

## PRECEDENT AND CONSTITUTIONAL STRUCTURE

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**ABSTRACT**—The Constitution does not talk about precedent, at least not explicitly, but several of its features suggest a place for deference to prior decisions. It isolates the judicial function and insulates federal courts from official and electoral control, promoting a vision of impersonality and continuity. It charges courts with applying a charter that is vague and ambiguous in important respects. And it was enacted at a time when prominent thinkers were already discussing the use of precedent to channel judicial discretion.

Taken in combination, these features make deference to precedent a sound inference from the Constitution's structure, text, and historical context. This understanding informs the treatment of precedent in concrete disputes as well as the locus of authority over the rules of precedent within the federal system. It also explains why the Supreme Court may legitimately reaffirm constitutional precedents even when they are flawed.

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INTRODUCTION

Judicial precedent is defeasible and it is indispensable. The Supreme Court commonly explains that respect for precedent is important, and even necessary, to the rule of law. At the same time, the Court cautions that no precedent is beyond reconsideration and the doctrine of stare decisis is not an “inexorable command” to endure the mistakes of the past.<sup>1</sup> Standing by precedent is “the preferred course” for reasons sounding in consistency, predictability, efficiency, and “the actual and perceived integrity of the judicial process.”<sup>2</sup> Still, preferred is different from required.<sup>3</sup> Sometimes

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<sup>1</sup> For support of the idea that following precedent is not an “inexorable command,” see, for example, *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); *Citizens United v. FEC*, 558 U.S. 310, 363 (2010); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 500 (2007) (Scalia, J., concurring in part and concurring in the judgment); *Lawrence v. Texas*, 539 U.S. 558, 577 (2003); *Hohn v. United States*, 524 U.S. 236, 251 (1998); *City of Boerne v. Flores*, 521 U.S. 507, 547 (1997) (O’Connor, J., dissenting); *United States v. International Business Machines Corp.*, 517 U.S. 843, 856 (1996); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 63 (1996); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 231 (1995); *Holder v. Hall*, 512 U.S. 874, 944–45 (1994) (Thomas, J., concurring in the judgment); and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 573 (1993) (Souter, J., concurring in part and concurring in the judgment).

<sup>2</sup> *Payne*, 501 U.S. at 827.

<sup>3</sup> See Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1537 (2000) [hereinafter Paulsen,

there are good reasons to depart from the past. When there are, the pull of precedent can give way.

There is no inherent contradiction in this vision of precedent. Fidelity to prior decisions can be integral to the rule of law *and* rebuttable for compelling reasons. The mystery is not how these principles coexist but where they come from. The Constitution does not expressly discuss the role of judicial precedent or the doctrine of stare decisis. While some commentators argue that deference to precedent is encompassed in provisions like Article III's "judicial Power," not everyone agrees.<sup>4</sup> Another possibility is that the Constitution takes no position on precedent, implicitly authorizing courts to apply common law principles of stare decisis.<sup>5</sup> Or maybe the Constitution actually forbids deference to precedent, at least when a decision deviates from the document's meaning as properly understood.

These possibilities are intriguing, and the scholarship analyzing them is insightful and instructive. But I want to approach the connection between precedent and constitutional law from a different angle. My claim is that we can view deference to precedent as an implicit constitutional principle that coheres with key features of the framework of American government.<sup>6</sup> This vision of precedent as a "basic self-governing principle within the Judicial Branch" has arisen from time to time in Supreme Court opinions.<sup>7</sup> My aim is to give it sustained attention and, in doing so, to take a step forward in understanding the constitutional dimensions of stare decisis.

Defending precedent as a constitutional principle does not fully determine how sharply past decisions should constrain future courts. Neither does my argument fully determine the set of considerations that can justify overruling prior decisions. Even so, studying the constitutional foundations of precedent helps to define the rules of engagement for courts tasked with applying old decisions to new facts. It also offers lessons about what federal judges must do, may do, and cannot do in their treatment of precedent. And the same goes for Congress. To take an example to which I return below, if

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*Abrogating Stare Decisis*]; *id.* at 1538 (describing the Supreme Court as taking the position that "stare decisis is neither a doctrine of constitutional dimension nor a strict rule of law, but rather is a subconstitutional doctrine of ostensibly wise judicial practice, procedure, and policy").

<sup>4</sup> U.S. CONST. art. III, § 1; *see infra* Section I.A.

<sup>5</sup> For purposes of this Article, I will be using the terms "common law" and "general law" to mean the same thing: a body of unwritten law operating to inform the treatment of precedent. For a discussion of situations in which distinguishing between the two terms might matter, see William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1137–38 (2017).

<sup>6</sup> *Contra* Paulsen, *Abrogating Stare Decisis*, *supra* note 3, at 1548 (arguing 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").

<sup>7</sup> *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989).

the Constitution requires presumptive deference to precedent, Congress has no power to eliminate that presumption. But to the extent stare decisis rests on a legal foundation apart from the Constitution itself, the doctrine may be susceptible to congressional abolition. Putting these principles together, I will contend that while legislation can affect the various factors that are included in the doctrinal calculus—much like it affects the federal courts’ admission of evidence<sup>8</sup>—the Constitution implies a baseline presumption of deference that even Congress cannot remove.

Recognizing the constitutional salience of precedent also responds to the objection that deferring to flawed decisions is unlawful. While the Constitution does not contain a “Stare Decisis Clause,”<sup>9</sup> the legal validity of deference arises by implication from the Constitution’s structure, text, and historical context. This approach helps to square the Supreme Court’s view of “respect for precedent” as “indispensable”<sup>10</sup> with its seemingly discordant description of stare decisis as “a policy judgment.”<sup>11</sup> Fidelity to precedent reflects a policy judgment rather than an unflinching command in the sense that it sometimes gives way: namely, when there is a special justification for overruling.<sup>12</sup> Still, the general presumption of deference remains “indispensable” to American constitutional law even as it allows some decisions to be overruled.<sup>13</sup>

This Article proceeds in four parts, beginning with constitutional foundations and moving to practical implications. Part I provides background by exploring some prominent analyses of the connection (or lack thereof) between precedent and the Constitution.

Part II develops an account of precedent as a constitutional principle. By giving federal judges life tenure and salary protection, the Constitution makes plain its vision of the judiciary as both enduring and independent of official and electoral control. The task assigned to the judiciary is also important: notwithstanding its areas of specificity, the Constitution often rests upon general concepts and commitments rather than detailed

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<sup>8</sup> See *infra* Part IV.

<sup>9</sup> Paulsen, *Abrogating Stare Decisis*, *supra* note 3, at 1571.

<sup>10</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (citation omitted).

<sup>11</sup> *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

<sup>12</sup> See Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 581–82 (2001) [hereinafter Fallon, *Stare Decisis*] (“That a principle is not absolute, or that a principle reflects judgments that include concerns of policy, does not entail that it lacks constitutional authorization.”).

<sup>13</sup> *Casey*, 505 U.S. at 854.

commands.<sup>14</sup> Whatever her interpretive principles, a judge inevitably will find herself without clear solutions to some constitutional disputes.<sup>15</sup>

That raises the question of what independent judges should do in the face of an uncertain (at least in some respects) Constitution. I submit that the constitutional blueprint suggests presumptive deference to precedent as the appropriate response. The founding generation was familiar with the use of past decisions to guide courts and to create space between the views of the individual judge and the content of the law. A practice of deferring to past decisions performs a constraining function notwithstanding the lack of official and electoral control over judges. It limits the extent to which judges may revise the existing body of constitutional law based on their personal philosophies—even when those philosophies are held and applied in good faith.

Without a practice of deferring to past decisions, life-tenured and salary-protected judges would receive substantial discretion to interpret the Constitution according to their individual methodological and normative premises. That discretion would remain even if the judges devoted themselves to following the document's text, because the text does not resolve every constitutional question. The doctrine of *stare decisis* offers a response to the challenges raised by inevitable disagreements over interpretive philosophy, especially as applied to a charter that is general and uncertain in multiple respects. Precedent constrains discretion while preserving the judiciary's independence from political forces, and it guides decisionmaking even when the Constitution is ambiguous or opaque. It also instills the law with a sense of stability that transcends interpretive debates

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<sup>14</sup> This phenomenon is sometimes referred to as *underdeterminacy*. E.g., Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 777 n.113 (1997) (using the concept of underdeterminacy in the context of originalist analysis to refer to situations in which “the original understanding might exclude a great many, but still not all, interpretations”); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987) (“The law is *underdeterminate* with respect to a given case if and only if the set of results in the case that can be squared with the legal materials is a nonidentical subset of the set of all imaginable results.”). In this Article, I use the term *indeterminacy* rather than *underdeterminacy*, mainly for syllabic savings but also because the colloquial sense of indeterminacy captures the idea of texts that leave multiple options (even if not infinite options) available.

<sup>15</sup> See, e.g., DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 7–8 (2010) (“Many provisions of the U.S. Constitution are quite precise and leave no room for quarreling, or for fancy questions about interpretation. . . . But other provisions of the Constitution, while written in plain enough English, do not give us such unequivocal instructions.”); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 11 (2015) (“Even after context is considered, vague terms in the Constitution may continue to underdetermine the content of constitutional doctrine and the outcome of constitutional cases.”); cf. JACK M. BALKIN, *LIVING ORIGINALISM* 7 (2011) (“When the Constitution uses vague standards or abstract principles, we must apply them to our own circumstances in our own time.”).

and separates the Constitution from the perspectives of those who apply it. The Supreme Court has been willing to make inferences from constitutional structure in contexts including sovereign immunity, federalism, and the separation of powers.<sup>16</sup> I hope to show that deference to precedent can be understood in a similar way.

Part III examines how precedent works in concrete cases. I contend that the principle of deference requires a special justification for overruling that goes beyond disagreement with a decision on the merits. The principle that overrulings should require more than disagreement allows precedent to play the constraining, stabilizing role the Constitution leaves for it.<sup>17</sup> Beyond this constitutional baseline, I offer some supplemental principles for implementing the doctrine. For example, I suggest that judges should resist the urge to overrule decisions that they deem to be clearly erroneous or poorly reasoned, because such descriptions tend to be bound up with methodological tendencies that vary from judge to judge. This rule, however, is not itself a constitutional inference. The constitutional imperative begins and ends with a presumption of deference. Even so, in thinking about how *stare decisis* is best operationalized, it is useful to draw on the core principles of stability and impersonality that animate the doctrine.

Finally, Part IV turns to the broader implications of determining whether the doctrine of *stare decisis* has constitutional foundations. Perhaps most importantly, to the extent *stare decisis* is a constitutional principle, it is insulated from congressional abolition. At the same time, the argument from constitutional structure theoretically leaves room for Congress to affect the components of *stare decisis* doctrine.

Before proceeding, I offer three notes about the scope of this Article. First, my analysis is limited to the federal judiciary, even though many of the costs and benefits of deferring to precedent extend to state courts as well. Second, while I will briefly discuss the effect of Supreme Court precedents on lower courts, my focus will be the Supreme Court's treatment of its own prior decisions; issues of discretion and constraint loom particularly large for a superior tribunal with no official oversight and no fear of judicial reversal. Third, though I will have a few words to say about statutory construction, what follows will deal primarily with constitutional cases and the interpretive disputes they generate.

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<sup>16</sup> See *infra* Section II.C.

<sup>17</sup> See, e.g., *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment) (“Who ignores [the doctrine of *stare decisis*] must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all).”).

## I. PRECEDENT AS POLICY AND LAW

The Supreme Court has called deference to precedent a “principle of policy.”<sup>18</sup> The basic idea is that judges should pay attention to the problems that legal U-turns can create, but they should not treat precedents as unflinching commands.<sup>19</sup> Hence the Court’s reference to a “series of prudential and pragmatic considerations”—including procedural workability, factual changes, reliance interests, and developments in related areas of the law—that bear on whether a dubious decision should be jettisoned or retained.<sup>20</sup>

The word “policy” can be misleading. It would be going too far to conclude from the Court’s “principle of policy” language that deference to precedent has no legal foundation.<sup>21</sup> “Policy” does not necessarily mean “not law.” Consider, for example, the Court’s description of the overbreadth doctrine of First Amendment jurisprudence as driven by “countervailing policies” that sometimes outweigh the general policy against challenging a law’s constitutionality as applied to someone else.<sup>22</sup> By referring to policies,

<sup>18</sup> *Citizens United v. FEC*, 558 U.S. 310, 363 (2010) (“[S]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision.”) (quotation marks omitted) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)); cf. *Hertz v. Woodman*, 218 U.S. 205, 212 (1910) (“The rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.”); Paulsen, *Abrogating Stare Decisis*, *supra* note 3, at 1537 (“Stare decisis, the Supreme Court has often reminded us, is a rule of policy, not a rule of law.”).

<sup>19</sup> See *Citizens United*, 558 U.S. at 378 (Roberts, C.J., concurring) (“When considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*. As Justice Jackson explained, this requires a ‘sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other.’” (quoting Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334, 334 (1944))).

<sup>20</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992); see also *Citizens United*, 558 U.S. at 362–63 (“Beyond workability, the relevant factors in deciding whether to adhere to the principle of stare decisis include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.” (quotation marks omitted) (quoting *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009))); STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* 152 (2010) (discussing factors including “the public’s reliance on a decision,” how long ago a precedent was decided, whether a precedent has “created a set of unworkable legal rules,” whether a precedent itself represented a departure from settled law, and whether a precedent “has become well embedded in national culture”).

<sup>21</sup> See, e.g., John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503, 508 (2000) (interpreting judicial depictions of stare decisis as a policy to mean “the rule [of stare decisis] is not absolute” and “the norms are influenced by and reflect policy considerations, as does the common law generally”).

<sup>22</sup> *New York v. Ferber*, 458 U.S. 747, 768 (1982) (internal quotation marks omitted); cf. *Bigelow v. Virginia*, 421 U.S. 809, 829 (1975) (“The policy of the First Amendment favors dissemination of information and opinion.”); *N.Y. Times Co. v. United States*, 403 U.S. 713, 754 (1971) (Harlan, J., dissenting) (noting the “strong First Amendment policy against prior restraints on publication”).

the Court is not saying its analysis is grounded in extralegal considerations. So, too, in the context of stare decisis. When it invokes its “policy” language, what the Court seems to mean is that the presumption of deference is rebuttable under the right circumstances—namely, when it is more important for the law to be *right* than *settled*.<sup>23</sup> The same conclusion flows from the Supreme Court’s characterization of deference to precedent as a “foundation stone”<sup>24</sup> that is “indispensable”<sup>25</sup> to the rule of law. Precedent might be defeasible, but it is also crucial to American constitutional law. Being faithful to the law means paying proper attention to prior judicial decisions. It does not mean those decisions must always be followed.<sup>26</sup>

The question remains: What makes it lawful for today’s Justice to vote to uphold a decision she thinks is wrong, even (or especially) if that decision involves an important constitutional issue? The Court’s description of deference as a principle of policy does not answer that question. We need to dig deeper to figure out where the policy comes from. A host of scholars have done just that, examining various explanations for the legal validity of deference to constitutional decisions.

Two broad categories of arguments are most relevant here. The first category links deference with a particular provision in the Constitution’s text—such as the “judicial Power” of Article III. The second treats deference as part of the common law background that predated the Constitution and remained intact after ratification.<sup>27</sup> These arguments are intricate, and I make no pretense of passing conclusive judgment on either one. But summarizing them is helpful both in understanding the lay of the land and in framing the constitutional argument that I develop in Part II.

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<sup>23</sup> See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting); Fallon, *Stare Decisis*, *supra* note 12, at 581 (noting that the Court’s statements that “stare decisis is ‘not an inexorable command’ . . . need imply no more than that stare decisis, like many principles of constitutional stature, is capable of being overridden”).

<sup>24</sup> *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014); see also *Citizens United*, 558 U.S. at 378 (Roberts, C.J., concurring) (noting that the “greatest purpose [of stare decisis] is to serve a constitutional ideal—the rule of law”).

<sup>25</sup> *Casey*, 505 U.S. at 854.

<sup>26</sup> See, e.g., *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. 180 (2005) [hereinafter *Hearing*] (statement of John G. Roberts, Jr., Judge, United States Court of Appeals for the District of Columbia Circuit) (“No judge gets up every morning with a clean slate and says, well, what should the Constitution look like today? . . . You begin with the precedents. . . . Those precedents become part of the rule of law that the judge must apply.”).

<sup>27</sup> Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 754 (1988) (“One could argue that the principle of stare decisis inheres in the ‘judicial power’ of article III. Alternatively, stare decisis could possess the nature of constitutional common law: not a constitutional imperative, but simply the natural result of judicial powers and duties established in the text and ultimately subject to the control of Congress.”).

### A. Constitutional Text

The Constitution's Third Article vests the "judicial Power" of the United States "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>28</sup> Our present concern is whether the judicial power implies anything about the role of precedent. The phrase does not explicitly address the doctrine of stare decisis, so the question becomes whether its deeper meaning informs the treatment of prior judicial decisions.<sup>29</sup>

The answer depends in the first instance on methodological choices about how the Constitution should be interpreted. Are we interested in the meaning of the judicial power as understood in modern times? Or the meaning of the judicial power at the time of ratification? Or the meaning of the judicial power that leads to the best results? Or some combination of these? Or something else entirely?

To begin with prevailing understandings: there is no doubt that appeals to precedent—even appeals that infuse precedent with "decision-altering effect"<sup>30</sup>—are a familiar part of modern American law. Judicial nominees talk about stare decisis with reverence during their confirmation hearings.<sup>31</sup> They use similar language after they are confirmed.<sup>32</sup> If our touchstone is contemporary discourse, the lawfulness of deferring to precedent is clear. Richard Fallon highlights this point in connecting "the relative entrenchment of stare decisis" with its "constitutionally authorized status."<sup>33</sup> This does not mean the Constitution's text will or should be ignored, but it does mean the "judicial Power" reflects accepted practice as well as language and history.<sup>34</sup>

<sup>28</sup> U.S. CONST. art. III, § 1.

<sup>29</sup> Cf. JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 168 (2013) ("The term *judicial power* in Article III is, at least on its face, ambiguous. It might be understood narrowly to mean the power to say what the law is in a particular judicial proceeding. But it might also be understood more broadly to include certain traditional aspects of the judicial office that were widely and consistently exercised.").

<sup>30</sup> Michael Stokes Paulsen, *The Intrinsicly Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 293 n.14 (2005) [hereinafter Paulsen, *Intrinsicly Corrupting Influence*].

<sup>31</sup> See, e.g., *Hearing*, *supra* note 26, at 158 (describing judicial humility as involving, among other things, "respect for precedent that forms part of the rule of law and that the judge is obligated to apply under principles of *stare decisis*").

<sup>32</sup> See Fallon, *Stare Decisis*, *supra* note 12, at 582–83 ("The Supreme Court invokes stare decisis with great regularity. Indeed, I am aware of no Justice, up through and including those currently sitting, who persistently has questioned the legitimacy of stare decisis or failed to apply it.").

<sup>33</sup> *Id.* at 582.

<sup>34</sup> See *id.* at 577 ("Article III's grant of 'the judicial Power' authorizes the Supreme Court to elaborate and rely on a principle of stare decisis and, more generally, to treat precedent as a constituent element of constitutional adjudication."); *id.* at 588 ("It is crucial that stare decisis can be seen as an authorized aspect of the 'judicial Power' conferred by Article III, even though—what is equally crucial—the norms defining the 'judicial Power' are themselves largely unwritten and owe their status to considerations going well

We cannot understand the judicial power, the argument goes, until we know how courts are exercising it. And they are exercising it in a way that treats presumptive deference to precedent as lawful and appropriate.<sup>35</sup>

While Supreme Court opinions regularly treat deference to precedent as lawful, they do not clearly ground the authority to defer in the Article III judicial power.<sup>36</sup> That creates the possibility of linking precedent with other clauses. For example, one might look to Article VI and its description of “This Constitution” as the “supreme Law of the Land.”<sup>37</sup> Frederick Schauer contends that “[s]hould the American people, or American judges, decide that judicial precedents should be authoritative in constitutional decisionmaking, and should count as part of what ‘the Constitution’ *is*, nothing in the Constitution itself could preclude such a social and political decision.”<sup>38</sup> Understood in this way, the Supremacy Clause provides another potential basis for grounding deference to precedent in the Constitution’s text.

Alternatively, the status of *stare decisis* as a widespread practice could establish the doctrine’s validity without connecting it to any particular provision. The rationale would be that areas of textual uncertainty, such as the role of precedent in constitutional adjudication, should be resolved in ways that reflect “social facts” and accepted practices.<sup>39</sup>

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beyond the ‘plain meaning’ of the Constitution’s language and its ‘original understanding.’”); *id.* at 582 (arguing that it “matters enormously that *stare decisis* is a principle with deep roots in historical and contemporary practice”); RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 115–16 (2001) (“[T]he Supreme Court’s authority to endow its precedents with power to trump what otherwise would be the best interpretation of the written Constitution cannot be derived from the written Constitution alone.”).

<sup>35</sup> See Fallon, *Stare Decisis*, *supra* note 12, at 591 (“[S]tare decisis merits recognition as constitutionally authorized. . . . [T]he considerations supporting this conclusion include, but are not limited to, the doctrine’s entrenched status and its normative desirability. *Stare decisis* is also reasonably consistent with the Constitution’s language and structure, and the evidence concerning the original understanding by no means mandates its rejection.”).

<sup>36</sup> The Court has used the phrases “*stare decisis*” and “judicial power” in proximity in decisions like *Planned Parenthood of Southeastern Pennsylvania v. Casey*, but without setting forth a comprehensive argument that the Article III judicial power encompasses a doctrine of *stare decisis*. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864–65 (1992) (“Our analysis would not be complete . . . without explaining why overruling *Roe*’s central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court’s capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law.”).

<sup>37</sup> U.S. CONST. art. VI.

<sup>38</sup> Frederick Schauer, *Precedent and the Necessary Externality of Constitutional Norms*, 17 HARV. J.L. & PUB. POL’Y 45, 55 (1994).

<sup>39</sup> Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1126 (2008) [hereinafter Fallon, *Constitutional Precedent*]; cf. Baude & Sachs, *supra* note 5, at 1129 (arguing that judges who are responding to indeterminacy “take their cues from an existing legal system, of which the interpretive rules form a part”); Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 98 (2016) (noting—albeit in the

An additional possibility for defending stare decisis is that the doctrine produces desirable results. Those results might include the protection of settled expectations, the conservation of judicial resources, or the assurance that like cases will be treated alike through consistent application of even-handed principles.<sup>40</sup> The textual arguments discussed above would remain relevant; a focus on results is commonly coupled with attention to factors such as text, structure, and history.<sup>41</sup> The argument would be that deference to precedent is warranted because the doctrine of stare decisis creates meaningful benefits *and* because it plausibly fits with the text of provisions such as the Article III judicial power.

If we shift from contemporary practice and pragmatic benefits to original meanings, we encounter a different set of claims. Some argue that the original meaning of the Article III judicial power encompasses the authority to give weight to prior decisions.<sup>42</sup> There may even be a duty to defer under certain circumstances.<sup>43</sup> An elegant version of this argument comes from John McGinnis and Michael Rappaport, who read Article III as *requiring* courts to give weight to a series of decisions on a particular issue while *allowing* courts to develop supplemental rules of precedent that do not flow directly from the Constitution.<sup>44</sup>

Yet there is no consensus about the relationship between judicial precedent and constitutional text. Some scholars take the view that Article

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course of challenging—an argumentative shift “away from abstract conceptual or normative arguments about interpretation” and toward “how we actually understand and apply the Constitution as law”).

<sup>40</sup> See, e.g., BREYER, *supra* note 20, at 151 (“Lower-court judges, lawyers, clients, and ordinary Americans all need stable law so that judges can decide their cases, lawyers can advise their clients, clients can make decisions, and ordinary Americans can buy homes, enter into contracts, and go about their daily lives without fear that changes in the law will turn their lives topsy-turvy.”).

<sup>41</sup> See *id.* at 80–81 (discussing a pragmatic tradition whereby judges “use textual language, history, context, relevant traditions, precedent, purposes, and consequences in their efforts to properly interpret an ambiguous text,” but noting that “when faced with open-ended language and a difficult interpretive question,” such judges “rely heavily on purposes and related consequences”).

<sup>42</sup> See MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 58–59 (2008). Professor Gerhardt adds another dimension to his textual argument by contending that “[t]he exercise of Article III judicial power entails deliberating over how it ought to be exercised,” and that “[d]eciding cases entails determining how much weight to accord to precedent and other sources of constitutional meaning.” *Id.* at 59.

<sup>43</sup> See Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 447 (2006) (arguing that “by 1787–1789, the concept of judicial power included significant respect for precedent” and that “judges would be bound by precedent such that they would have to follow analogous precedent or give significant reasons for not doing so”).

<sup>44</sup> See MCGINNIS & RAPPAPORT, *supra* note 29, at 168 (“There are strong reasons for concluding that the Framers’ generation would have understood the judicial power to include a minimal concept of precedent, which requires that some weight be given to a series of decisions.”); *id.* at 169 (“The bulk of precedent rules . . . are a matter of common law that is revisable by congressional statute.”).

III tells us little or nothing about the status of precedent.<sup>45</sup> A few go further and read the Constitution as foreclosing deference to flawed constitutional decisions. A prominent version of this latter argument, as presented by Gary Lawson, includes three steps that are most relevant here. First, the judicial power “is the power to decide cases in accordance with governing law.”<sup>46</sup> Second, the Constitution itself is hierarchically superior to all other sources of law.<sup>47</sup> Finally, “the power and duty to decide in accordance with law includes the power and duty to decide in accordance with the Constitution, even when . . . prior courts . . . have said otherwise.”<sup>48</sup> Michael Paulsen takes a similar position when he contends that the doctrine of stare decisis is unlawful “precisely to the extent that it yields deviations from the correct interpretation of the Constitution!”<sup>49</sup>

My project is not to evaluate these approaches—aside from the claim that the Constitution forbids deference to flawed precedents, to which I return below—but to recognize the implications of the diversity of views. The case law and commentary are home to competing perspectives about whether Article III’s judicial power (or other constitutional provisions)

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<sup>45</sup> Harrison, *supra* note 21, at 525 (“It is highly unlikely that when the Constitution was adopted Americans believed that the principle of stare decisis was hard-wired into the concept of judicial power. There were norms of precedent, but they were principles of general jurisprudence, no more fixed by the Constitution than is the law of admiralty.”); Gary Lawson, *Rebel Without a Clause: The Irrelevance of Article VI to Constitutional Supremacy*, 110 MICH. L. REV. FIRST IMPRESSIONS 33, 38 (2011) (“The ‘judicial Power’ is the power to decide cases in accordance with governing law. If the Constitution conflicts with any other potentially applicable source of law, such as statutes or prior judicial decisions . . . , the Constitution must prevail.”); Paulsen, *Abrogating Stare Decisis*, *supra* note 3, at 1571 (“The constitutional text simply cannot be read to support the assertion of a plenary judicial power to vest precedent with quasi-legislative force, effectively altering the meaning of the Constitution’s commands for purposes of judicial interpretation in subsequent cases.”). Thomas Healy also rejects the argument that the judicial power is best understood as encompassing an obligation to follow precedent, though he leaves open the possibility that “stare decisis is essential to the legitimacy of the courts and is therefore a de facto constitutional requirement.” Thomas Healy, *Stare Decisis and the Constitution: Four Questions and Answers*, 83 NOTRE DAME L. REV. 1173, 1180–83 (2008); cf. Norman R. Williams, *The Failings of Originalism: The Federal Courts and the Power of Precedent*, 37 U.C. DAVIS L. REV. 761, 767 (2004) (arguing that “the historical materials regarding Article III and the federal courts are too opaque to provide any definitive sense of the Framers’ views of the role of precedent in federal court adjudication”).

<sup>46</sup> Lawson, *supra* note 45, at 38.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Paulsen, *Intrinsically Corrupting Influence*, *supra* note 30, at 291; see also *id.* at 290 (“If one has a theory of stare decisis that permits precedent decisions to have genuine decision-altering weight—that is, if precedents dictate different results than the interpreter otherwise would reach in the absence of such precedents—then *stare decisis* corrupts the otherwise ‘pure’ constitutional decision-making process.”). Jonathan Mitchell likewise disputes that Article III establishes a doctrine of constitutional stare decisis, though he advances a different textualist argument to defend the doctrine in certain subcategories of constitutional cases. See Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 68 (2011) (concluding that “the written Constitution permits the Supreme Court to use wrongly decided precedents as rules of decision whenever it upholds a federal statute or treaty, or invalidates a state law”).

suggests anything about the role of precedent. For some, the text of the Constitution encompasses a degree of respect for precedent. For others, the text does no such thing. To be sure, modern courts commonly defer to precedent. But whether that practice coheres with the Constitution remains subject to debate.

### B. Common Law

The Constitution's plain text might not clearly authorize deference to precedent, but neither does the text clearly forbid deference. That opens the door to other arguments for establishing the legal validity of stare decisis in constitutional cases.

An intriguing possibility is that principles of stare decisis that existed prior to the founding are best understood as having carried over into postconstitutional practice—not via express incorporation by the Constitution's text but by being left undisturbed. Among the scholars advancing arguments in this spirit is John Harrison, who concludes that “[t]he norms of precedent as the federal courts know them consist mainly of unwritten principles that are characterized as binding law but that reflect substantial judicial input, custom, and practice.”<sup>50</sup> Stephen Sachs likewise suggests that stare decisis, while not “hard-cod[ed]” into the Constitution, was a common law backdrop against which the document was enacted and that remained in effect going forward.<sup>51</sup> And though they defend a narrow principle of stare decisis as emerging from the Article III judicial power, John McGinnis and Michael Rappaport also view background assumptions at the time of the founding as crucial to understanding the modern law of precedent.<sup>52</sup> For them, the historical background creates a strong presumption “against any constitutional interpretation that prohibits” deference to precedent, and the Constitution's text does nothing to rebut that presumption.<sup>53</sup>

If these scholars are correct that the Constitution left in place common law understandings about precedent, the next step is figuring out what those understandings were (and are). It is possible that the treatment of precedent should follow the rules that existed at the time of the founding. It is also

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<sup>50</sup> Harrison, *supra* note 21, at 529.

<sup>51</sup> Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1865 (2012).

<sup>52</sup> MCGINNIS & RAPPAPORT, *supra* note 29, at 154–55 (“Precedent was an important part of Anglo-American law for centuries before the enactment of the Constitution, and the Founding generation expected precedent to apply to, and continue after, the Constitution.”); *id.* at 168 (“The judicial power can be understood as requiring judges to deploy a minimal concept of precedent—a concept of precedent that was followed widely and consistently from at least the time of Coke until the enactment of the Constitution.”).

<sup>53</sup> *Id.* at 157.

possible that what carried over were not specific rules, but a general recognition of each generation's power to fashion its own doctrine of precedent. The latter approach would establish the legal validity of stare decisis "without requiring identification of a single, unchanging approach."<sup>54</sup> Whatever its precise formulation, the common law argument is rooted in preconstitutional understandings about the role and function of judicial decisions: deference to precedent is lawful because it is authorized by background understandings that the Constitution left in place.

The common law argument has different implications than theories that tether precedent to provisions such as the Article III judicial power. Most importantly, as I will discuss in Part IV, a doctrine of stare decisis that is grounded in the common law is subject to congressional revision to a greater degree than a doctrine grounded in the Constitution itself. While a common law doctrine of precedent is in some ways a "law of first resort,"<sup>55</sup> a constitutional requirement works differently. That makes it crucial to pinpoint the source of the doctrine—not only to determine its lawfulness but also to understand its degree of insulation from legislative revision.

## II. PRECEDENT AS CONSTITUTIONAL INFERENCE

There is another way to think about the relationship between precedent and the Constitution. Deference to precedent might not arise out of any particular clause. Nevertheless, it might be something more than a background assumption of the common law. This Part develops an account of deference to precedent as an inference from the Constitution's text, structure, and historical context—in other words, as an implicit principle of constitutional law.

My analysis begins with the Constitution's conceptualization of the judiciary, including its granting of life tenure and salary protection to federal judges. By insulating courts from official and electoral control, the Constitution raises questions about what remains to constrain judges, if judges are to be constrained at all. I want to be precise about the sort of constraint I am describing. The point is not to try to bind federal judges who wish to ignore the law for their own ends. I do not know any such judges, and to the extent they exist they would be no more likely to follow precedent than to follow the text of a constitutional provision they find problematic.

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<sup>54</sup> *Id.* at 171; *cf.* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 552–53 (2003) [hereinafter Nelson, *Originalism*] (“[M]embers of the founding generation could have expected future interpreters to use the liquidation process even if no relevant interpretive conventions told them to read this instruction into the Constitution itself.”).

<sup>55</sup> Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 11 (1975).

The type of constraint that I wish to discuss, and the type of constraint to which legal text and doctrine matter immensely, relates to judges who are seeking in good faith to apply the law in a principled fashion.

There is reason to be skeptical of reading the Constitution to permit the constant disruption of established doctrines based on nothing more than disagreement between the Justices of past and present. This vision of judicial decisionmaking is in tension with a constitutional blueprint that elevates the institution over the individual and treats the Supreme Court as a continuous body that retains its identity over time. Hence the need for constraint—not to prevent Justices from engaging in outrageous or lawless conduct but to prevent reasonable disagreements over judicial philosophy from destabilizing constitutional law. Of course the Constitution contemplates that new Justices will arrive at the Court, and of course it allows those Justices to reconsider problematic decisions, but that is different from accepting constitutional vacillation as the corollary of reasonable disagreement.

Disagreements over interpretive philosophy have been around as long as there has been a Constitution.<sup>56</sup> And the need for some safeguard against excessive vacillation in interpretive approach is all the greater because the Constitution's language is uncertain in important ways. That leaves the Justices to make choices that are not expressly dictated by the document's text. Such discretion is properly understood as cabined by a presumption of deference to precedent.

In sum, I view several features of the constitutional blueprint as converging to support an understanding of precedent as presumptively binding: the distinctive role, independence, and continuity of the judiciary; the uncertainty and generality of constitutional text in many respects; background understandings about the role of precedent in guiding judicial discretion; and related understandings about the use of precedent to settle the Constitution's meaning. That is in addition to the Supreme Court's descriptions of *stare decisis* as crucial to the rule of law.<sup>57</sup>

The account I propose is not strictly "originalist" in the sense of being derived from the original intentions or understandings of the framing generation. At the same time, I draw on Framing-Era understandings—in addition to other factors—as informing our thinking about the constitutional blueprint. Ultimately, my aim is to provide an account of how the Constitution's relationship with precedent ought to be understood *today*,

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<sup>56</sup> See Nelson, *Originalism*, *supra* note 54, at 570 ("[P]eople who discussed the Constitution's meaning proposed a variety of different interpretive approaches.").

<sup>57</sup> See *supra* Part I.

while focusing on factors that are meaningful to jurists and scholars of varying interpretive philosophies.

### A. *Judicial Role*

Whatever the exact meaning of the Article III judicial power,<sup>58</sup> the Constitution distinguishes it from the powers given to the legislative and executive branches. The separation suggests a vision of judges as engaged in a different sort of enterprise from their political peers. This recognition may seem prosaic, but it is important nevertheless. The Constitution makes plain that judges do not create or execute laws in the way that legislators and executive officials do. Inherent in Hamilton's description of the judiciary as the "least dangerous" branch is the idea that judgment is different in kind from the political powers of "purse" and "sword."<sup>59</sup>

There is a similar lesson in Article III's description of the judicial power as extending to cases and controversies.<sup>60</sup> The focus on resolving disputes suggests that, unlike the political branches which lead the polity forward, the judicial branches are reactive. Rather than being equipped for "active resolution," the judiciary is designed to answer questions that are posed to it.<sup>61</sup> It waits for controversies to arise instead of stirring them. There is a range of possibilities for how narrowly or broadly federal judges might draft their opinions. The respective merits of those approaches are beside the point for present purposes. Whether an individual judge sweeps broadly or narrowly or treads lightly or heavily in a particular opinion, she always needs to wait for cases to come to her. That is the nature of the judicial role as envisioned by Article III.

### B. *Continuity and Independence*

The judiciary's distinctiveness is underscored by its independence. Federal judges and Justices are nominated by the President and confirmed by the Senate,<sup>62</sup> but that is where the political process stops. Article III provides that judges "shall hold their Offices during good Behaviour."<sup>63</sup> And

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<sup>58</sup> *See id.*

<sup>59</sup> THE FEDERALIST NO. 78 (Alexander Hamilton).

<sup>60</sup> U.S. CONST. art. III, § 2.

<sup>61</sup> THE FEDERALIST NO. 78 (Alexander Hamilton).

<sup>62</sup> *See* U.S. CONST. art. II, § 2 (stating that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . 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 . . ."); *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1662 (2015) ("Our Founders vested authority to appoint federal judges in the President, with the advice and consent of the Senate, and entrusted those judges to hold their offices during good behavior.").

<sup>63</sup> U.S. CONST. art. III, § 1.

their compensation “shall not be diminished during their Continuance in Office.”<sup>64</sup> Salary protection is the corollary of life tenure, reflecting the concern that “a power over a man’s subsistence amounts to a power over his will.”<sup>65</sup> The Justices accordingly receive something like a “constitutional birthright” to resolve cases without worrying about political pressures.<sup>66</sup>

Permanence of appointment does not just help judges to be independent, though it certainly does that.<sup>67</sup> It also gives courts a sense of stability that is both notable and distinctive. The Supreme Court is a resonant example. The Court’s membership can remain unchanged even as presidents, senators, and congressional representatives come and go. Congress is remade every two years, but Article III “envisions the [Supreme] Court as a continuous body.”<sup>68</sup> This institutional continuity suggests a sense of stability and consistency that is difficult to square with a regime in which the Court is free to treat each day as a blank page.<sup>69</sup>

Through its grant of life tenure, the Constitution casts judging as a unique form of decisionmaking that must be protected from electoral and official control. Judges resolve disputes by their best lights irrespective of the contingencies of the political moment. Were federal judges exercising the same species of power as the political branches, there would be an argument for making them responsive to legislative, executive, or popular direction. American constitutional law rejects that understanding of what judges do.<sup>70</sup> As Chief Justice Roberts recently explained in discussing the Constitution’s origins, concerns about legislative interference with the courts “created the ‘sense of a sharp necessity to separate the legislative from the

<sup>64</sup> *Id.*

<sup>65</sup> THE FEDERALIST NO. 79 (Alexander Hamilton) (emphasis removed); *see also id.* (“[W]e can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter.”).

<sup>66</sup> *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1951 (2015) (Roberts, C.J., dissenting).

<sup>67</sup> *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (“If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.”).

<sup>68</sup> AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 234 (2012).

<sup>69</sup> *Cf. id.* at 234 (“Given the Court’s clear constitutional design, today’s justices may properly give past Court decisions a rebuttable presumption of correctness.”). As I will explain, I contend that this argument actually goes further, not just empowering but requiring today’s Justices to afford a presumption of deference to past decisions.

<sup>70</sup> *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (“The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution, and which after the Revolution had produced factional strife and partisan oppression.”).

judicial power.”<sup>71</sup> The framers responded with an independent power that resides in the judiciary alone.<sup>72</sup> By separating “the legislative power to make general law from the judicial power to apply that law in particular cases,” the framers found their “constitutional equilibrium.”<sup>73</sup>

Federal judges do not enjoy complete insulation under the Constitution. Article III states that judges hold their offices during good behavior,<sup>74</sup> arguably implying that certain types of ill behavior are beyond the pale. But the requirement of good behavior makes little difference if there is no penalty for being bad. While the constitutional basis for such a penalty has provoked debate,<sup>75</sup> at present there is a widely held belief within American legal culture that impeachment is the sole means of removing Article III judges.<sup>76</sup>

What if this belief is wrong? What if the Good Behavior Clause is properly understood as allowing Congress or the courts to remove individual judges, even Supreme Court Justices?<sup>77</sup> The specter of removal would provide an independent source of constraint, diluting the need for other tools—such as the doctrine of stare decisis—to serve that function. But in determining the extent of dilution, much would depend on the capaciousness with which good behavior were defined and the sorts of reasons that were deemed relevant to assessing a judge’s conduct.<sup>78</sup> In all events, the prevailing

<sup>71</sup> *Sharif*, 135 S. Ct. at 1951 (Roberts, C.J., dissenting) (quoting *Plaut*, 514 U.S. at 221).

<sup>72</sup> *Cf. Paulsen, Abrogating Stare Decisis*, *supra* note 3, at 1595 (“The Article III ‘judicial Power’ means that federal judges must be free to decide cases on the merits, without Congress telling them how to come out on a given case or particular issue or placing a thumb on the scale in favor of one or another decisional outcome.”).

<sup>73</sup> *See Plaut*, 514 U.S. at 224.

<sup>74</sup> U.S. CONST. art. III, § 1.

<sup>75</sup> *Compare* Saikrishna Prakash & Steven D. Smith, *How To Remove a Federal Judge*, 116 YALE L.J. 72, 77 (2006) (“[T]he Constitution adopted the then-established view that officers with good-behavior tenure forfeited their offices upon a finding of misbehavior in the ordinary courts.”), *with* Martin H. Redish, *Response: Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism*, 116 YALE L.J. 139, 141 (2006) (“[B]y substantially expanding the ability of the political branches to remove, and therefore intimidate, members of the federal judiciary, the Prakash-Smith proposal seriously endangers the ability of the independent federal courts to police the constitutional excesses of the political branches and to protect individual rights from majoritarian incursion.”), *and* James E. Pfander, *Removing Federal Judges*, 74 U. CHI. L. REV. 1227, 1230 (2007) (arguing that the Constitution “assign[s] the task of removing federal judges to the Senate after an impeachment trial and thereby implicitly but unavoidably foreclos[es] alternative methods of removal”).

<sup>76</sup> *See generally* Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. (forthcoming 2018) (on file with author); *see also* Prakash & Smith, *supra* note 75, at 74 (“It is a virtually unquestioned assumption among constitutional law cognoscenti that impeachment is the only means of removing a federal judge.”).

<sup>77</sup> *See* Prakash & Smith, *supra* note 75, at 134 (arguing that “Congress, using its ‘necessary and proper’ powers, could enact legislation providing for judicial proceedings to remove judges”).

<sup>78</sup> *Cf. Redish, supra* note 75, at 145 (arguing that the account of good behavior removal developed by Professors Prakash and Smith does not fully explain whether removal is available based on “judicial interpretation of the Constitution in a manner found offensive, inaccurate, or politically unacceptable by

understanding of the Good Behavior Clause as reflecting an unenforceable aspiration does not seem to be in any imminent jeopardy. For the foreseeable future, the removal of judges will occur, if at all, exclusively through the impeachment process.

Speaking of impeachment: That process is triggered only by “Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>79</sup> Notwithstanding various debates about the scope of the impeachment power, the prevailing wisdom is that being wrong about the law is not enough to get a federal judge impeached.<sup>80</sup> Life tenure and salary protection push federal judges far along the spectrum toward political insulation. The possibility of impeachment, at least as presently understood, brings them back just a few steps.

### *C. Impersonality and Stability Through Constraint*

The Supreme Court Justice who is granted life tenure and insulated from political pressures faces the question of what considerations she *should* keep in mind.<sup>81</sup> One concern is that independence might lead a Justice to behave in an unprincipled way. But as I suggested above, even if the Justices make their decisions in good faith and in a principled fashion, independence allows them to take very different approaches depending on their respective judicial philosophies.

Assuming that the Constitution does not require a particular approach to legal interpretation—an assumption reflected in the Supreme Court’s case law, though subject to debate—it is understandable that each Justice will make her own inquiry into the proper ends and means of constitutional

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members of Congress or the President”); Saikrishna Prakash & Steven D. Smith, *Reply: (Mis)Understanding Good-Behavior Tenure*, 116 *YALE L.J.* 159, 162 (2006) (“[I]t is perfectly clear that Congress cannot provide that judges will be ousted merely because Congress (or the President) disagrees with their judgments. . . . Although Congress cannot provide that judges should be removed for deciding a case incorrectly, it surely can provide for the removal of judges who decide cases through fortune-telling and séances. Judges who use these methodologies are guilty of misbehavior.”).

<sup>79</sup> U.S. CONST. art. II, § 4.

<sup>80</sup> See, e.g., SANFORD LEVINSON, *AN ARGUMENT OPEN TO ALL: READING THE FEDERALIST IN THE TWENTY-FIRST CENTURY* 312 (2015) (“More than two centuries since [Samuel] Chase’s acquittal, Congress has never again tried to impeach a federal judge for ideological reasons.”); WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 114 (1992) (describing Samuel Chase’s acquittal as establishing “the independence of federal judges from congressional oversight of the decisions they made in the cases that came before them”).

<sup>81</sup> See, e.g., ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 238 (2006) [hereinafter VERMEULE, *JUDGING UNDER UNCERTAINTY*] (“There can be no general answer to the questions how judges will behave or what they will value once they are freed from the blunt pressures toward reappointment, reelection, or financial security that affect many other types of officials.”).

interpretation.<sup>82</sup> There are limits, of course; we might properly deem it unlawful for a Justice to reach conclusions via coin flip. But it is much harder to say the same about prominent (though competing) interpretive theories such as originalism and living constitutionalism. The analysis is complicated further by the fact that it is not one Justice who makes decisions for the Supreme Court, but nine, and many more if we treat the Court as an enduring institution that maintains its identity over time. That raises the possibility that competent, principled Justices will give careful attention to an issue and nevertheless reach different results precisely because they begin from different methodological and normative premises. This risk is present even when judges are subject to removal, but it is heightened by the “liberat[ing]” effect of life tenure and salary protection.<sup>83</sup> Hopefully, interpretive diversity ends up strengthening the Court.<sup>84</sup> Even so, pluralism can make it more challenging for the Justices to find common ground.

Deferring to precedent is a way of reducing reliance on “the proclivities of individuals.”<sup>85</sup> In his account of the common law, Blackstone described judges issuing decisions “according to the law of the land,” which they master through “experience and study” and “being long personally accustomed to the judicial decisions of their predecessors.”<sup>86</sup> For him, abiding by precedent was the “established rule.”<sup>87</sup> The contrary approach, which allows the “scale of justice” to “waver with every new judge’s opinion,” risks the subordination of general principles to the individual judge’s “private sentiments.”<sup>88</sup> There are similar themes in Hamilton’s statement that “[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents.”<sup>89</sup> Those “rules and precedents” are what “define and point out

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<sup>82</sup> See Frederick Schauer, *Stare Decisis and the Selection Effect*, in PRECEDENT IN THE UNITED STATES SUPREME COURT 128–29 (Christopher J. Peters ed., 2013).

<sup>83</sup> See VERMEULE, JUDGING UNDER UNCERTAINTY, *supra* note 81, at 238.

<sup>84</sup> ADRIAN VERMEULE, THE SYSTEM OF THE CONSTITUTION 161 (2011) (describing the argument that “on a multi-member court, the marginal benefits of having more of a given type of judge decline systematically, implying that a diversity of judicial types is best”).

<sup>85</sup> *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).

<sup>86</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*68–69; see also Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 682 (1999) (describing Blackstone’s writings as reflecting the view that “a coherent doctrine of precedent cannot invite a de novo reexamination of whether the legal analysis in a prior decision conforms to the current judge’s view of the proper approach to the problem”).

<sup>87</sup> BLACKSTONE, *supra* note 86, at \*69.

<sup>88</sup> *Id.* Blackstone noted that deference to precedent is not absolute, and he identified situations in which overrulings are appropriate. See *id.* at \*69–70.

<sup>89</sup> THE FEDERALIST NO. 78 (Alexander Hamilton).

[judges'] duty in every particular case that comes before them."<sup>90</sup> Adams likewise described precedent as a safeguard against the "arbitrary Will or uninformed Reason of Prince or Judge."<sup>91</sup> And Madison's writings suggest a view that "the judicial oath provides no basis for adoption of the judge's individual understandings of a constitutional provision at the expense of precedent."<sup>92</sup>

What about Justices who are deciding cases of first impression? One might wonder whether presumptive deference to precedent, in its zeal to constrain subsequent jurists, leaves the initial deciders unconstrained.<sup>93</sup> This objection is a powerful one, and it warrants serious consideration. Yet I believe it can be answered.

First and foremost, the text of the Constitution remains a constraint on Justices who are deciding cases of first impression. Constitutional text is sometimes uncertain, leaving room for the exercise of discretion—which is a point to which I will return shortly. Even so, the text creates limits, and those limits must be respected. Second, all Justices, whether deciding cases of first impression or considering an applicable precedent, bring to bear certain views about the role of the Court and the province of the judiciary. Those views include attitudes toward judicial restraint. The doctrine of stare decisis presents no bar to Justices' taking a restrained approach to constitutional decisionmaking in cases of first impression based on their beliefs about the nature of adjudication, their understandings of Article III and its implications for the exercise of the judicial power, or their practical concerns about sweeping too broadly. Third, Justices face norms of reasoning that treat certain types of rationales and analogies as suspect within the broader legal culture. That creates an "argumentative burden" of explanation.<sup>94</sup>

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<sup>90</sup> *Id.*; cf. Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075, 1095 (2003) ("[P]recedents mattered in the common-law jurisprudence of the time of the founding. It was largely common ground that they should serve as a meaningful check on judicial discretion—a judge had a legal obligation to follow an on-point precedent within his jurisdiction unless he could produce a good legal reason not to do so.").

<sup>91</sup> 1 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 167 (L.H. Butterfield ed., 1961).

<sup>92</sup> Lee, *supra* note 86, at 711.

<sup>93</sup> Professor Paulsen raises a related, though distinct, point when he asks, "If the premise that supports a theory of stare decisis is that the judges have the power to bring meaning to the Constitution, then why don't today's judges have the *same* power to bring or give meaning to the Constitution?" Paulsen, *Intrinsically Corrupting Influence*, *supra* note 30, at 292.

<sup>94</sup> Cf. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 586–87 (1987) ("[T]he law . . . relies significantly on social and linguistic categories drawn from its larger environment. However contingent these categories may be in that larger culture, a court at least bears an argumentative burden if it wishes to depart from these categories.").

It might be countered that these same pressures would confront Justices in subsequent cases if there were no doctrine of *stare decisis*. And, indeed, that is true. But there is an important distinction between resolving a case of first impression and overruling a precedent. The former represents the unavoidable filling out of the constitutional framework; the latter, the reshaping of constitutional law and the reconsideration of putatively durable constitutional principles. To ensure that constitutional law remains impersonal and stable even when the text makes multiple readings available, we need to pay attention to the reasons for initiating a change. If judicial changes are justified by nothing more than reasonable disagreement between the Justices of yesterday and the Justices of today, there is a cost to the stability and impersonality of constitutional doctrine.<sup>95</sup>

This does not mean overrulings are forbidden; the Supreme Court has left no doubt that the doctrine of *stare decisis* allows overrulings under appropriate circumstances. The point of the doctrine is not to freeze the world in time but to place some limits on judicial change.<sup>96</sup> To return to Blackstone, the idea—which is applicable to the common law context Blackstone described as well as the interpretation of a constitution whose language is often framed in fairly general terms—is that the “scale of justice” should not be “liable to waiver with every new judge’s opinion,” even if the new judge is acting in good faith and in a principled manner.<sup>97</sup> One consequence, as we have seen, is to give the Justices more flexibility in cases of first impression than they might have in subsequent cases when an applicable precedent is on the books. But the rationale is not to privilege the views of Justices from days gone by. It is to protect established constitutional principles, which draw on judicial opinions as well as the Constitution’s text, from excessive vacillation based on mere disagreement.

Precedent, then, is a way of drawing together and guiding differently minded judges and Justices. The Constitution creates a Supreme Court, not a loose assemblage of individual decisionmakers. The primacy of the institution over the individual shapes the “rule of law underlying our own

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<sup>95</sup> See CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 7–8 (2004) (“Unless doctrine persists, unless doctrine itself is prolonged, it cannot sufficiently order social action. The Constitution promises that kind of persistence, and it can only deliver if its commands are instantiated in doctrines that persist.”).

<sup>96</sup> Cf. Lee, *supra* note 86, at 666 (“On one hand, the framing generation perceived the importance of stability and certainty in the law, and thus embraced a rule of following past decisions. On the other hand, a declaratory understanding of the common law gave rise to an exception permitting some form of reexamination of the merits of a prior decision.”).

<sup>97</sup> BLACKSTONE, *supra* note 86, at \*69.

Constitution.”<sup>98</sup> That rule-of-law ideal provides that every Justice should “think of himself not as an individual charged with deciding cases but as a member of a court.”<sup>99</sup> The aspiration is genuine “impersonality” even among Justices who have different approaches to legal interpretation and whose employment is guaranteed regardless of official and electoral pressures.<sup>100</sup> Having nine principled Justices is a start, but it is not enough if each one is committed to a different principle. A collective dedication to precedent can help the institution become something more than the individuals who comprise it.<sup>101</sup>

There is one other feature of the Constitution that warrants mention in any discussion of legal change. In Article V, the Constitution sets forth an amendment protocol initiated by the actions of Congress or state legislatures.<sup>102</sup> One might wonder whether this tells us anything about how judicial precedent should work. In particular, perhaps the amendment process implies that judges and Justices have no power to effect genuine constitutional change, meaning that judicial decisions should always be viewed as subject to reconsideration in a way the Constitution is not—except through the mechanisms of Article V.

This inference is entirely consistent with the doctrine of *stare decisis*, which acknowledges that judicial precedents must yield in ways and for reasons that the constitutional text does not. Moreover, even where the Supreme Court opts not to revisit its precedents, the ultimate power of constitutional revision always belongs to the people acting through Article V. The existence of Article V would not seem to present any challenge to the argument that the constitutional blueprint suggests the need for presumptive deference to Supreme Court precedents. That frees us to focus on other features such as the distinctiveness of judicial power, the implications of

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<sup>98</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992); *see also Citizens United v. FEC*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring) (noting that the “greatest purpose” of the doctrine of *stare decisis* is “to serve a constitutional ideal—the rule of law”).

<sup>99</sup> Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 21 (2012) (“[The subsequent judge] shares with his fellow judges, including [the precedent judge], the responsibility of seeing that cases that come before the court are decided on the basis of the rule of law.”).

<sup>100</sup> HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 569 (William N. Eskridge Jr. & Philip P. Frickey eds., 1994) (noting “[t]he desirability of promoting genuine impersonality of decision by minimizing the elements of personal discretion, and of facilitating the operation of the check of professional criticism”).

<sup>101</sup> On the role of precedent in helping courts to operate as institutions rather than combinations of individuals, *see RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* 99–103 (2017).

<sup>102</sup> U.S. CONST. art. V.

judicial independence, and the uncertainty of constitutional text in numerous respects—the latter of which I will now discuss.<sup>103</sup>

#### D. Textual Indeterminacy

The Constitution was always going to need interpreting.<sup>104</sup> There are many specifics, of course. Two senators clearly means two senators,<sup>105</sup> just like thirty-five years old clearly means thirty-five years old.<sup>106</sup> And even when it does not resolve a question completely, the Constitution provides guidance. For instance, while the precise scope of the Ex Post Facto Clauses is debatable, the Clauses pretty clearly set some limits on legal retroactivity.<sup>107</sup>

Yet the Constitution also leaves numerous questions unanswered.<sup>108</sup> It is a relatively brief document, and it describes key concepts like “the freedom of speech” and “due process of law” at high levels of generality. That generality creates substantial work for judges in applying constitutional commands to concrete disputes. Uncertainty remains even if one deems it

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<sup>103</sup> It is also possible to contend that Article III implies presumptive deference to precedent through its distinction between the Supreme Court and inferior courts. Consider the argument that Article III’s creation of a hierarchical federal judiciary implies an obligation on behalf of lower federal courts to follow Supreme Court decisions. See JAMES E. PFANDER, *ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES* 41 (2009) (concluding that “the Framers’ very conception of a unitary and hierarchical, rather than a plural and horizontal, judiciary presupposed a duty on the part of lower courts to obey their superior”). One might extend the argument to suggest that Supreme Court decisions are best understood as presumptively binding as a general matter, even when the Supreme Court itself is asked to reconsider them. On that understanding, the key difference between the Supreme Court and the lower federal courts would be that the former possesses the power to rebut the presumption of deference while the latter do not; the presumption would remain the same. I am not (yet, at least) confident about whether and to what extent this argument might bolster the constitutional case for stare decisis in the Supreme Court. But regardless of whether it supports the constitutional foundations of precedent, the argument does nothing to challenge the account I have developed in this Part.

<sup>104</sup> See *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgment) (“Those who ratified the Constitution knew that legal texts would often contain ambiguities.”).

<sup>105</sup> See U.S. CONST. art. I, § 3.

<sup>106</sup> See *id.* art. II, § 1.

<sup>107</sup> See *id.* art. I, §§ 9–10.

<sup>108</sup> As Professor Solum notes, “the Constitution includes a number of general, abstract, and vague phrases—‘freedom of speech,’ ‘legislative power,’ and so forth. The constitutional doctrines that are associated with the phrases have legal content that is richer than the communicative content of the provisions in which the phrases occur.” Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 501 (2013); see also AMAR, *supra* note 68, at 208 (“Because terseness is necessary, the document is importantly and intentionally underspecified. Judicial doctrine helps fill in the gaps, translating the Constitution’s broad dictates into law that works in court, in keeping with the vision of Article III.”).

appropriate to invoke supplemental principles of interpretation derived from the Constitution itself<sup>109</sup> or from the common law.<sup>110</sup>

The Constitution's text is thus indeterminate in important respects.<sup>111</sup> It is important to note the threshold question of what, exactly, we mean by indeterminate.<sup>112</sup> For example, concluding that a constitutional provision is indeterminate whenever it does not answer a question beyond a reasonable doubt will have different implications from treating a provision as indeterminate only when no reading is supported by a preponderance of the evidence.<sup>113</sup> This is a general problem of constitutional jurisprudence, and it need not detain us here. The important point for present purposes is that the application of constitutional provisions will often (though not always) be at least somewhat uncertain. The question is how Supreme Court Justices should proceed in the face of that uncertainty.<sup>114</sup>

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<sup>109</sup> A possible example is the Ninth Amendment, which provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX. For an argument that the Ninth Amendment provides interpretive guidance to constitutional decisionmakers, see Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV. 801, 806 (2008) (describing an historical account of the Ninth Amendment as “an *active federalist* provision that calls upon courts to limit the interpretation of enumerated federal power in order to preserve the people’s retained right to local self-government”). For another recent take, see Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498, 501 (2011) (“The plain language of the Ninth Amendment prohibits one, and only one, particular form of constitutional argument—that because some particular right or set of rights is mentioned in the Constitution, some other claimed right or set of rights should either be ‘denied’ . . . or ‘disparaged’ . . .”).

<sup>110</sup> See Baude & Sachs, *supra* note 5, at 1120 (arguing that “there are lots of . . . places where constitutional interpretation relies on [general] law to fill the gaps”); see also *id.* (“[W]e look to unwritten law to identify the Constitution’s legal force and the object of constitutional interpretation.”).

<sup>111</sup> As noted above, here I will use *indeterminate* as synonymous with *underdeterminate*, though the two terms are sometimes used to mean different things. See, e.g., Solum, *supra* note 15 at 41 (“We can say that a legal text is completely indeterminate with respect to a set of possible applications if the rule corresponding to the text produces outcomes for none of the applications of the set. . . . We can say that a legal text is underdeterminate with respect to an application set if the rule corresponding to the text produces outcomes for some but not all of the applications in the set.”).

<sup>112</sup> See Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL’Y 411, 413–14 (1996) (“[O]nce we have gathered up and analyzed all of the available uncertainties regarding a question, we still have to ask whether those uncertainties are enough to make the question indeterminate. Or put another way, we need to know *how uncertain* one must be about an answer before one ought to throw up one’s hands and pronounce the question indeterminate.”).

<sup>113</sup> See GARY LAWSON, EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS 122 (2017) (“There are almost always better and worse answers, even when there are no good answers. . . . [I]f the correct standard of proof for meaning is very high, then a relatively modest amount of vagueness or ambiguity is enough to foreclose interpretative determinacy and potentially open the field quite broadly to construction.”).

<sup>114</sup> The study of potential responses to semantic uncertainty in the Constitution’s text is sometimes described in terms of constitutional construction. There is a robust body of work on the legitimacy and dynamics of constitutional construction. For an introduction, see Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013).

One answer is that so long as the constitutional text makes a particular answer more likely to be correct, even by a sliver, than all others, the Justices should endorse it.<sup>115</sup> Yet we can also imagine other judicial responses when a case is close. For example, a Justice faced with a close case might apply a default rule that denies the existence of federal power and reaffirms the presumptive authority of the states.<sup>116</sup> That approach could be driven by “the fundamental constitutional principle of enumerated federal powers” and “unenumerated state powers.”<sup>117</sup> Alternatively, doubts might be resolved by upholding the exercise of legislative authority absent a clear prohibition against the act in question.<sup>118</sup> Another possibility is that courts should fall back on a presumption in favor of individual liberty that forbids governmental action without a clear constitutional basis.<sup>119</sup> Such a “presumption of liberty” might arise from sources including the Ninth Amendment and the Privileges or Immunities Clause, which can be read (the argument goes) as putting “the burden on the government to establish the necessity and propriety of any infringement on individual freedom.”<sup>120</sup>

Arguments grounded in historical practice can be framed in comparable terms. For example, when the Supreme Court interpreted the Recess Appointments Clause in *NLRB v. Noel Canning*, it put “*significant weight upon historical practice*.”<sup>121</sup> We can think of *Noel Canning* as offering another potential response to textual uncertainty: When in doubt, the Court

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<sup>115</sup> Cf. MCGINNIS & RAPPAPORT, *supra* note 29, at 142 (describing an approach for resolving situations “[w]hen the interpretation of language was unclear” by considering “the relevant originalist evidence—evidence based on text, structure, history, and intent—and select[ing] the interpretation that was supported more strongly by that evidence”).

<sup>116</sup> See Gary Lawson, *Classical Liberal Constitution or Classical Liberal Construction?*, 8 N.Y.U. J.L. & LIBERTY 808, 835–36 (2014).

<sup>117</sup> *Id.* at 835; *see also id.* at 835–36 (“Anyone claiming the benefit of an exercise of federal power must be asserting in the first instance that such power is authorized by the Constitution; otherwise, that exercise of power has no legal status. . . . In the case of challenges to state authority under the federal Constitution, precisely the opposite burden of proof applies.”).

<sup>118</sup> See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (arguing for the invalidation of legislation as unconstitutional only “when those who have the right to make laws have not merely made a mistake, but have made a very clear one”); cf. KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 36 (1999) (arguing that originalism cannot “embrace James Bradley Thayer’s strong form of judicial deference as a necessary component. . . . [W]hen the Constitution is knowable, the Court must act vigorously to enforce the limits it places on governmental action.” (footnote omitted)); *see also id.* at 232 n.82 (“Rather than a ‘clear mistake’ rule, perhaps an originalist Court should adopt something more closely approaching a ‘preponderance of the evidence’ rule to strike down laws on originalist grounds.”).

<sup>119</sup> See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 259–60 (2004).

<sup>120</sup> *Id.*

<sup>121</sup> 134 S. Ct. 2550, 2559 (2014).

should refrain from disturbing longstanding practices of the political branches.

To these possible responses to textual uncertainty, I propose adding one more: deference to judicial precedent. This understanding has deep roots in American constitutional history. To Madison, the meaning of the Constitution would need to “be liquidated and ascertained by a series of particular discussions and adjudications.”<sup>122</sup> Caleb Nelson characterizes Madison’s writings and other Founding-Era documents as suggesting that “[o]nce the meaning of an ambiguous provision had been ‘liquidate[d]’ by a sufficiently deliberate course of legislative or judicial decisions, future actors were generally bound to accept the settled interpretation even if they would have chosen a different one as an original matter.”<sup>123</sup> According to Professor Nelson, the obligation to follow precedent was relaxed when “a prior construction went beyond the range of indeterminacy.”<sup>124</sup> Precedent serves to limit “the discretion that legal indeterminacy would otherwise give judges.”<sup>125</sup> The result is “to ‘fix’ the meaning of provisions that were indeterminate when they emerged from the Philadelphia Convention.”<sup>126</sup>

The concept of liquidation extends beyond the creation of judicial precedents. Madison used the term more broadly, predicting that political actions would resolve some of the Constitution’s uncertainties.<sup>127</sup> The Supreme Court has recognized the same point. To return to *NLRB v. Noel Canning*, the Court drew on Madison’s vision of liquidation when it embraced the idea of “practice,” including practice within the political branches, as “an important interpretive factor even when the nature or

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<sup>122</sup> THE FEDERALIST NO. 37 (James Madison).

<sup>123</sup> Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 12 (2001) [hereinafter Nelson, *Stare Decisis*]; see also William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1811 (2013) (“[P]ost-ratification practice can serve to give concrete meaning to a constitutional provision even if it was vague as an original matter.”); Lee, *supra* note 86, at 665–66 (“[I]n Madison’s view, a precedent that is thought to expound or interpret the law or the Constitution is worthy of deference, but once the precedent ventures into the realm of altering or repealing the law, it should be rejected.”); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 941 (1985) (“[F]or Madison there could be no return to the unadorned text from interpretations that had received the approbation of the people.”).

<sup>124</sup> Nelson, *Stare Decisis*, *supra* note 123, at 14; see also *id.* at 11 (“Written laws, then, would have a range of indeterminacy. Madison and his contemporaries believed that precedents would operate within this range.”).

<sup>125</sup> *Id.* at 8.

<sup>126</sup> Nelson, *Originalism*, *supra* note 54, at 583.

<sup>127</sup> See *id.* at 527 (describing Madison’s view that practices and constructions outside the judiciary would liquidate the Constitution’s meaning).

longevity of that practice is subject to dispute, and even when that practice began after the founding era.”<sup>128</sup>

By settling uncertain areas of the constitutional landscape under a system of *stare decisis*, judicial precedents likewise give people a firmer basis for understanding and adapting to constitutional precepts. Liquidation also carries benefits for the judicial branch: As compared with the Constitution’s text alone, liquidation provides judges with a “thicker” set of legal rules and norms to apply.<sup>129</sup> Supreme Court decisions are full of precedents. In countless domains of constitutional law, the “real work [is] done by the Court’s analysis of its previous decisions.”<sup>130</sup> Where the Constitution does not say enough to resolve a legal question, judicial precedents guide the inquiry. That phenomenon, I submit, is unremarkable given the document’s sparseness and generality.

A presumption of deference to judicial precedent is compatible with other approaches to constitutional uncertainty—for instance, a presumption in favor of upholding legislation or in favor of protecting individual liberty<sup>131</sup>—in cases of first impression. Differences arise only when there is an applicable decision on the books.<sup>132</sup> Consider a case like *Citizens United v. FEC*, in which the Court departed from precedent and expanded the First Amendment rights of corporations (and labor unions).<sup>133</sup> Imagine that a given Justice viewed the Constitution’s text, including the First Amendment’s prohibition against laws “abridging the freedom of speech,” as uncertain in its application to corporate speech. If the Justice adopted, say, a presumption in favor of liberty, we might expect her to strike down restrictions that interfered with such speech. If, on the other hand, the Justice employed a practice of deferring to precedent, we would expect her to stand by (at least presumptively) the Court’s prior decisions allowing substantial restrictions on corporate speech.

In instances of conflict, why should any Justice opt for a presumption of deference to precedent as opposed to a different presumption? For those who emphasize existing practice as filling out the constitutional

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<sup>128</sup> 134 S. Ct. 2550, 2560 (2014); *see also id.* at 2559 (“[I]n interpreting the [Recess Appointments] Clause, we put significant weight upon historical practice.”).

<sup>129</sup> *Cf.* Thomas W. Merrill, *The Conservative Case for Precedent*, 31 HARV. J.L. & PUB. POL’Y 977, 980 (2008) (“[T]he legal norms that would apply in resolving disputed questions of law are much thicker in the universe of precedent than they are in the world of originalism.”).

<sup>130</sup> STRAUSS, *supra* note 15, at 33.

<sup>131</sup> *See supra* notes 122–23 and accompanying text.

<sup>132</sup> This was not the case in *Noel Canning*. *See* 134 S. Ct. at 2560 (“We have not previously interpreted the [Recess Appointments] Clause . . .”).

<sup>133</sup> *See* 558 U.S. 310, 365 (2010).

framework,<sup>134</sup> it is important that deference to precedent is a well-established feature of modern Supreme Court jurisprudence. The Justices continue to describe *stare decisis* as carrying “fundamental importance to”<sup>135</sup> and serving as a “foundation stone”<sup>136</sup> of the rule of law. For those who endorse Madisonian notions of liquidation, it matters that the Supreme Court’s accounts of the lawfulness and centrality of precedent have emerged over many years in opinions joined by an array of Justices.<sup>137</sup>

To the extent one perceives the Constitution’s creation of an independent, durable judiciary as suggesting the importance of an impersonal Supreme Court whose decisions transcend the interpretive tendencies of its sitting members, that is another powerful reason to view deference to precedent as reflecting broader constitutional principles. Precedent provides common ground between Justices who are inclined to view the Constitution differently. This point is more than theoretical; it is also borne out in practice, as Justices who exhibit divergent methodological tendencies continue to describe *stare decisis* as an important feature of the constitutional system.<sup>138</sup>

As we have seen, Founding Era thinkers were no strangers to the creation and consultation of precedents. Prominent intellectuals like Blackstone, Madison, Adams, and Hamilton discussed the role of precedent in constraining judicial discretion. It is true that, as Professor Harrison points out, the lack of an established system of case reports made information about prior cases “at best unsystematic.”<sup>139</sup> Even so, Professor Harrison notes that “Americans at the time of the Framing expected courts generally to follow precedent.”<sup>140</sup> Had the founding generation been unfamiliar with the concept of precedent, it would be more difficult to treat the Constitution as giving rise to inferences about the role of *stare decisis*. But viewing the Constitution

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<sup>134</sup> See *supra* Section II.B.

<sup>135</sup> *Hurst v. Florida*, 136 S. Ct. 616, 623 (2016).

<sup>136</sup> *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014) (internal quotation marks omitted).

<sup>137</sup> See, e.g., *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015); *Arizona v. Gant*, 556 U.S. 332, 348 (2009); *Randall v. Sorrell*, 548 U.S. 230, 243 (2006) (plurality opinion); *Lawrence v. Texas*, 539 U.S. 558, 577 (2003); *Harris v. United States*, 536 U.S. 545, 556–57 (2002) (plurality opinion); *Ring v. Arizona*, 536 U.S. 584, 608 (2002); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992).

<sup>138</sup> See *supra* Section II.B.

<sup>139</sup> Harrison, *supra* note 21, at 521.

<sup>140</sup> *Id.* at 522; see also MCGINNIS & RAPPAPORT, *supra* note 29, at 154 (“Precedent was an important part of Anglo-American law for centuries before the enactment of the Constitution . . . .”); Lee, *supra* note 86, at 683 (“The founding-era compromise seems comparable to the modern notion that only an egregious error justifies abandoning precedent.”).

against a background familiarity with precedent bolsters the case for relying on principles of stare decisis to channel judicial discretion.<sup>141</sup>

This style of argument does not connect precedent with a single textual anchor.<sup>142</sup> Nor does it depend on treating background assumptions about the common law as having survived the Constitution's enactment (though neither does it deny the validity of such an approach). Finally, I do not contend that the founding generation held a universal view of stare decisis as a tool for enhancing legal continuity notwithstanding disagreements among judges over time. My point, rather, is that the seeds of such an understanding were present in the writings of some key commentators, informing the inferences that can be drawn from the Constitution's text and structure.<sup>143</sup>

### *E. Synthesis*

In the foregoing Sections, I have emphasized the Constitution's protection of judicial independence, its conception of courts as enduring and stable, and its nature as a relatively brief charter that is uncertain in numerous respects. I have argued that those features are best understood as implying that Supreme Court decisions should receive presumptive deference going forward as a means of filling out the constitutional framework. That is especially true given background understandings of precedent as a check on individual discretion—understandings that were there at the founding and remain resonant to this day. Taken in combination, these points support the inference that deference to precedent is a constitutional principle.

The Supreme Court has made these sorts of inferences before. When the Court examined the contours of state sovereign immunity in *Alden v. Maine*, it followed what it found to be the most “natural inference” from the Constitution's “history and structure.”<sup>144</sup> Likewise, when it struck down provisions of federal law in *Printz v. United States*, the Court relied in part on “the structure of the Constitution” and its “essential postulate[s]” as

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<sup>141</sup> See Nelson, *Stare Decisis*, *supra* note 123, at 9 (arguing that concerns about excessive discretion “shaped most antebellum explanations of the need for *stare decisis*”).

<sup>142</sup> It is possible to view my account of precedent as complementing arguments that are grounded in the judicial power—arguments that I discussed in Part I. The rationale would be that the textual, contextual, and structural features I have discussed strengthen the case for interpreting the judicial power as encompassing an obligation of fidelity to precedent. I certainly have no objection to such an approach, but my argument does not depend on reading the judicial power in that way; it is available even to those who are skeptical of giving the judicial power such a prominent role in establishing the legitimacy of deference.

<sup>143</sup> This link with the Constitution responds to the argument that “[a]ny reliance on precedent that does not ultimately trace to getting the right answer to constitutional questions exceeds the boundaries of the judiciary's authority and is itself unconstitutional.” Lawson, *supra* note 45, at 40.

<sup>144</sup> 527 U.S. 706, 724 (1999).

barring Congress from requiring state and local officials to take various actions relating to background checks for handgun buyers.<sup>145</sup> And in *Plaut v. Spendthrift Farm, Inc.*, the Court invalidated a law requiring judges to reopen certain cases as being “repugnant to the text, structure, and traditions of Article III.”<sup>146</sup> The Court’s willingness to make inferences from the constitutional blueprint in cases like these bolsters the argument for conceptualizing stare decisis in comparable terms.

#### F. Deference in the Lower Federal Courts

Precedent is important to lower courts just as it is to the Supreme Court. Lower courts cite precedents all the time. They pay special attention to Supreme Court decisions, often construing them broadly and deferring to dicta and holdings alike.<sup>147</sup> But while prior decisions play a central role in lower court opinions, it does not necessarily follow that the rules of precedent should operate the same way as they do in the Supreme Court. Nor does it follow that the constitutional implications generalize across both contexts.

The Supreme Court works without a safety net. If it makes a mistake, there is no one to review its decisions, as captured in Justice Jackson’s famous statement that “we are infallible only because we are final.”<sup>148</sup> Of course, the people can respond in other ways. Congress can react to the Supreme Court’s failure to protect a right by enacting legislation, and in extreme cases a supermajority can band together to pass a constitutional amendment. Still, there is no superior court authorized to reconsider the Supreme Court’s decisions. Constraint needs to come from the Justices’ internal practices—practices that include deferring to precedent.

The situation is different in the lower courts. When a district court decides a case, it faces the prospect that a superior court may overrule it. So do circuit courts. Different judges will have different responses to the threat of superior-court reversal, but as a general matter lower courts know their work is being watched by someone with the power to undo it. The prospect of superior-court review, coupled with the existence of precedents from

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<sup>145</sup> 521 U.S. 898, 918 (1997) (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934)).

<sup>146</sup> 514 U.S. 211, 217–18 (1995); *see also id.* at 218–19 (“Article III establishes a ‘judicial department’ with the ‘province and duty . . . to say what the law is’ in particular cases and controversies. . . . By retroactively commanding the federal courts to reopen final judgments, Congress has violated this fundamental principle.”) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

<sup>147</sup> *See* Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 198 (2014) [hereinafter Kozel, *Scope of Precedent*].

<sup>148</sup> *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

those same superior courts, serves a unifying function. Moreover, constitutional interpretations by inferior courts are by their nature subject to further consideration as the appellate process runs its course. Only rulings of the Supreme Court represent the final word of the judicial department on the meaning of the Constitution. Those rulings have a unique resonance within the system the Constitution created.

The analysis might change if Congress were (politically) willing and (constitutionally) able to remove the Supreme Court's power to review certain categories of federal cases. The asserted source of Congress's authority to take such action presumably would be Article III's Exceptions and Regulations Clause.<sup>149</sup> While there is substantial debate about the Clause's proper interpretation,<sup>150</sup> on some readings it creates the possibility that Congress might "make decisions by inferior federal courts final" by insulating them from Supreme Court review.<sup>151</sup> Suffice to say that if such a scenario came to pass, there would be a strong argument for extending the constitutional defense of stare decisis to the decisions of whichever lower court was effectively given the power to render final decisions notwithstanding its constitutionally "inferior" status.<sup>152</sup>

Yet even on the assumption that Congress may use the Exceptions and Regulations Clause to give inferior courts the last word on federal law, the Constitution's "default rule" accords that authority to the Supreme Court.<sup>153</sup> That unique power and duty raises the possibility that the doctrine of stare decisis might operate differently in the Supreme Court than it does in other tribunals. I am not prepared to say—and do not have space to explore—whether that definitively is the case, but the possibility alone is enough to suggest that the prudent course is to focus first on analyzing stare decisis at the Supreme Court without making generalizations that might turn out to be, at the very least, complicated.

### III. PRECEDENT AND DOCTRINAL COMPOSITION

If stare decisis is a constitutional principle, the Supreme Court is justified in treating constitutional decisions as entitled to presumptive

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<sup>149</sup> U.S. CONST. art. III, § 2 ("In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

<sup>150</sup> See, e.g., PFANDER, *supra* note 103, at 7–10 (discussing key areas of scholarly debate over the interpretation of the Exceptions and Regulations Clause).

<sup>151</sup> Harrison, *supra* note 21, at 514; see also Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 230 (1985).

<sup>152</sup> See PFANDER, *supra* note 103, at 29 (highlighting "the fact that Article III specifies that any federal courts Congress creates must remain 'inferior' to the Supreme Court").

<sup>153</sup> See Harrison, *supra* note 21, at 515.

fidelity. The Court is not absolutely required to follow precedent in any given case. Presumptive deference is just that: presumptive. We still have plenty of work to do in understanding how stare decisis operates in particular disputes.

This Part moves from examining the foundations of stare decisis as a constitutional principle to exploring the operation of stare decisis as a legal doctrine. I take up three issues that are crucial in defining the role of precedent: the nature of the presumption of deference accorded to judicial decisions, the strength of that presumption, and the scope of a judicial decision as it applies to future disputes.

### *A. Presumption of Deference*

My characterization of stare decisis as a constitutional inference is based in part on the phenomenon of textual uncertainty: it was evident from the beginning, and it remains evident today, that the Constitution's text does not clearly resolve every dispute. Deferring to prior decisions is a way of filling out the constitutional framework while promoting stability and impersonality. Still, to the extent we are focused on uncertainty, the question arises whether the presumption of deference should extend to areas where the Constitution's text is clear.

I think the answer is generally yes, for reasons both practical and conceptual. On the practical side, it seems unlikely that the Supreme Court will render many decisions that undisputedly misconstrue clear constitutional text. If it were to do so, there would be no call for deference going forward; an opinion that interprets "two Senators" to mean "five Senators" is not worth taking seriously, much less treating with deference.<sup>154</sup> But clarity is not always so clear. What we are more likely to be talking about are situations in which various Justices disagree about whether a particular provision is clear, or situations in which they agree that a provision is clear but part ways over what it clearly means.

That brings me to the conceptual point. Especially given the sparseness and occasional abstraction of the Constitution's text, it is inevitable that different Justices will sometimes reach different conclusions about both the

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<sup>154</sup> The question of what exactly makes the "two Senators" example an "easy case," in Professor Schauer's words, is interesting. See Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985). It obviously begins with textual specificity. But Professor Schauer contends that even seemingly clear text can lead to difficult cases due to tension between a rule's clear language and evident purpose, conflict between two different rules that each have some claim to applicability, or morally uncomfortable results. See *id.* at 415–16. However one views Professor Schauer's statement that "language alone is insufficient to generate an easy case," *id.* at 416, the point remains that there are some constitutional issues on which there is no meaningful dispute, certainly because of clear constitutional text and arguably for other reasons as well.

document's clarity and its meaning. Again, this is not always true; as then-Judge Roberts noted during his confirmation hearing, "If the phrase in the Constitution says two-thirds of the Senate, everybody's a literalist when they interpret that."<sup>155</sup> But in other situations, there will be differences of opinion about what the Constitution says and whether the Constitution clearly says it. Those differences of opinion will flow in part from different perspectives about the sources that are relevant to interpreting the constitutional provision in question.<sup>156</sup> This was always destined to be the case, from the time of the founding until today.

It accordingly seems problematic to insist on a principle of presumptive deference that arises only after making a threshold determination of whether a provision is clear. Such an approach would bear similarities to the *Chevron* doctrine of administrative law, pursuant to which judicial deference to agencies depends on the absence of statutory clarity.<sup>157</sup> But regardless of the soundness of relying so heavily on perceived clarity in applying the *Chevron* doctrine, in the administrative context we are talking about judicial review of administrative decisionmaking. The dynamics are different when it comes to Supreme Court precedent; the question is whether today's Justices ought to defer to a decision of yesterday's Court. A presumption of deference infuses the Court's rulings with durability, and it pushes back against the idea that the Constitution is remade with every new appointment. In so doing, the presumption of deference responds to Hamilton's concerns about "arbitrary discretion," Blackstone's worries about judges' "private sentiments," and Madison's recognition that the Constitution's ambiguities would need to be liquidated over time.<sup>158</sup>

As a constitutional principle, then, *stare decisis* is best understood as general in its application. At the same time, my argument would not prevent a Justice from finding the presumption of deference to be rebutted if she concluded that a precedent misconstrued a clear constitutional provision.<sup>159</sup>

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<sup>155</sup> *Hearing*, *supra* note 26, at 159.

<sup>156</sup> See Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1216–17 (2015) ("[T]he perceived clarity of the text is not only a product of typical 'plain meaning' considerations such as dictionary definitions and linguistic conventions. Rather, such perceived clarity can also be affected by a variety of other considerations . . . includ[ing] reasoning about the purpose of a constitutional provision, structural inferences, understandings of the national ethos, consequentialist considerations, customary practice, and precedent.").

<sup>157</sup> See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984). On the relationship between *Chevron*-type review and *stare decisis*, see generally Nelson, *Stare Decisis*, *supra* note 123.

<sup>158</sup> See *supra* notes 88–89, 122 and accompanying text.

<sup>159</sup> See Nelson, *Stare Decisis*, *supra* note 123, at 14 ("[I]f, after giving precedents the benefit of the doubt, subsequent interpreters remained convinced that a prior construction went beyond the range of indeterminacy, they did not have to treat it as a valid gloss on the law.").

(Given that my focus is on principles of constitutional structure, I take no position on whether certain interpretations of provisions such as Article III's judicial power might create independent barriers to overruling.<sup>160</sup>) That is, the presumption of deference is general, but some Justices might nevertheless find it to be rebutted in situations of perceived constitutional clarity. I have concerns about such an approach, but as I will explain in the next Section, those concerns are properly understood as conceptual rather than constitutional.

### B. Strength of Deference

Presumptive deference means a Supreme Court decision cannot be overruled simply because five Justices have come to disagree with it. Consider, for example, a situation in which five Justices review a precedent and find it to be competently and impressively reasoned. They also think the precedent deals with a question that is quite difficult on the merits. Yet they ultimately conclude that the slightly better argument is on the other side of the issue, meaning that the relevant precedent is wrong.

Without more, this is not enough to rebut the presumptive deference owed to Supreme Court precedents. As Justice Kagan has noted, the “very point of *stare decisis*” is that the reasons for “revers[ing] an opinion must go beyond demonstrations (much less assertions) that it was wrong.”<sup>161</sup> That is what the Court means when it demands a “special justification” before overruling its prior decisions.<sup>162</sup> A Justice's conclusion that she would have decided a case differently is not enough to warrant an overruling. If it were, any constraining effect of precedent would vanish. *Stare decisis* means more than looking to prior decisions for their persuasive value. It entails a presumption of deference even to decisions that today's Justices view as incorrect.

That, however, is where my constitutional argument ends. I suggested in Part II that the constitutional framework is best understood as supporting presumptive deference to Supreme Court opinions. I have now added that rebutting the presumption requires more than mere disagreement. Within these bounds, we can imagine numerous permissible formulations of the doctrine of *stare decisis*. Selecting among those formulations is not a matter

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<sup>160</sup> On the relationship between precedent and the Article III judicial power, see *supra* Section I.A.

<sup>161</sup> *Harris v. Quinn*, 134 S. Ct. 2618, 2652 (2014) (Kagan, J., dissenting).

<sup>162</sup> *Id.* at 2651; see also *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014) (“[T]his Court has always held that ‘any departure’ from the doctrine [of *stare decisis*] ‘demands special justification.’” (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984))); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864 (1992) (reaffirming the “view repeated in our cases” that “a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided”).

of deriving rules from the Constitution itself. Rather, it is a matter of common law decisionmaking under the authority of the Supreme Court. Specific rules will emerge from the Court's development and application of the common law of precedent.<sup>163</sup> (Whether Congress also has a role to play in fleshing out the doctrine of *stare decisis* is a question I will discuss in Part IV, below.)

Thus, while the Constitution requires a presumption of deference, it does not answer the distinct question of how that presumption can be rebutted. Even so, some approaches are more consistent than others with the notions of constraint and impersonality that give the doctrine of *stare decisis* its resonance. For example, certain bases for overruling pose relatively little danger to the ability of precedent to serve as a stabilizing force and a bridge between different judges over time. The Supreme Court has recognized that the presumption of deference can be overcome by factors such as factual mistakes or outdated assumptions<sup>164</sup> and problems of procedural workability.<sup>165</sup> Overruling for reasons like these is fully consistent with the constitutional account of precedent that I have developed, because the justifications for reconsideration are premised on the idea that it takes more than disagreement to overcome the constraining force of precedent.

Other bases for overruling are more complex. Take, for instance, the argument that precedents are subject to overruling if they were not "well reasoned."<sup>166</sup> At first glance, it makes perfect sense to give the least amount of deference to precedents that exhibit flawed reasoning. The problem is that whether a decision was well-reasoned—or, more accurately, whether today's Justices perceive it as well-reasoned—tends to be bound up with whether the precedent is viewed as right or wrong on the merits. To treat a precedent's weak reasoning as a basis for overruling is a form of double counting; the justifications for deeming the precedent incorrect reemerge as bases for jettisoning it.<sup>167</sup> That dilutes the constraining, stabilizing effect of precedent

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<sup>163</sup> As noted above, John McGinnis and Michael Rappaport likewise emphasize the distinction between constitutional rules of precedent and supplementary rules grounded in the common law, though their constitutional argument revolves around the judicial power. *See* MCGINNIS & RAPPAPORT, *supra* note 29, at 168.

<sup>164</sup> *See, e.g., Casey*, 505 U.S. at 855 (noting the relevance of "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification").

<sup>165</sup> *See, e.g., Montejo v. Louisiana*, 556 U.S. 778, 792 (2009) ("[T]he fact that a decision has proved 'unworkable' is a traditional ground for overruling it.").

<sup>166</sup> *See, e.g., Citizens United v. FEC*, 558 U.S. 310, 362–63 (2010) (noting as a "relevant factor[] in deciding whether to adhere to the principle of *stare decisis* . . . whether the decision was well reasoned" (internal quotation marks and citation omitted)).

<sup>167</sup> *See id.* at 409 (Stevens, J., concurring in part and dissenting in part) ("The Court's central argument for why *stare decisis* ought to be trumped is that it does not like [the key precedent under

and increases the chances that constitutional law will ebb and flow with shifts in judicial personnel—and attendant shifts in the interpretive methodologies that enjoy primacy at any given moment.

As an alternative to considering whether a decision was well-reasoned, the Supreme Court might limit itself to a more categorical determination of whether the decision was within the bounds of permissible discretion. In his illuminating analysis of constitutional liquidation, Professor Nelson discusses this practice and draws a conceptual and historical distinction between precedents that are *wrong* and those that are *clearly wrong*, with the latter referring to situations in which a prior court “went *beyond* its discretionary authority” and reached an outcome that was impermissible.<sup>168</sup> The modern Supreme Court occasionally has gestured toward a comparable distinction between clear errors and closer calls.<sup>169</sup>

Within a given interpretive school, the Justices theoretically could distinguish between clear error and ordinary error while leaving the constraining power of precedent intact.<sup>170</sup> To see how, imagine an originalist Justice who concludes that a prior decision probably misinterprets the Constitution’s original meaning but who views the historical evidence as uncertain and the case as close. That Justice might choose to defer to precedent even if she is inclined to overrule other decisions whose flaws are more obvious. The same goes for Justices who hold other interpretive philosophies; they might abide by precedent when matters are in doubt while departing from decisions that are clearly flawed.<sup>171</sup>

Notwithstanding its intuitive appeal, the distinction between ordinary and clear errors faces difficulties in a world of competing theories about the proper ends and means of constitutional interpretation. In arenas up to and including the Supreme Court, judges embrace markedly different interpretive philosophies and normative commitments.<sup>172</sup> The resulting

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consideration]. The opinion ‘was not well reasoned,’ our colleagues assert, and it conflicts with First Amendment principles. This, of course, is the Court’s merits argument . . .” (citation omitted)).

<sup>168</sup> See Nelson, *Stare Decisis*, *supra* note 123, at 7.

<sup>169</sup> See *United States v. Gaudin*, 515 U.S. 506, 521 (1995) (including the consideration of whether a decision “has been proved manifestly erroneous” in the stare decisis calculus).

<sup>170</sup> For a competing perspective that challenges the use of clarity standards in the context of statutory interpretation, see Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (book review) (“Several substantive principles of interpretation . . . depend on an initial determination of whether a text is clear or ambiguous. But judges often cannot make that initial clarity versus ambiguity decision in a settled, principled, or evenhanded way.”).

<sup>171</sup> See Nelson, *Stare Decisis*, *supra* note 123, at 67 (noting the argument that “the current judges may be committed to an entirely different interpretive method than their predecessors, and they may be too quick to decide that their predecessors’ method was illegitimate”).

<sup>172</sup> Cf. Eric A. Posner & Adrian Vermeule, *The Votes of Other Judges*, 105 GEO. L.J. 159, 166 (2016) (“All nine Justices should recognize that reasonable minds can disagree about the proper approach to

pluralism muddies attempts at distinguishing between clear error and ordinary error. As Judge Kavanaugh noted in a recent essay on statutory interpretation, “One judge’s clarity is another judge’s ambiguity.”<sup>173</sup> That is doubly true when judges are applying different interpretive rubrics. Consider how an originalist Justice might determine whether a precedent decided on nonoriginalist grounds is clearly wrong, as opposed to just plain wrong.<sup>174</sup> Would she declare all nonoriginalist precedents to be not simply erroneous but clearly erroneous? Would nonoriginalist Justices do the same when faced with originalist precedents?

If the answer to these questions is no, difficulties arise from asking a Justice to evaluate the application of an interpretive methodology that she rejects.<sup>175</sup> The challenges are even greater if the answer is yes. Assuming that a particular Justice views all decisions that reflect an interpretive methodology different from her own as clearly wrong, the necessity of a special justification for overruling becomes a formality in a large swath of cases. On some theories, the Constitution is clear when history leaves little doubt about the original understanding of a provision. On other theories, even compelling evidence of original meanings is not dispositive. Instead, constitutional meaning also depends on other factors such as contemporary values or pragmatic analysis.<sup>176</sup> Without agreement about how to read the Constitution, the category of “clear error” faces pressure to expand steadily, undermining the ability of precedent to constrain individual Justices by subordinating their personal theories to the Court’s institutional identity.

A Justice might nevertheless be constrained by the Constitution as understood in light of her interpretive philosophy, be it originalism, living constitutionalism, or otherwise. Indeed, I have no doubt that Justices sometimes reach decisions they find regrettable because they feel obliged to

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interpretation, at least within conventional boundaries that comfortably include self-identified textualists, self-identified purposivists, self-identified intentionalists, and various hybrids. The federal judiciary has always contained multiple theoretical types . . .”).

<sup>173</sup> Kavanaugh, *supra* note 170, at 2137.

<sup>174</sup> See Randy J. Kozel, *Stare Decisis in the Second-Best World*, 103 CALIF. L. REV. 1139, 1172 (2015). Professor Nelson also recognizes this point, though he expects “the number of ‘false positives’ to remain tolerable.” See Nelson, *Stare Decisis*, *supra* note 123, at 67.

<sup>175</sup> See KOZEL, *supra* note 101, at 120–21.

<sup>176</sup> See, e.g., BALKIN, *supra* note 15, at 11 (“In every generation, We the People of the United States make the Constitution our own by calling upon its text and its principles and arguing about what they mean in our own time.”); BREYER, *supra* note 20, at 81 (“The Constitution establishes political institutions designed to ensure a workable, democratic form of government that protects basic personal liberties; divides and separates power . . . ; ensures a degree of equality; and guarantees a rule of law. These purposes can guide a judge’s efforts to interpret individual constitutional phrases.”); STRAUSS, *supra* note 15, at 35 (describing constitutional law as developing “through the accumulation and evolution of precedents, shaped to some degree by notions of fairness and good policy”).

decide cases in a principled manner that is true to their vision of constitutional law. But deference to precedent leads to the sort of constraint that transcends methodological disputes and personal proclivities.<sup>177</sup> Prior decisions provide a robust and publicly accessible source of legal meaning and bring together Justices across the philosophical spectrum.<sup>178</sup> Deferring to precedent is a way of mediating interpretive disagreements and promoting decisionmaking by reference to external sources of authority.<sup>179</sup> Those goals are harder to achieve if Justices distinguish among precedents based on the egregiousness of their mistakes—a distinction that raises the possibility of discarding precedents based on little more than disagreement with the interpretive methodology they reflect.

While there is significant value in resisting overrulings that are based on disagreements over interpretive methodology, my constitutional account of stare decisis does not demand such resistance. So long as the Supreme Court recognizes a presumption of deference to prior decisions, I think it would be perfectly lawful for the Court to treat the presumption as rebuttable in the face of, say, clear or manifest errors. My concerns about such a practice go to the operation of stare decisis, not to the doctrine's constitutional foundations.

A similar analysis extends to another factor that sometimes receives attention in the stare decisis calculus: the harms that a flawed decision has caused. The Supreme Court occasionally distinguishes, implicitly at least, among flawed precedents based on the perceived gravity of their ill effects. *Citizens United v. FEC* provides a useful example.<sup>180</sup> When Chief Justice Roberts wrote in his concurrence about the importance of reconsidering flawed precedents, he cited decisions on issues like racial segregation, minimum wage laws, and wiretapping.<sup>181</sup> One potential takeaway from this selection of examples is that precedents are in greater need of overruling when they are not only wrong in their reasoning but detrimental in their results.

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<sup>177</sup> Cf. *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1217–18 (2015) (Thomas, J., concurring in the judgment) (“Although ‘judicial independence’ is often discussed in terms of independence from external threats, the Framers understood the concept to also require independence from the ‘internal threat’ of ‘human will.’” (quoting PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 507, 508 (2008))).

<sup>178</sup> Cf. Merrill, *supra* note 129, at 980 (discussing the use of precedent to supplement constitutional meaning).

<sup>179</sup> See Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1711 (2013) (“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.”).

<sup>180</sup> 558 U.S. 310 (2010).

<sup>181</sup> *Id.* at 377 (Roberts, C.J., concurring).

It makes sense to be more concerned about harmful errors than harmless ones, just like it makes sense to be more concerned about clear mistakes than close calls. This is easy to see from the standpoint of an individual Justice. A Justice whose interpretive theory revolves around, say, popular sovereignty might distinguish severe interferences with the will of the people from minor interferences.<sup>182</sup> She accordingly might deem herself bound to tolerate the latter category of mistakes even as she votes to overturn the former. For example, she might draw a line between judicial failures to protect constitutional liberties, which the people can correct through ordinary legislation, and judicial recognition of liberties that lack any constitutional basis, which the people can correct only through the cumbersome amendment process.<sup>183</sup> Likewise, a Justice who believes that moral judgments are crucial to constitutional interpretation might vote to overrule deeply unjust decisions even as she tolerates mild transgressions of justice on grounds of *stare decisis*.<sup>184</sup>

The problem is that these determinations of harmfulness, like distinctions between clear error and ordinary error, depend on methodological and normative commitments that vary from Justice to Justice. Some Justices might think popular sovereignty is paramount in constitutional interpretation. Some might think morality and justice are key considerations. Interpretive philosophy tells a Justice which factors deserve primacy and which are irrelevant. When Justices hold different interpretive philosophies, we should expect them to part ways over the types of considerations they view as most important. A statute is not rendered unconstitutional simply by the fact that it is “bad” in some sense. The question is whether it is bad in ways that matter. Similar logic applies to the doctrine of *stare decisis*. Even if every Justice agreed that the harms caused by a particular precedent were serious, there could still be disagreement about whether those harms were pertinent to constitutional interpretation.

On balance, then, a precedent’s perceived harms generally should be excluded from the *stare decisis* calculus. That is the best way to ensure that precedent is genuinely constraining, as opposed to giving way in the face of disagreements over interpretive philosophy that lead to divergent views

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<sup>182</sup> See Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1442 (2007).

<sup>183</sup> See *id.* (“Presumptive invalidity . . . is generally required when an erroneous prior decision either maintains a structural error in the political process or completely immunizes an issue from majoritarian politics. Structural problems undermine the legitimacy of law, while erroneous immunizations require a supermajoritarian response where none may be possible.”).

<sup>184</sup> Cf. BREYER, *supra* note 20, at 150–51 (noting that *Brown v. Board of Education*, 347 U.S. 483 (1954), “overturned an earlier decision that the justices considered legally wrong, out of step with society and the law, and unusually harmful”).

about the sorts of consequences that are legally relevant. I have argued in other work that there may be a narrow exception for cases in which a precedent's effects are so exceptionally dire as to be intolerable from the standpoint of a particular Justice applying her personal interpretive philosophy.<sup>185</sup> But even if one supports this exception in theory, it arises in only a small fraction of cases. The more general takeaway is that tolerating some undesirable effects is the price of impersonality and constraint.

Again, this is not a constitutional mandate. Still, it reflects the fundamental importance of constraint and impersonality to the constitutional regime. At base, my argument has been that the Constitution is best understood as demanding some special justification for departing from precedent. I have also suggested that in putting this principle into practice, the Supreme Court should avoid asking whether an interpretive error is particularly clear or whether a precedent's effects are especially harmful. Those inquiries depend on underlying methodological and normative commitments that vary from Justice to Justice, and relying on them dampens precedent's ability to unite Justices across the philosophical spectrum. It is possible to say that a precedent's clear mistake (as opposed to a mistake that is less obvious) is a special justification for overruling it. It is possible to say the same about a precedent's problematic consequences (as opposed to consequences that are more benign). I have challenged these distinctions as diluting the effect of *stare decisis* in a world of interpretive pluralism, but that does not mean the distinctions are constitutionally prohibited. My account of *stare decisis* as a constitutional principle requires a presumption of deference to prior decisions even if one believes them to be mistaken. How that presumption may be rebutted is a separate matter.

### *C. Scope of Deference*

Specifying the conditions for overruling a decision is only half the story for a system of precedent. We need to pay equal attention to the rules that define a decision's scope of applicability. Whether past decisions are read narrowly or broadly goes a long way toward determining their impact on the trajectory of constitutional law.

While I have defended an interpretation of the Constitution that requires presumptive deference to precedent, that argument does not define the principles of precedential scope. Nevertheless, the underlying emphasis on constraint offers some lessons for how precedents should be—as a matter of sound judging, not constitutional imperative—construed in order to infuse the doctrine of *stare decisis* with genuine force.

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<sup>185</sup> See KOZEL, *supra* note 101, at 122–23.

First and foremost, past decisions should be interpreted broadly enough to provide a meaningful check on the discretion of future Justices. That requirement does not dictate a single approach to defining precedents' scope of applicability, but it does furnish a baseline: Future Justices must not limit precedents to their facts. Such an approach would undermine the prospect of constraint and reduce prior decisions to "arbitrary exercise[s] of judicial power"<sup>186</sup> by driving a wedge between legal orders and the reasoned deliberation that precedes them. Precedents should instead be treated as establishing legal rules that—as all rules do<sup>187</sup>—extend beyond the specific context in which they arose. This is not the same as infusing so-called dicta with binding effect. Future Justices certainly may choose to withhold deference from prior statements that are hypothetical or ancillary. At the same time, they should recognize that fidelity to precedent entails fidelity to the legal rule a prior decision helped to establish.<sup>188</sup> It is the confluence of reasoning and result that matters.

Of course, Justices will continue to debate how best to characterize various precedents in applying them to new facts. Our present concern is not to work out the details of the rules of precedential scope but to set the constitutional baseline. By recognizing stare decisis as a constitutional principle grounded in considerations such as the need for judicial constraint, we can see the value of treating precedents as embodiments and applications of legal rules rather than fact-bound, ad hoc determinations. The Supreme Court may—and should, for the sake of uniformity and predictability—continue to develop specific criteria for defining the scope of precedent as part of the common law of stare decisis. Relevant questions include whether judges should defer to doctrinal frameworks and how they should handle a prior court's statement of its rationale.<sup>189</sup> But the most important step is ensuring that precedents are treated as sources of legal rules that can impose meaningful constraint.

#### IV. THE IMPORTANCE OF BEING CONSTITUTIONAL

The previous Part discussed how the constitutional foundations of stare decisis inform the doctrine's composition and operation. This Part turns to

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<sup>186</sup> See Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2030 (1994).

<sup>187</sup> See Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 25 (1989) ("Every rule, by virtue of being a rule, decides issues that are broader than the particular facts of the cases in which they are announced.") (emphasis removed).

<sup>188</sup> Cf. Waldron, *supra* note 99, at 23 (arguing that a subsequent judge's duty is to treat the rule of a precedent case "as a genuine legal norm to which the court that he belongs to has already committed itself").

<sup>189</sup> See Kozel, *Scope of Precedent*, *supra* note 147, at 190–98.

implications for the constitutional system more broadly, with particular attention to three issues: the legal legitimacy of deferring to precedent, the role of arguments from precedent in judicial reasoning, and the locus of governmental authority over the rules of precedent.

#### A. Legitimacy

Notwithstanding the Supreme Court's consistent treatment of stare decisis as legally valid, some scholars have challenged the idea that the Court may properly defer to a precedent that misconstrues the Constitution.<sup>190</sup> Recognizing stare decisis as a constitutional inference removes any doubts about the doctrine's legitimacy, by which I mean its validity as a legal norm.<sup>191</sup>

On the account I have defended, deferring to precedent is more than a "good idea."<sup>192</sup> It is a constitutional principle that can properly affect the outcomes of cases.<sup>193</sup> When stare decisis is recognized as an "authoritative legal norm[],"<sup>194</sup> there is no longer any uncertainty about its legitimacy. That remains true even if the Supreme Court reaches a result it would have rejected but for the existence of precedent. As I have explained, the Court has a variety of options for structuring the doctrine of stare decisis. On some of those formulations, the strength of deference to precedent will be relatively strong. On other formulations, the strength of deference will be weaker. Either way, precedent remains a legitimate part of constitutional decisionmaking. Questions about the legitimacy of stare decisis are answered by the doctrine's constitutional foundations.

We can press on this idea by asking whether any formulations of the doctrine would violate the Constitution by being too strong in their insulation of prior decisions. Imagine, for example, that the Supreme Court declares that it henceforth will not even consider arguments asking it to overrule its prior constitutional decisions. Rather, every such decision is deemed to be

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<sup>190</sup> See *supra* Section III.A.

<sup>191</sup> On the concept of legal legitimacy, see Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794–95 (2005). My focus on legal legitimacy is not meant to deny the possibility that stare decisis may also be legitimate in other senses, such as through its "current sociological acceptance." *Id.* at 1792.

<sup>192</sup> Cf. Harrison, *supra* note 21, at 533 (describing the argument that stare decisis is desirable because "rules of precedent will enable the courts to provide generally accurate and stable legal rules while economizing on scarce decisional resources").

<sup>193</sup> *Id.* at 508.

<sup>194</sup> *Id.*

absolutely and fully insulated from overruling.<sup>195</sup> Might this create a constitutional problem, for example by denying litigants due process of law?<sup>196</sup> Resolving that question is beyond my purview here, for our current system of stare decisis is in no danger of overstepping constitutional bounds. So long as the doctrine maintains a resemblance to its current state—in which presumptive deference is integral, but the Court remains willing to overrule its prior decisions when it perceives a special justification for doing so—there is no risk of facing a Court that will not entertain an argument for overruling. The more salient constitutional question is whether a Justice may legitimately defer to a decision she views as flawed on the merits. I have argued that the best inference from the Constitution suggests that the answer is yes.

### B. Reasoning

Precedent does its most controversial work when there are good reasons to dispense with it.<sup>197</sup> The doctrine of stare decisis revolves around the idea that the desirable pressure judges feel to get the law right should be tempered by recognition of the importance of leaving things settled.<sup>198</sup>

Were stare decisis grounded exclusively in “prudential and pragmatic considerations” and disconnected from the Constitution,<sup>199</sup> we might conclude that the doctrine should give way whenever the stakes are high. If a prior decision drastically interferes with individual liberty or the proper operation of the government, it seems natural that deference should yield. Stability may be well and good, but when it conflicts with important rights such as those involving free speech, police searches, or jury trials, the policy of deference should not be allowed to undermine the Constitution’s protections.<sup>200</sup> There are hints in the Supreme Court’s case law of this type

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<sup>195</sup> For discussion of the United Kingdom’s experience during the twentieth century with an extremely strong form of deference, see NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* 125–28 (2008).

<sup>196</sup> See Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1013 (2003) (arguing that when the doctrine of stare decisis “effectively forecloses a litigant from meaningfully urging error-correction,” it “unconstitutionally deprives a litigant of the right to a hearing on the merits of her claims”).

<sup>197</sup> Cf. Schauer, *supra* note 94, at 575 (“[I]f we are truly arguing from precedent, then the fact that something was decided before gives it present value despite our current belief that the previous decision was erroneous.”).

<sup>198</sup> See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

<sup>199</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992).

<sup>200</sup> Cf. *Alleyne v. United States*, 570 U.S. 99, 116 n.5 (2013) (“The force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections.”); *Citizens United v. FEC*, 558 U.S. 310, 319 (2010) (“[S]tare decisis does not compel the continued acceptance of [the relevant precedent]. The Government may regulate corporate political speech through

of approach.<sup>201</sup> The vision of precedent on display is a relatively weak one in which deference is effectively reserved for the least significant cases. The doctrine of *stare decisis* tips the scales toward continuity when the stakes are low but not when serious constitutional interests are on the line.

But judgments about *stare decisis* should not be made solely by looking at the costs of deference in a particular case. A system of precedent works to cabin judicial discretion and ensure that all members of society, from public officials to private citizens, are bound by the law. It aspires to “principled predictability” in which disputes are resolved based on overarching, publicly accessible norms rather than case-specific or judge-specific criteria.<sup>202</sup> Deferring to precedent surely is not the only way for a judicial system to function.<sup>203</sup> But it is a way that fits well with the blueprint of the U.S. Constitution.

All of this is easier to see once we recognize deference to precedent as a constitutional principle. *Stare decisis* operates as a structural mechanism for promoting fairness and liberty through legal impersonality and continuity.<sup>204</sup> The Supreme Court has emphasized the liberty-enhancing features of the Constitution’s structure in various ways. “Federalism,” the Court has explained, “secures the freedom of the individual.”<sup>205</sup> Likewise, “the separation of powers can serve to safeguard individual liberty.”<sup>206</sup> The same is true of precedent.

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disclaimer and disclosure requirements, but it may not suppress that speech altogether.”); *Arizona v. Gant*, 556 U.S. 332, 348 (2009) (“We have never relied on *stare decisis* to justify the continuance of an unconstitutional police practice.”).

<sup>201</sup> See Randy J. Kozel, *Precedent and Speech*, 115 MICH. L. REV. 439, 484–86 (2017).

<sup>202</sup> See Waldron, *supra* note 99, at 13–14 (describing a “principled predictability” that “results from mapping an official and publicly disseminated understanding of the various sources of law onto the factual situations that people confront”).

<sup>203</sup> See *id.* at 30–31 (declining to endorse the view that the rule of law depends on *stare decisis*, but suggesting that “the justification of *stare decisis* might depend to a large extent on the rule of law”).

<sup>204</sup> See *Alden v. Maine*, 527 U.S. 706, 751 (1999) (noting connections between constitutional structure and “our liberty and republican form of government”); cf. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1155 (1992) (“The genius of the American Constitution lies in its use of structural devices to preserve individual liberty.”).

<sup>205</sup> *Bond v. United States*, 564 U.S. 211, 221 (2011).

<sup>206</sup> *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014); see also *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1954 (2015) (Roberts, C.J., dissenting) (“By diffusing federal powers among three different branches, and by protecting each branch against incursions from the others, the Framers devised a structure of government that promotes both liberty and accountability.”); *Stern v. Marshall*, 564 U.S. 462, 483–84 (2011) (“Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges. . . . By appointing judges to serve without term limits, and restricting the ability of the other branches to remove judges or diminish their salaries, the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the Executive, but rather with the

When stare decisis is viewed as a constitutional principle, it is more difficult to brush off deference as a nice idea but one that should not stand in the way of vindicating important rights or interests. Adjudication is no longer a matter of pitting precedent against what the Constitution demands. Instead, the question is how to handle two principles that pull in opposite directions but that each trace back to the Constitution. It becomes plausible that precedent might sometimes carry the day even when the stakes are high.

As noted above, the Constitution does not dictate how the doctrine of precedent should balance competing interests in particular cases. The tasks of doctrinal composition and application remain for the Supreme Court, so long as it preserves the requirement of a special justification for overruling that goes beyond mere disagreement. As the Court develops and applies the rules of precedent, it does more than implement a sound policy. It discharges an obligation rooted in the Constitution itself.

### C. *Authority Over the Rules of Precedent*

I argued in Part II that by distinguishing the judicial power from the powers of the executive and legislature, and by giving federal judges life tenure and salary protection, the Constitution suggests a vision of judging as unique among forms of official action. The interplay between judicial decisions and the separation of powers also arises in a second way, one that relates to the locus of authority over the rules of precedent in the federal system.

Even if the Constitution permits courts to apply the doctrine of stare decisis, there is an argument that Congress may forbid courts from invoking it.<sup>207</sup> The rationale is that if stare decisis is a feature of the common law that survived the Constitution's enactment but remains subject to congressional control, courts may defer to precedent only on terms permitted by Congress.<sup>208</sup> On this theory, Congress may craft rules of precedent so long as

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'[c]lear heads . . . and honest hearts' deemed 'essential to good judges.'" (quoting 1 WORKS OF JAMES WILSON 363 (J. Andrews ed., Chicago, Callaghan & Co. 1896)).

<sup>207</sup> See Paulsen, *Stare Decisis*, *supra* note 3, at 1540 ("The courts have the Article III power to decide constitutional cases on their merits. A statute abrogating stare decisis does not impair that power; it merely directs courts to carry out that constitutional power without regard to nonconstitutional policy or pragmatic considerations, where Congress has legislated a different policy with respect to such considerations.").

<sup>208</sup> See Harrison, *supra* note 21, at 505 ("The first question is whether the federal courts' norms of precedent are the kind of legal rule that is susceptible to alteration by ordinary legislation. My answer is yes. Most of them are federal common law, or as it was once called, general law . . ."); cf. MCGINNIS & RAPPAPORT, *supra* note 29, at 168–69 (arguing that "[t]here are strong reasons for concluding that the Framers' generation would have understood the judicial power to include a minimal concept of precedent, which requires that some weight be given to a series of decisions," but noting that "[t]he bulk of precedent rules . . . are a matter of common law that is revisable by congressional statute").

they are “adopted on their systemic merits, not in order to produce particular outcomes.”<sup>209</sup> Congress’s authority may even extend to forbidding deference altogether.

The analysis is different if *stare decisis* is a constitutional principle. On the account I have developed, *stare decisis* is part of the constitutional blueprint, albeit a part that arises from a set of inferences. As a constitutional principle, *stare decisis* is beyond Congress’s power to abolish.<sup>210</sup> The Supreme Court has a constitutional obligation to treat precedents with presumptive respect. That obligation does not fully define the rules of precedent, but it does demand that an overruling be justified by something more than the belief that one would have decided a case differently as an initial matter. Congress can no more abolish the doctrine of *stare decisis* than it can dispense with Article III’s rule that a conviction for treason requires the testimony of two witnesses.<sup>211</sup> Given its status as a principle of constitutional structure, the doctrine of *stare decisis* is insulated from legislative abolition.

It is a separate question whether Congress may dictate particular rules of *stare decisis* so long as it leaves intact the requirement of presumptive deference. Of course, Congress regularly shapes proceedings in the federal courts. For example, the federal rules of evidence reflect legislative enactments that courts must follow.<sup>212</sup> We can imagine Congress taking a similar approach to precedent by enacting various rules to bind the Supreme Court. Congress might require that in determining whether there is a special justification for overruling, the Court must give weight to whether a precedent is inconsistent with related lines of cases.<sup>213</sup> Or it might provide

<sup>209</sup> Harrison, *supra* note 21, at 531; *see also* MCGINNIS & RAPPAPORT, *supra* note 29, at 172 (“[T]he Necessary and Proper Clause permits Congress to frame only genuine precedent rules, not subterfuges for reaching particular results—that is, to exercise legislative, not judicial, power. Consequently, these precedent rules must be relatively general in scope and application.”).

<sup>210</sup> *See* Fallon, *Stare Decisis*, *supra* note 12, at 592 (“The power to say what the Constitution means or requires . . . implies a power to determine the sources of authority on which constitutional rulings properly rest. To recognize a congressional power to determine the weight to be accorded to precedent . . . would infringe that core judicial function.” (footnote omitted)); *cf.* Harrison, *supra* note 21, at 506 (“Congress may not alter constitutional rules, because the Constitution is hierarchically superior to statutes.”).

<sup>211</sup> *See* U.S. CONST. art. III, § 3 (“No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”); *cf.* Harrison, *supra* note 21, at 507 (using the two-witness requirement as an example of a rule that “Congress may not displace”).

<sup>212</sup> *See* Paulsen, *Stare Decisis*, *supra* note 3, at 1587 (“What are the Federal Rules of Evidence (and other sets of procedural rules) if not a direct regulation, pursuant to Congress’s power under the Necessary and Proper Clause, of how the judiciary goes about its business of deciding cases?”).

<sup>213</sup> *Cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) (noting the relevance of “whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine”).

that even if there is a special justification for overruling, the Court must consider whether substantial disruption would result.<sup>214</sup>

Enactments like these would not offend the status of precedent as a constitutional principle, because they would preserve the presumption of deference and the requirement of a special justification for overruling that goes beyond disagreement on the merits. If the enactments were nevertheless to violate the Constitution, it would be for other reasons. Maybe they would overstep Congress's powers under Article I's Necessary and Proper Clause, leaving no basis for legislative action.<sup>215</sup> Or maybe they impermissibly conflict with the Court's established practice of treating stare decisis as a "basic self-governing principle within the Judicial Branch,"<sup>216</sup> as bolstered by Congress's longstanding failure to challenge that understanding by passing responsive legislation.<sup>217</sup> Whatever one makes of such arguments, the core of stare decisis remains beyond the reach of the political branches.

#### CONCLUSION

In one form or another, precedent has been part of American legal culture for centuries.<sup>218</sup> And stare decisis remains a well-established feature of federal practice to this day. Even so, there continues to be uncertainty over exactly what stare decisis *is* and exactly *where* it comes from. I have argued that, notwithstanding the Supreme Court's frequent descriptions of stare

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<sup>214</sup> *Cf. id.* at 854 (noting the relevance of "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation").

<sup>215</sup> *See, e.g.,* MCGINNIS & RAPPAPORT, *supra* note 29, at 171 ("Congressional power to establish or revise precedent rules for constitutional cases in federal courts is found in Congress's authority to pass laws that are necessary and proper for carrying into execution the judicial power. This power allows Congress to pass laws that permit the judiciary to perform its job more effectively."); Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 CONST. COMMENT. 311, 340 (2005) (arguing that "practice has settled the matter such that the Court does have an autonomous, implied power to sometimes follow precedent," which cannot "be restricted by Congress legislating under the Necessary and Proper Clause"); Harrison, *supra* note 21, at 505 ("The necessary and proper power . . . authorizes legislation that is based on systemic considerations that are divorced from particular doctrinal results and hence would not enable Congress to control outcomes in areas where it may not legislate the substantive rule.").

<sup>216</sup> *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989).

<sup>217</sup> *See generally* Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59 (2017); *cf. id.* at 75 ("[I]f one branch has long articulated a constitutional view about the separation of powers and the other branch has been silent, it may not be clear whether there is any agreement between the branches. Nevertheless, the views of the branch that has maintained the position may still be entitled to some deference, especially if these views have been consistent and have reflected the views of both major political parties.").

<sup>218</sup> Fallon, *Stare Decisis*, *supra* note 12, at 580 ("Although stare decisis was initially a common law doctrine, its extension into constitutional law finds support in early constitutional history."); Healy, *supra* note 45, at 1183 ("Although I do not believe that American courts had fully embraced stare decisis by 1789, they did so over the next half century and have followed the principle for more than 150 years.").

decisis as a creature of judicial policy, the doctrine is best understood as an implied constitutional principle. It fills out the constitutional framework and promotes individual liberty by fostering impersonality, stability, and constraint. Deference is only presumptive; the doctrine of stare decisis does not flatly forbid overrulings. But it does require that they happen for permissible reasons.

The Supreme Court has a central role to play in developing the law of precedent, and Congress likewise has some authority to influence the rules applied in the federal courts. Yet the Constitution sets the baseline: Presumptive deference to precedent is part of the constitutional framework.

