin Edwards) was in jail, the former Elections Commissioner had been convicted of money laundering, three Insurance Commissioners in a row had been sent to jail, the Agriculture Commissioner was indicted on bribery charges, and the former President of the State Senate was in jail for money laundering. (For a summary of this recent political corruption, see [here](#).) Add the situations facing William Jefferson and David Vitter, and the ongoing investigation into the former administration of New Orleans mayor Marc Morial, and the corruption is really remarkable. For all the damage wrought by Katrina, maybe this can be a turning point for some of the state's problems. And, since Ruth's Chris moved its headquarters from New Orleans to Florida following Katrina and hasn't come back, I guess I don't care if their business suffers.

Posted by Amy Barrett on March 6, 2008 at 05:41 PM in [Law and Politics](#) | [Permalink](#)

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Sincerely,
MediaMentions

Posted by: [MediaMentions](#) | Mar 6, 2008 6:26:36 PM

As someone who lived in NO in the mid-1980's I've got to say that the whole state was/is run like a third-world country with rampant

corruption. It is amazing that a native New Orleanian is disappointed in the failure of things on a local and state level - clearly you have not been paying attention to things for your whole life.

For heaven's sake, Mississippi is doing a better job in rebuilding. Think about that.

I have to say, I respect and admire Bobby Jindal and I truly believe he will do a fine job for the people of Louisiana.

Posted by: anymouse | Mar 7, 2008 12:18:58 PM

Wow, anymouse, I have to say that was incredibly harsh. Actually, more than harsh - - rude. Of course I am aware of the corruption that has been present in LA politics my whole life. That does not diminish the heartbreak at the way that the corruption has inhibited the recovery from Katrina. Before the storm, corruption was a handicap to the economic development of New Orleans; since the storm, it has been a death blow.

In any event, the point of my post - - which you seem to have missed - - was not to express surprise at post-storm corruption, but to express admiration for Bobby Jindal in making efforts to clean it up.

Posted by: Amy Barrett | Mar 8, 2008 9:43:58 AM

MONDAY, MARCH 03, 2008

Sentencing Guidelines and Retroactivity

Unless you've been in a drug-induced haze, you've probably heard that the United States Sentencing Commission recently amended the Sentencing Guidelines to correct the crack/cocaine disparity. One of their most interesting aspects of these amendments—which became effective today—is that they are retroactive.

I write about fed courts, not criminal law, so the Sentencing Guidelines are outside my bailiwick. But these amendments have been table talk at my house over the last several months because my husband is a federal prosecutor. And because I'm teaching *Teague* right now, the policy issues surrounding retroactivity in the post-conviction context are generally on my mind.

These amendments are apparently the first that the Sentencing Commission has ever made retroactive. (An explanation is [here](#).) [The Department of Justice estimates](#) that over 20,000 inmates will file requests for a reduced sentence. There are a host of issues that arise with the retroactivity of these amendments. (And as you might surmise, the fact that my husband is a federal prosecutor very much concerned about the on-the-ground implications of retroactivity affects the issues that I see.)

Practically, are the courts, prosecutors, probation departments, and marshals equipped to deal with a 25% increase in the number of sentencings performed? Is the defendant entitled to an in-person hearing, obligating the United States marshals to transport the defendant from prison to the court where the sentence was originally imposed and obligating the courts to appoint counsel if the defendant cannot afford one? Legally, what issues can be relitigated? Although the amended Guideline seeks to limit reconsideration only to the impact of the change in the crack-cocaine offense level, courts are not bound to follow that guidance. In light of the recent Supreme Court decisions in *Gall* and *Kimbrough*, can a district judge properly refuse to consider the other sentencing factors identified by the Court at the resentencing? If a prosecutor did not seek an otherwise applicable sentencing enhancement in reliance on the hefty Guidelines score resulting from the fact that the offense involved crack cocaine, is the prosecutor entitled to now seek application of that enhancement? Would a prosecutor still be bound by a provision in a plea agreement in which he agreed to seek a sentence at the low end of the applicable sentencing range, where the Guidelines

setting that range have changed? If a defendant waived his appellate rights in a plea agreement, does that waiver still apply after the resentencing? Regardless of the impact of such a waiver, what appellate rights exist?

This retroactive change also underscores what seems to me an irony in the current federal sentencing regime. The courts must consider requests for new sentences based on amendments to the Guidelines, but because the Guidelines are not mandatory, the courts need not modify the sentences unless they so choose.

Does someone who knows more about this than I do have ideas about how the retroactive aspect of these amendments will be implemented? Was retroactivity a wise call?

Posted by Amy Barrett on March 3, 2008 at 07:45 PM in [Criminal Law](#) | [Permalink](#) | [Comments \(1\)](#) | [TrackBack](#)

SUNDAY, MARCH 02, 2008

An unlikely blogger

Mark Bittman has [this](#) piece in today's Times about his effort to observe a "secular Sabbath" -- a day free of (among other things) email and internet. He describes his fight against the temptation to check his email just before sleeping and immediately upon waking, as well as his frustration at reading the news without hyperlinks. As I begin this guest-blogging stint, I must give full disclosure: I am the antithesis of Bittman. No need for me to institute a "secular Sabbath," as I check my email infrequently on weekends and prefer my newspaper in hard copy. Needless to say, I don't fit the profile of a typical blogger. Nonetheless, I look forward to these next few weeks at PrawfsBlawg. Who knows? By the end of it, I may find myself having to institute a "secular Sabbath."

Posted by Amy Barrett on March 2, 2008 at 09:02 PM | [Permalink](#) | [Comments \(0\)](#) | [TrackBack](#)

THE SUPERVISORY POWER OF THE SUPREME COURT

Amy Coney Barrett*

Relying on something it calls “supervisory power” or “supervisory authority,” the Supreme Court regularly prescribes rules of procedure and evidence for inferior courts. Both scholars and the Court have treated the Court’s exercises of this authority as unexceptional exercises of the inherent authority that Article III grants every federal court to regulate procedure in the course of adjudication. Article III’s grant of inherent authority, however, is conventionally understood as permitting a federal court to regulate its own proceedings. When the Supreme Court exercises supervisory power, it regulates the proceedings of other federal courts. More than a reference to every court’s inherent authority, therefore, is required to justify the Court’s action. If the Supreme Court possesses a unique ability to regulate federal court procedure, it must be because of some unique attribute of the Supreme Court.

This Article explores a justification that may well animate the Court’s assertions of supervisory power: the notion that the Court possesses supervisory power by virtue of its constitutional supremacy. Analyzing this justification requires pursuit of two questions that are wholly unexplored in the literature and case law. Does Article III’s distinction between supreme and inferior courts operate only as a limit on the way that Congress can structure the judicial department, or does it also operate as a source of inherent authority for the Supreme Court? And assuming that the Court’s supremacy grants it inherent authority over inferior courts, is supervisory power over procedure part of the authority granted?

The law in this area is clear. This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals.

—*Dickerson v. United States*¹

INTRODUCTION

The Supreme Court’s relationship to inferior federal courts is not a matter on which the Court typically reflects in any depth. Nevertheless, the Court in *Dickerson* recently expressed great confidence in at least one aspect of that relationship: its authority over inferior federal court procedure, even outside the confines of the statutorily authorized federal rulemaking process. As *Dickerson* suggests, the idea that the Supreme

* Assistant Professor of Law, Notre Dame Law School. I received many helpful comments on previous drafts of this Article from participants in faculty workshops at the University of Illinois College of Law and the Notre Dame Law School. I am particularly grateful to Jesse Barrett, Joe Bauer, A.J. Bellia, Tricia Bellia, Steve Burbank, Brad Clark, Nicole Garnett, Ed Hartnett, Bill Kelley, John Nagle, Caleb Nelson, Jim Pfander, Jack Pratt, Bob Pushaw, Kevin Stack, Amanda Tyler, and Julian Velasco for reading and commenting on earlier drafts. Brian Foster and Jennifer Geelan provided excellent research assistance. Errors are mine.

1. 530 U.S. 428, 437 (2000).

Court possesses supervisory authority over inferior court procedure is well entrenched in its cases. The Court claimed such authority for the first time in 1943,² and since then, it has invoked that authority to announce, through adjudication, a wide range of procedures binding in inferior courts.

Contrary to the Court's assertion in *Dickerson*, however, the law in this area is not clear. The Supreme Court has never justified its claim to power over inferior court procedure. Both the Court and scholars studying it have assumed that the Court's assertions of supervisory authority are legitimate so long as they do not exceed the bounds of the inherent authority that every federal court possesses over procedure.³ But that inherent authority, which is incident to "the judicial Power" that Article III grants every federal court,⁴ has conventionally been understood as authorizing a federal court to regulate its *own* proceedings.⁵ In other words, both scholars and the Supreme Court—albeit without reflection on this point—have treated Article III's grant of inherent authority as a grant of authority over local procedure. In the supervisory power cases, however, the Supreme Court is neither regulating its own procedure nor reviewing an inferior court's regulation of its own procedure for consistency with statutory and constitutional limits. In these cases, the Supreme Court is directly regulating the proceedings of inferior courts. The legitimacy of this exercise, therefore, must be measured by more than the bounds of every federal court's inherent authority. There must be some reason to think that the Supreme Court has the power to make procedural choices for inferior federal courts.

This Article investigates whether the Court's supremacy grants it such power. It is possible that in designating the Court "supreme," Article III endows the Court with some inherent authority over its inferiors, including the authority to prescribe procedures for them. Whether Article III actually does so is an important question, not only for purposes of evaluating the legitimacy of the Court's claim to supervisory power, but also because its answer has implications for two ongoing scholarly debates.

Knowing whether the Supreme Court possesses inherent supervisory authority is relevant to the more general debate about the inherent authority of the federal courts. Scholars have long debated the extent of the federal courts' inherent authority over procedure, and the extent to which the federal courts share that power with Congress.⁶ These discus-

2. See *McNabb v. United States*, 318 U.S. 332, 340 (1943); see also *infra* notes 9–14 and accompanying text.

3. See *infra* notes 41–49 and accompanying text.

4. U.S. Const. art. III, § 1.

5. See *infra* notes 61–63 and accompanying text.

6. For recent articles addressing this topic, see, e.g., Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 *Const. Comment.* 191, 201–29 (2001) (arguing that Congress has limited power to regulate federal court

sions, however, rarely attend to the difference between local and supervisory rulemaking. This Article benefits that debate by focusing on the nature of the inherent authority at stake. Rather than considering the inherent authority of the federal courts in a general sense, it would be worthwhile to focus on whether congressional regulation of procedure potentially infringes on the inherent authority of every federal court to regulate its own procedure, the inherent authority of the Supreme Court to establish procedure for the judicial branch, or both.

Knowing whether the Supreme Court possesses inherent supervisory authority also brings the relationship between the Supreme Court and inferior courts into sharper relief. Scholars have considered a range of ways—including appellate review and vertical stare decisis—in which the Court’s supremacy might entitle it to control inferior courts.⁷ Despite this scholarship, little agreement exists on either the constitutionally required structure of the judicial branch or the Supreme Court’s role within it. This Article’s textual and structural analysis of Article III’s distinction between supreme and inferior courts contributes to the debate about whether Article III establishes a hierarchical judicial branch—and specifically, one in which the Court’s “supremacy” operates not only as a limit on the way Congress may structure the judicial branch, but also as a source of inherent authority for the Supreme Court.

The Article proceeds as follows. Part I lays the foundation for the project by explaining how the Supreme Court uses its supervisory power over inferior courts. Existing cases and commentary entirely overlook the distinction between local and supervisory rulemaking in exercises of inherent authority over procedure. Because they obscure this distinction, they do not analyze the Supreme Court’s exercises of supervisory power any differently than they would analyze a federal court’s exercise of authority over its own procedure. The central aim of this Part is to clarify what existing cases and commentary miss. The Supreme Court is doing more in the supervisory power cases than simply exercising the authority implicit in every federal court’s possession of the judicial power. These cases are different, and a different analysis must apply to them. By carefully distinguishing between local and supervisory rulemaking in exercises of inherent authority, one can more easily see what the Supreme Court is doing, as well as whether there are grounds on which to justify it.

procedure); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 *Yale L.J.* 1535, 1582–94 (2000) (arguing that Congress has broad power to regulate federal court procedure).

7. See, e.g., Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 *Stan. L. Rev.* 817, 828–37 (1994) [hereinafter Caminker, *Inferior Courts*] (arguing that Constitution’s distinction between supreme and inferior courts obligates inferior courts to follow Supreme Court precedents); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 *Tex. L. Rev.* 1433, 1500–12 (2000) [hereinafter Pfander, *Jurisdiction-Stripping*] (arguing that Court is not “supreme” vis-à-vis inferior courts absent some ability to review their judgments).

Parts II through IV analyze whether the Constitution grants the Supreme Court the inherent authority to engage in supervisory rulemaking. Part II begins the analysis with the words “supreme” and “inferior,” which turn out to be surprisingly ambiguous. As Part II explains, it is not at all clear, simply from the terms themselves, that Article III places the Supreme Court at the top of a judicial hierarchy. Founding-era evidence suggests that the terms “supreme” and “inferior” may well describe the differing geographic and subject matter jurisdiction of various courts rather than their respective places in a pyramid of authority. While the hierarchical reading is more appealing, Part II concludes that the text, standing alone, does not require it.

Given the facial textual ambiguity, Part III turns to the Constitution’s structure. Part III points out that the existence of supervisory power depends upon more than the conclusion that the terms “supreme” and “inferior” establish a judicial hierarchy. It depends also upon an issue that the literature has neglected to identify, much less explore: the structural effect of a hierarchy requirement. A requirement of hierarchy would certainly function as a limit on Congress, demanding that any congressional regulation of the judicial branch respect the Supreme Court’s position at the top of a judicial hierarchy. For the supervisory power to exist, however, Article III’s distinction between the Supreme Court and its inferiors must operate not only as a limit on Congress, but also as a source of inherent authority for the Supreme Court. Part III concludes that the structure of Article III, particularly when compared with Articles I and II, cuts against, though does not definitively rule out, the proposition that the word “supreme” in Article III grants the Supreme Court any unspecified power over inferior courts.

Part IV turns to history. Even assuming that the Court’s designation as “supreme” functions as a power grant rather than solely as a limitation on Congress, the Court’s claim to supervisory authority over procedure fails unless there is reason to believe that the power grant includes a grant of this particular authority. Thus, Part IV analyzes whether the authority to prescribe inferior court procedure historically has been understood as an inherent power of a “supreme” court. As Part IV explains, no evidence from English history, colonial history, or Founding-era history establishes an explicit link between a “supreme” court and superintendence of procedure. Despite the lack of discussion about a “supreme” court’s role in this regard, cases do exist from the Supreme Court’s early years in which the Court, without labeling its action as an exercise of supervisory authority, appears to lay down rules of procedure and evidence for inferior courts. History, therefore, appears to offer some support for the Court’s modern practice.

Part IV argues, however, that this support is illusory. The Supreme Court’s early, ostensible assertions of supervisory authority came at a time when courts understood the common law much differently than they do today. In the Founding era, courts decided common law cases by apply-

ing a body of customary law. Reflecting this approach, the Supreme Court reversed inferior courts for mistaking or misapplying established common law rules of procedure and evidence; it did not purport to displace the policy choices of inferior courts on these matters. Given the jurisprudential framework within which the early Supreme Court operated, Part IV argues that it is difficult to read these cases as endorsing the modern view that the Supreme Court possesses inherent power "to prescribe" procedural rules for inferior courts.

In the end, the Article concludes that the Constitution's text, structure, and history do not support the proposition that the Supreme Court possesses supervisory power over inferior courts by virtue of its constitutional "supremacy." Rather than reflecting a longstanding, constitutionally endorsed practice, the supervisory power doctrine more likely reflects modern assumptions about the Supreme Court's role in the federal judiciary. Congress can decide to give the Supreme Court such power through enabling legislation, but it seems exceedingly unlikely that the Constitution confers it.

I. THE SUPREME COURT'S CLAIM TO SUPERVISORY POWER

This Part lays the foundation for my project. After briefly describing how the Supreme Court's supervisory power cases work, this Part turns to the problem of identifying a source for the power. It discusses the source on which the Supreme Court's cases implicitly rely and which is explicitly advanced in the work of Professor Sara Sun Beale: the inherent authority over procedure that is attendant upon Article III's grant of "the judicial power."⁸ Against the prevailing account, this Part argues that the authority over procedure implicit in "the judicial power" is insufficient, standing alone, to justify the Supreme Court's claim to supervisory power. That grant is conventionally understood as vesting in every federal court the authority to regulate its *own* proceedings; for supervisory power to exist, the Supreme Court must possess the ability to control procedure in *other* courts. This Part concludes that if the Supreme Court possesses supervisory power over inferior court procedure, something more than a bare reference to every federal court's inherent Article III authority is necessary to justify it.

A. *The Supervisory Power Doctrine*

In 1943, in a case called *McNabb v. United States*, the Supreme Court asserted the power to supervise lower federal courts by devising procedures for them not otherwise required by the Constitution or a statute.⁹

8. See Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433 (1984); see also *infra* Part I.B.

9. 318 U.S. 332 (1943). *McNabb* is widely identified as the first case to assert the Supreme Court's supervisory power over lower court procedure. See, e.g., Beale, *supra*

Before 1943, the Supreme Court had openly claimed such a direct power over inferior court procedure only when it promulgated court rules pursuant to congressional authorization—for example, when it promulgated the Federal Equity Rules, the Federal Admiralty Rules, and the Federal Rules of Civil Procedure. The *McNabb* rule, by contrast, was announced in the context of adjudication and without reference to any legislative or constitutional grant of the authority to impose it. *McNabb* is a striking case insofar as it is a self-conscious exercise of supervisory rulemaking in the context of adjudication rather than in the process of promulgating court rules. Insofar as it is the first self-conscious exercise of such power, it is an important case.

McNabb's holding is relatively straightforward. The Supreme Court held that a district court must exclude from evidence a voluntary confession that was the product of a prolonged detention.¹⁰ The basis for this holding, however, is less straightforward. No constitutional or statutory provision required the confession's exclusion.¹¹ Instead, *McNabb's* exclusion of a confession obtained in circumstances that the Court believed unreasonable, though not unconstitutional, rested on an evidentiary policy of the Court's own making.¹² The Court, moreover, did not rely on any particular statutory or constitutional provision to justify its authority to make such a policy and enforce it in the inferior courts. Rather, the Court asserted simply that "[j]udicial supervision of . . . criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence."¹³ The Court referred to this exercise of power as an exercise of its "supervisory authority."¹⁴

The Court in *McNabb* was not entirely clear about who or what it was supervising with this "supervisory authority." As a result, cases relying on *McNabb* are not entirely clear on this point either. Although cases and commentary tend to treat all post-*McNabb* assertions of "supervisory au-

note 8, at 1435. The Court also asserted its supervisory power, however, to adopt a procedural rule in a case decided roughly two weeks before *McNabb*. See *Johnson v. United States*, 318 U.S. 189, 199 (1943) (relying on supervisory power rather than Fifth Amendment to prohibit comment on defendant's refusal to testify). In keeping with the literature and cases, this Article will refer to *McNabb* as the source of the modern supervisory authority doctrine.

Because some might wonder, it is worth noting that the Supreme Court did not invoke supervisory power when it decided *Weeks v. United States*, 232 U.S. 383 (1914), the first exclusionary rule case. *Weeks* purported to ground the exclusion of illegally seized evidence in the Fourth Amendment itself. *Id.* at 398. It was not until after *McNabb* that some justices explained *Weeks* as an exercise of the Court's supervisory power. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 678 (1961) (Harlan, J., dissenting).

10. *McNabb*, 318 U.S. at 341–42; see also *Anderson v. United States*, 318 U.S. 350, 355–56 (1943) (applying *McNabb* rule to exclude confession in case decided on same day as *McNabb*).

11. See *McNabb*, 318 U.S. at 341, 343–45.

12. See *id.* at 346–47.

13. *Id.* at 340.

14. *Id.* at 341.

thority” interchangeably, close study of these cases reveals that federal courts relying on *McNabb* actually use the term “supervisory authority” in three different ways. In some instances, courts use the term “supervisory authority” to refer to the power of an appellate court to supervise lower courts by prescribing procedures for them above and beyond those required by statutory and constitutional provisions.¹⁵ In other instances, courts use the term “supervisory authority” to refer to a court’s power to supervise the litigation before it.¹⁶ In still other instances, courts use the term “supervisory authority” to refer to the power of a federal court to supervise law enforcement officials.¹⁷ This Article focuses on the Supreme Court’s invocations of “supervisory authority” only to the extent that the term is used in the first sense, as a power to supervise lower courts by prescribing procedures for them.

And indeed, *McNabb* is the first in a significant line of cases in which the Supreme Court has asserted supervisory authority in just this respect, as a power to prescribe procedures binding in the inferior courts. To understand how the supervisory power works, it is helpful to consider some of the cases in this line. *Thiel v. Southern Pacific Co.*¹⁸ is a frequently cited example. There, the Supreme Court relied on its supervisory authority to announce a rule governing the composition of federal juries.¹⁹ In that case, a district court in California decided to exempt all daily wage

15. See *infra* notes 18–36 and accompanying text.

16. See, e.g., *Carlisle v. United States*, 517 U.S. 416, 425–26 (1996) (recognizing limited “supervisory power” of district courts over litigation before them); *Ortega-Rodriguez v. United States*, 507 U.S. 234, 257 (1993) (recognizing “supervisory authority” of courts of appeals over litigation before them); *Thomas v. Arn*, 474 U.S. 140, 146–47 (1985) (acknowledging “supervisory powers” of courts of appeals). Despite the fact that these cases use the term “supervisory authority” or “supervisory power,” it is important to recognize that they are actually describing a court’s inherent authority over local procedure. For a description of a federal court’s inherent authority over procedure, see *infra* notes 44–46 and accompanying text. For a discussion of the difference between local rules, by which a federal court regulates its own procedure, and supervisory rules, by which a federal court regulates the procedure of a lower court, see *infra* Part I.C.

17. Most of the commentary addressing “supervisory power” addresses this use of the phrase. See, e.g., Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 *Iowa L. Rev.* 735, 779–82 (2001); Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 *Vand. L. Rev.* 1303, 1310 (2003); Matthew E. Brady, Note, *A Separation of Powers Approach to the Supervisory Power of the Federal Courts*, 34 *Stan. L. Rev.* 427, 437–40 (1982); Note, *The Supervisory Power of the Federal Courts*, 76 *Harv. L. Rev.* 1656, 1660–64 (1963) [hereinafter *Harvard Note*]. These articles are discussed more fully in Part I.B, *infra*.

An inferior court’s adoption of a procedure designed to supervise law enforcement does not implicate the kind of supervisory power addressed by this Article. Note, however, that when the Supreme Court requires inferior courts to follow an evidentiary rule aimed at controlling certain law enforcement activities, the Supreme Court may be described as supervising both law enforcement and inferior courts. Indeed, *McNabb* itself is an example of such overlap. See *supra* notes 10–14 and accompanying text.

18. 328 U.S. 217 (1946).

19. *Id.* at 225.

earners from jury service because of the financial hardship that such service imposed upon them.²⁰ Constitutional and statutory provisions did impose some limits on jury composition—for example, in reviewing the district court’s policy, the Supreme Court noted one federal statute prohibiting disqualification from jury service on the basis of “race, color, or previous condition of servitude”²¹ and another requiring that jurors be chosen “without reference to party affiliations.”²² But the Court did not claim that the exclusion of daily wage earners from federal juries, which the Court perceived as discrimination based on social class, violated the Constitution or any federal statute.²³ Instead, invoking the power claimed in *McNabb*, its “power of supervision over the administration of justice in the federal courts,”²⁴ the Supreme Court announced a rule to address what the Constitution and United States Code did not: It held that the “systematic and intentional exclusion” of daily wage earners from juries was prohibited in the federal courts.²⁵

Castro v. United States is another, more recent example of a case in which the Supreme Court invoked its supervisory power to prescribe inferior court procedure.²⁶ In *Castro*, a prisoner, proceeding pro se, attacked his conviction with a self-styled “Rule 33 motion for a new trial.”²⁷ The district court recharacterized the motion as one seeking habeas corpus relief from federal detention under 28 U.S.C. § 2255 without notifying the litigant about the consequences of the recharacterization,²⁸ which were significant: Recharacterization “subject[ed] any subsequent motion under § 2255 to the restrictive conditions that federal law imposes upon a ‘second or successive’ (but not upon a first) federal habeas motion.”²⁹ Predictably, the prisoner later filed what he thought was his first motion under § 2255, and the district court dismissed the claim for the prisoner’s failure to comply with applicable restrictions on “second or successive” claims.³⁰ The Eleventh Circuit affirmed the district court’s judgment, but the Supreme Court reversed.³¹ Section 2255 did not itself require district courts to warn litigants about recharacterization and its consequences; nor did the district court’s failure to warn violate any constitutional provision. Invoking its supervisory authority, however, the Supreme Court held that a district court must notify a pro se litigant about

20. *Id.* at 221–22.

21. *Id.* at 221 (quoting 28 U.S.C. § 415 (1940)).

22. *Id.* (quoting 28 U.S.C. § 412).

23. *Id.* at 220–21.

24. *Id.* at 225.

25. *Id.* at 220.

26. 540 U.S. 375 (2003).

27. *Id.* at 378.

28. *Id.* at 379.

29. *Id.* at 377.

30. *Id.* at 379.

31. *Id.* at 379, 384.

recharacterization and its consequences before actually recasting a prisoner's motion as one for habeas relief.³²

Thiel and *Castro* are two examples of the Supreme Court's exercise of supervisory power. Others exist. In *Young v. United States ex rel. Vuitton et Fils*, for example, the Court established a rule forbidding an inferior court to appoint an interested prosecutor in contempt proceedings.³³ In *Rosales-Lopez v. United States*, the Court established a rule requiring district courts to inquire into racial prejudice on voir dire when there is a possibility that racial prejudice could influence the jury.³⁴ In *McCarthy v. United States*, the Court established a rule entitling a defendant to plead anew if a district court accepts a guilty plea without observing Rule 11 of the Federal Rules of Criminal Procedure.³⁵ In *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, the Supreme Court relied on its supervisory power to issue guidelines regulating the way the courts of appeals consider petitions for rehearing en banc.³⁶

The supervisory power cases share three important characteristics. First, they announce procedural rules not otherwise required by Congress or the Constitution.³⁷ In this respect, the cases are a kind of procedural common law.³⁸ Second, the Supreme Court typically employs the power,

32. *Id.* at 382–83.

33. 481 U.S. 787, 808–09 (1987).

34. 451 U.S. 182, 190–92 (1981); see also *Ristaino v. Ross*, 424 U.S. 589, 597 n.9 (1976) (foreshadowing *Rosales-Lopez*).

35. 394 U.S. 459, 463–64 (1969).

36. 345 U.S. 247, 260–68 (1953). For examples in addition to those described in the text, see *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466, 2483–84 (2004) (declining to use supervisory power to adopt rule barring domestic discovery for use in foreign proceedings, but indicating willingness to revisit issue in later case); *Jones v. United States*, 527 U.S. 373, 383–84 (1999) (declining to use supervisory power to require jury instruction on consequences of deadlock, but implying that power could be used to do so); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 878–79 (1982) (O'Connor, J., concurring) (urging Court to use its supervisory power to impose standard on lower courts regarding detention of deportable aliens who are potential witnesses).

37. It is worth noting, though, that the Supreme Court has occasionally elevated rules initially announced pursuant to the supervisory power to constitutional status. For example, in *Ballard v. United States*, the Supreme Court relied on its supervisory power to condemn the “purposeful and systematic exclusion of women” from a panel of grand and petit jurors in district court. 329 U.S. 187, 193, 195 (1946). Years later, the Court grounded the prohibition of gender discrimination in jury service in the Constitution itself. See *Taylor v. Louisiana*, 419 U.S. 522, 525–26 (1975) (holding that blanket exemption from jury service for women violated Sixth Amendment); see also *Dickerson v. United States*, 530 U.S. 428, 430–40 (2000) (holding that rule established by *Miranda v. Arizona*, 384 U.S. 436 (1966), initially presented as supervisory rule, was actually constitutional in nature).

38. I acknowledge that the line between textual interpretation and common lawmaking is not always clear. Cf. Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 4–5 (1985) (arguing that supposed distinctions between the two are often illusory). These cases, however, fit comfortably within the definition of common law, because in them, the Court does not even purport to interpret a constitutional or statutory text. See *id.* at 7 (defining “federal common law” even more

as it did in *McNabb*, *Thiel*, and *Castro*, to announce generally applicable rules rather than case-specific commands. Because these cases are applicable across the federal courts, the rules they announce resemble rules of constitutional procedure or rules promulgated under the Rules Enabling Act.³⁹ Third, the Supreme Court in these cases does not announce rules governing its own procedure; rather, it announces rules governing procedure in inferior courts. These cases, therefore, are instances of supervisory rather than local rulemaking.

The fact that these cases involve supervisory rather than local rulemaking is, for present purposes, their most important feature, and I will say more about it shortly.⁴⁰ To put the importance of this feature in context, however, it is first necessary to describe the justification that apparently underlies the Supreme Court's exercise of supervisory power. The next subpart turns to that task.

B. *The "Judicial Power" as a Justification for Supervisory Authority*

The Supreme Court has been remarkably vague about the source of its supervisory authority. After exhaustively studying the Supreme Court's cases, Professor Sara Sun Beale has offered what stands as the best-articulated justification for the doctrine.⁴¹ Professor Beale persuasively rejects

broadly to mean court-adopted rules not required by legal text, even if they purport to interpret one).

39. This is not to say that the regulation of procedure by adjudication and its regulation by prospective court rulemaking are alike in every relevant respect. Cf. Stephen B. Burbank, *Procedure, Politics, and Power: The Role of Congress*, 79 *Notre Dame L. Rev.* 1677, 1681 (2004) [hereinafter Burbank, *Procedure*] (insisting that distinction "between procedure fashioned (or applied as precedent) in decisional law and that provided prospectively in court rules" is critical in any discussion of inherent power over rulemaking). On the contrary, they differ in important respects, including in how they are initiated and who participates in them. The accompanying text aims only to highlight one respect in which procedures generated by adjudication and those generated by prospective rulemaking are similar: their effect. This is because of the federal courts' rigid approach to both horizontal and vertical stare decisis, which, as I have argued elsewhere, blurs the distinction between adjudication and legislation by treating case holdings like generally applicable rules. See Amy Coney Barrett, *Stare Decisis and Due Process*, 74 *U. Colo. L. Rev.* 1011, 1052–60 (2003). *Castro v. United States*, discussed supra in text accompanying notes 26–32, illustrates the point. The notice requirement that the Court adopted in that case has the same basic effect on future cases as if it had been adopted in the rulemaking process. Indeed, recognizing such similarity of effect, the Supreme Court has openly acknowledged on at least one occasion that it considers adjudication and rulemaking to be two means of accomplishing the same end. See *Hawkins v. United States*, 358 U.S. 74, 78 (1958) ("[T]his Court, by decision or under its rule-making power, can change or modify the [witness competency rules] where circumstances or further experience dictates." (emphasis added) (citation omitted)); see also Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 *Ala. L. Rev.* 221, 245 (1997) (noting that courts sometimes use "case-by-case adjudication to circumvent or preempt court rulemaking obstacles posed by the Enabling Act process").

40. See *infra* Part I.C.

41. Beale, *supra* note 8. The supervisory power doctrine has drawn a relatively modest amount of commentary, and apart from Professor Beale's work, none of it explores

the proposition that the supervisory authority has a statutory source.⁴² As she explains, the detailed scheme prescribed by the Rules Enabling Act makes it difficult, if not impossible, for the Supreme Court to construe more general statutes like the appellate review statutes as grants of supervisory procedural authority.⁴³ Instead, consistent with what she finds implicit in the cases, Beale identifies Article III's grant of "judicial power" as the source of supervisory authority.

As Beale explains, the Supreme Court has long understood Article III to grant federal courts the "inherent power" to accomplish, through adjudication, those tasks necessary to the execution of the "judicial power."⁴⁴ For example, because a federal court could not exercise its

the source of the Supreme Court's power. For the main articles addressing the supervisory power doctrine, see John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & Pol'y 423 (1997) (arguing that supervisory power of federal courts does not extend to supervising federal prosecutors); Alfred Hill, *The Bill of Rights and the Supervisory Power*, 69 Colum. L. Rev. 181 (1969) (arguing that supervisory doctrine usefully permits Supreme Court to go beyond what Bill of Rights requires, but that supervisory power is limited by separation of powers principle); see also Brady, *supra* note 17 (arguing that Supreme Court has taken unduly narrow view of its supervisory power); Rebecca Ann Mitchells, *Case Note, Supervisory Power Meets the Harmless Error Rule in Federal Grand Jury Proceedings*, 79 J. Crim. L. & Criminology 1037 (1988) (arguing that Supreme Court has applied harmless error rule too aggressively in reviewing inferior court exercises of supervisory power); Harvard Note, *supra* note 17 (reviewing Supreme Court exercises of supervisory power and suggesting rationales for doctrine).

42. See Beale, *supra* note 8, at 1477–78.

43. *Id.* at 1477–80. On two occasions, the Supreme Court has asserted obliquely and in dicta that the supervisory power derives from the statutes giving it the authority to review the judgments of inferior federal courts. See *Nguyen v. United States*, 539 U.S. 69, 81 n.13 (2003) ("The authority which Congress has granted this Court to review judgments of the courts of appeals undoubtedly vests us not only with the authority to correct errors of substantive law, but to prescribe the method by which those courts go about deciding the cases before them." (internal quotation marks omitted) (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 393 (1974) (Rehnquist, J., concurring))); *Cupp v. Naughten*, 414 U.S. 141, 146 (1973) ("Within such a unitary jurisdictional framework the appellate court will, of course, require the trial court to conform to constitutional mandates, but it may likewise require it to follow procedures deemed desirable from the viewpoint of sound judicial practice although in no-wise commanded by statute or by the Constitution."). Because this Article focuses on the potential constitutional justification for the Supreme Court's supervisory power, I do not address the statutory justification. For a persuasive argument that no statutory authority exists, however, see Professor Beale's excellent analysis. See also *infra* note 78 (noting that Supreme Court's lack of supervisory authority over state courts casts doubt on proposition that supervisory authority is merely incident to appellate review).

44. Beale, *supra* note 8, at 1468–73. For cases supporting this proposition, see *Chambers v. NASCO*, 501 U.S. 32, 43 (1991) ("It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'" (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812))); *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (asserting that there is "power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants"); *Eash v. Riggins Trucking Inc.*,

core Article III power of adjudication without an accurate and relevant factual record, it must have the power to do those things necessary to develop an accurate and relevant factual record—including such things as managing discovery, compelling testimony, appointing experts, and excluding and admitting evidence.⁴⁵ Possession of “inherent authority” means that a federal court can engage in certain tasks necessary to the exercise of the judicial power even in the absence of a statute explicitly authorizing it to do so, and, absent a statute guiding a federal court in the performance of such tasks, the court can rely on its implied Article III authority to create judicial guidelines for their execution. While debate exists about the limits of a federal court’s inherent power, the basic proposition that some inherent power exists is uncontroversial.⁴⁶ And Beale concludes that this inherent authority “provides an ample basis for the Supreme Court’s formulation of procedural rules”—although she, like other scholars, questions whether this inherent authority justifies the broad range of rules that the Court has announced pursuant to it.⁴⁷ Beale argues that while the authority attendant upon Article III’s grant of “the judicial power” permits the Court to formulate procedural rules (like the one announced in *Thiel*), many of the Court’s supervisory rules govern matters of substance (like the one announced in *McNabb*).⁴⁸

Beale’s identification of “the judicial power” as the source of the Supreme Court’s supervisory authority makes explicit what is otherwise implicit in the supervisory power cases and commentary.⁴⁹ Both the Su-

757 F.2d 557, 561–64 (3d Cir. 1985) (categorizing exercises of inherent power into three categories: irreducible power, necessary power, and useful power); see also Pushaw, *supra* note 17, *passim* (describing scope of inherent authority).

45. Pushaw, *supra* note 17, at 742.

46. *Id.* at 788–92 (summarizing scholarship on inherent power, which reflects agreement on its existence, but disagreement about its scope and degree to which it may be displaced by legislation). I put aside here the question whether Article III grants federal courts the inherent power to regulate procedure not only by adjudication, but also by prospective court rules. The former is relatively uncontroversial, but the latter is not. See Burbank, Procedure, *supra* note 39, at 1682 (questioning how “a power to promulgate prospective, legislation-like rules can be squared with the grant of judicial power in Article III”). Thus, references in this Article to the inherent authority of the federal courts relate exclusively to their inherent authority to regulate procedure by adjudication.

47. Beale, *supra* note 8, at 1465, 1470.

48. *Id.* at 1473–77, 1490–91. Although she does not explain why, Beale asserts that only the Supreme Court possesses the authority to prescribe procedure for lower courts; in other words, she rejects the notion that the Constitution or any statute authorizes the courts of appeals to prescribe procedure for district courts. *Id.* Similarly, several circuit judges have expressed misgivings about the proposition that courts of appeals possess supervisory authority over district courts. Their view, like Professor Beale’s, is that supervisory authority belongs exclusively to the Supreme Court. See *United States v. Strotbers*, 77 F.3d 1389, 1397–99 (D.C. Cir. 1996) (Sentelle, J., concurring) (questioning assertions by courts of appeals of supervisory authority over procedure in the district courts); *Burton v. United States*, 483 F.2d 1182, 1189–90 (9th Cir. 1973) (Byrne, J., dissenting) (same).

49. See Beale, *supra* note 8, at 1464 (“[M]ost courts and commentators have characterized supervisory power as an implied or inherent power.”).

preme Court and scholars studying it have assumed that so long as a matter falls within the inherent authority granted to every federal court by Article III, and so long as its regulation does not impinge upon the prerogatives of other branches, the Supreme Court may regulate it in the inferior courts. Their assumption in this regard is evident in the fact that the cases and commentary treat the Supreme Court's regulation of inferior court procedure as analytically indistinct from a federal court's regulation of the proceedings before it. They use the term "supervisory authority" to refer to both,⁵⁰ and they treat the Supreme Court's regulation of inferior court procedure, like a federal court's regulation of its own procedure, as posing primarily a separation of powers problem.⁵¹ Thus, most of the scholarship regarding the supervisory power doctrine is devoted to analyzing whether particular assertions of supervisory authority impinge on the prerogatives of the other branches. Insofar as the Supreme Court has adopted supervisory rules that attempt to regulate the out-of-court conduct of federal investigators and prosecutors, usually by excluding evidence, scholars have argued that the Court has impinged upon the Executive's law enforcement authority.⁵² Insofar as the Supreme Court has adopted supervisory rules that undermine existing statutory schemes, scholars have argued that the Court has impinged upon Congress's legislative power.⁵³

The supervisory power doctrine, however, does not only pose an interbranch problem; it also poses an intrabranch problem. Both scholars and the Supreme Court have paid inadequate attention to the premise on which the Supreme Court's claim to supervisory authority rests: that the Supreme Court has the inherent authority to regulate procedure and evidence in *other* federal courts. Occasionally, an individual Justice has questioned whether the Court in fact possesses such power over inferior

50. See *supra* notes 15–16 and accompanying text.

51. Cf. Pushaw, *supra* note 17, *passim* (extensively analyzing separation of powers problem inherent in any federal court's exercise of inherent authority over procedure).

52. See, e.g., Beale, *supra* note 8, at 1434 (arguing, *inter alia*, that use of supervisory power has "fostered the erroneous view that the federal courts exercise general supervision over federal prosecutors and investigators"); Hill, *supra* note 41, at 214 (arguing that exclusion of legally seized evidence is "unwarranted interference with executive prerogatives, in violation of the constitutional principle of separation of powers"); Zacharias & Green, *supra* note 17, at 1314 (noting that exercise of supervisory powers to indirectly regulate federal prosecutors raises separation of powers concerns); Brady, *supra* note 17, *passim* (analyzing supervisory power as problem of balancing executive and judicial power).

53. See, e.g., Beale, *supra* note 8, at 1503–05 (arguing that insofar as they purport to create nonstatutory remedies under rubric of supervisory power, Supreme Court's supervisory cases impinge on legislative power); Evan Caminker & Erwin Chemerinsky, *The Lawless Execution of Robert Alton Harris*, 102 *Yale L.J.* 225, 251 (1992) (arguing that Supreme Court's assertion of supervisory power in Harris's case was "de facto nullification of congressional directives"); see also *United States v. Nat'l City Lines, Inc.*, 334 U.S. 573, 589 (1948) (holding that supervisory power announced in *McNabb* "does not extend to disregarding a validly enacted and applicable statute or permitting departure from it").

courts, or at least whether its exercise in a particular case imprudently involves the Court in matters better left to those courts. Thus, Justices have lamented the Court's assertion of "vague supervisory powers over federal courts,"⁵⁴ and questioned "the basis for any direct authority to supervise lower courts."⁵⁵ They have argued that in the absence of a statutory, constitutional, or court rule on point, procedural choices are left to the discretion of the inferior courts.⁵⁶ Notwithstanding these occasional reservations, the Court has never developed a justification for its claim to the authority to supervise other federal courts.

As Professor Beale explains, it is generally recognized that Article III's grant of "judicial power" vests every Article III court with some degree of inherent authority permitting it to develop procedures necessary to adjudicate the cases before it. Pursuant to this grant, the Supreme Court surely has the power to develop procedures to help it dispose of cases on the Supreme Court's *own* docket.⁵⁷ It does not necessarily follow, however, that the Supreme Court has the power to prescribe procedures controlling the way that inferior courts dispose of the cases on *their* dockets. Using the inherent authority of every court over local procedure to justify the Supreme Court's prescription of inferior court procedure conflates the difference between local and supervisory rules.

54. *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 273 (1953) (Jackson, J., dissenting).

55. *Bank of N.S. v. United States*, 487 U.S. 250, 264 (1988) (Scalia, J., concurring) (cautioning that while Court has "authority to review lower courts' exercise of this supervisory authority, insofar as it affects the judgments brought before us, . . . I do not see the basis for any direct authority to supervise lower courts").

56. See, e.g., *Ballard v. United States*, 329 U.S. 187, 203 (1946) (Burton, J., dissenting) ("In the absence of a binding statutory or court rule then requiring such inclusion of women, the District Court was compelled to exercise its own discretion in including or excluding them [from jury service]."); *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227-29 (1946) (Frankfurter, J., dissenting) (arguing that in absence of any statutory or constitutional requirement, Supreme Court should review district court's exercise of inherent authority for abuse of discretion rather than substituting its own discretion for that of district court); see also *Lehman Bros. v. Schein*, 416 U.S. 386, 392-95 (1974) (Rehnquist, J., concurring) (arguing that Court should exercise its supervisory power with due regard for discretion of inferior court); *Shenker v. Balt. & Ohio R.R. Co.*, 374 U.S. 1, 5 (1963) (refusing to second-guess Third Circuit's rule that majority of its active members, rather than majority of those voting on petition, was required to take case en banc, because to do so "would involve [the Court] unnecessarily in the internal administration of the Courts of Appeals"); *United States v. Am.-Foreign S.S. Corp.*, 363 U.S. 685, 695 (1960) (Harlan, J., dissenting) (arguing that decision whether circuit judge who retired during course of proceedings was "active" for purposes of participating in en banc hearing should be "left with the various Courts of Appeals, if indeed not to the conscience and good taste of the particular circuit judge concerned").

57. To be sure, the Supreme Court's inherent authority over its own procedure might permit it to dictate some inferior court procedures designed to facilitate the Supreme Court's own review of the inferior court record. But any power to engage in such indirect regulation is far more limited than the power that the Supreme Court has actually claimed: the power to supervise inferior courts directly, in ways unconnected to the Supreme Court's own proceedings.

C. *Local and Supervisory Rules*

As stated above, the fact that these cases involve supervisory rather than local rulemaking is, for present purposes, their most important feature. Yet it is also their most obscured feature. Discussions of the federal courts' inherent power to regulate procedure rarely attend to the distinction between local and supervisory rules,⁵⁸ and discussions of the supervisory power doctrine—despite its name—are no exception. Because of the importance of this distinction to my project, this subpart will explore this feature of the cases in greater depth.

Local rules are rules adopted by a court to regulate practice in that same court. Supervisory rules are rules adopted by a court to regulate practice in a lower court. The difference between the two is clear in the case of rules adopted pursuant to a court's authority under the Rules Enabling Act. For example, the Federal Rules of Civil Procedure, which are promulgated by the Supreme Court to regulate practice in district courts, are supervisory rules. The local rules of the Southern District of New York, which are promulgated by the District Court for the Southern District of New York and apply only in that court, are local rules.

This distinction, evident in the case of prospective court rules, exists in a more subtle and generally unrecognized way in the case of procedures adopted through adjudication pursuant to a federal court's inherent authority.⁵⁹ As explained in Part I.B, it is generally recognized that Article III vests every federal court with some degree of "inherent authority" to regulate procedure by adjudication.⁶⁰ Discussions of this inherent authority tend to focus on a federal court's inherent authority over the proceedings before it—that is, these discussions focus upon a federal court's inherent authority over local procedure. (Indeed, I am unaware of any discussion about the inherent authority to regulate procedure by adjudication focusing on a federal court's power over proceedings before an inferior court.) This focus on local procedure is evident in some of the cases typically invoked as illustrative of the federal courts' inherent authority. For example, in *Chambers v. NASCO, Inc.*, an iconic case in this line, the Supreme Court addressed the inherent authority of a district

58. But see Burbank, Procedure, *supra* note 39, at 1681 (asserting that critical distinction for purposes of analyzing judiciary's inherent rulemaking authority is between "local court rules (for the regulation of proceedings in the promulgating court) and supervisory court rules (for the regulation of proceedings in inferior courts)"); cf. Stephen B. Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015, 1116 (1982) (observing that in run-up to enactment of Rules Enabling Act, arguments that Supreme Court possessed inherent power to regulate procedure often "ignor[ed] distinctions between local and supervisory rules of court").

59. For a discussion of the inherent authority of the federal courts, see *supra* notes 44–48 and accompanying text.

60. See *supra* notes 44–46 and accompanying text.

court to sanction a party and lawyer appearing before it.⁶¹ In *Link v. Wabash Railroad Co.*, the Supreme Court upheld the authority of a district court to dismiss a lawsuit sua sponte for failure to prosecute.⁶² And in *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, the Supreme Court held that a court of appeals possessed the inherent authority to vacate a judgment for fraud on the court.⁶³

Discussions of the Supreme Court's "supervisory authority" doctrine continue this focus on local procedure. This Article uses the term "supervisory authority" to refer exclusively to the Supreme Court's authority to adopt, through adjudication, rules of procedure for inferior courts. As Part I.A explained, however, the Supreme Court has used the term "supervisory authority" to describe a broad range of rulemaking activity, some of it supervisory and some of it local.⁶⁴ Scholarly discussion of the Supreme Court's supervisory power has not distinguished the two.⁶⁵ Instead, scholars have treated the Supreme Court's assertions of "supervisory authority" as a synonym for or species of more generic "inherent authority"; and by "inherent authority," scholars typically mean inherent authority in the way it has been most fully explored in the cases and scholarship—inherent authority over local procedure.⁶⁶

The true "supervisory power" cases, however, work differently than those most commonly identified as illustrative of the federal courts' inherent authority. In the supervisory power cases, the Supreme Court does not simply review a procedure adopted by a lower court to ensure that the lower court acted within its inherent authority over local procedure. In the supervisory power cases, the Supreme Court displaces inferior court discretion by announcing its own rule. In other words, rather

61. 501 U.S. 32, 42–58 (1991); see also *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980) (recognizing inherent power of federal court to assess attorney's fees against counsel).

62. 370 U.S. 626, 630–31 (1962).

63. 322 U.S. 238, 244 (1944). For examples other than those discussed in the text, see *Clinton v. Jones*, 520 U.S. 681, 706 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket."); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507–09 (1947) (holding that district court possessed inherent authority to dismiss suit on ground of forum non conveniens), partially superseded by Act of June 25, 1948, ch. 646, § 1, 62 Stat. 869, 937 (codified as amended at 28 U.S.C. § 1404 (2000)); *Ex parte Peterson*, 253 U.S. 300, 312 (1920) (holding that district court had inherent power to appoint auditor to assist in performance of its judicial duties); *Bowen v. Chase*, 94 U.S. 812, 824 (1876) (acknowledging court's inherent power to consolidate actions arising out of single controversy).

64. See *supra* notes 15–17 and accompanying text.

65. See *supra* notes 15–17 and accompanying text; see also Gleeson, *supra* note 41, at 459–66 (describing supervisory power without distinguishing between local and supervisory rulemaking in its exercise); Zacharias & Green, *supra* note 17, at 1310–11 (same); Brady, *supra* note 17, at 427 & n.2, 445–47 (same).

66. Cf. Pushaw, *supra* note 17, at 738 n.4 (observing that Supreme Court uses "inherent powers" (or 'inherent authority') as a term of art to describe incidental actions that federal judges take without a specific statutory grant as needed to exercise their primary 'judicial power' of deciding cases").

than measuring the inferior court's action by the bounds of the inferior court's authority, the Supreme Court measures the inferior court's action for consistency with the Supreme Court's newly announced standard.

It is worth focusing carefully on the distinction between cases in which the Supreme Court reviews a lower court's exercise of inherent authority and cases in which the Supreme Court invokes its supervisory authority to prescribe a rule for lower courts.⁶⁷ In the former kind of case, the Supreme Court simply decides whether a lower court's rule falls within the broad range of the lower court's discretion. It will either hold that a particular rule was beyond the lower court's power (as defined by a statute or the Constitution),⁶⁸ or it will approve the lower court's rule while leaving room for other courts to choose a different approach.⁶⁹ When the Supreme Court exercises its supervisory authority to prescribe inferior court procedure, by contrast, it announces a rule not required by any statutory or constitutional provision and leaves no room for lower courts to choose a different approach in future cases. One could summarize the difference this way: In the former cases, the Supreme Court reviews an instance of local rulemaking by adjudication; in the latter cases, the Supreme Court engages in supervisory rulemaking by adjudication.

Consider, for example, *Thiel v. Southern Pacific Co.*, described above.⁷⁰ There, the Supreme Court did not simply ask whether the district court acted within the bounds of its authority in adopting a blanket exemption from jury service for daily wage earners—that is, the Court did not ask whether the exemption exceeded the district court's inherent authority under Article III, whether it was rational, or whether it ran afoul of any other constitutional or statutory provision. By that measure, the Supreme Court may well have had to leave the exemption undisturbed. Instead, the Supreme Court announced its own standard forbidding such exemptions as discriminatory and overrode the district court's practice as inconsistent with that standard.⁷¹ The same is true of *Castro v. United*

67. The Supreme Court makes that task difficult by using the term "supervisory authority" imprecisely. As stated in Part I.A, *supra*, the Court sometimes uses the term "supervisory authority" to refer to the inherent authority of a federal court to supervise the litigation before it. See *supra* note 16 and accompanying text. An invocation of "supervisory authority," therefore, does not necessarily mean that the Supreme Court is announcing a rule through adjudication. One must read the case carefully to see whether the Supreme Court decides to review the inferior court's rule or to adopt its own.

68. See, e.g., *Ortega-Rodriguez v. United States*, 507 U.S. 234, 244–52 (1993) (holding unreasonable Eleventh Circuit policy of dismissing appeals filed by former fugitives); *United States v. Payner*, 447 U.S. 727, 736–37 (1980) (reversing district court's decision to exclude evidence under its inherent authority over local procedure as exceeding limits on that authority).

69. See, e.g., *Thomas v. Arn*, 474 U.S. 140, 155 (1985) (holding that "a court of appeals *may* adopt a rule conditioning appeal" on filing of timely objections to a magistrate's report (emphasis added)).

70. 328 U.S. 217 (1946); see *supra* text accompanying notes 18–25.

71. *Id.* at 225.

States, also described above.⁷² There, the Supreme Court did not simply ask whether the district court acted within its authority in refusing to notify a pro se litigant of the consequences of its recharacterization of his motion as one for habeas relief. By that measure, the Supreme Court may well have had to leave the non-notification policy undisturbed. Instead, the Supreme Court announced its own standard requiring notification and struck the district court's practice as inconsistent with that standard.⁷³

This is not to say that the particular rules that the Supreme Court adopted in *Thiel* and *Castro* are poor policy choices or that the matters of jury composition and habeas practice do not benefit from uniform, rather than ad hoc, treatment. This is only to illustrate how rules generated pursuant to the Supreme Court's supervisory power work. They are not like the more familiar class of "inherent authority" cases in which a federal court adopts a rule governing practice before that same federal court. In the supervisory power cases, the Supreme Court adopts a rule governing practice in an inferior court. In the inherent authority cases, the Supreme Court reviews inferior court rules for abuse of discretion. In the supervisory power cases, the Supreme Court actually displaces inferior court discretion.⁷⁴

The basis for that displacement remains inadequately explained in the cases and commentary. The justification implicit in the cases is the one made explicit by Professor Beale: that the supervisory power derives from the inherent authority that the Supreme Court possesses by virtue of its possession of "the judicial power."⁷⁵ That conclusion, however, does not automatically follow from the grant of inherent authority that is implicit in Article III's grant of "the judicial power." Article III grants "the judicial power" to every federal court. If the Supreme Court possesses a unique ability to regulate procedure on behalf of other federal courts, it must be because of some unique attribute of the Supreme Court.

72. 540 U.S. 375 (2003); see *supra* text accompanying notes 26–32.

73. *Id.* at 383–84.

74. Thus, Evan Caminker and Erwin Chemerinsky are mistaken when they assert that the Supreme Court has only invoked an inherent authority to manage its own proceedings and the power to review the propriety of lower court exercises of inherent authority over their own proceedings, but not the power to otherwise supervise inferior courts. Caminker and Chemerinsky claim that the Supreme Court "has never held that by virtue of its position atop the judicial hierarchy, it enjoys a unique power to supervise the conduct of inferior federal courts beyond this traditional sense of reviewing the soundness of a lower court's exercise of the power to manage its own proceedings." Caminker & Chemerinsky, *supra* note 53, at 250. That kind of "unique power," however, is precisely the authority that the supervisory power cases assert.

75. See *supra* notes 41–48 and accompanying text.

II. THE CONSTITUTION'S DESIGNATION OF A "SUPREME" COURT AND "INFERIOR" COURTS

This Part identifies and begins to analyze a stronger constitutional basis for the supervisory power: the Constitution's designation of the Court as "supreme" and all other Article III courts as "inferior" to it.⁷⁶ Indeed, if the supervisory power over procedure has a constitutional source, this must be it, because the Constitution's distinction between "supreme" and "inferior" courts is the only constitutional language that arguably gives the Supreme Court any authority over its inferiors. In general terms, an argument for constitutionally based supervisory power would go like this: By virtue of its supremacy, the Supreme Court has the power to oversee the federal judiciary. As overseer, the Supreme Court is empowered (and, as departmental leader, arguably even obliged) to adopt procedural rules to ensure the smooth and uniform functioning of inferior federal courts.

Locating the supervisory power in this aspect of Article III has the benefit of explaining the contours of the doctrine. The Supreme Court has been emphatic in its insistence that its supervisory power does not extend to state courts,⁷⁷ although it has never explained why that is so. Article III's distinction between supreme and inferior courts offers an explanation. If rooted there, the supervisory power is not simply incident to the Court's appellate jurisdiction, which extends to both state and federal courts.⁷⁸ If rooted in the supreme/inferior distinction, the supervisory

76. See U.S. Const. art. I, § 8, cl. 9 (conferring power on Congress to "constitute Tribunals inferior to the supreme Court"); *id.* art. III, § 1 (vesting judicial power in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish"). Some commentators have located the Court's supervisory power in its constitutional supremacy, although none has fully developed the argument. See, e.g., James E. Pfander, *Marbury*, Original Jurisdiction, and the Supreme Court's Supervisory Powers, 101 *Colum. L. Rev.* 1515, 1602-03 (2001) [hereinafter Pfander, *Marbury*] (describing chores, including rulemaking, that fall to the Supreme Court in its capacity "as the constitutionally mandated leader of a hierarchical judicial department").

77. See, e.g., *Early v. Packer*, 537 U.S. 3, 10 (2002) (noting that rule announced pursuant to Supreme Court's supervisory power is inapplicable to state courts); *Dickerson v. United States*, 530 U.S. 428, 438 (2000) ("It is beyond dispute that we do not hold a supervisory power over the courts of the several States."); *Smith v. Phillips*, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.").

78. Indeed, the fact that the Court's supervisory authority does not extend to state courts is good evidence that the Court has not thought carefully about its occasional assertions that the supervisory power derives from the appellate review statutes. See *supra* note 43. It would be quite remarkable for the Supreme Court to claim *vis-à-vis* state courts, as it has *vis-à-vis* inferior federal courts, that "[t]he authority which Congress has granted this Court to review judgments of the courts of appeals undoubtedly vests us not only with the authority to correct errors of substantive law, but to prescribe the method by which those courts go about deciding the cases before them." *Nguyen v. United States*, 539 U.S. 69, 81 n.13 (2003) (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 393 (1974) (Rehnquist, J., concurring)).

power is a feature of the constitutional relationship between the Supreme Court and the courts inferior to it.

Evaluating the strength of a claim to supervisory authority based on the supreme/inferior distinction necessitates an evaluation of the kind of relationship that Article III contemplates for the Supreme Court and its inferiors. Determining the constitutionally required structure of the federal judicial department, however, is more complicated than one might expect, and there is surprisingly little scholarly guidance in the area. The constitutional analysis raises three questions. The first has engendered scholarly disagreement, and the remaining two are wholly unexplored in the literature.

First is the threshold question of whether the constitutional distinction between “supreme” and “inferior” courts establishes a judicial hierarchy. The terms “supreme” and “inferior” are capable of two constructions: They might render inferior courts “subordinate to” the Supreme Court, or they might refer simply to the relative jurisdictional reach of the courts. A claim to constitutionally based supervisory power is viable only if the terms “supreme” and “inferior” establish a judicial hierarchy by rendering inferior courts subordinate to the Supreme Court. Scholars have explored these competing constructions of the supreme/inferior distinction at some length, but no consensus exists as to which is correct.

Second, if one decides that the supreme/inferior distinction does render inferior courts subordinate to the Supreme Court, one must determine the structural effect of this subordination requirement. Does it operate only as a limit on Congress’s ability to structure the federal court system, or does it also act as a source of inherent authority for the Supreme Court vis-à-vis its inferiors?⁷⁹ Thus far, scholars have devoted textual and structural analysis only to ways in which the supreme/inferior distinction might limit Congress’s ability to structure the federal court system.⁸⁰ Nearly every scholar who has studied the impact of the su-

79. There might also be another possibility, which could coexist with either or both possibilities mentioned in the text: The distinction might operate as a source of obligation for the inferior federal courts. Evan Caminker appears to take this view in his study of whether the distinction makes vertical stare decisis a constitutional requirement. See Caminker, *Inferior Courts*, supra note 7. Caminker argues that it is a constitutional obligation of “inferior” courts to follow the decisions of their judicial superior, the “Supreme” Court. *Id.* at 832–34. On Caminker’s account, the force of this obligation emanates from the Constitution itself; it apparently would exist even if the Supreme Court had never required it of the inferior courts. See, e.g., *id.* at 834 (arguing that Article III’s distinction between a “supreme” court and “inferior” courts makes vertical stare decisis a constitutional requirement); *id.* at 867–69 (arguing that inferior courts must follow Supreme Court precedent even if Congress strips Supreme Court of its appellate jurisdiction).

80. James Pfander argues that the Court’s supremacy operates as a source of inherent power, but his argument is historical rather than structural. Professor Pfander argues that the power to issue discretionary writs is a historically accepted function of a “supreme” court, but he does not consider whether the Constitution’s structure supports his construction of the Court’s supremacy as a source of inherent authority rather than as a

preme/inferior distinction has done so in the course of considering whether that distinction limits Congress's ability to deprive the Supreme Court of jurisdiction to review the judgments of inferior federal courts—the argument being that the Court might not be “supreme” in relation to inferior courts without the ability to review at least some of their judgments.⁸¹ A textual and structural study of whether the Court's supremacy imbues it with inherent power over inferior courts is absent in the scholarship.

Third, if the Court's supremacy does give it inherent authority over inferior courts, does that authority include the supervisory authority to prescribe procedures for them? Study of this question is also absent in the scholarship.

The next three Parts of this Article evaluate these questions with an analysis of the Constitution's text, structure, and history. This Part begins with the text. It defines the words “supreme” and “inferior,” with reference to both eighteenth- and twentieth-century dictionaries. According to dictionaries, the supreme/inferior distinction might mean that inferior courts have narrower geographic and subject matter jurisdiction than the Supreme Court; it might mean that inferior courts are subordinate to the Supreme Court; or it might mean both. Despite the counterintuitive nature of a definition referring exclusively to jurisdictional differences, scholars have advanced nonfrivolous historical arguments supporting the nonhierarchical reading of Article III. Given the ambiguity of the terms “supreme” and “inferior,” this Part considers whether their grammatical context or their use in other parts of the Constitution clarifies their meaning. After explaining that neither does, this Part concludes that the terms “supreme” and “inferior” do little, standing alone, to answer the question whether the Supreme Court possesses supervisory power over its inferiors.

A. Possible Definitions of “Supreme” and “Inferior”

The Constitution establishes a “supreme Court,” and gives Congress the power to establish courts inferior to the supreme.⁸² This distinction between a “supreme” Court and its “inferiors” is the only language in the Constitution that arguably demands a particular kind of relationship between the Supreme Court and any courts that Congress chooses to estab-

limit on Congress. Pfander, *Marbury*, supra note 76, at 1518–19; see also Pfander, *Jurisdiction-Stripping*, supra note 7, at 1442–64 (documenting historical connection between “supreme” courts and power to issue supervisory writs).

81. See infra note 152.

82. Professor Pfander observes that the term “supreme,” which appears with a lower case “s” in the Constitution, describes the function of the court rather than specifying its name. See Pfander, *Jurisdiction-Stripping*, supra note 7, at 1455 n.8. According to Pfander, the “Supreme Court” derives its name from the Judiciary Act of 1789, which names the one supreme court the “Supreme Court,” and names the inferior courts “Circuit Courts” and “District Courts.” See *id.*

lish.⁸³ This language relating to the courts appears in two places, Article III and Article I. Article III provides as follows:

The judicial Power of the United States, shall be vested in one *supreme* Court, and in such *inferior* Courts as the Congress may from time to time ordain and establish. The Judges, both of the *supreme* and *inferior* Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.⁸⁴

Article I grants Congress the power to “constitute Tribunals *inferior* to the *supreme* Court.”⁸⁵

The words “supreme” and “inferior” are the starting place for any discussion about the structure of the judicial branch, but their impact on that structure is unclear. When considering whether the Supreme Court possesses supervisory power over inferior court procedure, one is tempted to conclude that such power is naturally incident to the court heading the judicial department. But the terms “supreme” and “inferior” leave ambiguous even the most basic question of whether Article III establishes a hierarchical judicial department. In other words, it is not immediately clear, simply from the text itself, whether the Constitution establishes the Supreme Court as a departmental head with some degree of control over its inferiors.

Dictionaries suggest two possible interpretations of the distinction between “supreme” and “inferior,” only one of which necessarily subjects inferior courts to Supreme Court control. The 1755 edition of Samuel Johnson’s dictionary offers the following definitions of the word “inferior”: “1. Lower in place. 2. Lower in station or rank of life . . . 3. Lower in value or excellency. . . . 4. Subordinate.”⁸⁶ The same dictionary gives the following definitions for the word “supreme”: “1. Highest in dignity; highest in authority. . . . 2. Highest; most excellent.”⁸⁷ Modern dictionaries define the words similarly.⁸⁸ According to these definitions, Article

83. See Wilfred J. Ritz, *Rewriting the History of the Judiciary Act of 1789*, at 14 (Wythe Holt & L.H. LaRue eds., 1990) (“Only the first provision [of Article III], which mandates ‘one supreme Court,’ has major structural implications.”).

84. U.S. Const. art. III, § 1 (emphasis added).

85. Id. art. I, § 8, cl. 9 (emphasis added).

86. Samuel Johnson, *A Dictionary of the English Language* (7th ed. London, J.F. & C. Rivington 1785).

87. Id.

88. *Webster’s Third New International Dictionary* defines “supreme” as follows, in relevant part: “2 a: highest in rank or authority (as within the state or church): holding or exercising power that cannot be exceeded or overruled: dominant . . . 3 a: not exceeded by any other in degree, quality, or intensity: greatest possible . . . 4 a: ultimate, final . . . b: of utmost importance” *Webster’s Third New International Dictionary of the English Language Unabridged* 2299 (1993) [hereinafter *Webster’s*]. It defines “inferior” as follows, in relevant part: “1: situated lower down or nearer what is regarded as the bottom or base . . . 2 a: of lower degree or rank . . . 3 a: of less importance, value, or merit: of poorer quality” Id. at 1158.

III's distinction between "supreme" and "inferior" courts might imply a relationship of subordination, in which the Supreme Court controls inferior courts. Or the distinction might have nothing to do with control, referring merely to the relative rank or importance of courts.⁸⁹ Those who believe that Article III uses the terms in the latter sense generally maintain that for courts, the difference in rank or importance is manifested in jurisdictional scope, with a "supreme" court having wide jurisdictional and/or subject matter competence, and an "inferior" court having relatively narrower jurisdictional and/or subject matter competence.⁹⁰

Before proceeding any further, two cautions are in order. *First*, it is important to resist the temptation to make the choice between these two interpretations a strict either/or problem—in other words, to argue that the supreme/inferior distinction must refer *either* to a relationship of subordination *or* to relative rank. One ought to resist this temptation because it is not a particularly helpful way to frame the problem. Deciding that someone is "lesser in rank" to another does not exclude the possibility that the person is also "subordinate to" the other. In some instances, one is lesser in rank or importance but not "subordinate to" another, as an associate professor is "lesser in rank than" but not "subordinate to" a full professor. In other instances, however, subordination is a feature of lesser rank: A lieutenant is both "lesser in rank than" and "subordinate to" a colonel.⁹¹ As this example shows, concluding that the supreme/inferior distinction refers to relative rank does not rule out the possibility that it also refers to subordination.⁹² As what matters for present purposes is whether the distinction puts inferior courts within the Supreme Court's control, it is analytically more direct to frame the question this way: Regardless of whether the Constitution's distinction between "su-

89. Cf. Black's Law Dictionary 381 (8th ed. 2004) (defining "inferior court" as "[a]ny court . . . subordinate to the chief appellate tribunal [in the particular] judicial system" or "[a] court of special, limited, or statutory jurisdiction" (emphasis added)).

90. See *infra* Part II.B; see also Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power,"* 80 B.U. L. Rev. 967, 983–84 (2000) (arguing that words "supreme" and "inferior" more likely refer to jurisdictional differences than to relationship of subordination); Edward A. Hartnett, *Not the King's Bench*, 20 Const. Comment. 283, 314 (2003) (noting that supreme/inferior distinction does not necessarily refer to relationship of subordination, but may instead refer to "status, or breadth of geographic and subject matter jurisdiction").

91. Indeed, this is also the case for the federal courts, even if one considers it the consequence of statutory rather than constitutional design. A district judge is both "lower in rank than" and "subordinate to" a justice of the Supreme Court. She is lower in rank because her title is less prestigious and she gets paid less. She is "subordinate" because the Supreme Court can reverse her judgments.

92. Cf. Pfander, *Jurisdiction-Stripping*, *supra* note 7, at 1458–59 (asserting that supreme/inferior distinction refers both to difference in jurisdictional breadth and to relationship of subordination); William S. Dodge, Note, *Congressional Control of Supreme Court Appellate Jurisdiction: Why the Original Jurisdiction Clause Suggests an "Essential Role,"* 100 Yale L.J. 1013, 1020–30 (1991) (arguing that supreme means "most important" for purposes of Article III, but that Supreme Court cannot maintain that status without some amount of appellate jurisdiction—i.e., control—over inferior courts).

preme” and “inferior” courts refers to rank, does it contemplate that any inferior courts Congress chooses to establish be “subordinate to” the Supreme Court? The fact that the supreme/inferior distinction can also refer to relative rank is important to the analysis only insofar as it permits one to answer this question “no” without depriving the terms of content.

Second, one must be careful to separate the familiar from the constitutionally required.⁹³ Numerous statutes treat inferior courts as subordinates of the Supreme Court. The Rules Enabling Act and statutes dealing with the Supreme Court’s appellate jurisdiction are just two examples. It is important to keep in mind, however, the possibility that the scheme with which we are familiar may well be the result of congressional choice rather than constitutional mandate.

B. *Historical Support for the Nonhierarchical Definition*

Scholars—most notably, David Engdahl and Wilfred Ritz—have amassed considerable historical evidence suggesting that lawyers in the Founding period used the words “supreme” and “inferior” to describe the relative geographic and subject matter competence of courts rather than their respective positions in a judicial hierarchy.⁹⁴ Engdahl notes, for example, that in describing the English system, “Blackstone called courts ‘inferior’ and ‘supreme’ without reference to hierarchy.”⁹⁵ For Black-

93. Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 *Stan. L. Rev.* 895, 905 (1984) (criticizing arguments about Supreme Court’s role that “confuse[] the familiar with the necessary, the desirable with the constitutionally mandated”).

94. See David E. Engdahl, *What’s in a Name? The Constitutionality of Multiple “Supreme” Courts*, 66 *Ind. L.J.* 457 (1991); Ritz, *supra* note 83, at 35 (“[T]he basic court system structure in 1787–89 . . . was horizontal. There were different levels of courts, which by definition means that some were ‘superior’ and others were ‘inferior.’ *All were trial courts.*”).

95. Engdahl, *supra* note 94, at 466; see also Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 *Harv. L. Rev.* 1153, 1180 n.139 (1992) (“[T]he words ‘supreme’ and ‘inferior’ were [probably] used in the same sense in the Constitution as in Blackstone’s *Commentaries*: to distinguish between courts ‘subject to narrow geographic and subject matter restraints’ and courts not subject to such restraints.” (quoting Dodge, *supra* note 92, at 1020–28)). While Blackstone largely does use the terms in the sense that these commentators describe, see *supra* note 94, in at least one place, Blackstone notes that “supreme courts . . . were . . . constituted to correct the errors of the inferior ones.” 3 William Blackstone, *Commentaries* *31. Blackstone does refer to multiple “supreme courts,” and he does go on to focus on the jurisdictional differences between supreme and inferior courts, both of which were primarily courts of original jurisdiction. *Id.* at *31–*32; see also *id.* at *32–*70 (describing in detail English courts of general civil jurisdiction). But it would be incorrect to claim that Blackstone did not conceive of supreme courts as possessing any sort of error-correcting function. Similarly, St. George Tucker praised Virginia’s post-revolution judicial system for “[t]he establishment of superior courts which sit regularly in various parts of the country; and possess appellate jurisdiction in civil cases to a certain amount, [which] has already produced very beneficial effects in correcting the proceedings of the inferior courts” 4 St. George Tucker, *Blackstone’s Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States*

stone, an “inferior” court was one “subject to narrow geographic and subject matter restraints,” not one “low in the hierarchy of a pyramidal judicial system.”⁹⁶ According to Engdahl, this usage of the word “supreme” was carried over into the colonial courts, which often had multiple “supreme” courts,⁹⁷ and, ultimately, into the Constitution itself.⁹⁸ As a result, Engdahl’s understanding of the supreme/inferior distinction is radically nonhierarchical: It would permit Congress wholly to deprive the Supreme Court of its appellate jurisdiction and presumably even to submit the judgments of the Supreme Court to review by other federal courts.⁹⁹ In Engdahl’s view, the constitutional requirement that the Court be “supreme” would be satisfied so long as the Supreme Court remained the federal court with the widest geographic and subject matter

and of the Commonwealth of Virginia app. note A, at 4 (Philadelphia, Birch & Small 1803) [hereinafter Tucker, Blackstone’s Commentaries].

96. Engdahl, *supra* note 94, at 466; cf. R.J. Walker & Richard Ward, Walker & Walker’s English Legal System 141 (7th ed. 1994) (“The nature of superior courts is that their jurisdiction is limited neither by the value of the subject matter of an action nor geographically. The jurisdiction of inferior courts is limited both geographically and according to the value of the subject matter of the dispute.”). Interestingly, *Webster’s Third New International Dictionary* defines “inferior court” the same way Blackstone apparently understood it: “having limited and specified rather than general jurisdiction.” Webster’s, *supra* note 88, at 1158; see also Black’s Law Dictionary, *supra* note 89, at 381 (giving similar definition).

97. Engdahl claims that in 1787, many of the states had multiple “supreme” courts and no state reserved the title “supreme” for the court at “the apex of a judicial pyramid.” Engdahl, *supra* note 94, at 470; see also Ritz, *supra* note 83, at 41–46 (making similar point). It is interesting to note that even when states had a pyramidal judicial system at the time of the Founding, they did not necessarily use the words “supreme” and “inferior” to capture that structure. New York, for example, named its court of last resort the “Court for the Trial of Impeachments and Corrections of Errors.” See N.Y. Const. of 1777, art. 32. Its “Supreme Court of Judicature” had some appellate jurisdiction and wide original jurisdiction, but was subject to review by the Court for the Trial of Impeachments and Corrections of Errors. *Id.*; see also N.Y. State Courts of Appeals & N.Y. State Archives and Records Admin., “Duelly and Constantly Kept”: A History of the New York Supreme Court, 1691–1847 and An Inventory of Its Records (Albany, Utica and Geneva Offices), 1797–1847, at 10 (1991), available at <http://www.courts.state.ny.us/history/elecbook/duelly/pgI.htm> (on file with the *Columbia Law Review*); cf. Richard H. Fallon, Jr. et al., Hart and Wechsler’s *The Federal Courts and the Federal System* 624 (5th ed. 2003) (noting that “Supreme Court of Pennsylvania” was not Pennsylvania’s highest court in 1805).

98. Engdahl, *supra* note 94, at 503–04 (asserting that history shows that our federal history did not begin with hierarchical judicial department, and that such hierarchy “is by no means what the text of the Constitution requires”). Among the evidence that Engdahl uses to support his argument is Virginia’s proposal that the federal Constitution provide for “one *or more* supreme tribunals.” *Id.* at 464 (quoting 1 *The Records of the Federal Convention of 1787*, at 21 (Max Farrand ed., rev. ed. 1966) [hereinafter Farrand’s Records]).

99. See *id.* at 491 (“[T]here are no impediments whatever to Congress’ discretion in deciding whether and how to fix lines of review.” (citation omitted)); *id.* at 504 (“The same legislative branch that pyramided the [federal] judiciary may refashion it however political wisdom directs, without doing violence to the Constitution.” (citations omitted)).

jurisdiction.¹⁰⁰ The current hierarchy, according to Engdahl, is entirely the result of congressional rather than constitutional choices.

I do not raise this scholarship to assert that the nonhierarchical account advanced by scholars like Engdahl and Ritz is necessarily correct.¹⁰¹ On the contrary, I have significant reservations about the nonhierarchical account.¹⁰² I do think, however, that these scholars amass enough credible evidence supporting the nonhierarchical definition that it cannot be dismissed out of hand. The next two subparts of this Part consider whether grammatical context or the use of the words in other parts of the Constitution resolves the problem.

C. *The Significance of the Preposition "to"*

Evan Caminker has argued that Article III's distinction between a "supreme" court and its "inferiors" is best understood as creating a relationship of subordination between the Supreme Court and its inferi-

100. See *id.* at 475 n.95 (asserting that "supreme" and "inferior" refer to relative subject matter or geographic competence); *id.* at 491 ("[T]he terms 'supreme' and 'inferior,' as used in the Constitution, bear no hierarchical meaning at all.").

101. In fact, Engdahl's reading of the historical record is a matter of scholarly debate. Some find it persuasive, see, e.g., Bhagwat, *supra* note 90, at 984 & n.101; Hartnett, *supra* note 90, at 291–92 & nn.29–30, but others disagree with it, in whole or in part, see, e.g., Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 *Yale L.J.* 255, 273 n.90 (1992) (disagreeing with many of the conclusions of Engdahl's "superb" article); Caminker, *Inferior Courts*, *supra* note 7, at 830–32 (rejecting Engdahl's interpretation); Pfander, *Jurisdiction-Stripping*, *supra* note 7, at 1448–49, 1453 n.81 (asserting that while generally persuasive, Engdahl's account overlooks historical role of "supreme" courts in supervising inferior courts through prerogative writs, an area in which courts like King's Bench were "both supreme and final"). Similarly, Ritz's reading of the record differs in significant ways from that of other prominent historical accounts. See Ritz, *supra* note 83, at 41, 49–51 (describing his disagreement with Julius Goebel, Jr. about, *inter alia*, whether hierarchical judicial systems were well-established in states at time of Founding).

102. In the course of the narrower historical research that I undertook for Part IV, I encountered significant evidence that the Founding generation expected inferior courts to be subordinate. See, e.g., *Federal Farmer XV* (Jan. 18, 1788), in 2 *The Complete Anti-Federalist* 315, 316–17 (Herbert J. Storing ed., 1981) (assuming that Article III places Supreme Court atop hierarchical federal judiciary, and approving that design); *The Federalist No. 82*, at 427 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (arguing that Article III means that "the organs of the national judiciary should be one supreme Court, and as many *subordinate* courts, as congress should think proper to appoint" (emphasis added)); Letter from Chief Justice John Jay to George Washington (Sept. 15, 1790), reprinted in 3 *Joseph Story, Commentaries on the Constitution of the United States* 440 n.1 (Boston, Hilliard, Gray & Co. 1833) [hereinafter *Story, Commentaries*] (describing federal circuit courts as "inferior and subordinate"); see also *supra* note 95 (describing evidence that Blackstone and St. George Tucker expected hierarchical judiciaries). Because, however, I ultimately investigated a different and narrower historical question, see *infra* Part IV, I am not prepared to dismiss entirely the nonhierarchical account here. Given the conflicting historical evidence and the scholarly disagreement, evaluating the accuracy of the nonhierarchical account is a project in its own right.

ors.¹⁰³ Caminker acknowledges that the supreme/inferior distinction might mean that inferior courts are merely “lesser in rank” than the Supreme Court, or it might mean that they are “subordinate to” the Supreme Court.¹⁰⁴ He concludes that the second definition—subordination—is the more natural reading.¹⁰⁵ In reaching this conclusion, Caminker relies heavily on Article I. He emphasizes that in empowering Congress to create inferior courts, Article I describes Tribunals “‘inferior to’” the “supreme” Court rather than tribunals “‘inferior (or lesser) than’ . . . the ‘supreme’ Court.”¹⁰⁶ For Caminker, “[t]he use of ‘to’ clearly suggests a direct relationship of subordination, not a comparative description of the courts’ respective features.”¹⁰⁷

The weight that Caminker puts on Article I’s use of the preposition “to,” however, is misplaced. The word “inferior” can take the preposition “to” regardless whether the word is used to denote subordination or merely rank. Consider the following example sentences from the *Oxford English Dictionary*, all given to illustrate the “lower than, less than, not so good or great as, unequal to” meaning of the word “inferior”:

The noyse not *inferiour to* a cannon.¹⁰⁸

It had been nothing *inferiour to* them in beauty and profit.¹⁰⁹

I feel myself *inferiour to* the task.¹¹⁰

These examples are from the seventeenth and eighteenth centuries, but modern dictionaries similarly note that the word “inferior” often takes the preposition “to” without implying a subordinate relationship when used to denote a difference in value or rank.¹¹¹ For example, the 2001 *New Oxford American Dictionary* illustrates the “rank” definition of inferior with the phrase “schooling in inner-city areas was *inferior to* that in the rest of the country.”¹¹²

103. See Caminker, *Inferior Courts*, supra note 7, at 832.

104. *Id.* at 828 (internal quotation marks omitted).

105. *Id.* at 832.

106. *Id.*

107. *Id.*; see also James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 *Harv. L. Rev.* 643, 696 n.242 (2004) (agreeing with Caminker’s construction); Pfander, *Jurisdiction-Stripping*, supra note 7, at 1441 (same).

108. 7 *Oxford English Dictionary* 924 (2d ed. 1989) (emphasis added) (citing Thomas Herbert, *A Relation of Some Yeares Travaile Begunne Anno 1626, into Afrique and the Greater Asia* 20 (London, 2d ed. 1638)).

109. *Id.* (emphasis added) (citing Henry Maule, *The History of the Picts* I.8 (Edinburgh 1706)).

110. *Id.* (emphasis added) (citing James Boswell, *An Account of Corsica* 9 (London, 2d ed. 1768)).

111. See, e.g., *Random House Webster’s College Dictionary* 676 (2000) (“inferior . . . I. low or lower in station, rank, degree or grade (often fol. by *to*)”); *Webster’s New Universal Unabridged Dictionary* 938 (2d ed. 1983) (“inferior . . . 3. lower in quality or value than (with *to*)”).

112. *The New Oxford American Dictionary* 869 (Elizabeth J. Jewell & Frank Abate eds., 2001).

This is not to say, of course, that Articles I and III *necessarily* use the word “inferior” to denote a difference in rank rather than a relationship of subordination. It is only to say that contrary to Caminker’s argument, the use of the word “to” does not rule out the possibility that Articles I and III are using the word in this manner. No matter what the terms of the relationship it establishes—one of comparison or one of control—“inferior” is a relational word, capable of taking the preposition “to.” Contrary to Caminker’s argument, the grammatical structure of the phrase does not dispel its ambiguity.

D. “Inferior” in the Appointments Clause

The word “inferior” also appears in the Appointments Clause of Article II, where the Constitution distinguishes between the principal and “inferior” officers of the Executive Branch.¹¹³ If the word is clearly used to mean “subordinate” in that Clause, that would be good evidence that the word has the same meaning in Articles I and III.¹¹⁴ As it turns out, however, the word “inferior” in the Appointments Clause does little to dispel the ambiguity, for the use of “inferior” in the Appointments Clause presents the same interpretive dilemma that it does in Articles I and III. In the Appointments Clause, as in Articles I and III, one can read “inferior” to mean “subordinate” or merely “different in rank or authority.” Although the Supreme Court has never interpreted the word “inferior” (or, for that matter, the word “supreme”) for purposes of Articles I and III,¹¹⁵ it has done so for purposes of Article II. And, in that context, the

113. The text of the Appointments Clause reads:

[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2; see also *Edmond v. United States*, 520 U.S. 651, 659–61 (1997) (describing distinction between principal and inferior officers in Appointments Clause).

114. Cf. Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 748–49 (1999) (arguing for interpretive approach that considers how a word is used throughout Constitution).

115. Although the Supreme Court has never addressed the question whether “inferior” courts must be subordinate to the supreme, it has addressed the meaning of the word “inferior” at least in passing in some old cases. Unfortunately, though, these cases do little to clear up the confusion about the meaning of the term. One characteristic of “inferior” courts at common law was that their judgments were presumed nullities. The Supreme Court’s primary concern in these cases was to make clear that while inferior federal courts, like inferior courts at common law, possess a limited jurisdictional scope, their judgments are entitled to a presumption of regularity. See *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 204–05 (1830); *Kempe’s Lessee v. Kennedy*, 9 U.S. (5 Cranch) 173, 185 (1809); *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 10 (1799). These cases do not address the question whether inferior federal courts—in addition to any jurisdictional limitations attendant to their inferior status—are also subordinate to the Supreme Court.

Supreme Court interpreted the word “inferior” to mean a “difference in rank or authority” rather than “subordinate.” In *Morrison v. Olson*, the Supreme Court held that the independent counsel was an “inferior” officer in the Executive Branch even though she was not “subordinate to” the President.¹¹⁶ According to the *Morrison* Court, an officer can be “inferior” even if not subordinate, so long as her authority is more limited than that of more highly ranked principal officers.¹¹⁷

Morrison shows that it is possible to construe the word “inferior” in the Constitution to mean something other than subordinate, but it does not necessarily demonstrate that this is the best construction of the term. The majority reached its conclusion about the meaning of “inferior” over the vigorous dissent of Justice Scalia, who argued that it was implausible to interpret the word “inferior” in the Appointments Clause as meaning anything other than “subordinate.”¹¹⁸ “In a document dealing with the structure (the constitution) of a government,” Justice Scalia insisted, “it would be unpardonably careless to use the word [inferior] unless a relationship of subordination was intended.”¹¹⁹

There is some force to Justice Scalia’s point that “subordinate” is the more natural interpretation of the word “inferior.”¹²⁰ Given, however,

116. 487 U.S. 654, 671 (1988).

117. *Id.* at 671–73. In addition to noting that the independent counsel’s tenure, jurisdiction, and duties were more limited than that of the Attorney General, a “principal” officer for purposes of Article II, the Court also noted that “the fact that [the independent counsel] can be removed by the Attorney General indicates that she is to some degree ‘inferior’ in rank and authority.” *Id.* at 671. The majority acknowledged, however, that the removal provision did not render the independent counsel “subordinate to” either the Attorney General or the President. *Id.* This is presumably because, as Justice Scalia noted in dissent, the removal provision subjected the independent counsel to removal only for “good cause”—a limitation “specifically intended to ensure that she be *independent* of, not *subordinate* to, the President and the Attorney General.” *Id.* at 723 (Scalia, J., dissenting).

118. *Id.* at 719 (Scalia, J., dissenting). Nine years after *Morrison* was decided, Justice Scalia wrote the majority opinion in *Edmond v. United States*, and dicta in that opinion suggests that an “inferior” officer for purposes of Article II must be subject to some sort of supervision by a “principal” officer. 520 U.S. at 663. *Edmond*’s holding, however, is narrower than its dicta, and *Edmond* did not overrule *Morrison*. *Morrison* held that an independent but lesser ranked official could be “inferior”; *Edmond*, by contrast, held only that a subordinate official was necessarily “inferior.” Even after *Edmond*, therefore, the possibility remains that “inferior” in the Appointments Clause can mean something other than subordinate. *Morrison* is the case that enlivens that possibility.

119. *Morrison*, 487 U.S. at 719 (Scalia, J., dissenting). On this same reasoning, he asserted as an aside that Article III’s use of the word “inferior” renders inferior courts “subordinate to” the Supreme Court. *Id.* at 719–20; see also *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) (Scalia, J.) (asserting without analysis that Article III’s distinction between “supreme” and “inferior” courts implicitly creates “hierarchy” within judicial department).

120. For a sampling of those expressing views similar to Justice Scalia’s, see, e.g., Akhil Reed Amar, Some Opinions on the Opinion Clause, 82 Va. L. Rev. 647, 668–69 & n.92 (1996) (agreeing with Justice Scalia’s “forceful dissent” regarding interpretation of “inferior”); Caminker, *Inferior Courts*, supra note 7, at 828 n.46, 832 (implicitly agreeing with Justice Scalia); Frank H. Easterbrook, *Unitary Executive Interpretation: A Comment*,

the competing historical evidence, the ambiguity in the terms “supreme” and “inferior” ought to be taken seriously. By themselves, these terms do not answer the question whether Article III establishes a hierarchy headed by the Supreme Court. A careful structural analysis—and, if that yields no result, a study of the historical sources on which Engdahl, Ritz, and others rely—is necessary to answer that question.

III. SUPREME AND INFERIOR COURTS: THE CONSTITUTIONAL STRUCTURE

This Part explores whether the Constitution’s structure answers the question its text leaves open: Does Article III render inferior courts subordinate to the Supreme Court? It also introduces a new question: Assuming that Article III does render inferior courts subordinate to the Supreme Court, what is the structural function of that subordination requirement? Does it function only as a limit on how Congress structures the judicial branch, or does it also grant the Supreme Court some inherent authority to control its subordinates? Article III’s text, ambiguous on the first-order question of hierarchy, certainly does not answer the second-order question of whether a requirement of hierarchy functions as a constraint or as a power source. This Part pursues both questions by studying the structure of Article III itself, by comparing Article III to Articles I and II, and finally, by discussing the implications that one can draw from the analysis.

A. Article III

Article III is largely silent with respect to the structure of the judicial department. Apart from the language distinguishing between a “supreme” court and “inferior” courts, Article III says little about the relationship between the Supreme Court and its inferiors. On the one hand, certain aspects of Article III suggest that all federal judges are on equal footing—or, as some scholars put it, that they enjoy structural parity.¹²¹ All federal judges have life tenure and an irreducible salary, and all federal courts, both supreme and inferior, possess “the judicial power of the United States.”¹²² On the other hand, Article III does contain at least one provision other than the supreme/inferior distinction that is suggestive of hierarchy: It provides that “the supreme Court shall have appel-

15 Cardozo L. Rev. 313, 319 (1993) (“History and the structure of the Constitution reveal that ‘inferior officers’ and ‘inferior courts’ are *subordinate* institutions, not ‘unimportant’ ones.”).

121. See Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. Rev. 205, 221 (1985) [hereinafter Amar, Neo-Federalist View] (arguing that all federal judges have “structural parity” because they all enjoy same structural protections); see also Lawrence Gene Sager, Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 57, 60 (1981) (arguing that either Supreme Court or inferior federal courts can fulfill “essential function” of federal judiciary).

122. U.S. Const. art. III, § 1.

late Jurisdiction."¹²³ Insofar as this provision grants the Supreme Court appellate jurisdiction to review the judgments of inferior federal courts, it suggests that the Supreme Court sits above those courts in a judicial hierarchy.

The Appellate Jurisdiction Clause is good evidence that Article III envisions some sort of hierarchy. But the hierarchy that one can infer from that clause, standing alone, is fairly weak. The grant of appellate jurisdiction is immediately qualified by the Exceptions and Regulations Clause, which provides that the Court has appellate jurisdiction only subject to "such Exceptions, and under such Regulations, as the Congress shall make."¹²⁴ As others have observed, the Exceptions and Regulations Clause "plainly diminishes the extent to which the Supreme Court is hierarchically dominant over the inferior courts,"¹²⁵ because it permits Congress to insulate some—and arguably all—inferior federal court judgments from Supreme Court review. In fact, the threat that this clause poses to the Supreme Court's hierarchical dominance has prompted scholars to consider whether the Court's designation as "supreme" limits the exceptions that Congress can make to the Court's appellate jurisdiction over inferior federal courts.¹²⁶ Thus, study of Article III's structure circles the inquiry back to its starting point, a consideration of how the Court's supremacy affects the structure of the judicial branch. Because Article III itself says little about that question, it is worth comparing that Article with Articles I and II, which establish the other two branches of the federal government.

B. *A Comparison to Article II*

Article III's silence on matters of structure is particularly striking when Article III is compared to Articles I and II, which give a reasonable amount of detail regarding the composition of the other two branches.¹²⁷ Consider Article II. The claim that the Court's supremacy endows it with supervisory power requires one to view Article III as creating a hierarchy

123. *Id.* § 2, cl. 2. Two other aspects of Article III suggest that the Supreme Court occupies a special place in the Judicial Department: The Supreme Court is the only court created by the Constitution, and the only court with an irreducible core of original jurisdiction. See *id.* § 1 (creating Supreme Court but rendering inferior courts optional); *id.* § 2, cl. 2 (defining Supreme Court's original jurisdiction). These features, however, do not have a clear bearing on the Court's relationship to inferior courts.

124. *Id.* § 2, cl. 2.

125. Calabresi & Lawson, *supra* note 101, at 276; see also Amar, *Neo-Federalist View*, *supra* note 121, at 257 ("[T]he 'exceptions' clause gives Congress the power to structure the internal hierarchy of the federal judiciary by shifting the final power to decide various mandatory cases from the Supreme Court to other Article III judges." (emphasis omitted)).

126. See *infra* note 152 and accompanying text.

127. Cf. Ritz, *supra* note 83, at 14 ("Article III . . . is about one-half the length of Article II, which established the presidency, and it is about one-fifth the length of Article I, which established the Congress.").

headed by the Supreme Court. But Article II, which indisputably creates a hierarchy headed by the President,¹²⁸ does so far more explicitly.

To begin with, Article II gives the President significant ability to control executive branch membership. The President has the power to nominate (and, with the advice and consent of the Senate, to appoint) principal officers of the executive branch; thus, the President's first means of directing the executive branch is filling it with principal officers who are loyal to him.¹²⁹ Article III, by contrast, does not guarantee the Supreme Court any say in the selection of inferior judges.¹³⁰ Nor, of course, does Article III give the Supreme Court any say in their retention. While there is disagreement as to whether the President possesses an absolute or limited ability to remove those who exercise executive power, there is general agreement that the President must have *some* ability to remove such officials.¹³¹ The Supreme Court, by contrast, has no ability to remove

128. Even those who resist a strong "unitary executive" reading of Article II concede some hierarchy in Article II. See, e.g., Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *Colum. L. Rev.* 1, 8 (1994) ("No one denies that in some sense the framers created a unitary executive; the question is in what sense."). Indeed, quite apart from any disputes about Article II's Vesting Clause, which is the focus of most debate about the structure of the executive department, it is undeniable that the text of Article II explicitly grants the President some control over other executive branch officials. In addition to the examples mentioned in the text, note that Article II, Section 2, Clause 1 renders the President "Commander in Chief of the Army and Navy of the United States."

129. I do not mean to suggest that the President necessarily controls those whom he appoints. After all, the President also appoints judges, and he does not control them. My point here is only that, at least at the upper echelon, the appointment power gives the executive branch a coherence that the judicial branch—staffed with judges who owe no particular allegiance to the Supreme Court or its Chief Justice—lacks.

130. Burke Shartel argued that Congress could vest the Chief Justice of the Supreme Court with the power to appoint inferior officers in the judicial branch. *Burke Shartel, Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 *Mich. L. Rev.* 485, 492 (1930). But see Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 *U. Pa. J. Const. L.* 341, 369–70 (2004) (questioning whether judges on inferior courts qualify as "inferior officers" for purposes of Appointments Clause). Even if Congress could vest the Supreme Court or the Chief Justice with the power to appoint judges to staff the inferior courts, the point here is that the Constitution does not *guarantee* either the Supreme Court or the Chief Justice that opportunity. The President, by contrast, is constitutionally guaranteed the right to nominate at least the principal officers of the executive branch.

131. Even those who accept congressional delegations of executive power to independent officials typically believe that the President must have the ability to fire such officials, if only for cause. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 692, 695–96 (1988) (holding that statutory provisions regarding appointment of independent counsel did not violate Article II because, among other things, President could fire independent counsel for "good cause"); Lessig & Sunstein, *supra* note 128, at 117–18 (defending certain "good cause" limitations on President's removal power, but not total withdrawal of it). By contrast, those who believe that the President has the power to control all exercises of executive power typically accept fewer limits on his ability to remove those who wield it. See, e.g., *Morrison*, 487 U.S. at 723–24 & n.4 (Scalia, J., dissenting) (arguing that President possesses, at a minimum, unlimited ability to remove any officer performing "purely executive" function); Calabresi & Rhodes, *supra* note 95, at 1166 & n.57 ("The third and

inferior court judges, who enjoy the same guarantees of life tenure and undiminished salary as do Supreme Court justices.

Even through devices short of removal, Article II is clear about the fact that at least some executive officers report to the President in some respect. Article II expressly permits the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."¹³² Article III, by contrast, does not expressly authorize the Supreme Court to make any demands of inferior courts. There is no Article III analogue to the Opinions Clause under which the Supreme Court could demand that inferior courts provide it with written opinions regarding the judgments they issue. Article III, unlike Article II, does not provide the Supreme Court with any specific means of controlling other members of the judicial department. Some have come to regard it as the Supreme Court's role to "take care that federal law is uniformly interpreted," much as the President must "take care that the laws be faithfully executed."¹³³ Article III, however, does not explicitly charge the Supreme Court with this function, much less endow it with the means to carry it out.

It is also worth comparing Article III's Vesting Clause with that of Article II. Article III vests the judicial power "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."¹³⁴ Article II provides that "[t]he executive Power shall be vested in a President of the United States of America."¹³⁵ A vast literature exists debating whether Article II's Vesting Clause requires a "hierarchical, unified executive department under the direct control of the President,"¹³⁶ or whether the Clause permits a looser hierarchy in which some exercises of executive power can be placed beyond the President's direct

weakest model of the unitary executive contends that the President has unlimited power to remove at will any principal officers (and perhaps certain inferior officers) who exercise executive power.").

132. U.S. Const. art. II, § 2, cl. 1. I need not resolve here whether Article II's specification of the opinion power implies that the President lacks other, greater means of controlling executive branch officials. See generally Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701, 728-33 (describing and entering debate about effect of Opinions Clause on general claims about executive power). My point here is simply to contrast the Constitution's grant of this specific power with the lack of any comparable grant to the Supreme Court.

133. U.S. Const. art. II, § 3; cf. Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157, 161 (1960) (arguing that Supreme Court's essential function is, inter alia, "to provide a tribunal for the ultimate resolution of inconsistent or conflicting interpretations of federal law by state and federal courts").

134. U.S. Const. art. III, § 1.

135. *Id.* art. II, § 1, cl. 1.

136. Calabresi & Rhodes, *supra* note 95, at 1165.

control.¹³⁷ Whichever position one ultimately takes in that debate, it is worth noting that while it is at least plausible to construe Article II's Vesting Clause as placing all executive power within the control of the President, a comparable construction of Article III's Vesting Clause is not plausible. Article III does not vest the judicial power exclusively in "a supreme Court," leaving open the possibility that inferior courts exercise the judicial power at the Supreme Court's pleasure. On the contrary, Article III makes clear that the judicial power vests directly in each Article III court. Inferior courts are capable of exercising judicial power wholly independently of the Supreme Court's direction. They do not depend on the Supreme Court to give them the power, and the Supreme Court cannot take it away.¹³⁸

In fact, rather than giving the Supreme Court grounds for claiming control of all exercises of judicial power, Article III's Vesting Clause arguably *limits* the degree of control that the Supreme Court can exert over inferior courts. The Supreme Court's control over inferior courts is already limited by the Good Behavior Clause, which gives judges intrabranch as well as interbranch protection from job loss and salary reduction.¹³⁹ But the Vesting Clause may also prevent the Supreme Court from controlling inferior courts through methods short of these more drastic measures. The Vesting Clause may prohibit the Supreme Court from regulating inferior courts in a way that cripples their ability to exercise "judicial power"; otherwise, the Supreme Court could effectively take away what Article III gives.¹⁴⁰ As Judge Tatel eloquently put it in the con-

137. For a sampling of the debate, compare *id.* at 1208 (arguing that Article II mandates unitary executive), and Prakash, *supra* note 132, at 763 (same), with A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 Nw. U. L. Rev. 1346, 1373-74 (1994) (arguing that Article II permits looser hierarchy with independent agencies largely insulated from direct presidential control), and Lessig & Sunstein, *supra* note 128, at 108-10 (same).

138. Cf. *Lindh v. Murphy*, 96 F.3d 856, 869 (7th Cir. 1996) (en banc), *rev'd* on other grounds, 521 U.S. 320 (1997) (making point that Article III's Vesting Clause, in contrast to Article II's Vesting Clause, prohibits view that inferior courts are analogous to executive agencies, deriving power from Supreme Court); Geoffrey P. Miller, *Independent Agencies*, 1986 Sup. Ct. Rev. 41, 60 ("Inferior courts are granted judicial power through the Constitution itself; the power does not flow by delegation from the Supreme Court. In contrast, the Constitution . . . expressly vests the entire executive power in 'a President of the United States of America.'").

139. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 n.10 (1982) (asserting that constitutional "guarantee of life tenure insulates the individual judge from improper influences not only by other branches but by colleagues as well, and thus promotes judicial individualism"); see also *supra* notes 121-122 and accompanying text.

140. One could draw a rough analogy to congressional regulation of the courts. Congress is indisputably authorized to engage in some regulation of the federal courts. Its power in this respect, however, is not unlimited. Both courts and commentators have closely examined how Article III's grant of judicial power limits the amount of control that Congress is otherwise authorized to exert over the courts. See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995) (holding that judicial power granted by Article III

text of judicial discipline, “[T]he principle of judicial independence guarantees to individual Article III judges a degree of protection against interference with their exercise of judicial power, including interference by fellow judges.”¹⁴¹ The Supreme Court has expressed the same sentiment.¹⁴²

The Supreme Court’s treatment of an inferior court’s control of its bar membership is instructive in this regard. This is one of two areas (the other being judicial discipline) in which the Supreme Court has explored, even briefly, the degree to which federal courts can regulate other federal courts. From very early on, the Supreme Court has expressed “doubts . . . respecting the extent of its authority as to the conduct of the Circuit and District Courts towards their officers,” given that the power to discipline the bar is “incidental to all Courts.”¹⁴³ As the Second Circuit more recently put it, the authority to discipline attorneys practicing before it is “an inherent, self-contained power of any court, [thus] the power of an appellate court to review a lower court’s decision to sanction an attorney is not self-evident.”¹⁴⁴ In the end, federal appel-

includes power to conclusively resolve cases and that a congressional command to reopen final judgments violates this “fundamental principle”). Although vehement disagreement exists about where Article III draws the line, few would dispute that the federal courts possess some core of “judicial power” that Congress cannot reduce. One might similarly argue that all Article III courts must possess some core of “judicial power” that even the Supreme Court cannot reduce. Of course, the boundaries limiting intrabranched interference with judicial power would be drawn differently than those limiting interference by the other branches. Cf. Evan Caminker, *Allocating the Judicial Power in a “Unified Judiciary,”* 78 *Tex. L. Rev.* 1513, 1526 (2000) (“[C]ertain attributes of the judicial power mean one thing when threatened by actors external to the federal judiciary and quite another when threatened by actors inside the Article III hierarchy.”).

141. *McBryde v. Comm. to Review Circuit Council Conduct and Disability Orders of the Judicial Conference*, 264 F.3d 52, 77 (D.C. Cir. 2001) (Tatel, J., concurring).

142. See, e.g., *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 84 (1970) (“There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function.”); *id.* at 137 (Douglas, J., dissenting) (arguing that Constitution does not authorize one group of judges to “censor or discipline any federal judge” or “declare him inefficient and strip him of his power to act as a judge”); *id.* at 141–42 (Black, J., dissenting) (declaring himself “unable to find in our Constitution or in any statute any authority whatever for judges to arrogate to themselves” the power to deprive another judge of “the full power of his office”); see also *In re Certain Complaints Under Investigation*, 783 F.2d 1488, 1507 (11th Cir. 1986) (acknowledging that Article III guarantees federal judges some degree of independence, but holding that Judicial Councils Reform and Judicial Conduct and Disability Act did not violate that guarantee).

143. *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 530–31 (1824).

144. *In re Jacobs*, 44 F.3d 84, 87–88 (2d Cir. 1994); see also *In re Morrissey*, 305 F.3d 211, 217 (4th Cir. 2002) (acknowledging that power to discipline bar, like contempt power, is inherent in every court and its exercise can be reviewed only for abuse of discretion); *McBryde*, 264 F.3d at 78–80 (Tatel, J., concurring) (arguing that “a judge’s authority to control the courtroom is essential to the . . . judicial power” and cannot be undermined, even by other judges).

late courts will review a lower court's decision to disbar an attorney, but only for an abuse of discretion.¹⁴⁵

Thus, unlike Article II's Vesting Clause, Article III's Vesting Clause does not strengthen the Supreme Court's claim to departmental dominance. Instead, Article III's Vesting Clause actually weakens that claim by making clear that the judicial power inheres in every federal court.

C. A Comparison to Article I

It is also worth comparing Article III with Article I. Unlike Article II, Article I does not create a pyramid of authority. Nonetheless, it still has more to say about departmental structure than does Article III.

The tone of Article I is one of self-governance, which is perhaps fitting for a department whose members hold the legislative power collectively. Article I's Vesting Clause stands in sharp contrast to the Vesting Clauses of Articles II and III. Article I makes clear that the members of Congress hold the legislative power together, as "a Congress of the United States."¹⁴⁶ Unlike the executive, no one member of Congress can plausibly launch an exclusive claim to the power of her department. Unlike any single Article III court, no one member of Congress can, acting alone, exercise the power of her department. Instead, members of Congress can exercise legislative power only when acting in concert with each other (and the President). Perhaps fittingly, members of Congress settle matters of branch governance through collective action as well.

Article I permits members of Congress to exercise a fair amount of control over one another. Indeed, one might say that it sets up a democracy of sorts within the most democratically selected branch. For example, Article I expressly authorizes each House to choose its own leader: The House of Representatives chooses its Speaker and the Senate chooses its President pro tempore.¹⁴⁷ Article III, by contrast, does not give members of the judiciary any comparable power; it does not, for example, guarantee the Supreme Court the right to select its own chief.¹⁴⁸ Article I also expressly authorizes members of Congress to discipline one another. Section 5 authorizes each House to "compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide," and to "punish its Members for disorderly Behavior, and, with

145. See, e.g., *Sacher v. Ass'n of Bar of N.Y.*, 347 U.S. 388, 388–89 (1954) (reversing judgment of disbarment on ground that District Court exceeded its discretion in permanently disbarring attorney).

146. U.S. Const. art. I, § 1.

147. *Id.* § 2, cl. 5 & § 3, cl. 5. Both Houses also have the power to select their "other Officers." *Id.*

148. Edward T. Swaine argues that Congress could grant the Supreme Court the power to select its own chief. Edward T. Swaine, *Hail, No: Changing the Chief Justice*, 154 U. Pa. L. Rev. (forthcoming June 2006). Whatever the merits of that argument, the point here is that the Constitution does not *guarantee* the Supreme Court the ability to do so. Cf. *supra* note 130 (making similar point with respect to selection of judges for inferior courts).

the Concurrence of two thirds, expel a Member."¹⁴⁹ By contrast, Article III does not expressly grant the judiciary any power to control or discipline its members. Currently existing means of judicial self-discipline are entirely statutory,¹⁵⁰ and, because of the Good Behavior Clause, they stop short of removal.

In short, just as Article II specifies some ways in which members of the executive branch must answer to the President, Article I specifies ways in which members of Congress must answer to one another. Article III, by contrast, not only fails to specify any ways in which inferior courts must answer to the Supreme Court, but it fails to specify any ways in which members of the judicial branch must answer to one another. Article III does not expressly authorize judges to promote or demote one another to or from positions of judicial branch leadership; nor does it expressly authorize judges to require any particular standard of behavior of one another. Whereas Article I's Vesting Clause emphasizes the interdependence of members of Congress, Article III's Vesting Clause emphasizes the independence of each Article III court.

D. *Conclusions from Constitutional Silence*

As the above discussion illustrates, Article III reflects neither the obvious hierarchy of Article II nor the self-governance of Article I. One could draw a number of different conclusions from this silence.

First, one might conclude that Article III's relative silence with respect to departmental structure is reason to adopt the nonhierarchical reading of the supreme/inferior distinction. In light of the explicit structural choices made by Articles I and II, one could understand Article III's silence on these matters to reflect deliberate agnosticism about the structure of the judicial branch. On this view, Congress could, consistently with Article III, create a nonhierarchical judicial department in which federal courts operate largely independently of one another. Or Congress could, consistently with Article III, create a hierarchical judicial department like the one it has in fact chosen to create. One taking this view would argue that Article III leaves the choice entirely in Congress's hands.¹⁵¹ A claim to constitutionally based supervisory power would fail on this account of Article III.

Second, one might interpret the supreme/inferior distinction to refer to a relationship of subordination, but still decide to attribute signifi-

149. U.S. Const. art. I, § 5, cls. 1, 2.

150. See, e.g., Judicial Discipline and Removal Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5122 (codified as amended in scattered sections of 28 U.S.C. (2000)). It is important to emphasize that this Act authorizes means of judicial *self*-discipline. Congress's only means of directly disciplining federal judges lies in its power to impeach them. See U.S. Const. art II, § 4.

151. This is basically the conclusion that David Engdahl reaches, although he reaches it through a historical rather than a structural argument. See Engdahl, *supra* note 94, at 490-91, 503-04; *supra* Part II.B.

cance to Article III's silence about departmental structure. The interpretive task is not complete once one equates "inferior" with "subordinate"; one must still decide what structural function the supreme/inferior distinction performs. The distinction might operate exclusively as a limit on the way Congress can shape the judicial department—in other words, it might mean simply that Congress cannot create inferior courts that operate wholly outside of the Supreme Court's control.¹⁵² Or the distinction might operate as a source of inherent authority for the Supreme Court—in other words, it might directly equip the Supreme Court with some means of controlling inferior courts. One inclined to interpret the supreme/inferior distinction as referring to a relationship of subordination but reluctant to dismiss the significance of Article III's silence on matters of departmental structure would likely prefer the more restrained view of the distinction's structural function (limiting Congress) to the more expansive one (granting inherent power). The restrained view would consider Article III's silence regarding means by which the Supreme Court might control its inferiors (particularly in contrast to Article II) or means by which members of the judiciary might control one another (particularly in contrast to Article I) to counsel against implying any powers in that regard. The Supreme Court, on this view, could not claim simply by virtue of its title to have power over its subordinates that Congress did not expressly give. A claim to constitutionally based supervisory power, therefore, would also fail on this account of Article III.

Third, one could discount Article III's relative silence with respect to departmental structure and leave open the possibility that the supreme/

152. Consider that most of the reflection on the impact of the supreme/inferior distinction has occurred in the context of considering how that distinction might limit Congress's regulation of the judicial branch. In the debate regarding the extent of Congress's power under the Exceptions and Regulations Clause to strip the Supreme Court of its appellate jurisdiction, scholars have explored whether a court can be "supreme" vis-à-vis its inferiors without some amount of appellate jurisdiction over them. Some scholars argue that the Court's "supremacy" operates as a limit on Congress's jurisdiction-stripping power by requiring the Supreme Court to possess some core of appellate jurisdiction that Congress cannot reduce. See, e.g., Caminker, *Inferior Courts*, supra note 7, at 834–35 (arguing that the Court's "supremacy" requires it to have appellate jurisdiction over enough cases "to ensure that the Court lead[s] the nation in federal law interpretation"); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 *Harv. L. Rev.* 1362, 1364–65 (1953) (arguing that Congress cannot make exceptions to Supreme Court's jurisdiction that will "destroy the essential role of the Supreme Court in the constitutional plan"); Ratner, supra note 133, at 161 (arguing that "essential functions" of the Supreme Court include ensuring the supremacy and uniformity of federal law); see also supra note 92. Others, however, argue that the Court's "supremacy" provides only a minimal limit on Congress's regulation of the judicial branch. See, e.g., Amar, *Neo-Federalist View*, supra note 121, at 221 n.60 (arguing that Supreme Court tops a pyramid only in that it can never be reversed by any other court in any case that is given to it); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 *Duke L.J.* 503, 515 (2000) ("The Supreme Court is supreme in that it must be the court of last resort.").

inferior distinction vests the Court with inherent supervisory powers.¹⁵³ A limited view of the Supreme Court's constitutionally required position in the judicial department is not, after all, the only possible explanation for Article III's silence. The Madisonian compromise left the creation of inferior courts to Congress's discretion. The Framers may have intended that the "supreme" court would control its inferiors, but avoided spelling out any details of that control for fear of giving the impression that Congress was obliged or expected to create inferior courts. In addition, it may have seemed pointless to flesh out a relationship between the Supreme Court and courts that were, after all, merely hypothetical at that point. Stopping at the supreme/inferior distinction may have been prudent understatement rather than a choice to limit the Supreme Court's powers. It also may be that at the time the Constitution was written, a "supreme" court had some powers that were so commonly understood that it would have been unnecessary to spell them out.¹⁵⁴ Simply calling the court "supreme" effectively described at least a core of power, and the absence of more detail does not undercut the presence of that core. A claim to constitutionally based supervisory power might succeed on this account.

The Appellate Jurisdiction Clause does provide some limited evidence from which one can infer a hierarchy in Article III. That clause directly vests the Supreme Court with the jurisdiction to review the judgments of inferior federal courts (and state courts). It is true that Congress can limit this appellate jurisdiction, and perhaps even wholly withdraw it, pursuant to the Exceptions and Regulations Clause. Nevertheless, the Constitution's grant of appellate jurisdiction to the Supreme Court reflects at least a presumption that one of the Court's functions is correcting the errors of inferior federal courts. Consequently, the second and third options seem more plausible than the first.¹⁵⁵

153. This is the conclusion Professor Pfander reaches in his study of the Supreme Court's inherent authority to issue discretionary writs controlling inferior courts, although he reaches it from history rather than through a structural and textual analysis. See Pfander, *Jurisdiction-Stripping*, supra note 7, at 1441 ("[T]he Court's supremacy gives it authority to supervise the work of inferior federal tribunals through the exercise of its power to issue discretionary writs."); Pfander, *Marbury*, supra note 76, at 1568 (describing this supervisory power as an "inherent feature of the authority of supreme courts"). But see Julius Goebel, Jr., *1 History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, at 784-92 (1971) (arguing that early Supreme Court did not recognize inherent power of superintendence); Hartnett, supra note 90, at 307-16 (disputing Pfander's claim that Court's supremacy gives it the "constitutional prerogative to supervise inferior federal courts" through issuance of discretionary writs).

154. Professor Pfander argues, for example, that the power to issue discretionary writs was one such feature. See supra note 153.

155. There is also historical evidence supporting this conclusion. In addition to the evidence noted earlier, supra notes 95 & 102, it is worth observing that from the very beginning, the statutes regulating the judiciary treated the Supreme Court as its head. See *infra* Part IV.B (describing supervisory rulemaking grants to Supreme Court).

As between the second and third options, however, the third seems less consistent with the Constitution's structure. If the words "supreme" and "inferior" establish a hierarchy, it seems far more likely that the requirement of hierarchy serves the more restrained function of limiting Congress than the more expansive one of granting power. This conclusion garners some support from the fact that Article III is the only one of the first three articles that fails to detail any particular control that the ostensible departmental head has over its inferiors, or even that individual members of the branch have over one another. Admittedly, though, that silence, as noted above, might be explained by the Madisonian compromise.

Cutting more strongly against the third option is the fact that when Article III speaks, as it does in the Vesting and Good Behavior Clauses, it points toward judicial independence rather than subservience, even within the judicial department. The Vesting Clause makes clear that each Article III court enjoys the judicial power in its own right, rather than as a Supreme Court delegatee. The Good Behavior Clause guarantees the independence of every Article III judge against other government actors—even other Article III judges. Together, these clauses insulate inferior courts from Supreme Court control. It goes exactly against that grain to argue that Article III implicitly subjects inferior courts to unspecified kinds of Supreme Court control, even if they must remain subordinate to the Supreme Court in any regulatory scheme.

While the focus of this Part is the Constitution's structure, it is worth noting that interpreting "supreme" to confer inherent authority also runs contrary to the way that the Supreme Court historically has interpreted the scope of its powers. In the Court's early years, litigants occasionally tried to persuade the Court that its designation as "supreme" brought inherent power with it. The Court rebuffed these arguments. For example, litigants occasionally argued that the Court's designation as "supreme" gave it the inherent authority to issue discretionary writs.¹⁵⁶ The Court dismissed this argument, instead treating its mandamus authority as deriving wholly from congressional grant.¹⁵⁷ In a related vein, litigants argued on at least two occasions that the Court's designation as "supreme" gave it the inherent authority to exercise appellate jurisdiction

156. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 146 (1803) (argument of C. Lee) ("This is the *supreme* court, and by reason of its supremacy must have the superintendance [sic] of the inferior tribunals and officers, whether judicial or ministerial.")

157. *Id.* at 173–76; see Hartnett, *supra* note 90, at 293–94 (characterizing *Marbury's* holding as implicit endorsement of proposition that Supreme Court lacks inherent authority to issue mandamus); see also *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 622 (1838) (observing that Supreme Court's mandamus power was "not exercised, as in England, by the king's bench, as having a general supervising power over inferior courts," but within limits prescribed by Congress).

over inferior court judgments.¹⁵⁸ The Court ignored this argument each time it was raised, treating its appellate jurisdiction as deriving exclusively from the explicit grant in the Appellate Jurisdiction Clause and not from its supremacy.¹⁵⁹

To be sure, the Court's refusal to recognize an inherent power to issue discretionary writs or an inherent power to exercise appellate jurisdiction does not establish that the Court lacks the inherent power to prescribe procedure for inferior courts. The Court's refusal to recognize these other inherent powers, however, does reflect the Court's general hostility to the suggestion that the supreme/inferior distinction operates as a source of inherent authority. The Court has long been reticent to claim any kind of inherent authority over inferior courts, instead taking the position that any power it possesses over inferior courts depends upon an express constitutional grant or enabling legislation.¹⁶⁰

In sum, the structure of Article III is in significant tension with the proposition that the Court's "supremacy" grants it any inherent authority over inferior courts. It might press the argument too far, however, to argue that the structure of Article III definitively forecloses that interpretation. Fortunately, determining whether supervisory authority over inferior courts derives from the Court's designation as "supreme" does not ultimately demand that I resolve either the question of whether the supreme/inferior distinction refers to hierarchy or rank, or whether, assuming it refers to hierarchy, that hierarchy functions only as a restraint on congressional action or also as a source of inherent power. Conclud-

158. See *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 311 (1810) (argument of E. Livingston) ("This court has jurisdiction in consequence of its being the *supreme* court, and the other an *inferior* court. The terms *supreme* and *inferior* are correlative, and imply a power of revision in the superior court."); *Clarke v. Bazadone*, 5 U.S. (1 Cranch) 212, 212 (1803) (argument of G. Mason) ("[T]his court possesses a general superintending power over all the other courts of the United States, resulting from the nature of a *supreme* court, independent of any express provisions of the constitution or laws of the United States.").

159. The Supreme Court did not address the arguments related to its inherent authority as a "supreme" court in either *Clarke* or *Durousseau*. The Court's opinion in *Clarke* consists of a brief assertion that, because Congress had not granted it jurisdiction to review the judgments of the general court of the Northwestern Territory, the Court "could not take cognizance of the case." *Clarke*, 5 U.S. at 214. Similarly, in *Durousseau*, the Court ignored the argument grounded in its supremacy, and discussed only an argument made by Charles Lee related to Article III's Appellate Jurisdiction Clause. Lee argued that Article III vested the Court directly with appellate jurisdiction unless Congress exercised its power to make exceptions to or regulations of that jurisdiction; as Congress had not explicitly excepted this case from the Court's appellate jurisdiction, it had authority to hear it. *Durousseau*, 10 U.S. at 313-14. The Court rejected Lee's argument; it construed Congress's regulation of its jurisdiction as an implicit denial of appellate jurisdiction in all other circumstances. *Id.* The effect of this holding is that the Supreme Court lacks appellate jurisdiction unless Congress explicitly confers it. See also *United States v. More*, 7 U.S. (3 Cranch) 159, 173 (1805) (holding same).

160. Cf. Goebel, *supra* note 153, at 791 ("From the beginning, [the Supreme Court] recognized how dependent its operation was upon enabling legislation . . .").

ing that the supreme/inferior distinction establishes a judicial hierarchy, and that the Court's supremacy endows it with inherent power, are necessary but insufficient conditions for determining that the supervisory power exists. Even assuming that the supreme/inferior distinction refers to a judicial hierarchy, and even assuming that the word "supreme" is a source of inherent power rather than merely a restraint on congressional action, there must be some basis for claiming that such inherent authority extends to the prescription of inferior court procedure. The fact that *some* inherent authority exists—for example, the inherent authority to control inferior courts through the issuance of discretionary writs—does not establish the existence of *this* inherent authority—a supervisory power over inferior court procedure.

This problem might be described as determining the scope of the subordination, and it is a problem that would arise no matter which of the two structural functions a requirement of hierarchy serves. One entity can be subordinate to another without being subordinate in every respect. For example, the Constitution renders the states subordinate to Congress insofar as it makes federal law "the supreme" law of the land.¹⁶¹ State law is not, however, subordinate to federal law in every respect. It must yield to federal law only when Congress legislates on a matter that Article I puts within congressional control; all matters outside of congressional control are reserved to the states.¹⁶² The very nature of our federal system is that the states are subordinate in some respects and independent in others. The relationship is a blend of subordination and independence.

Similarly, assuming that inferior courts are subordinate to the Supreme Court, their relationship to the Supreme Court is necessarily a blend of subordination and independence rather than across-the-board subordination. There are some matters, like salary and life tenure, over which the Supreme Court indisputably has no control. Even putting salary and life tenure aside, however, the position that the Constitution requires across-the-board subordination of inferior courts is unsustainable. To state an immediate objection to that position, interpreting the supreme/inferior distinction to require total subordination would require that the Supreme Court have the option of reviewing every case decided by an inferior court—a position in direct opposition to the Exceptions and Regulations Clause.¹⁶³

Application of the subordination requirement, then, is more nuanced than a claim that because the Court is supreme, it must be supreme in every respect. Here, application of that requirement demands

161. U.S. Const. art. VI, cl. 2.

162. *Id.* amend. X.

163. Cf. Hartnett, *supra* note 90, at 314 n.143 (noting that within a judicial hierarchy, "if there are situations in which A can reverse the judgments of B, and B can never reverse the judgments of A, then B is inferior to A, even if there are many situations in which A cannot reverse the judgments of B").

an analysis of whether the particular area of inferior court procedure is an area placed within the Supreme Court's control, even in the absence of enabling legislation.

Article III's text and structure, relatively ambiguous on the questions of hierarchy and conferral of inherent power over subordinates, obviously do not answer the more specific question of whether the Court's supremacy grants it supervisory procedural authority. Consequently, a viable claim to supervisory authority over the specific area of inferior court procedure would have to be rooted in history. If supreme courts traditionally exercised the "authority to prescribe rules of evidence and procedure that are binding in [inferior] tribunals,"¹⁶⁴ one might argue that a reasonable reader of Article III at the time of the Founding would have understood the court's designation as "supreme" implicitly to confer that same power on the Supreme Court of the United States. If no such tradition exists, however, it is difficult, if not impossible, to make the case that such power is part and parcel of the Court's constitutional supremacy. The next Part therefore turns to history to determine whether or not tradition gives the Court's claim to supervisory power constitutional grounding.

IV. THE HISTORY OF SUPERVISORY POWER

Because the Constitution does not clearly confer such a power on the Supreme Court, the success of a claim to inherent supervisory authority over inferior court procedure based on the Court's "supremacy" depends on the existence of extraconstitutional evidence supporting it. In an effort to find such support, this Part of the Article turns to the historical record. This Part aims to determine whether the power to announce supervisory rules for inferior courts was so integral to the role of a supreme court at the time of the Founding that the mere designation of the Court as "supreme" and other Article III courts as "inferior" would have been understood to vest the Supreme Court with supervisory power over inferior court procedure.

The influence of the English and colonial experience on the Founding generation means that any consideration of Founding-era attitudes must take English and colonial sources into account. I found no evidence, however, that either English or colonial legal systems treated supervisory power over inferior court procedure as a necessary feature of a court designated "supreme."¹⁶⁵ In the absence of any well-settled English

164. *Dickerson v. United States*, 530 U.S. 428, 437 (2000).

165. I consulted the following sources on the English system: *Henrici de Bracton, On the Laws and Customs of England* (George E. Woodbine ed., Samuel E. Thorne trans., Harvard Univ. Press 1968) (1569), available at <http://hsl.law.harvard.edu/bracton>; *Joseph Chitty, A Treatise on the Parties to Actions, the Forms of Actions, and on Pleading* (Philadelphia, Carey, Lea & Carey 1828); *W.S. Holdsworth, A History of English Law*, vols. 1, 4, 5, 9, & 10 (1922–1938); *John Reeves, Reeves' History of the English Law* (W.F. Finlason ed., Philadelphia, M. Murphy 1880); *Henry John Stephen, A Treatise on the*

or colonial practice, this Part begins its more detailed discussion of the historical record with the Founding. The first two subparts address the framing of Article III and the enactment of early legislation regarding the judicial branch. As these subparts explain, none of the records surrounding these events reflects any discussion about any inherent supervisory authority of the Supreme Court. The third subpart of this Part describes the results of my search through Founding-era treatises, Supreme Court arguments, and Supreme Court cases. References to supervisory authority are also absent in these sources. Neither treatise writers, advocates before the Court, nor the Supreme Court itself addressed the possibility that the Supreme Court possesses the inherent authority to prescribe inferior court procedure.

There are some early cases, though, in which the Supreme Court, without explicit discussion about what it was doing, appears to lay down rules of procedure and evidence governing inferior courts. At first blush, these cases seem to support the notion that the Supreme Court possesses supervisory authority over inferior court procedure. The final subparts of this Part argue, however, that this support is illusory. In the early cases, the Supreme Court was not prescribing procedure for inferior courts; it was reviewing the decisions of inferior courts for consistency with settled common law rules. Reading these cases as support for the supervisory authority would ignore their historical context. The claim to supervisory authority is not a claim that the early Supreme Court was making.

A. *Constitution: Convention and Ratification*

If the Framers of the Constitution thought that a “supreme” court possessed inherent power over inferior court procedure, they did not say so in the course of drafting Article III.¹⁶⁶ Nor did the topic arise in the state ratification debates or the public commentary of the Federalists and Anti-Federalists on the proposed Constitution.¹⁶⁷ This is not surprising, however, for the drafting and ratification of Article III focused on broader-brush issues of judicial branch structure. Dominating the discussion of Article III were issues such as the wisdom of life tenure for federal

Principles of Pleading in Civil Actions (London, Joseph Butterworth & Son 1824); Tucker, *Blackstone’s Commentaries*, supra note 95. On the colonial system I consulted the following sources: Mary Sarah Bilder, *The Transatlantic Constitution* (2004); Peter Charles Hoffer, *Law and People in Colonial America* (rev. ed. 1998); 1 Story, *Commentaries*, supra note 102 (detailing colonial legal systems); 2 id. (detailing judicial system under Articles of Confederation).

166. See generally Farrand’s *Records*, supra note 98; Supplement to Max Farrand’s *The Records of the Federal Convention of 1787* (James H. Hutson ed., 1987).

167. See generally *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott & Co. 1861); *The Complete Anti-Federalist*, supra note 102; *The Federalist*, supra note 102.

judges and the necessity of inferior federal courts.¹⁶⁸ The details of judicial branch administration simply did not arise. Thus, the absence of any discussion of inherent supervisory power in the convention and ratification debates does not necessarily undermine the claim that the Constitution confers such power on the Supreme Court.

B. *Early Congressional Regulation of the Judicial Branch*

There were four pieces of early legislation that significantly affected the structure of the federal judiciary and the procedures it followed: the Judiciary Act of 1789, the Process Act of 1789, a 1792 amendment to the Process Act, and a 1793 amendment to the Judiciary Act. The drafting and enactment of these statutes would have been a more natural time than the drafting and ratification of Article III for the supervisory power to at least receive mention. The Judiciary and Process Acts did focus on the details of judicial branch administration, and, importantly for present purposes, they provided between them a fairly comprehensive scheme for the regulation of federal court procedure.¹⁶⁹ If the First Congress and its observers had perceived the Court's designation as "supreme" to imbue the Supreme Court with inherent supervisory power over procedure, it presumably would have been natural for someone to mention that power at least in passing as Congress drafted an initial set of federal court procedures. The same is true for the Second and Third Congresses, which enacted the first amendments to these statutes. I have found, however, no evidence in the Acts, their drafting history, or contemporary commentary upon them suggesting that anyone believed the Supreme Court to possess any inherent power to formulate inferior court procedure, in the course of adjudication or otherwise.¹⁷⁰

168. On the wisdom of life tenure for federal judges, see, for example, 2 Farrand's Records, *supra* note 98, at 428–29. On the necessity and desirability of inferior courts, see, for example, 1 *id.* at 124–25; 2 *id.* at 45–46.

169. Numerous provisions in these Acts dealt with procedure. For just a few examples, see Judiciary Act of 1789, ch. 20, § 15, 1 Stat. 73, 82 (granting all federal courts power to "require the parties to produce books or writings in their possession or power, which contain [pertinent] evidence"); *id.* § 17 (granting all federal courts "power to grant new trials"); *id.* § 30 (authorizing depositions "*de bene esse*"); Process Act of 1789, ch. 21, § 1, 1 Stat. 93, 93 (providing that all writs and process issuing from federal courts "shall be under the seal of the court from whence they issue"); *id.* § 2 (requiring the circuit and district courts, in suits at common law, to follow the procedures of the supreme court of the state in which they sat).

170. The first three volumes of the Annals of Congress cover the enactment of all four of these statutes. A review of those volumes revealed no discussion about the Supreme Court's supervisory authority (or lack thereof) over inferior court procedure. Nor did the Supreme Court's supervisory authority (or lack thereof) appear to be a topic of debate among informed onlookers of the time. See generally 4 The Documentary History of the Supreme Court of the United States, 1789–1800 (Maeva Marcus & James R. Perry eds., 1985) [hereinafter 4 Documentary History] (collecting letters, diary and journal entries, newspaper items, and notes of speeches and debates that cast light upon enactment of Judiciary and Process Acts of 1789); Goebel, *supra* note 153, at 457–551 (describing history of Judiciary and Process Acts of 1789). It must be acknowledged, however, that proving a

There are a few places in the historical record where the silence is worth comment. One such place is the silence regarding the enactment of section 17 of the Judiciary Act of 1789. Section 17 granted each federal court local rulemaking authority,¹⁷¹ but neither the Judiciary Act of 1789 nor the Process Act of 1789 granted the Supreme Court supervisory rulemaking authority. I found no discussion of any inherent supervisory power surrounding the enactment of section 17, even though one believing the Court to possess such power might have perceived some tension in a grant of local rulemaking authority to each federal court with no grant of supervisory rulemaking authority to the Supreme Court.¹⁷² One believing the Court to possess such power presumably would prefer a scheme of court rulemaking controlled by the Supreme Court.

There was also no discussion of inherent supervisory authority when Congress first authorized the Supreme Court to promulgate supervisory court rules. In 1792, Congress amended the Process Act to make a federal court's general obligation to follow state procedure subject to "such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same."¹⁷³ The historical record contains no discussion of the potential relationship between this statutory grant and any constitutionally based supervisory power that the Supreme Court might possess, even though this statutory grant could relate to constitutional power in a number of ways. The statutory grant might have reiterated the Court's inherent supervisory power, insofar as it might simply have made explicit what is implicit in Article III. It might have extended inherent supervisory power, insofar as the Court's inherent power may extend only to adjudication, and this grant authorized, in addition, the promulgation of court rules. Or it might have curtailed inherent supervisory power, insofar as it might have extinguished the

negative here (i.e., that the inherent supervisory power was *not* discussed) is complicated by the fact that the records from this period, particularly of debates in the Senate, are not complete. The Annals of Congress were reconstructed in the 1820s–40s based on contemporary newspaper accounts of House proceedings. Because the Senate did not allow reporters to observe its proceedings until February 20, 1794, the only record of its proceedings in the first two Congresses, and part of the third, is the official journal (which consisted of roll calls and parliamentary entries), and individual senators' notes. Thus, as a general matter, the lack of discussion regarding the inherent supervisory power in the House during this period is more meaningful than the similar silence in the Senate.

171. Judiciary Act of 1789 § 17, 1 Stat. at 83.

172. To be sure, the Judiciary Act gave the federal courts the power to prescribe local court rules, and this Article focuses on the regulation of procedure through adjudication. The two are nonetheless related, and the consideration of one provides an occasion to consider the other. It is also worth noting that just as I found no discussion of the Supreme Court's inherent authority to regulate inferior court procedure by adjudication, I found no discussion of any inherent authority on the part of the Supreme Court to promulgate supervisory court rules.

173. Process Act, ch. 36, § 2, 1 Stat. 275, 276 (1792).

Court's ability to proceed by adjudication and required the Court to proceed by promulgating court rules. The fact that neither members of Congress nor congressional observers discussed the relationship between the statutory grant and the inherent supervisory power is at least some evidence that neither believed the Supreme Court to possess inherent supervisory power.

The silence surrounding a House proposal to amend the Judiciary Act the next year is also noteworthy. In 1793, the House proposed amending the rulemaking grant in the Judiciary Act to withdraw the grant of local rulemaking authority to all federal courts and replace it with an exclusive grant of supervisory rulemaking authority to the Supreme Court.¹⁷⁴ The Senate rejected that proposal.¹⁷⁵ In his description of the event, Julius Goebel observes, "Clearly the House meant that the regulation of practice was in the future to be committed to the Supreme Court alone," but "[t]he Senate was not prepared to embark on the drastic change in policy charted by the House."¹⁷⁶ There was no discussion of inherent supervisory authority surrounding either the proposal or its rejection, even though the existence of inherent supervisory authority seems pertinent to congressional choices about how to structure statutory grants of court rulemaking authority.

While the historical record yields no references to the Supreme Court's inherent supervisory authority, it does sometimes refer to a federal court's inherent authority over its own procedure. For example, in his report to Congress on the Judiciary Act of 1789, Attorney General Edmund Randolph observed, "Rules of practice belong to the authority of every court, and their other incidental powers add to that authority."¹⁷⁷ Interestingly, Randolph's comment in this regard is part of an explanation for his never-acted-upon proposal for legislation granting the Supreme Court authority to promulgate national rules of procedure.¹⁷⁸ He justified his proposed grant of supervisory rulemaking authority by

174. Goebel, *supra* note 153, at 550 & n.186.

175. *Id.* at 550-51.

176. *Id.* at 550.

177. Edmund Randolph, Report of the Attorney-General to the House of Representatives (Dec. 27, 1790), in 4 Documentary History, *supra* note 170, at 127, 166 [hereinafter Randolph Report]. For an early case referencing a federal court's inherent authority over local procedure, see *United States v. Hill*, 26 F. Cas. 315, 317 (Marshall, Circuit Justice, C.C.D. Va. 1809) (No. 15,364) (holding that federal circuit courts had power to summon grand jury even though no statute explicitly gave them this power, because circuit courts could not give effect to statutes granting them criminal jurisdiction in absence of such power).

178. Randolph Report, *supra* note 177, at 153 (section 32 of proposed bill). Interestingly, Randolph was not the only one who thought it desirable to have the Supreme Court design uniform procedure for the federal courts. On January 29, 1790, Congressman William Loughton Smith of South Carolina introduced a resolution "that the Judges of the Supreme Court be directed to report to the House a plan for regulating the Processes in the Federal Courts." 1 Annals of Cong. 1143 (Joseph Gales ed., 1790), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db>

reference to the inherent authority of every court over local procedure rather than by reference to any inherent supervisory power of the Supreme Court.¹⁷⁹ The latter would have been a stronger justification, had Randolph believed the Supreme Court to possess it.

To be sure, the silence in the history of the Judiciary and Process Acts of 1789, and the early amendments to those Acts, does not *disprove* the existence of inherent supervisory power in the Supreme Court. But unlike the silence on this score in the convention and ratification debates, it does cast at least some doubt on the claim that contemporary observers would have widely understood the Court's designation as "supreme" and other Article III courts as "inferior" to vest the Court with inherent supervisory power over inferior court procedure. Where references to inherent supervisory authority would have been natural, the historical record is silent.

C. *Cases and Contemporary Treatises*

As the above subparts explain, neither Article III's drafting and ratification nor its implementation in early legislation offers historical support for the claim that supervisory power is an inherent feature of the Court's supremacy. But it may be that the acid test for historical support lies in the Supreme Court's own cases. If the Supreme Court and its bar assumed from the very beginning that the Court possessed supervisory power over inferior court procedure, that would be good evidence that Article III indeed confers such a power. Thus, this subpart looks at what the Supreme Court was doing in its early years.

On the one hand, it may seem odd to look to the Supreme Court's early history for assertions of supervisory power. As Part I explains, *McNabb* is widely treated in the cases and commentary as the seminal "supervisory power" case. And apart from an overlooked case decided a few weeks before it,¹⁸⁰ *McNabb* is the first case in which the Supreme Court openly asserted something called "supervisory authority" or "supervisory power" over the procedures employed by inferior courts. Before *McNabb*, courts employing the terms "supervisory authority" or "supervisory power" were referring to something else, like a court's "supervisory authority" over a jury verdict,¹⁸¹ or its "supervisory power" to issue discre-

&recNum=572 (on file with the *Columbia Law Review*). The resolution was laid on the table and never acted upon. *Id.*

179. Randolph Report, *supra* note 177, at 166.

180. See *supra* note 9 (discussing *Johnson v. United States*, 318 U.S. 189 (1943)).

181. See, e.g., *Ulman v. Clark*, 100 F. 180, 196 (C.C.D. W. Va. 1900) (referring to court's "'supervisory power'" over jury verdict (quoting *People v. Knutte*, 44 P. 166, 166 (Cal. 1896))); *United States v. Polhamus*, 27 F. Cas. 585, 587 (C.C.S.D.N.Y. 1875) (No. 16,062) (referring to same); *Lombard v. Chicago*, 15 F. Cas. 796, 798 (C.C.N.D. Ill. 1865) (No. 8,470) (same).

tionary writs.¹⁸² The Supreme Court did not openly claim to possess “supervisory authority” over inferior court procedure until *McNabb* was decided in 1943.

On the other hand, there is good reason to hesitate before conclusively identifying *McNabb* as the doctrine’s genesis. Even post-*McNabb*, the Supreme Court sometimes announces procedures for inferior courts without explicitly invoking its “supervisory authority.”¹⁸³ If the Supreme Court has asserted supervisory authority implicitly in the years since *McNabb* was decided, it may have done so before *McNabb* was decided as well. Indeed, the *McNabb* Court asserted that history supported its claim to supervisory power, at least with respect to formulating rules of evidence for criminal proceedings.¹⁸⁴ The Court claimed that “this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions.”¹⁸⁵

The question, then, is not necessarily whether the Supreme Court has, from the beginning, asserted something called “supervisory power,” but whether it has, from the beginning, formulated rules of procedure and evidence for inferior federal courts in the course of adjudication. In other words, it is important to consider what the Supreme Court has actually been doing, regardless of what the Court has been calling it.

1. *Method.* — Before discussing the results of my historical study of the Supreme Court’s early practice, I will briefly describe its parameters. *First*, its substantive scope: As Part I described, since *McNabb* was decided, the Supreme Court has relied on its supervisory power to establish a broad range of rules, including both those that would conventionally be called “evidentiary” and those that would conventionally be called “procedural.” In studying the Supreme Court’s early practice, I took a similarly broad approach, considering anything arguably “procedural” or “eviden-

182. See, e.g., *Ex parte Crane*, 30 U.S. (5 Pet.) 190, 193–94 (1831) (asserting that Judiciary Act of 1789 gives Supreme Court power to superintend inferior tribunals through writ of mandamus).

183. Cf. Beale, *supra* note 8, at 1448 n.100 (“The dividing line between supervisory power rulings and other cases is not always clear.”). For examples of post-*McNabb* cases in which the Supreme Court formulates rules of evidence or procedure for inferior federal courts without explicitly invoking “supervisory authority,” see *Jencks v. United States*, 353 U.S. 657, 672 (1957) (holding that criminal action must be dismissed when government fails to comply with production order on grounds of privilege); *Roviaro v. United States*, 353 U.S. 53, 65 (1957) (finding prejudicial error when trial court allowed government to withhold identity of undercover employee in spite of accused’s demands for disclosure).

184. *McNabb v. United States*, 318 U.S. 332, 341 (1943).

185. *Id.* As support for this proposition, the Supreme Court cited the following examples: *Wolfe v. United States*, 291 U.S. 7 (1934); *Funk v. United States*, 290 U.S. 371 (1933); *United States v. Murphy*, 41 U.S. (16 Pet.) 203 (1842); *United States v. Wood*, 39 U.S. (14 Pet.) 430 (1840); *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 468–70 (1827); *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 199 (1820); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 643–44 (1818); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 130–31 (1807). Of these cases, only the latter four are arguably close enough to 1789 to be considered reflective of Founding-era perceptions of the role of the Supreme Court.

tiary.” And because the Supreme Court has asserted supervisory authority in both civil and criminal cases, I considered the early Court’s practice in both civil and criminal cases.

Second, the sources I consulted: I set out to determine whether supervisory power over rulemaking was viewed as an inherent feature of the Court’s supremacy by either the Court itself or informed observers of the early federal courts. In light of that objective, I considered Supreme Court opinions, published accounts of oral arguments before the Supreme Court, early inferior court opinions, and contemporary treatises.¹⁸⁶

Finally, my method: The breadth of the search’s substantive parameters—everything falling within a broad definition of “procedure”—made it difficult to formulate search terms that would capture all the relevant material. Thus, I read the first ten volumes of the United States Reports (1789–1810) in their entirety, flagging all cases in which the Supreme Court addressed questions that could be even arguably categorized as procedural or evidentiary. For representative cases decided after 1810, I relied on searches and citations gleaned from secondary sources.

2. *Results*. — Neither the Supreme Court, in its early cases, nor the authors of contemporary treatises ever discussed the question whether the Court possessed inherent power to adopt, in the course of adjudication, procedures for inferior courts that are not required by the Constitution or statute. Nor did any advocate before the Supreme Court press the Court to recognize an inherent power to announce procedural rules for inferior courts. Advocates pressed the Supreme Court to recognize other powers as inherent in its supremacy—for example, to recognize an inherent power to review inferior court proceedings and an inherent power to

186. I reviewed the following contemporary treatises: Alfred Conkling, *A Treatise on the Organization, Jurisdiction and Practice of the Courts of the United States* (Albany, Wm. & A. Gould & Co. 1831); Nathan Dane, *A General Abridgment and Digest of American Law* (Boston, Cummings, Hilliard & Co. 1823–1824); Peter S. Du Ponceau, *A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States* (Philadelphia, Small 1824); James Gould, *A Treatise on the Principles of Pleading in Civil Actions* (Boston, Lilly & Wait 1832); James Kent, *Commentaries on American Law* (O.W. Holmes, Jr. ed., Boston, Little, Brown, & Co. 12th ed. 1873); Thomas Starkie, *A Practical Treatise on the Law of Evidence* (Boston, Wells & Lilly 2d ed. 1828); 3 Story, *Commentaries*, supra note 102; Joseph Story, *A Selection of Pleadings in Civil Actions* (Boston, Carter & Hendee 2d ed. 1829); Zephaniah Swift, *A Digest of the Law of Evidence, in Civil and Criminal Cases* (Hartford, Oliver D. Cooke 1810); Tucker, *Blackstone’s Commentaries*, supra note 95; Henry St. George Tucker, *Commentaries on the Laws of Virginia* (Richmond, Shepherd & Colin 3d ed. 1846); 2 James Wilson, *The Works of James Wilson* (Robert Green McCloskey ed., 1967). While not contemporary treatises, the following were helpful sources: Goebel, supra note 153; Robert Wyness Millar, *Civil Procedure of the Trial Court in Historical Perspective* (1952); Erwin C. Surrency, *History of the Federal Courts* (1987); 1 Charles Warren, *The Supreme Court in United States History* (rev. ed. 1926); G. Edward White, *3–4 History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815–35* (1988).

issue discretionary writs to inferior courts.¹⁸⁷ But no advocate ever pressed the Court to recognize this particular inherent power.

Despite this absence of explicit discussion about the Supreme Court's authority to prescribe procedure for inferior courts, there are a number of occasions on which, at least at first blush, the Court appears to be doing just that. Consider the following evidentiary rulings in civil cases.¹⁸⁸ In *Church v. Hubbard*, the Supreme Court held that a circuit court had improperly admitted evidence of Portuguese laws and a Portuguese judgment in a civil case.¹⁸⁹ In so holding, the Court specified rules for the authentication of foreign laws and judgments,¹⁹⁰ and the rules that the Court specified derived neither from a statute nor from the Constitution. Similarly, in *Croudson v. Leonard*, the Court held a foreign judgment to be conclusive evidence of the matter adjudicated.¹⁹¹ In *Smith v. Carrington*, the Court reversed a circuit court for admitting a copy of a letter into evidence in violation of the nonstatutory, nonconstitutional principle that a copy is inadmissible unless its truth is established and "sufficient reasons for the non-production of the original [are] shown."¹⁹²

Consider also cases in which the Supreme Court apparently announced common law rules of civil procedure. In *Cooke v. Graham's Administrator*, the Supreme Court held that a special demurrer entered by a

187. See *supra* notes 156–160 and accompanying text (describing Supreme Court's rejection of these arguments for inherent power).

188. For examples of civil evidentiary rulings other than those described in the text, see *Queen v. Hepburn*, 11 U.S. (7 Cranch) 290, 296–97 (1813) (refusing to recognize hearsay exception that would admit certain hearsay on petition by slave for freedom); *Field v. Holland*, 10 U.S. (6 Cranch) 8, 24 (1810) (agreeing with circuit court that answer of one defendant binds other defendants claiming through him); *Bingham v. Cabbot*, 3 U.S. (3 Dall.) 19, 39–42 (1795) (holding that circuit court was incorrect to exclude certain items of evidence).

189. 6 U.S. (2 Cranch) 187, 237–38 (1804). In 1831, the Court held that the Rules of Decision Act makes state evidentiary law binding in federal courts in civil cases. *Hinde v. Vattier's Lessee*, 30 U.S. (5 Pet.) 398, 401 (1831). But in civil cases decided before 1831, the Supreme Court typically applied federal general common law without addressing the choice-of-law problem. Indeed, in *Queen v. Hepburn*, the Court deliberately applied general common law rather than Maryland law, which recognized the hearsay exception advanced by the plaintiff. 11 U.S. (7 Cranch) at 298 (Duvall, J., dissenting).

190. The Court held that to be admissible, the laws of foreign nations must be authenticated by the oath of someone with the authority to swear to their authenticity. 6 U.S. (2 Cranch) at 237–38. For foreign judgments to be admissible, they must be authenticated as follows: "1. By an exemplification under the great seal. 2. By a copy proved to be a true copy. 3. By the certificate of an officer authorised by law, which certificate must itself be properly authenticated." *Id.* at 238; see also *Yeaton v. Fry*, 9 U.S. (5 Cranch) 335, 343 (1809) (holding that seals of courts of admiralty, in cases arising under law of nations, are self-authenticating).

191. 8 U.S. (4 Cranch) 434, 436 (1808) (Johnson, J.); *id.* at 442–43 (Washington, J.).

192. 8 U.S. (4 Cranch) 62, 70 (1807); see also *Cooke v. Woodrow*, 9 U.S. (5 Cranch) 13, 14 (1809) (clarifying, because circuit court "had some difficulty upon the point," that "[t]he general rule of evidence is, that the best evidence must be produced which the nature of the case admits, and which is in the power of the party").

plaintiff put his own pleadings at issue, and any variance between the plaintiff's pleadings and his evidence was fatal to his case.¹⁹³ In *Pawling v. United States*, again dealing with standards applicable on demurrer, the Court asserted that "[t]he party demurring admits the truth of the testimony to which he demurs, and also those conclusions of fact which a jury may fairly draw from that testimony."¹⁹⁴ The Supreme Court was particularly active in the field of equity procedure. In addition to the Equity Rules that it promulgated in 1822 pursuant to a statutory grant,¹⁹⁵ the Court dealt with equity procedure on a case-by-case basis. In *Mallow v. Hinde*, for example, the Supreme Court held that a circuit court sitting in equity must dismiss the plaintiff's bill if parties necessary and indispensable to the resolution of the dispute were not before the court.¹⁹⁶

The Supreme Court also regulated evidence and procedure in criminal cases, although the early Supreme Court's limited appellate jurisdiction in criminal cases meant that the criminal cases were more limited in number. In *United States v. Gooding*, the Supreme Court held that the testimony of one participant in a conspiracy can be introduced against another,¹⁹⁷ and in *United States v. Palmer*, the Supreme Court decided that

193. 7 U.S. (3 Cranch) 229, 235 (1805) (reversing circuit court for violation of this rule). *Cooke* was decided by the Circuit Court of Alexandria; thus, under the Process Act, Virginia's law of procedure should have governed this suit. See Process Act, ch. 36, § 2, 1 Stat. 275, 276 (1792). Neither the parties nor the Supreme Court mention this fact, however, and the Court does not specify whether it is applying general common law principles or Virginia's particular exposition of the same. Perhaps Virginia law and the general common law did not differ on the procedural question at issue.

194. 8 U.S. (4 Cranch) 219, 221–22, 224 (1808) (reversing district court for district of Kentucky for violating this rule). In *United States v. Arthur*, another Kentucky case, the Court held that "[t]he want of oyer is a fatal defect in the plea of the defendants," and that judgment on demurrer must be entered "against the party who committed the first error in pleading." 9 U.S. (5 Cranch) 257, 261 (1809). It may be that the Supreme Court applied general common law principles of pleading in these two cases because it believed then, as it later held in *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 47–50 (1825), that the Process Act did not technically require a federal court sitting in Kentucky at that time to apply Kentucky procedure. In *Wayman*, the Supreme Court held that the Process Act of 1789 and its 1792 amendment required federal courts to follow the procedures effective in 1789 in the state in which they sat. *Id.* Kentucky, however, was not admitted to the Union until 1792. The Process Act was not amended to apply to federal courts sitting in later-admitted states like Kentucky until 1828. Act of May 19, 1828, ch. 68, 4 Stat. 278. Thus, in cases decided before 1828, Kentucky procedure did not necessarily control.

195. See *supra* note 173 and accompanying text (describing 1792 amendment to Process Act, which conferred supervisory rulemaking authority on Supreme Court).

196. 25 U.S. (12 Wheat.) 193, 196–98 (1827); see also *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 166–68 (1825) (recognizing same rule).

197. 25 U.S. (12 Wheat.) 460, 470 (1827); see also *Am. Fur Co. v. United States*, 27 U.S. (2 Pet.) 358, 364–65 (1829) (holding same). In 1851, the Court held that in making evidentiary determinations in criminal cases, the Judiciary Act required a federal court to observe the law of the state in which it sat, as that state law stood in 1789. *United States v. Reid*, 53 U.S. (12 How.) 361, 363 (1851). For later-admitted states, the law of evidence governing the state on its date of admission controlled. See *Logan v. United States*, 144 U.S. 263, 302–03 (1892). Before the Court interpreted the Judiciary Act to impose that requirement, however, it did not treat state law as controlling the determination of

the seal of a newly established government is not self-authenticating.¹⁹⁸ An example of the Supreme Court announcing a rule of criminal procedure can be found in *United States v. Marchant & Colson*, where the Court held that a criminal defendant has no right to demand to be tried separately from his codefendant.¹⁹⁹

Thus, there are cases from the late eighteenth and early nineteenth centuries in which the Supreme Court exerted control over the procedures employed by inferior federal courts. In each of these cases, the Supreme Court appears to lay down a procedural rule that will govern inferior federal courts in future cases, and these rules govern matters ranging from the standards applicable on a demurrer to the coconspirator exception to the hearsay rule. Because these cases appear to embody Supreme Court policy judgments that inferior courts must follow, they bear some resemblance to the modern supervisory power cases. Indeed, the *McNabb* Court relied on at least some of these cases in claiming historical support for the supervisory power.²⁰⁰

D. *Founding-Era and Modern Views of the Common Law*

The Supreme Court's early cases, then, are the strongest historical evidence supporting the notion that the Court possesses an inherent power over procedure in inferior courts. Upon close study, however, the resemblance between the modern and early cases recedes, and an important distinction emerges: The early and modern cases differ significantly in the way the Supreme Court perceives its own activity. In modern supervisory power cases, the Supreme Court does not purport to measure the inferior court's policy choice against an external standard; instead, the Court self-consciously formulates its own standard. In the early cases, by contrast, the Supreme Court purports to apply rather than formulate standards. The difference is not merely rhetorical; rather, the early and modern cases differ in their basic jurisprudential underpinnings. Because an understanding of these underpinnings is vital to putting the

evidentiary questions in criminal cases. See, e.g., *Gooding*, 25 U.S. (12 Wheat.) at 470. Instead, it resolved evidentiary questions with reference to general common law principles. For a fuller discussion of the relationship between common law principles and the Supreme Court's early evidentiary and procedural jurisprudence, see *infra* notes 211–234 and accompanying text.

198. 16 U.S. (3 Wheat.) 610, 635 (1818). For examples of early evidentiary discussions in criminal cases other than those described in the text, see *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 199 (1820) (rejecting, in dictum, argument that national character of ship can be proved only through its register); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 130–31 (1807) (noting division on Court with respect to admissibility of particular affidavit and resolving case on another ground).

199. 25 U.S. (12 Wheat.) 480, 485 (1827). Rather than a right, the Supreme Court held severance to be “a matter of sound discretion, to be exercised by the Court with all due regard and tenderness to prisoners, according to the known humanity of our criminal jurisprudence.” *Id.*

200. See *supra* note 185.

early, ostensible assertions of supervisory power in their proper context, this subpart will briefly describe the differences between the Founding-era and modern views of the common law. It will then analyze what these differences mean for evaluating the Supreme Court's early, ostensible assertions of supervisory power.

1. *Founding-Era View of the Common Law.* — Modern lawyers understand any particular common law decision as the policy choice of the court that issued it. In the modern view, “the common law” and “judicial decisions” are one and the same; the common law does not exist apart from judicial decisions, which create it. Lawyers of the eighteenth and early nineteenth centuries, however, perceived matters quite differently. “The common law” and “judicial decisions” were not one and the same; the common law existed independently of judicial decisions, which merely described it.²⁰¹ The difference between the Founding-era and modern views might be roughly summarized this way: Founding-era lawyers perceived the judicial role in common law cases as an exercise in law declaration; modern lawyers perceive it as one of law creation.

It is difficult for the modern lawyer to understand the judicial role in common law cases as anything other than deliberate policymaking.²⁰² A particular stumbling block to that enterprise is identifying what it was that Founding-era judges thought they were declaring. The declaratory view maintained that judicial decisions were evidence of the common law, not the common law itself.²⁰³ Of what, then, did the common law consist? It is tempting to conclude, along with Justice Holmes, that the common law was an empty vessel, and that judges trying to elucidate it were channeling a “brooding omnipresence in the sky.”²⁰⁴ Modern scholars have carefully demonstrated, however, that the common law was more than a “brooding omnipresence”: It was an identifiable body of rules and customs that courts applied in the absence of a sovereign command to the contrary.²⁰⁵ This body of rules and customs was not “law” in the modern

201. See, e.g., 1 Blackstone, *supra* note 95, at *71 (stating that “*the law*, and the *opinion of the judge*, are not always convertible terms,” but “we may take it as a general rule, ‘that the decisions of courts of justice are the evidence of what is common law’” (quoting Code Just. 1.14.12 (Justinian 474))); 1 Kent, *supra* note 186, at 473 (“The best evidence of the common law is to be found in the decisions of the courts of justice . . .”).

202. As the legal historian G. Edward White observed:

It may be easier to fathom judges riding in stagecoaches, or communicating to each other in handwritten letters with eighteenth-century calligraphy, or wearing knee breeches beneath their robes, or holding conferences in a boarding-house, than to imagine their seeing their declarations of legal rules and principles as anything other than creative lawmaking.

White, *supra* note 186, at 974–75.

203. See *supra* note 201 and accompanying text.

204. *S. Pac. Co. v. Jenson*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

205. See, e.g., Randall Bridwell & Ralph U. Whitten, *The Constitution and the Common Law* 6 (1977) (explaining Justice Story's view that “the common law included both rules and a process of application, [which] had to contain a degree of certainty”); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L.

sense of the word, because it was not the product of sovereign command. Rather than emanating from a particular sovereign, the common law grew out of the customs and practices of particular groups of actors. The relevant actors in the development of custom depended upon the type of common law at issue.²⁰⁶ For example, the law merchant, an important branch of the common law, was based upon the customs and practices of merchants.²⁰⁷ The law of nations, another important branch of the common law, represented “the amorphous but considerable body of usage and agreement” that existed among European states over hundreds of years.²⁰⁸

Much could be said about the declaratory view of the common law, but for present purposes, I want to focus on a particular aspect of it: the fact that these customary rules served a discretion-limiting function. Today, it is commonly understood that common law cases provide an occasion for judicial lawmaking. When a common law case falls within a court’s jurisdiction, and no statutory or constitutional provision controls, the court has the discretion to choose a sound policy. In the early years of their existence, however, the federal courts did not perceive common law questions as wholly open to judicial answers. As Bradford Clark has explained, the customary rules of the common law “provide[d] the judiciary with substantial guidance, and thus [did] not leave courts free to formulate rules of decision according to their own standards.”²⁰⁹ Because courts resolving common law cases in the Founding era were “attempting to discern a preexisting body of law, they were not engaged in unrestrained judicial lawmaking.”²¹⁰

That Founding-era judges were largely discerning and applying customary law, rather than engaging in unrestrained policymaking, has been well documented in substantive areas like commercial law and maritime law.²¹¹ Though unexplored, the same phenomenon is evident in proce-

Rev. 1245, 1279–90 (1996) (describing “identifiable body of rules and customs” that comprised law of nations or general common law); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv. L. Rev. 1513, 1517–21 (1984) (describing how general common law was perceived in Founding era).

206. Fletcher, *supra* note 205, at 1517.

207. *Id.*; see also Bridwell & Whitten, *supra* note 205, at 96 (noting that commercial law “had not originated from any sovereign, but in the behavior over centuries of parties to commercial transactions”); Michael Conant, *The Commerce Clause, the Supremacy Clause and the Law Merchant: Swift v. Tyson and the Unity of Commercial Law*, 15 J. Mar. L. & Com. 153, 156 (1984) (“[T]he merchants created the patterns of customary behavior that were most efficient in marketing goods and facilitating payment, and the courts adopted rules to enforce these customs.”).

208. Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. Pa. L. Rev. 26, 29 (1952).

209. Clark, *supra* note 205, at 1276.

210. *Id.* at 1287.

211. See Bridwell & Whitten, *supra* note 205, at 61–97 (commercial law); Fletcher, *supra* note 205, at 1555–58 (maritime law); see also Clark, *supra* note 205, at 1276–92

dural cases. Today, when a question of procedure lacking a statutory or constitutional answer arises in the course of adjudication, it is commonly understood that a federal court has the discretion to fill that gap.²¹² But when early federal courts faced such gaps in federal court procedure, they turned first to the common law—and not to their own discretion—to fill them. Thus, in *United States v. Marchant & Colson*, the Supreme Court, analyzing a point of criminal procedure, observed that “[t]he subject is not provided for by any act of Congress; and, therefore, if the right can be maintained at all, it must be as a right derived from the common law, which the Courts of the United States are bound to recognise [sic] and enforce.”²¹³ In *United States v. Burr*, Chief Justice Marshall similarly asserted that in devising process, courts are bound by “that generally recognized and long established law, which forms the substratum of the laws of every state.”²¹⁴

2. *The Common Law and Supervisory Power.* — This general principle, applicable across early cases elucidating procedural common law, is evident in the early, ostensible assertions of supervisory power described in this Part. While the rhetoric of the modern supervisory power cases makes clear that the Supreme Court is self-consciously displacing the discretion of the inferior courts by making policy choices for them, the rhetoric of the early cases is strikingly different. The rhetoric of the early

(describing generally federal court application of law of nations, of which maritime and commercial law were branches); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand. L. Rev. 819, 832 (1989) (same).

212. See supra notes 44–46 and accompanying text.

213. 25 U.S. (12 Wheat.) 480, 480 (1827) (turning to common law to decide whether criminal defendant correctly claimed right to severance); cf. Du Ponceau, supra note 186, at xiv–xv (insisting that common law does not operate as “source of power” for federal courts, but as “means for its exercise”).

214. 25 F. Cas. 187, 188 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 14,694); see also *Jennings v. Carson*, 8 U.S. (4 Cranch) 2, 24 (1807) (“It must be supposed that a court of admiralty . . . not having its practice precisely regulated by law, would conform to those principles which usually govern courts proceeding *in rem*, and which seem necessarily to belong to the proper exercise of their functions.”); *United States v. Craig*, 25 F. Cas. 682, 683 (Washington, Circuit Justice, C.C.E.D. Pa. 1827) (No. 14,883) (deciding, on question of admissibility of evidence, to “govern myself by what I consider the general rule settled in England,” despite disagreement with that rule); *United States v. Coolidge*, 25 F. Cas. 619, 620 (Story, Circuit Justice, C.C.D. Mass. 1816) (No. 14,857), rev’d on other grounds, 14 U.S. (1 Wheat.) 415 (1816) (holding that in absence of positive law governing “process, pleadings, or the principles of adjudication,” federal courts must be “governed exclusively by the common law”); *United States v. Johns*, 4 U.S. (4 Dall.) 412, 414 (Washington, Circuit Justice, C.C.D. Pa. 1806) (No. 15,481) (holding that when Congress fails to prescribe rule of criminal procedure, “the common law rule must be pursued,” and deciding that in that case, common law guaranteed thirty-five peremptory challenges); cf. Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 Colum. L. Rev. 1291, 1330 (1986) (“During most of the period prior to the Civil War, the Court regularly made law, both procedural and substantive, without considering the legitimacy of its actions. The Court’s lawmaking reflected its natural law perspective: it was not legislating; it was merely discovering true answers to unclear problems before it.”).

cases makes clear that the Supreme Court did not perceive itself to be displacing inferior court discretion—in large part because, as discussed above, neither the Supreme Court nor the inferior courts thought that judicial discretion was involved. Both the inferior courts and the Supreme Court considered themselves bound by customary law in elucidating procedure for the federal courts. Inferior courts applied the common law, and the Supreme Court measured their judgments against that standard, much as the Court might measure their judgments against the text of a statutory or constitutional provision.²¹⁵ Thus it is that in the early cases described above, the Supreme Court never presents its holdings as new supervisory rules, but rather as articulations of “known and familiar,”²¹⁶ “well understood,”²¹⁷ and “usual”²¹⁸ procedural principles.²¹⁹ The discussion of federal court procedure in treatises of the time similarly reflects the understanding that federal courts were applying common law principles, not creating their own.²²⁰

The category of customary law to which the Supreme Court turned in these early, ostensible assertions of supervisory power depended upon the case. The cases discussed in this Part, while all cases that a modern lawyer would classify as “procedural” or “evidentiary,” in fact cut across a number of common law categories. Some, like those dealing with the means of proving foreign judgments, laws, and government seals, drew

215. Of course, the application of customary rules may involve “norm elaboration at the margins.” Clark, *supra* note 205, at 1287. That is true, however, of the application of statutory and constitutional provisions as well. While it is hard to identify the place where the interpretation and application of law cross over into lawmaking, there must be some difference between the two if legislation and adjudication are to remain distinct. *Id.* at 1289.

216. *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 469–70 (1827) (calling coconspirator exception to hearsay rule “the known and familiar principle of criminal jurisprudence” and supporting its assertion that principle is well-settled with reference to *Starkie on Evidence*); see also *Queen v. Hepburn*, 11 U.S. (7 Cranch) 290, 296 (1813) (affirming circuit court’s refusal to recognize new hearsay exception on ground that circuit court correctly perceived that common law recognized no such exception).

217. *Church v. Hubbart*, 6 U.S. (2 Cranch) 187, 236 (1804) (“Foreign laws are well understood to be facts which must, like other facts, be proved to exist before they can be received in a court of justice.”).

218. *Id.* at 238. The Court called its rules regarding the authentication of judgments “the usual” and “the most proper, if not the only modes of verifying foreign judgments.” *Id.*

219. In addition to those cited above, consider also *United States v. Palmer*, where, in arguing in favor of the position that the Court ultimately adopted, counsel for the United States presented his position regarding authentication of a government seal as reflecting “[t]he established rules of evidence” rather than an occasion for the Court to adopt a supervisory rule. 16 U.S. (3 Wheat.) 610, 624 (1818).

220. See, e.g., Conkling, *supra* note 186, at 317 (“A considerable number of decisions have taken place in the national courts [regarding executions], but as they are only declarative of the general common law principles recognized in all courts . . . it does not fall within the design of this work to notice them.”).

from the law of nations.²²¹ Others, like those dealing with civil pleading and evidence admissible in criminal cases, drew from what might be described as American common law.²²² Still others, like those dealing with necessary and indispensable parties, drew from equity, which, while distinct from the tradition of common law, had its own set of customary rules.²²³ The particular branch of customary law at issue, however, is not as important as the fact that no matter which branch was at issue, the Supreme Court treated custom as controlling. The customary law applied in these cases, therefore, served a discretion-limiting function.

Of course, emphasizing that customary law served a discretion-limiting function does not mean that either discretion or change was absent from the application of common law principles to procedural questions. On the contrary, the federal courts openly acknowledged the presence of both. As for discretion, federal courts had it because the common law did not supply a rule to govern every procedural detail. There were some matters that the common law did not address, or addressed by leaving them to the court's discretion.²²⁴ For example, in 1795, the Circuit Court of Pennsylvania had to decide how many jurors to be summoned

221. See, e.g., *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 187 (1820); *Palmer*, 16 U.S. (3 Wheat.) at 620; *Church*, 6 U.S. (2 Cranch) at 187; see also *Croudson v. Leonard*, 8 U.S. (4 Cranch) 434, 442 (1808) (holding that foreign judgment was conclusive evidence of matter adjudicated, in particularly good example of Court applying law of nations). The effect of foreign judgments was a politically contentious issue throughout the Napoleonic wars, because "[t]here was substantial suspicion that the English and French admiralty courts were prone to find falsely that captured American vessels were not neutral and thus to condemn the vessels as lawful prizes when they were legally entitled to go free." Fletcher, *supra* note 205, at 1540. Despite that suspicion, the *Croudson* Court adhered to the rule established in the law of nations. Justice Washington explained:

If the injustice of the belligerent powers, and of their courts, should render this rule oppressive to the citizens of neutral nations, I can only say with the judges who decided the case of *Hughes v. Cornelius*, let the government in its wisdom adopt the proper means to remedy the mischief. I hold the rules of law, when once firmly established, to be beyond the controul [sic] of those who are merely to pronounce what the law is, and if from any circumstance it has become impolitic, in a national point of view, it is for the nation to annul or to modify it.

Croudson, 8 U.S. (4 Cranch) at 442–43 (Washington, J.).

222. See, e.g., *United States v. Marchant & Colson*, 25 U.S. (12 Wheat.) 480, 480, 482 (1827) (common law criminal procedure); *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 468–79 (1827) (common law evidence); *Pawling v. United States*, 8 U.S. (4 Cranch) 219, 221–22 (1808) (common law civil procedure); *Cooke v. Graham's Adm'r*, 7 U.S. (3 Cranch) 229, 235 (1805) (common law civil procedure).

223. See, e.g., *Mallow v. Hinde*, 25 U.S. (12 Wheat.) 193, 196–98 (1827); *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 166–68 (1825). As for the relationship between equity and customary rules: Blackstone treated equity as a branch of common law, precisely because, like the customs comprising the common law, the customs of equity practice "have been admitted and received by immemorial usage and custom in some particular cases, and some particular courts." 1 Blackstone, *supra* note 95, at *80.

224. See, e.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 452, 469 (1793) (ruling, in absence of governing common law, on validity of service of process against defendant state).

for a venire.²²⁵ The common law did not fix the number; thus the court, finding that the common law left the matter to its discretion, let the marshal decide how many veniremen to call.²²⁶ There are many examples of this variety—incidental matters of procedure on which the federal courts had to exercise their own judgment.²²⁷

As for change, the common law, while an identifiable body of customs and rules, was not a static body of customs and rules. New customs developed to meet new situations. In keeping with this principle, James Kent explained that while settlers had taken the English common law with them to America, it was retained only “*so far* as it was adapted to our institutions and circumstances.”²²⁸ Americans took pride in the modifications they made to English common law, including those made to procedural common law.²²⁹ Thus Peter Du Ponceau, an early and prominent member of the Supreme Court bar, boasted that simplified civil procedure in America meant that “[t]he costs of a law suit are comparatively

225. *United States v. Insurgents of Pa.*, 2 U.S. (2 Dall.) 335, 341–42 (1795) (Patterson, J.) (“Since, therefore, the act of Congress does not itself fix the number of jurors . . . it is a necessary consequence that the subject must depend on the common law; and . . . the Court may direct any number of jurors to be summoned . . .”).

226. *Id.*

227. See, e.g., *Wright v. Hollingsworth’s Lessee*, 26 U.S. (1 Pet.) 165, 168 (1828) (holding that decision to allow or refuse amendment of pleadings is, like other “incidental orders,” so “peculiarly addressed to the sound discretion of the Courts of original jurisdiction, as to be fit for their decision only, under their own rules and modes of practice”); *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824) (holding that federal courts have discretion to decide when to discharge jury from giving verdict); *United States v. Evans*, 9 U.S. (5 Cranch) 280, 281 (1809) (holding that Supreme Court would not interfere with district court’s refusal to reinstate cause after nonsuit); *Marine Ins. Co. v. Young*, 9 U.S. (5 Cranch) 187, 190–91 (1809) (holding that decision whether to grant new trial is within discretion of inferior court and Supreme Court will not interfere on writ of error); *Mandeville v. Wilson*, 9 U.S. (5 Cranch) 15, 17–18 (1809) (holding same as *Wright*); *Henderson v. Moore*, 9 U.S. (5 Cranch) 11, 12–13 (1809) (holding same as *Marine Insurance Co.*); *Woods v. Young*, 8 U.S. (4 Cranch) 237, 238 (1808) (holding that decision whether to grant continuance is within discretion of federal court, and Supreme Court will not look into merits of its exercise). The federal courts also used the rulemaking power granted them by section 17 of the Judiciary Act of 1789 to promulgate court rules, at least some of which presumably addressed matters that were unregulated by the common law. See, e.g., *N.D.N.Y. R. 5* (1831), reprinted in Conkling, *supra* note 186, at 466 (“When the attorneys . . . of the adverse party [sic] do not reside within forty miles of each other, service may be made on the agent [residing in Utica, New York].”).

228. Kent, *supra* note 186, at 343.

229. See Du Ponceau, *supra* note 186, at xxiv (“[T]he common law appears more and more dignified with *American features*. . . . Thus, the law in this country, as every other science, tends to improvement.”); *id.* at 107 (asserting that common law “has received its greatest improvement and perfection in this country, where it shines with greater lustre than has ever illumined the island of Great Britain”); *id.* at 112, 117 (further praising improvements made on common law); Book Review, 17 *N. Am. Rev.* 69, 72 (1823) (“[W]e may pride ourselves upon the improvements, which we have made in this country [upon the English common law]”); see also Swift, *supra* note 186, at x (“Though sundry valuable Treatises have been written upon Evidence in England, yet they contain many things of little use here, and are not perfectly well adapted to our Country.”).

trifling, and the law is accessible, to the poor as well as to the rich.”²³⁰ Of course, not all changes to ancient common law procedure were appreciated, and, in addition to extolling progress in some areas, courts and commentators also spent some energy advocating a retreat from changes that they regarded as aberrations.²³¹

Given that the common law was neither comprehensive nor immune to change, it would have been theoretically possible, even in the system of common law that prevailed in the Founding era, for the Supreme Court to exert “supervisory authority” in the modern, policymaking sense of the term. If the Supreme Court in the Founding era believed itself to possess supervisory authority over inferior court procedure, we might expect to see that authority exercised over matters that the common law left open—like the number of veniremen to call—or over aspects of the common law that the Supreme Court thought ripe for change. Importantly, however, I have found no case in which the Supreme Court claimed the authority either to adopt a rule for the federal judiciary in a space the common law left open or to effect unilaterally a change in procedural common law. On the contrary, if a matter openly required the exercise of judicial discretion, the Supreme Court left the matter to the inferior court’s discretion.²³² And the Court on at least one occasion expressly *disclaimed* the power unilaterally to make changes in procedural common law. In *Marine Insurance Co. of Alexandria v. Hodgson*, the Court observed that “[h]owever desirable it may be” to change a particular rule of evidence, “this court does not know that it possesses the power of changing the law of pleading, or to admit of evidence inconsistent with the forms

230. Du Ponceau, *supra* note 186, at 115. Du Ponceau went on to acknowledge that “a loose practice, it is true, has succeeded in our Courts to the strict forms of pleading, but it appears to work well to all practical purposes.” *Id.* at 115–16.

231. For example, the Supreme Court viewed the grant of local rulemaking power in the Process Act as a tool that federal courts could use to undo unwise changes made by state legislatures to the common law. The Process Act obligated a federal court to follow the state law of procedure in effect in 1789 in the state in which the federal court sat. Process Act, ch. 36, § 2, 1 Stat. 275, 276 (1792). In *Wayman v. Southard*, the Supreme Court argued that to the extent that state legislatures in 1789, under pressures of the moment, had varied unwisely from the “ancient, permanent, and approved system” of common law procedure, the Process Act’s grant of rulemaking power was designed to permit federal courts to return federal practice to that approved system. 23 U.S. (10 Wheat.) 1, 47 (1825); cf. *Brown v. Van Braam*, 3 U.S. (3 Dall.) 344, 346 (1797) (Chase, J., concurring) (insisting that if state judicial opinions construing common law, rather than common law itself, were permitted to control procedural questions in federal courts, federal courts would become enmeshed “in an endless labyrinth of false constructions, and idle forms”).

232. See, e.g., *supra* notes 224–227 and accompanying text. In *Philadelphia & Trenton Rail Co. v. Stimpson*, the Court held:

The mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced, are, properly, matters belonging to the practice of the Circuit Courts, with which this Court ought not to interfere; unless it shall choose to prescribe some fixed, general rules on the subject, under the authority of the act of Congress.

39 U.S. (14 Pet.) 448, 463 (1840).

which [the law of pleading] has prescribed."²³³ When it came to change, the Court seemed to view itself as a participant in the development of procedural custom, not the dictator of procedural rules.²³⁴

In the end, the Supreme Court's early procedural cases offer only illusory support for the notion that the Court has historically enjoyed the power to prescribe procedure for inferior courts. Randall Bridwell and Ralph Whitten have criticized legal scholars' "constant insistence that the language of the cases of the period and the writings about its jurisprudence *actually* means what one thinks it should mean by modern standards, rather than what it seems to mean as practiced by people of the period."²³⁵ That caution resonates here. People of the Founding period would not have understood the Supreme Court in these cases to be "prescribing" procedure for inferior courts. They would have understood the Supreme Court to be measuring inferior court action against settled customary rules. History, therefore, fails to support the proposition that Founding-era lawyers would have perceived the Court's "supremacy" as endowing it with the power to directly supervise inferior court procedure.

3. *The Common Law and Supervisory Power: An Alternate Account.* — Admittedly, one could agree that the early and modern cases reveal a shift in the Court's perception of its role but disagree with the conclusion I draw from the shift. I argue that the disintegration of procedural custom, and concomitant rise in judicial discretion to develop procedure, distinguishes the modern cases from the early ones in a way that undermines the Supreme Court's claim to supervisory power. Others, however, might draw a different conclusion from this jurisprudential shift. Given that the Supreme Court has long played a role in the maintenance of procedural common law, one might argue that these very same factors—the disintegration of the common law and concomitant rise in judicial discretion—make the supervisory power doctrine a fitting, even necessary, response to change. At least in theory, the federal general common law of procedure was uniform throughout the federal courts. The loss of that law would have left each federal court to its own devices, the argument might go, unless the Supreme Court articulated standards to replace it. Indeed, one might say that the very scope of the supervisory power underscores its status as the successor of the customary law: Procedures announced pursuant to the Supreme Court's supervisory power, like the Supreme Court's early holdings on matters of federal general

233. 10 U.S. (6 Cranch) 206, 219 (1810). Justices riding circuit were similarly reluctant to effect change in longstanding procedural custom. In *Livingston v. Jefferson*, Chief Justice Marshall, riding circuit, asserted that "if judges have determined to carry their innovation on the old rule, no further; if, for a long course of time, . . . they have determined this to be the limit of their fiction, it would require a hardihood which I do not possess, to pass this limit." 15 F. Cas. 660, 664 (C.C.D. Va. 1811) (No. 8,411).

234. Given the reluctance of any one court, including the Supreme Court, to effect procedural change, it would be interesting to trace how procedural change crept into the common law. Tracing that development, however, is beyond this Article's scope.

235. Bridwell & Whitten, *supra* note 205, at 97.

common law, bind only the federal courts.²³⁶ One subscribing to this way of thinking might cast the supervisory power doctrine as the modern face of the Supreme Court's longstanding practice of encouraging a uniform federal common law of procedure. And as a continuation of that longstanding practice, the argument might go, the supervisory power doctrine has a historical pedigree that gives it constitutional legitimacy.

While not without appeal, this account has several problems. As an initial matter, it ignores the structural predicate to the question of supervisory power: the question whether the Court's supremacy grants it any inherent supervisory authority or simply restricts the way Congress can structure the judicial branch. Even if the Supreme Court's early cases can be read to extend any authority granted by Article III to the realm of procedure, they cannot, by themselves, establish the proposition that Article III grants the Court any inherent supervisory authority. One seeking to establish that proposition must still confront the structural arguments raised in Part III. And the Supreme Court's early cases do not push those arguments one way or the other, because they simply do not address the question whether the Court possesses inherent supervisory authority over inferior courts.

Even assuming that the structural hurdle is cleared, however, this account also overstates the extent to which the loss of customary law gave rise to a need for a doctrine like the supervisory power. Just before *Erie Railroad Co. v. Tompkins* laid the federal general common law to rest,²³⁷ Congress passed the Rules Enabling Act, which statutorily authorizes the Supreme Court to promulgate supervisory court rules.²³⁸ The Rules Enabling Act is a far better answer to the loss of customary procedure than is the doctrine of supervisory power. The Act aims to provide uniform rules of procedure and evidence throughout the federal courts. The process it prescribes for doing so takes the views of many constituencies—including appellate judges, trial judges, academics, practitioners, and the public—into account.²³⁹ Exercises of supervisory power not only lack the discipline of traditional common lawmaking, in which custom limits judicial

236. I am indebted to Jim Pfander for drawing my attention to this point.

237. 304 U.S. 64 (1938).

238. Act of June 19, 1934, ch. 651, §§ 1–2, 48 Stat. 1064, 1064 (current version at 28 U.S.C. § 2072 (2000)). Interestingly, the Supreme Court promulgated the first set of rules under the Act, the Federal Rules of Civil Procedure, in 1938, the same year that it decided *Erie*. See generally Mary Kay Kane, *The Golden Wedding Year: Erie Railroad Company v. Tompkins and the Federal Rules*, 63 *Notre Dame L. Rev.* 671 (1988) (discussing confluence of these two events).

239. In that sense, rules promulgated under the Act, like the customs comprising the common law, are based on the experiences of the community that will be governed by them. See *supra* notes 205–208 and accompanying text (describing participants in formation of customary law).

discretion; they also lack the inclusiveness and transparency that the Enabling Act demands of the modern court rulemaking process.²⁴⁰

In any event, the history described in this Part has an important consequence even for those who read the Supreme Court's early procedural cases as some support for the supervisory power. At most, history makes the case for what Stephen Burbank has described as inherent power "in the weak sense."²⁴¹ As Professor Burbank has explained, it is important to distinguish "between inherent power in the weak sense (the power to act in the absence of congressional authorization) and inherent power in the strong sense (the power to act in contravention of congressional prescription)."²⁴² Even assuming that Article III grants the Supreme Court supervisory power, the history described in this Part compels the conclusion that this supervisory power is not inherent power in the strong sense. For supervisory power to exist in the strong sense, the prescription of inferior court procedure by adjudication would have to be a core function of the Supreme Court, such that, if Congress withdrew it, the Court would no longer be "supreme."²⁴³ Given that the Court did not claim to possess supervisory power until 1943, one would be hard pressed to cast that power as so central to the role of the Supreme Court that it is beyond congressional regulation—even if the Constitution permits the supervisory power to exist in the absence of a congressional command to the contrary.²⁴⁴ And while it is beyond the scope of this Article to pursue this question, one believing the Court to possess supervisory power must ulti-

240. I owe this point to Steve Burbank. See also Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. Pa. L. Rev. 1099, 1136–41 (2002) (arguing that federal rulemaking process produces better procedures than does Supreme Court, acting alone).

241. Burbank, *Procedure*, supra note 39, at 1681.

242. *Id.*

243. See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (describing inalienable inherent powers of a federal court as those "necessary to the exercise of all others"); *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 562 (3d Cir. 1985) (describing "irreducible inherent authority" as "an extremely narrow range of authority involving activity so fundamental to the essence of a court as a constitutional tribunal that to divest the court of absolute command within this sphere is really to render practically meaningless the terms 'court' and 'judicial power'"). These descriptions refer to inherent local authority. Because inherent supervisory authority would derive from the Court's constitutional supremacy, the relevant inquiry is not whether supervisory authority is fundamental to the essence of a court, but, as stated in the accompanying text, whether it is fundamental to the essence of a supreme court vis-à-vis its inferiors.

244. This conclusion is consistent with Professor Burbank's persuasive argument that the power to promulgate prospective local and supervisory court rules of procedure cannot be inherent power in the strong sense. Burbank, *Procedure*, supra note 39, at 1687–88. It is also consistent with the Court's own position. While the Court has never distinguished between inherent supervisory authority and inherent local authority in discussing the degree to which Congress can regulate procedure, the Court has always insisted that, as a general matter, Congress retains ultimate authority over procedure in the federal courts. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution.").

mately decide whether the Rules Enabling Act is a congressional command to the contrary. Even if the Court possesses supervisory power in the weak sense, it may well be that the detailed scheme of supervisory rulemaking prescribed by the Rules Enabling Act extinguishes the Court's ability to act outside that process.

CONCLUSION

This Article has argued that the Constitution's structure cuts against, and history rules out, the proposition that the Supreme Court possesses inherent supervisory power over inferior court procedure. If such authority exists, it derives from the Constitution's distinction between supreme and inferior courts. Part III claimed that it is more consistent with the Constitution's structure to interpret the Court's "supremacy" vis-à-vis inferior federal courts as a limit on the way Congress can structure the judicial branch than to interpret it as a source of inherent authority for the Supreme Court. Even assuming, however, that the Court's "supremacy" functions as a grant of power to the Supreme Court, the conclusion that the Supreme Court possesses supervisory power over procedure depends upon the conclusion that this particular power is part of that grant. Part IV argued that history fails to support that conclusion. It was not until the twentieth century, when the Court rejected the notion of federal general common law, that it claimed the right to prescribe procedure for inferior federal courts. Given the recent vintage of this claim, history does not support the notion that the power to prescribe inferior court procedure is inherent in any court designated "supreme."

The implications of this conclusion are potentially far-reaching. For example, if it lacks inherent supervisory power over inferior federal courts, does the Supreme Court have the authority to prescribe, through adjudication, rules of statutory interpretation that all federal courts must observe? Rules of issue and claim preclusion? Rules of stare decisis? Resolving these questions is a problem for another day. For now, it is enough to observe that, unless the Supreme Court acts through the federal rulemaking process, inferior federal courts may have more independence on these matters than is commonly assumed.

Statutory Stare Decisis in the Courts of Appeals

Amy Coney Barrett*

Introduction

The Supreme Court has long given its cases interpreting statutes special protection from overruling. The Court is relatively willing to overrule its constitutional precedents, because in that context, the Court reasons that “correction through legislative action is practically impossible.”¹ But the Supreme Court insists that a party advocating the abandonment of a statutory precedent bears a greater burden. In that context, the Court claims that stare decisis has “special force.”² It gains this special force from the principle of legislative supremacy—the belief that Congress, rather than the Supreme Court, bears primary responsibility for shaping policy through statutory law.

The Supreme Court’s cases and the literature discussing them offer two explanations for how the Supreme Court’s statutory stare decisis practice honors the supremacy of the legislature. One line of thought interprets Congress’s silence following the Supreme Court’s interpretation of a statute as approval of that interpretation. If Congress had disagreed with the Supreme Court’s interpretation, the argument goes, Congress would have amended the statute to reflect its disagreement. By failing to amend the statute, Congress signals its acquiescence in the Supreme Court’s approach. According to this way of thinking, the Court’s practice of giving its statutory precedent particularly forceful effect reflects its reluctance to abandon statutory interpretations that Congress, through its silence, has effectively approved. Statutory stare decisis, in other words, reflects deference to Congress’s wishes.

A second line of thought eschews the notion that congressional silence following a Supreme Court statutory interpretation reflects acquiescence in it, but still advocates heightened stare decisis in statutory cases as a means of honoring legislative supremacy. Those who subscribe to this second school of thought emphasize that in our Constitution’s separation of powers, policymaking is an aspect of legislative, rather than judicial, power. Because statutory interpretation inevitably involves policymaking, it risks infringing upon legislative power, and consequently, the Supreme Court should approach the task with caution. The Court cannot avoid interpreting a statute—and the attendant policymaking—the first time a statutory ambiguity is presented to it. Thereafter, however, the Supreme Court’s refusal to revisit a statutory interpretation is a means of shifting policymaking responsibility back to Congress, where it belongs. “Were we to alter our statutory interpretations from

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1 *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting).

2 *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989).

case to case,” the Supreme Court explains, “Congress would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair.”³ In other words, super-strong statutory stare decisis lets Congress know that changes in statutory interpretations ought to come from it.⁴ As a result, the argument goes, Congress (and other interested parties) will be more likely to use the democratic rather than the judicial process to resolve the policy questions that lie at the heart of interpretive disputes.

A robust literature exists debating the wisdom of the Supreme Court’s statutory stare decisis doctrine. That robust literature, however, has wholly overlooked a curious aspect of super-strong statutory stare decisis: the courts of appeals have adopted it too. Scholars of statutory interpretation have not noticed the appearance of this doctrine in the lower courts, and the logic of its presence there is not immediately apparent. It is one thing to claim that congressional silence signals approval of a decision from the Supreme Court; it is another thing to claim that congressional silence signals approval of a decision from any of the courts of appeals. Similarly, it is one thing to assert that Congress ought to correct the Supreme Court’s statutory mistakes; it is another thing to assert that Congress ought to correct mistakes from each of the thirteen circuits.

This Article explores whether statutory stare decisis is an example of an interpretive practice in which the Supreme Court and the lower courts should diverge. Part I briefly describes the doctrine of statutory stare decisis and the rationales advanced for that doctrine in the Supreme Court. Part II analyzes whether a theory of congressional acquiescence supports statutory stare decisis in the circuits, and Part III analyzes whether the doctrine can be justified by reference to the Constitution’s separation-of-powers principle. I conclude that in the courts of appeals, as in the Supreme Court, the theory emphasizing the connection between statutory stare decisis and the separation of powers provides far more credible support for the doctrine than does a theory of congressional acquiescence. Nevertheless, even the separation-of-powers theory does not justify super-strong statutory stare decisis in the courts of appeals. To the extent that statutory stare decisis operates as a restraint on judicial policymaking, it does so based on assumptions about how Congress will react to the Supreme Court. It is both impractical and inconsistent with the system of appellate review that Congress has designed for the inferior courts to assume that Congress will respond to them in the same way. Whatever the merits of statutory stare decisis in the Supreme Court, the inferior courts have no sound basis for following the Supreme Court’s practice.

Although my specific focus here appears narrow, the subject in fact has larger implications. For one thing, statutory stare decisis has become part of the methodology that the courts of appeals apply in interpreting statutes. Because the courts of appeals resolve more interpretive disputes than does the

³ *Neal v. United States*, 516 U.S. 284, 295–96 (1996).

⁴ I have borrowed the modifier “super-strong” from William Eskridge. See William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 *Geo. L.J.* 1361, 1362 (1988) [hereinafter Eskridge, *Overruling Statutory Precedents*] (describing the Supreme Court’s statutory stare decisis practice as the application of a “super-strong presumption of correctness” to statutory precedents).

Supreme Court, ensuring a sound interpretive theory for the courts of appeals is in some respects more important than doing the same for the Supreme Court. Abandoning statutory stare decisis in the courts of appeals is a step in that direction. Even beyond the limited doctrinal impact of this insight, however, the question whether the courts of appeals ought to be applying statutory stare decisis is a question worth asking. This Article's conclusion illuminates the neglect that scholars and courts have shown toward the structural differences between the Supreme Court and the inferior courts in questions of interpretation, and it underscores the importance and potential fruitfulness of focusing attention on those differences.

I. Statutory Stare Decisis in the Supreme Court

A. The Doctrine

The Supreme Court has accorded heightened deference to its statutory precedent for roughly a century.⁵ The classic illustration of this heightened deference is the line of Supreme Court cases addressing the question whether the Sherman Act, which renders illegal "every contract . . . in restraint of trade or commerce among the several States,"⁶ applies to organized baseball. In 1922, the Supreme Court held in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs* that it did not because the Court considered baseball to be a purely intrastate affair.⁷ Over the next thirty years, both the business of baseball and the Court's understanding of "interstate commerce" so expanded that the Court almost surely would have applied the Sherman Act to organized baseball if it had considered the question as an original matter.⁸ Nonetheless, in *Toolson v. New York Yankees, Inc.*, decided in 1953, the Court reaffirmed baseball's exemption from federal antitrust law on the ground that the precedent exempting it was statutory.⁹ The Court insisted that any change in statutory precedent ought to come from Congress, and Congress, though aware of *Federal Baseball*, had left it undisturbed.¹⁰

⁵ Thomas Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 731 (1999) (asserting that the Supreme Court's heightened deference toward statutory precedent first surfaced in the late nineteenth century and "crystallized in a series of opinions in the Hughes Court"). William Eskridge, Philip Frickey, and Elizabeth Garrett have observed that state courts are even more emphatic in their belief that statutory precedent should be overruled only rarely. WILLIAM ESKRIDGE ET AL., *CASES AND MATERIALS ON LEGISLATION* 612 (3d ed. 2001).

⁶ See 15 U.S.C. § 1 (2000).

⁷ *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208-09 (1922).

⁸ *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357-60 (1953) (Burton, J., dissenting) (describing ways in which organized baseball had increasingly affected interstate commerce through, *inter alia*, interstate travel, interstate advertising, and interstate purchases); see also *Flood v. Kuhn*, 407 U.S. 258, 286 (1972) (Douglas, J., dissenting) (noting that when *Federal Baseball* was decided, the Court had a "narrow, parochial view of commerce" that had been undermined by subsequent decisions giving "interstate commerce" an expansive interpretation for purposes of the Commerce Clause).

⁹ *Toolson*, 346 U.S. at 357.

¹⁰ *Id.*

The Court confronted the baseball exemption again in *Flood v. Kuhn*,¹¹ and by this time, baseball's exemption had become a downright anomaly. *Flood* reached the Supreme Court in 1972. By then, the Court had interpreted the Sherman Act to apply to boxing, football, and basketball.¹² Baseball appeared to be the only organized sport beyond the Sherman Act's reach. Nonetheless, the Supreme Court again affirmed its original interpretation, again on the ground of statutory stare decisis.¹³ Had *Federal Baseball* and *Toolson* been constitutional or common law cases, the change in case law and circumstances would have justified overruling them.¹⁴ But these cases interpreted a statute. While acknowledging that the baseball exemption was illogical and inconsistent with other case law, the Court asserted that statutory precedent deserves particularly strong stare decisis effect, and it left the baseball exemption in place.¹⁵

While *Toolson* and *Flood* may represent an anomaly in federal antitrust law, they do not represent an anomaly in statutory interpretation. Instead, these cases illustrate a principle well ingrained in the Supreme Court's jurisprudence: Cases interpreting statutes are rarely overruled. As the Court often explains, "Considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation."¹⁶ Because statutory precedents are nearly sacrosanct, "the burden borne by the party advocating abandonment of a precedent is greater where the Court is asked to overrule a point of statutory construction" than when the Court is asked to overrule another point of law.¹⁷ Indeed, the force of the Supreme Court's statutory stare decisis doc-

¹¹ *Flood*, 407 U.S. at 258.

¹² *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204, 1205 (1971) (Douglas, J.) (asserting that basketball enjoys no exemption from the antitrust laws); *Radovich v. Nat'l Football League*, 352 U.S. 445, 447-48 (1957) (holding that antitrust laws apply to football); *United States v. Int'l Boxing Club of N.Y.*, 348 U.S. 236, 242-43 (1955) (holding that antitrust laws apply to boxing).

¹³ *Flood*, 407 U.S. at 283-84. While the Supreme Court has not retreated from its position that statutory precedent deserves super-strong effect, it has begun to relax that presumption in cases arising under the Sherman Act. Recently, the Court has begun to reason that since the Sherman Act authorizes the creation of federal common law, cases interpreting the Sherman Act ought to be treated like common law cases, rather than statutory cases, for purposes of stare decisis effect. See, e.g., *State Oil Co. v. Khan*, 522 U.S. 3, 20-21 (1997); see also Eskridge, *Overruling Statutory Precedents*, *supra* note 4, at 1376-81 (describing the Court's practice with respect to "common law" statutes like the Sherman Act). For a discussion of how the Supreme Court treats its common law precedent, see *infra* note 21 and accompanying text.

¹⁴ Both changed circumstances and developments in the law are established grounds for overruling constitutional and common law precedents, assuming that reliance interests do not cut strongly the other way. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 855 (1992) (considering both the workability of prior constitutional interpretation and "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification"); *United States v. Reliable Transfer Co.*, 421 U.S. 397, 403 (1975) (overruling common law precedent because "subsequent history and experience have conspicuously eroded the rule's foundations").

¹⁵ *Flood*, 407 U.S. at 283-84. Some change in this area recently has come from Congress. The Curt Flood Act of 1998 subjects organized baseball to the antitrust laws, at least with respect to matters relating to the employment of major league baseball players. 15 U.S.C. § 26b (2000).

¹⁶ *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).

¹⁷ *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989).

trine is so strong that it prevails over other interpretive principles, including otherwise weighty interpretive principles like “clear statement” rules.¹⁸ The Supreme Court repeatedly asserts that statutory cases are special and call for special application of stare decisis.¹⁹

This special treatment of statutory precedent fits into a system in which the Supreme Court varies the strength of the precedent according to the source of law that the precedent interprets. Cases interpreting statutes, as we have been discussing, receive stronger-than-normal stare decisis effect. Cases interpreting the Constitution, by contrast, receive weaker-than-normal stare decisis effect. The Supreme Court frequently explains that it will more readily overrule a constitutional decision than any other kind of decision, because when it erroneously interprets the Constitution, “correction through legislative action is practically impossible.”²⁰ The baseline of normal stare decisis effect is apparently reserved for cases developing the federal common law.²¹ This variety of approaches means that stare decisis effectively comes in three different strengths in the Supreme Court: “statutory strong,” “common law normal,” and “constitutional weak.”²² The next part describes the rationales that have been advanced to justify the Supreme Court’s application of a super-strong presumption against overruling statutory precedent.

18 *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 206–07 (1991) (“In the case before us the clear statement inquiry need not be made and we need not decide whether FELA satisfies that standard, for the rule in any event does not prevail over the doctrine of stare decisis as applied to a longstanding statutory construction implicating important reliance interests.”); see also *id.* at 209–14 (O’Connor, J., dissenting) (protesting that the clear statement rule is more important than statutory stare decisis). The clear statement rule at issue in *Hilton* was the rule that the Court will not construe a federal statute to abrogate a State’s sovereign immunity unless Congress makes clear its intention to do so.

19 Of course, as with any interpretive principle, the Court is susceptible to being criticized for applying it inconsistently. See, e.g., Eskridge, *Overruling Statutory Precedents*, *supra* note 4, at 1427–39 (listing twenty-six Supreme Court decisions explicitly overruling statutory precedents between 1961 and 1987, another twenty-four implicitly overruling statutory precedents, and another thirty-five significantly curtailing statutory precedents or overruling their reasoning). Even assuming that these are examples of occasional unfaithfulness rather than legitimate overruling, statutory stare decisis remains an important force in the Court’s jurisprudence, as Eskridge himself recognizes. *Id.* at 1368; see also Lawrence C. Marshall, “Let Congress Do It”: *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 182–83 (1989) (noting the continuing force of the principle despite the Court’s occasional unfaithfulness to it).

20 *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting). John Manning argues that the Court’s different treatment of statutory and constitutional cases for purposes of stare decisis is part of an “important intellectual tradition” in which the Court calls for greater flexibility in interpreting the Constitution than in interpreting statutes. John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1692–93, 1697–99 & n.138 (2004).

21 Eskridge, *Overruling Statutory Precedents*, *supra* note 4, at 1366; see, e.g., *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403–05 (1970) (discussing four factors underlying the value of stare decisis in the common law context).

22 Eskridge, *Overruling Statutory Precedents*, *supra* note 4, at 1362, 1364–66 (describing the Court’s three-tiered approach to stare decisis, which accords super-strong effect to statutory precedents, normal effect to common law precedents, and weak effect to constitutional precedents).

B. Rationales for Statutory Stare Decisis

1. Congressional Acquiescence

The Supreme Court's statutory stare decisis opinions reveal two rationales, both rooted in legislative supremacy, for giving statutory precedent particularly strong effect. The rationale that has been discussed most widely in both the cases and commentary is the one I will call "congressional acquiescence"—the belief that congressional inaction following the Supreme Court's interpretation of a statute reflects congressional acquiescence in it.²³ While this rationale is misguided, as I will explain in Part II, it is fairly easy to describe. It proceeds from the premise that the Supreme Court ought to function as Congress's faithful agent in interpreting statutes, and it treats Congress's silence following a Supreme Court opinion as indicating what Congress, as principal, desires.²⁴ Guido Calabresi has explained the logic of the acquiescence rationale this way: "When a court says to a legislature, 'You (or your predecessor) meant X,' it almost invites the legislature to answer: 'We did not.'"²⁵ If Congress does not correct the Court's interpretation by amending the statute, the Court should assume that Congress approves of its

²³ See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 763–64 (1998); *Ankenbrandt v. Richards*, 504 U.S. 689, 700–01 (1992); *Hilton*, 502 U.S. at 202; *United States v. Johnson*, 481 U.S. 681, 686, 687 n.6 (1987); *Johnson v. Transp. Agency*, 480 U.S. 616, 629 n.7 (1987); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 421–22, 424 (1986); *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 55 n.18 (1985); *Flood v. Kuhn*, 407 U.S. 258, 281–84 (1972); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488–89 (1940). See generally William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 71–78 (1988) [hereinafter Eskridge, *Interpreting Legislative Inaction*]; Eskridge, *Overruling Statutory Precedents*, *supra* note 4, at 1402–08; Daniel A. Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 2, 8–14 (1988); John Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities"*, 64 B.U. L. REV. 737, 741–54 (1985); Marshall, *supra* note 19, at 184–96; Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515 (1982).

²⁴ See, e.g., *Flood*, 407 U.S. at 283–84 ("Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively."); see also Eskridge, *Interpreting Legislative Inaction*, *supra* note 23, at 93–95 (recognizing that in the congressional acquiescence cases, the Supreme Court takes Congress's silence as a sign of its actual intent); Marshall, *supra* note 19, at 185–86 (same). William Eskridge has argued that although the cases use acquiescence as an indication of actual intent, they are more defensible if rereasoned as an attempt to give Congress "the institutional burden of responding" to statutory interpretations. Eskridge, *Interpreting Legislative Inaction*, *supra* note 23, at 108. They create this "institutional burden of response" by adopting a rebuttable presumption that Congress agrees unless it says otherwise. *Id.* This argument is a variant of the separation-of-powers rationale, which I discuss in the next section. See *id.* at 118–19 (characterizing the "rebuttable presumption" argument as an attempt to shift responsibility for error correction to Congress, "the better forum").

²⁵ GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 32 (1982); cf. WILLIAM ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 220 (1994) (analogizing the significance of legislative silence to Sherlock Holmes's "dog that did not bark").

interpretation.²⁶ And if Congress approves, the Court, as its faithful agent, should not change course.²⁷

2. Separation of Powers

The Court's opinions reflect a second rationale for statutory stare decisis, which I will call the "separation-of-powers" rationale. This rationale rests on concerns about institutional competence rather than on inferences from congressional silence.²⁸ The Supreme Court often justifies statutory stare decisis by explaining that "[c]onsiderations of stare decisis have special force in the area of statutory interpretation, for here . . . Congress remains free to alter what we have done."²⁹ Unfortunately, however, the Supreme Court does not usually go on to explain why change is better left to Congress. It thus takes a more detailed account to unpack the potential connection between separation of powers and statutory stare decisis.

Sometimes, the Supreme Court seems to justify its claim that changes in statutory interpretation are better left to Congress by comparing statutory interpretation to constitutional interpretation.³⁰ The Court frequently notes that because the Constitution is difficult to amend, the Court is the only one that can effectively fix its interpretive errors in constitutional law.³¹ With respect to statutory errors, however, the Court notes that change can come from Congress (and the President) through the normal legislative process.³²

²⁶ See, e.g., *Johnson*, 480 U.S. at 629 n.7 ("Congress has not amended the statute to reject our construction, nor have any such amendments even been proposed, and we therefore may assume that our interpretation was correct.").

²⁷ See *id.*

²⁸ See *Neal v. United States*, 516 U.S. 284, 295–96 (1996); *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 255–61 (1970) (Black, J., dissenting); *Francis v. S. Pac. Co.*, 333 U.S. 445, 450 (1948); *Douglass v. County of Pike*, 101 U.S. 677, 687 (1879).

²⁹ *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989). The Court has repeatedly quoted *Patterson* for this proposition. See, e.g., *Hohn v. United States*, 524 U.S. 236, 251 (1998); *Hubbard v. United States*, 514 U.S. 695, 712 n.11 (1995); *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. 265, 284 (1995) (O'Connor, J., concurring); *Ankenbrandt v. Richards*, 504 U.S. 689, 700 (1992); *Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451, 479 n.29 (1992); *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991); *California v. FERC*, 495 U.S. 490, 499 (1990). The Court has identified Congress as the appropriate actor on other occasions as well. See, e.g., *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736–37 (1977) (asserting that respect for precedent ought to be strongest "in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation").

³⁰ For example, the most frequently cited statement of the difference between constitutional and statutory stare decisis puts it this way:

Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting).

³¹ See, e.g., *id.*; see also *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996); *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991); *Payne v. Tennessee*, 501 U.S. 808, 827–30 (1991).

³² See, e.g., *Burnet*, 285 U.S. at 406–07 (Brandeis, J., dissenting); see also *Patterson*, 491 U.S. at 172–73; *Ill. Brick Co.*, 431 U.S. at 736–37.

Thus, the Court appears to reason, it should be exceedingly reluctant to revisit statutory precedent.

The Constitution is indisputably difficult to amend, and that might be a reason for the Court to more readily reconsider its constitutional interpretations—in other words, to give them weaker-than-normal precedential effect.³³ But the difficulty of amending the Constitution does not explain why the Court ought to give *stronger*-than-normal precedential effect to statutory interpretations, as opposed to the normal precedential effect it gives to common law precedents.³⁴ Indeed, there is no connection whatever between the conclusion that constitutional precedent should receive weak *stare decisis* effect and the claim that statutory precedent should be effectively immune from reconsideration. The validity of the Supreme Court's—and, for that matter, any federal court's—assertion that Congress is the appropriate actor in this context should be assessed not by reference to the relative difficulties of constitutional and statutory amendment, but by comparing the institutional capabilities of Congress and the courts with respect to statutory interpretation.

When it comes to the institutional capabilities of Congress and the Court, the Supreme Court's opinions suggest two explanations for its belief that change is better left to Congress.³⁵ Congress may be the appropriate actor as a matter of resource allocation: given congressional availability for the task, perhaps the Court's resources are better spent elsewhere.³⁶ Or, Congress may be the appropriate actor as a matter of constitutional structure: given that the resolution of statutory ambiguity involves policymaking, perhaps that task is better left to the legislative branch.

A resource-allocation argument based on efficiency is unsatisfying, because it is far from clear that it is more efficient for Congress, rather than the Court, to correct the Court's statutory mistakes. For one thing, the structural barriers to change are higher in Congress than in the Court. The Court can effect change with five votes; a legislative amendment must garner the support of a majority in both houses and the President. For another, the Court has easier access to evidence of its own statutory mistakes. The Court continually deals with many of the statutes it interprets; the very process of applying precedent (or, through certiorari petitions, seeing how the lower courts are applying its precedent) gives the Court an opportunity to evaluate whether a prior statutory interpretation was misguided. Congress, however, must either make a special effort to monitor Supreme Court interpretations,

³³ *But see* Frank Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 429 (1988) (arguing against weak *stare decisis* in constitutional cases).

³⁴ *See supra* note 21 and accompanying text.

³⁵ *Cf. Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 268 (1987) (Stevens, J., concurring in part and dissenting in part) (arguing that “after a statute has been construed, either by this Court or by a consistent course of decision by other federal judges and agencies, it acquires a meaning that should be as clear as if the judicial gloss had been drafted by the Congress itself. This position reflects both respect for Congress's role and the compelling need to preserve the courts' limited resources.” (citations omitted)).

³⁶ Lawrence Marshall characterizes this argument as the “task-splitting” argument, one that “allocate[s] the Court's resources (for revisiting precedent) according to the perceived need for the Court's involvement.” Marshall, *supra* note 19, at 197.

or rely on others to bring the Court's decisions to its attention. The space on the Court's agenda is undeniably limited—but that is also true of Congress, which has a limited amount of time to address a panoply of policy issues. Getting the attention of either body is an arduous task. If efficiency is the only consideration, statutory stare decisis has the feel of one busy institution shifting part of its workload to another.³⁷ And this is all the more true for the courts upon which this Article focuses, the courts of appeals. It is difficult to imagine that it is more efficient for Congress to take responsibility for the thousands of circuit-level statutory interpretations, rather than leaving any necessary changes to either the circuits themselves or the Supreme Court.

That is not to say that some other, normative consideration cannot justify the shift. Instead of asking which institution can more efficiently accomplish the task of error correction—an inquiry that could begin an endless cycle of point-counterpoint—a better question is which body *should* assume this task. Even if the Supreme Court is not justified in believing that Congress has more resources to devote to monitoring and fixing its statutory mistakes, the Court may be justified in believing that the legislative branch is better suited for the job.

This is where the separation-of-powers rationale comes in. The most compelling explanation for statutory stare decisis casts it as a means of respecting the Constitution's division of power between the legislative and judicial branches. The Supreme Court itself has not itself fully elaborated the separation-of-powers theme that is implicit in its cases.³⁸ But others have attempted to do so. Two leading versions of the separation-of-powers rationale have been proposed, one by Justice Hugo Black and one by Professor Lawrence Marshall. These two theories are the primary articulations of the separation-of-powers rationale. I will describe each in turn.

First, Justice Black's theory: Justice Black is closely associated with the Supreme Court's statutory stare decisis doctrine, for he was one of its most vocal advocates.³⁹ He recognized that statutory interpretation inevitably requires the resolution of statutory ambiguity, and that the resolution of statutory ambiguity inevitably requires some degree of policymaking.⁴⁰ He was deeply uncomfortable, however, with the Supreme Court's undertaking any policymaking role.⁴¹ He grudgingly acknowledged that when the Supreme Court first interprets a statute, the resolution of statutory ambiguity—and the attendant policymaking—is “unavoidable in the decision of the case before it.”⁴² In subsequent cases, however, Justice Black insisted that the Supreme Court ought to avoid judicial policymaking by observing statutory

³⁷ See *id.* at 198 (making similar point).

³⁸ For examples of cases in which this theme is implicit, see *supra* note 29.

³⁹ See Eskridge, *Overruling Statutory Precedents*, *supra* note 4, at 1397–98 (identifying Justice Black's iteration of the separation-of-powers rationale as the “most celebrated, and forceful, articulation” of that theory); Marshall, *supra* note 19, at 208 (calling Justice Black “perhaps the Court's strongest advocate of a strong rule of statutory stare decisis”).

⁴⁰ *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 236, 257 (1970) (Black, J., dissenting).

⁴¹ *Id.* at 256–57.

⁴² *Id.* at 258.

stare decisis.⁴³ His position in this regard is rather extreme. He went so far as to claim that “[w]hen the law has been settled by an earlier case then any subsequent ‘reinterpretation’ of the statute is gratuitous and neither more nor less than an amendment: it is no different in effect from a judicial alteration of language that Congress itself placed in the statute.”⁴⁴ Thus, Justice Black believed that the Supreme Court’s deviation from statutory precedent literally violates the Constitution by usurping legislative power.⁴⁵ Adherence to statutory precedent, in his view, is a way “to avoid encroaching on the power of Congress to determine policies and make laws to carry them out.”⁴⁶

To the extent that Justice Black perceived a constitutional violation in the Supreme Court’s reinterpretation of a statute, his theory suffers from logical flaws that I will detail in Part III. But his basic discomfort with the policymaking inherent in the resolution of statutory ambiguity, and his perception of statutory stare decisis as a means of curbing such policymaking, have proven influential, particularly among those scholars and judges who adopt a textualist approach to statutory interpretation.⁴⁷ Modern textualists refuse to attribute any significance to congressional inaction following the Supreme Court’s interpretation of a statute.⁴⁸ Despite this refusal, many textualists—including those on the Supreme Court—still embrace statutory stare decisis.⁴⁹ Lawrence Marshall is the scholar who has advanced the most sustained explanation why.⁵⁰

Lawrence Marshall builds on Justice Black’s basic position, but he casts statutory stare decisis as a constitutionally based policy rather than a constitutional mandate. Like Justice Black, Marshall views the resolution of statutory ambiguity as an exercise in policymaking, and policymaking as the

⁴³ *Id.* at 256–58.

⁴⁴ *Id.* at 257–58.

⁴⁵ *Id.* at 258.

⁴⁶ *Id.* at 256–57.

⁴⁷ For a description of the textualist approach, see ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 14–37 (1997). A hallmark of this approach is the belief that interpretive techniques ought to limit judicial lawmaking. *Id.* at 17–23.

⁴⁸ See, e.g., *Johnson v. Transp. Agency*, 480 U.S. 616, 671–72 (1987) (Scalia, J., dissenting) (rejecting the “congressional acquiescence” theory). It is worth noting that the “congressional acquiescence” theory is a relative of the “purposive approach” to statutory interpretation that textualists emphatically reject. See Manning, *supra* note 20, at 1689–92 (2004) (describing textualist rejection of purposive approach). The purposive approach assumes that congressional intent or purpose, even though unexpressed in the enacted statutory language, can be a reliable guide to interpreting statutory text. *Id.* at 1684. The “congressional acquiescence” theory, which purports to interpret a statute in light of Congress’s unexpressed assent to a prior interpretation, see *supra* notes 23–27 and accompanying text, proceeds from the same basic assumption.

⁴⁹ Most commentators consider Justices Scalia and Thomas the Court’s most committed textualists. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2418 n.114 (2003). Both Justice Scalia and Justice Thomas embrace statutory stare decisis. See, e.g., *Rasul v. Bush*, 124 S. Ct. 2686, 2704 (2004) (Scalia, J., dissenting) (acknowledging special force of statutory precedents); *Fogerty v. Fantasy*, 510 U.S. 517, 538–39 (1994) (Thomas, J., concurring) (same). Other justices, to be sure, also embrace statutory stare decisis. See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 792, 804 n.4 (1998) (Souter, J.). I emphasize textualists here because, having explicitly rejected the congressional acquiescence theory, their adherence to the doctrine necessarily rests on some other ground.

⁵⁰ See generally Marshall, *supra* note 19.

province of the legislature.⁵¹ Like Justice Black, Marshall thinks it inevitable that the Supreme Court makes policy when it first interprets a statute.⁵² But unlike Justice Black, Marshall does not view the Supreme Court's deviation from statutory precedent as a literal transgression upon the legislative power. Instead, Marshall argues that statutory stare decisis is an interpretive principle derived from, but not required by, the Constitution's separation of powers.⁵³

In Marshall's iteration of it, statutory stare decisis functions as a democracy-forcing measure. He sees statutory stare decisis as a way for the Supreme Court to spur Congress to take responsibility for difficult policy calls left open by statutory language.⁵⁴ In fact, to better serve that end, Marshall proposes that the Supreme Court upgrade its statutory presumption from "super strong" to "absolute" on the theory that if Congress knows that change can come only from it—i.e., that the Supreme Court will *never* overrule its statutory precedents—Congress will be more likely to override statutory interpretations that it does not like.⁵⁵ The Supreme Court, perhaps influenced by Marshall's scholarship, has on at least one occasion advanced a theory for the statutory presumption similar to his. In *Neal v. United States*,⁵⁶ the Court, refusing to depart from a prior statutory interpretation, explained that "[w]ere we to alter our statutory interpretations from case to case, Congress would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair."⁵⁷ This version of the separation-of-powers rationale is about creating an incentive for congressional action.

C. Statutory Stare Decisis in the Courts of Appeals

To this point, my focus has been the Supreme Court. I have described the super-strong stare decisis effect that the Supreme Court accords its statutory precedent, as well as the rationales—congressional acquiescence and separation of powers—that the Supreme Court has given for that practice. I now turn to the point that has been overlooked by the otherwise robust literature on this topic: the courts of appeals apply this doctrine too. A majority of the circuits has explicitly adopted the super-strong presumption against overruling statutory precedents,⁵⁸ and in those circuits that have never explic-

⁵¹ *Id.* at 201–06.

⁵² *Id.* at 206–07.

⁵³ *Id.* at 219–20.

⁵⁴ *Id.* at 208–15.

⁵⁵ *Id.* at 209–15.

⁵⁶ *Neal v. United States*, 516 U.S. 284 (1996).

⁵⁷ *Id.* at 296; *see also* *Comm'r v. Fink*, 483 U.S. 89, 104 (1987) (Stevens, J., dissenting) (arguing that "if Congress understands that as long as a statute is interpreted in a consistent manner, it will not be reexamined by courts except in the most extraordinary circumstances, Congress will be encouraged to give close scrutiny to judicial interpretations of its work product").

⁵⁸ *See, e.g., In re Zurko*, 142 F.3d 1447, 1457–58 (Fed. Cir. 1998) (en banc), *rev'd on other grounds sub nom.* *Dickinson v. Zurko*, 527 U.S. 150, 165 (1999); *Bath Iron Works Corp. v. Dir., Office of Workers' Comp. Programs*, 136 F.3d 34, 42 (1st Cir. 1998); *Chi. Truck Drivers v. Steinberg*, 32 F.3d 269, 272 (7th Cir. 1994); *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 875–76 (D.C. Cir. 1992) (en banc); *Owen v. Comm'r*, No. 78-1341, 1981

itly applied the rule, separate opinions assume that it applies.⁵⁹ Only the Tenth Circuit has remained silent with respect to the super-strong statutory presumption, and no court of appeals has declined to follow it.

Neither those who support nor those who criticize the Supreme Court's statutory stare doctrine have noticed, much less questioned, this phenomenon. Nor have the courts of appeals given much thought to whether the doctrine makes sense for them. Instead, there appears to be a widespread assumption that statutory stare decisis is simply part of our interpretive doctrine—generally applicable to all federal courts—much like the plain meaning rule or the canons of statutory construction.⁶⁰

To be sure, the statutory presumption operates differently in the courts of appeals than in the Supreme Court. The most important stare decisis principle in the courts of appeals is that one panel cannot overrule another.⁶¹ When an existing panel decision is on point, the no-panel-overruling rule disposes of the case at hand without the need to consider other stare decisis principles.⁶² Panels that cite the statutory presumption approvingly, therefore, are simply giving an additional reason why they will not overturn precedent. The statutory presumption, however, has real bite when a court of appeals sits en banc. In that context, the no-panel-overruling rule does not apply; thus, other principles of stare decisis, including the statutory presumption, determine whether an en banc court will adhere to precedent. Not surprisingly, many of the appellate opinions that discuss statutory stare decisis have been written in en banc cases.⁶³

WL 16570, at *9 (6th Cir. June 23, 1981); *Cottrell v. Comm'r*, 628 F.2d 1127, 1131 (8th Cir. 1980) (en banc); *Gen. Dynamics Corp. v. Benefits Review Bd.*, 565 F.2d 208, 212 (2d Cir. 1977); see also *United States v. Rorie*, 58 M.J. 399, 406 (C.A.A.F. 2003) (recognizing that the stare decisis doctrine is "most compelling" where courts undertake statutory construction).

⁵⁹ *CSX Transp., Inc. v. Bhd. of Maint. of Way Employees*, 327 F.3d 1309, 1331 (11th Cir. 2003) (Black, J., concurring) (citing statutory presumption as an additional reason why court should not overrule precedent); *United States v. Coleman*, 158 F.3d 199, 204–05 (4th Cir. 1998) (en banc) (Widener, J., dissenting) (criticizing majority for failing to apply heightened statutory presumption); *United States v. Anderson*, 885 F.2d 1248, 1262–66 (5th Cir. 1989) (en banc) (Smith, J., dissenting) (same); *United States v. Aguon*, 851 F.2d 1158, 1177–78, 1181–84 (9th Cir. 1988) (en banc) (Wallace, J., dissenting) (same), *overruled on other grounds by Evans v. United States*, 504 U.S. 255, 265 (1992); *Friette v. Kimberlin*, 508 F.2d 205, 219–23 (3d Cir. 1974) (Adams, J., dissenting) (same).

⁶⁰ The leading Legislation casebook, for example, presents statutory stare decisis this way. ESKRIDGE ET AL., *supra* note 5, at 599–617. The rule is presented as simply part of our statutory doctrine, with no discussion of which federal courts do apply, or should apply, the "super-strong" presumption of statutory stare decisis. *Id.*

⁶¹ See Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1017–18 (2003) (describing the impact of the rule, followed in every circuit, that one panel cannot overrule another).

⁶² See, e.g., *Abdulai v. Ashcroft*, 239 F.3d 543, 553 (3d Cir. 2001) (acknowledging that absent intervening authority, an on-point panel decision is dispositive in subsequent cases); *Woodling v. Garrett Corp.*, 813 F.2d 543, 557 (2d Cir. 1987) (same).

⁶³ See *Coleman*, 158 F.3d at 204 (Widener, J., dissenting); *In re Zurko*, 142 F.3d at 1457–58; *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1556, 1558 (Fed. Cir. 1994) (en banc) (Mayer, J., dissenting); *Critical Mass*, 975 F.2d at 875–77; *Anderson*, 885 F.2d at 1256 (Smith, J., dissenting); *Aguon*, 851 F.2d at 1172–76 (Reinhardt, J., concurring); *id.* at 1177 (Wallace, J., concurring in part and dissenting in part); *Fast v. Sch. Dist. of Ladue*, 728 F.2d 1030, 1034 (8th Cir. 1984) (en banc); *Cottrell*, 628 F.2d at 1131.

Generally speaking, the circuits that have adopted the presumption have simply assumed without question that since the presumption applies in the Supreme Court, it must apply in the courts of appeals as well. For example, in quoting Supreme Court precedent regarding the presumption, the First Circuit simply substituted “the courts” for “this Court’s” as if the two were interchangeable.⁶⁴ In accusing a majority of the en banc court of disregarding the presumption, Judge Jerry Smith asserted without analysis that “[the Fifth Circuit] should adhere generally to the same constraints of stare decisis which the [Supreme] Court acknowledges.”⁶⁵ Most opinions simply cite Supreme Court cases as if they control in this context.⁶⁶

On two occasions, judges sitting in en banc cases have at least raised the issue whether the Supreme Court’s statutory stare decisis principle transfers automatically to the lower courts. The D.C. Circuit, sitting en banc, has cautioned that although the Supreme Court’s statutory stare decisis rule applies in the courts of appeals, it applies with modifications.⁶⁷ Because no single court of appeals establishes the “ultimate judicial precedent” interpreting a particular statute, the D.C. Circuit reasoned, a court of appeals must be willing to reconsider a statutory interpretation when a circuit split develops, or when the en banc court decides that the precedent is “fundamentally flawed.”⁶⁸ Similarly, concurring in *United States v. Aguon*,⁶⁹ Judge Reinhardt cautioned that the Ninth Circuit should not adopt the Supreme Court’s statutory stare decisis doctrine wholesale, because “there is a substantial difference between the role of this court and that of the Supreme Court.”⁷⁰

Even in those instances in which differences between the Supreme Court and the courts of appeals have been acknowledged, however, the fundamental point that statutory stare decisis should have substantially more bite than constitutional stare decisis has not been questioned.⁷¹ This is a startling over-

⁶⁴ *Bath Iron Works Corp. v. Dir., Office of Workers’ Comp. Programs*, 136 F.3d 34, 42 (1st Cir. 1998) (asserting that “‘considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change [the courts’] interpretation of its legislation” (quoting *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) (emphasis added))).

⁶⁵ *Anderson*, 885 F.2d at 1264 (Smith, J., dissenting).

⁶⁶ See *Coleman*, 158 F.3d at 204 (Widener, J., dissenting); *In re Zurko*, 142 F.3d at 1457–58; *Chi. Truck Drivers v. Steinberg*, 32 F.3d 269, 272 (7th Cir. 1994); *Loveladies Harbor*, 27 F.3d at 1556, 1558 (Mayer, J., dissenting); *Tradewinds, Inc. v. Citibank*, No. 81-1424, 1981 U.S. App. LEXIS 11046, at *16–21 (3d Cir. July 27, 1981) (Adams, J., dissenting); *Owen v. Comm’r*, No. 78-1341, 1981 WL 16570, at *25 (6th Cir. June 23, 1981); *Cottrell*, 628 F.2d at 1131; *Gen. Dynamics Corp. v. Benefits Review Bd.*, 565 F.2d 208, 212 (2d Cir. 1977); *Frilette v. Kimberlin*, 508 F.2d 205, 219–23 (3d Cir. 1974) (Adams, J., concurring).

⁶⁷ *Critical Mass*, 975 F.2d at 876; see also *id.* at 881 (Randolph, J., concurring) (emphasizing that the different position of federal appellate courts requires modifications in the statutory stare decisis rule); Richard L. Rainey, *Stare Decisis and Statutory Interpretation: An Argument for a Complete Overruling of the National Parks Test*, 61 GEO. WASH. L. REV. 1430, 1460–68 (1993) (discussing application of statutory stare decisis in *Critical Mass*).

⁶⁸ *Critical Mass*, 975 F.2d at 876.

⁶⁹ *United States v. Aguon*, 851 F.2d 1158 (9th Cir. 1988).

⁷⁰ *Id.* at 1173 (Reinhardt, J., concurring).

⁷¹ Judge Reinhardt’s concurring opinion in *Aguon* comes close to questioning this point, but stops short of actually doing it. In *Aguon*, Judge Reinhardt argued that the courts of appeals generally have more freedom to overrule precedents than does the Supreme Court. *Id.* at 1173–76. But he did not dispute that the statutory nature of a precedent is an additional factor

sight. The statutory presumption is grounded in judgments about how Congress reacts to the Supreme Court. Even assuming that these judgments are sound, the courts of appeals should not presume that Congress reacts to them in the same way.

In the next two parts of this Article, I address the question that has been ignored by both courts and scholars writing in the area: Does it make sense for the courts of appeals to give statutory precedents a more forceful presumption against overruling? To analyze this question, I will consider whether either the acquiescence rationale or the separation-of-powers rationale supports the doctrine of statutory stare decisis in the courts of appeals. While I cover both rationales, the separation-of-powers analysis is the heart of the analysis. The separation-of-powers rationale is the more compelling of the two rationales for statutory stare decisis in the Supreme Court; thus, statutory stare decisis in the courts of appeals must stand or fall upon it.

It is important to emphasize that in considering each of these rationales, I will neither add to nor exhaustively describe the extensive literature debating the question whether these rationales justify statutory stare decisis in the Supreme Court. That ground is well traveled, and my focus here is different. I am particularly interested in the question of how a federal court's position in the judicial hierarchy might affect its choice to employ an interpretive doctrine like statutory stare decisis. In light of that interest, I assume the basic validity of the doctrine in the Supreme Court and pursue only the question whether it works in the courts of appeals. I conclude that at least with respect to this interpretive doctrine, an inferior court ought to pause before simply adopting the Supreme Court's practice as its own.

II. *The Acquiescence Rationale in the Courts of Appeals*

Even with respect to Supreme Court decisions, the notion that congressional silence following a judicial interpretation constitutes congressional acquiescence in it has been subject to a great deal of scholarly and judicial criticism.⁷² This criticism has been persuasive, and the thrust of the contemporary cases and scholarship is that the separation-of-powers rationale offers a more promising justification than does congressional acquiescence for the Supreme Court's statutory stare decisis doctrine.⁷³ Notwithstanding this state

mitigating against overruling it, particularly in the absence of conflict among the circuits. *Id.* at 1173–74.

⁷² See, e.g., Eskridge, *Overruling Statutory Precedents*, *supra* note 4, at 1402–09; Marshall, *supra* note 19, at 184–96. It is worth noting that the topic of legislative inaction spans more broadly than statutory stare decisis. For example, the Court sometimes interprets congressional silence in the face of an administrative or lower court statutory interpretation as congressional acceptance of that interpretation. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 596–692 (1983). It sometimes interprets congressional rejection of particular statutory language as a sign that Congress did not intend for the statute to cover such a situation. See Eskridge, *Interpreting Legislative Inaction*, *supra* note 23, at 84–89 (discussing the “rejected proposal” cases). And, when Congress reenacts a statute without changing a judicial interpretation, the Court sometimes interprets reenactment as approval of the existing interpretation. See, e.g., *Holder v. Hall*, 512 U.S. 874, 961–62 (1994) (Stevens, J., dissenting) (collecting cases).

⁷³ See Eskridge, *Overruling Statutory Precedents*, *supra* note 4, at 1402 (noting that commentators more often defend statutory stare decisis with rationales that resonate with the sepa-

of affairs, the acquiescence rationale continues to garner at least some scholarly and judicial support. Daniel Farber, among other commentators, has defended it.⁷⁴ The Supreme Court, while in some cases disparaging the acquiescence rationale, continues in other cases to rely upon it.⁷⁵ And the courts of appeals also occasionally invoke the inference of congressional acquiescence from congressional silence in refusing to overrule circuit-level statutory interpretations.⁷⁶ Given that the acquiescence rationale continues to enjoy some support in the cases and literature, an analysis of statutory stare decisis in the courts of appeals would be incomplete without consideration of this rationale. Thus, I will begin by discussing whether a theory of congressional acquiescence justifies statutory stare decisis in the courts of appeals.

The traditional critiques of the Supreme Court's use of the acquiescence rationale can be synthesized under four general headings: ignorance, ambiguity, relevance, and constitutionality. The courts of appeals' use of the acquiescence rationale is subject to these same general criticisms. Indeed, these criticisms have even more force when considered at the circuit level.

A. Ignorance

The acquiescence rationale, which assumes that a majority of Congress supports a particular statutory interpretation, only works if a majority of Congress knows about the statutory interpretation at issue. Empirical research shows fairly conclusively, however, that Congress is generally unaware of circuit-level statutory interpretations. Stefanie A. Lindquist and David A.

ration-of-powers principle than with the congressional acquiescence theory); *id.* at 1397–1402 (describing separation-of-powers arguments); Marshall, *supra* note 19, at 200 (observing that the Constitution's separation of powers is the only viable explanation for the doctrine).

⁷⁴ See Farber, *supra* note 23, at 8–14 (defending acquiescence); *The Supreme Court, 1997 Term—Leading Cases*, 112 HARV. L. REV. 122, 269 (1998) (calling the acquiescence rationale “perhaps [the] most persuasive” argument for heightened statutory stare decisis).

⁷⁵ For cases in which the Supreme Court criticizes the acquiescence rationale, see, for example, *Alexander v. Sandoval*, 532 U.S. 275, 292–93 (2001); *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 186 (1994); *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 241 (1970); *Girouard v. United States*, 328 U.S. 61, 69–70 (1946); *Cleveland v. United States*, 329 U.S. 14, 22–24 (1946) (Rutledge, J., concurring); *Helvering v. Hallock*, 309 U.S. 106, 119–20 (1940). For cases in which the Supreme Court relies on acquiescence, see, for example, *supra* note 23. See also *Cent. Bank of Denver*, 511 U.S. at 187 (admitting that the Court's cases regarding the significance of congressional inaction have not been consistent).

⁷⁶ See, e.g., *Gen. Dynamics Corp. v. Benefits Review Bd.*, 565 F.2d 208, 212 (2d Cir. 1977) (refusing to overturn precedent because, *inter alia*, “Congress has not amended the Act to provide for a different rule”); *Tradewinds, Inc. v. Citibank*, No. 81-1424, 1981 U.S. App. LEXIS 11046, at *15 (3d Cir. July 27, 1981) (*same*); *Aguon*, 851 F.2d at 1178 (Wallace, J., dissenting) (arguing that the heightened presumption should control, because “[n]either Congress nor the Supreme Court has ever seen fit . . . to overturn the line of authority developed nearly unanimously by the circuits”); see also *United States v. Rorie*, 58 M.J. 399, 411 (C.A.A.F. 2003) (Efron, J., dissenting) (arguing that where Congress had not disturbed a prior statutory interpretation of the United States Court of Appeals for the Armed Forces, that court should not depart from precedent).

Yalof have performed the most comprehensive study.⁷⁷ They reviewed all bills reported out of committee between 1990 and 1998 that proposed to override, clarify, or codify statutory interpretations made by the intermediate federal appellate courts.⁷⁸ In that time period, the courts of appeals issued more than 26,332 opinions.⁷⁹ Congress proposed to respond to only 187 of them and actually responded to only 65 of them.⁸⁰ Lindquist and Yalof conclude that “members of Congress are much less likely to stay informed about the thousands of statutory decisions rendered by lower federal courts” than they are about Supreme Court precedents, “which receive relatively full media coverage.”⁸¹ Lindquist and Yalof’s findings echo those made by William Eskridge a decade earlier in his well-known study of congressional responses to the statutory interpretation decisions of the federal courts.⁸² Eskridge found that while Congress was surprisingly responsive to the Supreme Court, it was surprisingly unresponsive to the courts of appeals.⁸³ He asserted that his study showed “impressive congressional activity in connection with Supreme Court decisions,” but “unimpressive knowledge of and response to the far more numerous lower federal court statutory interpretation decisions.”⁸⁴

Because Congress lacks actual knowledge of circuit-level statutory interpretations, the acquiescence rationale could only work if the courts of appeals grounded it in a theory of constructive rather than actual knowledge. In other words, the courts of appeals could try to ground the acquiescence rationale in the belief that “[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law,” including case law.⁸⁵

Constructive knowledge, however, sits uneasily in this context. Courts typically impute constructive knowledge of the law before someone acts or violates a duty to act. Thus, citizens are expected to inquire about the relevant law before they undertake some action, or fail to undertake some action, in violation of it.⁸⁶ On this same principle, courts assume that Congress

⁷⁷ See Stefanie A. Lindquist & David A. Yalof, *Congressional Responses to Federal Circuit Court Decisions*, 85 JUDICATURE 61 (2001).

⁷⁸ *Id.* at 63.

⁷⁹ *Id.* tbl.1.

⁸⁰ *Id.* at 64–65, 68 & tbl.1.

⁸¹ *Id.* at 62; see also *id.* at 68 (asserting that “any textual theory of statutory interpretation suggesting that Congress will respond to absurd or incorrect judicial interpretations has little empirical foundation, at least in the courts of appeals”).

⁸² See generally William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) [hereinafter Eskridge, *Overriding Statutory Interpretation Decisions*].

⁸³ *Id.* at 337 n.12, 338, 415–16.

⁸⁴ *Id.* at 416; see also Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge of Positive Political Theory*, 80 GEO. L.J. 635, 661–62 (1992) (concluding, after a survey, that congressional staff are generally unaware of the D.C. Circuit’s statutory interpretation opinions).

⁸⁵ *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696–97 (1979). *Contra* *Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731, 742 (7th Cir. 1986) (“We do not think it realistic ‘to assume that our elected representatives, like other citizens, know the law,’ when ‘law’ is defined to mean every judicial gloss, however recherché, on a technical statute.” (citations omitted)).

⁸⁶ See *Lambert v. California*, 355 U.S. 225, 228 (1957) (noting that constructive knowledge of the law is imposed on citizens who undertake some activity or who, though passive, find

acquaints itself with judicial interpretations of a statute before Congress re-enacts or amends that statute; in these circumstances, congressional action provides an occasion for inquiry.⁸⁷ By definition, however, Congress does not “act” if it simply does not respond to a judicial opinion; nor does Congress have a *duty* to enact legislation in response to judicial opinions with which it disagrees.⁸⁸ Use of the constructive knowledge principle in this context would assume that elected representatives have a freestanding knowledge of the law—i.e., knowledge of the law in the absence of any impetus for informing themselves of it. This would be a truly unusual use of the concept of constructive knowledge.

The Supreme Court, while apparently willing to impute freestanding constructive knowledge of its own statutory interpretations to Congress,⁸⁹ has

themselves in circumstances that give them reason to inquire about a law imposing a duty on them).

⁸⁷ For a case relying on the reenactment rule, see, for example, *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975). For cases dealing with congressional amendment, see, for example, *Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998) (“And the force of precedent here is enhanced by Congress’s amendment to the liability provisions of Title VII since the *Meritor* decision, without providing any modification of our holding.”); *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782–88 (1985) (asserting that Congress’s amendment of a statute without explicit repudiation of a lower court’s interpretation of the statute indicates that Congress accepted the lower court’s interpretation); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 384–86 (1983) (similar); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378–82 (1982) (similar); *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74, 81 nn.6 & 9 (1980) (similar); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 731–33 (1975) (similar); and *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200–01 (1974) (similar). Of course, if an amendment addresses a different part of the statute, amendment does not provide an occasion for Congress’s acquainting itself with the courts’ interpretation of unrelated language.

⁸⁸ William Eskridge casts legislative inaction cases (a category broader than, but including, reliance on legislative inaction to justify statutory stare decisis) as actually creating a congressional duty to act in the event of disagreement with a Supreme Court statutory interpretation. *ESKRIDGE*, *supra* note 25, at 249. It would be extraordinary, however, for the judiciary to impose a duty on Congress that the Constitution does not itself require. Now, it is possible to unhinge statutory stare decisis from intent. The Court could say that regardless of what Congress intends by its silence, the more prudent course (for reasons of stability or separation of powers, for example) is for the Court to adhere to precedent unless it hears otherwise from Congress. But that is not what the Court says when it invokes the acquiescence rationale. In these cases, the Court adheres to precedent on the specific ground that Congress has effectively told it to do so. *See supra* notes 23–27 and accompanying text. Insofar as Eskridge understands the presumption as giving Congress the institutional burden of response, as he has elsewhere argued, *see supra* note 24, his argument is a variant of the separation-of-powers rationale that I will address shortly.

⁸⁹ The Supreme Court’s invocation of the acquiescence rationale to support statutory stare decisis appears to bear little relationship to the likelihood that Congress actually knows about the relevant decision, suggesting that it might rest its own use of the acquiescence rationale on an inference of constructive knowledge. I have found no decision in which the Court refuses to apply the heightened stare decisis presumption on the ground that Congress likely lacked actual knowledge of the Court’s prior statutory interpretation. When affirmative evidence of congressional knowledge exists, however, the Court sometimes uses it to bolster the case for using the presumption. *See Johnson v. Transp. Agency*, 480 U.S. 616, 629 n.7 (1987) (arguing that “legislative inattention . . . is not a plausible explanation for congressional inaction” because the precedent “was a widely publicized decision that addressed a prominent issue of public debate”); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986) (stating that “[w]e are especially reluctant to reject this presumption in an area that has seen careful, intense, and

apparently refused to impute constructive knowledge of lower court statutory interpretations to Congress. When the Court interprets a statute, it sometimes attributes significance to congressional inaction in the face of lower court interpretations of the same statute—but only when circumstances make it likely that Congress was actually aware of those decisions.⁹⁰ When an inference of actual knowledge is unlikely, the Court typically refuses to give any significance to legislative inaction.⁹¹

The Court's apparent reluctance to impute constructive knowledge in this context makes sense. Even assuming that the Supreme Court can fairly impute constructive knowledge of its opinions to Congress, intermediate appellate opinions pose special difficulties. A court of appeals opinion does not represent settled law; it represents developing law. Other circuits might go a different way. Or, the Supreme Court might go a different way if it ultimately takes up the issue. To be sure, one might view the law as *relatively* settled if all or most circuits have adopted the same position. But even then, it is not settled in the way a Supreme Court settles the law. Imposing constructive knowledge of circuit-level statutory interpretations effectively requires Congress to stay abreast of the law not only in its relatively final form, but also in its various stages of development.

Granted, situations do exist in which courts have imputed constructive knowledge of circuit opinions, despite their relative fluidity. For example, courts have generally held that circuit-level opinions can “clearly establish” the law for purposes of qualified immunity, and courts have imputed knowledge of that “clearly established” circuit level law to government officials who act or violate a duty to act in violation of the Constitution.⁹² Even in the qualified immunity context, though, deciding when a court of appeals opinion

sustained congressional attention”); *Flood v. Kuhn*, 407 U.S. 258, 281–84 (1972) (finding heightened deference especially appropriate where Congress had considered and rejected proposals to “overturn” Court’s interpretation); *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953) (same).

⁹⁰ See *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 338 (1988) (inferring acquiescence when “federal and state courts have held with virtual unanimity over more than seven decades” that a statute should be interpreted a particular way); *Lindahl*, 470 U.S. at 782–90 (inferring acquiescence in a lower court case when legislative history cited it); *Bloomer*, 445 U.S. at 84 (inferring acquiescence when witnesses at hearings brought lower court decisions to Congress’s attention); *Blue Chip Stamps*, 421 U.S. at 731–33 (inferring congressional acquiescence when hundreds of lower court cases shared same interpretation); *Gulf Oil Corp.*, 419 U.S. at 200–01 (inferring congressional acquiescence when lower courts interpreted a statute consistently for four decades); *Blau v. Lehman*, 368 U.S. 403, 412–13 & n.13 (1962) (inferring acquiescence where Congress received a report of the relevant lower court decision); cf. *Bob Jones Univ. v. United States*, 461 U.S. 574, 599 (1983) (inferring acquiescence in IRS rules when Congress was “aware—acutely aware” of those rulings). None of these cases, of course, is an instance of statutory *stare decisis*, because none is a case in which the Court relies on acquiescence to decide whether to adhere to its own precedent.

⁹¹ See *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 614–17 (1981) (refusing to infer congressional acquiescence in the statutory interpretation of one circuit); *United States v. Powell*, 379 U.S. 48, 55 n.13 (1964) (similar).

⁹² See, e.g., *Marsh v. Butler County*, 268 F.3d 1014, 1032 n.10 (11th Cir. 2001) (en banc) (asserting that the Eleventh Circuit cases can clearly establish the law in the Eleventh Circuit). *But see* *Schlothauer v. Robinson*, 757 F.2d 196, 197–98 (8th Cir. 1985) (strongly implying that only Supreme Court decisions, not decisions from the Eighth Circuit, clearly establish the law).

clearly establishes the law is not without difficulty, and courts struggle with the question.⁹³ While courts are sometimes willing to impute constructive knowledge of lower court opinions, constructive knowledge in this context is certainly a heavier burden to impose. And it bears repeating that courts only impose constructive knowledge on someone who acts or violates a duty to act. Congress has no duty to “overrule” legislatively those statutory interpretations with which it disagrees; nor, of course, does Congress have any duty to stay abreast of court of appeals decisions.⁹⁴

In sum, Congress’s general lack of actual knowledge of circuit opinions and the unreasonableness of imposing constructive knowledge in this context drastically limit the number of cases in which the inference of congressional approval from congressional silence is at all plausible in the court of appeals context.

B. Ambiguity

For the acquiescence rationale to work, Congress must not only know about the relevant judicial opinion, but it must be reasonable for the court to interpret Congress’s post-opinion silence as satisfaction with the opinion. The very unreasonableness of this inference is the primary reason that commentators have criticized the Supreme Court’s reliance on legislative inaction. Their criticism, persuasive in the context of the Supreme Court, only gains more force when applied to the courts of appeals.

Congressional silence is meaningless. Does it signal acquiescence in a judicial interpretation or an unwillingness to expend political capital to fix the error?⁹⁵ A host of explanations other than congressional approval of an opinion may account for legislative inaction. For example, Congress may fail to legislate on the topic in question because other measures “have a stronger claim on the limited time and energy of the [legislative] body.”⁹⁶ Or, legislators may believe that a “bill is sound in principle but politically inexpedient

⁹³ For example, the Eleventh Circuit refuses to consider cases from other circuits in determining whether the law was “clearly established.” *Marsh*, 268 F.3d at 1033 n.10 (asserting that cases from other circuits cannot “clearly establish” the law for officials acting in the Eleventh Circuit because “[w]e do not expect public officials to sort out the law of every jurisdiction in the country”). Other circuits, however, will take out-of-circuit case law into account. *See, e.g.*, *Salier v. Brooks*, 343 F.3d 868, 879 (6th Cir. 2003); *McClendon v. Columbia*, 305 F.3d 314, 329–30 (5th Cir. 2002). The courts also struggle to define the effect of a circuit split on the state of the law. *Compare* *Rivero v. San Francisco*, 316 F.3d 857, 865 (9th Cir. 2002) (strongly asserting that the existence of a circuit split does not undermine the clarity of the law in the Ninth Circuit when the Ninth Circuit has taken sides in the split), *with* *Burgess v. Lowery*, 201 F.3d 942, 944 (7th Cir. 2000) (observing that a circuit split might undermine the clarity of the law in the Seventh Circuit even when the Seventh Circuit had taken sides in the split).

⁹⁴ *See supra* note 88.

⁹⁵ *See* Eskridge, *Interpreting Legislative Inaction*, *supra* note 23, at 98–99; Marshall, *supra* note 19, at 190–91 (discussing numerous explanations for inaction that may apply “even to a Congress full of legislators who are acutely aware of, and strongly disagree with, a court decision construing an act of Congress”).

⁹⁶ Marshall, *supra* note 19, at 190 (quoting H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1393–1401 (tentative ed. 1958) (unpublished manuscript)).

to be connected with.”⁹⁷ Or, legislators may tentatively approve, but believe that “action should be withheld until the problem can be attacked on a broader front.”⁹⁸ The list of possible explanations goes on. Numerous obstacles, both procedural and practical, hinder the passage of legislation, and, as a result, even a legislature with a majority that vehemently disagrees with a judicial decision may fail to act on its disagreement. Equating the failure to act with agreement reflects a simple and complete misunderstanding of the legislative process.⁹⁹

This misunderstanding undercuts reliance on acquiescence for either the Supreme Court or a court of appeals. For a court of appeals, though, the unsettled nature of intermediate appellate opinions further exacerbates the problem. Does congressional silence in the face of an Eighth Circuit opinion signal agreement with that decision? Or does it mean that Congress is waiting to see what other circuits do or whether the Supreme Court takes the issue? Or does it mean that Congress does not think that a decision of the Eighth Circuit, even one incorrectly interpreting a statute, is worth spending political capital to fix? Worse, what is a court to make of congressional silence in the face of circuit conflict?¹⁰⁰ In short, the argument that congressional silence raises an inference of acquiescence in a court of appeals decision is simply unsustainable.

C. Relevance

In addition to the problems of ignorance and ambiguity, commentators have raised a relevancy objection to the Supreme Court’s use of the acquiescence rationale that is equally applicable to the courts of appeals.¹⁰¹ Both the Supreme Court and the courts of appeals have asserted repeatedly that the intent of the Congress that enacted a statute controls the interpretation of

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Cf. Johnson v. Transp. Agency*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) (“The ‘complicated check on legislation’ erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.” (citations omitted)); Frank Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 538 (1983) (noting that “[t]here are a hundred ways in which a bill can die even though there is no opposition to it”).

¹⁰⁰ Even where they otherwise follow the presumption, some circuits have noted that the existence of a circuit split complicates its application. *See United States v. Anderson*, 885 F.2d 1248, 1255 n.12 (5th Cir. 1989) (en banc) (asserting that “congressional silence is not of great significance, given the split in the circuits”); *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 876 (D.C. Cir. 1992) (en banc) (arguing that a circuit split eliminates the basis for applying the statutory presumption); *id.* at 881 (Randolph, J., concurring) (same); *United States v. Aguon*, 851 F.2d 1158, 1173–74 (9th Cir. 1988) (en banc) (Reinhardt, J., concurring) (same); *EEOC v. Metro. Educ. Enters.*, 60 F.3d 1225, 1230 (7th Cir. 1995) (Ripple, J., concurring) (same).

¹⁰¹ Eskridge, *Interpreting Legislative Inaction*, *supra* note 23, at 95–96 (noting the inconsistency between the Court’s disapproval of subsequent legislative history and its acceptance of subsequent legislative inaction); Marshall, *supra* note 19, at 193–95 (same).

the statute.¹⁰² For this reason, the federal courts will not consider post-enactment legislative history when they interpret a statute.¹⁰³ As the Supreme Court has explained, “[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.”¹⁰⁴ Yet the acquiescence rationale relies not on the intent of the enacting Congress, but on the intent of subsequent Congresses whose inaction may ratify the Court’s statutory gloss. If the intent of the enacting Congress is what counts, why should a court take account of what later Congresses think or whether they decline to act?¹⁰⁵ The supposed acquiescence of a later Congress is simply irrelevant.

D. Daniel Farber’s Alternative Way

To avoid, or at least soften, the problems of ignorance, ambiguity, and irrelevance that plague the acquiescence rationale, Daniel Farber has advanced a creative “veil of ignorance” argument to defend the Supreme Court’s reliance on congressional inaction.¹⁰⁶ He argues that if asked at the time of enactment, legislators would express a preference for a rule of statutory interpretation that attributes significance to legislative inaction—a category broader than, but including, statutory stare decisis.¹⁰⁷ *Ex ante*, legislators cannot know whether judicial interpretations will unduly benefit or unduly hurt their side of the legislative bargain.¹⁰⁸ Because they can expect as many errors to benefit as hurt their policy preferences over time and across many statutes, legislators would not be particularly concerned about leaving statutory misinterpretations on the books.¹⁰⁹ They would be concerned, however, about the social costs imposed by a weak form of stare decisis—one permitting corrections despite evidence of legislative acquiescence in the supposed error.¹¹⁰ Uncertainty breeds difficulty in planning

¹⁰² See, e.g., *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980); *United States v. Price*, 361 U.S. 304, 313 (1960); *European Cmty. v. RJR Nabisco, Inc.*, 355 F.3d 123, 136 (2d Cir. 2004) (holding that “expressions of legislative intent made years after the statute’s initial enactment are entitled to limited weight under any circumstances, even when the post-enactment views of Congress as a whole are evident”); *Tax & Accounting Software Corp. v. United States*, 301 F.3d 1254, 1266 (10th Cir. 2002) (holding that “Congress cannot retroactively change the meaning and intent of previously enacted statutory language through the introduction of legislative history which purports to state what the original meaning of that statutory language was”); *N. Broward Hosp. Dist. v. Shalala*, 172 F.3d 90, 98 (D.C. Cir. 1999) (holding that “subsequent legislative history is an ‘unreliable guide to legislative intent’”) (citations omitted).

¹⁰³ See *supra* note 102.

¹⁰⁴ *Consumer Prod. Safety Comm’n*, 447 U.S. at 118 (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).

¹⁰⁵ Cf. *Johnson v. Transp. Agency*, 480 U.S. 616, 671 (1987) (Scalia, J., dissenting) (asserting that the acquiescence rationale is “based . . . on the patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant”); see also Easterbrook, *supra* note 33, at 427 (asserting that “think[ing] of Congress as a discontinuous body . . . affects the theory of precedent”).

¹⁰⁶ Farber, *supra* note 23, at 8–14.

¹⁰⁷ *Id.* at 11–14.

¹⁰⁸ *Id.* at 11–12.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 12–13.

transactions as well as increased litigation.¹¹¹ In addition, the Court's failure to take future congressional approval of statutory interpretations into account increases the resources that Congress may have to devote to considering and perhaps enacting legislative overrides.¹¹² Because legislators would prefer a rule that reduces uncertainty to a rule that permits the Court to resurrect and enforce the original legislative bargain, the argument goes, treating congressional silence as acquiescence does advance congressional desires.¹¹³

Even assuming that Farber accurately predicts legislative preferences vis-à-vis the Supreme Court, his argument has no apparent application to statutory stare decisis at the court of appeals level. (Nor, importantly, does Farber argue that it does.) First, Farber's argument rests on his assertion that congressional silence, even if not conclusive, is at least probative of congressional approval.¹¹⁴ As others have argued, however, that is simply not the case—inaction could mean *anything*, perhaps including approval, but certainly not necessarily or even likely so.¹¹⁵ Given that alternative explanations for congressional silence are even more forceful vis-à-vis the courts of appeals than the Supreme Court,¹¹⁶ the probative value of silence is so weak as to be useless at the inferior court level. Second, it is not clear that legislators would have the same *ex ante* preference in favor of strong, acquiescence-based stare decisis, because they do not receive the same benefit in return for relinquishing their attachment to the original legislative deal. Strong stare decisis in a court of appeals does not provide the same overall certainty in planning or reduced litigation, because the possibility always exists that other circuits—or the Supreme Court—could decide the case differently. Nor does strong stare decisis in a court of appeals greatly reduce the risk that Congress will have to devote legislative resources to considering an override, because the risk that Congress would step in to override an intermediate court's interpretation is already low.¹¹⁷ Given that the benefits are reduced in this context, legislators behind Farber's veil of ignorance may well reach a different calculus. Even if they would prefer that the Supreme Court adopt super-strong stare decisis, it is far from certain that they would choose a similar course for the courts of appeals.

E. Constitutional Impediments

Finally, commentators have raised a constitutional objection to the Supreme Court's use of the acquiescence rationale that also applies to its use by

¹¹¹ *Id.* at 12.

¹¹² *Id.* at 13.

¹¹³ *Id.* at 13. *But see* Marshall, *supra* note 19, at 198–200 (pointing out flaws in Farber's theory, even as applied to the Supreme Court); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 73–76 (2001) (same).

¹¹⁴ Farber, *supra* note 23, at 10.

¹¹⁵ *See* Marshall, *supra* note 19, at 191 (arguing that even in the Supreme Court context, “logical relevance does not demonstrate that the probability of congressional agreement is sufficient to support any form of a presumption of congressional acquiescence”).

¹¹⁶ *See supra* notes 95–100 and accompanying text.

¹¹⁷ *See supra* note 80 and accompanying text (asserting that Congress responds to relatively few circuit opinions).

the courts of appeals.¹¹⁸ On the one hand, when a court interprets a statute to mean “X,” the acquiescence rationale permits Congress, through its silence, to respond “Yes, we meant ‘X.’” (For present purposes, I am putting aside all other objections to the acquiescence rationale, including the relevance of what a later Congress thinks.) On the other hand, the acquiescence rationale also permits Congress, by legislatively “overruling” a statutory interpretation, to respond “We did not mean ‘X’ at the time, but ‘X’ sounds good to us now.” With only silence to go on, a court cannot know which message Congress is sending, and the latter message runs headlong into the Constitution. As commentators have repeatedly emphasized and I will briefly describe here, permitting the inaction of a current Congress to ratify a potential departure from the statutory scheme circumvents the constitutional limits on the legislative process.

Congress can only legislate through the constitutionally prescribed process of bicameralism and presentment.¹¹⁹ Silence cannot satisfy the requirement of bicameralism. Without a vote, it is impossible to tell whether a majority of both houses supports a measure. And even assuming that silence could somehow satisfy the requirement of bicameralism, ratification by inaction circumvents the requirement of presentment. If Congress’s silence is given legal effect, Congress effectively can amend an existing statute without ever giving the President the opportunity to veto the amendment.¹²⁰ The acquiescence rationale assumes that Congress’s view about the meaning of a statute is the only relevant view; Congress, however, is not the only body with a role in making or amending statutes. The acquiescence rationale wholly overlooks the Executive’s role in the legislative process.

III. *The Separation-of-Powers Rationale in the Courts of Appeals*

Congressional acquiescence—a theory on shaky ground in the Supreme Court—runs into even more trouble in the courts of appeals. With the underbrush of the acquiescence rationale cleared away, we can consider the more promising justification for statutory stare decisis in the courts of appeals: the separation-of-powers rationale. The idea that the constitutional separation of powers requires or at least militates in favor of statutory stare decisis runs through Supreme Court opinions, and the courts of appeals echo it. If statutory stare decisis can be justified in the courts of appeals, it must stand or fall on this ground.

¹¹⁸ See Eskridge, *Interpreting Legislative Inaction*, *supra* note 23, at 96–97 (identifying constitutional difficulties with attributing legal significance to legislative inaction); Marshall, *supra* note 19, at 194 (same).

¹¹⁹ U.S. CONST. art. IV, § 7, cl. 2; *INS v. Chadha*, 462 U.S. 919, 945–59 (1983).

¹²⁰ See *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 186 (1994); *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (refusing to give effect to congressional acquiescence because, *inter alia*, “Congress may legislate . . . only through the passage of a bill which is approved by both Houses and signed by the President” (citations omitted)); *Cleveland v. United States*, 329 U.S. 14, 22 n.4 (1946) (Rutledge, J., concurring) (stating that “in view of the specific and constitutional procedures required for the enactment of legislation, it would seem hardly justifiable to treat as having legislative effect any action or nonaction not taken in accordance with the prescribed procedures”); Nelson, *supra* note 113, at 76–77.

As explained in Part I, existing case law and commentary offer two different versions of the separation-of-powers rationale, one advanced by Justice Hugo Black and the other advanced by Professor Lawrence Marshall. In this section, I consider whether either Justice Black's or Lawrence Marshall's understanding justifies statutory stare decisis in the courts of appeals. After concluding that neither does, I then consider the possibility of a third version of the separation-of-powers rationale, one not articulated in existing scholarship or case law. I argue that statutory stare decisis is best understood not as a constitutional mandate, as Justice Black described it; nor as a means of spurring congressional action, as Professor Marshall describes it; but instead, as a simple restraint on judicial policymaking derived from, but not required by, the Constitution's separation of powers. I find this explanation of statutory stare decisis more compelling, but conclude that it also ultimately fails to justify statutory stare decisis in the courts of appeals.

A. Justice Black's Theory

Recall that Justice Black, the justice who has most clearly articulated a separation-of-powers theory for statutory stare decisis, insisted that the Constitution gives the legislative branch the exclusive authority to correct statutory mistakes. According to Justice Black, "[W]hen this Court first interprets a statute, then the statute becomes what this Court has said it is."¹²¹ Justice Black believed that to alter that language is a legislative function, a task that Article I vests in Congress.¹²² Congress, unlike the Court, is an elected body, and Congress, unlike the Court, is capable of responding to political pressure and of performing the investigation required to develop policy.¹²³ Thus, the Court "should interject itself as little as possible into the law-making and law-changing process."¹²⁴ Justice Black's argument has been persuasive to some circuit judges, who have invoked it in asserting the statutory presumption.¹²⁵

¹²¹ *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 257 (1970) (Black, J., dissenting). The Court has sounded a similar theme in other cases. See *Francis v. S. Pac. Co.*, 333 U.S. 445, 450 (1948) (stating that "[w]e find the long and well-settled construction of the Act plus reenactment of the free-pass provision without change of the established interpretation most persuasive indications that the . . . [judicial interpretation] has become part of the warp and woof of the legislation"); *Douglass v. County of Pike*, 101 U.S. 677, 687 (1879) (holding that "[a]fter a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment").

¹²² *Boys Mkts.*, 398 U.S. at 258 (Black, J., dissenting).

¹²³ *Id.*

¹²⁴ *Id.*; see also Frank E. Horack, Jr., *Congressional Silence: A Tool of Judicial Supremacy*, 25 TEX. L. REV. 247, 250-51 (1947) (making a similar "judicial amendment" argument to support statutory stare decisis).

¹²⁵ See *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1558 (Fed. Cir. 1994) (en banc) (Mayer, J., dissenting) (asserting that "[o]nce the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end" (quotation omitted)); *United States v. Anderson*, 885 F.2d 1248, 1265 & n.11 (5th Cir. 1989) (en banc) (Smith, J., dissenting) (noting the "colorable argument" that altering a prior statutory interpretation violates the separation-of-powers principle, "as any subsequent change of position has the practical effect of amending the statute, an act that is legislative rather than judicial in nature"); *Tradewinds, Inc. v. Citibank*, No. 81-1424, 1981 U.S. App. LEXIS 11046, at *20 (3d Cir. July 27,

Justice Black's analysis, however, is patently flawed.¹²⁶ He does not identify the force that transforms an initial judicial interpretation into statutory text; nor does he explain why the very same act of judicial interpretation violates Article I in one context but not another. As William Eskridge asks: "Why should an errant initial interpretation of legislative expectations be considered acceptable judicial lawmaking, and a later, corrective interpretation be considered usurpation?"¹²⁷

The premise that an initial judicial interpretation of statutory language becomes an actual part of the statute itself is particularly strained in the court of appeals context, where different circuits can interpret the same language differently. Does the interpretation of a single circuit become temporarily part of the statute subject to the development of a conflict? When there is a conflict, does the statute revert to its "original form" until the Supreme Court steps in to resolve the conflict? Or, do court of appeals statutory interpretations become part of the "warp and woof" of a statute only once some number of circuits weighs in and agrees? If so, what is the tipping point?

The court of appeals context also underscores the logical difficulties of distinguishing between "initial interpretations," which are "unavoidable" and therefore permissible in Justice Black's view, and "reinterpretations," which are avoidable and therefore impermissible.¹²⁸ Once one circuit has interpreted an ambiguity, are not *all* later interpretations, even those from other circuits, unnecessary? Indeed, once any federal court at any level of the judicial hierarchy fills a gap, are not all interpretations in later cases, even from a superior court, strictly speaking, "unnecessary?" The longstanding stare decisis structure of the federal courts provides that one circuit does not bind another, and that vertical stare decisis is a one-way obligation running from superior to inferior courts.¹²⁹ Adopting Justice Black's strong separation-of-powers view would require the federal courts either to define "necessity" artificially (e.g., by saying that it is "necessary" for each precedential component of the federal court system to define a statutory term for itself) or to depart radically from the existing stare decisis structure. In short, Justice Black's position cannot justify statutory stare decisis in the courts of appeals.

1981) (Adams, J., concurring) (arguing that "we should abstain from usurping the congressional power of altering or amending legislation"); *Frilette v. Kimberlin*, 508 F.2d 205, 219–20 (3d Cir. 1975) (Adams, J., dissenting) (asserting that "a court, in altering its interpretation of the meaning to be derived from the words of the statute, encroaches on the power of Congress to enact or amend legislation").

¹²⁶ Eskridge, *Overruling Statutory Precedents*, *supra* note 4, at 1398–1400; Marshall, *supra* note 19, at 209 (stating that "[t]aken alone, Justice Black's position appears to be a bit shallow").

¹²⁷ Eskridge, *Overruling Statutory Precedents*, *supra* note 4, at 1399.

¹²⁸ *Boys Mkts.*, 398 U.S. at 257–58 (Black, J., dissenting).

¹²⁹ See, e.g., *Northwest Forest Res. Council v. Dombeck*, 107 F.3d 897, 900 (D.C. Cir. 1997) (describing horizontal stare decisis in the federal courts); Evan Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 *STAN. L. REV.* 817, 818 (1994) (describing vertical stare decisis in the federal courts).

B. Statutory Stare Decisis as a Spur to Legislative Action

Recall Lawrence Marshall's more convincing account of the separation-of-powers reason for the statutory presumption.¹³⁰ Marshall recognizes that some policymaking is an inevitable part of statutory interpretation, both because it is impossible to completely eliminate ambiguity from language and because ambiguity is the inevitable result of legislative bargaining.¹³¹ He argues that it should be as small a part as possible, however, because any judicial policymaking is necessarily countermajoritarian.¹³² While it may not violate any express constitutional command, such policymaking is in serious tension with the constitutional structure, and the Court should seek to limit it.¹³³ Marshall's proposed way of limiting it is for the Supreme Court to shift the policymaking responsibility back to Congress by making statutory stare decisis an absolute rule.¹³⁴ According to Marshall, if the Court makes clear that it is absolutely unwilling to revisit statutory interpretations, both Congress and other parties interested in an issue will know that change can only come from the legislature.¹³⁵ Marshall claims that such line-drawing will make it more likely that Congress will rely on the democratic rather than the judicial process to resolve statutory ambiguities.

But Marshall limits his proposal to the Supreme Court, and it is easy to see why.¹³⁶ In Marshall's view, statutory stare decisis aims to evoke a congressional response; at the intermediate appellate level, a number of factors sap the likelihood of a meaningful congressional response. That is not to say that Congress never responds to statutory interpretations of the courts of appeals. Sometimes, it does.¹³⁷ But a theory of statutory stare decisis that assumes a norm of congressional response to the courts of appeals is deeply flawed.

For one thing, an information deficit exists. As discussed above, Congress tends not to know about the courts of appeals' statutory interpreta-

¹³⁰ See Marshall, *supra* note 19, at 200–19; see also William N. Eskridge, Jr., *The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases*, 88 MICH. L. REV. 2450, 2453–66 (1990) [hereinafter Eskridge, *Amorous Defendant*] (criticizing Marshall's theory); Lawrence C. Marshall, *Contempt of Congress: A Reply to the Critics of an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 2467 (1990) (responding to Eskridge).

¹³¹ Marshall, *supra* note 19, at 206–07.

¹³² *Id.* at 207.

¹³³ *Id.* at 201–08, 220–21 (arguing that “the nonmajoritarian aspect of judicial lawmaking should have a ‘conditioning influence’ in the Court’s formulation of stare decisis rules” (footnotes omitted)); cf. Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 540 (1948) (asserting that statutory stare decisis “places the responsibility where it belongs”). *But see* Eskridge, *Amorous Defendant*, *supra* note 130, at 2458–66 (disputing both that policymaking is reserved for the legislature and that judicial involvement is democracy-enhancing).

¹³⁴ Marshall, *supra* note 19, at 208.

¹³⁵ *Id.* at 209–15. *But see* Eskridge, *Amorous Defendant*, *supra* note 130, at 2453–58 (disputing that the Supreme Court’s adoption of an absolute rule would succeed in spurring congressional response).

¹³⁶ Marshall, *supra* note 19, at 216. Marshall does not say whether the Court’s current version of statutory stare decisis (as opposed to the absolute statutory stare decisis that Marshall advocates) has any role in the lower courts.

¹³⁷ See *supra* note 80 and accompanying text.

tions.¹³⁸ A prerequisite to congressional action, therefore, is missing—Congress cannot respond to errors about which it is unaware. Defenders of the “congressional incentive” theory might respond that actual knowledge does not matter. Unlike the acquiescence theory, the “congressional incentive” theory does not rely on what Congress already knows; instead, it relies on what the courts hope to inspire Congress to learn. Part and parcel of motivating Congress to respond to the statutory interpretations of the courts of appeals is motivating Congress to monitor these decisions.

Motivating Congress to monitor and respond to the statutory interpretations of the courts of appeals, however, is an uphill battle. Congress’s current unawareness of circuit opinions suggests at the very least that affirmative steps must be taken to inform Congress if this factor is to support statutory stare decisis; the knowledge obviously is not present in Congress as a matter of course.¹³⁹ It might be reasonable for the Supreme Court to attempt to spur Congress to monitor the relatively few statutory interpretation opinions it publishes each term.¹⁴⁰ Together, however, the courts of appeals issue thousands of statutory interpretations a year.¹⁴¹ It is simply not manageable for Congress to stay on top of this many opinions.¹⁴²

Even if Congress could manage the circuit caseload, other factors decrease Congress’s incentive to monitor and respond. Most important is the relatively small impact that any single court of appeals can have on the national scene. When the Supreme Court interprets a statute, Marshall’s “congressional incentive” theory assumes that Congress will act because Congress knows that change can only come from it.¹⁴³ When a court of appeals issues a decision, however, Congress knows that change may also originate from another source: the Supreme Court. I do not take a position here on whether it is appropriate for the Supreme Court to “discipline” the democratic process by forcing Congress to resolve statutory interpretation disputes through legislation.¹⁴⁴ Assuming, however, that it is appropriate for the Supreme Court to perform this sort of disciplining function, it is hard to see how a court of appeals could effectively play this role. The Supreme Court can hope to elicit a congressional response because it has the last word. The courts of appeals lack the ability to elicit a congressional response because they do not. If

¹³⁸ See *supra* notes 77–84 and accompanying text.

¹³⁹ See *supra* notes 77–84 and accompanying text.

¹⁴⁰ See Eskridge, *Overriding Statutory Interpretation Decisions*, *supra* note 82, at 339 n.15 (noting that the Supreme Court issued about eighty statutory interpretations per year during the period covered by Eskridge’s study); Marshall, *supra* note 19, at 216 n.181 (noting that the Court decided sixty-four statutory cases in its 1986 Term).

¹⁴¹ See *supra* note 79 and accompanying text.

¹⁴² Cf. James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 7 (1994) (stating that “Congress could not possibly modify or reject in text each statutory interpretation decision with which it has serious concerns and still have time to transact any other legislative business”).

¹⁴³ See *supra* note 135 and accompanying text.

¹⁴⁴ Cf. Jane Schacter, *Metademocracy*, 108 HARV. L. REV. 593, 609, 642–46 (1995) (using the phrase “disciplinarian approach” to describe approaches to statutory interpretation designed to influence or modify legislative behavior).

statutory stare decisis is a task-shifting mechanism, the courts of appeals generally lack the leverage to shift the task effectively.¹⁴⁵

An individual circuit's leverage over Congress is also decreased by the limited geographical reach of its opinions. A Supreme Court statutory interpretation binds the whole nation; thus, incentives potentially exist for *any* member of Congress (not to mention the President and interest groups) to support legislation overriding a Supreme Court opinion that undercuts that legislator's (or the President's or the interest groups') preferred statutory policy. When the First Circuit interprets a statute, however, what incentive does a senator from California have to introduce or support legislation to override a judicial opinion that affects a small portion of the East Coast and Puerto Rico? Common sense dictates that decisions not affecting a legislator's constituents are not likely to be at the top of her agenda; nor will the President or a national interest group necessarily take an interest in a decision with parochial effect. And even when a legislator has real concerns about one circuit's position, the limited geographical impact of the decision may dissuade her from acting, or inhibit her efforts to convince her colleagues to act. When one circuit speaks, Congress may well prefer to wait and see what other circuits say before devoting resources to an override.¹⁴⁶

To be sure, it would be an overstatement to say that Congress never has an incentive to respond to the lower courts, for Congress does override some lower court decisions.¹⁴⁷ Given that Congress is less likely to know about, much less respond to, lower court decisions than Supreme Court decisions, however, the incentive to override a lower court decision is necessarily limited.¹⁴⁸ Congress may have an incentive to act when a number of circuits

¹⁴⁵ Cf. Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2225 (2002) (noting that "[t]he Supreme Court is far more likely to provoke congressional overrides than lower courts").

¹⁴⁶ The data compiled by Lindquist and Yalof offers some support for the notion that Congress is likely to wait to see what other circuits do. Lindquist and Yalof found that Congress proposed to respond, either positively or negatively, to 187 appeals court cases. Lindquist & Yalof, *supra* note 77, at 63–64. Of those 187 cases, 66 were instances of circuit conflict that Congress introduced legislation to resolve. *Id.* Lindquist and Yalof do not isolate whether congressional overrides in the remaining cases were aimed at the decision of a single circuit, or a position on which several circuits concurred. Eskridge's data regarding lower court overrides is also silent with respect to this distinction. See generally Eskridge, *Overriding Statutory Interpretation Decisions*, *supra* note 82.

¹⁴⁷ See generally Lindquist & Yalof, *supra* note 77 (studying the frequency and type of congressional responses, including overrides, to the decisions of the courts of appeals). See also Eskridge, *supra* note 82, at 338 & tbl.1 (noting that Congress overrides or modifies statutory decisions by lower courts as well as decisions by the Supreme Court).

¹⁴⁸ Lindquist and Yalof argue that the speed and relative infrequency of congressional reactions to the courts of appeals' decisions suggest that Congress relies on a system of "fire-alarm monitoring" of judicial statutory interpretations. Lindquist & Yalof, *supra* note 77, at 67 (citations omitted). That is, rather than systematically watching all judicial decisions, Congress relies on "complaints ('alarms') by lobbyists from organized groups to trigger oversight." *Id.* As the term "fire-alarm monitoring" implies, interest groups are not likely to press for an override of every lower court loss, only of those perceived to be "fires." Cf. Eskridge, *Overriding Statutory Interpretation Decisions*, *supra* note 82, at 363 ("[An interest] group's ability to place an issue on the legislative agenda does not ensure that the group will do so. There are many reasons endogenous to the political process why a group might not press a statutory issue that it lost in court.").

have either joined in or divided over a particular statutory interpretation.¹⁴⁹ In that case, Congress might speak to express its disagreement with what has become a well-established judicial position, or to resolve the uncertainty created by a circuit split.¹⁵⁰ Congress may also have an incentive to act when a “specialty” circuit speaks—for example, when the Second Circuit decides an important securities case, the D.C. Circuit an important administrative law case, or the Federal Circuit an important patent case.¹⁵¹ Because “specialty” circuits tend to have the last word on issues arising within their fields, such decisions have influence beyond the borders of the circuit and may more easily command congressional attention and response.¹⁵² Or, Congress may have an incentive to act when a particular statutory interpretation, though isolated, is of enough strategic or symbolic importance to rile an influential interest group.¹⁵³

The fact that Congress has an incentive to respond to a subset of lower court decisions, however, does not justify the presumption that Congress has an incentive to respond to all, or even most, of them. A “presumption” applicable in only a few circumstances is not a generally applicable “presump-

¹⁴⁹ See *Comm’r v. Fink*, 483 U.S. 89, 104 (1987) (Stevens, J., dissenting) (asserting that a long, consistent line of lower court decisions should give Congress an incentive to act if it disagrees); Lindquist & Yalof, *supra* note 77, at 66 (noting instances of congressional overrides to resolve circuit conflicts).

¹⁵⁰ See *supra* note 149.

¹⁵¹ A circuit’s “specialty” may be jurisdictional. For example, statutes frequently grant the D.C. Circuit exclusive jurisdiction over various administrative matters, and the Federal Circuit has exclusive jurisdiction over various patent matters. Or, a specialty might be an accident of geography. For example, the Second Circuit decides relatively more securities cases simply because the New York Stock Exchange is located within that circuit. For this reason, Justice Blackmun called the Second Circuit “the ‘Mother Court’ of securities law.” *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting).

¹⁵² Lindquist and Yalof’s data shows that Congress responded to more opinions from the D.C. Circuit than any other. Congress overrode, clarified, or codified roughly eighteen percent of the D.C. Circuit’s opinions. Lindquist & Yalof, *supra* note 77, at 64. The numbers from the Ninth Circuit are not far behind: Congress responded to fifteen percent of the Ninth Circuit’s opinions. *Id.* The closest percentage after the Ninth Circuit is the nine percent to which Congress responded from both the Second and the Seventh Circuits. *Id.* Contrast these numbers with the four percent of opinions to which Congress responded from the Fourth, Tenth, and Eleventh Circuits. *Id.* Lindquist and Yalof opine that Congress responds to a high percentage of D.C. Circuit opinions because the D.C. Circuit “renders most of its decisions in regulatory matters of central concern to important legislative programs.” *Id.* That may be. Another explanation, though, is that regulatory statutes often grant exclusive review to the D.C. Circuit; thus, the D.C. Circuit has the first and, subject to Supreme Court review, the last judicial word on many, if not most, administrative matters. See Patricia Wald, *Regulation at Risk: Are Courts Part of the Solution, or Most of the Problem?*, 67 S. CAL. L. REV. 621, 647 (1994) (noting that Congress typically designates the D.C. Circuit as the exclusive forum for review of administrative rules). Lindquist and Yalof explain the high percentage of responses to the Ninth Circuit by pointing to the fact that the Ninth Circuit issues more opinions than any other circuit. Lindquist & Yalof, *supra* note 77, at 64. That may be. But another explanation is that because the Ninth Circuit is the largest circuit, its decisions tend to affect more people than the decisions of most circuits. Thus, members of Congress should have more interest in responding to these decisions.

¹⁵³ For example, Lindquist and Yalof observe that Congress overrides a relatively high percentage of the interpretations of environmental statutes issued by the courts of appeals, and they speculate that it does so because of the influence of interest groups like the Sierra Club and the Natural Resources Defense Council. Lindquist & Yalof, *supra* note 77, at 65.

tion.” It may be a factor that courts consider when circumstances suggest it, but it is not a principle justifying an across-the-board doctrinal approach.

Another factor worth considering is whether Congress should be primarily responsible for monitoring and changing wayward court of appeals statutory interpretations. Institutionally, it makes more sense for the Supreme Court to assume this role. By virtue of its appellate jurisdiction, the Supreme Court supervises the judgments of the lower federal courts; its primary function is to monitor and correct errors that lower courts (and state courts) make in interpreting federal law.¹⁵⁴ Congress, which creates the lower courts and defines the Supreme Court’s appellate jurisdiction, is the body that designed this system. Accordingly, it would be at least reasonable to infer that Congress expects the Supreme Court to bear the burden of monitoring and response vis-à-vis the lower courts, leaving Congress free to monitor and respond to only the Supreme Court’s relatively small docket. Of course, Congress may override lower court interpretations to the extent Congress is interested in particular issues or the opinions otherwise come to its attention. The courts of appeals should not, however, expect Congress to perform a job that Congress has structurally allocated to the Supreme Court through the appellate review process.

If this description adequately captures Congress’s expectations, one might then wonder whether the Supreme Court is performing—or, given resource limitations, is even capable of performing—the job that Congress has apparently allocated to it. Congress is presumably concerned about whether the lower courts are interpreting its statutes correctly; the Supreme Court is generally concerned about resolving splits rather than merely correcting errors.¹⁵⁵ If Congress primarily monitors the Supreme Court’s docket, and the Supreme Court does not take up statutory errors, then those errors will likely escape congressional attention. Perhaps, then, the courts of appeals should try to get Congress to react directly to them.

This response has some surface appeal, but upon analysis becomes less persuasive. One way to understand the Court’s certiorari practice is that it uses disagreement among the circuits as proxies for interpretive error. If only one or two courts have addressed a statutory ambiguity, and if they have interpreted that ambiguity the same way, the Court has to engage in relatively close scrutiny to detect errors in the lower courts’ reasoning. Performing that scrutiny for every certiorari petition would be time consuming and, with limited lower court input on the issue and the press of other work, the Court would be at greater risk of making interpretive errors itself. For efficiency’s sake, it relies on the process of “percolation” to separate cases that

¹⁵⁴ See Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 65 (1998) (noting that the Supreme Court sees “its role as principally one of promoting uniformity in the interpretation of federal law”).

¹⁵⁵ See SUP. CT. R. 10.1(a) (noting that a conflict between one court of appeals and another, or between a court of appeals and a state supreme court, is a reason for the Court’s exercise of its certiorari jurisdiction); ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 193 (7th ed. 1993) (explaining that the Supreme Court will not typically grant certiorari simply because the decision below is wrong).

merit review from those that do not.¹⁵⁶ The emergence of a circuit split signals a need for the Court's intervention, for when a split exists, so does error: in resolving a split, the Court necessarily declares some courts on the wrong side of the interpretive divide. By contrast, if the circuits agree, error—while certainly not impossible—is at least less likely. The fact that the circuits are arriving at the same conclusion suggests that they are arriving at the right conclusion.

Given the volume of circuit opinions, and the press of its other business, Congress is no more capable than the Supreme Court of engaging in close scrutiny of every single statutory interpretation released by a court of appeals.¹⁵⁷ If Congress took primary responsibility for monitoring lower court statutory interpretations, it too would have to rely on proxies for error. Indeed, the most comprehensive study of congressional responses to circuit opinions indicates that to the extent that Congress currently monitors the circuits at all, it already relies on proxies rather than case-by-case study.¹⁵⁸ For example, Congress is more likely to respond to the courts of appeals when a split exists, or when interest groups sound the alarm about a particular circuit opinion.¹⁵⁹ In light of the limitations that any monitoring institution would face, the Supreme Court's choice of selective rather than systematic monitoring is not itself reason for the lower courts to circumvent the congressionally designed appellate structure.

In sum, the "congressional incentive" version of the separation-of-powers rationale does not justify statutory stare decisis in the courts of appeals. For one thing, Congress has significantly less incentive to respond to a decision from a court of appeals than it does to a decision from the Supreme Court. For another, the way Congress has designed the appellate structure suggests that it expects the Supreme Court to function as the body primarily responsible for monitoring and responding to the inferior federal courts. The congressional incentive theory may well justify statutory stare decisis in the Supreme Court. But it does not provide a foundation for the doctrine in the lower courts.

C. *Statutory Stare Decisis as Judicial Restraint*

Considering how separation-of-powers principles might justify statutory stare decisis in the courts of appeals prompts reflection on another way of understanding the separation-of-powers rationale. Currently, the best articulated justification of statutory stare decisis in case law or commentary is Professor Marshall's.¹⁶⁰ Perhaps, though, it is possible to articulate a new

¹⁵⁶ "Percolation" describes the Supreme Court's practice of waiting for several federal and state courts to address an issue before granting certiorari and deciding an issue itself. See Dorf, *supra* note 154, at 65–66.

¹⁵⁷ See *supra* notes 139–42 and accompanying text (arguing that it is not realistic to expect Congress to monitor the thousands of statutory interpretations that the courts of appeals issue annually, as opposed to the relatively small number of statutory interpretations that the Supreme Court issues each term).

¹⁵⁸ Lindquist & Yalof, *supra* note 77, at 66–69.

¹⁵⁹ See *supra* notes 148–53 and accompanying text.

¹⁶⁰ See generally Marshall, *supra* note 19.

justification that does not focus on creating congressional incentives to act. Another separation-of-powers theme runs implicitly through the statutory *stare decisis* decisions of both the Supreme Court and the courts of appeals but has not been drawn out by the literature. One could state the principle this way: courts ought generally to refuse to revisit statutory precedents *regardless* of whether their refusal prompts congressional action. This rationale blends aspects of Justice Black's theory with aspects of Professor Marshall's. Like Justice Black's theory, this rationale focuses on limiting judicial behavior rather than on influencing congressional behavior.¹⁶¹ Like Professor Marshall's, this rationale is grounded in constitutional policy rather than constitutional proscription.¹⁶²

This explanation fits better both with what the circuits and the Supreme Court actually say about statutory *stare decisis*. The courts of appeals never show any concern, and the Supreme Court only rarely shows any concern, about the likelihood that Congress actually will override statutory interpretations with which it disagrees.¹⁶³ The courts most often assert simply that if a prior judicial interpretation does not capture the statute's meaning, Congress can—and therefore should—be the one to fix it.¹⁶⁴ The theme running through their opinions is that a preference for legislative modification of stat-

¹⁶¹ See *supra* notes 43–46 and accompanying text.

¹⁶² See *supra* note 53 and accompanying text.

¹⁶³ *Neal v. United States*, 516 U.S. 284, 295 (1996), is one of the rare cases in which the Supreme Court shows concern about affecting congressional behavior.

¹⁶⁴ See *United States v. Coleman*, 158 F.3d 199, 204 (4th Cir. 1998) (Widener, J., dissenting) (insisting that “change of an authoritative construction of a statute by a court should almost always be accomplished by Congress rather than by a court”); *In re Zurko*, 142 F.3d 1447, 1457–58 (Fed. Cir. 1998) (en banc) (explaining that the court is particularly reluctant to overrule a statutory interpretation because in this circumstance, “Congress remains free to alter what we have done” (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989))), *rev'd on other grounds sub nom. Dickinson v. Zurko*, 527 U.S. 150, 165 (1999); *Bath Iron Works Corp. v. Dir., Office of Worker's Comp. Programs*, 136 F.3d 34, 42 (1st Cir. 1998) (claiming that “a settled construction of an important federal statute should not be disturbed unless and until Congress so decides” (quoting *Reves v. Ernst & Young*, 494 U.S. 56, 74 (1990) (Stevens, J., concurring))); *Chi. Truck Drivers v. Steinberg*, 32 F.3d 269, 271 (7th Cir. 1994) (explaining that the court is particularly reluctant to overrule a statutory interpretation because in this circumstance, “Congress remains free to alter what we have done” (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989))); *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 875 (D.C. Cir. 1992) (same); *id.* at 881 (Randolph, J., concurring) (claiming that “[i]t is just the possibility of a congressional override that the Supreme Court has deemed important” for purposes of the statutory presumption); *United States v. Aguon*, 851 F.2d 1158, 1177 (9th Cir. 1988) (en banc) (Wallace, J., concurring in part and dissenting in part) (asserting that “considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation” (quoting *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977))); *Fast v. City of Ladue*, 728 F.2d 1030, 1034 (8th Cir. 1984) (cautioning that the power to overrule should be sparingly exercised in a matter of “statutory construction, the kind of question on which Congress can easily correct us if it wishes”); *Miller v. Comm'r*, 733 F.2d 399, 409 (6th Cir. 1984) (en banc) (Contie, J., dissenting) (asserting that Congress should amend a statute “if Congress dislikes the construction which the courts . . . have traditionally placed upon it”); *Owen v. Comm'r*, No. 78-1341, 1981 U.S. App. LEXIS 12069, at *25 (6th Cir. June 23, 1981) (similar); *id.* at *27 (Kennedy, J., concurring) (claiming that if precedent “is to be changed that change should be made by the Congress”); *Cottrell v. Comm'r*, 628 F.2d 1127, 1131 (6th Cir. 1980) (similar); *Gen. Dynamics Corp. v. Benefits Review Bd.*, 565 F.2d 208, 212 (2d Cir. 1977) (similar).

utory interpretations counsels against judicial modification, whether or not Congress is likely to step in.¹⁶⁵

The preference for legislative modification of statutory interpretations reflects a basic discomfort with the role of the federal courts in interpreting statutes. This third version of the separation-of-powers rationale, like the well-known versions advanced by Justice Black and Professor Marshall, rests on discomfort with Congress's delegating policymaking authority to the courts in the form of statutory ambiguity.¹⁶⁶ This assumption stands in sharp contrast to the way the courts treat similar delegations to administrative agencies.¹⁶⁷ The *Chevron* doctrine interprets statutory ambiguity as an implicit delegation of policymaking authority from Congress to administrative agencies.¹⁶⁸ The ambiguity is the agency's to fill, and, so long as they give an adequate explanation for a policy shift, agencies are free to shift from one reasonable interpretation of statutory ambiguity to another.¹⁶⁹ Statutory stare decisis, however, views similar statutory ambiguity in statutes entrusted primarily to judicial interpretation as cause for concern.¹⁷⁰ While courts cannot wholly avoid the resolution of statutory ambiguity, neither should they feel free to shift among reasonable interpretations of that ambiguity as they might if they viewed the gap as truly theirs to fill.

Resolving the question of whether *Chevron*-style delegations to the judiciary are constitutionally suspect would take a full-length article in itself. For

¹⁶⁵ This understanding of the separation-of-powers rationale is particularly clear in Judge Randolph's dissent in *Critical Mass Energy Project v. Nuclear Regulatory Commission*, where he asserts that "[i]t is just the possibility of a congressional override," rather than the likelihood of one, that is important for purposes of statutory stare decisis. *Critical Mass*, 975 F.2d at 881 (Randolph, J., dissenting); cf. John Copeland Nagle, *Corrections Day*, 43 UCLA L. REV. 1267, 1316 (1996) (stating that "[t]he mere possibility of [a procedure by which Congress can correct mistakes], whether or not Congress chooses to employ it, points toward a reduced judicial and administrative role in correcting statutory mistakes").

¹⁶⁶ See Marshall, *supra* note 19, at 223–25 (arguing that congressional delegations to the judiciary are constitutionally suspect).

¹⁶⁷ It also stands in contrast to the way that the Court treats delegations to the judiciary in other contexts. See *Mistretta v. United States*, 488 U.S. 361, 380–81, 386–87, 390 (1989) (approving delegation to the judicial branch of authority to promulgate sentencing guidelines); *Sibbach v. Wilson*, 312 U.S. 1, 9–10 (1941) (approving delegation to the Supreme Court of authority to promulgate procedural rules).

¹⁶⁸ *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843–44 (1984).

¹⁶⁹ See *id.* at 865–66.

¹⁷⁰ See, e.g., *Neal v. United States*, 516 U.S. 284, 295 (1996) (noting that an agency "[e]ntrusted within its sphere to make policy judgments," may abandon old interpretations in favor of new ones, but the Court "do[es] not have the same latitude to forsake prior interpretations of a statute"). In this respect, the statutory stare decisis doctrine is internally inconsistent. While it treats *Chevron*-like delegations with suspicion, it views more blatant delegations like the Sherman Act as unproblematic; indeed, the Supreme Court relaxes the stare decisis presumption in the latter context on the theory that the judiciary is freer to shift among interpretations in the case of a "common-law statute." See, e.g., *State Oil Co. v. Khan*, 522 U.S. 3, 20–21 (1997) (asserting that statutory stare decisis is relaxed in the context of the Sherman Act because of that statute's broad delegation of policymaking authority to the courts). Professor Lawrence Marshall avoids this inconsistency by arguing that his rule of absolute statutory stare decisis ought also to apply to federal common law decisions and interpretations of common-law-like statutes, for it is in these instances when "the lawmaking role of the court is at its pinnacle." Marshall, *supra* note 19, at 223.

now, it is enough to say that even assuming that such delegations are suspect—an assumption that is open to question—it is doubtful that any individual circuit ought to adopt the super-strong statutory presumption to address that concern.

It is again a matter of the structural position of the thirteen circuits within the judicial hierarchy. Compared to the Supreme Court, an individual circuit has a very limited ability to confine the boundaries of a policymaking delegation by observing statutory stare decisis. When the Supreme Court fills a statutory gap, it speaks on behalf of the entire judicial department by virtue of the obligation that inferior federal courts have to follow Supreme Court precedent. The Supreme Court's doctrine of statutory stare decisis presumptively ends the exercise of delegated authority because unless the Court itself revisits the interpretation, that interpretation stands as the judiciary's final word. No single circuit, however, speaks on behalf of the entire judicial department. When a single circuit fills a statutory gap, it is still possible that other circuits or the Supreme Court could interpret the statute differently; the delegation is still in play. Thus, a single circuit's observation of statutory stare decisis does not put a department-wide halt to the exercise of that delegated authority; it presumptively ends it in only one limited part of the federal judiciary. Because judicial modification of the statutory interpretation is still possible from other corners of the department, holding out for legislative modification seems like a hopeless gesture. In this context, court of appeals decisions are more like the decisions of district courts than the Supreme Court.

One might respond that perhaps even a very limited restraint is better than no restraint at all. An individual circuit's observance of statutory stare decisis will reduce judicial policymaking by concluding the delegation at least within that circuit, and even a limited reduction of judicial policymaking might be a benefit worth achieving.

Yet achieving that benefit is in tension with the role that the courts of appeals otherwise play in the federal court system. By virtue of both their internal structure and position in the judicial hierarchy, the courts of appeals should be more open than the Supreme Court to departing from precedent. For example, the purpose of an en banc sitting is to provide a full-court check on a three-judge decision.¹⁷¹ Attributing nearly conclusive weight to the panel's decision—which is what circuit judges who support statutory stare decisis find themselves advocating—undermines the very purpose of the en banc mechanism. In addition, a circuit should be willing to reconsider precedent, including statutory interpretations, based on what its sister circuits do. Although a circuit is not obligated to follow its peers, decisions from coequal courts provide the opportunity both to check reasoning and to advance uniformity. Statutory stare decisis focuses a court on its relationship with Congress to the exclusion of its intra- and intercircuit relationships. The Supreme Court, which does not sit in panels and has no coequal courts, need not take such factors into account.¹⁷²

¹⁷¹ See generally FED. R. APP. P. 35.

¹⁷² See Evan Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior*

Even if statutory stare decisis does not primarily aim to influence congressional behavior, the relationship between Congress and the acting court is relevant. A preference for legislative modification rather than judicial modification of a statutory interpretation sets up a dichotomy between the relevant court and Congress: either the court can change a statutory interpretation, or Congress can, and it is better for Congress to perform that job. For a court of appeals, however, this is a false dichotomy: change can also come from the Supreme Court. As already discussed, Congress's allocation of appellate jurisdiction to the Supreme Court can reasonably be interpreted to reflect a congressional preference that the Supreme Court, rather than Congress, assume primary responsibility for supervising lower court statutory interpretations.¹⁷³ And Congress's relatively low rate of response to the courts of appeals, as opposed to the Supreme Court, may well reflect a reality that to the extent that Congress engages in an inter-branch dialogue with the courts, it is only interested in (or able to) deal with the Supreme Court.¹⁷⁴ Thus, when a court of appeals refuses to change a prior statutory interpretation, it can be viewed as restraining its policymaking role in favor of the Supreme Court doing the job rather than in favor of Congress doing the job. There is no particular separation-of-powers benefit in having one federal court, rather than another, perform a policymaking function. And given the Supreme Court's choice of selective rather than systematic lower court monitoring,¹⁷⁵ it makes little sense as a matter of intra-branch practice for a circuit to adopt a blanket preference for Supreme Court error correction. To the contrary, having the courts of appeals more freely correct errors in statutory interpretation would encourage efficiency and uniformity within the judicial branch. If a court of appeals concludes that it is on the wrong side of a circuit split, it is more efficient for the court of appeals to rectify the statutory interpretation itself than to force the Supreme Court (and litigants) to expend resources to resolve the split.

Conclusion

The Supreme Court has long given its statutory precedent super-strong effect, and the courts of appeals have followed suit. As the courts of appeals apply it, statutory stare decisis is probably best justified neither as a nod to congressional acquiescence, nor as an attempt to spur congressional action, but as a simple restraint on judicial policymaking. Even on this different rationale, however, the doctrine is an ill fit in the inferior courts. Refusing to revisit statutory interpretations as a means of restraining judicial policymaking may or may not be appropriate in the Supreme Court, which settles the

Court Decisionmaking, 73 TEX. L. REV. 1, 6 (1994). Caminker describes conventional wisdom as holding that the "judicial function is identical for courts of all levels and that lower courts therefore should expound the law in the same way that the Supreme Court does." *Id.* But, as Caminker observes, "this latter assumption fails to consider the possibility that different courts ought to play different roles in order to best promote the values served by a hierarchical judiciary." *Id.*

¹⁷³ See *supra* p. 346.

¹⁷⁴ See *supra* notes 80–84 and accompanying text.

¹⁷⁵ See *supra* pp. 346–47.

meaning of statutes on behalf of the entire judicial department. But it certainly does not make sense in the courts of appeals, which, by virtue of their position in the judicial hierarchy, have different considerations to take into account when deciding whether to overrule precedent.

That is not to say, of course, that the courts of appeals should attribute *no* stare decisis effect to their statutory interpretations. Most of the time, simple reliance interests counsel against a circuit's departure from a prior, reasonable statutory interpretation. Courts account for reliance interests, though, with the doctrine of stare decisis as practiced through the centuries. It is hard to see why the precedential effect of statutory interpretations in the courts of appeals should be anything more than the simple presumption against overruling that all opinions enjoy.

This conclusion challenges the conventional approach to interpretive theory. We tend to take a one-size-fits-all approach to federal court decision-making, assuming that the same interpretive practices should apply throughout the federal courts. The example of statutory stare decisis shows, however, that at least with respect to some interpretive practices, a more customized approach is in order. As we assess interpretive doctrines, we ought to pay attention to the relative institutional positions of the courts applying them. Practices that make sense for the Supreme Court do not necessarily make sense for courts at other levels of the federal judiciary.

STARE DECISIS AND DUE PROCESS

AMY CONEY BARRETT*

INTRODUCTION

Courts and commentators have devoted a great deal of attention lately to the constitutional limits of stare decisis. The Eighth Circuit's decision in *Anastasoff v. United States* has sparked scholarly and judicial debate about whether treating unpublished opinions as devoid of precedential effect violates Article III.¹ Debates have also erupted over the question whether Congress has the power to abrogate stare decisis by statute,² and the related question whether stare decisis is a

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1. *Anastasoff v. United States*, 223 F.3d 898 (8th Cir.), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000). For cases addressing this issue, see *Symbol Technologies, Inc. v. Lemelson Med., Educ., & Research Found.*, 277 F.3d 1361 (Fed. Cir. 2002); *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001); *Williams v. Dallas Rapid Area Transit*, 256 F.3d 260 (5th Cir. 2001) (Smith, J., dissenting from denial of reh'g en banc); *Suboh v. City of Revere*, 141 F. Supp. 2d 124, 144 n.18 (D. Mass.), *aff'd in part, rev'd in part*, 298 F.3d 81 (1st Cir. 2001). For a sampling of recent literature addressing this issue, see Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & The Nature of Precedent*, 4 GREEN BAG 2D 17 (2000); Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAW., June 2000, at 43; Thomas R. Lee & Lance S. Lehnhof, *The Anastasoff Case and the Judicial Power to "Unpublish" Opinions*, 77 NOTRE DAME L. REV. 135 (2001); Polly J. Price, *Precedent & Judicial Power After the Founding*, 42 B.C. L. REV. 81 (2000); Kenneth Anthony Laretto, Note, *Precedent, Judicial Power, and the Constitutionality of "No-Citation" Rules in the Federal Courts of Appeals*, 54 STAN. L. REV. 1037 (2002); Daniel B. Levin, Case Note, *Fairness and Precedent*, 110 YALE L.J. 1295 (2001); Lance A. Wade, Note, *Honda Meets Anastasoff: The Procedural Due Process Argument Against Rules Prohibiting Citation to Unpublished Judicial Decisions*, 42 B.C. L. REV. 695 (2001).

2. See John Harrison, *The Power of Congress Over Rules of Precedent*, 50 DUKE L.J. 503 (2000); Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMM. 191 (2001); Michael Stokes Paulsen, *Abrogating Stare Decisis: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535 (2000).

doctrine of constitutional stature or merely of judicial discretion.³

This Article explores a different constitutional limit on the doctrine of stare decisis: the Due Process Clause. Most writing about stare decisis treats the doctrine as one of exclusively institutional concern.⁴ Courts and commentators conceive of stare decisis as a doctrine that binds judges rather than litigants, and they have traditionally devoted the study of stare decisis to the doctrine's systemic costs and benefits. For example, the concerns driving the contemporary debate about stare decisis include whether stare decisis is efficient,⁵ whether overruling precedent harms the public's perception of the judiciary,⁶ and whether certain kinds of social reliance interests should count more heavily than others in a court's overruling calculus.⁷

Missing from the discussion is an appreciation for the way that stare decisis affects individual litigants. To the extent that stare decisis binds judges, it inevitably binds litigants as well. Indeed, when viewed from the perspective of an individual litigant, stare decisis often functions like the doctrine of issue preclusion—it precludes the relitigation of issues decided in earlier cases. This preclusive effect is real, and it can affect an individual litigant dramatically. Courts and commentators, however, generally fail to focus on the way that stare decisis precludes individual litigants, much less on the question that occupies most of the discussion in the parallel context of issue preclusion: whether preclusion of litigants, particularly nonparty litigants, offends the Due Process Clause.

In this Article, I argue that the preclusive effect of precedent raises due process concerns, and, on occasion, slides into unconstitutionality. The Due Process Clause requires that a person receive notice and an opportunity for a hearing before a court deprives her of life, liberty, or property.⁸ In the context of preclusion, courts have translated this requirement into the

3. See Richard Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 570 (2001); Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43 (2001).

4. See *infra* notes 69–76 and accompanying text.

5. See *infra* note 76.

6. See *infra* note 75.

7. See *infra* note 70.

8. U.S. CONST. amends. V, XIV.

general rule that a judicial determination can bind only the parties to a dispute, for only the parties have received notice of the proceeding and an opportunity to litigate the merits of their claims.⁹ The preclusion literature summarily asserts that this “parties only” requirement does not apply to stare decisis because prior judicial determinations do not “bind” nonparties through the operation of stare decisis; stare decisis, in contrast to issue preclusion, is a flexible doctrine permitting error-correction.¹⁰ Yet stare decisis often functions *inflexibly* in the federal courts, binding litigants in a way indistinguishable from nonparty preclusion.¹¹ I argue that in its rigid application—when it effectively forecloses a litigant from meaningfully urging error-correction—stare decisis unconstitutionally deprives a litigant of the right to a hearing on the merits of her claims. To avoid the due process problem, I argue that stare decisis must be flexible in fact, not just in theory.

The Article proceeds as follows. Parts I and II set up the problem. Part I describes the ways in which precedent precludes litigants, despite the common assumption that a court’s ability to distinguish cases deprives precedent of any potentially preclusive effect. Part II explains the way in which the courts have fleshed out the requirements of due process in the context of issue preclusion. In Part II, I highlight the tension created by the courts’ solicitude for the due process rights of litigants for purposes of preclusion and the corresponding lack of such solicitude for purposes of stare decisis.

Part III analyzes whether stare decisis differs from issue preclusion in a way that justifies its remarkably different treatment of nonparty litigants. I first examine the conventional theoretical justification for the difference, which

9. *Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971) (“Due process prohibits estopping [nonparties] despite one or more existing adjudications of the identical issue which stand squarely against their position.”). See *infra* notes 95–96 and accompanying text (discussing the limits of issue preclusion).

10. See *infra* notes 123–26 and accompanying text. I limit this assertion to one found in the preclusion literature because courts have not grappled with the due process difference between stare decisis and issue preclusion. To the extent that they consider issue preclusion and stare decisis in conjunction, they tend to consider stare decisis to be a variant of preclusion, but one that reaches beyond the parties to a dispute. See *infra* notes 117–20 and accompanying text.

11. See *infra* Part I.A.

is the supposed flexibility of stare decisis. The Due Process Clause generally prohibits the application of issue preclusion to nonparties because the initial case presents the only opportunity for a hearing on the merits; in later cases, courts will not entertain arguments about whether the prior determination was correct. Under a flexible version of stare decisis, by contrast, the initial case does not present the only opportunity for a hearing; in later cases, litigants may challenge the merits of the earlier decision. Part III argues that while the flexibility rationale works as a matter of theory, it fails to justify the way that the federal courts apply precedent to nonparties in practice. The federal courts, particularly the courts of appeals, generally have taken an *inflexible* approach to stare decisis. Once precedent is set, a court rarely revisits it, even in the face of compelling arguments that the precedent is wrong.

Part III thus asks whether a rationale other than flexibility can justify binding nonparties for purposes of stare decisis but not issue preclusion. Specifically, I examine whether the difference between factual determinations and legal ones can justify applying the Due Process Clause in one context but not the other. Because issue preclusion historically applied only to questions of fact, one might be tempted to assume that the right to a hearing extends only to factual disputes. Part III argues that this assumption is flawed. As an initial matter, it is no longer true that issue preclusion applies exclusively to matters of fact. Courts have extended preclusion to issues of law, thereby at least implicitly recognizing that the Due Process Clause guarantees a hearing with respect to legal as well as factual disputes. And that implicit recognition is correct. Whether federal courts act to resolve legal or factual questions, they can act only through adjudication, and adjudication necessarily triggers the Due Process Clause. It is the act of adjudication, not the nature of the determination at stake, that determines whether the Due Process Clause applies.

Part IV considers the implications of due process for stare decisis. The primary implication is that courts should apply precedent flexibly. As a matter of theory, a litigant's ability to secure error-correction is what distinguishes stare decisis from issue preclusion. To the extent that a court applies the rules of stare decisis in a way that makes it impossible, practically speaking, for a litigant to convince a court to overrule

erroneous precedent, the court deprives that litigant of a hearing on the merits of her claim. Part IV emphasizes, however, that a flexible approach to stare decisis does not render reliance interests irrelevant. Particularly when the alleged error is one that falls within a court's federal common law authority, or its ability to choose one reasonable interpretation of a text rather than another, a court should seriously consider reliance interests in deciding whether to adhere to precedent. But the court must also account for the due process rights of individual litigants, and, when precedent clearly exceeds the bounds of statutory or constitutional text, reliance interests should figure far less prominently in a court's overruling calculus.

Two limitations on my analysis are worth mentioning at the outset. My exploration of these two doctrines is limited to their treatment by the federal courts. And my exploration of stare decisis is limited to its "horizontal," as opposed to its "vertical" effect; in other words, I consider a court's obligation to follow its own precedent, rather than its obligation to follow the precedent of a superior court.¹²

Because most contemporary studies of stare decisis focus on the Supreme Court, it is worth emphasizing that the primary implications of this study will be for the courts of appeals. As a general rule, the district courts do not observe horizontal stare decisis.¹³ And while the force of horizontal stare decisis is certainly felt in the Supreme Court, the courts of appeals feel it more keenly. It is rare that a litigant is wholly precluded by precedent in the Supreme Court, because the Supreme Court generally grants certiorari only on open

12. The nature of a lower court's obligation to obey higher courts is a topic in its own right. See generally Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 272-79 (1992); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994); see also Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused*, 7 J.L. & RELIGION 33 (1989).

13. *Fishman & Tobin, Inc. v. Tropical Shipping & Constr. Co.*, 240 F.3d 956, 965 n.14 (11th Cir. 2001); *United States v. Cerceda*, 172 F.3d 806, 812 n.6 (11th Cir. 1999); *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995); *Crown Builders v. Stowe Eng'g Corp.*, 8 F. Supp. 2d 483 (D.V.I. 1998); 18 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 134.02[1][d] (3d ed. 1997) [hereinafter *MOORE'S FEDERAL PRACTICE*]; see also Lee & Lehnhof, *supra* note 1, at 168-69 (describing long historical tradition of district courts refusing to treat the precedent of other district courts, even within the same district, as controlling).

questions, or on questions that the Court deliberately selects for reconsideration.¹⁴

I. STARE DECISIS

“Stare decisis” is short for *stare decisis et non quieta movere*, which means “stand by the thing decided and do not disturb the calm.”¹⁵ The term “stare decisis” is used in varying ways.¹⁶ At its most basic level, however, stare decisis refers simply to a court’s practice of following precedent, whether its own or that of a superior court.¹⁷ I will use the term in this respect.

A. *The Preclusive Effect of Stare Decisis*

An initial burden in making a due process argument about stare decisis is convincing the audience that precedent matters. Conventional wisdom has it that stare decisis is a flexible doctrine, and, to the extent that doctrinal rules ever *require* a particular result, precedent is manipulable enough to leave

14. The discretionary nature of certiorari means that the Supreme Court need not (and usually does not) take cases that can be decided comfortably by its existing case law. Thus, while stare decisis is the primary means of enforcing the status quo in the courts of appeals, in the Supreme Court, the status quo generally is enforced by the denial of certiorari. The Supreme Court’s discretionary jurisdiction has another effect on stare decisis: it has created a smaller body of Supreme Court case law. Litigants are freer in the Supreme Court because there are more open issues. In a court of appeals, particularly one with a heavy docket, a larger number of cases controls the court’s moves. The court’s decision at the circuit level will also be more confined by the rule that one panel cannot overrule another. While the Supreme Court is constrained by strong doctrinal presumptions against overruling—which are not insignificant—the “no panel overruling” rule erects an additional, firmer bar to overruling in the courts of appeals.

15. James C. Rehnquist, Note, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U.L. REV. 345, 347 (1986).

16. For example, Frederick Schauer uses “stare decisis” to refer to a lower court’s obligation to obey superior court case law and “precedent” to refer to a court’s obligation to obey its own prior case law. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 576 n.11 (1987) [hereinafter Schauer, *Precedent*]. Polly Price uses “stare decisis” to mean “a strict practice of following precedent,” and “the doctrine of precedent” to mean a practice of looking to prior case law. Price, *supra* note 1, at 84 n.10, 105.

17. I will use the terms “horizontal” stare decisis and “vertical” stare decisis to distinguish between a court’s practice of following its own precedent and a court’s practice of following the precedent of a superior court.

courts free to escape that result if they choose. Certainly, if this is true, one need not worry about the impact of stare decisis on individual litigants.

1. Doctrinal Rules Treat Precedent as Preclusive

Despite the conventional wisdom—and despite the fact that the conventional wisdom is sometimes right—precedent does operate to preclude litigants in the mainstream of cases. Once a court decides an issue in a published opinion, a later litigant may debate whether the earlier case applies, but she typically may not debate whether the court correctly decided it. Thus, if the Eighth Circuit decides in Plaintiff A's case that tax refund claims are timely under the Internal Revenue Code only when the IRS *receives* them on time, Plaintiff B cannot successfully argue in the Eighth Circuit that tax refund claims are timely when *mailed* on time.¹⁸ Precedent settles the issue for Plaintiff B, no matter what arguments Plaintiff B can advance in support of a “mailbox rule.” First-in-time litigants usually receive the only opportunity to air arguments on the merits of a legal issue.

The merits are closed to Plaintiff B because the rules and presumptions that the federal courts have adopted to guide the treatment of precedent ensure, as they are intended to, that overruling rarely occurs. Litigants feel precedent's preclusive effect most keenly in the courts of appeals, which candidly describe their approach to stare decisis as “strict,” “binding,” and “rigid.”¹⁹ This rigidity comes largely from the rule, followed in every circuit, that one panel cannot overrule

18. Cf. *Anastasoff v. United States*, 223 F.3d 898 (8th Cir.), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000) (rejecting appellant's arguments for a “mailbox” rule to gauge timeliness of tax-refund claims because *Christie v. United States* established a “receipt” rule); *Christie v. United States*, 1992 U.S. App. LEXIS 38446, at *7 (8th Cir. Mar. 20, 1992) (per curiam) (establishing “receipt” rule to gauge timeliness of tax refund claims).

19. See, e.g., *Hart v. Massanari*, 266 F.3d 1155, 1175 (9th Cir. 2001) (describing federal stare decisis as “a system of strict binding precedent”); *id.* at 1167 (doubtful that the “Framers viewed precedent in the rigid form that we do today”); *Ford v. Cimarron Ins. Co.*, 230 F.3d 828, 832 (5th Cir. 2000) (rule that one panel cannot overrule another is “immutable”); *FDIC v. Abraham*, 137 F.3d 264, 268 (5th Cir. 1998) (“We are, of course, a strict stare decisis court.”); *Sam & Ali, Inc. v. Ohio Dep't of Liquor Control*, 158 F.3d 397, 405 (6th Cir. 1998) (prior panel decision is “binding stare decisis”); *Robbins v. Amoco Prod. Co.*, 952 F.2d 901, 904 (5th Cir. 1992) (panel “owe[s] strict obedience to circuit precedent”).

another.²⁰ A panel possesses the authority to overrule precedent only when there has been an intervening, contrary decision by the Supreme Court or by the relevant court of appeals sitting en banc.²¹ Thus, while a litigant may make persuasive arguments for overruling precedent, the panel is obliged by circuit rule to ignore them.²² Indeed, the Federal Circuit recently went so far as to say that it “would not welcome” future appeals on a particular issue given the obligation of future panels to follow precedent.²³

Litigants will find the merits of certain issues foreclosed even in courts with the authority to overrule precedent, such as the Supreme Court or a court of appeals sitting en banc. Neither the Supreme Court nor any of the courts of appeals

20. See *Bath Iron Works Corp. v. Dir., Office of Workers' Comp. Programs*, 136 F.3d 34, 40 (1st Cir. 1998); *Woodling v. Garrett Corp.*, 813 F.2d 543, 557 (2d Cir. 1987); *Abdulai v. Ashcroft*, 239 F.3d 543, 553 (3d Cir. 2001); 3D CIR. I.O.P. 9.1; *Norfolk & West. Ry. Co. v. Dir., Office of Worker's Comp. Programs*, 5 F.3d 777, 779 (4th Cir. 1993); *Abraham*, 137 F.3d at 268; *Sam & Ali, Inc.*, 158 F.3d at 405; *Dir., Office of Workers' Comp. Programs v. Peabody Coal Co.*, 554 F.2d 310, 333 (7th Cir. 1977); *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1297 (8th Cir. 1994); *In re Osborne*, 76 F.3d 306, 309 (9th Cir. 1996); *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000); 11TH CIR. RULE 36-3; *United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc); *Thompson v. Thompson*, 244 F.2d 374, 375 (D.C. Cir. 1957); *LaForte v. Horner*, 833 F.2d 977, 980 (Fed. Cir. 1987).

21. See cases cited *supra* note 20.

22. A colleague has raised the question whether the “no panel overruling” rule is more fairly characterized as a rule of stare decisis or as a rule of circuit administration. A fair number of cases explicitly treat the rule as a variant of stare decisis. See, e.g., *Stauth v. Nat'l Union Fire Ins. Co.*, 236 F.3d 1260, 1267 (10th Cir. 2001); *United States v. Lewko*, 269 F.3d 64, 66 (1st Cir. 2001); *Abraham*, 137 F.3d at 269; *Williams v. Chrans*, 50 F.3d 1356, 1357 (7th Cir. 1995). Even putting the courts' apparent understanding of the rule aside, I think the rule is fairly treated as part of stare decisis doctrine. The “no panel overruling” rule, like the rules of stare decisis generally, specifies the terms on which precedent may be overruled. Granted, it is a rule of circuit administration insofar as it allocates decisionmaking power between panels situated earlier in time, panels situated later in time, and the en banc court. Cf. *North Carolina Util. Comm'n v. FCC*, 552 F.2d 1036, 1045 (4th Cir. 1977) (“If the rule of interpanel accord serves a purpose different from that of stare decisis, its purpose must be to allocate decision-making power between coequal panels subject to reversal by the Court of Appeals en banc.”). But in this respect, stare decisis itself is a rule of judicial administration. It too “allocate[s] decisionmaking responsibility among successive courts, by specifying the point at which an issue may be addressed.” Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297, 304 (1979). The “no panel overruling” rule, like stare decisis generally, is a means by which the courts order the exercise of the judicial power so as to maintain stability in the law.

23. *Phonometrics Inc. v. Choice Hotels Int'l, Inc.*, 2001 WL 1217219, at *912 (Fed. Cir. Oct. 9, 2001).

will overrule precedent absent “special justification.”²⁴ Error in the precedent does not so qualify.²⁵ Instead, in addition to the error, courts consider a series of factors. To be overruled, a case should be not only erroneous, but also unworkable.²⁶ Overruling it should not tarnish the public’s perception of the judiciary or upset reliance interests.²⁷ The very strong presumption in the federal courts is that precedent will stand.²⁸

In certain categories of cases, courts have strengthened this presumption even further. The Supreme Court and many of the courts of appeals have adopted a “super strong” presumption of irreversibility for statutory precedent on the theory that Congress’s failure to amend a statute in response to a judicial interpretation of it reflects approval of that interpretation.²⁹ This “super strong” presumption for statutory

24. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 443 (2000); *United States v. Int’l Bus. Mach. Corp.*, 517 U.S. 843, 856 (1996); *Payne v. Tennessee*, 501 U.S. 808, 849 (1991) (“[T]his Court has never departed from precedent absent ‘special justification.’”); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (same); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984); *Arecibo Cmty. Health Care v. Puerto Rico*, 270 F.3d 17, 22 (1st Cir. 2001) (“A departure from stare decisis must . . . be supported by some ‘special justification.’”); *United States v. Reveron Martinez*, 836 F.2d 684, 687 n.2 (1st Cir. 1988) (same); see also Emery G. Lee, III, *Overruling Rhetoric: The Court’s New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581, 582 (2002) (arguing that the “special justification” standard is a relatively new requirement).

25. See cases cited *supra* note 24; see also Emery G. Lee, III, *supra* note 24, at 582 (“special justification” requires “more than the belief that the precedent was wrongly decided”).

26. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992) (considering, *inter alia*, whether prior rule was unworkable); *Gately v. Massachusetts*, 2 F.3d 1221, 1226 (1st Cir. 1993) (noting that “a decision may properly be overruled if seriously out of keeping with contemporary views or passed by in the development of the law or proved to be unworkable”).

27. *Casey*, 505 U.S. at 855–56, 865.

28. See, e.g., *Payne*, 501 U.S. at 827 (“Adhering to precedent ‘is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.’” (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting))); *Gately*, 2 F.3d at 1226 (“[T]here is a heavy presumption that settled issues of law will not be reexamined.”).

29. *Patterson*, 491 U.S. at 172–73 (“Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.”); see also *Hohn v. United States*, 524 U.S. 236, 251 (1998); *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 424, n.34 (1986); *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). The courts of appeals apply the same presumption. See, e.g., *Elec. Contractors, Inc. v. NLRB*, 245 F.3d 109, 120–21 (2d Cir. 2001); *Stewart v. Dutra Constr. Co.*, 230 F.3d 461, 467 (1st Cir. 2000); *Bath Iron Works Corp. v. Dir., Office of Workers’*

precedent is relatively recent.³⁰ Other categories of cases, however, such as commercial cases and cases involving property rights, have long received heightened protection from overruling.³¹ Precedent infused with a "super strong" presumption of irreversibility binds litigants even more tightly to results obtained by those who have gone before them.³²

2. Does Distinguishing Dampen the Preclusive Effect of Stare Decisis?

Cynics might argue that precedent does not bind litigants because, no matter what the rules of stare decisis require, courts generally circumvent precedent they do not like.³³ In this view, a court's ability to distinguish cases significantly undercuts any potentially preclusive effect of stare decisis.

The ability to distinguish cases, however, either honestly or disingenuously, does not entirely deprive stare decisis of its bite.³⁴ To take disingenuous distinguishing (distinguishing the

Comp., 136 F.3d 34, 42 (1st Cir. 1998); *United States v. Coleman*, 158 F.3d 199, 204 (4th Cir. 1998) (Widener, J., dissenting); *Mid-America Tablewares, Inc. v. Mogi Trading Co.*, 100 F.3d 1353, 1364 (7th Cir. 1996); *Chi. Truck Drivers v. Steinberg*, 32 F.3d 269, 272 (7th Cir. 1994); *Wash. Legal Found. v. United States Sentencing Comm'n*, 17 F.3d 1446, 1448-49 (D.C. Cir. 1994); *General Dynamics Corp. v. Benefits Review Bd.*, 565 F.2d 208, 212 (2d Cir. 1977). The phrase "super strong" presumption belongs to William Eskridge. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988).

30. Thomas R. Lee, *Stare Decisis in Historical Perspective*, 52 VAND. L. REV. 647, 730-32 (1999) [hereinafter Lee, *Historical Perspective*] (arguing that the statutory presumption is a twentieth-century development).

31. See *infra* note 74 (collecting cases). The Supreme Court has also suggested that cases resolving "intensely divisive" issues should receive special protection from overruling. *Casey*, 505 U.S. at 866-67.

32. Cf. Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 540 (1948) ("More than any other doctrine in the field of precedent, [the presumption against overruling statutory cases] has served to limit the freedom of the court.").

33. See, e.g., Hiroshi Motomura, *Using Judgments as Evidence*, 70 MINN. L. REV. 979, 1017 n.186 (1986) ("Stare decisis is not binding because cases can always be distinguished.").

34. Cf. Lea Brilmayer, *A Reply*, 93 HARV. L. REV. 1727, 1728 (1980) ("Neither the cliché that any two cases are potentially distinguishable nor the characterization of some precedents as formative or tentative solves the problem. If taken literally, these seem to suggest that it would not make any difference whether adverse precedents were established. Regardless of whether one perceives the proper role of stare decisis as strong or weak, in the real world of litigation, precedents do have some binding force."); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV.

plainly indistinguishable) first: It undeniably happens, and every lawyer has her favorite example of it. Judicial dishonesty, however, simply cannot be the rule rather than the exception. Karl Llewellyn once described what he called the “steadying factors in our appellate courts.”³⁵ He argued that, among other things, the education of judges, the expectations of them on the bench, and the public nature of decisionmaking work strongly against any impulse to engage in unreasoned and willful decisionmaking.³⁶ Llewellyn’s description is sensible, and practice appears to bear it out. In the main, judges do not treat precedent with thinly disguised contempt. Instead, they write their opinions as if precedent counts.³⁷

A court’s capacity for “honest” distinguishing (distinguishing fairly allowed by the rules of stare decisis) does somewhat blunt a case’s effect on later litigants.³⁸ Courts cannot, however, fairly distinguish every case. As Frederick Schauer has observed, the idea that a judge can, in “all or even most” cases, rationalize from precedent a result she wants is “at least erroneous and at times preposterous.”³⁹

Cases involving judicial review illustrate well the fact that precedent is sometimes indistinguishable. Judicial review can affect nonparty litigants acutely. Once a court holds a statute or a portion of a statute facially unconstitutional, it is virtually impossible for later courts to resurrect it. For example, after *United States v. Morrison*,⁴⁰ it is doubtful that any litigant could successfully bring a private cause of action under the Violence Against Women Act. After *United States v. Lopez*,⁴¹ it

603, 652 (1992) (“[T]he undesirability of having an adverse precedent on the books is unquestionable.”).

35. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 19–61 (1960).

36. *Id.*

37. This is true even when they do not agree with precedent. See, e.g., *infra* notes 48–49 (collecting cases in which courts follow precedent while noting disagreement with it).

38. The ability to distinguish is not logically inconsistent with preclusive effect. Courts can also distinguish prior cases for purposes of issue preclusion, and we have no trouble considering issue preclusion “preclusive.” See *infra* note 92 and accompanying text.

39. Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 411 (1985).

40. *United States v. Morrison*, 529 U.S. 598 (2000).

41. *United States v. Lopez*, 514 U.S. 549 (1995). The precedential effect of *Morrison* and *Lopez* is, of course, primarily vertical. The point remains the same, however, when one considers the impact of such judicial review cases from a horizontal perspective.

is unlikely that any federal prosecutor could secure a conviction under the Gun-Free School Zones Act.

Cases interpreting texts are often difficult to distinguish; thus, they too can have a significant impact on later litigants. If a court holds that “mere possession” of a gun qualifies as “use” of it under the federal drug trafficking statute,⁴² later defendants cannot persuasively argue that “use” requires “active employment.” Or, if a court holds that a correctible vision impairment is not a “disability” under the Americans with Disabilities Act,⁴³ later plaintiffs cannot successfully argue that it does so qualify.

The vagueness of language does not significantly diminish the potentially broad impact of textual interpretations on later litigants. For example, the word “use” may have a range of possible meanings, and it may be unclear which of those meanings Congress intended to convey in a particular statute. A court may hold that “brandishing” a gun violates a statutory prohibition on “using” a gun. This interpretation, to be sure, does not rule out all possible interpretations—if a later case presents the question whether “mere possession” constitutes “use” under the same statute, the earlier case will not answer the question. Nonetheless, the earlier case still makes at least one interpretation concrete. And that one, concrete interpretation (“brandishing” constitutes “use”) will govern all later cases presenting the same interpretive question.

Even when it is distinguishable, precedent binds litigants. A litigant distinguishing a prior case does not contest that the precedent binds her *as to the issue decided in that case*. She simply argues that a different issue is at stake. Thus, a plaintiff who challenges a crèche and menorah display on city property is bound by *Lynch v. Donnelly*,⁴⁴ which upheld a public crèche display, and by *County of Allegheny v. ACLU*,⁴⁵ which upheld a public menorah display. To win, she must argue that the display is unconstitutional despite these holdings.

42. *Cf. United States v. Torres-Rodriguez*, 930 F.2d 1375, 1385 (9th Cir. 1991) (holding that mere possession constitutes “use” under Section 924(c)), *overruled by* *Bailey v. United States*, 516 U.S. 137, 143 (1995) (holding that “use” under Section 924(c) requires some active employment).

43. *Cf. Sutton v. United Airlines*, 527 U.S. 471, 488–89 (1999) (holding that a correctible vision impairment is not a disability for purposes of the Americans with Disabilities Act).

44. 465 U.S. 668 (1984).

45. 492 U.S. 573 (1989).

Whether a litigant argues by distancing herself from precedent or by trying to come within its terms, she acknowledges its binding effect. And even where prior cases do not control directly, they are likely to affect the outcome simply by defining the terms of the argument. As students of path-dependence theory have observed; “[T]he order in which cases arrive in the courts can significantly affect the specific legal doctrine that ultimately results.”⁴⁶ This is precisely why litigants with an agenda in mind orchestrate the order in which “test” cases arrive in the courts.⁴⁷

Whatever theoretical arguments one might make about the ability of distinguishing to gut stare decisis, neither judges nor litigants behave as if precedent were meaningless. Instead, they treat precedent as having real effect on outcomes. For example, judges sometimes publicly assert that they are following precedent despite disagreement with either its reasoning or the result it commands.⁴⁸ A recent Seventh Circuit case is illustrative. There, the court stated:

46. Oona Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 605 (2001); see also Frank Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 425–26 (1988) [hereinafter Easterbrook, *Stability and Reliability in Judicial Decisions*]; Frank Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 817–21 (1982); Maxwell Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309 (1995). Frederick Schauer has observed that first cases can “distort by ‘hogging the stage,’” they set the frame of reference even though the first decisionmaker could not necessarily anticipate later issues that would be affected. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 655 (1995) [hereinafter Schauer, *Giving Reasons*]; see also Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 722–23 (2001) (“[B]ecause of the binding force given to circuit precedents, early decisions rendered in . . . imperfect settings may and often will establish how all future cases raising the particular legal issue are litigated and decided.”).

47. Hathaway, *supra* note 46, at 648–50. Hathaway gives the examples of Thurgood Marshall’s strategy in segregation cases and Justice Ruth Bader Ginsburg’s strategy in gender discrimination cases. *Id.*

48. See, e.g., *Clay v. United States*, 2002 WL 126094 (7th Cir. Jan. 25, 2002), *rev’d*, 123 S. Ct. 1072 (2003) (“Bowling to *stare decisis*, we are reluctant to overrule a recently-reaffirmed precedent without guidance from the Supreme Court.”); *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 426 (5th Cir. 1987) (bowing to precedent but urging that it be overruled en banc); *United States v. Hoover*, 246 F.3d 1054, 1065 (7th Cir. 2001) (Rovner, J., concurring) (“I accept, as I must, the panel’s holding in *Jackson*; it is the law of this circuit . . . I do so, however, with great reservation as to the prudence [of the panel’s decision in that case]”); *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 876 (5th Cir. 2000) (Wiener, J., concurring); *Bellsouth Corp. v. FCC*, 162 F.3d 678, 697 (D.C. Cir. 1998) (Sentelle, J., concurring) (joining majority’s result “only for reasons of stare

[T]he judges of this panel believe that students involved in extracurricular activities should not be subject to random, suspicionless drug testing as a condition of participation in the activity. Nevertheless, we are bound by this court's recent precedent in *Todd* . . . [W]e believe that we must adhere to the holding in *Todd*⁴⁹

Other opinions are to the same effect.⁵⁰

The recent controversy over the legitimacy of unpublished opinions is more evidence that the federal courts take stare decisis very seriously.⁵¹ This issue is only significant because federal courts perceive published opinions as binding.⁵² Judges on both sides of the issue have made that much clear.⁵³ If stare decisis were nothing but a "noodle," to borrow a word from

decisis and binding precedent, not because I believe it correct"); *Geib v. Amoco Oil Co.*, 163 F.3d 329, 330–31 (6th Cir. 1995) (Engel, J., concurring) ("Were this issue before us as an original matter . . . I am quite certain that I would hold [otherwise] However, I agree that we are bound to honor our prior decision as a matter of stare decisis"). For the expression of similar sentiment with respect to vertical stare decisis, see, for example, *Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1113 (5th Cir. 1997) (Garza, J., concurring) ("For the second time in my judicial career, I am forced to follow a Supreme Court opinion I believe to be inimical to the Constitution."), *overruled by Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001); *Sojourner T. v. Edwards*, 974 F.2d 27, 31 (5th Cir. 1992) (Garza, J., concurring) (following *Planned Parenthood v. Casey* despite disagreement with it); *Loughney v. Hickey*, 635 F.2d 1063, 1065 (3d Cir. 1980) (Aldisert, J., concurring) (following precedent despite "vehement disagreement" with it).

49. *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052, 1066 (7th Cir. 2000) (adhering to *Todd v. Rush County Sch.*, 133 F.3d 984 (7th Cir. 1998)).

50. See *supra* note 48 (collecting cases).

51. See *supra* note 1 (collecting post-*Anastasoff* literature); see also Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119 (1994); Lauren K. Robel, *The Myth of the Disposable Opinions: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989); Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 HARV. C.R.-C.L. L. REV. 109 (1995); George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 29 MERCER L. REV. 477 (1988).

52. See, e.g., *Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 197 (D.C. Cir. 1996) (citing the distinction as justification for its departure from prior unpublished opinion).

53. See *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001); *Anastasoff v. United States*, 223 F.3d 898 (8th Cir.), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000); see also Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219 (1999); Boggs & Brooks, *supra* note 1; Kozinski & Reinhardt, *supra* note 1; Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177 (1999).

Judge Posner,⁵⁴ the distinction between published and unpublished opinions would be of no consequence.⁵⁵

Litigants, too, take stare decisis seriously. Repeat litigants settle cases that are not sure wins for fear of the effect that a loss could have on cases coming down the pike. Repeat players who settle also try to convince the court to vacate precedent so as to escape its stare decisis effect. Nonparties invested in an issue file amicus briefs in an effort to shape the precedent that will later affect them. Nonparties occasionally seek even greater involvement. Courts grant motions for intervention as of right based on the potential for adverse stare decisis effects.⁵⁶ In the high-profile case *Piscataway Township Board*

54. *Bethesda Lutheran Homes & Serv., Inc. v. Born*, 238 F.3d 853, 858 (7th Cir. 2001).

55. Indeed, the use of unpublished opinions may be attributable at least in part to the rigidity of stare decisis. Because it is so difficult to overrule a published opinion, the courts of appeals sometimes use unpublished opinions to avoid precedential effect. See, e.g., *Milton S. Kronheim & Co.*, 91 F.3d at 204–05 (Silberman, J., concurring) (noting that prior opinion was unpublished so as to avoid giving it precedential effect, thereby preserving the opportunity to raise the issue again); see also Cooper & Berman, *supra* note 46, at 739–40 (advocating use of the unpublished opinion as a way to avoid prematurely setting circuit precedent in stone); Patricia Wald, *The Rhetoric of Results and the Results of Rhetoric*, 62 U. CHI. L. REV. 1371, 1374 (1995) (“I have seen judges purposely compromise on an unpublished opinion incorporating an agreed-upon result in order to avoid a time-consuming public debate about what law controls. I have even seen wily would-be dissenters go along with a result they do not like so long as it is not elevated to a precedent.”). Interestingly, Thomas R. Lee and Lance S. Lehnhof have asserted that the founding generation’s approach to precedent “is most closely aligned with the current treatment accorded to unpublished opinions, not with the more rigid adherence extended to their published counterparts.” Lee & Lehnhof, *supra* note 1, at 154.

56. See, e.g., *Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. Dep’t of Interior*, 100 F.3d 837, 844 (10th Cir. 1996); *Sierra Club v. Glickman*, 82 F.3d 106, 109–10 (5th Cir. 1996); *Oneida Indian Nation v. New York*, 732 F.2d 261, 265–66 (2d Cir. 1984); *Corby Recreation, Inc. v. General Elec. Co.*, 581 F.2d 175, 177 (8th Cir. 1978); *NRDC v. United States Nuclear Regulatory Comm’n*, 578 F.2d 1341, 1345 (10th Cir. 1978); *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967); *Fla. Power Corp. v. Granlund*, 78 F.R.D. 441, 444 (M.D. Fla. 1978); *In re Oceana Int’l, Inc.*, 49 F.R.D. 329, 332 (S.D.N.Y. 1970). The adverse stare decisis effects of a decision on nonparties do not typically require joinder under Rule 19, see Geoffrey Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254, 1288 n.183 (1961), although some scholars have argued that maybe they should, see Carl Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C. L. REV. 745, 777 (1987). In addition, while courts generally refuse to certify class actions based on adverse impact from stare decisis (because, of course, this would make all or most actions certifiable), they have certified classes when the possibility of adverse stare decisis effects is coupled with some sort of pre-existing legal relationship between class members. Elizabeth Barker Brandt, *Fairness to the Absent Members of a Defendant Class: A*

of *Education v. Taxman*, nonparties engineered a settlement between the parties just before oral argument in the Supreme Court for fear of the blow that bad precedent in that case could deal to affirmative action.⁵⁷ The preclusive power of stare decisis is real, and those faced with its threat treat it as so.

3. The Due Process Question

This preclusive effect raises serious due process issues, and, as I shall argue below, occasionally slides into unconstitutionality. In adjudication—where, by definition, life, liberty, or property is at stake—the Constitution guarantees litigants due process of law.⁵⁸ Due process includes the right to an opportunity to be heard on the merits of one's claims or defenses.⁵⁹ To the extent that a rigid application of stare decisis deprives litigants of this opportunity, it raises a due process issue.

Occasionally, a court or commentator has at least flagged this problem.⁶⁰ For example, in *Northwest Forest Resource Council v. Dombeck*, the D.C. Circuit recognized that the improper application of stare decisis can offend the Due

Proposed Revision of Rule 23, 1990 B.Y.U. L. REV. 909, 948 n.80 (1990) (collecting cases).

57. *Taxman v. Bd. of Educ. of Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996), cert. granted sub nom. *Piscataway Township Bd. of Educ. v. Taxman*, 521 U.S. 1117 (1997), cert. dismissed, 522 U.S. 1010 (1997); see also Lisa Estrada, *Buying the Status Quo on Affirmative Action: The Piscataway Settlement and its Lessons about Interest Group Path Manipulation*, 9 GEO. MASON U. CIV. RTS. L.J. 207 (1999); Linda Greenhouse, *Settlement Ends High Court Case on Preferences: Tactical Retreat*, N.Y. TIMES, Nov. 22, 1997, at A1.

58. U.S. CONST. amend. V; see also *infra* notes 171–73 and accompanying text (discussing adjudication and due process).

59. *Richards v. Jefferson County*, 517 U.S. 793, 797–98, 797 n.4 (1996); *Martin v. Wilks*, 490 U.S. 755, 761–62 (1989); *Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940).

60. John McCoid has observed that if rigorously followed, the “no panel overruling” rule “seems to be on the borderline of a denial of due process to the party who is adversely affected by the prior decision. He has no true day in court on his claim or defense.” John McCoid, *Inconsistent Judgments*, 48 WASH. & LEE L. REV. 487, 513 (1991); see also Brilmayer, *supra* note 22, at 306–07 (1979) (identifying a due process problem in the application of stare decisis, albeit a due process problem of less severity than that posed by res judicata). In a related vein, Barry A. Miller has argued that sua sponte appellate rulings can violate a litigant's due process right to an opportunity to be heard. Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253 (2002).

Process Clause.⁶¹ In *Dombeck*, the district court had rejected the plaintiffs' challenges to a federal environmental plan on the ground that it was bound by the stare decisis effect of a decision by a court in another district.⁶² The D.C. Circuit held that stare decisis did not apply because a district court is not bound by decisions from another district, and the rejection of the plaintiffs' claims on this ground violated their "right to be heard on the merits of their claims."⁶³

Similarly, in *Colby v. J.C. Penney Co.*, a district judge treated precedent from another district as outcome-determinative in a sex discrimination suit against J.C. Penney.⁶⁴ The Seventh Circuit pointed out that neither claim nor issue preclusion could apply to the *Colby* plaintiff because she had not been a party to the prior suit.⁶⁵ It then reversed the district court for treating persuasive authority as authoritative. In doing so, it observed that "within reason, the parties to cases before [this court and the district courts of this circuit] are entitled to our independent judgment."⁶⁶ While the Seventh Circuit did not ground its decision in the Due Process Clause, its decision appears to rest on due process concerns.

Both *Dombeck* and *Colby* raise more questions than they answer. In asserting that the due process failure lay in the district court's choice to treat persuasive precedent as binding, *Dombeck* implies that the Due Process Clause would have permitted the court to foreclose the merits of the litigants' claims with precedent from the same jurisdiction. The case does not explain why the rigid application of precedent offends the Due Process Clause in the former context but not the latter. Similarly, *Colby* does not explain why preclusion by out-of-

61. 107 F.3d 897 (D.C. Cir. 1997). By contrast, the Sixth Circuit has dismissed the argument that rigid application of precedent to a nonparty violates the Due Process Clause as "obviously without merit." *Kent v. Johnson*, 821 F.2d 1220, 1228 (6th Cir. 1987).

62. In *Dombeck*, the plaintiffs challenged the Secretary of Interior's plan for managing forests in the Pacific Northwest. Other groups unsuccessfully had challenged the same plan in the Western District of Washington. *Dombeck*, 107 F.3d at 898.

63. *Id.*

64. 811 F.2d 1119 (7th Cir. 1987). J.C. Penney only permitted those employees who were "heads of household" to opt into the company's medical and dental insurance plans. The EEOC had challenged the same policy unsuccessfully before a district court in Detroit. *Id.* at 1122.

65. *Id.* at 1124-25.

66. *Id.* at 1123.

circuit precedent offends fairness but preclusion by in-circuit precedent does not. The question of whether and how the Due Process Clause applies to the doctrine of stare decisis remains unexamined in existing scholarship and case law.

B. *The Standard Account of Stare Decisis*

Courts and scholars have given the topic of stare decisis serious attention.⁶⁷ But with very few exceptions, they have not paid attention to the preclusive effect of precedent on individual litigants,⁶⁸ much less to whether this preclusion

67. For a sampling of the literature, see, for example, BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); *PRECEDENT IN LAW* (Lawrence Goldstein ed., 1987); LLEWELLYN, *supra* note 35; Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989); William Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 VT. L. REV. 5 (1994); Charles Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401 (1988); James Eisenhower, III, *Four Theories of Precedent*, 61 TEMP. L. REV. 871 (1988); Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140 (1994); Anthony Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990); Lee, *Historical Perspective*, *supra* note 30; Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367 (1988) [hereinafter Maltz, *The Nature of Precedent*]; Earl Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467 [hereinafter Maltz, *Death of Stare Decisis*]; Henry Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988); Erin O'Hara, *Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis*, 24 SETON HALL L. REV. 736 (1993); Paulsen, *supra* note 2; Christopher Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031 (1996); Lewis Powell, Jr., *Stare Decisis and Judicial Restraint*, 1991 J. SUP. CT. HIST. 16; Max Radin, *The Trail of the Calf*, 32 CORNELL L.Q. 137 (1936); Schauer, *Precedent*, *supra* note 16; Jed Bergman, Note, *Putting Precedent in Its Place: Stare Decisis and Federal Predictions of State Law*, 96 COLUM. L. REV. 969 (1996).

68. Notable exceptions are Lea Brilmayer, Christopher Peters, and William Rubenstein. While none of these scholars has explored the due process problem, each has observed the way that stare decisis affects individual litigants. See Brilmayer, *supra* note 22 (arguing that the justiciability doctrines can be understood as a way of ensuring that later litigants are adequately represented in the litigation of cases that will bind them); Christopher Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312 (1997) (arguing that adjudicative lawmaking is democratically legitimate so long as later litigants are similarly situated to the parties who originally litigated a precedential case); William Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997) (proposing a "group decisionmaking" model for civil-rights litigation to counter the problem of individual litigants unilaterally binding other group members through the operation of stare decisis). There are a few others who have noted the preclusive effect on individual litigants at least in passing. See, e.g., Arthur S. Miller, *Constitutional Decisions as De Facto Class Actions: A Comment on the Implications of Cooper v. Aaron*, 58 U. DET. J. OF URBAN LAW 573, 574 (1981)

implicates due process. Instead, the standard account of stare decisis has treated stare decisis as a doctrine of exclusively institutional concern.

The questions that traditionally have occupied courts and scholars with respect to stare decisis are systemic. Courts and commentators have considered the kinds of errors that justify or even require the overruling of precedent.⁶⁹ They have thought about the kinds of reliance interests that justify keeping an erroneous decision on the books.⁷⁰ They have debated whether the force of a precedent should vary with its subject matter—whether it should be particularly weak in constitutional cases⁷¹ and cases dealing with procedure and

(observing that “Supreme Court decisions, in constitutional cases at least, are *de facto* class actions”); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 285–86 (1994) (making same *de facto* class action point). Occasionally a court has noted the implications of stare decisis for individual litigants. *See, e.g.*, *Richmond Newspapers v. Virginia*, 448 U.S. 555, 595 (1979) (Brennan, J., concurring) (observing that cases involving individuals “impose official and practical consequences upon members of society at large”).

69. *See, e.g.*, Akhil Reed Amar, *On Lawson on Precedent*, 17 HARV. J.L. & PUB. POL. 39, 39–42 (1994) (arguing that judges may adhere to even constitutional errors); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y. 23 (1994) (arguing that judges are bound by the judicial oath to correct errors of constitutional interpretation); Lee, *Historical Perspective*, *supra* note 30, at 655–59 (detailing vacillation on Supreme Court regarding whether existence of error is grounds for overruling); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 18 (2001) (arguing that demonstrable errors should be overruled); Geoffrey Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 HARV. J.L. & PUB. POL’Y. 67, 71–73 (1988).

70. *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 855–57 (1992) (holding that reliance on availability of abortion counts in stare decisis calculus); *id.* at 956–57 (Rehnquist, C.J., dissenting) (insisting that such abstract interests do not count); Michael J. Gerhardt, *The Pressure of Precedent: A Critique of the Conservative Approaches to Stare Decisis in Abortion Cases*, 10 CONST. COMMENT. 67, 78 (1993) (claiming that reliance interests at stake in *Casey* were even greater than plurality imagined); *see also* A. GOLDBERG, *EQUAL JUSTICE: THE WARREN ERA OF THE SUPREME COURT* 74 (1971) (arguing that stare decisis should be strongest when overruling precedent would contract individual freedom and weakest when overruling would expand individual freedom), *quoted in* Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 403 (1988).

71. The Supreme Court often notes that stare decisis should be weaker in constitutional cases, because constitutional amendment—the only way around a constitutional decision if it is not overruled—can be accomplished only with great difficulty. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 235 (1997); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984); *Smith v. Allwright*, 321 U.S. 649, 665–66 (1944); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–11 (1932) (Brandeis, J., dissenting). Courts of appeals make the same point. *See, e.g.*, *Joy v. Penn-*

evidence,⁷² and particularly strong in statutory cases⁷³ and cases dealing with property and contract.⁷⁴ They have worried about whether a weak form of stare decisis would harm the

Harris-Madison Sch. Corp., 212 F.3d 1052, 1065–66 (7th Cir. 2000); *United States v. Babich*, 785 F.2d 415, 417 (3d Cir. 1986); *Gault v. Garrison*, 523 F.2d 205, 207 (7th Cir. 1975); *Whiteside v. S. Bus Lines*, 177 F.2d 949, 951 (6th Cir. 1949). For commentary discussing this “weak” constitutional presumption, see, for example, Easterbrook, *Stability and Reliability in Judicial Decisions*, *supra* note 46, at 430–31 (arguing that constitutional presumption should be strong, not weak). In addition to the standard “difficulty of amendment” rationale, some advance the judicial oath to uphold the Constitution as a reason for giving stare decisis less force in constitutional cases. See, e.g., *South Carolina v. Gathers*, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting); *Graves v. New York ex rel. O’Keefe*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring); William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949); Lawson, *supra* note 69; Paulsen, *supra* note 2, at 1548 n.38.

72. See *infra* note 74.

73. Both the Supreme Court and the courts of appeals treat statutory precedent as particularly binding. See *supra* note 24 (citing cases). For commentary discussing this “super strong” statutory presumption, see, for example, Easterbrook, *Stability and Reliability in Judicial Decisions*, *supra* note 46, at 426–29 (criticizing presumption); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988) (criticizing presumption); Daniel A. Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 1, 12 n.45 (1988) (supporting presumption); Levi, *supra* note 32, at 540 (supporting presumption); Maltz, *The Nature of Precedent*, *supra* note 67, at 388–89 (criticizing presumption); Lawrence C. Marshall, *Let Congress Do It: The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989) (supporting presumption).

74. The Supreme Court has said that “[c]onsiderations of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved . . . ; the opposite is true in cases . . . involving procedural and evidentiary rules.” *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (citing *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965)); see also *Hohn v. United States*, 524 U.S. 236, 251–52 (1998); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *Burnet*, 285 U.S. at 405–11 (Brandeis, J., dissenting); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472 (1924); *The Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 458 (1852); *Smith v. Turner*, 48 U.S. (7 How.) 283, 470 (1849). For similar discussion in the courts of appeals, see *Johnson & Johnston Assoc., Inc. v. R.E. Serv. Co.*, 285 F.3d 1046, 1066 (Fed. Cir. 2002) (property); *United States v. Boyd*, 208 F.3d 638, 652 (7th Cir. 2000) (procedure); *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 960 (9th Cir. 1982) (property); *Cherokee Nation v. Oklahoma*, 402 F.2d 739, 746 (10th Cir. 1968) (property); *United States v. Minnesota*, 113 F.2d 770, 774 (8th Cir. 1940) (property); *Dunn v. Micco*, 106 F.2d 356, 359 (10th Cir. 1939) (property); *Am. Mortgage Co. v. Hopper*, 64 F. 553 (9th Cir. 1894) (property); see also *Meadows v. Chevron*, 782 F. Supp. 1189, 1192 (E.D. Tex. 1991) (stare decisis applies with special force to decisions affecting title to land). The view that cases involving property rights should receive special protection from stare decisis has been sharply criticized. See, e.g., *Payne*, 501 U.S. at 852–53 (Marshall, J., dissenting) (“[S]tare decisis is in many respects even more critical in adjudication involving constitutional liberties than in adjudication involving commercial entitlements.”); Bader, *supra* note 67, at 5; Gerhardt, *supra* note 70, at 78–79.

public's perception of the judiciary.⁷⁵ They have analyzed whether stare decisis is efficient.⁷⁶

To the extent that the traditional account has focused on precedent's binding effect, it has focused on judges. As the Federal Circuit has put it; "[S]tare decisis is a doctrine that binds courts. . . . It does not bind parties."⁷⁷ Stare decisis is regarded as a doctrine of judicial restraint.⁷⁸ Alexander Hamilton touted the virtues of stare decisis on this basis in Federalist No. 78.⁷⁹ Advocates of a particularly binding form of stare decisis often rest their arguments on the need to restrain the judicial power,⁸⁰ and arguments bemoaning the supposed demise of stare decisis tend to be arguments about how the law has become nothing but what a majority of judges says it is.⁸¹ That judges feel stare decisis operating directly upon them in a personal way, rather than upon litigants, is made evident

75. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 866–67 (1992); *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970); Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1118–20 (1995) (claiming that the Court's concern about how stare decisis will affect its image is a twentieth-century trend that *Casey* fully developed); Maltz, *Death of Stare Decisis*, *supra* note 67, at 484; Powell, Jr., *supra* note 67, at 484; John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 2 (1983).

76. See, e.g., William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976); Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643 (2000) [hereinafter Lee, *Economic Perspective*]; Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93 (1989).

77. *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1373–74 (Fed Cir. 2001); see also 18 MOORE'S FEDERAL PRACTICE, *supra* note 13, at § 130.01 n.2 (similar).

78. See Nelson, *supra* note 69, at 8 (arguing that stare decisis developed as a means of restraining the discretion "that legal indeterminacy would otherwise give judges"). Viewing stare decisis as a means of protecting a court's appearance of legitimacy goes to this same concern: by exercising restraint in following precedent, a court preserves its public legitimacy. See *supra* note 75 and accompanying text.

79. In Federalist No. 78, Hamilton argued that in order "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . ." THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

80. See generally *id.*

81. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting); William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis*; Casey, Dickerson, and the Consequences of Pragmatic Adjudication, 2002 UTAH L. REV. 53, 56; Maltz, *Death of Stare Decisis*, *supra* note 67, at 484.

simply by the number of times phrases like “we are constrained by” and “we are bound by” appear in judicial opinions.⁸² Those chafing against stare decisis typically frame their arguments as arguments about why *judges* should be free to follow their own best judgment in deciding a case.⁸³ No one makes the argument that stare decisis should leave *litigants* free. In the conventional view, stare decisis is an obligation that runs with the judicial office, binding each judge to commitments made by her predecessors.⁸⁴

Of course—and this is true despite the system’s failure to acknowledge it—to the extent that precedent binds judges, it inevitably binds litigants.⁸⁵ We take no account of this effect, however, in shaping stare decisis doctrine. In the traditional account of stare decisis, individual litigants are invisible players.

II. ISSUE PRECLUSION AND THE REQUIREMENTS OF DUE PROCESS

This oversight in stare decisis doctrine is surprising given the painstaking attention we have paid to the implications of preclusion for litigants in other areas of the law. The problem in stare decisis comes into focus when seen through the lens of issue preclusion, which litigants experience in much the same way as stare decisis. Although the two doctrines *affect* litigants similarly, they *treat* litigants quite differently. While stare

82. See, e.g., *United States v. Humphrey*, 287 F.3d 422, 450 (6th Cir. 2002); *Perez v. Volvo Car Corp.*, 247 F.3d 303, 313 (1st Cir. 2001); *Harris v. Philip Morris Inc.*, 232 F.3d 456, 459 (5th Cir. 2000); *Ass’n of Civilian Technicians Mont. Air Chapter v. FLRA*, 756 F.2d 172, 176 (D.C. Cir. 1985); *Ransom v. S & S Food Ctr.*, 700 F.2d 670, 674 (11th Cir. 1983); *United States v. Rosales-Lopez*, 617 F.2d 1349, 1354 (9th Cir. 1980); *Pitcairn v. Fisher*, 78 F.2d 649, 653 (8th Cir. 1935).

83. See, e.g., *Johnson v. Transp. Agency*, 480 U.S. 616, 644 n.4 (1987) (Stevens, J., concurring) (relying on Justice Cardozo to argue that a judge ought to be free to overrule a decision inconsistent with her sense of justice); *Tyler Pipe Indus. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 265 (1987) (Scalia, J., dissenting) (calling wrongly decided precedent a “sort of intellectual adverse possession”); CARDOZO, *supra* note 67, at 152 (“If judges have woefully misinterpreted the mores of their day, or the mores of their day are no longer ours, they ought not to tie, in helpless submission, the hands of their successors.”).

84. Amar, *supra* note 69, at 41–43 (stating that stare decisis gives earlier courts priority over later courts); Brilmayer, *supra* note 22, at 304 (“Stare decisis in effect subordinates the opinions and policy choices of later courts to those of the present court.”).

85. See *supra* Part I.A.

decisis virtually ignores individual litigants, issue preclusion makes them a primary concern.

A. Issue Preclusion and the Requirements of Due Process

Stare decisis and issue preclusion operate in much the same way: Both are judge-made doctrines that use the resolution of an issue in one suit to determine the issue in later suits.⁸⁶ Thus, under stare decisis, a decision holding a municipal curfew unconstitutional⁸⁷ will control the disposition of this issue when it recurs in a later suit. Similarly, under issue preclusion, a decision holding a statute constitutional will control the disposition of that issue when it recurs in a later suit.⁸⁸

Issue preclusion arises when an issue “actually litigated” in a suit and “necessary” to the resolution of it recurs in a later suit.⁸⁹ Issue preclusion will not apply unless the party to be precluded had a “full and fair opportunity to litigate” in the prior suit.⁹⁰ It can be invoked by one litigant against another

86. For an overview of the requirements of issue preclusion, see 18 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4416 (2d ed. 2002) [hereinafter WRIGHT ET AL., *FEDERAL PRACTICE*].

87. See, e.g., *Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997) (holding unconstitutional a municipal curfew ordinance).

88. See, e.g., *Montana v. United States*, 440 U.S. 147 (1979) (binding the United States to the Montana Supreme Court’s prior determination that a particular tax statute was constitutional).

89. *Va. Hosp. Ass’n v. Baliles*, 830 F.2d 1308, 1311–12 (4th Cir. 1987); *Mother’s Restaurant, Inc. v. Mama’s Pizza*, 723 F.2d 1566, 1569 (Fed Cir. 1983); *RESTATEMENT (SECOND) OF JUDGMENTS* §§ 27, 39 (1982) [hereinafter *RESTATEMENT*]; 18 WRIGHT ET AL., *FEDERAL PRACTICE*, *supra* note 86, at §§ 4419, 4421. *Cf.* *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (asserting that prior court decision not binding precedent on a point neither raised by counsel nor discussed in opinion of court); *Webster v. Fall*, 266 U.S. 507, 511 (1925) (same); *Nat’l Cable Television Ass’n v. Am. Cinema Editors*, 937 F.2d 1572, 1581 (Fed. Cir. 1991) (same); see also *Matter of Ellis*, 674 F.2d 1238, 1250 (9th Cir. 1982) (asserting that both collateral estoppel and stare decisis “give effect only to matters that have formed an essential basis for the earlier decision”).

90. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 333 (1979); *Blonder-Tongue Lab. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971); *RESTATEMENT*, *supra* note 89, at §§ 28, 29. A variety of factors might render the litigant’s first opportunity to litigate less than “full” or “fair.” The amount at stake in the first suit may have been small, thereby decreasing the party’s incentive to litigate well. *Parklane Hosiery Co.*, 439 U.S. at 333; 18 WRIGHT ET AL., *FEDERAL PRACTICE*, *supra* note 86, at § 4423. Counsel in the first suit may have been inexperienced or incompetent. *Id.* at § 4465 n.32. The party may not have been able to foresee at the time of the first suit that there would be later litigation raising the same issue, which might also affect her incentive. *Id.* at §§ 4415 & 4423–24. Limited

or a court can raise it sua sponte.⁹¹ When preclusion applies, the merits are closed. A court will not listen to a litigant's arguments for a different result, regardless of whether she can argue persuasively that the first court wrongly decided the issue. Because the stakes of preclusion are high, in preclusion, as in stare decisis, litigants wrangle over whether the issue in the prior suit is close enough to control, as well as over whether the issue decided in the prior suit was "necessary" to the ultimate resolution of the case. In either context, a court can distinguish a prior determination, or reinterpret it as "dicta."⁹²

Issue preclusion and stare decisis share similar goals.⁹³ Both seek to promote judicial economy, avoid the disrepute to the system that arises from inconsistent results, and lay issues to rest so that people can order their affairs.⁹⁴ Issue preclusion,

procedures, such as restrictive rules of evidence, may have been used in the first suit. *Standefor v. United States*, 447 U.S. 10, 22–23 (1980); *Parklane Hosiery Co.*, 439 U.S. at 333. The jury's verdict in the first suit may have been a compromise—for example, in a jurisdiction where contributory negligence would be an absolute bar to the plaintiff's recovery, a jury might split the difference by finding liability but awarding much lower damages than a finding of liability appears to deserve. 18 WRIGHT ET AL., FEDERAL PRACTICE, *supra* note 86, at § 4423; 18A *id.* §4465.

91. See *Arizona v. California*, 530 U.S. 392, 412 (2000) (noting, in a case of original jurisdiction, that the Court could raise preclusion sua sponte); *Jackson v. N. Bank Towing Corp.*, 213 F.3d 885, 889 (5th Cir. 2000) (permitting a court to raise the issue of res judicata sua sponte to affirm the district court); *Doe v. Pfrommer*, 148 F.3d 73, 80 (2d Cir. 1998) (“[F]ailure of a defendant to raise res judicata does not deprive a court of the power to dismiss a claim on that ground.”); *Indep. Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556, 562 n.5 (8th Cir. 1996); *Studio Art Theatre of Evansville, Inc. v. City of Evansville*, 76 F.3d 128, 130 (7th Cir. 1996); see also 18 WRIGHT ET AL., FEDERAL PRACTICE, *supra* note 86, at § 4405 (“It has become increasingly common to raise the question of preclusion on the court’s own motion.”).

92. Cf. RESTATEMENT, *supra* note 89, at § 27 cmt. h (determinations not essential to the judgment “have the characteristics of dicta”); 18 WRIGHT ET AL., FEDERAL PRACTICE, *supra* note 86, at § 4417 (delineating the issue that is or is not precluded is “one of the most difficult problems” in the application of issue preclusion).

93. Cf. *Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1525–26 (10th Cir. 1997) (“The related doctrines of collateral estoppel and stare decisis are exactly the sorts of tools that have been designed to ensure uniformity and compliance with binding precedent.”).

94. For the goals for stare decisis, see, for example, *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (“Stare decisis . . . promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”); Schauer, *Precedent*, *supra* note 16, at 595–601 (similar). For the goals of issue preclusion, see, for example, *Allen v. McCurry*, 449 U.S. 90, 94 (preclusion “relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance

however, pursues these aims on a smaller scale than does stare decisis. Issue preclusion can be invoked only against someone who was a party to the first suit; thus, its reach is limited to a small group of litigants. Stare decisis, on the other hand, reaches a group as large as the jurisdiction of the deciding court.

The Due Process Clause is what narrows the scope of issue preclusion. While courts impose no due process limit on the application of stare decisis, they have imposed significant due process limits on the application of issue preclusion. The Due Process Clause requires that a litigant receive notice of a proceeding and an opportunity to be heard in it before she is bound to any determinations resulting from it.⁹⁵ In observance of this guarantee, courts generally apply issue preclusion only against those who were parties to the first suit.⁹⁶ Parties to the first suit have already received one "opportunity to be heard" on an issue; due process does not require that they receive a second. Most nonparties, however, have received neither notice nor a hearing; consequently, they cannot be bound.

Courts and scholars have seriously considered whether any circumstances exist in which judgments can bind nonparties.⁹⁷ Indeed, concern over how the expansion of judgments might affect a litigant's right to a "day in court" is a consistent theme in the case law and literature of preclusion.⁹⁸ A settled exception to the nonparty limitation on judgments is the rule of privity. Courts may bind nonparties in a special relationship with parties; the relationships that qualify for this exception

on adjudication."); 18 WRIGHT ET AL., FEDERAL PRACTICE, *supra* note 86, at § 4403 (similar); McCoid, *supra* note 60, at 488–89 (similar). The doctrines share narrower objectives as well. For example, both accord particularly strong effect to decisions involving property, where reliance interests are considered especially significant. See RESTATEMENT, *supra* note 89, at tit. E, Introductory Note (property interests receive particular weight for purposes of preclusion); *Payne*, 501 U.S. at 828 (asserting that property interests are given particular weight for purposes of stare decisis) (citing *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965)).

95. *Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971); see also *Richards v. Jefferson County*, 517 U.S. 793, 797–98, 797 n.4 (1996); *Martin v. Wilks*, 490 U.S. 755, 761–62 (1989); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313–17 (1950); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *Galpin v. Page*, 85 U.S. 350, 368–69 (1873).

96. *Blonder-Tongue Lab.*, 402 U.S. at 329; RESTATEMENT, *supra* note 89, at § 34.

97. See *infra* notes 101–05.

98. See *infra* notes 101–05.

are known as relationships of "privity."⁹⁹ Under the rule of privity, a court might bind a beneficiary to a judgment entered against a trustee, a principal to a judgment entered against her agent, or a class member to a judgment entered against the class representative.¹⁰⁰ A court might also bind a nonparty if the nonparty has exercised sufficient control over the suit from the sidelines.¹⁰¹ In these kinds of relationships, the nonparty effectively has been heard by virtue of either the obligation that the party has to protect her interests (as in a trust relationship) or the control that she exercises over the party (as in an agency relationship).

The "parties or privies" limit on preclusion's reach imposes significant costs in efficiency and consistency. As a result, scholars and courts debate the legitimacy of binding nonparties to judgments on a theory of "virtual representation."¹⁰² In its

99. See RESTATEMENT, *supra* note 89, at ch.1, 1 ("The concept of 'privity' refers to a cluster of relationships under which the preclusive effects of a judgment extend beyond a party to the original action and apply to persons having specified relationships to that party, for example, the relationship of successor in interest."). "Privity" has been criticized for being a conclusory term rather than an analytical tool. See, e.g., 18A WRIGHT ET AL., FEDERAL PRACTICE, *supra* note 86, at §§ 4448-49 (arguing that privity is "no more than a convenient means of expressing conclusions [regarding preclusion] that are supported by independent analysis").

100. See RESTATEMENT, *supra* note 89, at § 41.

101. See, e.g., *Montana v. United States*, 440 U.S. 147, 154-55 (1979) (binding the United States to the result of a suit brought by a private contractor because the United States had a sufficient "laboring oar" in the conduct of the first suit to trigger preclusion); *Va. Hosp. Ass'n v. Baliles*, 830 F.2d 1308, 1312 (4th Cir. 1987) (explaining that a nonparty can be collaterally estopped by the judgment in a prior suit if the nonparty (1) "had a direct financial or proprietary interest in the prior litigation" and (2) "assumed control over the prior litigation"); RESTATEMENT, *supra* note 89, at § 39 ("A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party.").

102. For commentary supporting a broad version of virtual representation, see, for example, Michael A. Berch, *A Proposal to Permit Collateral Estoppel of Nonparties Seeking Affirmative Relief*, 1979 ARIZ. ST. L.J. 511, 532; Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 206-18 (1992); Lawrence C. George, *Sweet Uses of Adversity: Parklane Hosiery and the Collateral Class Action*, 32 STAN. L. REV. 655 (1980); Allan D. Vestal, *Res Judicata/Preclusion: Expansion*, 47 S. CAL. L. REV. 357, 380 (1974); Note, *Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485 (1974); Comment, *Nonparties and Preclusion by Judgment: The Privity Rule Reconsidered*, 56 CAL. L. REV. 1098 (1968). For commentary opposing broad use of virtual representation, see, for example, James R. Pielemeier, *Due Process Limitation on the Application of Collateral Estoppel Against Nonparties to Prior Litigation*, 63 B.U. L. REV. 383 (1983); Jack L. Johnson, Comment, *Due or Voodoo Process:*

broad form, virtual representation would bind a nonparty to the result of an earlier suit based on nothing more than similarity of circumstances to those of one of the parties in the prior suit.¹⁰³ Virtual-representation advocates would not give the nonparty the right to participate either personally or through a surrogate with whom she has a special relationship. According to virtual-representation theory, if the party and the nonparty face similar facts, and thus share an interest in a similar outcome, courts can assume that the party adequately represented the nonparty's interests.¹⁰⁴ And in this view, adequate representation satisfies the Due Process Clause; nothing more is required.¹⁰⁵

The debate over virtual representation is particularly useful to a study of the due process implications of stare decisis because, as other scholars have observed, virtual representation bears a striking resemblance to stare decisis.¹⁰⁶ Indeed, some scholars have defended the constitutionality of virtual representation on this very ground.¹⁰⁷ Like virtual representation, stare decisis binds nonparties based on nothing

Virtual Representation as a Justification for the Preclusion of a Nonparty's Claim, 68 TUL. L. REV. 1303 (1994).

103. The seminal case for this theory of virtual representation in the federal courts is generally thought to be *Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir. 1975). See also *Cauefield v. Fidelity & Cas. Co.*, 378 F.2d 876 (5th Cir. 1967) (applying Louisiana law). Robert Bone has pointed out that other forms of "virtual representation" have historically existed; for example, he points to the fact that in the eighteenth century, successors in interest like remaindermen could be bound to results achieved by the tenant in tail. Bone, *supra* note 102, at 206–18. But "virtual representation" as a theory rooted in interest representation did not surface explicitly until the 1970s in cases like *Aerojet-General*, 511 F.2d at 710.

104. Berch, *supra* note 102, at 532; George, *supra* note 102, at 662, 671–73; Vestal, *supra* note 102, at 380.

105. Berch, *supra* note 102, at 532; George, *supra* note 102, at 662, 671–73; Vestal, *supra* note 102, at 380. *But see* Pielemeier, *supra* note 102, at 383 (arguing that due process requires more).

106. See Brilmayer, *supra* note 22, at 306–07; Peters, *supra* note 68 (passim). Despite this similarity, not even the minimalist due process standard of "adequate representation" has ever been applied to stare decisis. Cf. *EEOC v. Trabucco*, 791 F.2d 1, 4 (1st Cir. 1986) ("We have found no case . . . that supports [the] contention that a weak or ineffective presentation in a prior case deprives the ruling of precedential effect.").

107. See, e.g., ROBERT C. CASAD & KEVIN M. CLERMONT, *RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE* (2001); Berch, *supra* note 102, at 531–32. If courts may bind similarly situated strangers to suits through stare decisis, the argument goes, surely they may do so through virtual representation. Casad and Clermont assert that the constitutionality of stare decisis is self-evident. See CASAD & CLERMONT, *supra*, at 15–16 (claiming that "nobody questions the constitutionality of stare-decisis").

more than shared circumstances with prior litigants. If Plaintiff A unsuccessfully challenges the timeliness rule adopted by the Internal Revenue Service for refund claims, Plaintiff B, challenging the same rule, will be bound to the result—not because of a special relationship between A and B, but because they are similarly situated with respect to the IRS.¹⁰⁸

Apart from a few early cases, courts have largely rejected the broad form of virtual representation as inconsistent with due process.¹⁰⁹ Courts occasionally apply a narrow form of virtual representation to bind a nonparty when, in the absence of a relationship traditionally described as one of privity, the nonparty nonetheless had some connection to a party in the prior suit, or exercised some measure of control over it.¹¹⁰ But the requirement of some actual participation is firm. The Supreme Court has held that nonparties cannot be bound to a judgment simply because their interests are “essentially identical” to those of the parties.¹¹¹ The Court has also held that a litigant cannot be bound to the result of a suit simply because she failed to intervene in it.¹¹² In the context of preclusion, courts are generally vigilant about protecting a litigant’s opportunity to be heard.

B. The Tension between Stare Decisis and Issue Preclusion

From the perspective of a litigant, stare decisis and issue preclusion overlap in effect, yet diverge in due process protection. This creates tension in the law; at times, this tension is particularly striking. A court could not use issue

108. See *supra* note 18 and accompanying text.

109. See, e.g., *Richards v. Jefferson County*, 517 U.S. 793, 805 (1996); *Becherer v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 193 F.3d 415, 428–29 (6th Cir. 1999).

110. See, e.g., *Tyus v. Schoemehl*, 93 F.3d 449, 455–58 (8th Cir. 1996); *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 338–341 (5th Cir. 1982) (holding that an express or implied relationship between the parties and nonparties is required; similarity of interests is not enough).

111. *Richards*, 517 U.S. at 796, 799–805.

112. *Martin v. Wilks*, 490 U.S. 755, 765 (1989); see also RESTATEMENT, *supra* note 89, at § 39, cmt. c (“To have control of litigation requires that a person have effective choice as to the legal theories and proofs to be advanced on behalf of the party to the action. He must also have control over the opportunity to obtain review. . . . It is not sufficient . . . that the person merely contributed funds or advice in support of the party, supplied counsel to the party, or appeared as *amicus curiae*.”).

preclusion to hold a criminal defendant to the determination in a codefendant's case of a particular sentencing issue, or of the question whether a trial was rendered unfair by pretrial publicity. Not having been a party in the codefendant's case, a criminal defendant would be entitled, under preclusion law, to her "own day in court" on those issues. But the federal courts have employed "strict adherence to prior circuit precedent" to the same effect, refusing even to entertain arguments on issues previously raised in appeals of codefendants.¹¹³ Similarly, some courts, after refusing to preclude a nonparty on due process grounds, have used stare decisis to exactly the same end.¹¹⁴ The federal courts say that they rely on stare decisis to "clean up" after issue preclusion; stare decisis ensures uniformity in those cases that issue preclusion does not reach.¹¹⁵ In this vein,

113. See, e.g., *United States v. Hoover*, 246 F.3d 1054, 1057 (7th Cir. 2001) (holding that stare decisis effect of case involving appellant's fellow gang members prevented appellant from relitigating issue whether surveillance tapes were properly admitted against him); *United States v. Jackson*, 2001 WL 1092784 (7th Cir. Sept. 14, 2001) (same); *United States v. Reveron Martinez*, 836 F.2d 684, 687 (1st Cir. 1988) (holding that stare decisis effect of case involving codefendants precluded appellant from relitigating issue whether pretrial publicity deprived appellant of his right to a fair trial); see also *Heldt v. Nicholson*, 2000 U.S. App. LEXIS 21246, at *4 (6th Cir. Aug. 10, 2000) (holding one civil appellant "barred" by issue preclusion and the co-appellant "barred" by the precedential effect of decisions concerning the other appellant). But see *United States v. Youngpeter*, 1998 U.S. App. LEXIS 7434, at *10 (10th Cir. Apr. 13, 1998) (refusing to follow *Diaz-Bastardo* and *Reveron Martinez* because "the principle of stare decisis cannot eclipse a defendant's right to be present and represented during critical stages of his sentencing").

114. See *Perez v. Volvo Car Corp.*, 247 F.3d 303, 313 (1st Cir. 2001) (asserting that although prior case "has no *res judicata* effect . . . we nonetheless are bound to follow it, under principles of *stare decisis*"); *United States v. 177.51 Acres of Land*, 716 F.2d 78, 81 (1st Cir. 1983) (after admitting technical inapplicability of issue preclusion, using stare decisis to reach same result); *Mooney v. Fibreboard Corp.*, 485 F. Supp. 242, 249 (E.D. Tex. 1980) (asserting that even if collateral estoppel did not apply, stare decisis did); *Flatt v. Johns Manville Sales Corp.*, 488 F. Supp. 836, 841 (E.D. Tex. 1980); see also *McDuffie v. Estelle*, 935 F.2d 682, 687 n.7 (5th Cir. 1991) (maintaining that even if collateral estoppel did not apply, same result would obtain under stare decisis); *Ransom v. S & S Food Ctr.*, 700 F.2d 670, 674 (11th Cir. 1983) (refusing to consider whether collateral estoppel applied, because stare decisis did); *In re Staff Mortgage & Inv. Corp.*, 655 F.2d 967 (9th Cir. 1981) (prior case controlled, regardless whether considered a matter of stare decisis or collateral estoppel); *Brewster v. Comm'r*, 607 F.2d 1369, 1374 n.5 (D.C. Cir. 1979) (same); *Journal-Tribune Publ'g Co. v. Comm'r*, 348 F.2d 266, 271 (8th Cir. 1965) (holding that although collateral estoppel did not apply, stare decisis required same result).

115. *Markman v. Westview Instruments*, 517 U.S. 370, 391 (1996) (asserting that where issue preclusion cannot be asserted against nonparties, stare decisis can be used to promote uniformity); *United States v. Maine*, 420 U.S. 515, 527

courts acknowledge that even where the refusal of class certification technically protects the rights of absentees who would otherwise be bound by a judgment, the stare decisis effect of an opinion—from which absentees receive no protection—is likely to affect them almost as powerfully.¹¹⁶

The Seventh Circuit's recent decision in *Bethesda Lutheran Homes and Services, Inc. v. Born* illustrates well the tension between the two doctrines.¹¹⁷ There, arguing against precedent, the plaintiffs asserted that "because they [were] new parties, the previous decisions [were] not binding."¹¹⁸ Judge Posner responded for the panel as follows:

The plaintiffs' lawyer does not understand the doctrine of stare decisis. It is res judicata that bars the same party from relitigating a case after final judgment, and the

(1975) ("Of course, the defendant States were not parties . . . to the relevant decisions, and they are not precluded by res judicata But the doctrine of stare decisis is still a powerful force"); *Robbins v. Amoco Prod. Co.*, 952 F.2d 901, 904 (5th Cir. 1992) (asserting that once a court has construed a specific writing such as a contract or will, its construction is "binding and conclusive in all subsequent suits involving the same subject matter, whether the parties and the property are the same or not . . . [t]his result is reached by virtue of stare decisis.") (citations omitted); *EEOC v. Trabucco*, 791 F.2d 1, 2 (1st Cir. 1986) (asserting that stare decisis ensures uniformity where preclusion and res judicata cannot); *CASAD & CLERMONT*, *supra* note 107, at 15 (suggesting that the existence of stare decisis is a reason for not extending res judicata, since stare decisis can do much of res judicata's work); *Motomura*, *supra* note 33, at 1021 (noting that courts "view stare decisis as one means of using a prior judgment against a nonparty when collateral estoppel is unavailable"); *JAY TIDMARSH & ROGER H. TRANGSRUD, COMPLEX LITIGATION AND THE ADVERSARY SYSTEM* 207 (1998) (maintaining that the "preclusion" doctrine of stare decisis does some of the same work as offensive collateral estoppel).

116. *Ameritech Benefit Plan Comm. v. Communication Workers of Am.*, 220 F.3d 814, 821 (7th Cir. 2000); *see also Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n*, 814 F.2d 358, 367 (7th Cir. 1987) (suggesting that stare decisis be given particularly powerful effect in those cases suitable for class treatment); *Roberts v. Am. Airlines, Inc.*, 526 F.2d 757, 763 (7th Cir. 1975) (observing that although judgment rendered before class certification did not bind those who would otherwise have been members of the class, defendants had "the not inconsequential protection of stare decisis"); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 256 (1975) (3d Cir. 1974) ("Since [a Rule 23(b)(2)] class is cohesive, its members would be bound either by the collateral estoppel or the stare decisis effect of a suit brought by an individual plaintiff."); Jack Weinstein, *Some Reflections on United States Group Actions*, 45 AM. J. COMP. L. 833, 833-34 (1997) (arguing that because stare decisis has such powerful effect, in many cases the benefit of using the class-action device is simply the "public relations and psychological" advantage).

117. 238 F.3d 853 (7th Cir. 2001).

118. *Id.* at 858.

doctrine of law of the case that counsels adherence to earlier rulings in the same case. It is stare decisis that bars a different party from obtaining the overruling of a decision. The existence of different parties is assumed by the doctrine, rather than being something that takes a case outside its reach. Of course, stare decisis is a less rigid doctrine than *res judicata*. But it is not a noodle. For the sake of law's stability, a court will not reexamine a recent decision . . . unless given a compelling reason to do so.¹¹⁹

The Seventh Circuit thus asserts that the whole point of stare decisis is to function as a kind of nonparty preclusion. Not as absolute, perhaps, as true preclusion, but a "bar" nonetheless. The First Circuit has made a similar point, asserting that "[s]tare decisis, unlike the doctrines of *res judicata* and collateral estoppel, is not narrowly confined to parties and privies Rather, when its application is deemed appropriate, the doctrine is broad in impact, reaching strangers to the earlier litigation."¹²⁰

Arthur S. Miller once remarked that if Supreme Court opinions bind everyone through the force of precedent, much of our class-action law, in its focus on the intricacies of who can be bound, is beside the point.¹²¹ His insight resonates here. Why bother protecting nonparties from judgments for purposes of issue preclusion if, as the First and Seventh Circuits have claimed, stare decisis binds them anyway?

119. *Id.* (citations omitted).

120. *Trabucco*, 791 F.2d at 2 (emphasis omitted); see also *Milton S. Kronheim & Co. v. Dist. of Columbia*, 91 F.3d 193, 209 (D.C. Cir. 1996) (Silberman, J., concurring) ("[P]rinciples of *res judicata* and estoppel will bar the District from relitigating the issue with the *same* party; and stare decisis should ordinarily preclude the District from relitigating the issue with a *different* party") (emphasis in original); *Ute Indian Tribe v. Utah*, 935 F. Supp. 1473, 1509 (D. Utah 1996) ("Stare decisis has the broadest application of all the relitigation doctrines, in the sense that it applies not only to the parties in the particular case and those in privity with them, but also to strangers to the litigation.") (quoting 1B JAMES W. MOORE & JO DESHA LUCAS, *MOORE'S FEDERAL PRACTICE* ¶ 0.401 at I-2) (2d ed. 1993)); *aff'd in part, rev'd in part*, 716 F.2d 1298 (10th Cir. 1983).

121. Arthur S. Miller, *Constitutional Decisions as De Facto Class Actions: A Comment on the Implications of Cooper v. Aaron*, 58 U. DET. J. OF URBAN LAW 573, 575 (1981). Miller asserted that because of their binding effect, "Supreme Court cases, in constitutional cases at least, are de facto class actions." *Id.* at 574. "Therefore," he went on to say, "much of class-action law, as it has developed, becomes irrelevant." *Id.* at 575.

One way of resolving this tension is that proposed by defenders of virtual representation: Courts could make the doctrine of issue preclusion more like the doctrine of *stare decisis*. They could abandon the “parties and privies” rule and bind nonparties on the basis of shared circumstances with parties. If adequate representation satisfies the Due Process Clause, the tension dissipates.

Even putting aside the courts’ general rejection of broad virtual-representation theory in the preclusion context, this approach is unsatisfactory. Virtual representation is inconsistent enough with our deep-rooted views about procedural fairness that even its most ardent proponents urge its use in a fairly limited class of cases. Courts and commentators typically conceive of virtual representation as a doctrine that might force a plaintiff to forfeit a claim but cannot impose an affirmative obligation upon a defendant.¹²² It is difficult to imagine a court applying virtual representation against a civil defendant, particularly in a case involving money damages rather than injunctive relief. And no one, to my knowledge, has proposed its use in criminal cases.

These limits on virtual-representation theory mean that even those who think that preclusion doctrine overvalues the due process rights of civil plaintiffs concede a core of cases in which a court must deal with a litigant personally, rather than through a similarly situated surrogate. Agreement exists on a core of due process, even though disagreement exists about the borders of due process. This agreement makes it worth entertaining another means of resolving the tension: Perhaps the understanding of the due process developed in the preclusion context should inform our approach to *stare decisis*.

III. WHY THE DIFFERENCE?

A threshold question is whether the tension between *stare decisis* and issue preclusion is superficial. Differences in the

122. See, e.g., Bone, *supra* note 102 (discussing virtual representation only in terms of precluding potential plaintiffs); Berch, *supra* note 102 (same). *But see* George, *supra* note 102, at 657 (advocating preclusion of even absent defendants on a virtual representation theory). The prominent cases addressing virtual representation have involved preclusion or potential preclusion of a plaintiff, not a defendant. See, e.g., Richards v. Jefferson County, 517 U.S. 793 (1996); Martin v. Wilks, 490 U.S. 755 (1989); Becherer v. Merrill Lynch, 193 F.3d 415 (6th Cir. 1999); Tyus v. Schoemehl, 93 F.3d 449 (8th Cir. 1996).

doctrines may justify the different ways they treat nonparties. If that is the case, then the understanding of due process developed in the context of issue preclusion is inapposite to a study of due process in the context of stare decisis. In this Part, I will analyze whether such fundamental differences exist.

A. *Flexibility*

The standard explanation as to why the doctrines treat nonparties differently is the supposed flexibility of stare decisis, as opposed to the rigidity of issue preclusion.¹²³ Once an issue is settled for purposes of preclusion, it is settled for all time, regardless of error, except in certain circumstances that rarely apply.¹²⁴ Arguments on the merits cannot undo it. Stare decisis, by contrast, allows for the possibility of error-correction. Nonparties are not bound to precedent because they are free to make, as Rule 11 puts it, “nonfrivolous argument[s] for the . . . reversal of existing law”¹²⁵ According to the standard explanation, the flexibility of stare decisis preserves a nonparty’s opportunity to be heard. In other words, stare decisis is different because a litigant can make arguments on the merits, which she could not do if issue preclusion applied, and arguments that are good enough will convince a court to go the other way.¹²⁶

Although the flexibility rationale works in theory, it does not account for current judicial practice. The persuasiveness of this rationale turns on a litigant’s ability to escape precedent by demonstrating error in it. As already discussed, however, courts almost never overrule precedent simply on the basis of error.¹²⁷ Indeed, one would be hard-pressed to describe stare

123. See, e.g., RESTATEMENT, *supra* note 89, at § 29 cmt. i; MOORE’S FEDERAL PRACTICE, *supra* note 13, at § 130.04[2]; CASAD & CLERMONT, *supra* note 107; 18 WRIGHT ET AL., FEDERAL PRACTICE, *supra* note 86, at § 4425.

124. See 18 WRIGHT ET AL., FEDERAL PRACTICE, *supra* note 86, at § 4426 (limited exception to preclusion for situations in which preclusion would work an injustice); RESTATEMENT, *supra* note 89, at § 28 (identifying exceptions).

125. FED. R. CIV. P. 11.

126. CASAD & CLERMONT, *supra* note 107, at 15 (explaining that stare decisis is different than res judicata because it is flexible; “the rendering court can overrule [prior decisions] when clearly convinced they are wrong”).

127. This proposition is firm in the courts of appeals. One panel cannot overrule another on the basis of error, see, e.g., *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 426 (5th Cir. 1987) (“[O]ne panel cannot overturn another

decisis doctrine in the federal courts as “flexible.” As Part I discussed, the federal courts, particularly the courts of appeals, are by their own admission quite inflexible in the application of precedent.¹²⁸ The “no panel overruling” rules set most circuit law in relative stone, and the presumptions and “super strong” presumptions that otherwise apply usually foreordain the result.¹²⁹ Overruling is a “special occasion” event. Courts do it sparingly, and when they do it, they often spark charges of illegitimacy. One does not hear judges or commentators praise overruling as a sign of the law’s flexibility; rather, they more often condemn it as a sign of judicial willfulness.¹³⁰

Nor does the ability to distinguish cases give stare decisis a flexibility that issue preclusion lacks. As Part I discussed, distinguishing does not always avert precedent’s preclusive effect, because many cases simply cannot be distinguished.¹³¹ Moreover, distinguishing does not logically separate stare decisis from issue preclusion; distinguishing occurs in both contexts. As Part II discussed, in issue preclusion, as in stare decisis, litigants wrangle over whether the issue in the prior

panel, regardless of how wrong the earlier panel decision may seem to be.”), and error in a panel decision is not a basis for granting en banc review. See *infra* note 137. The Supreme Court is also reluctant to overrule its precedent on the basis of error. See, e.g., *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (arguing that stare decisis “is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation.”). Caleb Nelson has argued that earlier courts accepted error as a legitimate basis for overruling. Nelson, *supra* note 69, at 1, n. 1, 16–21.

128. See *supra* note 19 and accompanying text.

129. See *supra* notes 20–32 and accompanying text.

130. See, e.g., *Hohn v. United States*, 524 U.S. 236, 254 (1998) (Scalia, J., dissenting); *Agostini v. Felton*, 521 U.S. 203, 255 (1997) (Ginsburg, J., dissenting); *Payne v. Tennessee*, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting); *United States v. Humphrey*, 287 F.3d 422, 452 (6th Cir. 2002) (majority criticizing dissent); *Silicon Graphics Inc. v. McCracken*, 195 F.3d 521, 521 (9th Cir. 1999) (Reinhardt, J., dissenting from denial of reh’g en banc); *In re Sealed Case No. 97-3112*, 181 F.3d 128, 145 (D.C. Cir. 1999) (Henderson, J., concurring); *English v. United States*, 42 F.3d 473, 485 (9th Cir. 1994) (Browning, J., concurring); *Estate of Maxwell v. Comm’r*, 3 F.3d 591, 602 (2d Cir. 1993) (Walker, J., dissenting); see also HAROLD SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999); SAUL BRENNER & HAROLD J. SPAETH, STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946-1992 (1995); Christopher P. Banks, *The Supreme Court and Precedent: An Analysis of Natural Courts and Reversal Trends*, 75 JUDICATURE 262 (1992).

131. See *supra* Part I.A.2.

suit is close enough to control, as well as over whether the issue decided in the first suit was “necessary” to its resolution or merely “dicta.”¹³²

One might argue, however, that the possibility of appeal softens the rigidity of binding horizontal precedent, sufficiently distinguishing it from issue preclusion. Issue preclusion applies across courts. If a district court decided an issue in one case, that determination would bind the parties even before a court of appeals in a subsequent case. Or, if a state court decided an issue in one case, that determination later would bind even in a federal court.¹³³ For purposes of stare decisis, by contrast, a lower-court determination does not bind a higher court. The ability to appeal might serve as an escape hatch; even if a lower court refused to listen to a litigant’s arguments, a higher court might listen.¹³⁴ This possibility might create enough flexibility to make stare decisis different.

This argument only works, of course, if a higher court exists. The possibility of appeal obviously cannot soften any rigidity in the Supreme Court’s observance of horizontal stare decisis because there is no higher court to which a litigant can appeal. The possibility of appeal could ease rigidity, however, in the courts of appeals. If rigid horizontal stare decisis deprived a litigant of a hearing before a three-judge panel, that litigant theoretically could seek relief from the full court of appeals, sitting en banc, or from the Supreme Court.¹³⁵ A higher court could give the litigant a hearing on the merits of her legal argument.

En banc review, however, is unlikely.¹³⁶ First, the en banc court is unlikely to take the case if the only ground urged is

132. See *supra* note 92 and accompanying text.

133. The way in which preclusion should apply across jurisdictions, however, is not always clear. See generally Robert C. Casad, *Preclusion in a Federal System*, 70 CORNELL L. REV. 599 (1985).

134. John McCoid has also made this suggestion. McCoid, *supra* note 60, at 513.

135. Because district courts do not observe horizontal stare decisis, see *supra* note 13, it is unnecessary to discuss appeal as a means of easing horizontal rigidity. Horizontal rigidity is necessarily absent in a system without binding horizontal stare decisis.

136. The difficulty of securing en banc review is mitigated in some circuits by a practice that permits overruling by a panel so long as the opinion is circulated to the full court. In some circuits, consent of the full court is required for overruling; in other circuits, only the consent of a majority of the court is required. See, e.g., 7th CIR. R. 40(e); *United States v. Meyers*, 200 F.3d 715, 721 (10th Cir. 2000); *United States v. Coffin*, 76 F.3d 494, 496 n.1 (2d Cir. 1996); *Irons*

error-correction. The standards for granting en banc review resemble those for certiorari—review is granted on “important” questions or questions on which panels within the circuit have disagreed.¹³⁷ Cases where the panel merely got it wrong do not satisfy the standard. Second, numerous judges have candidly admitted that they are not disposed to grant en banc review because they regard it as burdensome and inefficient.¹³⁸ Given these factors, it is unsurprising that the courts of appeals resolve fewer than one percent of their cases en banc.¹³⁹

The chances that the Supreme Court will grant certiorari are similarly low. The Court rejects over ninety-seven percent of petitions for certiorari.¹⁴⁰ The Court’s rules explicitly state

v. Diamond, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981); *In re Multi-Piece Rim Prods. Liab. Litig.*, 612 F.2d 377, 378 n.2 (8th Cir. 1980); *Bell v. United States*, 521 F.2d 713, 715 n.3 (4th Cir. 1975). I have been unable to find any studies tracking how often this informal mechanism for overruling is used. My sense from reading a substantial portion of appellate case law on stare decisis, however, is that courts use it infrequently.

137. FED. R. APP. P. 35(a) provides: “An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court’s decisions; or (2) the proceeding involves a question of exceptional importance;” *see also* EEOC v. Ind. Bell Tel. Co., 256 F.3d 516, 529 (7th Cir. 2001) (en banc) (Posner, J. concurring) (“[W]e do not take cases en banc merely because of disagreement with a panel’s decision We take cases en banc to answer questions of general importance likely to recur, or to resolve intracircuit conflicts, or to address issues of transcendent public significance—perhaps even to curb a ‘runaway’ panel—but not just to review a panel opinion for error, even in cases that particularly agitate judges . . .”).

138. Richard S. Arnold, *Why Judges Don’t Like Petitions for Rehearing*, 3 J. APP. PRAC. & PROCESS 29, 37 (2001); Irving R. Kaufman, *Do the Costs of the En banc Proceeding Outweigh Its Advantages?*, 69 JUDICATURE 7 (1985); James Oakes, *Personal Reflections on Learned Hand and the Second Circuit*, 47 STAN. L. REV. 387, 393 (1995); Pamela Ann Rymer, *How Big is Too Big?*, 15 J. L. & POL. 383, 392 (1999); Joseph T. Sneed, *The Judging Cycle: Federal Circuit Court Style*, 57 OHIO STATE L.J. 939, 942 (1996); Deanell Reece Tacha, *The “C” Word: On Collegiality*, 56 OHIO STATE L. J. 585, 590 (1995); *see also* J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS 217 (1981).

139. DONALD R. SONGER, ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 12 (2000); *see also* Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 549 (1989) (giving same statistic with respect to en bancs granted in the Ninth Circuit from 1981-1986).

140. SONGER, *supra* note 139, at 8. As Jeffrey O. Cooper and Douglas A. Berman have recently noted, the federal courts of appeals are, in practice, “courts of last resort.” Cooper & Berman, *supra* note 46, at 718. Cooper and Berman note that in 1998, “the federal courts of appeals resolved nearly 25,000 cases on the merits . . . , while the Supreme Court in its 1998-1999 term chose to review only seventy cases from the federal circuit courts.” *Id.*; *see also* Wald, *supra* note 55, at

that it will not grant review simply to correct error in the lower court's decision.¹⁴¹ To warrant review, a petition must present a question of national importance, or one on which the courts of appeals have divided.¹⁴² In addition, the record must be clean and the case must be well-lawyered.¹⁴³ The Court's stringent certiorari standards render the possibility of Supreme Court review too remote to cure a lack of an opportunity to be heard at the circuit level.¹⁴⁴

At least on the current state of affairs, the flexibility rationale cannot account for why courts treat nonparties differently for purposes of precedent than for purposes of issue preclusion. A litigant facing unfavorable precedent in a court of appeals will have no opportunity to argue for a different rule. The panel lacks the authority to overrule and review by either the court sitting en banc or the Supreme Court is a remote possibility. From the perspective of the litigant, stare decisis is no more flexible than preclusion.

B. The Distinction between Fact and Law

A rationale other than flexibility, however, may justify the different ways that stare decisis and issue preclusion treat nonparties. Perhaps, as a colleague has suggested to me, stare decisis and issue preclusion are apples and oranges, applying to fundamentally different kinds of determinations. Issue preclusion applies to factual determinations, the argument

1375–76 (“[F]ederal courts of appeals are the courts of last resort for almost forty-nine thousand appeals every year Indisputably, the thirteen courts of appeals declare more federal law affecting far more citizens than the Supreme Court does.”).

141. SUP. CT. R. 10; *see also* ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE 221 (6th ed. 1986) (“It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions.”).

142. SUP. CT. R. 10; STERN, *supra* note 141, at 221.

143. SUP. CT. R. 10; STERN, *supra* note 141, at 221.

144. *See also* McCoid, *supra* note 60, at 513–14 (arguing that because certiorari petitions are often denied for nonmerits reasons, it cannot necessarily be said that the right to petition for certiorari in the Supreme Court gives a litigant the hearing she lacked in the lower courts). A litigant's opportunity to be heard in district court on an issue on which circuit precedent exists is obviously limited by vertical stare decisis; *see also In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998) (noting that where circuit precedent exists adverse to an appellant, the appellant has no way of getting a judge at either the district, circuit, or supreme court level to listen to her, even if her argument is sound).

goes, and *stare decisis* applies to legal determinations. Perhaps the Due Process Clause requires notice and a hearing in the former context but not the latter, making it permissible for a court to bind nonparties to precedent.

This argument has some intuitive appeal, largely because lawyers tend to think of issue preclusion as a doctrine dealing exclusively with fact-bound determinations. And this impression of issue preclusion has historical support. Historically, courts drew a line between facts and law for purposes of issue preclusion. They restricted issue preclusion to questions of fact or “mixed” questions, reserving questions of “pure” law for *stare decisis*.¹⁴⁵ Courts only applied issue preclusion’s due process analysis, therefore, in the context of fact-bound determinations. It would be easy to assume that that is the only context in which this due process analysis governs.

At least as traditionally articulated, however, the rationale for excepting legal questions from preclusion’s reach does not support the notion that a court can bind nonparties on matters of law but not matters of fact. The rationale for this exception, according to both courts and commentators, is the injustice of binding a party to a legal determination that nonparties can challenge through the more “flexible” doctrine of *stare decisis*.¹⁴⁶ In other words, courts do not bind nonparties on

145. See, e.g., *Comm’r v. Sunnen*, 333 U.S. 591 (1948); *United States v. Moser*, 266 U.S. 236, 242 (1924) (holding that preclusion does not apply to “unmixed questions of law”). Some commentators urge that this still should be the proper standard. *CASAD & CLERMONT*, *supra* note 107, at 130–32; 18 *WRIGHT ET AL.*, *FEDERAL PRACTICE*, *supra* note 86, § 4425. The Restatement (Second) of Judgments takes a different approach. Rather than distinguishing between “mixed” and “pure” questions of law, it recommends that preclusive effect should be given to all determinations of law unless “the two actions involve claims that are substantially unrelated” or “a new determination [of the issue] is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws.” *RESTATEMENT*, *supra* note 89, at § 28(2). The Supreme Court has adopted the Restatement’s view. See *infra* notes 150–54 and accompanying text.

146. *Nat’l Org of Veterans’ Advocates v. Sec’y of Veterans’ Affairs*, 260 F.3d 1365, 1373 (Fed Cir 2001); *RESTATEMENT*, *supra* note 89, § 28; 18 *WRIGHT ET AL.*, *FEDERAL PRACTICE*, *supra* note 86, § 4425, at 244 (among the reasons most commonly advanced against applying issue preclusion to questions of law is that “it is particularly unjust to preclude reargument of questions of law that would be open to challenge by other litigants”); Austin Wakeman Scott, *Collateral Estoppel by Judgment*, 56 *HARV. L. REV.* 1, 7 (1942) (“It would be manifestly unjust to apply one rule of law forever as between the parties and to apply a different rule as to all other persons.”).

questions of law, so neither should they bind parties. Rather than justifying judicial inflexibility on legal matters, the traditional fact/law distinction assumes that flexibility exists.¹⁴⁷ Indeed, if stare decisis were rigid, the stated reason for the “pure law” exception—to give parties the same flexibility as nonparties—would evaporate.

Perhaps, though, one could articulate a different reason why issue preclusion should not apply to questions of law, one that echoes my colleague’s instinct: Preclusion should not attach to questions of so-called “pure” law because courts should have the ability to be *inflexible* on matters of law if they so wish. The negative implication of permitting preclusion of parties on questions of law is that nonparties cannot be so precluded.¹⁴⁸ And one might take the position that courts should be able to preclude everyone, parties and nonparties alike, on questions of law. On this view, the development of the law through judicial opinions is the exclusive prerogative of the courts, and the Due Process Clause guarantees no one notice or a hearing on the merits of the purely legal issues at stake in her case. If the notice and hearing requirements do not apply in this context, then issue-preclusion analysis is inapposite.¹⁴⁹ Courts need not worry whether the litigant to be bound to the prior determination was a party to the earlier litigation, or, if so, whether she had a “full and fair opportunity to litigate” the merits of her claims and defenses.

1. Preclusion Applies to Legal Questions

An initial difficulty with the claim that the Due Process Clause does not apply to legal determinations is that the federal courts have put purely legal determinations into the category of rulings to which preclusion can attach. Following the lead of the Restatement (Second) of Judgments, the courts

147. In this sense, the traditional reason for excepting legal issues from the reach of issue preclusion dovetails with the traditional “flexibility” rationale justifying different treatment of nonparties for purposes of stare decisis and issue preclusion. *See generally* Part III.A.

148. *See infra* notes 155–57 and accompanying text.

149. It is conceivable that a litigant could claim an entitlement to preclusion on a legal question even if the court were not inclined to preclude. In such a case, issue preclusion might apply, even though the notice and hearing requirements might not. This is not, however, the way that preclusion on questions of law has played out in the cases. *See infra* notes 155–57 and accompanying text.

have withdrawn the broad exception for unmixed questions of law.¹⁵⁰ In *Montana v. United States*, the Supreme Court precluded the federal government from relitigating the constitutionality of a Montana tax statute.¹⁵¹ It held that preclusion could apply to unmixed questions of law so long as the subject matter of the successive actions is “substantially related.”¹⁵² Five years later, in *United States v. Stauffer Chemical Co.*, the Court again applied preclusion to a question best characterized as one of “pure law.”¹⁵³ There, the Tenth Circuit had held that private contractors did not qualify as “authorized representatives” eligible to conduct inspections of plants under the Clean Air Act. The Supreme Court held the government precluded from relitigating this issue against the same party in the Sixth Circuit.¹⁵⁴ Under the Court’s (and the Restatement’s) approach, the “purely legal” nature of a determination does not disqualify it from issue preclusion.

The negative implication of permitting preclusion of parties on questions of law is that nonparties cannot be so precluded. For example, in *Montana v. United States*, before the Supreme Court held the United States precluded from relitigating a legal question, it analyzed whether the United States’ participation in the first suit justified binding it to the court’s conclusions in that suit.¹⁵⁵ That analysis would be unnecessary if nonparties could be bound. In *Richards v. Jefferson County*, the due process protection for nonparties is more explicit. There, a group of plaintiffs challenged the constitutionality of a county occupational tax, and the state court upheld it.¹⁵⁶ The Supreme Court held it a violation of due process for state courts to preclude later plaintiffs, who were

150. See, e.g., *Carr v. District of Columbia*, 646 F.2d 599, 608 (D.C. Cir. 1980) (“The ‘fact/law’ characterization of the issue we have before us is not critical; it is today well accepted that issue preclusion applies to questions of law and law application as well as to questions of fact.”). Cf. RESTATEMENT, *supra* note 89, at § 27; *id.* at § 28 cmt. b and at Rep. Note to § 28 subsection (2) (“Such a change in formulation rests in part on the ambiguity of the terms ‘fact’ and ‘law.’”); JACK H. FRIEDENTHAL, ET AL., CIVIL PROCEDURE 669 (2d ed. 1993) (“The line between issues of fact and issues of law is hard to draw because courts do not concern themselves either with fact or law issues in isolation but with the application of the one to the other.”).

151. 440 U.S. 147 (1979).

152. *Id.* at 162–63.

153. 464 U.S. 165, 171 (1984).

154. *Id.* at 168, 171–72.

155. 440 U.S. at 154–55.

156. 517 U.S. 793 (1996).

neither parties nor privies to the first suit, from litigating the same legal question.¹⁵⁷ Parties could be precluded, but nonparties could not. In extending issue preclusion to questions of law, the federal courts have acknowledged, inevitably if indirectly, that due process notice and hearing requirements apply to the judicial resolution of questions of law.

The elimination of the fact/law distinction in issue preclusion has made it difficult to argue that the kinds of determinations to which stare decisis and issue preclusion apply distinguish the two doctrines. Instead, the two doctrines apply to the very same determinations.¹⁵⁸ Stare decisis has always overlapped with issue preclusion with respect to “mixed questions.” For example, a determination that particular behavior violates securities law would not only constitute a “mixed” question to which preclusion would apply, but it would also set a legal standard to be used for purposes of stare decisis in later cases involving similar behavior.¹⁵⁹ Now, however, the

157. *Id.* at 802. It is unclear whether *Richards* rests on both claim and issue preclusion, or only on claim preclusion. The Alabama Supreme Court barred the petitioners on the ground of claim preclusion; before the United States Supreme Court, the county urged affirmance on the basis of issue preclusion. Brief for Respondent, at 32 (“Due process would be better served by using issue preclusion, rather than claim preclusion, to bar further litigation of the Petitioners’ equal protection claims.”). The United States Supreme Court discusses “res judicata” and “binding the petitioners to a judgment,” terminology that is broad enough to include issue preclusion, but could also be used to mean claim preclusion alone. The broader reading seems to be the better one. *See, e.g.*, 517 U.S. at 805 (“A state court’s freedom to rely on prior precedent in rejecting a litigant’s claims does not afford it similar freedom to bind a litigant to a prior judgment to which he was not a party.”).

158. One commentator has suggested that the collapse of the fact/law distinction has rendered stare decisis and issue preclusion functionally the same, so much so that the two could be collapsed into one doctrine. Colin Hugh Buckley, *Issue Preclusion and Issues of Law: A Doctrinal Framework Based on Rules of Recognition, Jurisdiction, and Legal History*, 24 HOUS. L. REV. 875, 881 n.28 (1987).

159. For example, in *SEC v. Parklane Hosiery Co.*, 422 F. Supp. 477 (S.D.N.Y. 1976), a securities fraud case, the District Court found that the proxy statement “contain[ed] at least one misstatement and two omissions” and that the “omitted information would have had a substantial likelihood of affecting the price of the stock.” *Id.* at 484–85. This determination served as the foundation for issue preclusion in a subsequent shareholder suit. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). Later courts and litigants also relied on this same determination for purposes of stare decisis. *See, e.g.*, *Gluck v. Agemian*, 495 F. Supp. 1209, 1214–15 (S.D.N.Y. 1980) (relying on facts and application of facts to law in first *Parklane* action to make determination of materiality in another case); *SEC v. Everest Mgmt. Corp.*, 466 F. Supp. 167, 175 (S.D.N.Y. 1979) (relying on

two overlap with respect to “pure” questions as well. *Stare decisis* would clearly apply to an issue of statutory interpretation like the one at stake in *Stauffer Chemical*;¹⁶⁰ it would also apply to an issue of judicial review like the one at stake in *Montana*.¹⁶¹

Because the very same act can serve as the foundation for either issue preclusion or *stare decisis* in a later case, it is impossible to tell at the time a judicial determination is made whether it should be analyzed in terms of preclusion or precedent. The choice of analysis is made after the fact, and it is based on the context in which the issue recurs, rather than on the nature of the determination at stake. If the issue recurs in a situation in which the litigant adversely affected by the determination was a party to the prior suit, the rules of preclusion determine whether the prior holding controls. If the litigant adversely affected was not a party to the prior suit, the rules of *stare decisis* determine the effect of the prior holding. Under current doctrine, the nature of a determination does not explain the doctrines’ different treatment of nonparties.

2. Legislation and Adjudication

But one could draw a narrower conclusion from the extension of issue preclusion to questions of law. In a sense, *Montana* and *Stauffer Chemical*, the cases extending issue preclusion to questions of law,¹⁶² dovetail with *Dombeck* and *Colby*, the cases flagging a due process problem in the rigid application of precedent.¹⁶³ Neither *Montana* and *Stauffer*

facts and application of law to facts in first *Parklane* action in determining appropriateness of issuing injunction against further securities fraud).

160. Indeed, in a later case, courts and litigants did consider *Stauffer Chemical*’s interpretation of “authorized representatives” for purposes of *stare decisis*. See, e.g., *Bunker Hill Co. Lead & Zinc Smelter v. EPA*, 658 F.2d 1280, 1283 (9th Cir. 1981). Of course, since this case arose in another circuit, it relied on *Stauffer Chemical* as merely persuasive authority.

161. See, e.g., *Gregory Constr. Co. v. Blanchard*, 1989 WL 78201, at *4 (6th Cir. July 17, 1989) (applying both nonmutual collateral estoppel and *stare decisis* to the question of a statute’s constitutionality that had been determined in an earlier suit).

162. *Montana v. United States*, 440 U.S. 147 (1979); *United States v. Stauffer Chemical Co.*, 464 U.S. 165 (1984). See *supra* notes 151–154 and accompanying text.

163. *Northwest Forest Res. Council v. Dombeck*, 107 F.3d 897 (D.C. Cir. 1997); *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987). *Dombeck*

Chemical on the one hand, nor *Dombeck* and *Colby* on the other, speak to the impact of the Due Process Clause on the development of case law within a single jurisdiction. *Montana* and *Stauffer Chemical* both apply issue preclusion across jurisdictional lines. In *Montana*, a state court decided the first case and a federal court the second; in *Stauffer Chemical*, the Sixth Circuit decided the first case and the Tenth Circuit the second. Thus, in both cases, the court applied issue preclusion to a question of law only where precedent was not authoritative under stare decisis. Similarly, both *Dombeck* and *Colby* reversed district courts for treating case law from other jurisdictions as authoritative. *Montana*, *Stauffer Chemical*, *Dombeck*, and *Colby* seem to assume that federal courts can bind both parties and nonparties to precedent originating in that jurisdiction, but that the Due Process Clause prohibits binding nonparties to precedent that originates in another jurisdiction.¹⁶⁴

One could read these cases, therefore, for a proposition narrower than that the Due Process Clause guarantees a hearing on questions of law generally. One could read these cases as standing for the proposition that the Due Process Clause guarantees litigants notice and a hearing only on matters of first impression within a jurisdiction. Due process requires that a court give its independent judgment at least once. Matters that the jurisdiction has already considered, however, bind everyone litigating in that jurisdiction on what is presumably a virtual-representation theory, with the first litigant representing the interests of everyone else to be

flags the problem explicitly and *Colby* flags it implicitly. See *supra* notes 61–66 and accompanying text.

164. *Richards v. Jefferson County*, 517 U.S. 793 (1996), on the other hand, can be read to support the application of due process notice and hearing requirements to precedent from the same jurisdiction. The Alabama Supreme Court decided both the first and second cases, and the United States Supreme Court noted that “[a] state court’s freedom to rely on prior precedent in rejecting a litigant’s claims does not afford it similar freedom to bind a litigant to a prior judgment to which he was not a party.” *Id.* at 805. Admittedly, this case can also be read as one addressing claim preclusion, see *supra* note 157, in which case it would not support this point. In *Richards*, the later case raised some issues that the earlier case had not; the Alabama Supreme Court barred both the previously raised and unraised claims on a claim preclusion theory. Precluding the new claims—which were federal constitutional claims—is even more troubling than precluding the claims that the earlier litigants had actually litigated. Arguably, the Supreme Court may have viewed matters differently if only issue preclusion were at stake.

bound.¹⁶⁵ This view vests a court with the power to develop generally binding principles within a jurisdiction; in other words, within its own jurisdictional lines, a court functions in a quasi-legislative capacity. A legislature has the ability to promulgate law without affording individual notice and a hearing. Why should a different standard bind courts?

The nature of adjudication thwarts this argument. The exercise of the judicial power requires notice and an opportunity to be heard, while the exercise of the legislative power, as Justice Kennedy puts it, “raises no due process concerns.”¹⁶⁶ Legislation, by definition, binds groups.¹⁶⁷ The focus of a “legislative” act cannot be an *individual* deprivation of life, liberty, or property; if that were its focus, the act would properly be characterized as “adjudication.”¹⁶⁸ Because no *individual* life, liberty, or property is at stake, legislative action does not trigger the Due Process Clause.¹⁶⁹ When the

165. For a discussion of virtual representation, see *supra* notes 102–12 and accompanying text. See also Peters, *supra* note 68 (using virtual-representation theory to justify the way judicial “lawmaking” binds nonparties); Brilmayer, *supra* note 22 (arguing that the case and controversy requirement ensures better virtual representation, and therefore better justifies binding nonparties to precedent through stare decisis). Cf. Rubenstein, *supra* note 68 (arguing for *actual* representation of absentees in civil-rights litigation because virtual representation inadequately protects their interests in the development of precedent that will bind them).

166. *Missouri v. Jenkins*, 495 U.S. 33, 66 (1990) (Kennedy, J., concurring).

167. *Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo.*, 239 U.S. 441, 445–46 (1915); *Londoner v. Denver*, 210 U.S. 373, 385–86 (1908). Cf. U.S. CONST. art. I, § 9, cl. 3 (prohibiting bills of attainder).

168. There are cases in which legislative action and adjudicative action are hard to distinguish, because sometimes generally applicable laws affect only a few. See, e.g., *Bi-Metallic*, 239 U.S. at 441; *Club Misty, Inc. v. Laski*, 208 F.3d 615 (7th Cir. 2000); *37712, Inc. v. Ohio Dep’t of Liquor Control*, 113 F.3d 614 (6th Cir. 1997); *Philly’s v. Byrne*, 732 F.2d 87 (7th Cir. 1984). So long as the law is generally applicable, and not focused on an individual, however, it still constitutes “legislation” to which no notice and hearing requirements apply. *Id.* If the administrative or legislative act has an individual focus, however, it is adjudication, and notice and hearing requirements apply. *Id.*

169. See *Missouri*, 495 U.S. at 66–67 (Kennedy, J., concurring) (asserting that the exercise of the judicial power requires notice and a hearing, while the exercise of the legislative power “raises no due process concerns”); *Philly’s*, 732 F.2d at 92 (“Notice and opportunity for a hearing are not constitutionally required safeguards of legislative action.”); OTTO J. HETZEL, ET AL., LEGISLATIVE LAW AND PROCESS: CASES AND MATERIALS 729 (2d ed., The Michie Co. 1993) (1980) (“[I]t is settled law that the trappings of procedural due process, e.g., notice and an opportunity to be heard, are inapplicable to ‘legislative’ decisions.”). It may be an overstatement to assert that the Due Process Clause has *no* applicability to legislation; while it certainly does not require notice and a hearing, it may impose other requirements. See generally WILLIAM N. ESKRIDGE & PHILIP P. FRICKEY,

government acts at that level of generality, the electoral process is sufficient to protect individual interests.¹⁷⁰ Notice and a hearing are not required.

Federal courts, however, act against litigants specifically and concretely. The “case or controversy” requirement ensures that life, liberty, or property is at stake every time a federal court acts.¹⁷¹ And, in the context of federal court adjudication, the Supreme Court has been clear that due process requires notice and a hearing. As the Court put it in *Mullane v. Central Hanover Bank & Trust Co.*, “Many controversies have raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for a hearing”¹⁷² The individualized nature of adjudication and the due process protections this nature entails are what distinguishes legislation from adjudication.¹⁷³ The *Bi-Metallic* line of cases constrains legislators and administrators from evading the requirements of due process by disguising adjudication as legislation. Similarly, cases limiting the reach of judgments constrain judges from evading the requirements of due process by treating adjudication like legislation. A court, unlike a legislature, must give affected parties notice and a hearing before it acts.

CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 381–497 (2d ed. 1995); Hans Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

170. “Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. . . . Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.” *Bi-Metallic Investment*, 239 U.S. at 443; see also *Philly’s*, 732 F.2d at 92 (“The fact that a statute (or statute-like regulation) applies across the board provides a substitute safeguard [for the notice and hearing requirement].”).

171. U.S. CONST. art. III, § 2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Muskrat v. United States*, 219 U.S. 346 (1911).

172. 339 U.S. 306, 313 (1950); see also *Richards v. Jefferson County*, 517 U.S. 793, 797 n.4 (1996) (citations omitted):

The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard, so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.

173. See *supra* notes 167–70 and accompanying text.

This notice-and-hearing requirement applies whether or not judicial opinions are understood to be “law.”¹⁷⁴ The federal courts indisputably make law (although the scope of their ability to do so is much disputed).¹⁷⁵ The applicability of the Due Process Clause does not turn on the *source* of a law; rather, it turns on what the government does with a law. Regardless whether a rule of law derives from Congress, the Executive, or the Judiciary, it cannot be applied to deprive an individual of life, liberty, or property without notice and a hearing.¹⁷⁶ Thus, the *application* of a generally applicable rule to an individual triggers due process even though the *promulgation* of that rule does not. For example, the Due Process Clause did not guarantee any individual notice and a hearing before Congress passed the Americans with Disabilities Act.¹⁷⁷ It does, however, guarantee notice and a hearing before any individual can be held liable for violating that Act. Similarly, even though a federal court may have the power to announce a generally binding standard, it may not apply that standard against any individual without first giving that individual notice and a hearing.

The degree to which opinions are “lawlike,” however, may well affect the scope of the hearing that the court must give. A hearing with respect to a statute—or, for that matter, a regulation—does not throw open for debate the policy choices underlying the statute or regulation. Rather, where the right to a hearing exists, litigants have the right to press the “merits” of their claims. Arguments on the merits of statutory and regulatory claims traditionally include arguments about (1) what the statute or regulation means, (2) whether the statute or regulation applies to the situation at hand, and (3) whether the statute or regulation was promulgated without authority.¹⁷⁸ Thus, for example, a litigant tried for possessing

174. For an insightful analysis of competing understandings of judicial opinions, see Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43 (1993).

175. See generally Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996).

176. The nature and timing of the hearing due is context-specific. See *Matthews v. Eldridge*, 424 U.S. 319 (1976).

177. 42 U.S.C. § 12101–12213 (2000).

178. Considering the scope of the hearing that due process requires brushes up against the jurisdiction-stripping debate. If Congress can close all fora to legal arguments, one cannot say that the Due Process Clause guarantees the opportunity to make them. (For a general discussion of the jurisdiction-stripping

cocaine can argue at her hearing about (1) whether the statute under which she is charged forbids cocaine possession, (2) whether she possessed cocaine, and (3) whether forbidding cocaine possession is constitutional, either generally or as applied to her situation. But no one believes that the Due Process Clause requires that the litigant receive an individual hearing with respect to whether forbidding cocaine possession is a poor legislative policy choice.¹⁷⁹ To the extent that either the Constitution or Congress entrusts the courts with policymaking authority on a particular matter, the courts might be able to similarly limit the scope of the hearing due: A

debate, see RICHARD H. FALLON ET AL, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 373-79 (4th ed. 1996)). The Due Process Clause does not guarantee that these arguments, even arguments about constitutional or statutory excess, can be pressed as an initial matter in *federal* court. Most presume, however, that at least with respect to constitutional claims, due process requires that the state courts remain open. See, e.g., *Webster v. Doe*, 486 U.S. 592, 603 (1988) (avoiding the "serious constitutional question" that would arise if a federal statute were construed to deny *any* judicial forum for a colorable constitutional claim") (emphasis added); *Bartlett v. Bowen*, 816 F.2d 695 (D.C. Cir. 1987) (holding that the preclusion of both state and federal jurisdiction to hear constitutional claims violates the Due Process Clause); *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir. 1948) (same). Courts are less hospitable to the argument that due process requires a judicial forum for claims that official action exceeded statutory authority, see RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 17.8 (4th ed. 2002), though they more willingly interpret door-closing provisions to preclude review of agency applications of law to fact than review of the general lawfulness of agency regulations. Richard H. Fallon, Jr., *Some Confusions About Judicial Review, Due Process, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 334-35 (1993); Richard H. Fallon Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 982 (1988). In any event, even assuming that Congress may close all judicial fora to select constitutional or statutory claims, the Due Process Clause would presumably entitle a litigant to press these kinds of arguments before an agency or executive official. Indeed, a litigant's ability—or lack thereof—to make legal arguments before an agency often influences the way courts interpret door-closing provisions. See, e.g., *Johnson v. Robison*, 415 U.S. 366, 368 (1974) (interpreting door-closing provision to permit review of constitutional claims where agency had disclaimed the authority to judge such claims); *Traynor v. Walters*, 791 F.2d 226, 229 (2d Cir. 1986) (interpreting door-closing provision to preclude review of statutory questions when the agency had "never disclaimed its authority to determine whether its own regulations comply with federal statutes or whether they are properly applied to a particular case"), *rev'd*, *Traynor v. Turnage*, 485 U.S. 535 (1988).

179. Citizens do not have the right to make these kinds of policy arguments in the first stage, when the statute or regulation is promulgated. See *supra* notes 166-70 and accompanying text. There is no reason to permit them to raise such arguments at the second stage, when the statute or regulation is applied. Moreover, to the extent that the hearing occurs in a judicial forum, such arguments are misplaced because courts cannot disrupt legislative policy choices.

hearing may be unnecessary with respect to whether a particular judicially created rule is a poor policy choice.

The federal courts' power to engage in policymaking includes at least the traditional areas of federal common law.¹⁸⁰ One could argue that it also includes the authority to choose among reasonable interpretations of ambiguous statutory and constitutional provisions. Recent scholarship by Caleb Nelson illuminates the latter point.¹⁸¹ Nelson analogizes *stare decisis* to the *Chevron* doctrine, under which courts interpret ambiguity in a statute as delegating to an agency the authority to choose among reasonable interpretations of it.¹⁸² A court cannot substitute its preferred interpretation for that of an agency; so long as the agency's interpretation is reasonable, a court must defer to it.¹⁸³ Courts do not defer, however, to administrative interpretations that exceed statutory terms.¹⁸⁴ So, Nelson argues, should it be with *stare decisis*.¹⁸⁵ According to Nelson, one might think of textual ambiguity as delegating the authority to earlier-in-time courts to flesh out the ambiguity.¹⁸⁶ If a precedent reasonably interprets a constitutional or statutory provision, a successor court should not substitute its judgment for that of the predecessor court.¹⁸⁷ If, however, a precedent is a "demonstrably erroneous" interpretation, a court need not—and should not—defer to it.¹⁸⁸ The former is within what we might think of as the predecessor court's "policymaking" authority; the latter is not.

Analogizing judicial opinions to legislation, one might argue that at least with respect to federal common law and reasonable interpretations of ambiguous texts, a court need not grant a litigant a hearing with respect to the wisdom of choosing one common law rule rather than another, or one reasonable interpretation of a text rather than another.

180. See Clark, *supra* note 175, at 126–66 (identifying traditional areas of federal-common law).

181. Nelson, *supra* note 69.

182. *Id.* at 6–7. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 844–45 (1984).

183. *Chevron*, 467 U.S. at 843–44.

184. *Id.* at 842–43.

185. Nelson, *supra* note 69, at 6–8.

186. *Id.*; see also Brilmayer, *supra* note 22, at 304 ("*Stare decisis* in effect subordinates the opinions and policy choices of later courts to those of the present court.").

187. *Id.* at 7.

188. *Id.* at 8.

Instead, as with a statute or regulation, arguments on the “merits” might include only arguments about (1) what the precedent means, (2) whether it applies in this case, and (3) whether it conflicts with statutory or constitutional norms.

Whether the Due Process Clause requires a court to grant a litigant a hearing with respect to the wisdom of its policy choices, as opposed to simply their consistency with statutory or constitutional law, is a difficult problem. On balance, I think the best answer is that it does. Although the Due Process Clause does not guarantee a hearing with respect to the wisdom of legislative and administrative policy choices, the electoral process gives individuals a voice in congressional or administrative lawmaking. Citizens elect both legislators and the Executive based on judgments about the policies particular candidates would implement. If they dislike the policy choices made, they can vote for different candidates in the next election. In addition, an opportunity exists for interested parties to express their views before either Congress or an agency. The process is generally formal (notice and comment)¹⁸⁹ with respect to agency action and informal (lobbying) with respect to congressional action.¹⁹⁰

Before a court, nonparties are protected by neither the electoral process nor the opportunity to press their views.¹⁹¹ The only opportunity that a litigant has to express her views to a court is during the adjudicative process; thus, in the adjudicative process, a court ought to protect that opportunity. The idea that any organ of government could close itself

189. 5 U.S.C. § 553 (2000).

190. Bill Kelley has suggested to me that even though the Due Process Clause does not apply to legislative action, the legislature would provoke due process-like concerns if it refused interested parties any opportunity to express opinions to it. In addition to First Amendment problems, the closing of any organ of government to its citizens raises concerns that sound in procedural fairness. Cf. Linde, *supra* note 169.

191. Amicus briefs do allow some interested nonparties to express their views to a court. Nonparties, however, do not have a right to file amicus briefs. See SUP. CT. R. 37(2)(a) (providing that an amicus brief “*may* be filed” with written consent of the parties or by leave of the Court) (emphasis added); FED. R. APP. P. 29(a) (An “amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.”); *Nat’l Org. of Women v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000) (“Whether to permit a nonparty to submit a brief, as amicus curiae, is, with immaterial exceptions, a matter of judicial grace.”) (citations omitted); 9A WRIGHT ET AL., FEDERAL PRACTICE, *supra* note 86, at § 3975 (“There is no right of nonparties generally to submit an amicus curiae brief.”).

completely to citizen input is a troubling one, and one that, with respect to the judiciary, a more flexible approach to *stare decisis* could avoid.

Even if, however, the Due Process Clause does not protect a litigant's opportunity to advance arguments regarding the wisdom of judicial policy choices, it presumably at least guarantees the opportunity to make the same kinds of arguments on the merits that a litigant can make with respect to a legislative or administrative standard: arguments about (1) what the precedent means, (2) whether it applies in this case, and (3) whether the precedent conflicts with the statutory or constitutional norms it purports to implement. It is fair to say that courts are in the habit of considering the first two kinds of arguments. It is the third kind of argument—which amounts to an argument that precedent is wrong—that a strict approach to *stare decisis* is likely to preclude. It is ironic that courts do not flinch at using strict *stare decisis* to bar this kind of argument. Courts balk at congressional attempts to strip their jurisdiction largely because of the risk that a litigant will be left with no forum hospitable to claims that one of the political branches has exceeded its constitutional authority (and, to a lesser extent, to claims that the Executive has exceeded statutory authority).¹⁹² But courts seem to have no problem figuratively stripping their jurisdiction to entertain claims about their own excesses.

IV. THE IMPLICATIONS OF DUE PROCESS FOR STARE DECISIS

It is telling that flexibility is the standard justification for the different ways that issue preclusion and *stare decisis* treat nonparties.¹⁹³ In advancing flexibility as a rationale, courts and commentators have recognized, at least implicitly, that *stare decisis* raises the same due process concerns as issue preclusion. Because, however, the due process reason for flexibility in *stare decisis* has received little attention, it has been easy for flexibility to slip out of the doctrine.

Without flexibility, *stare decisis* functions as a doctrine of preclusion, and its application to nonparty litigants poses the same due process problem as the application of issue preclusion

192. See *supra* note 178.

193. See *supra* Part III.A (discussing traditional rationale of flexibility).

to nonparty litigants. Issue preclusion handles its due process problem by exempting nonparties from the reach of judicial determinations—an option not available to stare decisis, a doctrine whose primary purpose is to provide jurisdiction-wide stability. Flexibility is the price for precedent's wider reach.

What, however, does “flexibility” mean? At a minimum, it requires that the courts remove the structural barriers to error-correction that currently exist. The courts of appeals should either eliminate the rule that prohibits one panel from overruling another, or change the en banc rules to add error-correction as a basis for review.¹⁹⁴ But even once the structural impediments to error-correction are gone, the question of how a court should approach the problem of error-correction remains. Must a court correct every error? Must a court treat every aspect of precedent as open to question?

A. Flexibility and Reliance

The first question that a suggestion of flexibility prompts is whether the Due Process Clause requires a court to correct error at the expense of well-settled reliance interests. Reliance has always counted as an important consideration in the overruling calculus; indeed, the protection of reliance interests from judicial flip-flops is the doctrine's animating force. One might wonder whether I am suggesting that an individual's right to a hearing necessarily trumps societal reliance interests, no matter how deep they run.

1. Errors within Judicial Discretion

The importance of reliance depends on what kind of “error” a litigant demonstrates. I argued in Part III that a litigant ought to get a hearing with respect to the wisdom of judicial policy choices.¹⁹⁵ If, however, a litigant alleges an error that falls within what we might think of as the courts' “policymaking” authority, reliance interests ought to weigh heavily in a court's decision regarding whether to change

194. Another means of providing flexibility would be for the Supreme Court to adopt a practice of granting review to correct error. See *supra* notes 133–44 and accompanying text. The burdens this would place on the Supreme Court's docket, however, make this course unlikely.

195. See *supra* notes 189–91 and accompanying text.

course. Thus, reliance ought to weigh heavily if the issue is whether the previous court should have chosen one reasonable interpretation of a text rather than another, or decided differently a matter within its federal common law authority. A court possesses discretion in these matters, and frank considerations of policy appropriately guide its exercise of discretion. Where the precedent is a permissible choice, reliance interests should clip a successor court's freedom to change course.¹⁹⁶

2. Demonstrable Errors

If, however, a litigant demonstrates that precedent demonstrably conflicts with the statutory or constitutional provision it purports to interpret, the role of reliance is significantly diminished, and possibly eliminated.

On the one hand, the situation is analogous to judicial review of a statute or administrative regulation. If a statute conflicts with the Constitution, or if a regulation conflicts with either its enabling statute or the Constitution, the court will hold the statute or regulation invalid without regard to anyone's reliance on it.¹⁹⁷ It is difficult to explain why a court should treat its own *ultra vires* acts differently, and indeed, scholars have struggled mightily to explain where a court might derive the authority to do so.¹⁹⁸ The Constitution does not clearly grant the judicial department such power, and, as some scholars have pointed out, the judicial oath, Article V, and separation-of-powers principles cut against it.¹⁹⁹

On the other hand, because even clear errors sometimes inspire reliance that would be costly to upset, even those who convincingly challenge the courts' power to adhere to clear

196. Giving reliance a role primarily when the error relates to a matter within judicial discretion is consistent with the role *stare decisis* historically has played. Caleb Nelson has argued that *stare decisis* developed to constrain judicial discretion on matters lying within the courts' policymaking authority. Nelson, *supra* note 69, at 5. If the force of precedent is at its apex, so to speak, when a court has policymaking authority, it makes sense that reliance interests are at their apex in this circumstance as well.

197. *See, e.g.*, *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating one-House legislative veto even though numerous statutes contained similar legislative veto provisions, and may not have been passed without them).

198. *See, e.g.*, Amar, *supra* note 69; Fallon, *supra* note 3; Lawson, *supra* note 69; Paulsen, *supra* note 2.

199. *See, e.g.*, Lawson *supra* note 69; Paulsen, *supra* note 2.

error do not expect the practice to cease altogether.²⁰⁰ We live with the occasional assertion of such power even in the absence of a wholly satisfying justification for it.

Whether the federal courts possess the power to adhere to plainly erroneous interpretations of constitutional and statutory texts is a complicated question that I will not attempt to resolve here. Instead, assuming that such power exists, I add the Due Process Clause to the list of factors—including the judicial oath, Article V, and separation-of-powers principles—counseling in favor of its narrow exercise. Even if, for the sake of reliance, we are willing to tolerate a narrow incursion into these principles, a broad incursion would intolerably shift the balance between the judicial power and its counterweights. A broad power to trump constitutional text with erroneous gloss would remove the line between judicial interpretation and constitutional amendment. A broad power to trump statutory text with erroneous gloss would remove the line between judicial interpretation and legislation. And, importantly, broad power in either circumstance would remove the due process limit on the judiciary's exercise of power over an individual. To the extent that courts are willing to claim the power to adhere to clear error, they ought to at least be cognizant of the due process effect on individual litigants before they do so. The costs of overruling ought to be particularly high before a court acts in this circumstance.

In any event, the phenomenon of courts' adhering to demonstrable error should have a limited effect on this theory of flexibility. A shift toward flexibility would have the largest impact in the courts of appeals, and circuit precedent rarely inspires the kind of reliance that justifies adherence to plain error. The authority of the courts of appeals is geographically confined, which limits the number of people likely to rely on an opinion. Other courts of appeals may go different ways on an issue, which undercuts the reasonableness of reliance. Also undercutting the reasonableness of reliance is the knowledge that the Supreme Court could always reverse the course of the

200. *See, e.g.,* Lawson *supra* note 69, at 33 (noting that the Legal Tender cases, even if wrong, are in no danger of being overruled because of stare decisis theories like Lawson's; the real-world costs are too high).

circuit's jurisprudence on the point.²⁰¹ For these reasons, the problem of adhering to clear error should be of greatest concern to the Supreme Court. Its opinions—which apply nationwide and are incapable of reversal by another court—are the ones most likely to induce deep-seated reliance.²⁰²

It is also worth nothing that a flexible system of stare decisis would make it more difficult for clear errors to become embedded in doctrine. For one thing, it would be easier for later courts to purge errors from case law. For another, because nonparties would be on notice of stare decisis's flexibility, it would be less reasonable for them to rely on precedent—at least to the extent that precedent is untested.²⁰³

In sum, while reliance should figure heavily in the overruling calculus when a litigant convinces a court that precedent is unwise, it should count much less, if at all, when a litigant convinces a court that precedent conflicts with the statutory or constitutional provision that it purports to interpret.

B. Flexibility in Stare Decisis is Consistent with History

One might wonder whether the flexibility to correct errors is consistent with the history of stare decisis. If courts historically have refused to entertain seriously arguments for overruling, one should rightly regard with suspicion the argument that the practice is unconstitutional.

201. Interestingly, neither the courts of appeals nor the Supreme Court explicitly take reliance interests into account when considering whether to overrule or adhere to a line of precedent from an inferior court.

202. The exception might be a circuit that decides issues that neither other courts nor the Supreme Court often decide. For example, it is conceivable that a D.C. Circuit opinion on administrative law, or a Federal Circuit opinion on patents, could induce this kind of reliance.

203. See Fried, *supra* note 67, at 1143 (asserting that if it were known that courts could overrule more easily, people would adjust their expectations accordingly). Caleb Nelson has also noted that it is not necessarily true that a "weaker" system of stare decisis will impose greater costs of change than a "stronger" one. According to Nelson, the costs that come from the fine distinctions that courts draw to chip away at an erroneous precedent over time might create more uncertainty and cost in the end than a single dramatic change. Nelson, *supra* note 69, at 64–65.

Historical work done by scholars of stare decisis suggests that stare decisis doctrine is a relatively modern doctrine.²⁰⁴ While lawyers and courts were reasoning from precedent as early as the time of Coke, the notion that courts have any sort of obligation to follow precedent did not surface until the time of Blackstone,²⁰⁵ and even Blackstone's concept of precedent was relatively soft.²⁰⁶ At the time of the Founding, the concept of precedent was in a state of flux.²⁰⁷ As Henry Monaghan puts it, "The Framers were familiar with the idea of precedent. But . . . [t]he whole idea of just what precedent entailed was unclear."²⁰⁸

The years between 1800 and 1850 have been described as the "critical years" for stare decisis's development.²⁰⁹ It was not until the early 1800s that the practice of a court majority speaking in one voice took hold.²¹⁰ Before the nineteenth century, each judge on an appellate court generally wrote a separate opinion, a practice that would have made it difficult for any one opinion to control later cases.²¹¹ Another development during this period was the emergence of reliable case-reporting systems, which are a prerequisite to a more rigid version of stare decisis.²¹² For these reasons and others, American lawyers did not conceive of precedent as a binding force until the 1850s.²¹³

Even after the 1850s, stare decisis was not as rigid as the version of stare decisis employed today. The rules that give modern stare decisis doctrine much of its rigor are decidedly

204. Lee & Lehnhof, *supra* note 1, at 154 ("The general consensus among legal historians is that the doctrine of stare decisis is of 'relatively recent origin.'") (quoting Lee, *Historical Perspective*, *supra* note 30, at 659).

205. Lee, *Historical Perspective*, *supra* note 30, at 661.

206. Radin, *supra* note 67, at 155.

207. Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 50 (1959) ("American cases, up to the year 1800, had no firm doctrine of stare decisis."); Lee, *Historical Perspective*, *supra* note 30, at 666 (noting that in the antebellum period, stare decisis was in an "uneasy state of internal conflict"); Price, *supra* note 1, at 90-91 (asserting that there is no clear evidence as to what Framers thought about precedent).

208. Monaghan, *supra* note 67, at 770 n.267 (citations omitted).

209. Kempin, *supra* note 207.

210. *Hart v. Massanari*, 266 F.3d 1155, 1162 (9th Cir. 2001) (citing George L. Haskins & Herbert A. Johnson, *Foundations of Power: John Marshall, 1801-15*, in 2 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 382-89 (Paul A. Freund ed., 1981)).

211. *Hart*, 266 F.3d at 1162 n.6.

212. Kempin, *supra* note 207, at 34-36.

213. *Id.* at 50; see also Nelson, *supra* note 69, at 45 & nn.163-164.

modern. Although some variance exists from circuit to circuit, no-panel-overruling rules appear to have surfaced only in the last fifty years.²¹⁴ Similarly, the presumption against overruling cases interpreting statutes did not appear until the twentieth century.²¹⁵ In addition, Caleb Nelson has argued that until the last half-century, courts usually felt free to overrule precedent that demonstrably conflicted with a text it purported to interpret.²¹⁶ Nelson persuasively argues that requiring courts to adhere to even demonstrably erroneous precedents through the operation of stare decisis is a relatively recent phenomenon.²¹⁷

214. The earliest cases citing the “no panel overruling” rule in each circuit appear to be *Lacy v. Gardino*, 791 F.2d 980, 984–85 (1st Cir. 1986); *Mother’s Rest. v. Mama’s Pizza, Inc.*, 723 F.2d 1566, 1573 (Fed. Cir. 1983); *Bonner v. City of Prichard*, 661 F.2d 1206, 1211 (11th Cir. 1981); *Timmreck v. United States*, 577 F.2d 372, 376 n.15 (6th Cir. 1978), *rev’d*, 441 U.S. 780 (1979); *United States v. Kasto*, 584 F.2d 268, 272 n.4 (8th Cir. 1978); *U.S. Dep’t of Labor v. Peabody Coal Co.*, 554 F.2d 310, 333 (7th Cir. 1977); *Of Course, Inc. v. Comm’r*, 499 F.2d 754, 760 (4th Cir. 1974); *Charleston v. United States*, 444 F.2d 504, 506 (9th Cir. 1971); *Pierce v. Elk Towing Co.*, 364 F.2d 504, 504 (3d Cir. 1966); *Sanchez v. United States*, 417 F.2d 494, 496–97 (5th Cir. 1969); *O’Malley v. United States*, 340 F.2d 930, 933 (7th Cir. 1964) (Kiley, J., concurring), *rev’d*, 383 U.S. 627 (1966); *American-Foreign Steamship Corp. v. United States*, 265 F.2d 136, 142 (2d Cir. 1958), *vacated on other grounds*, 363 U.S. 685 (1960); *United States v. U.S. Vanadium Corp.*, 230 F.2d 646, 649 (10th Cir. 1956); *Thompson v. Thompson*, 244 F.2d 374, 375 (D.C. Cir. 1957).

215. Thomas Lee has identified the presumption against overruling statutory cases as a twentieth-century development, crystallized in opinions of the Hughes Court. Lee, *Historical Perspective*, *supra* note 30, at 731–32.

216. Nelson distinguishes between kinds of error: “errors” on which reasonable people could disagree and “demonstrable errors.” He argues that stare decisis developed to protect only the former kind of “errors” from overruling. Nelson, *supra* note 69; *see also* Lee & Lehnhof, *supra* note 1, at 152 n.87 (observing that the Framers’ view that “judicial decisions were merely evidence of the law and as such could be disregarded” is in contrast with “current circuit rules [that] require . . . published opinions [to] be treated as binding precedent and only disregarded following an en banc overruling”); *Cooper & Berman*, *supra* note 46, at 749–51 (arguing that at the Founding and beyond, courts did not consider themselves strictly bound by precedent, but thought themselves free to depart when precedent was erroneous); Emery G. Lee, III, *supra* note 24 (arguing that the Court’s historical approach to constitutional stare decisis was to give constitutional precedent little weight).

217. Nelson, *supra* note 69. Thomas Lee claims that the Supreme Court has never been consistent in its treatment of error. The doctrine has been, as Lee puts it, in an “uneasy state of internal conflict” about error since the Founding. Lee, *Historical Perspective*, *supra* note 30, at 666. *See id.* at 681–87 (concluding that posture of Marshall Court towards error-correction was roughly the same as that of the modern Court).

C. *Following Correct Precedent*

It is evident how flexibility would play out when the existence of precedent keeps a court from its preferred resolution.²¹⁸ In this situation, flexibility frees the court to do what it wants to do. But what about when a court does not want to overrule precedent? It is one thing to consider whether a judge *must* follow precedent; it is another to consider whether she *can* do so. One of the most common criticisms of a “weaker” system of stare decisis is that it would push the burden of judges to “the breaking point” by forcing them to reconsider every issue anew, even those issues that do not appear to be wrongly decided.²¹⁹ Often, judges want to follow precedent because they do not want the work of rethinking issues from scratch; they want the option of occasional inflexibility because perpetual flexibility is burdensome. As Walter Murphy has put it, stare decisis provides “harried judges who face difficult choices with a welcome decision-making crutch.”²²⁰

To the extent that this criticism presumes that a flexible approach to stare decisis would force a judge to consider every issue “anew,” however, it sets up a straw man. This view assumes that a court can gauge the merit of an argument only by analyzing the litigant’s arguments and any relevant constitutional or statutory text as if the issue raised were a matter of first impression. And in this view, the litigant should win if the current court, in its exercise of wholly independent legal reasoning, is persuaded by the litigant’s arguments. A civil-law system generally works this way; in a civil-law system, the court’s only real tools for gauging the persuasiveness of an argument are the litigants’ arguments and the original text.²²¹

218. See, e.g., *supra* notes 48–49 and accompanying text (discussing cases in which courts follow precedent despite their disagreement with it).

219. CARDOZO, *supra* note 67, at 149–52; see also *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992).

220. WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 22–23 (1964), quoted in *BRENNER & SPAETH, supra* note 130, at 3.

221. JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 48–49 (2d ed. 1985). It is well-known that civil-law systems do not observe the rule of stare decisis. Interestingly, while they do observe *res judicata*, they do not observe collateral estoppel. *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 436 (5th Cir. 2000) (noting that issue preclusion did not apply in Louisiana until 1991); *B.E. Welch v. Crown Zellerbach Corp.*, 359 So.2d 154, 156–57 (La. 1978)

In a precedent-based system, however, judges do not decide cases in a vacuum; rather, precedent always affects the way they view the merits. Some have argued that stare decisis's only power is its ability to constrain a court to follow erroneous precedent.²²² Stare decisis has tremendous power, however, even apart from holding judges to error. Precedent influences a judge's perception of what the right result should be.²²³ On a general level, precedent might give a judge an analytical framework—like, for example, the tiers of judicial review or the First Amendment framework of limited and public fora—through which to approach a problem. More narrowly, the analysis in a prior case of a particular issue might persuade the court of its correctness—for example, precedent might persuade a judge that “disability” in the ADA does not include correctible vision impairments.²²⁴ Flexibility does not mean that a judge must pretend that precedent does not exist. On the contrary, precedent can both inform and persuade.

Flexibility, moreover, is consistent with treating some principles as water under the bridge. Sometimes a judge wants more than guidance from precedent; she wants to treat some principles as correct without thinking independently about

(holding that collateral estoppel does not apply in Louisiana); LA. REV. STAT. ANN. § 13:4231 (1991), cmt (b) (“R.S. 13:4231 also changes the law by adopting the principle of issue preclusion.”). While the reasons for this are probably historical, see Note, *Developments in the Law of Res Judicata*, 65 HARV. L. REV. 818, 820–21 (1952) (res judicata derives from Roman law and collateral estoppel from Germanic), the absence of issue preclusion in civil systems also suggests a conceptual link between the two doctrines.

222. See, e.g., *United States ex rel. Fong Foo v. Shaughnessy*, 234 F.2d 715, 718–19 (2d Cir. 1955); BRENNER & SPAETH, *supra* note 130, at 8; Alexander, *supra* note 67, at 4; Fallon, *supra* note 3, at 570 (2001) (“The force of the doctrine . . . lies in its propensity to perpetuate what was initially judicial error or to block reconsideration of what was at least arguably judicial error.”) (citations omitted); Max Radin, *Case Law and Stare Decisis: Concerning Präjudizienrecht in Amerika*, 33 COLUM. L. REV. 199, 200–01 (1933).

223. Michael Paulsen calls this stare decisis’s “information” function, as opposed to its “disposition” function, which controls how a court disposes of a case. Paulsen, *supra* note 2, at 1544. Cf. Schauer, *Giving Reasons*, *supra* note 46, at 655.

224. Cf. *Sutton v. United Airlines*, 527 U.S. 471 (1999). No conflict exists between adherence to precedent and flexibility in this circumstance. Flexibility permits a judge to reject precedent when a litigant’s arguments on the merits persuade her to do so. It frees the judge and litigants from *non-merits-related* constraints that would otherwise hold the judge and litigants to the prior case. For example, flexibility frees judges and litigants of a rule that requires following precedent for its own sake, whether or not it is persuasive. When the merits themselves rather than a non-merits constraint cause a judge to choose precedent, no conflict exists. The litigant has the right to be heard, not the right to be right.

them. For example, without so much as reading *Marbury v. Madison*,²²⁵ a judge might decide to treat as correct the assertion that the Constitution permits judicial review. In this circumstance, the judge does not necessarily agree with the analysis in prior cases; for all she knows, she might have decided *Marbury* differently if the question of judicial review had been put to her as an initial matter. But she wants to treat at least some principles as beyond question.

Flexibility in stare decisis means that a litigant must have the chance to persuade the court on the merits of the issues important to her case. The question, then, is what it means to resolve a case on its merits. The view that treating some principles as water under the bridge offends fairness rests on the assumption that independent analysis of a legal proposition is the only acceptable way of testing its merit. Considering the pedigree of a legal proposition, however, also can serve as a reasonable way to gauge its merit. The fact that a long line of predecessor courts has affirmed and reaffirmed a proposition is a valid indication that the proposition is sound. Indeed, some humility inheres in a judge's substituting the judgment of her predecessors for her own. A judge inclined to buck a long line of opposing precedent could reasonably wonder whether her view is idiosyncratic.²²⁶ Where a proposition is well-established, its pedigree is as acceptable a reason to follow it as a judge's own analysis. A well-worn path can serve as a shortcut to the resolution.

One way of thinking about this problem is by analogy to the civil law. Civil-law systems, as a formal matter, eschew reliance on precedent because they consider legislative enactments to be the only legitimate source of law.²²⁷ Albeit for a reason other than due process, civilian judges would also face a conflict in relying on a long line of precedent rather than thinking independently through an issue of textual interpretation. In such a circumstance, reliance on the precedent might offend separation of powers if the judge might

225. 5 U.S. 137 (1803).

226. Cf. Monaghan, *supra* note 67, at 755–56 n.184 (expressing “grave doubt that a judge should cast a deciding vote on the basis of a theory, however historically correct, that is unacceptable to his own colleagues, has long been unacceptable to his colleagues, and that has no reasonable likelihood of being acceptable to any future justice”).

227. MERRYMAN, *supra* note 221, at 29.

have come out a different way based on independent analysis of the text.²²⁸

A concept called *jurisprudence constante*, however, permits the civilian judge to take the shortcut of relying on a stream of precedent.²²⁹ Although a judge cannot legitimately rely on a single case, or even a handful of cases, as a basis for a judgment, she may rely on *jurisprudence constante*, a long line of cases. The consistent stream of decisions does not compel the judge to reach a particular result. Rather, it gives her a legitimate way of thinking about the merits, despite the normal injunction in civil law that she rely on text rather than gloss.

So here. A stream of consistent case law does not require a judge to reach a certain result, but it gives her a valid way of resolving the merits if she chooses to rely on it.

Deferring to a stream of cases is not merely a civilian concept; the common law has a similar practice. Even in the eighteenth century, when it was relatively uncommon for a judge to treat one opinion as binding, it was relatively common for a judge to rely on “the accumulated experience of the courts.”²³⁰ According to Caleb Nelson, the reason that common-law judges deferred to a line of cases is that they understood that earlier judges in the line would have scrutinized the logic of the first several decisions and overruled those decisions if they were incorrect.²³¹ As Nelson notes:

228. *Id.* at 29, 44.

229. John Bell, *Comparing Precedent*, 82 CORNELL L. REV. 1243, 1257 (1997) (book review) (“[T]he civilian approach typically gives greater weight to a line of authority (*la jurisprudence constante*) than to an individual decision. It is the cumulation of authority in a particular direction that is seen as persuasive.”) (citations omitted); James L. Dennis, *The 21st John M. Tucker, Jr. Lecture in Civil Law: Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 LA. L. REV. 1, 15 (1993) (“When a series of decisions forms a constant stream of uniform and homogeneous rulings having the same reasoning, [*jurisprudence constante*] accords the cases considerable persuasive authority and justifies, without requiring, the court in abstaining from new inquiry because of its faith in the precedents.”) (citations omitted); Francesco G. Mazzotta, *Precedents in Italian Law*, 9 MSU-DCL J. INT’L L. 121, 142 (2000) (explaining that not one decision, but “a coherent group of decisions,” established “*giurisprudenza costante*” in Italian law); Alvin B. Rubin, *Hazards of a Civilian Venturer in a Federal Court: Travel and Travail on the Erie Railroad*, 48 LA. L. REV. 1369, 1372 (1988).

230. Nelson, *supra* note 69, at 35–36 n.124 (quoting Kempin, *supra* note 207, at 30); see also Lee & Lehnhof, *supra* note 1, at 172 (under the “custom of the realm,” a line of decisions carried more force than any one decision (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *70)).

231. Nelson, *supra* note 69, at 35–36.

[I]f each judge in the series had felt bound by the first decision on the issue, then there would have been no difference between a series of decisions and an isolated precedent; the chance that the series was correct would be identical to the chance that the first decision was correct.²³²

It is not only the participation of many judges over time that gives value to a settled line of precedent; the participation of many litigants over time adds value as well. One reason that we value litigant participation in the context of preclusion law is the recognition that different litigants might get different outcomes on the same set of facts.²³³ This is not to say that results are always arbitrary—that there is never a right answer and that each litigant is entitled to her own shot at convincing the decisionmaker to buy into a relative view of correctness. But this is to say that the process of legal decisionmaking is complicated, no less in matters of law than in matters of fact. The first framing of an issue may not present the full picture. Certain arguments may be overlooked or poorly made. Overly attractive or unattractive aspects of a particular litigant or lawyer's personality, circumstances, or demeanor might push a decisionmaker one way or another.

232. *Id.* at 36.

233. Roger Trangsrud has observed that:

[O]ur civil justice system has traditionally and correctly aimed to give each individual . . . a fair and equal opportunity to try his case, knowing that similarly situated plaintiffs will sometimes obtain widely different outcomes. The value of insuring absolute consistency has for centuries been regarded as not worth the compromised due process and diminishment of individual claim autonomy

Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 77; see also Johnson, *supra* note 102, at 1323–24; 18 WRIGHT ET AL., FEDERAL PRACTICE, *supra* note 86, at § 4416:

Considerations of sympathy, prejudice, distaste for the substantive rules, and even ignorance or incapacity may control the outcome Determinations of who was negligent, for example, may be affected by the apparent attractiveness of the parties, the extent of their injuries, speculation as to insurance coverage, and many other factors that legal rules hold irrelevant. To transport an apparent finding of negligence from one trial setting to another may turn upside down the real purposes and actual determinations of the first tribunal.

Lawrence George claims that it is the possibility of different litigants getting different results, not the “abstract constitutional assurance” of a “day in court,” that drives preclusion doctrine. George, *supra* note 102, at 679. *But see* Bone, *supra* note 102, at 233–34 (disputing the idea that litigant participation affects outcomes).

Allowing an issue to be hashed out multiple times compensates for the imperfections—the very humanness—in the process of decisionmaking. It allows the courts to see a more complete picture before rushing to judgment.²³⁴ All arguments may not have been aired, or aired well, the first time, but by the tenth, or twentieth time, chances are that they will have been made. An idiosyncrasy of personality or circumstance may have pushed one or even two decisions in a particular direction, but by the time a long line of decisions has been issued on a certain point, some trends should emerge that are independent of the personalities behind them. This is a phenomenon that some scholars have observed in the mass tort context: When litigation involving a particular mass tort is “immature,” individual judgments are often aberrational; by the time it has evolved to a “mature” state, similarly situated plaintiffs tend to receive similar outcomes and damages.²³⁵

Of course, if a judge can substitute the judgment of a long line of predecessors for her own, one might wonder why she cannot substitute the judgment of a handful of her predecessors for her own. If it does not offend fairness for a judge to refuse to reconsider thick precedent, why does it offend fairness for a judge to refuse to rethink thin precedent? The difference is in degree rather than kind, but degree matters here. The question is when it becomes reasonable to use the pedigree of a legal proposition as a proxy for the proposition's

234. Cf. Lee, *Economic Perspective*, *supra* note 76, at 652 (stating that stare decisis helps judges get it right, as they “check their results against those reached by other judges”) (quotations omitted); Nelson, *supra* note 69, at 58 (“good arguments will tend to perpetuate themselves even under the weaker version of stare decisis, while bad arguments will have less staying power”). It is the Supreme Court's desire to see a more complete picture before rushing to judgment that leads it to allow issues to “percolate” in the lower courts before taking them up in the Supreme Court. See ROBERT L. STERN ET AL, *SUPREME COURT PRACTICE: FOR PRACTICE IN THE SUPREME COURT OF THE UNITED STATES* (7th ed., BNA 1993). Indeed, reluctance to “freez[e] the development of the law” by allowing the first determination of a legal issue to control all others is one reason why the Court refuses to allow nonmutual estoppel to be asserted against the United States. *United States v. Mendoza*, 464 U.S. 154, 164 (1984). The United States is often the only litigant against whom certain issues will be litigated; thus, to hold the United States to the results of a suit against one party could effectively stop, in all circuits, litigation of a particular issue. To be sure, the “freeze” that would accompany the application of nonmutual collateral estoppel would be more complete than that accompanying the application of rigorous stare decisis, because issue preclusion applies across jurisdictional lines. The problem, however, is nonetheless present in both circumstances.

235. TIDMARSH & TRANGSRUD, *supra* note 115, at 235–36.

merit; the longer the pedigree, the better a proxy it is. There is institutional value in airing an issue multiple times. But at some point, relitigation ceases to add value.²³⁶ A point comes where all the arguments have been made and a variety of lawyers and litigants have made them.²³⁷ Consistency emerges. One cannot say the same of a proposition that only a smattering of prior courts have considered. While it is permissible and indeed desirable for a judge to rely on thin precedent for its persuasive value, it is unreasonable for her to accept it as conclusive without any critical analysis. Again, the analogy to *jurisprudence constante* is helpful: It is the existence of the line of cases, not any one case, that gives a proposition its force.

It presumably would be a rare case where precedent was thin and a judge could truly say she wanted to rely on it uncritically. A judge need not test the strength of an opinion by reading all the cases it cites, or by working the problem through as if she were writing the opinion herself. In most cases, simply reading the opinion gives the judge enough information to evaluate it. A judge has to read a case to see whether its holding decides the question at hand; in most cases, reading an opinion closely enough to get its holding also gives the judge enough information to evaluate whether or not she agrees with the holding. Indeed, if a judge reads an opinion reasonably closely, it would likely take more effort for her to turn simultaneous critical assessment of the opinion "off" than to turn it "on."²³⁸ As Earl Maltz observes, "[T]he degree to which reliance on precedent actually eases the rigors of judicial decision-making can easily be overstated."²³⁹

236. Similarly, in the preclusion context, Jay Tidmarsh and Roger Trangsrud have argued that once mass-tort litigation has become "mature," "continued prosecution of individual suits serves no useful purpose." TIDMARSH & TRANGSRUD, *supra* note 115, at 236.

237. At this same point, the litigant's interest in individual participation becomes weaker as well. Individual participation is important because it is extremely difficult to say with any certainty that a litigant has been adequately represented by one similarly situated prior litigant. Once an issue has percolated through the legal system for a length of time, however, it is safer to say that at some point along the way (and maybe even in a combination of litigants along the way) the current litigant was adequately represented.

238. *Cf.* Paulsen, *supra* note 2, at 1545 (questioning how much efficiency is gained by the "disposition" function of stare decisis).

239. Maltz, *The Nature of Precedent*, *supra* note 67, at 370.

Reliance on thick horizontal precedent is also relatively rare. The kind of well-established precedent that judges accept almost unthinkingly is most likely to exist in the Supreme Court, and the Supreme Court is not likely to grant certiorari if the question presented challenges the well-established. Except with respect to matters of special expertise, like, perhaps, administrative law in the D.C. Circuit or patent law in the Federal Circuit, it is unlikely that a court of appeals would have the kind of precedent that is so absorbed into legal consciousness that lawyers and judges accept it as an article of faith. If the issue were that important, the Supreme Court would have addressed it, and the precedent would be vertical.²⁴⁰

To the extent, however, that precedent is well-established in a court of appeals, it is unlikely that many litigants would press for overruling it, even with a flexible system of stare decisis in place. Doing so would require them to expend resources on an argument with little chance of success. Precedent is the strongest predictor of what a court would do if faced with the same question again. The more cases that exist in the prior line, the stronger a predictor it is. A rational litigant will not invest legal fees in a sure loser. In addition, the courts of appeals limit the length of briefs; a rational lawyer will not advise a client to allocate precious brief space to a losing argument.

In sum, while a flexible approach to stare decisis would undoubtedly introduce some inefficiency into the system, it would not require the reconsideration of every case on the books.

CONCLUSION

We tend to think of stare decisis as an institutional doctrine. Viewed through the lens of issue preclusion, however, its impact on individual litigants comes into focus. The

240. Thomas Lee has noted that the efficiency argument works best as a justification for vertical stare decisis in district courts. Lee argues that district courts would have difficulty managing their workloads if, in addition to learning complex facts, they also had to devote a great deal of time to deciding legal questions. In district courts, vertical stare decisis streamlines the process. But in appellate courts, which have lighter dockets and deal primarily in legal principles, the efficiency rationale—particularly for horizontal stare decisis—is less compelling. Lee, *Economic Perspective*, *supra* note 76, at 648–49.

preclusive impact of stare decisis is real, and it can affect a litigant dramatically. Through the operation of stare decisis, litigants are bound to results obtained by those who have gone before them. They typically lack the opportunity to press their own arguments about whether precedent correctly interprets underlying statutory or constitutional provisions.

The comparison to issue preclusion also illuminates the due process limit on the courts' application of precedent. In issue preclusion, as in the application of precedent, adjudication is involved; adjudication triggers the Due Process Clause. Issue preclusion handles due process limits by restricting preclusion to parties and their privies. Stare decisis, at least as a formal matter, has chosen to handle the due process limit with flexibility. That flexibility, however, must be observed in substance as well as form. Flexibility requires that courts allow for the possibility of error-correction. Current stare decisis doctrine, however, does not generally allow for this possibility. Indeed, many aspects of current stare decisis doctrine—most notably, the combination of the no-panel-overruling rule and the stringent standards for en banc and Supreme Court review—affirmatively work *against* flexibility.

This Article urges the federal courts to restore flexibility to stare decisis doctrine. Generally speaking, if a litigant demonstrates that a prior decision clearly misinterprets the statutory or constitutional provision it purports to interpret, the court should overrule the precedent. Reliance interests count, but they count far less when precedent clearly exceeds a court's interpretive authority than they do when precedent, though perhaps not the ideal choice, was nonetheless within the court's discretion.

It is undeniable that attention to the participation rights of individual litigants would bring some inefficiency to stare decisis doctrine. It has done so for issue preclusion. But if due process indeed guarantees some opportunity to participate in judicial decisionmaking, we should start paying attention. Otherwise, the elaborate protections that we have in place for preclusion do not mean much.

CATHOLIC JUDGES IN CAPITAL CASES

JOHN H. GARVEY*

AMY V. CONEY**

Here is an interesting cultural collision. The death penalty is back in fashion in our legal system. Congress has created more than sixty new capital crimes. The Attorney General has used the new laws to prosecute Timothy McVeigh and Theodore Kaczynski. The federal courts have lost some of their authority to review state executions. The Catholic Church, with no sense of timing (or a fine sense of urgency), has picked this moment to launch a campaign against capital punishment. This puts Catholic judges in a bind. They are obliged by oath, professional commitment, and the demands of citizenship to enforce the death penalty. They are also obliged to adhere to their church's teaching on moral matters.

The legal system has a solution for this dilemma—it allows (indeed it requires) the recusal of judges whose convictions keep them from doing their job. This is a good solution. But it is harder than you think to determine when a judge must recuse himself and when he may stay on the job. Catholic judges will not want to shirk their judicial obligations. They will want to sit whenever they can without acting immorally. So they need to know what the church teaches, and its effect on them. On the other hand litigants and the general public are entitled to impartial justice, and that may be something that a judge who is heedful of ecclesiastical pronouncements cannot dispense. We need to know whether judges are sometimes legally disqualified from hearing cases that their consciences would let them decide.

We talk specifically about Catholic judges, but they are not alone in facing this difficulty. Quakers have opposed capital punishment in this country since its founding. The Church of the Brethren has long espoused the same pacifist ideal. The Union of American Hebrew Con-

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gregations, in common with a large number of liberal Protestant groups, has spoken out against the death penalty during much of this century. Unitarians and Universalists did so both before and after their merger in 1961.¹ And of course there may be any number of judges who believe in no God at all who would nevertheless have insurmountable conscientious problems with enforcing the death penalty. We focus on Catholic judges not because their church has set a better example, but because it is the one we belong to. So do a large number of judges. It is hard to get an exact figure, but it appears that as many as one-fourth of all federal judges may be Catholic.² Moreover, although there has been some variation in Catholic teaching about the death penalty over the years, the pope and the American bishops have recently offered clear and forceful denunciations that have drawn considerable public attention.

To simplify our exposition we also focus on federal judges, and this requires a little explanation. Historically the states have been more enthusiastic about capital punishment than the federal government. Of the 4,116 people executed (outside the military) since 1930, only thirty-three have been federal prisoners—none since 1963.³ But federal inclinations are changing fast. In 1988 Congress passed the “drug kingpin” statute (the Anti-Drug Abuse Act).⁴ Through May 1995 the government had asked for death sentences under that law in forty-six cases—six or seven a year.⁵ In 1994 Congress passed the Violent Crime Control

1. A useful collection of statements by these and other bodies can be found in *THE CHURCHES SPEAK ON: CAPITAL PUNISHMENT* (J. Gordon Melton, ed., 1989).

2. A National Law Journal survey of 348 state and 57 federal judges done in 1987 reports that 29% identified themselves as Catholic. Ellen L. Rosen, *The Nation's Judges: No Unanimous Opinion*, NAT'L L.J., Aug. 10, 1987, at S18. Lucy Payne, associate librarian in the Notre Dame Law Library, has searched individual biographies of federal judges and concluded that the figure is about 25%. Ms. Payne reviewed entries in the Marquis Database on Westlaw, American Bench 1995-96, and the Almanac of the Federal Judiciary. She also consulted faculty members about the religious affiliation of judges they knew personally. Using the 1151 entries in the Almanac as her base number, she confirmed that 180 are Catholic, and at least 109 others may be—a proportion that comes to 25.1%.

3. *Capital Punishment 1994*, BUREAU OF JUST. STAT. BULL. 10 (Feb. 1996). George Kannar, *Federalizing Death*, 44 BUFF. L. REV. 325, 329 (1996). Harry Blackmun was the last judge to pass on that prisoner's execution. *Feguer v. U.S.*, 302 F.2d 214 (8th Cir. 1962).

4. 21 U.S.C. § 848 (1997). In the years following *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976), Congress allowed death penalty statutes to languish on the books rather than revise them to comply with new constitutional requirements. The Anti-Drug Abuse Act thus in effect “reinstated” the federal death penalty.

5. Kannar, *supra* note 3, at 327. See, e.g., *United States v. McCullah*, 76 F.3d 1087 (10th Cir. 1996); *United States v. Flores*, 63 F.3d 1342 (5th Cir. 1995), *cert. denied*, 117 S. Ct. 87 (1996); *Chandler v. United States*, 996 F.2d 1073 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 2724 (1994); *United States v. Tidwell*, 1995 U.S. Dist. LEXIS 19153 (E.D. Pa. Dec. 22, 1995);

and Law Enforcement Act, which added about sixty new federal capital crimes.⁶ Of course federal judges encounter the death penalty most often in habeas review of state cases, and here Congress has recently *reduced* their role—so that state prisoners cannot delay execution by filing repeated petitions. The Antiterrorism and Effective Death Penalty Act of 1996⁷ will prevent a certain amount of this, but it is less radical than some suppose. Federal judges will still see a fair number of state capital cases.

So federal judges do less capital sentencing than state judges. But they are getting more active. And the “drug kingpin” law contains a recent, detailed set of procedures for death cases that will help us explain the various roles judges may play. Finally, the federal recusal statute, substantially amended in 1974, is as good a law as anything the states have to offer for addressing this problem. Our conclusions would not be different if we were to focus on state judges—indeed, we hope to have most influence on that level. We have chosen to state our case in federal terms in order to make it as accessible as possible.

To anticipate our conclusions just briefly, we believe that Catholic judges (if they are faithful to the teaching of their church) are morally precluded from enforcing the death penalty. This means that they can neither themselves sentence criminals to death nor enforce jury recommendations of death. Whether they may affirm lower court orders of either kind is a question we have the most difficulty in resolving. There are parts of capital cases in which we think orthodox⁸ Catholic judges

United States v. Perry, 1994 U.S. Dist. LEXIS 20462 (D.C. Jan. 11, 1994).

6. Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994); Charles Kenneth Eldred, Note, *The New Federal Death Penalties*, 22 AM. J. CRIM. L. 293 (1994).

7. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

8. We have had some difficulty in choosing an adjective that means nothing more nor less than “faithful to the teaching of the church on the subject of capital punishment.” The word “observant” has something to recommend it, though in ordinary Catholic circles it is likely to signify someone who regularly receives the sacraments and observes the rituals of the church. “Orthodox” has several misleading connotations. One is that it is also used to designate particular sects, like those eastern churches (Russian Orthodox, Greek Orthodox) not in communion with Rome. Though there is a division of opinion among the members of the Roman Catholic Church on the subject of capital punishment, we do not wish to imply that it has led to the formation of camps, branches, or sects within the church. “Orthodox” has also been used in a sociological sense by writers like James Davison Hunter to signify a kind of religious conservatism (its antonym is “progressive”). JAMES DAVISON HUNTER, *CULTURE WARS* 43-46 (1991). Opposition to capital punishment is not a trait characteristic of this group. Above all we do not wish to imply that one’s orthodoxy (or heterodoxy) with regard to this point of doctrine entails anything about the soundness of one’s judgment or

may participate—these include trial on the issue of guilt and collateral review of capital convictions. The moral impossibility of enforcing capital punishment in the first two or three cases (sentencing, enforcing jury recommendations, affirming) is a sufficient reason for recusal under federal law. But mere identification of a judge as Catholic is not a sufficient reason. Indeed, it is constitutionally insufficient.

I. CATHOLIC TEACHING ABOUT CAPITAL PUNISHMENT

In the last twelve years there has been an explosion of thought about the role of religion in our law and politics.⁹ On the whole this work has been very beneficial. It has led to a deep and sympathetic understanding of a very serious issue. One shortcoming of this body of writing is that the treatment of religion has been fairly abstract and general. It will not suffice to discuss our problem on that plane. Catholic teaching about capital punishment is fairly complicated. Furthermore, it is not possible to say, as some might suppose, that members of the Catholic Church are simply bound by their faith to follow the Church's teaching on this issue. And even if they were, the prohibition against capital punishment has different implications for people acting in different roles. Though one might say that it was simply and unqualifiedly wrong to flip the switch or pull the trigger that kills a human being, this is not what judges do. Judges cooperate in many ways more or less direct with that evil act, and their participation in some of these ways is permissible, even commendable. In the first half of our paper, we will examine some of these complications.

A. *Teaching About Capital Punishment*

In modern Catholic teaching, capital punishment is often condemned along with other practices whose point is the taking of life—abortion, euthanasia, nuclear war, and murder itself. It is sometimes said that consistency requires no less—that respect for life in all these cases is a seamless garment.¹⁰ Human beings are created in the image and likeness of God, and “[h]uman life is thus given a sacred and invio-

religious behavior in other areas. By “orthodox Catholic” in the context of our subject we mean simply one who holds as correct the teaching of the church's magisterium about capital punishment.

9. It started with Kent Greenawald's Cooley Lectures at the University of Michigan Law School, published as *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352 (1985).

10. The metaphor is Cardinal Joseph Bernardin's. JOSEPH BERNADIN, CARDINAL BERNADIN'S CALL FOR A CONSISTENT ETHIC ON LIFE (1983), reprinted in 13 ORIGINS 491 (1983).

lable character, which reflects the inviolability of the Creator himself."¹¹ That seems to make things pretty simple. It is a good rule of thumb to say, "No killing. Period." But a more precise statement of the church's teaching requires a few qualifications. The prohibitions against abortion and euthanasia (properly defined) are absolute; those against war and capital punishment are not.

There are two evident differences between the cases. First, abortion and euthanasia take away innocent life. This is not always so with war and punishment. Second, in cases of aggression it may be impossible to avoid the taking of life. Sometimes the only way to save the victim is to do what will in fact kill the aggressor. Let us consider how these differences affect the church's position on capital punishment.

1. Guilt and Retribution

We might distinguish between executing criminals and killing the aged and the unborn in this way: criminals deserve punishment for their crimes; aged and unborn victims are innocent. The church certainly teaches that criminals deserve punishment. In his recent encyclical, *Evangelium Vitae*, Pope John Paul II says that the

primary purpose of the punishment which society inflicts is "to redress the disorder caused by the offense." Public authority must redress the violation of personal and social rights by imposing on the offender an adequate punishment for the crime, as a condition for the offender to regain the exercise of his or her freedom.¹²

When X commits a crime the government should "redress the disorder" ("redress the violation") by punishing him. But is death a proper redress?

That depends on what balance or disorder we are trying to redress. In Catholic teaching the desire to get even—to take revenge, to appease one's anger—is not a permissible reason for acting. If it were it might justify execution, because the proper measure would be the feelings of those concerned about the victim, and they might be satisfied with no less. But the gospel teaches that it is wrong to act out of hatred, to answer evil with evil. When the pope speaks of the need for redress, he has in mind a requirement of justice. We who live in society accept con-

11. John Paul II, *EVANGELIUM VITAE* § 53 (1995). Cf. *Genesis* 1:26-28.

12. *EVANGELIUM VITAE* § 56, quoting *CATECHISM OF THE CATHOLIC CHURCH* ¶ 2266 (1994). This section of the Catechism was revised in 1997 to conform more closely with *Evangelium Vitae*. We explain the changes *infra* at notes 33-35.

straints on our own actions out of consideration for other people and for the good of society. It might serve my purposes to knock you down and take your car, but I subscribe to a set of laws that forbid me to do that. The criminal who engages in car-jacking, however, cheats on rules that the rest of us obey, and seizes "more than [his] fair share of the liberty to do as one pleases. This overreaching requires steps to restore a just balance between criminals and law-abiding people."¹³ This is why fines and imprisonment are appropriate means of punishment: a fine diminishes the criminal's assets and so his opportunities for choice, and prison directly restrains his liberty.

But what about taking his life, as he has taken the life of his victim? This misstates the relevant comparison. As John Finnis points out, the "law of talion" (life for life, eye for eye, etc.) misses the point, for it concentrates on the material content or consequences of criminal acts rather than on their formal wrongfulness (unfairness) which consists in a will to prefer unrestrained self-interest to common good, or at least in an unwillingness to make the effort to remain within the common way.¹⁴

The measure of guilt is not the harm done to the victim (though that should certainly be repaired, if it can) but the selfish will of the criminal. There should doubtless be some proportion between the criminal's bad will and the severity of his punishment, but the theory of retribution does not permit us to be more specific. It does not justify capital punishment. Neither does it rule it out.

For the Christian, though, there are reasons to limit the measure of retribution. First, there is the belief that each person is made in the image and likeness of God. This is no less true of those who have broken the law than of those who have kept it. Recognizing this dignity "should make us unwilling to treat the lives of even those who have taken human life as expendable."¹⁵ Second, though the case of criminals is different from the unborn, the aged, and the infirm, rejecting the death penalty "removes a certain ambiguity which might otherwise affect the witness that we wish to give to the sanctity of human life in all its stages."¹⁶ It makes a more convincing case against abortion and euthanasia if we can say in an unqualified way that God alone is the Lord of

13. GERMAIN GRISEZ, 2 THE WAY OF THE LORD JESUS: LIVING A CHRISTIAN LIFE 891 (1993); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 262-263 (1980).

14. FINNIS, *supra* note 13, at 264.

15. U.S. CATHOLIC CONFERENCE, U.S. BISHOPS' STATEMENT ON CAPITAL PUNISHMENT ¶ 11 (Nov. 1980).

16. *Id.* at ¶ 12.

life. Third, and most important, rejection of the death penalty is most consistent with the example of Jesus, who taught and practiced that we should love our enemies.¹⁷

2. Incapacitation and Deterrence

Let us turn now to the second difference that we observed between capital punishment and abortion or euthanasia. A thoroughly consistent respect for human life can create real dilemmas. It may happen, for example, that the only way to stop an aggressor from taking one's own life is to take his instead. The church teaches that if one acts with the intention of stopping such an attack, and uses only such force as is necessary for doing so, one shows a proper respect for life.¹⁸ The same principle applies to the defense of others entrusted to one's care—a parent protecting his or her children, for example.¹⁹ And in traditional Catholic teaching the principle has sometimes been extended to the death penalty. Consider what the 1994 edition of the Catechism of the Catholic Church had to say:

Preserving the common good of society requires rendering the aggressor unable to inflict harm. For this reason the traditional teaching of the Church has acknowledged as well-founded the right and duty of legitimate public authority to punish malefactors by means of penalties commensurate with the gravity of the crime, not excluding, in cases of extreme gravity, the death penalty. . . .

If bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority should limit itself to such means, because they better correspond to the concrete conditions of the common good and are more in conformity to the dignity of the human person.²⁰

There is some ambiguity here about just what it is that the death penalty defends us against. There is a clear suggestion that it may sometimes be necessary to incapacitate the criminal (“defend human lives against an aggressor”), as the police may be obliged to use lethal force against attacking felons. The phrase “protect public order and the

17. *Id.* at ¶ 13; *Matthew* 5:44.

18. THOMAS AQUINAS, 3 THE SUMMA THEOLOGIAE IIaIIae, Q. 64, a.7 (Fathers of the English Dominican Province trans., 1981).

19. CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2265, 2309 (1994).

20. *Id.* at ¶¶ 2266-2267. *Cf. supra* note 18, at Q. 25, a.6; Q. 64, a. 2.

safety of persons" is more uncertain. Some say we must execute murderers to deter others from acting likewise. Standing alone, this is not an argument that Catholics can accept. The appeal to general deterrence is a claim that we should do evil for the good that may come of it, and that is an impermissible suggestion.²¹ Perhaps if there is some other justification for punishing the criminal in this way (retribution, for example), the likelihood of deterrence would be an additional reason for going to that extreme.

The modern Catholic opposition to the death penalty has been driven by the conviction that neither of these arguments about the defense of society—the need for incapacitation and deterrence—is persuasive in developed countries. The Pontifical Commission for Justice and Peace, which studied the question at the request of the American Catholic bishops, concluded in 1976 that "There is no convincing evidence to support the contention that [the death penalty] is exemplary or, in modern terms, a deterrent. [Therefore] it can be concluded that capital punishment is outside the realm of practicable just punishments."²² Four years later the National Conference of Catholic Bishops issued a Statement on Capital Punishment which concluded "that in the conditions of contemporary American society, the legitimate purposes of punishment do not justify the imposition of the death penalty."²³ Like the Pontifical Commission, the bishops stressed the lack of evidence to prove that occasional executions have any general deterrent effect. They did not gainsay the importance of protecting society from violence. But, they said, the legal process that must precede an execution is long and complex, so it is not a very effective means of preserving order in times of civil disturbance. All in all, given "its nature as legal penalty and . . . its practical consequences, capital punishment is different from the taking of life in legitimate self-defense or in defense of society."²⁴ The bishops were less dogmatic in their pronouncement than they sometimes are. The Statement was adopted by a vote of 145 to 31, with 41 abstentions. It closed with a recognition that many citizens sincerely believe in capital punishment: "nor is this position incompatible with

21. M.B. Crowe, *II Theology and Capital Punishment*, 31 IRISH THEO. Q. 99, 112 (1964); Germain G. Grisez, *Toward a Consistent Natural-law Ethics of Killing*, 15 AM. J. JURIS. 64, 70-71 (1970).

22. *The Church and the Death Penalty* (1976) (emphases omitted), reprinted in 6 ORIGINS 389, 391 (1976).

23. UNITED STATES CATHOLIC CONFERENCE, *supra* note 15, at ¶¶ 8-9.

24. *Id.* at ¶ 8.

Catholic tradition.”²⁵

When Pope John Paul II addressed the subject in his 1995 encyclical *Evangelium Vitae*, he was not so hesitant. He said:

[T]here is a growing tendency, both in the Church and in civil society, to demand that [the death penalty] be applied in a very limited way or even that it be abolished completely. . . . [T]he nature and extent of the punishment must be carefully evaluated and decided upon, and ought not go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society. Today however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent.²⁶

The pope did not clarify exactly what *would* count as a case where the death penalty was justified. The first example that comes to mind is a society where murderers cannot be kept securely in custody for the duration of their terms. That is not the United States, where people rarely escape from federal prison.²⁷ And even if it were true in (say) New Mexico because its state prisons were (let us suppose) obsolete and poorly guarded, one might justifiably argue that New Mexico could not avoid its moral obligations by under-funding its penal system. It might be different if the New Mexico economy were so primitive that it could not afford to build and maintain a modern prison system, but that is not the case. This argument—the failure of incapacitation—is one that will work only in parts of the world far less developed than the United States.

A second example that comes to mind is one in which imprisonment is not an effective specific deterrent—such as murder by a prisoner already serving a life sentence.²⁸ The pope’s encyclical speaks of the impossibility of “defend[ing] society.” Murderous prisoners, because they are in prison, do not pose a threat to society as such. Their victims are guards and other prisoners. The pope probably did not mean to suggest

25. *Id.* at ¶ 22.

26. *EVANGELIUM VITAE* *supra* note 11, at §56 (emphasis omitted).

27. The Federal Bureau of Prisons reports that in fiscal 1994 only one prisoner escaped from a federal correctional facility; in 1995 the number was six. (The Bureau distinguishes escapes from “walk-aways” and “AWOLs”—the loss of control over prisoners in looser forms of custody.) BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1995, Table 6.56 (1996) (visited Mar. 1, 1998) <http://www.albany.edu/sourcebook/1995/tos*_6.html#6_S>.

28. EDWARD A. MALLOY, C.S.C., *THE ETHICS OF LAW ENFORCEMENT AND CRIMINAL PUNISHMENT* 88 (1982).

that capital punishment could be imposed if it would save many lives (“society”), but not if it would save only a few (guards and prisoners). If the Church rejects the death penalty for murderers already serving life sentences, the more likely explanation would be that it does not work or that there are alternatives (better security before the fact, increased punishments like solitary confinement after the fact) that do.²⁹

The third sort of exception to the presumptive rule against capital punishment—the most obvious meaning of “defend[ing] society”—may be the case where crime threatens the stability of the political order. Karl Barth, though in principle opposed to capital punishment, argued that it was called for in cases of high treason in wartime.³⁰ John Langan, S.J., has suggested that when the pope spoke of defending society he may have been thinking of countries like Colombia where the democratic process is seriously threatened by crime on a large scale.³¹ Perhaps the implication is that the state can be made secure only by reducing the number of gang lords and their soldiers rather than incarcerating them. A sufficiently large and well organized criminal element could infiltrate, intimidate, and overpower courts, police, prosecution, and prisons. Better, therefore, to kill those who commit murder.

This example, like the first one, does not fit the United States very well. The United States is unusually violent for a developed nation. Its large cities have gangs that engage in drug trafficking, mayhem, and murder. These criminal organizations, for the most part unconnected with one another, do not threaten the stability of the federal or state governments. They do make life in urban neighborhoods hazardous and unpleasant. But it is seldom suggested that the murderers among them be executed in order to reduce the criminal element to manageable size. Some say the death penalty should be imposed because gang members

29. The 1976 statement by the Pontifical Commission for Justice and Peace hints at the first point. In the course of its argument that executions do not deter, the Commission cited a study purporting to show that this was true even for those who murdered policemen. *The Church and the Death Penalty*, *supra* note 22, at 391. Edward Malloy argues that it is psychologically improbable, given the barbarous conditions of prison life, that the threat of death at the hands of the state looms large in prisoners' deliberations. MALLOY, *supra* note 28, at 88. One can even imagine a life prisoner committing murder in order to end a sentence that he was finding unendurable.

30. III KARL BARTH, *CHURCH DOGMATICS* 448 (Part 3, 1960). Barth's reason is that the traitor, by endangering his country, has “forfeited his right to live in this community and therefore to be rightly subject to death[.]” *Id.* Such arguments about desert do not fit very comfortably with the Catholic approach to capital punishment.

31. John Langan, S.J., *Situating the Teaching of John Paul II on Capital Punishment: Reflections on Evangelium Vitae in CHOOSING LIFE* 210, 221 (Kevin W. Wildes, S.J. & Alan C. Mitchell eds., 1997).

who murder deserve it. That argument is foreclosed by Catholic teaching on the subject. Some say we should impose it because that is the only way to deter urban crime. But there is no reason to think that urban criminals are peculiarly susceptible to deterrence. The argument probably works no better here than it does elsewhere.

The almost unqualified condemnation of capital punishment announced by the pope in *Evangelium Vitae* led this year to a change in the language of the Catechism that we quoted above.³² It now reads this way:

Assuming that the guilty party's identity and responsibility have been fully determined, the traditional teaching of the church does not exclude recourse to the death penalty, if this is the only possible way of effectively defending human lives against the unjust aggressor.

If, however, non-lethal means are sufficient to defend and protect people's safety from the aggressor, authority will limit itself to such means, as these are more in keeping with the concrete conditions of the common good and more in conformity with the dignity of the human person.

Today, in fact, as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offense incapable of doing harm—without definitively taking away from him the possibility of redeeming himself—the cases in which the execution of the offender is an absolute necessity are very rare, if not practically nonexistent.³³

This version consciously stresses that the only acceptable justification for executing a criminal is the need to keep him from killing again (“the only possible way of effectively defending human lives against the unjust aggressor”; “defend and protect people's safety from the aggressor”; “rendering one who has committed an offense incapable of doing harm”). The 1994 version spoke conjunctively about the need “to defend human lives against an aggressor and to protect public order and the safety of persons.”³⁴ The 1997 version deletes the suggestion that “protecting public order” is a sufficient reason for the death penalty.³⁵

32. See *supra* page 309.

33. *Vatican List of Catechism Changes*, 27 ORIGINS 257, 261 ¶ 2267 (1997).

34. CATECHISM OF THE CATHOLIC CHURCH *supra* note 19, at ¶ 2267 (1994).

35. The amended version of ¶ 2266 observes that punishment serves three purposes: “defending public order,” “protecting people's safety,” and “a medicinal purpose”

B. *The Binding Effect of Church Teaching*

We have been talking about the Catholic Church's teaching on the subject of capital punishment. Let us look now at how it might be binding on Catholic judges. This subject—the authoritative force of Catholic teaching on church members—is fairly complex. It is not the case that individual Catholics must, on pain of infidelity, follow all directives of the pope and the bishops. The authoritativeness of church teaching varies in several ways. First, it matters who the speaker is. Statements by individual bishops or offices in the Vatican bureaucracy may have less weight than statements by episcopal conferences (like the National Conference of Catholic Bishops) or by the pope. Second, it adds something to the authority of the speaker if there is vertical as well as horizontal support for it—*i.e.*, if the teaching is not only currently widespread, but has a long history behind it. Third, authority is also a function of the speaker's intention. The pope and the bishops have (rather rarely) made statements which are treated as infallible teachings, but when they do so, they indicate as much. This is not unlike a clear statement rule in statutory interpretation: if the teaching is not accompanied by an express claim to that kind of authority, it warrants less deference.³⁶ Fourth, the authoritativeness of the Church's teaching varies with the subject matter. Its decrees about astronomy have not been notably successful.³⁷ The Church's jurisdiction, if we may express it that way, is limited to matters of "faith or morals,"³⁸ and within that domain it speaks with more assurance on some matters (*e.g.*, that Jesus is God) than on others (*e.g.*, that the use of contraceptives is immoral).³⁹

Recent teachings about the death penalty have certainly come from

(contributing "to the correction of the guilty party"). *Vatican List of Catechism Changes, supra* note 33, at 261. Only the second of these is carried over to the next paragraph, which takes up the death penalty.

36. The "Dogmatic Constitution on the Church (*Lumen Gentium*)" issued by Vatican II states that the pope teaches infallibly only when "he proclaims *by a definitive act* some doctrine of faith or morals." *The Dogmatic Constitution on the Church (Lumen Gentium)*, in THE DOCUMENTS OF VATICAN II 14 (Walter M. Abbot, S.J. ed. & Very Rev. Msgr. Joseph Gallagher trans. ed., 1966). The bishops do so only when they enunciate such a doctrine in a council approved by the pope, or when—scattered throughout the world—"they concur in a single viewpoint *as the one which must be held conclusively.*" *Id.* at § 25.

37. Addressing the Pontifical Academy of Sciences in October 1992, Pope John Paul II acknowledged that the judges of the Holy Office were wrong to condemn Galileo. *Lessons of the Galileo Case*, 22 ORIGINS 370 (1992).

38. *Lumen Gentium supra* note 36, at § 25.

39. For a fuller treatment of these themes see John H. Garvey, *The Pope's Submarine*, 30 SAN DIEGO L. REV. 849 (1993).

the sources that American Catholics should find most authoritative—the pope, the American bishops, and the Catechism of the Catholic Church.⁴⁰ There are, however, several reasons for saying that none of these teachings should be treated as infallibly true. There was, to begin with, some dissent from the bishops' 1980 statement, which closed with a recognition that a belief in capital punishment was not “incompatible with Catholic tradition.” It is also true that the pope's encyclical does not display the kind of clear intention that accompanies infallible pronouncements.

Moreover, it cannot fairly be said that the current teaching has been the unanimous and long-standing belief of the church. The early Fathers were not of one mind about capital punishment. Clement of Alexandria (c. 150-211) supported the idea for the irreformable evildoer—for his own sake, to prevent him from doing further wrong, and for the defense of society, which he might infect.⁴¹ Origen (c. 185-254) took the state's power over life and death for granted, as did St. John Chrysostom (c. 344-407).⁴² Augustine mentions, as an exception to the commandment against killing, the action of those who represent “the public justice . . . and in this capacity . . . put to death wicked men.”⁴³ Thomas Aquinas in the high middle ages argued that “if any man is dangerous to the community and is subverting it by some sin, the treatment to be commended is his execution in order to preserve the common good[.]”⁴⁴ In the same period the church required certain heretics returning to the faith to profess (among other things) the belief that public officials could impose capital punishment without committing any grave sin.⁴⁵

It might therefore be said that the Church has wandered a bit before coming to its current conclusion. Its teaching is nevertheless entitled to

40. The Catechism was begun at the request of the Synod of Bishops convened in 1985 for the twentieth anniversary of the close of the Second Vatican Council. “The project was the object of extensive consultation among all Catholic Bishops, their Episcopal Conferences or Synods, and of theological and catechetical institutes. As a whole, it received a broadly favorable acceptance on the part of the Episcopate.” CATECHISM OF THE CATHOLIC CHURCH *supra* note 12, at 4. At the time of its publication the pope declared it to be “a sure norm for teaching the faith.” *Id.* at 5.

41. *The Stromata, or Miscellanies* Book I, ch. xxvii, in II THE ANTE-NICENE FATHERS 339 (Alexander Roberts & James Donaldson eds., 1956).

42. M.B. CROWE, I THEOLOGY AND CAPITAL PUNISHMENT 24, 32-35 (1964).

43. I SAINT AUGUSTINE, CITY OF GOD, ch. 21., at 27 (Marcus Dods trans., Random House, 1950).

44. AQUINAS, *supra* note 18, at 2a 2ae Q. 64, a.2. See also JAMES J. MEGIVERN, THE DEATH PENALTY: AN HISTORICAL AND THEOLOGICAL SURVEY (1997) (providing a fairly extensive review of the history of Catholic thought on the death penalty).

45. GRISEZ, *supra* note 13, at 893 & n.108.

serious respect from church members. Vatican II's Constitution on the Church said the following about such non-infallible moral teachings:

Bishops, teaching in communion with the Roman Pontiff, are to be respected by all as witnesses to divine and Catholic truth. In matters of faith and morals, the bishops speak in the name of Christ and *the faithful are to accept their teaching and adhere to it with a religious assent of soul. This religious submission of will and of mind must be shown in a special way to the authentic teaching authority of the Roman Pontiff, even when he is not speaking ex cathedra [i.e. infallibly].*⁴⁶

That is fairly strong language, and it seems to cover a case like this where the bishops are "teaching in communion with the [pope]." Notice, though, that it is limited to "matters of faith and morals," and that even with respect to such matters, the duty to comply cannot be any clearer than the teaching itself. That clouds the issue slightly.

The proclamations at issue here are not flat prohibitions like the ban on abortion, which (properly defined) is always immoral. Capital punishment, the pope declares, is permissible "in cases of absolute necessity[,] when it would not be possible otherwise to defend society."⁴⁷ It is difficult to think of examples, as we have indicated. The pope himself has observed that "such cases are very rare, if not practically non-existent."⁴⁸ Still, one could conceivably accept the Church's teaching but consider that it does not apply to cases that we have not yet (because of a lack of imagination) been able to hypothesize.

One might also reject the current teaching, or rather the assumptions underlying it, on the theory that they are not concerned with "matters of faith and morals." Both the pope and the United States bishops make a more or less strictly moral claim that only reasons analogous to self-defense can justify capital punishment. This is not the sort of claim that will be more persuasive in some times and places than in others. However, the statements about what *will* justify executions are of a different sort. The Catechism, the bishops, and the pope all say that capital punishment is only permitted when it is necessary to protect public safety and order. The pope adds the observation that "[t]oday . . . , as a result of steady improvement in the organization of the penal system, such

46. *Lumen Gentium supra* note 36, at § 25 (emphasis added). Canon 752 of the Code of Canon Law uses almost the same language. THE CODE OF CANNON LAW, §752 (James A. Cordien et al. eds., 1983).

47. *Evangelium Vitae supra* note 11, at § 56.

48. *Id.*

cases are very rare, if not practically non-existent.”⁴⁹ One might say that the pope and the bishops, while entitled to the utmost respect for their moral judgments, are no better than any other interested observer when it comes to describing the level of violence in twentieth century America or the deterrent effect that capital punishment has on the average American gangster. Indeed it is conceivable that the pope’s statement, directed as it is to the Catholic Church throughout the world, is not even intended to describe American society in particular.⁵⁰

One could say all this, but it has an air of evasion about it. We have found it difficult to imagine cases where the death penalty would be necessary in the requisite sense. The United States bishops’ judgment about deterrence matches the prevailing opinion among informed observers.⁵¹ The pope’s insistence on a showing of “absolute necessity” suggests that even if his empirical judgment is only approximately true, we should draw the same moral conclusion.

C. Cooperation with Evil

Thus far, we have discussed what the Catholic Church teaches about capital punishment and what binding effect that teaching might have on Church members. But there is still another facet to the problem for Catholic judges: not everyone who plays a role in the system of capital punishment bears the same degree of guilt. Some do not act wrongly at all. In the old Code of Canon Law there was a rule that a person who had served as a public executioner could not be ordained as a priest. His immediate assistants were also disqualified, but only if they had actually taken part in an execution. The judge who imposed the death sentence was also disqualified, but jurors who only made a decision about guilt or innocence were not. Nor were lawyers, witnesses, or even those who built scaffolds.⁵² These distinctions might seem too refined, but they are not out of line with our own intuitions. The most adamant opponent of capital punishment today would probably impute no blame to the manufacturer whose needles are used for a lethal injection; nor to

49. *Id.*

50. Langan, *supra* note 31, at 11.

51. CHALLENGING CAPITAL PUNISHMENT (Kenneth C. Haas and James A. Inciardi eds., 1988); NATIONAL RESEARCH COUNCIL, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (1978); Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177 (1981).

52. T. LINCOLN BOUSCAREN, S.J., & ADAM C. ELLIS, S.J., CANON LAW: A TEXT AND COMMENTARY c. 984, 6°-7° (1946).

the bus driver who brings the executioner to work. If we are going to make these kinds of distinctions, we will also (though for rather different reasons) have a difficult time with judges, who play a wide variety of roles. At one extreme is the sentencing judge who imposes a sentence of death. This is still a step removed from the actual execution, which the judge will not even see, but it is a role where the judge bears a primary responsibility for what happens to the criminal. At the other end is the Supreme Court justice who votes to deny certiorari to a state prisoner, condemned to death, whose last hope is to convince someone that the trial court improperly denied his suppression motion. Our instinct is to say that the Church's teaching on capital punishment has little bearing on this last case. But how exactly is it different?

In Catholic moral theology, there is an extensive literature on this subject, usually collected under the heading of cooperation with evil. Stated abstractly, these are cases where one person ("the cooperator") gives physical or moral assistance to another person ("the wrongdoer") who is doing some immoral action. In judging the morality of the cooperator's action, the most important distinction the Church draws is between what it calls formal and material cooperation. Here is a simile to help lawyers think about the distinction. In first amendment law there are two "tracks" for judging government actions that sin against the freedom of speech. Track one is for cases where the government acts with a bad intention—where it restricts speech because it does not like what is being said. (Imagine a law forbidding people to make jokes about the Vice President.) This kind of action is almost always unconstitutional. Track two is for cases where the government restricts speech unintentionally, in the course of doing something else. (Imagine a law against littering applied to a politician distributing handbills.) This kind of action is sometimes unconstitutional and sometimes not. The courts will balance the law's good effects against its impact on speech.⁵³

Formal and material cooperation are a little like tracks one and two. A person formally cooperates with another person's immoral act when he shares in the immoral intention of the other. Imagine a tenant who, coveting the apartment of his Jewish neighbor, gives his name to the Nazis. Formal cooperation is always immoral.⁵⁴ Material cooperation involves an act that has the effect of helping a wrongdoer, where the co-

53. For a summary of the law and an explanation of the role of intentions see JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* 207-218 (1996).

54. BERNARD HÄRING, *II THE LAW OF CHRIST* 496 (1963); C. HENRY PESCHKE, *I CHRISTIAN ETHICS* 251-252 (1981).

operator does not share in the wrongdoer's immoral intention. Imagine a grocer who sells food to a glutton, or a letter carrier who delivers an extortionate threat. Material cooperation is only sometimes immoral. We judge this by a kind of moral balancing test—weighing the importance of doing the act against the gravity of the evil, its proximity, the certainty that one's act will contribute to it, and the danger of scandal to others.⁵⁵

Rather than say much more about these rules in the abstract, let us see how they might apply to judges. We will examine a few of the roles a federal judge can be asked to play in a capital case arising under the Anti-Drug Abuse Act of 1988 (the "drug kingpin" statute).⁵⁶ This Act authorizes capital punishment where a defendant engaged in a "continuing criminal enterprise" intentionally kills someone or causes such a killing. The United States Attorney must serve notice of the government's intention to seek the death penalty early on,⁵⁷ but the sentencing hearing is held after trial on the issue of guilt, generally before the judge and jury who handled the trial.⁵⁸ At the hearing the government must prove that there are certain factors present that make the crime an aggravated case, deserving of death.⁵⁹ The defendant tries to prove factors that might mitigate against death—his youth, record, state of mind, and so on. The jury can recommend death if it finds the requisite aggravating factors and concludes that they outweigh any mitigating factors. But no matter what its findings, it is not required to impose death.⁶⁰ Neither is the judge who sits without a jury. When the hearing

55. HÄRING *supra* note 54, at 496-500; GERMAIN GRISEZ, 3 THE WAY OF THE LORD JESUS: DIFFICULT MORAL QUESTIONS, App. 2, 876-884 (1997).

56. 21 U.S.C. § 848 (1997).

57. *Id.* § 848(h). A protocol in the U.S. Attorneys' Manual requires the U.S. Attorney to notify the head of the Criminal Division of the Department of Justice of his desire to seek capital punishment. The request is then reviewed by the Department. The Attorney General makes the final decision.

58. The defendant can choose, with the government's approval, to have a hearing before the judge alone. *Id.* § 848(i).

59. The statute includes aggravating factors. It requires proof of one from § 848(n)(1) and another from § 848(n)(2)-(12). Subsection (n)(1) requires that the defendant must have (A) intentionally killed the victim, or (B) intentionally inflicted serious bodily injury which resulted in death, or something like that. Subsections (n)(2)-(12) cover a variety of aggravating factors ranging from prior killings (2), to picking on an especially vulnerable victim (old, young, infirm) (9), to employing torture or serious physical abuse in the commission of the offense (12).

60. *Id.* § 848(k). It has been suggested that this provision, because it gives the judge and the jury "discretion to dispense mercy," violates the eighth amendment. Brian Serr, *Of Crime and Punishment, Kingpins and Footsoldiers, Life and Death: The Drug War and the Federal Death Penalty Provision—Problems of Interpretation and Constitutionality*, 25 ARIZ.

is held before a jury and the jury recommends the death penalty, however, the Act provides that "the court shall sentence the defendant to death."⁶¹

1. Sentencing With a Jury

Let us begin by considering the action of the judge who sentences a defendant to death upon the jury's recommendation. Here is an example of such a sentence imposed in *United States v. Chandler*:

SENTENCE

Based upon the Special Findings and Recommendations of the jury on April 3, 1991, under Count 3, the court hereby imposes upon the defendant a sentence of death. The defendant will be

ST. L. J. 895, 922 (1993). The Court in *Furman v. Georgia*, 408 U.S. 238 (1972), held that Georgia's death penalty was cruel and unusual punishment because it gave the jury unrestricted discretion to choose between death and life imprisonment for murder. The cure for that deficiency, which the Court approved in *Gregg v. Georgia*, 428 U.S. 153 (1976), was to separate the determination of guilt from the sentence (so that all relevant information could be laid before the jury at the sentencing phase) and to guide the jury's discretion by requiring it to weigh statutorily defined aggravating factors against mitigating factors. Serr suggests that § 848(k) returns us to the unconstitutional discretion of the pre-*Furman* era. But this is a mistake. The difference between *Furman* and § 848(k) is that *Furman* gave the jury discretion that was open at both ends—it could be either uncommonly merciful or uncommonly harsh. Section 848, by contrast, is open only at one end. The requirement that the government prove two of the statutory aggravating factors, and convince the judge or jury that these (and other aggravations) outweigh any mitigating factors, closes off the possibility of discretionary harshness. It is true that § 848(k) leaves open the possibility of mercy in any case. And this can lead to a kind of unfairness: some really bad actors may be spared when people like them are executed.

But this was true in *Gregg*. The jury could not recommend death without finding a statutory aggravating circumstance. But it could make a recommendation of mercy binding on the trial court without finding any mitigating circumstance. *Gregg*, 428 U.S. at 197 (opinion of Stewart, Powell, and Stevens, JJ.). In fact, the plurality said, "[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." *Id.* at 199. This was the basis for the Court's later decision in *McCleskey v. Kemp*, 481 U.S. 279, 306-307 (1987), rejecting a petitioner's claim of disproportionality: "absent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, McCleskey cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty." As another commentator later observed,

At one time, it appeared that the Court was trying to achieve rationality in the process of selecting those to be spared as well as those to be executed—*Furman* seemed to demand as much. The Court, however, has essentially abandoned the former effort, holding that the eighth amendment is little concerned with consistency in sparing a life.

Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1109 (1990)

61. 21 U.S.C. § 848(l).

remanded to the custody of the Bureau of Prisons with directions to cause such death sentence to be implemented.⁶²

This is a straightforward case of formal cooperation, one in which the judge sets the wheels of injustice in motion. Once the judge enters the order, the government is authorized—indeed unless there is a pardon, *bound*—to put the defendant to death. And the judge intends that this should happen. That the judge may feel reluctance or regret does not change his intent. One who pulls a trigger reluctantly still intends to fire a gun. One who gives an order cannot protest that he did not intend it to be carried out.

There are two points that might cause some hesitation. Perhaps the judge's act, though it is followed by momentous consequences, is really just a formality, and should not entail the burden of guilt we impute to it. Consider the docket clerk who enters the order. It would be a bit much to accuse the clerk of formal cooperation in the execution. Both acts seem to be routine, ministerial—the cranking of tiny wheels in a machine that runs by itself. Section 848(1) tells the judge that, "Upon the [jury's] recommendation that the sentence of death be imposed, the court shall sentence the defendant to death."⁶³

But the judge's and the clerk's acts are not the same. The content of the order does not matter to the clerk. He files death sentences and discovery orders indifferently, as the post office franks love letters, pornography, blackmail, and letter bombs without a thought to their contents. Content matters to the judge, who composes the order. More importantly, he commands that the execution take place. This is an exercise of authority that in our system of government only a judge can have. It is true that the statute obliges him to give the order, but the reason it obliges *him* (rather than the docket clerk or the court reporter) is that we want the approval of a responsible figure who has seen the proceedings and polled the jurors, and who can assure us that there is no legal reason against the sentence being imposed.⁶⁴

The other point that might cause hesitation concerns the judge's intent. Consider this case. In *Zobrest v. Catalina Foothills School Dis-*

62. CR 90-H-266-E (N.D. Ala., May 14, 1991), *vacated in part and aff'd in part*, 996 F.2d 1073 (11th Cir. 1993), *cert. denied*, 512 U.S. 1227 (1994).

63. 21 U.S.C. § 848(i).

64. The statute allows, under certain circumstances, for a change of judge between trial and sentencing hearing. 21 U.S.C. § 848(i). But the judge who sentences the defendant must be the judge who has sat through the sentencing proceeding. *Cf. Morgan v. United States*, 298 U.S. 468 (1936).

trict,⁶⁵ the Supreme Court approved public payment of a sign-language interpreter for a parochial school student. Strict separationists complained that the interpreter would accompany the student even to mass, and that having a state employee deliver religious messages would violate the establishment clause. The Court replied that there was a difference between a teacher and an interpreter: The interpreter is obliged to "transmit everything that is said in exactly the same way it was intended." In passing it on he does not signify his own (or his employer's) approval.⁶⁶ Might we say that the judge stands like an interpreter between the jury and the Bureau of Prisons? If the judge hands the message on without endorsing it, might he lack the intent required for formal cooperation?

This comparison leaves out an essential component of what the judge does. He does not merely repeat what the jury has said; he orders it to be done. Under the statute the jury only makes a "recommendation"; the judge "imposes" the sentence.⁶⁷ The judge's order says, "the court hereby imposes upon the defendant a sentence of death." It is a performative utterance.

2. Sentencing By the Judge

Under the drug kingpin law a defendant can opt, with the government's agreement, to dispense with a jury and have his sentence determined by the judge alone. A judge who imposes the death penalty in such a case is plainly engaged in formal cooperation. Here there can be no suggestion that the judge is acting like a docket clerk or an interpreter. He bears responsibility for the entire decision, and could make it either way. Section 848(k) states that "the court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence."⁶⁸

But suppose that the judge in the end decides *not* to order death. The judge might in fact make up his mind at the beginning of the hearing that, no matter what the evidence showed, he would not (because he morally could not) impose the death penalty. We argue in Part II that if the judge entertained this resolve he would be obliged to recuse himself. But the judge might go through the sentencing hearing with an open mind, and only after all the evidence was in decide on life rather than

65. 509 U.S. 1 (1993).

66. *Id.* at 13.

67. 21 U.S.C. § 848(l).

68. *Id.* § 848(k).

death. If that is what happens can we say, at the end of the day, that he has done nothing wrong? In order to actually conduct the hearing with an open mind, the judge who accepts that capital punishment is wrong must suspend his moral judgment during deliberation. It is the willingness to do this that we want to focus on.

Conscience is not a uniquely Christian idea⁶⁹—many people subscribe to the notion of an interior faculty that guides our moral judgments.⁷⁰ Christians generally maintain, however, that judgments of conscience are more than natural insights. They are judgments illumined by faith (or darkened by error and vice).⁷¹ The Catholic Church teaches its members that they are bound to obey the certain judgment of their consciences.⁷² A judge who suspends his moral judgment during sentencing sets his conscience aside. The effect of the decision, though internal, is real—the judge rejects his obligation to obey conscience and consents, at least provisionally, to act contrary to right judgment. He cuts himself loose from his moral moorings.⁷³ Because the act lacks any observable effect (the defendant gets life in the end) it is easy to overlook this point. But the Catholic Church, unlike the criminal law, maintains that we can sin in thought as well as action. This is not a moral stance peculiar to Catholics. You may recall the attention Jimmy Carter received when he told an interviewer from Playboy magazine that he had sinned by lusting in his heart.⁷⁴ He was referring to the injunction in Matthew's gospel: "What I say to you is: anyone who looks lustfully at a woman

69. HÄRING *supra* note 54, at 136; PESCHKE *supra* note 54, at 152. Peschke describes an ancient Egyptian inscription in which the word "heart" replaces the word conscience: "The heart is an excellent witness . . . he must stand in fear of departing from its guidance." *Id.* at 152. Häring calls conscience, as an ethical guide, a "point of contact with those who are not religious-minded at all." HÄRING *supra* note 54, at 146.

70. PESCHKE *supra* note 54, at 147.

71. *Id.* at 152; HÄRING *supra* note 54, at 136.

72. 1 *Timothy* 1:19: ("hold fast to faith and a good conscience. Some men, by rejecting the guidance of their conscience, have made shipwreck of their faith"); 1 *Timothy* 2:9 ("They must hold fast to the divinely revealed faith with a clear conscience."); *Romans* 14:22 ("Use the faith you have as your rule of life in the sight of God. Happy the man whose conscience does not condemn what he has chosen to do! But if a man eats when his conscience has misgivings about eating, he is already condemned, because he is not acting in accordance with what he believes. Whatever does not accord with one's belief is sinful."); CATECHISM OF THE CATHOLIC CHURCH *supra* note 12, at 1790, 1800 ("A human being must always obey the certain judgment of his conscience.").

73. In cautioning against obscuring conscience, Häring points to *Matthew* 6:22-24: "The eye is the body's lamp . . . and if your light is darkness, how deep will the darkness be!"

74. Robert Scheer, *Interview with Jimmy Carter*, in *THE PLAYBOY INTERVIEW* 456-488 (G. Barry Golson ed., 1981).

has already committed adultery with his in this thoughts."⁷⁵ The moral problem with suspending judgment in a capital sentencing hearing is like this. It would be wrong for a judge to place himself at the service of evil by getting in a position to go where events may take him.

3. The Guilt Phase

Suppose the district judge knows in advance of trial that the United States Attorney will seek the death penalty, and resolves to take no part in sentencing. May the judge nevertheless handle the case up until that point? May he sit in the trial on the issue of guilt or innocence and then withdraw? The statute might allow this.⁷⁶ We will explore in Part II whether this solution is *legally* proper. Let us assume for the moment that it is, and ask whether there might be a *moral* problem with making such a contribution. The judge who guides the jury to a guilty verdict lays the groundwork for the defendant's execution. Is it wrong for one opposed to the death penalty to do this?

There are several important differences between this case and the first two. There is nothing intrinsically wrong with trying the defendant. Indeed it is a *good* thing to try and convict criminals who murder innocent people. It is doing justice. This is not like sentencing the defendant to death—a punishment that is wrong despite the defendant's guilt. Moreover, the judge who conducts the trial need not intend to bring about the defendant's death. Think of *Washington v. Davis*.⁷⁷ The government gave a verbal ability test to candidates for the police force. There is nothing intrinsically wrong with this. It is a good idea to have cops who can communicate. The test also disqualified more black than white candidates. But the government did not intend this effect; indeed it regretted it. So too here. The judge's unintended contribution to capital punishment is an example of material cooperation.⁷⁸

Unlike formal cooperation, material cooperation is not always im-

75. *Matthew* 5:28. See also *Exodus* 20:17; *Deuteronomy* 5:21; *Matthew* 15:17-20; *Mark* 7:18-23.

76. 21 U.S.C. § 848(i)(1) reads as follows: "When . . . the defendant is found guilty . . . the judge who presided at the trial . . . , or any other judge if the judge who presided at the trial . . . is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed."

77. 426 U.S. 229 (1976).

78. "Merely material cooperation is concerned with a good or at least with an indifferent act. The act, neither in itself (*i.e.*, by its own inner purposiveness) nor by the intent of the agent, contributes to the sin of another, but is misused or misappropriated by the latter and is thus placed in the service of his sinful activity." HÄRING *supra* note 54, at 496.

moral. But neither is there a very neat rule for deciding when it is. The rules are, as we suggested earlier, like the balancing test we use on track two in speech cases or like the tort rules of proximate cause, which define an actor's responsibility for far-reaching effects. In judging the propriety of material cooperation an actor must weigh his reasons for participating against such things as the gravity of the evil, the proximity of his cooperation, the certainty that his work will be misused, the probability that his refusal to cooperate would prevent the evil, and the danger of scandal to others.⁷⁹

Consider what this might mean for a Catholic judge sitting at trial on the issue of guilt. The judge has a strong reason to participate in that phase: society needs judges to enforce the criminal law. Those who do so help maintain a peaceful and just society. It is this social good that we must weigh against the harm of material cooperation. The evil of capital punishment is certainly grave—the taking of human life. But the judge does not actually participate in the sentencing. Indeed he does not know for certain whether he is contributing to a death sentence because he does not know what sentence will be imposed at the later hearing. Recusing himself would not prevent the evil, because another judge would replace him at trial. For these reasons we think that the district judge's material cooperation in capital punishment can be morally justified.⁸⁰

79. HÄRING *supra* note 54, at 499. The balancing test we give in the text follows St. Alphonsus Liguori, whose *Theologia Moralís* (L. Gaudé ed. 1905-1912) states the standard way of thinking about material cooperation. Germain Grisez offers a different sort of balancing test. GRISEZ, *supra* note 55. He suggests that we compare the good reasons for cooperating in the immoral act to the good reasons for not cooperating, "rather than to the gravity of the wrongdoing and how closely the act will involve one in it . . ." *Id.* at 877. Grisez suggests that this is a clearer way of thinking about the issue for a number of reasons. One is that material cooperation can have a number of bad side effects, some of them quite distinct from the wrongdoing that St. Alphonsus considers in his balancing process.

Third parties can be scandalized by someone's material cooperation. This can happen in various ways. Sometimes the fact that "good people" are involved makes wrongdoing seem not so wrong and provides material for rationalization and self-deception by people tempted to undertake the same sort of wrong.

Id. at 881. Another is that describing this judgment (about material cooperation) as a weighing of goods and bads oversells a metaphor. What we describe as "goods and bads are benefits and detriments to the true fulfillment of the persons involved . . ."—not a set of concrete entities whose values and disvalues can be measured and commensurated." *Id.* at 885.

80. One of the virtues of Grisez's more nuanced account of material cooperation is that it directs our attention to some features we might otherwise overlook. A district judge deciding whether to try the issue of guilt or innocence should consider whether, even if his participation does the defendant no injustice, he may appear to condone capital punishment, or make it seem "not so wrong," by taking part in the larger process. Material cooperation can

4. Appeal

The appellate judge, like the district judge, plays a variety of roles, and some of them present more difficult moral questions than others. If the defendant is convicted and sentenced to death under the drug kingpin law, he may appeal both the conviction and the sentence. The judge's role in reviewing a conviction is not very different from his role in conducting a trial on the issue of guilt. Consider some of the claims in *United States v. Chandler*.⁸¹ Chandler was convicted of murder in furtherance of a continuing criminal enterprise in violation of 21 U.S.C. § 848(e).⁸² He argued on appeal that the indictment failed to allege and the jury instructions failed to require a connection between the murder and the enterprise. The Eleventh Circuit concluded that the language of both was sufficiently clear on the point.⁸³ Chandler also charged that the government had called a witness (a police officer who identified a piece of paper seized in Chandler's home) who was not on the witness list that the law requires the government to supply.⁸⁴ The court agreed that this was an error, but it did not require reversal because Chandler had made no contemporaneous objection, and it had no effect on the outcome of

cause scandal even if it doesn't contribute to the sin of *this* execution. Consider the wonderful account of the scribe Eleazar during the persecution of Antiochus. (This is not a case of material cooperation, but it nicely illustrates the evil of scandal.)

Eleazar, . . . a man now advanced in age and of noble presence, was being forced to open his mouth to eat swine's flesh. . . .

Those who were in charge of that unlawful sacrifice took the man aside, because of their long acquaintance with him, and privately urged him to bring meat of his own providing, proper for him to use, and pretend that he was eating the flesh of the sacrificial meal which had been commanded by the king, so that by doing this he might be saved from death, and be treated kindly on account of his old friendship with them. . . .

"Such pretense is not worthy of our time in life," he said, "lest many of the young should suppose that Eleazar in his ninetieth year has gone over to an alien religion, and through my pretense, for the sake of living a brief moment longer, they should be led astray because of me, while I defile and disgrace my old age."

2 *Maccabees* 6:18-25. We do not think that the danger of scandal in the case we are concerned with is great enough to warrant stepping aside. The judge who sits at trial and leaves at sentencing proclaims by a public act that he finds the conclusion of the procedure objectionable. (Eleazar, had he done as he was asked, would have deceived his young followers.) And there are, as we say in the text, good reasons for taking part up to that point. (It is a good thing to try, convict, and punish violent criminals. It is only wrong to kill them.)

81. 996 F.2d 1073 (11th Cir. 1993).

82. *Id.* at 1096.

83. *Id.* at 1098.

84. *Id.*

the trial.⁸⁵

Affirming Chandler's conviction has the effect of sending him to death. And the appellate judge knows this, because he does his job after sentencing (not before, like the trial judge). But his cooperation is also material rather than formal. In reviewing the sufficiency of the indictment, the jury instructions, and the trial procedure he takes no position on the issue of capital punishment. He would reach the same conclusion if the defendant were sentenced to life in prison. Apart from its unintended consequences, his act (reviewing the fairness of the trial) is a good and just thing to do. If he did not sit on the case someone else would, with the same result. On balance, this seems like the kind of material cooperation that is morally acceptable.

The appellate court's review of Chandler's sentence is a closer question. This seems to complete the district court's order, as the district court completes the jury's recommendation. Is there any real difference between the two cases? The statute provides that

[t]he court shall affirm the sentence if it determines that

- (A) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and
- (B) the information supports the special finding of the existence of every aggravating factor upon which the sentence was based, together with, or the failure to find, any mitigating factors

In all other cases the court shall remand the case for reconsideration under this section.⁸⁶

In one way this assignment seems to make the appellate judge more culpable than the trial judge. If the jury recommends death, the trial judge has no choice about imposing that sentence. He might therefore say that his action is just a formality, like the docket clerk's entry of the judgment. We found that this excuse does not work, given the nature of the judge's order. But the excuse is not even available to the appellate judge. The statute directs him to review the evidence and the behavior of the judge and jury, and gives him two options: affirm or remand. He (more accurately, the panel) thus has some room to affect the defendant's fate.

Strictly speaking, though, the panel neither condemns nor saves the defendant. The sentencing judge's order in *Chandler* said, "the court hereby imposes upon the defendant a sentence of death." The Eleventh

85. *Id.* at 1099.

86. 21 U.S.C. § 848(q)(3).

Circuit's order said:

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the Judgment . . . of the said District Court in this cause be and the same is hereby VACATED IN PART and AFFIRMED IN PART.⁸⁷

To affirm the sentence is not to approve it, but to say that the trial court did its job. What the court of appeals really decides is that the responsibility for life and death lies somewhere else. When the court of appeals finds an error it does not sentence the defendant itself. It "remand[s] the case for reconsideration."⁸⁸

The appellate judge can thus say, we think rightly, that he does not intentionally direct or promote the defendant's execution. Consider a slightly easier case of the same sort. The defendant, convicted in Alabama state court, seeks direct review in the United States Supreme Court. He claims that the death penalty violates the Eighth Amendment.⁸⁹ The Supreme Court would probably reject this claim. It might point out that the text of the Fifth Amendment contemplates executions.⁹⁰ But affirming the sentence is not the same thing as authorizing capital punishment. It only means that in our federal system, the federal courts are not empowered to hold up executions if Alabama chooses to carry them out. The responsibility for doing that lies with the voters, legislators, and judges of Alabama. An affirmance under the drug king-pin law makes a more modest, but comparable, point: that the statute entrusts the decision to the trial judge and jury.

Appellate review of a death sentence is not, then, a case of formal cooperation. This does not mean that it is all right. Whatever might be the legal significance of an affirmance, it probably looks to most people like an endorsement of the sentence. This can cause scandal, leading others into sin:

87. *U.S. v. Chandler*, Nos. 91-7466 and 91-7577. The part of the judgment that was vacated had to do with Chandler's conviction for conspiracy. His convictions and sentences on the other counts, including his death sentence, were affirmed. *Chandler*, 996 F.2d 1073 (11th Cir. 1993).

88. 21 U.S.C. § 848(q)(3).

89. The Eighth Amendment provides, in part, that "Cruel and unusual punishment [shall not be] inflicted." U.S. CONST. amend VIII.

90. The Fifth Amendment speaks of "capital" crimes and deprivations of life:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury[;] nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law . . .

U.S. CONST. amend. V.

Sometimes the fact that "good" people are involved makes wrongdoing seem not so wrong and provides material for rationalization and self-deception by people tempted to undertake the same sort of wrong. . . . [O]ften the material cooperation of "good" people in wrongdoing leads others to cooperate in it formally. . . ."⁹¹

Considerations like this make it exceedingly difficult to pass moral judgment on the appellate review of sentencing. The morality of the acts which fall under that description will, it seems to us, vary from one set of circumstances to another.

5. Habeas Corpus

This is a bit of a misnomer if we confine our attention to federal convictions. Section 2255 of the federal code,⁹² though it gives federal prisoners relief commensurate with what state prisoners get in habeas corpus proceedings, is a slightly different procedure. A § 2255 motion is a further step in the criminal case, not a separate civil action. This means that it is filed with the judge who tried the case and handled the sentence (or if they are different, with the judge who supervised the proceeding being attacked).⁹³ And that in turn means that orthodox Catholic judges who recuse themselves from capital sentencing proceedings will not ordinarily be assigned § 2255 motions attacking the sentence itself. It may nevertheless occasionally happen when the appropriate judge is unavailable to consider the motion.⁹⁴ And of course judges who preside over the guilt phase will be assigned motions attacking that proceeding. Is there a moral objection to deciding either of these questions?

Let us first consider an attack on the underlying conviction. Suppose the prisoner claims that he had ineffective assistance of counsel, or that

91. *GRISEZ*, *supra* note 55, at 881.

92. 28 U.S.C. § 2255 provides, in part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. . . . If the court finds [for the prisoner] the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. . . .

93. Rules Governing Section 2255 Proceedings, Rule 4(a).

94. *Id.* And Catholic judges will face similar issues in federal habeas review of state convictions, which can go to any judge.

the court violated the confrontation clause by letting the prosecution use a videotaped deposition of its key witness. We have already explained why we think it would be permissible for a pro-life judge to sit in the guilt phase of a capital trial, where questions like these might arise in the first instance. We see even less reason to worry about deciding them on collateral review. When the movant invokes the right to counsel or the confrontation clause, the judge's job is to interpret the Sixth Amendment. We need judges to do this to maintain the balance between individual rights and government authority. Though the judge must know that the movant's life is at stake, he can act without intending to cause the movant's death. This is a case of material, not formal, cooperation. And as material cooperation goes, one can make a pretty good case for it. It would be unwise from the point of view of death row inmates to leave the interpretation of the constitution to death-qualified judges.⁹⁵

An attack on the sentence itself is a harder question, just as it is on appeal. Suppose the movant charges that the aggravating circumstances relied on by the prosecution are expressed in the statute in unconstitutionally vague terms, or were not proven beyond a reasonable doubt.⁹⁶ Would it be wrong for a judge who conscientiously opposes the death penalty to decide claims like these where the movant's life is at stake?

The problem seems rather like the one we identified in appellate review. The movant who makes a vagueness claim asks the judge to invalidate a capital sentencing scheme created by Congress because it does not narrow the sentencer's discretion enough. But a judge cannot just casually strike down laws enacted by democratically elected officials. The power of judicial review created in *Marbury v. Madison*⁹⁷ lets the judge intervene only when a law is inconsistent with the constitution. Saying that the Eighth Amendment does not authorize intervention is not equivalent to enforcing or approving what Congress has done. Here is what the court says:

[I]t is ORDERED, ADJUDGED, and DECREED that all . . . claims asserted in Chandler's . . . motion to vacate and for a new trial . . . are DENIED, and a final judgment in favor of the United States is hereby ENTERED with respect to Chandler's motion to vacate

95. We borrow the phrase "death qualified" from the jury context. See *infra* page 336; *Buchanan v. Kentucky*, 483 U.S. 402, 407 n.6 (1987).

96. Cf. *Arave v. Creech*, 507 U.S. 463 (1993) (§ 2254); *Richmond v. Lewis*, 506 U.S. 40 (1992) (§ 2254).

97. 5 U.S. (1 Cranch) 137 (1803).

and for a new trial.⁹⁸

In essence the judge declines to get involved. Of course we all know that judicial review is not a mechanical process, that there is a lot of room to maneuver, and that a determined judge *can* get involved, often without running a serious risk of reversal. But the conscientious judge is not under a moral obligation to save all the prisoners he can. The real responsibility for Chandler's death sentence lies with the Congress that wrote the law, the President who signed it, the prosecutor who invoked it, and the judge and jury who imposed the sentence. The § 2255 judge who declines to undo their work has a good reason for standing by if he is respecting a lawful and otherwise useful and morally acceptable division of authority.

II. RECUSAL

Let us now consider whether the moral difficulties we perceive with recommending, imposing, and reviewing the death penalty should as a legal matter prevent Catholic judges from sitting in capital cases. There are two recusal⁹⁹ statutes in the federal judicial code. We will focus on 28 U.S.C. § 455, which has two provisions that bear on this problem:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.¹⁰⁰

Subsection (b)(1), the older of the two provisions, requires proof of ac-

98. This is an order disposing of a § 2255 motion in *U. S. v. Chandler*, 957 F. Supp. 1505 (N.D. Ala. 1997).

99. We will generally speak of recusal but this is slightly inaccurate. Strictly speaking "recusal" refers to a judge's voluntarily stepping down. The proper term for mandatory stepping down under a statute is "disqualification." John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROB. 43, 45 (1970).

100. The other statute, 28 U.S.C. § 144, does the same work as § 455(b)(1). It provides: Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

This provision is limited to district judges, and comes into play only when a party makes a motion supported by an affidavit. Section 455 requires a judge to disqualify himself.

tual bias or prejudice—proof that the judge is actually unfaithful to his oath to discharge his duties impartially.¹⁰¹ Subsection (a) is concerned less with the litigants' right to a neutral judge than with the appearance of justice and the legitimacy of the judicial system. For that reason it asks how people might perceive the judge—it may require recusal even if there is no bias in fact.

We will begin with subsection (b)(1), the issue of actual bias or prejudice. We said in Part I that observant Catholic judges may have real moral problems with sentencing. Here we ask whether these moral difficulties count as disqualifying prejudices under the recusal statute. We also said in Part I that such judges might be able to try capital cases, and maybe decide capital appeals, notwithstanding their opposition to the death penalty. But a judge's pro-life convictions might affect his behavior outside the sentencing proceeding. The judge might, for example, be more reluctant to convict (or more willing to reverse) if a finding of guilt would inevitably lead to the defendant's execution. Should this sort of collateral influence also count as a disqualifying prejudice?

We will then look at subsection (a), the issue of apparent partiality. What happens when a Catholic judge who does not agree with the Church's teaching sits on a phase of the case (let us say sentencing) where he should have problems but professes not to? Does the simple fact of membership in the Catholic Church disqualify him because it creates a "reasonable question" about his impartiality?

A. "Personal Bias or Prejudice"

The phrase "personal bias or prejudice" in subsection (b)(1) can mean that the judge has some illegitimate reason for wanting to rule against this particular party. For example, the defendant may have mistreated the judge's daughter in an unhappy love affair. But the requisite bias need not be personal in the sense that the judge has prior first-hand knowledge of the parties.

Bias and prejudice [are] not divided into the "personal" kind, which is offensive, and the official kind, which is perfectly all right. . . . It is common to speak of "personal bias" or "personal prejudice" without meaning the adjective to do anything except emphasize the idiosyncratic nature of bias and prejudice. . . . In

101. Actually subsections (a) and (b)(1) were both added in 1974, when § 455 was substantially amended. But subsection (b)(1) copied the "personal bias or prejudice" language of § 144, which has been around since 1911. The appearance-of-impartiality rule of subsection (a) was new. See *Liteky v. United States*, 510 U.S. 540 (1994); Randall J. Litteneker, Note, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236 (1978).

a similar vein, one speaks of an individual's "personal preference," without implying that he could also have a "nonpersonal preference."¹⁰²

So "personal" does not just mean that the judge has it in for *this* defendant. Nor does "bias or prejudice" mean animosity¹⁰³ toward a particular class of people (say, Germans).¹⁰⁴ That may be, but it is not necessarily so. Subsection (b)(1) also covers a bias or prejudice about a particular issue, which may "concern a party" in the sense that it spoils his hope for success. We speak this way about jurors who are unalterably opposed to the death penalty. The government is allowed to exclude them in capital cases. When the question first arose in 1892, the Supreme Court said, "A juror who has conscientious scruples on any subject, which prevent him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence, is not an impartial juror."¹⁰⁵ When the Court revisited the issue in 1968 Justice Black observed, "As I see the issue in this case, it is a question of plain bias."¹⁰⁶ This does not mean that a judge with an unalterable moral objection to the death penalty is in all cases automatically disqualified. Judges play many different roles in capital cases. And the legal impediments to sitting, no less than the moral ones, may vary with the role.

1. Sentencing With a Jury

The easiest case is the one we discussed at pages 320-22. Suppose a drug kingpin is tried before a jury and the jury recommends death. The statute says that "Upon the [jury's] recommendation that the sentence of death be imposed, the court shall sentence the defendant to death."¹⁰⁷ This directs the judge to formally cooperate in bringing about the defendant's execution—something the observant Catholic judge should not do. Of course judges often have to set aside their personal convictions in order to do justice, but this is easier in some cases than in others. We can set aside convictions about facts if there is some reason to trust

102. *Litky*, 510 U.S. at 549.

103. Or partiality. We will stress the negative aspect just to simplify the exposition.

104. *See, e.g., Berger v. United States*, 255 U.S. 22 (1921).

105. *Logan v. United States*, 144 U.S. 263, 298 (1892).

106. *Witherspoon v. Illinois*, 391 U.S. 510, 535 (1968) (Black, J., dissenting). *Witherspoon* held that the state could not exclude all jurors who had conscientious scruples against capital punishment—only those who would be "irrevocably committed" to vote against the death penalty in all cases. *Id.* at 522.

107. 21 U.S.C. § 848(l).

another person's perceptions more than our own. (I may know that you have better eyesight than I.) We can also set aside our legal convictions in deference to a superior authority in the legal system. Here is an example of Justice Brandeis doing this:

Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus [I act on the assumption that the right of free speech is] protected by the federal Constitution from invasion by the states.¹⁰⁸

But the principle at stake in capital sentencing is a moral one, not a factual or simply legal one. And the judge is asked to violate it—not to reason from different legal premises to morally unobjectionable conclusions (like Justice Brandeis did in *Whitney*). There is no way the judge can do his job and obey his conscience. The judge's conscience tells him to impose a life sentence; federal law directs him to impose death. Because the judge is unable to give the government the judgment to which it is entitled under the law, § 455(b)(1) directs him to disqualify himself.

This is not a difficult case. But it has two procedural complications. First, the judge who sentences the defendant must be the one who has conducted the sentencing hearing. This might seem unnecessary, since the judge only enforces the jury's recommendation, and anybody can do that. But the sentencing provision includes one last escape clause: it concludes by saying that a death sentence cannot be carried out on a person who is retarded or mentally disabled.¹⁰⁹ The sentencing judge must ensure that the last proviso does not prevent him from enforcing the jury's recommendation, and he can only do so if he has attended the hearing and heard the information bearing on this point. This means that the Catholic judge must recuse himself before the hearing, not after it.

The second wrinkle is this. The law says that in the ordinary course "the judge who presided at the trial . . . shall conduct a separate sentencing hearing[.]"¹¹⁰ This is obviously the efficient way of doing things since much of the evidence presented at trial will assist in the proof of aggravating and mitigating factors. A new judge would have to rely on

108. *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

109. 21 U.S.C. § 848(l).

110. 21 U.S.C. § 848(i)(1) provides that when "the defendant is found guilty . . . the judge who presided at the trial . . . or any other judge if the judge who presided at the trial . . . is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed."

the trial transcript and exhibits rather than his observation of the real thing.¹¹¹ Does this mean, then, that our scrupulous judge should back out even earlier in the process so that his substitute will be well prepared when he gets to the sentencing hearing? The appropriate time would probably be when the government files notice of its intent to seek the death penalty.

That is a sensible solution, but we do not think it is required by the statute, and all things considered, it may not even be the best approach. Although the law presumes that the trial judge will ordinarily conduct the sentencing hearing, it provides that “any other judge” can do so if the trial judge “is unavailable.”¹¹² The last phrase is not defined in the Act, and the legislative history is unilluminating.¹¹³ The phrase describes a judge who is disqualified just as well as it does one who is sick or absent. Though it might be more efficient to require recusal earlier in the proceedings, there is no textual reason for insisting on it. From the point of view of the federal judiciary as a whole, there is something to be said for not doing so. There is some inter-judge unfairness in shifting the entire capital caseload from Catholic judges—and others with unalterable scruples—to those who lack their moral qualms. As for the parties, it is not clear that late-stage recusal favors one side or the other. A judge’s opposition to the death penalty might affect his discretionary rulings at trial. If so, a defendant should favor late over early recusal. On the other hand when the same judge handles both phases, it may happen that residual doubts about guilt will temper the severity of punishment.¹¹⁴ In that case the defendant should favor early recusal so he can have the same judge throughout.

It seems to us, then, that the proper approach to this kind of case—morally and legally—is for the observant Catholic judge to recuse himself after trial and before the sentencing hearing. It would probably be appropriate to give the parties prior notice that he intends to do so if the trial ends in conviction.

2. Sentencing By the Judge

If the defendant requests and the government agrees, the sentencing

111. *Id.* § 848(j).

112. *See supra* note 110.

113. The provision about the judge being “unavailable” was in the bill from the beginning (it appeared in the original Senate version, S. 7556-01, 100th Cong. § 1(i)(1)(1988)) but was not debated at any point along the way.

114. *Lockhart v. McCree*, 476 U.S. 162, 181 (1986).

hearing may be conducted before the judge alone. The breadth of the judge's responsibility in this case makes the recusal question (like the moral question) a tricky one. In the last case the judge's conscience obliged him to act contrary to law, and the only legal solution (short of resignation) was recusal. When the judge sits alone he can decline to impose the death penalty without exceeding the scope of his discretion. This is explicit in the law: "the court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence[.]"¹¹⁵ And it is implicit in the judge's authority to find any factors he might chance upon "in the defendant's background or character [that] mitigate against imposition of the death sentence."¹¹⁶ Here there is no impossible conflict of duties. And yet there is a difference between what this judge would do at a sentencing hearing and what his neighbor in the next courtroom would do. The religiously scrupulous judge, though he might never exceed the scope of his discretion, would always come down in exactly the same place. Would this be an abuse of discretion?

There is a parallel to this problem in the rules about selecting "death-qualified" juries. States that impose capital punishment generally have rules designed to keep convinced death penalty opponents from serving on juries. In 1960 Illinois had a statute that allowed a juror to be challenged for cause if he had "conscientious scruples against capital punishment."¹¹⁷ The Court held in *Witherspoon v. Illinois*¹¹⁸ that this was actually too broad a disqualification—a jury cleared of all people who harbored doubts about the wisdom of capital punishment would not be impartial in the constitutional sense.¹¹⁹ Such a jury would be death-prone.

The Court pointed out that many of these people could perform the sentencing function perfectly well. In Illinois at that time¹²⁰ the jury had complete discretion to decide whether or not death was the proper penalty. As the Court saw it, someone "who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a ju-

115. 21 U.S.C. § 848(k).

116. *Id.* § 848(m)(10).

117. ILL. REV. STAT. c. 38 § 743 (1959).

118. 391 U.S. 510 (1968).

119. *Id.* at 519-20.

120. The Court decided *Witherspoon* before *Furman v. Georgia*, 408 U.S. 238 (1972). In *Furman*, the Court held that systems like Illinois's that give juries unrestricted discretion violate the Eighth Amendment.

ror.”¹²¹ But even in a regime that allowed that degree of discretion, the Court noted, it would be proper for the state to exclude a juror who “would automatically vote against” death, or whose attitude toward the death penalty would prevent him from making an impartial decision about guilt.¹²² The Court enforced this suggestion in *Wainwright v. Witt*.¹²³ The defendant, sentenced to death, complained that several people had been kept off the jury for their opposition to capital punishment. The Court upheld their exclusion—indeed, it announced a rule that made exclusion easier than *Witherspoon* had done: “[T]he State may exclude from capital sentencing juries that ‘class’ of veniremen whose views would prevent or substantially impair the performance of their duties in accordance with their instructions or their oaths.”¹²⁴

It is hard to say exactly what duty the conscientious juror fails to perform. Under current death penalty jurisprudence the state cannot require a jury to impose death in any particular case. Jurors must always be allowed to consider (and act on) mitigating factors in the defendant’s character and record.¹²⁵ This means that a life sentence is always, in any particular case, a legally permissible choice. The juror cannot violate his duty by choosing it. Another possible explanation of the Court’s remark might be that, because death sentences usually have to be unanimous, one conscientious objector could avert capital punishment in each case, and the cumulative effect of such behavior would be to render executions impossible. This would, the Court suggested, “frustrate the State’s legitimate interest in administering constitutional capital sentencing schemes.”¹²⁶ In this account we need not attribute a violation of duty to any individual juror. It is rather their collective behavior that prevents the judicial system from carrying out the will of the legislature. But the only way to cure the problem is to exclude the members of the class as they appear in individual cases.

The weakness of this explanation is that it does not fit very well with the test the Court announced for deciding who is excludable—jurors “whose views would prevent . . . the performance of their duties in accordance with their instructions or their oaths.”¹²⁷ *Morgan v. Illinois*¹²⁸

121. *Witherspoon*, 391 U.S. at 519.

122. *Id.* at 522 n.21.

123. 469 U.S. 412 (1985).

124. *Id.* at 426 n.5.

125. *Sumner v. Shuman*, 483 U.S. 66 (1987); *Lockett v. Ohio*, 38 U.S. 586, 597 (1978) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion).

126. *Wainwright*, 469 U.S. at 423.

127. *Id.* at 424.

offers a more persuasive idea. *Morgan* is the flip side of *Witherspoon*. It affirms the defendant's right to exclude a juror who, having found guilt, would automatically vote to impose the death penalty. The problem with such a juror is not that he reaches a forbidden conclusion. It is that he refuses to go through the process required to get there.

A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror.¹²⁹

More prosaically we might say that he fails to keep an open mind until all the evidence is in. This is the literal meaning of prejudice. As the Court said in *Morgan*, if it were a judge rather than a juror who was "refusing in advance to follow the statutory direction to consider that evidence[, he] should disqualify himself[.]"¹³⁰

One might object that a requirement to "consider," unsupported by any obligation to "decide," is just wasted motion. But if it is, it is a popular exercise. The National Environmental Policy Act¹³¹ amounts to nothing more. Its best known and most frequently contested provision is the requirement that a federal agency must prepare an environmental impact statement before it undertakes a major federal action with significant environmental effects.¹³² The point of the exercise is to control "how agencies go about their decision-making not *what* they actually decide to do."¹³³ The Public Utility Regulatory Policies Act,¹³⁴ a conservation measure enacted during the Carter administration, included a similar provision for naked consideration. Title I of the Act required state public utility authorities to consider six different approaches to structuring rates.¹³⁵ But the Act specifically provided that state authorities were free, having considered them, to accept or reject these propos-

128. 504 U.S. 719 (1992).

129. *Id.* at 729.

130. *Id.* at 739.

131. 42 U.S.C. §§ 4331-4347.

132. *Id.* § 4332(2)(C).

133. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 810 (2d ed. 1994).

134. Public Utility Regulatory Policies Act of 1978, PUB. L. NO. 95-612, 92 STAT. 3117 (codified as amended in scattered sections of 16, 42, & 43 U.S.C.).

135. 16 U.S.C. § 2621(d). The approaches included time-of-day rates, seasonal rates, and interruptible rates.

als.¹³⁶

On a slightly more exalted level, we have turned to “consideration” requirements to solve a variety of constitutional problems. Here it is the very lack of any obligation to decide that renders them acceptable. *Regents of the University of California v. Bakke*¹³⁷ is the most celebrated example. Justice Powell held that the California-Davis Medical School could not decide in advance of reading its admissions folders that it would reserve sixteen seats for certain racial minorities.¹³⁸ If it wanted to employ affirmative action, Justice Powell said, the proper approach was to consider race as a factor that played a sort of mitigating role in the total mix of applicant characteristics.¹³⁹ The current approach to using race in voter reapportionment is similar. A state cannot decide in advance how many “white” and “black” districts it will create. If a state wants to take account of race the only permissible approach is to consider it as one among many factors, and see how the deliberations play out.¹⁴⁰

Our legal assessment of sentencing by the judge thus matches fairly closely our moral assessment. We said it would be morally improper for a judge who conscientiously opposed capital punishment to suspend judgment and consider, with an open mind, the possibility of imposing it. The proper moral course seems to be to avoid putting oneself in this predicament. The recusal law reaches the same result for its own reasons: if a judge cannot honestly consider death as a possibility, he is “prejudiced” within the meaning of § 455(b)(1) and should recuse himself.

3. The Guilt Phase

Suppose a judge is religiously opposed to the death penalty but willing to preside over a trial on the issue of guilt or innocence. The United States Attorney might worry that the judge’s pro-life convictions will carry over to collateral matters at trial, making it more difficult to secure a conviction. Consider two examples from *United States v. Chandler*.¹⁴¹ The government charged Chandler with running a con-

136. *Id.*, § 2621(a).

137. 438 U.S. 265 (1975).

138. *Id.*

139. *Id.* at 317-18.

140. *Bush v. Vera*, 116 S. Ct. 1941 (1996); *Shaw v. Reno*, 509 U.S. 630 (1993); T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines after Shaw v. Reno*, 92 MICH. L. REV. 588, 650 (1993).

141. 996 F.2d 1073 (11th Cir. 1993).

tinuing criminal enterprise (a large marijuana operation) and murdering a man named Martin Shuler in connection with it.¹⁴² One of Chandler's arguments was that the indictment did not allege with sufficient clarity that he had murdered Shuler in furtherance of the criminal enterprise.¹⁴³ A judge averse to capital punishment might read the indictment Chandler's way, or impose a clear statement rule, in order to reduce the charge to something less than capital murder. The government also offered evidence that Chandler had threatened two other men for stealing his marijuana, and that they had then disappeared.¹⁴⁴ Chandler argued¹⁴⁵ that this evidence violated Federal Rule of Evidence Rule 403 (unfair prejudice) and Rule 404 (propensity evidence). A pro-life judge might be tempted to rule for Chandler on issues like these, to improve the odds of acquittal. Is an aversion to death a disqualifying bias or prejudice in these circumstances?

This is not an unusual problem. A judge will often entertain an ideological bias that makes him lean one way or the other. In fact we might safely say that *every* judge has such an inclination. As Chief Justice Rehnquist once observed when rejecting a motion to disqualify himself,

[s]ince most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. . . . Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* would be evidence of lack of qualification, not lack of bias.¹⁴⁶

Implicit in the Chief Justice's observation are two reasons why we should not automatically disqualify judges for holding such views or convictions. One is that everyone has them. If we applied this criterion faithfully we would disqualify the entire judiciary. The rule of necessity that allows judges to sit on cases about judicial compensation applies here too: better a flawed judge than no judge at all.¹⁴⁷ The second is that the possession of convictions is not only inevitable, it is to some ex-

142. *Id.* at 1080.

143. *Id.* at 1096-97.

144. *Id.* at 1100-01.

145. Chandler actually made these arguments for the first time on appeal. At trial he objected only on hearsay grounds. *Id.* at 1101.

146. *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (memorandum of Rehnquist, J.).

147. *United States v. Will*, 449 U.S. 200, 211-17 (1980).

tent desirable. Judges in civil law countries are nonpolitical civil servants; they look on their job as a fairly mechanical one.¹⁴⁸ Federal judges are nominated and confirmed by politicians. Justice Marshall was chosen by Lyndon Johnson precisely because he was a hero in the fight for racial equality. It would be odd if those principles kept him from sitting in school desegregation cases, even if they made his judgments fairly predictable.¹⁴⁹

This is not to say that we expect or want judges to let personal convictions determine their judgment on all collateral questions. There are easy cases. We expect judges to recognize them and follow the law even if it runs against their inclination. Justice Douglas routinely voted against the Internal Revenue Service in tax cases no matter what the issue was.¹⁵⁰ This is unacceptable judicial behavior.

When we discussed sentencing with a jury,¹⁵¹ we pointed out that a judge cannot set aside moral convictions as easily as he can convictions about matters of fact or (sometimes) law. There is, though, an important difference between that case and this one. When an observant Catholic judge sits on the guilt phase of a capital case his cooperation with the evil of capital punishment is material rather than formal. He does not intentionally promote the defendant's execution by sustaining the indictment or admitting evidence. His objective is to deal justly with the defendant—to find out if he has murdered someone to protect his marijuana business. If the judge lets his opposition to capital punishment control his decision of collateral issues, he runs the risk of acting unjustly in two different ways. First, he could bring about the acquittal of a guilty person. Second, he could sabotage a system of procedural and evidentiary rules that we employ to good effect in other cases. There is no good reason to suppose that judges who oppose capital punishment are so committed to their objective that they are willing to cause these sorts of injustice in order to achieve it.

4. Appeal

Recusal problems on appeal are like those at the guilt phase, though they are not identical. From a moral point of view deciding an appeal is an act of material cooperation, not formal, and one where it is difficult to say what outcome is morally preferable. The issue is especially diffi-

148. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 34-38 (2d ed. 1985).

149. See *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1 (S.D.N.Y. 1975).

150. BERNARD WOLFMAN, ET AL., *DISSENT WITHOUT OPINION* (1975).

151 See *supra*, pages 333-34.

cult in cases where the judge is asked to review the death sentence itself. Unless he intervenes the defendant will die. And his act of affirming, whatever its legal significance might be, looks a lot like approval of the sentence. Conscientious Catholic judges might have more trouble with cases like these than they would at trial.

Suppose, though, that such a judge is willing to sit. Are there any legal impediments to his doing so? The government's concern, similar to its concern at trial, is that the judge's opposition to capital punishment might warp his judgment on other legal questions. And one of the questions on appeal is the propriety of the sentence itself. How could the conscientious judge ever escape the influence of his convictions in deciding that issue?

The difficulty is compounded by the nature of the question itself. The choice of a sentence is a very flexible undertaking. The law requires the government to prove a capital offense and two different kinds of aggravating factors,¹⁵² but once it has done that the sentencing authority is on its own. It can always refuse death.¹⁵³ And it can probably also always impose death. The law offers no guidance about how to balance aggravating and mitigating factors. It requires only that the person doing it keep an open mind until the information is all in.

On appeal the issue is not quite so formless. The court of appeals is directed to check for only a few defects. It must affirm the sentence unless it was "imposed under the influence of passion, prejudice, or any other arbitrary factor," or the evidence and other information (from the sentencing hearing) does not support the findings about aggravating and mitigating factors.¹⁵⁴ These are fairly standard directions for review of fact-finding—ones that judges know how to follow. The job is made easier by two rules of deference. The court of appeals looks at the information in the light most favorable to the prosecution (which won below). And the court defers to the sentencing body, especially a jury, about the credibility of witnesses (who appeared live below).¹⁵⁵ When the job is this limited, constrained, and familiar, there will be easy cases, as there are in the guilt phase.

No doubt an appellate judge can, if he wants, find reasons to reverse even in easy cases. Consider the statutory charge to review the informa-

152. 21 U.S.C. § 848(n). *See supra* note 59.

153. 21 U.S.C. § 848(k).

154. *Id.* § 848(q)(3).

155. *Jackson v. Virginia*, 443 U.S. 307 (1979); *United States v. McCullah*, 76 F.3d 1087, 1112 (10th Cir. 1996), *cert denied*, 117 S. Ct. 1699 (1997).

tion supporting mitigating factors.¹⁵⁶ A defendant is entitled at the sentencing hearing to introduce any information about his "background or character [that might] mitigate against imposition of the death sentence."¹⁵⁷ If a defendant made any effort at all along these lines, it is hard to imagine an appellate judge bent on reversing who would be unable to find some incident or feature that tempered his guilt or made his life worth saving. Robert Cover once argued that the judge has a moral obligation to engage in just this sort of nit-picking to save as many lives as he can.¹⁵⁸ This is a suggestion that we reject. There is a real moral cost to undermining the legal system, even in small ways. If the system were completely corrupt (as, say, the regime in Nazi Germany was) we could ignore this consideration. But it is hardly possible to make that claim about our own legal system. It has flaws—the death penalty is one. On the whole, though, it is a decent and just institution that judges should take care to preserve. If one cannot in conscience affirm a death sentence the proper response is to recuse oneself.¹⁵⁹ If the judge does no moral wrong in affirming, he should enforce the law in easy cases, even if he could save a life by cheating.

B. *The Appearance of "Impartiality"*

Section 455(a) requires disqualification "in any proceeding in which [the judge's] impartiality might reasonably be questioned."¹⁶⁰ This is an easier route than § 455(b)(1) because it does not require proof of actual bias or prejudice.¹⁶¹ It is not a question about the judge's state of mind

156. 21 U.S.C. § 848(q)(3)(B).

157. *Id.* § 848(m)(10).

158. Cover made this proposal about judges called on to enforce the draft laws during the Viet Nam War. Robert M. Cover, Book Review, 68 COLUM. L. REV. 1003 (1968). He made a much more moderate version of the same argument à propos judges called on to enforce the law of slavery. ROBERT M. COVER, JUSTICE ACCUSED (1975).

159. Michael Paulsen makes an argument much like this in connection with abortion. He concludes that "where there is no honest, legitimate alternative for deciding the case but to follow positive law supporting the right to commit an abortion," the judge should recuse himself. Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused*, 7 J. L. & REL. 33, 79 (1990). The abortion case is a bit easier, we think. Both the state and the unborn child's mother are (at least typically) acting with gross unfairness to the unborn child, whereas the moral objection to capital punishment is not that it is unfair to the offender.

160. 28 U.S.C. § 455(a).

161. There are several reported cases where litigants have claimed that the judge's religious belief has caused actual bias sufficient to disqualify him under § 455(b)(1) or under § 144. All such claims have failed for lack of proof. *United States v. Merkt*, 794 F.2d 950 (5th Cir. 1986); *Singer v. Waldman*, 745 F.2d 606 (10th Cir. 1984); *Kennedy v. Meacham*, 540 F.2d

at all. The issue is whether a reasonable person might doubt his impartiality. In *Liljeberg v. Health Services Acquisition Corp.*¹⁶² the Court found a violation of § 455(a) where the judge, as a trustee of Loyola University, had a financial interest in the outcome of a case before him but was unaware of the conflict. The point of subsection (a) is to promote public confidence in the integrity of the judiciary, not to guarantee the parties actual fairness. That being so, the Court held, "a violation of § 455(a) is established when a reasonable person, knowing the relevant facts, would expect that a [judge] knew of circumstances creating an appearance of partiality, notwithstanding a finding that the judge was not actually conscious of those circumstances."¹⁶³

Suppose we transpose this principle to the case where a Catholic judge who is unaware of or disagrees with the Church's teaching conducts a death sentence hearing under § 848(i)—not an improbable event given the number of Catholic judges and the increasing number of federal capital cases. The government might move for disqualification on the following theory:

- (1) The Catholic Church forbids its members to participate in capital punishment.
- (2) Judge X is a member of the Catholic Church.
- (3) Judge X may not know of the Church's teaching, or may disagree with it, but a reasonable observer would expect him to follow it.
- (4) Therefore Judge X's impartiality might reasonably be questioned, and he is disqualified under § 455(a).

Is there merit to this motion?

We think not, for two reasons. The first is that membership in the Catholic Church is too imperfect a proxy for flat opposition to the death penalty to make the observer's assumption in (3) reasonable. The second is that using mere membership in any church to disqualify a federal judge would violate the Religious Test Clause.

Let us begin with the first point. We have argued that Catholics who take seriously the Church's teaching on moral questions should find it difficult to imagine cases where the government would be justified in imposing capital punishment. But even among Catholics of this descrip-

1057 (10th Cir. 1976); *Annur-Ibn-Hashim Bey v. Philadelphia Passport Agency*, 1986 WL 14733 (E.D. Pa. 1986); *United States v. Ibrahim El-Gabrowni*, 844 F. Supp. 955 (S.D.N.Y. 1994); *Menora v. Illinois High School Ass'n*, 527 F. Supp. 632 (N.D. Ill. 1981).

162. 486 U.S. 847 (1988).

163. *Id.* at 850.

tion there may be some differences of opinion. Some might say that the death penalty is a necessary deterrent against murder by prisoners serving life sentences.¹⁶⁴ Some might reject the assumptions underlying the Church's teaching, believing that the pope and the bishops (though entitled to the utmost deference for their moral judgment) had misunderstood certain facts about American society.

There may be some, but not much, room for difference on those points. There is more on the next. In Part IC we explained that the judge's moral duty varies with the nature of the judicial task. Catholic judges are not forbidden to have *anything* to do with the death penalty. We think that they may sit on the guilt phase of capital cases—provided they withdraw before sentencing. They may handle appeals challenging convictions and (perhaps) even sentences. They may also engage in collateral review of cases where the defendant was sentenced to death. Recusal motions directed at these activities should necessarily fail. But the judge's cooperation with evil passes acceptable limits when he conducts a sentencing hearing—the issue with which we are now concerned.

Thus far we have been talking about the behavior of orthodox Catholics in capital cases. But when people make sociological claims about who is a Catholic, or what Catholics think and do, they do not confine their attention to the orthodox. One often reads in the popular press about how many Catholics dissent from the Church's teaching about contraception, abortion, divorce, homosexuality, or the ordination of women.¹⁶⁵ Some Catholics draw a more general conclusion from these particulars—that the Church's teaching is advisory rather than authoritative. Members are well-advised to consider it, but in the end they are free to accept or reject it. This attitude about teaching is linked to another about membership—that it is a matter of voluntary association. An individual is a Catholic in good standing if he says so. These attitudes about teaching and membership conflict with the Church's traditional understanding of itself, but they fit well with the American way of thinking about religion as a free and democratic kind of enterprise. Envisioning Catholicism in this way severs the link between Church membership and belief about the death penalty. If the reasonable ob-

164. We rejected this assertion earlier in the text. See *supra* notes 20-35 and accompanying text. But we left open the possibility of showing that the death penalty is an effective deterrent in these cases, and that there are no equally effective alternatives.

165. Kenneth Woodward, *Mixed Blessings*, NEWSWEEK, Aug. 16, 1993, at 38; Andrew M. Greeley, *The Abortion Debate and the Catholic Subculture*, 167 AMERICA 13 (July 4-11, 1992). On the death penalty in particular, see Robert F. Drinan, *Catholics and the Death Penalty*, 170 AMERICA 13 (June 18-25, 1994).

server of § 455(a) holds this picture of the Catholic judge, it is hard to say why he should think that being Catholic affects his impartiality.

The case is then rather like *Menora v. Illinois High School Association*,¹⁶⁶ a suit on behalf of Orthodox Jewish boys who were forbidden to wear yarmulkes while playing high school basketball. The principal defendant moved to disqualify judge Milton Shadur because he was Jewish, and because before his appointment he had been an active member of the American Jewish Congress. This, the defendant charged, raised a reasonable question about his impartiality. Judge Shadur replied:

I am Jewish, but I am not an Orthodox Jew. I do not share the beliefs of plaintiffs, nor do I practice them. But of course I respect them as I respect the beliefs and practices of every religion or, for that matter, every atheist and every agnostic. As for American Jewish Congress, like most Jewish organizations it does not have a particular religious affiliation of its own, either Orthodox, Conservative or Reform. Its members are drawn from every shade of Jewish belief or, in many cases, from every shade of lack of Jewish belief.¹⁶⁷

If one assumes that the judge, though nominally a member of the same religion as the plaintiffs, is free to give allegiance to that version of doctrine he finds most convincing, this is a persuasive reason for denying recusal.

Our final observation about the first point is that many judges—even some who would regard themselves as orthodox Catholics—when faced with a conflict between moral and legal duties, see themselves as bound to enforce the law. Part of the explanation for this is that the moral-legal distinction is not as clear as we might wish. As Robert Cover put it, “the moral-[legal] decision [is actually] a moral-moral decision—a decision between the substantive moral propositions relating to [life and the death penalty] and the moral ends served by the [legal] structure as a whole, by fidelity to it.”¹⁶⁸ There is a significant moral dimension to the legal structure created by our constitution. That system empowers Congress to define our corporate objectives, directs judges to enforce them, and sets limits on the power of judges to change our course. It would betray a public trust and undermine this system if judges who flatly opposed capital punishment were to cheat—to take charge of sentencing hearings and manipulate the law and evidence in order to save

166. 527 F. Supp. 632 (N.D. Ill. 1981).

167. *Id.* at 633.

168. COVER, *supra* note 158, at 199.

lives. Some judges see a positive as well as a negative side to this role responsibility—a duty to do one’s job, not just to refrain from undercutting it. This is the position Governor Mario Cuomo took in defending his decision to allow abortion in the state of New York.

[T]he Catholic who holds political office in a pluralistic democracy . . . bears special responsibility. He or she undertakes to help create conditions under which all can live with a maximum of dignity and with a reasonable degree of freedom; where everyone who chooses may hold beliefs different from specifically Catholic ones, sometimes contradictory to them[.]

In fact, Catholic public officials take an oath to preserve the Constitution that guarantees this freedom. . . . [T]o assure our freedom we must allow others the same freedom, even if occasionally it produces conduct . . . which we would hold to be sinful.¹⁶⁹

Justice Brennan took a similar position during his confirmation hearings in 1957, when he was asked whether he could abide by his oath in cases where “matters of faith and morals” got mixed with “matters of law and justice.” He said:

Senator, [I took my] oath just as unreservedly as I know you did . . . And . . . there isn’t any obligation of our faith superior to that. [In my service on the Court] what shall control me is the oath that I took to support the Constitution and laws of the United States and [I shall] so act upon the cases that come before me for decision that it is that oath and that alone which governs.¹⁷⁰

We do not defend this position as the proper response for a Catholic judge to take with respect to abortion or the death penalty. We mention it here for a different reason. The question in a disqualification motion under § 455(a) is whether a reasonable observer would expect a Catholic judge, simply by virtue of membership in the Catholic Church, to be unalterably opposed to capital punishment. It is a sociological observation, not a moral conclusion. And as a sociological observation about judges who are Catholics it is, for the reasons we have noted, unfortunately inaccurate.

169. Mario M. Cuomo, *Religious Belief and Public Morality: A Catholic Governor’s Perspective*, 1 NOTRE DAME J.L. ETHICS & PUB. POL’Y 13, 16 (1984).

170. *Nomination of William Joseph Brennan, Jr.: Hearings Before the Committee on the Judiciary, United States Senate*, 85th Cong., 1st Sess. 34 (1957). The interchange is discussed in Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047, 1062-63 (1990).

Let us turn now to the second reason why such a motion should be denied. The original constitution made no mention of religious liberty as such. That guarantee came four years later in the first amendment. But article VI of the constitution did include this provision at the end of the oath clause: "no religious Test shall ever be required as a Qualification to any office or public Trust under the United States."¹⁷¹ The idea probably has as much in common with our later establishment clause as with the free exercise clause. That is to say, it is as much concerned with the composition of the government (and perhaps the participant's interest in sharing those duties) as it is with the practice of faith. At the time of the convention the laws of Georgia, New Hampshire, New Jersey, North Carolina, and Vermont required high executive and legislative officers to declare their belief in the Protestant religion. Maryland and Massachusetts limited office-holding to Christians. Delaware, Pennsylvania, and Vermont insisted on an acknowledgment of the divine inspiration of the old and the new testaments.¹⁷² By dropping limitations like these, article VI made a federal establishment of religion less likely because it prevented homogeneity among the lawmakers. It also assured an equal role in government to (most prominently) Catholics and Jews.

It seems plainly inconsistent with the clause to suggest that Catholics, simply by virtue of being Catholics, are disqualified from serving as judges.¹⁷³ There are, however, two features of this case which make it more difficult. One is that a disqualification motion prevents a Catholic judge from serving only in a particular kind of case, not from appointment, confirmation, and service in general. This fact tempers the scope of the violation, but it does not justify it. It is a point that can easily be extended to a wide range of cases, with unpalatable results. As Judge Noonan has observed, it might be raised in abortion cases as well as death penalty cases. It might be asserted against Orthodox Jews and Mormons, who also oppose abortion.¹⁷⁴ It might be asserted against legislators no less than judges. Suppose the Senate adopted a rule for its own proceedings that Catholics could not vote on measures dealing with

171. U.S. CONST. art. VI, cl. 3.

172. CARL ZOLLMAN, *AMERICAN CHURCH LAW* 5 (1933). The fullest account of the colonial situation and the history of the clause is Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 *CASE W. RES. L. REV.* 674 (1987).

173. It is a different matter to say that a particular Catholic judge, because he holds firmly to a proposition which his church teaches, is disqualified under § 455(b)(1) from activities which require him to hold the contrary.

174. *Feminist Women's Health Center v. Codispoti*, 69 F.3d 399 (9th Cir. 1995).

abortion or aid to parochial schools. Our natural reaction to a proposal like this is to think that it violates the freedoms of religion and speech. It probably does.¹⁷⁵ But the religious test clause provides the most precise explanation of its deficiency. We cannot limit representation along religious lines, and this goes for voting rights as well as the right to serve.¹⁷⁶

The other feature which makes this case difficult is that it involves judges. The religious test clause says that religion cannot be a qualification for any "office or public Trust under the United States."¹⁷⁷ Does this phrase include judges? We said a moment ago that one purpose of the clause was to head off an establishment by preventing homogeneity among the lawmakers. It need not apply to judges to serve that end.¹⁷⁸ But the oath clause in which the religious test clause appears speaks of "executive and *judicial Officers*"—language which pretty clearly signifies that the framers thought of a judgeship as an "office."¹⁷⁹ The evident meaning of the religious test clause is that those whom the first part of the sentence requires to take an oath shall not have to swear to any religious propositions. Judges are required to take an oath by the first part of the sentence. And we should guard against understanding the religious test clause too narrowly. People supported it for more than one reason, and some did so for reasons that would look to us more like arguments for the free exercise of religion. James Iredell defended it this way: "This article is calculated to secure universal religious liberty,

175. The Court held in *McDaniel v. Paty*, 435 U.S. 618 (1978), that a state law disqualifying clergy from legislative service violated the free exercise clause. The decision invalidating a religious oath in *Torcaso v. Watkins*, 367 U.S. 488 (1961), also relies in part on the free exercise clause.

176. It is no answer to say that legislators, because they make the laws, can follow the teachings of their religion without *violating* the laws—as the reasonable observer will suspect Catholic judges of wanting to do. Legislators are bound by the supreme law (the constitution), and can break their oaths and violate it by passing laws against abortion and other constitutionally protected acts that they view as sinful.

177. U.S. CONST. art. VI, cl. 3.

178. The judge's faith is not irrelevant. Unconstitutional laws, if they could get passed, would get a more receptive hearing from courts whose members all belonged to the majority religion.

179. The full text is:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

U.S. CONST. art. VI, cl. 3.

by putting all sects on a level—the only way to prevent persecution.”¹⁸⁰ Isaac Backus defended the clause because he believed that “nothing is more evident, both in reason and the Holy Scriptures, than that religion is ever a matter between God and individuals.”¹⁸¹ It is certainly inconsistent with ideas like these to disqualify judges because of their affiliation with certain religious groups.¹⁸²

III. CONCLUSION

Catholic judges must answer some complex moral and legal questions in deciding whether to sit in death penalty cases. Sometimes (as with direct appeals of death sentences) the right answers are not obvious. But in a system that effectively leaves the decision up to the judge, these are questions that responsible Catholics must consider seriously. Judges cannot—nor should they try to—align our legal system with the Church’s moral teaching whenever the two diverge. They should, however, conform their own behavior to the Church’s standard. Perhaps their good example will have some effect.

180. IV ELLIOT’S DEBATES ON THE FEDERAL CONSTITUTION 196 (1901).

181. LEO PFEFFER, CHURCH STATE AND FREEDOM 124 (1967).

182. Even if the public knows that a judge’s religious belief is (like Judge Noonan’s well known opposition to abortion) more than nominal, we think that the free exercise and religious test clauses prevent disqualification under § 455(a). Although a litigant could make a stronger case here for the “appearance of partiality” than where the judge has made no public statements about the depth of his belief, we think the constitutional guarantees trump the public relations concerns of § 455(a). As a practical matter this leaves most recusals for religious reasons in the hands of judges themselves, for problems of proof make § 455(b) motions hard to win. Only the judge himself really knows when his religious belief will cause actual bias.