

Essay

THE POWER OF CONGRESS OVER THE RULES OF PRECEDENT

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In the *Passenger Cases*¹ Chief Justice Taney expressed his willingness always to reconsider his Court's constitutional doctrines.² In *Dickerson v. United States*³ the Court declined to do as Chief Justice Taney said he would have done and adhered to *Miranda v. Arizona*⁴ without saying whether a majority of the Justices believed *Miranda* to have been correctly decided as an original matter.⁵

Suppose that some time between the Taney and Rehnquist Courts Congress had adopted a statute purporting to codify Chief Justice Taney's suggestion by providing that the Supreme Court shall depart from its precedents whenever it believes them to be incorrect.

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1. 48 U.S. (7 How.) 283 (1849).
2. Chief Justice Taney noted:

I do not, however, object to the revision of [a question he had believed decided by earlier cases], and am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.

Id. at 470 (Taney, C.J., dissenting).

3. 120 S. Ct. 2326 (2000).
4. 384 U.S. 436 (1966).
5. "Whether or not we would agree with *Miranda's* reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now." *Dickerson*, 120 S. Ct. at 2336 (citations omitted). In dissent, Justice Scalia asserted that only *stare decisis* was propping up *Miranda*. The Court, he maintained, could not say, "We reaffirm today that custodial interrogation that is not preceded by *Miranda* warnings or their equivalent violates the Constitution of the United States." It cannot say that, because a majority of the Court does not believe it." *Id.* at 2337 (Scalia, J., dissenting).

Would the Court have been obliged to decide whether *Miranda* was right in the first place, or would the majority properly have disregarded such a statute as beyond congressional power and decided for themselves what the rule of stare decisis should be?

The question of congressional power over the norms of stare decisis also arises in more mundane contexts. A decade ago, the Federal Courts Study Committee suggested that in order to deal with conflicts among the circuits, the Supreme Court be empowered to refer a case presenting a question as to which a conflict had arisen to an en banc sitting of a court of appeals that had not yet reached the question. According to the proposal, the decision of that court of appeals should set nationwide precedent.⁶ Whether Congress validly could legislate that rule of stare decisis depends in large part on the extent of its power over precedent.

Despite the practical and theoretical interest of this question, it seems to have received very little scholarly attention.⁷ A powerful recent study of constitutional questions related to precedent deals with this issue in one sentence: “Moreover, I presume that the Necessary and Proper Clause allows Congress to command the federal courts to follow the precedents established by other courts.”⁸ This Article will attempt to fill that gap. I argue that Congress has substantial authority to legislate concerning the rules of precedent in federal court. My conclusion, put briefly, is that Congress at least may adopt any norm of stare decisis that a court reasonably could recognize. Congress, therefore, may adopt or modify rules of precedent in pursuit of accu-

6. See FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 126 (1990). The Committee was appointed by the Chief Justice, at the instance of Congress, to deal with questions concerning the workload of the federal judiciary. Its members were drawn from the federal bench, Congress, the executive branch, and the bar. Congress has not yet enacted legislation to improve the federal judiciary’s ability to deal with intercircuit conflicts.

7. Professor Michael Stokes Paulsen recently broke the academic silence on this topic in *Abrogating Stare Decisis By Statute: May Congress Remove the Precedential Effects of Roe and Casey?*, 109 YALE L.J. 1535 (2000). Despite the seeming similarities, Professor Paulsen’s article and this one have relatively little overlap. He does not consider the possibility that the norms of stare decisis are given to rather than made by the judiciary, whereas I start from the assumption that they are. Paulsen addresses “[t]he proposition that the judiciary has sole and exclusive power to determine the stare decisis weight to be accorded its own decisions” and rejects it, concluding that “[t]he judicial Power’ of Article III simply does not include a plenary constitutional power, or inviolable institutional privilege, to make what are concededly rules of policy.” *Id.* at 1570. I agree with Professor Paulsen’s answer to the question he poses but think that it is not the main question.

8. Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 838 (1994) (footnote omitted).

racy, economy, stability, and predictability in the law—the considerations the courts traditionally have considered when they have formulated such norms. I will not address whether Congress has a truly plenary power that would enable it to adopt any rule it likes concerning the courts' treatment of their prior cases.⁹

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, and at least one seems to be derived from a statute. That conclusion takes the argument only part of the way. Congressional action is valid only if it rests on an enumerated constitutional power, and Congress may not, in the form of legislation, invade the executive or judicial powers. The relevant enumerated power here comes from the Necessary and Proper Clause, under which Congress may pass laws that carry into execution the other two powers.¹⁰ Such a congressional authority poses no threat to the separation of powers, or at least no more of a threat than the necessary and proper power inevitably does. That threat might be serious were Congress empowered to legislate with an eye to determining the doctrines according to which the courts decide cases. The necessary and proper power, however, 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.

In a largely uncharted field like this one, the first explorer can expect to provide only a basic map. This Essay presents what I believe to be the best way to analyze the question of congressional power over precedent and the answer that results from that analysis. I cannot hope to develop the definitive treatment of that question, and certainly do not aspire even to sketch answers to the many further questions that arise if my basic claim is correct. I do hope, however, to provide a useful traveler's report from a hitherto undiscovered country.

9. I do not consider whether Congress has any power to legislate concerning rules of precedent applied by state courts.

10. See U.S. CONST. art. I, § 8, cl. 18.

I. THE NATURE AND STATUS OF THE RULES OF PRECEDENT

Nothing in the nature of the rules of precedent keeps Congress from legislating on this subject. Congress may not alter constitutional rules, because the Constitution is hierarchically superior to statutes.¹¹ When legislating within the scope of its enumerated powers, however, Congress may, in general, deal freely with law from other sources because federal statutes are the supreme law of the land.¹² It may displace state law, for example.

Section I.A begins by arguing that the norms of stare decisis fall into the category of authoritative legal rules. Such rules have a source, whether that source be the Constitution or elsewhere. Section I.B maintains that the rules of stare decisis applied by the federal judiciary do not derive from the Constitution. Section I.C argues that norms of precedent used by the federal courts mainly consist of general law, or federal common law in contemporary terminology. At least one of those norms appears to rest on judicial interpretations of the statutes that structure the federal courts. Pursuant to its granted powers, Congress may alter or displace the general law, and of course it may change rules that arise from its statutes.

A. *The Nature of Rules of Precedent*

1. *Rules of Precedent as Authoritative Legal Rules.* Much of this Article is concerned with identifying the place of stare decisis norms in the American legal hierarchy. Legal norms are hierarchically arranged in part because of Article VI of the Constitution, which establishes the supremacy of federal law with respect to state law and nonfederal law generally, including both foreign law and general or common law that is not the work of any identifiable sovereign,

11. The standard citation for this proposition, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), also reminds us that some constitutional rules may in a sense be altered by Congress in that they represent defaults that the legislature is empowered to change. *See id.* at 179. Article III, for example, sets out the appellate jurisdiction of the Supreme Court while giving Congress power to make exceptions to it. *See* U.S. CONST. art. III. Similarly, the Twentieth Amendment sets January 3rd as the congressional meeting date, subject to statutory alteration. *See id.* amend. XX, § 2.

12. *See* U.S. CONST. art. VI. The qualifier in the text reflects the fact that Congress often may not alter the legal consequences of acts of the other two branches that change legal relationships; thus, it may not undo what the president does with a pardon. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 141 (1872).

domestic or foreign.¹³ Implicit in the Constitution is its own hierarchical superiority to other forms of federal law.¹⁴ In order to know whether Congress may alter or displace the existing norms of stare decisis, it is necessary to know where they fit in that ordering, or to put it another way, to know where they come from.

Asking that question assumes that stare decisis norms have a place in the hierarchy, that they are one of the kinds of law that the federal courts apply when they decide cases. This Essay rests on that claim, and, despite its axiomatic feel, the premise requires some defense because there is an alternative way of thinking about precedent. To see the alternative, it is useful to consider a rule that I will argue is both importantly similar to and importantly different from the norms of stare decisis. This is the Constitution's requirement that any conviction for treason against the United States rest on confession in open court or the testimony of two witnesses to the same overt act.¹⁵

The two-witnesses rule has three features that are important for this Essay. First, it comes straight from the Constitution, and hence Congress may not displace it. Second, it is higher-order in that it does not itself provide a rule for conduct, but rather governs the application of other rules. In this case, the other rule is the definition of treason, which also comes from the Constitution.¹⁶ When the treason rule is applied in a criminal proceeding, the two-witnesses rule controls. Finally, and relevant here, the two-witnesses rule is authoritative in that the courts must apply it, even when in their judgment it fails to achieve its purpose. A judge in a treason trial may be utterly convinced that the defendant is guilty and that the case has not been trumped up by the government, but if there are not two witnesses to the same overt act, the defendant goes free. Cases would come out differently were the two-witnesses requirement not authoritative but instead a generalization that the courts usually followed because it was usually reliable. Were the two-witnesses principle of the latter type, a judge would not follow it when convinced that the defendant was guilty, because it would have no independent force of its own.

13. See U.S. CONST. art. VI.

14. An attempt to identify more precisely just where the Constitution embodies that assumption is found in John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333 (1998).

15. "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." U.S. CONST. art. III, § 3.

16. "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." *Id.*

Norms of stare decisis, I will assume, have the same kind of independent force as the two-witnesses rule. If they do not, then to say that American courts follow them is gravely to impeach their adherence to the rule of law. Norms of precedent have decisive force precisely when the court would have come out the other way had it not been following precedent. If principles of stare decisis are authoritative legal norms, then for a court to follow them is by definition not lawless, and the result is no more peculiar than what happens when a treason defendant is acquitted under the two-witnesses rule even though the court believes the defendant guilty. But if norms of precedent are based on judicial policy judgments that do not have an authoritative source, then to follow precedent is to apply the wrong legal rule, not because some higher-order legal rule requires it, but because the court thinks that doing so is a good idea.¹⁷

Courts frequently do characterize stare decisis as a policy,¹⁸ but I read such statements to mean two things. First, the rule is not absolute.¹⁹ Second, the norms are influenced by and reflect policy considerations, as does the common law generally. When judges say they are bound by precedent, I take them to mean that they are following actual rules and not ignoring the law because they believe that ap-

17. Treating rules of precedent as authoritative legal rules is one consequence of a fundamental assumption that I make about the judicial function, an assumption that leads to a particular account of the process often called judicial legislation. I assume that the judicial function is to find the facts concerning particular disputes and apply rules of law to those facts. A court may need to make policy judgments in order to do that, either because the applicable norm instructs it to do so or because that norm is unclear in its application, but those policy judgments are part of the adjudicative process and are made within the limits given by the norms being applied. As Justice Scalia says, judges make law, but “they make it *as judges make it*, which is to say *as though* they were ‘finding’ it.” *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring). Finding it means deriving it from some pre-existing norm, however open-ended that norm may be. Hence, the concept of judicial legislation is a metaphor, an account of a way in which the process of adjudication resembles the process of legislation. Legislatures, by contrast, make law in the primary literal sense of selecting a norm on the basis simply of its merits and prescribing it *ex nihilo*.

Courts make law in the manner I attribute to them any time the applicable norms are not clear. Some courts, but by no means all, also make law in the sense of setting precedents that will be treated as authoritative by later decisionmakers including later courts. This form of judicial legislation, however familiar it may be, does not invariably accompany the process of adjudication. Federal district courts do not legislate in this sense, nor do courts in legal systems that do not treat cases as authoritative.

18. *See, e.g., Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (“[S]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.”).

19. *See id.*

plying it would be undesirable.²⁰ By assuming that the rules of stare decisis are authoritative legal rules, this Essay also puts to one side the argument that it is illegitimate for federal courts to follow precedent in applying federal law.

2. *Rules of Precedent as Norms Internal to Judicial Decisionmaking.* In order to understand the source of norms of stare decisis, it is first necessary to be more precise about the way in which courts become obliged to follow precedent. Courts may be required to do so because judicial precedent is part of the primary law that governs the conduct of parties in litigation. On the other hand, rules of precedent may operate like rules of evidence, which govern the internal decisionmaking of the courts. To be sure, private people will often be intensely interested in the courts' operating procedures, as Mafiosi are interested in the evidentiary rules of attorney-client privilege. But the two different kinds of rules have different sources and different implications.

The rules of precedent could bind everyone, not just the courts, for either of two reasons. First, it could be that cases are literally law, the way statutes are law. Despite the implication of the phrase "case law," for example, it is quite unlikely that cases are law in the American constitutional system. If courts follow precedent because judicial decisions are law, then they should not follow it in cases involving the Constitution, federal statutes, or treaties. As Gary Lawson has pointed out, under the Supremacy Clause written federal law is superior to everything else, including by implication judicial opinions.²¹ Even if such opinions can be characterized as laws of the United

20. To say that rules of precedent are authoritative legal rules, and hence to some extent opaque to the reasons for having them, is of course not to say that they are completely opaque. They are not, in fact, completely opaque, and hence to a substantial degree directly reflect the policies that underlie them. Nor are they without authority because courts in formulating them consider those policies, just as legislatures do when they formulate legal rules; courts do that when they formulate the law of contracts, but they nevertheless regard contract law as binding on them. Probably the most famous account of the nature and limits of judicial legislation comes from Justice Holmes: "[J]udges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court." *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). Common law judges at once follow and make law.

21. See Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 24 (1994). The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land" U.S. CONST. art. VI., cl. 2.

States within the meaning of Article VI, they still cannot prevail over the Constitution; when a law of the United States conflicts with the Constitution, the latter wins. A court, therefore, would have to prefer the Constitution as the court understands it to the earlier decision, even though the earlier decision had the force of a law of the United States, and there would be no *stare decisis*. In the hierarchy of federal law, at least, talking about judicial decisions as the law is inaccurate shorthand.

Second, it could be that judicial decisions, although not literally law, are for the world at large conclusive gloss on whatever law is relevant, including the Constitution. This thesis is not embarrassed by the Constitution's superiority, because gloss piggy-backs on the law being glossed, and an interpretation piggybacked on the Constitution is the supreme interpretation of the land. That would be so, not because of any rule specifically about the way courts are to operate, but because of a general principle applicable to all who seek to follow the law.

Whatever may be the merits of the proposition that judicial interpretations are conclusive gloss for all legal actors, this proposition cannot be the source of the norms of precedent in anything like the form with which we are familiar. Assume that judicial decisions do indeed authoritatively interpret the law they apply. District courts apply law and decide cases just as much as does the Supreme Court. So when the United States District Court for the Eastern District of Virginia decides an issue under a federal statute, every other court in the country, up to and including the Supreme Court of the United States, must follow its conclusion in later cases. That would be true if judicial constructions of the primary law themselves had the status of primary law, but precedent does not work that way in America.

It may seem that I am being uncharitable to the conclusive gloss hypothesis. Surely it entails some adjustment for the internal structure of the judiciary. One adjustment is to say that the principle applies only to decisions of the highest court. If that is so, then the principle cannot account for norms of precedent in general, for it cannot tell which district courts, if any, must follow the Fourth Circuit's cases. Another adjustment, perhaps superficially attractive, is to say that courts produce conclusive gloss only "within their jurisdiction," or something like that. A court's jurisdiction, according to this view, includes only those subject to its authority, which in turn includes private people whose cases it can decide and other courts that it can reverse. The Fourth Circuit, by this reasoning, produces conclusive

gloss for people and district courts in Maryland, Virginia, West Virginia, North Carolina, and South Carolina, but for no one else. The Supreme Court conclusively glosses federal law because it can decide any case with a federal question, reversing any lower court if necessary.

This refinement still does not work. It gives nonjudicial actors a rule they cannot follow because it can subject them to inconsistent interpretations from different courts. An issue of federal law can end up being litigated in more than one court. Both the Fourth Circuit and the Supreme Court of Virginia must apply the Constitution's search and seizure rules but neither can reverse the other.²² Virginia's highest court can decide a search and seizure question one way and the federal court of appeals can decide the very same legal question the other way. If the Supreme Court of the United States denies certiorari in both cases, the Virginia State Police will be left with inconsistent pieces of supposedly conclusive constitutional interpretation.

The problem here is that under the norms of precedent with which we are familiar, the authority of a judicial decision depends in part on the appellate structure of the courts. The United States Court of Appeals for the Fourth Circuit usually makes law for district courts within the Fourth Circuit, but never for district courts in the Eighth Circuit. The Fourth Circuit in general can reverse district courts in North Carolina but not in Iowa. The Fourth Circuit does not make patent law even for district courts in North Carolina, however, because it cannot reverse district courts in North Carolina on patent questions. Cases involving such questions are appealable only to the Federal Circuit.²³ This structure of rules about judicial lawmaking is hard to reconcile with the hypothesis that precedent is authoritative because judicial decisions are in general sources of primary obligation and entitlement. It is, however, quite natural if one believes that the norms of precedent are part of the internal operating procedures of the courts. If they are, then one would expect those norms to interact with other aspects of those internal operations.

22. The Supreme Court has appellate jurisdiction over the state courts, *see* 28 U.S.C. § 1257 (1994), but the federal courts of appeals do not, *see* 28 U.S.C. §§ 1291-96 (1994).

23. The allocation of appellate jurisdiction among the regional courts of appeals and between them and the United States Court of Appeals for the Federal Circuit is found in 28 U.S.C. §§ 1294 and 1295. Under the latter, the Federal Circuit has exclusive jurisdiction (with stated exceptions) over all cases from the federal district courts where "the jurisdiction of that court was based, in whole or in part, on section 1338 of this title," 28 U.S.C. §1295(a)(1) (1994), which gives the district courts jurisdiction over "any civil action arising under any Act of Congress relating to patents," *id.* §1338(a).

Courts do not follow precedent because other courts conclusively gloss the law. Courts can conclusively gloss the law because other courts follow precedent. Appellate hierarchies and rules of stare decisis logically precede judicial lawmaking, not the other way around.

Rules of stare decisis thus seem not to result from principles about the status of judicial decisions that apply to the world at large. That leaves the possibility that precedent results from principles of reasoning and decision specific to courts. As internal rules of judicial reasoning, norms of stare decisis closely resemble rules of evidence, through which courts perform the factfinding part of their function. Rules of evidence are the lenses through which courts look at the world. Sometimes they distort reality: maybe the one point about constitutional law most Americans know is that the exclusionary rule keeps out probative, often conclusive, evidence of guilt.

As mentioned above, rules of evidence can have that effect precisely because they are authoritative legal rules, and not just rules of thumb. Authoritative rules to some extent depart from the reasons for having them. Hearsay, for example, often has serious reliability problems. But some hearsay is in fact reliable. Not all reliable hearsay, however, comes within one of the exclusions or exceptions, which is to say that sometimes the rule operates where its rationale does not.²⁴ Moreover, the rules of evidence reflect some considerations that have nothing to do with factfinding. Testimonial privileges are a leading example. Conversations between attorney and client are not kept out because they are unlikely to lead to truth. On the contrary, that is exactly where they are likely to lead and that is the problem with them: too much truth in adjudication would mean too little good legal advice.

Rules of precedent are like rules of evidence for questions of law rather than fact. They give special, sometimes dispositive, strength to one particular indicator of what the law requires. Precedent means that prior decisions are taken as correct, or correct unless shown otherwise to some requisite degree, much as an evidentiary presumption means that some fact is taken to be true, or true unless clearly shown not to be. Moreover, norms of stare decisis have both of the features

24. In 1961, then-Professor Weinstein described and criticized the rule-like nature of the regime under which hearsay is excluded subject to categorical exceptions of inclusion. See Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331 (1961). He explained that hearsay is frequently unreliable, *see id.* at 334-36, noted that some hearsay is reliable, *see id.* at 336-37, and pointed out that the system of categorical exceptions still excludes some reliable statements, *see id.* at 337-38.

just noted about rules of evidence. First, they sometimes fail the purpose of accurately interpreting the law. Sometimes the earlier court was wrong. Second, they reflect considerations other than just the correct resolution of legal issues. In particular, stare decisis is justified on the need for uniformity and stability (the former applies especially to horizontal, the latter to vertical, precedent).²⁵ Having a uniform and stable answer is not the same as having the right answer.

B. Precedent and the Constitution

1. *Text and Structure.* The first and most serious problem with the suggestion that the Constitution itself establishes rules of precedent is that it does not even come close to mentioning the subject. It contains other rules of judicial procedure, and indeed of evidence, but does not mention stare decisis.²⁶

The Constitution does call one federal court supreme and all other federal courts inferior. Professor Evan Caminker, in the most serious analysis of the constitutional sources of precedent so far, infers from the terminology that lower federal courts are agents of the Supreme Court, as lower executive officers are agents of the president, and that they are therefore required to follow the Court's precedents.²⁷ He argues that it is very hard to account for the distinction between supreme and inferior courts on any other hypothesis.

While Caminker's reasoning is powerful, it is not conclusive on the point he addresses, and his conclusion does not embrace the entire field of precedent. Indeed, it may create another *expressio unius* problem for other forms of precedent, insofar as the Constitution bothers to create this one and no other. In any event, the argument from "supreme" and "inferior" encounters difficulties, some of which Caminker discusses, though I think he undervalues them.

At the outset, the claim that inferior federal courts are agents of the Supreme Court must struggle with the language of Article III, which vests the judicial power in both.²⁸ Article III's Vesting Clause is

25. Vertical stare decisis refers to the rule that courts must follow the precedents of courts above them in the appellate hierarchy. Horizontal stare decisis refers to the rule that a court must follow its own precedents.

26. The jury trial provisions of Article III and the Sixth Amendment are procedures, and the Confrontation Clause of the Sixth Amendment is a rule of evidence.

27. See Caminker, *supra* note 8, at 828-34.

28. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST.

in sharp contrast with that of Article II, which grants the executive power to the president alone.²⁹ That aspect of Article II is the primary textual prop leaned on by those who argue that the president must be able to control lower executive officers: the power such officers exercise is the president's.³⁰ But the power that lower federal courts exercise, says the Constitution, is their own.

Article III, moreover, provides that Congress may make exceptions to the appellate jurisdiction of the Supreme Court. Most commentators, even those who believe that some federal court must exercise all of the Article III jurisdiction, generally agree that the exceptions power enables Congress to make decisions by inferior federal courts final.³¹ The upshot is that whole areas of law may go for decades without a Supreme Court decision. Federal criminal law could do so in the nineteenth century, when the Court, as a general matter, had no appellate jurisdiction over criminal cases in the lower federal courts.³² This relationship between the supreme and inferior federal courts does not look like that of agent and principal.

Finally, this account of vertical stare decisis rests on a very particular kind of agent-principal relationship, one that operates through the binding force of the Supreme Court's opinions. The Court apparently has no authority to direct lower courts through extrajudicial pronouncements in advance of actual cases in the way that the Commander-in-Chief may direct the military in advance of conducting operations. Yet the Constitution makes no provision for the production or publication of such opinions. It may seem obvious to us that the Supreme Court will issue opinions that will become available to bench and bar, but it was not at all obvious when the Constitution was

art. III, § 1.

29. "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1.

30. See *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).

31. See, e.g., 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). Amar argues that some federal court must be able finally to decide every case to which the federal judicial power extends under the case-denominated heads of jurisdiction in Article III. Whether that is the Supreme Court or one of the inferior courts, however, is up to Congress, because the Constitution assumes parity among federal judges. See *id.*

32. See *United States v. More*, 7 U.S. (3 Cranch) 159, 173 (1805). Questions of criminal law could come before the Court when the judges of a Circuit Court divided in opinion and certified the question. See ALFRED CONKLING, *A TREATISE ON THE ORGANIZATION AND JURISDICTION OF THE SUPREME, CIRCUIT, AND DISTRICT COURTS OF THE UNITED STATES* 21 (1842).

adopted.³³ A document that meant to set up a principal that would communicate with its agents only in this stylized fashion likely would have said something about its chosen and highly specialized mode of communication.

The more plausible reading is thus that lower courts are inferior in that they may be subjected to the Supreme Court's appellate jurisdiction and are so subjected by the Constitution's default rule. The Supreme Court is supreme in that it must be the court of last resort.

The argument based on the Court's adjective has the advantage that it gives *stare decisis* a textual basis. Otherwise the Constitution says nothing that obviously bears on precedent one way or another. It is natural to respond that my statement shows a lack of appreciation for the text's implications. Courts have the judicial power, goes the response, and judicial power simply brings with it rules of precedent. Moreover, while the Constitution does not say anything about this in so many words, it does deal with the structure of the judiciary, both by prescribing such rules to a certain extent and by giving Congress the power to complete the system. On this account, rules of precedent follow more or less automatically from rules of judicial structure, so they are in effect given by the Constitution even though not expressed. There may be some details to be worked out, but constitutional law is like that.

In fact, there are two serious difficulties with the suggestion that rules of precedent are implied by the Constitution's rules about the structure of the judiciary. One is that there are a lot of details to be worked out, and the Constitution generally gives us no guidance about how to approach them. Moreover, on several points, standard doctrine is contrary to what one would infer from the Constitution if one believed that it provided rules of *stare decisis*.

Consider first horizontal precedent, which operates within courts.³⁴ It raises many questions that one is hard pressed to answer on the basis of the Constitution. Most basic is the question whether the rule of *stare decisis* is absolute, and if not, when a prior case is to be overruled. Judicial debates about the force of precedent are not conducted with an eye on any particular constitutional text or identi-

33. As Caminker notes, in the early days Supreme Court opinions were delivered *seriatim* and were not regularly published because there was no official reporter. *See* Caminker, *supra* note 8, at 833-34 & n.69. The only written opinions referred to by the Constitution are those of the heads of executive departments, which the president may call for. *See* U.S. CONST. art. II, § 2, cl. 1.

34. *See supra* note 25.

fiable aspect of the structure the text creates. A leading current example is *Payne v. Tennessee*,³⁵ which overruled two earlier cases that had severely limited the use of “victim impact statements” at the sentencing phase in capital cases.³⁶ While the majority and dissent clashed sharply on the strength of stare decisis and on the factors that should influence overruling, the debate turned on policy considerations rather than specific features of the Constitution. The Chief Justice, speaking for the majority, explained that adherence to precedent is generally good because it promotes evenhandedness, predictability, consistency, and reliance, as well as actual and perceived judicial integrity. Nevertheless, he maintained that the rule is not absolute but rather a matter of sound policy.³⁷ Justice Marshall wrote the primary dissent, an impassioned opinion that begins with a harsh accusation: “Power, not reason, is the new currency of this Court’s decisionmaking.”³⁸ He agreed that stare decisis is not absolute but nevertheless had substantial force, appealing not to anything in particular in the Constitution but to the values of the rule of law itself.³⁹

While debates in the Supreme Court have the highest profile, the complex structure of the inferior federal courts raises important questions, answers to which are hard to attribute to the Constitution. One basic issue is whether horizontal stare decisis in the inferior courts operates throughout each level of the appellate hierarchy or in some more limited fashion. Should the Sixth Circuit be bound by the Ninth Circuit’s precedents? The current answer is no.⁴⁰ On the other hand, the rule may have been the opposite a hundred years ago.⁴¹ One could

35. 501 U.S. 808 (1991).

36. *Id.* at 830 (overruling both *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989)).

37. *See id.* at 827-30.

38. *Id.* at 844 (Marshall, J., dissenting).

39. *See id.* at 848-50.

40. *See, e.g., Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (noting the rule that the decisions of a circuit are not binding upon other circuits).

41. In *Shreve v. Cheesman*, 69 F. 785 (8th Cir. 1895), the Eighth Circuit noted:

It is a principle of general jurisprudence that courts of concurrent or co-ordinate jurisdiction will follow the deliberate decisions of each other, in order to prevent unseemly conflicts, and to preserve uniformity of decision and harmony of action. This principle is nowhere more firmly established or more implicitly followed than in the circuit courts of the United States. A deliberate decision of a question of law by one of these courts is generally treated as a controlling precedent in every federal circuit court in the Union, until it is reversed or modified by an appellate court.

Id. at 790. Although that opinion was delivered by one of the then-recently-formed circuit courts of appeals, it appears to have referred to the practice of the federal trial courts that had long gone by the name of Circuit Courts and still did so for a while after the circuit courts of ap-

go either way on this question for reasons of policy, but the Constitution says nothing about the structure of the lower federal courts.

The current structure of the federal judiciary raises another question concerning horizontal stare decisis: what is the significance of the way in which multi-member courts sit to decide cases? In the current federal system, the Justices of the Supreme Court always sit all together, the judges of the courts of appeals sometimes do, and the judges of the district courts almost never do.⁴² That makes things easy for the Supreme Court and the district courts but complicated for the courts of appeals, which routinely sit en banc. Those courts' response to this complication is the rule that panels are bound by an absolute rule of stare decisis but the court sitting en banc is not.⁴³ A more difficult question, which some of the courts of appeals may not have addressed, is whether a panel opinion has any precedential force at all when an issue it decided is presented to the court en banc.⁴⁴ No court of appeals, however, accords absolute stare decisis effect to a panel opinion when sitting en banc; were that the rule, the court would convene en banc only to decide questions of first impression.

This is not the only way to arrange the relative roles of panels and en banc sittings. One natural alternative would be to make en banc precedents binding on panels without the inter-panel rule. That approach would preserve a distinctive role for the en banc court without enabling one panel to bind the circuit in a way that could be rejected only through a full-court sitting. Both norms have merits and demerits, but it is very hard to see how the Constitution bears on the question. Yet if it provides the rules of horizontal stare decisis, it must provide one here.

peals were created. The *Shreve* court went on to equivocate as to whether Circuit Courts treated one another's cases as persuasive or binding authority, but seems to have inclined to the view that they were treated as binding. *See id.* at 791-92.

42. *See* 28 U.S.C. § 46 (1994) (explaining that courts of appeals are generally to sit in panels of three, although they may sit in larger panels, and may sit en banc); *id.* § 132 (detailing the principle that, except as otherwise provided by statute or court rule, judicial power of district courts may be exercised by a single judge).

43. *See, e.g.,* *United States v. Allah*, 130 F.3d 33, 38 (2d Cir. 1997) (stating that the court is bound by panel precedent unless that precedent is overruled by the Supreme Court or the Second Circuit sitting en banc); 18 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 134.02[1][c] (3d ed. 1997) (explaining that a published decision of a court of appeals panel is a decision of the court and thus carries with it the force of stare decisis).

44. According to the D.C. Circuit, the en banc court will not overrule a panel precedent simply because the panel was wrong, but is not absolutely bound by panel precedent in the way that another panel would be. *See Critical Mass Energy Project v. Nuclear Reg. Comm'n*, 975 F.2d 871, 875-76 (D.C. Cir. 1992) (en banc).

Horizontal stare decisis also suffers from the second problem, that familiar doctrine is hard to square with the thesis that the Constitution dictates the rules. One standard principle is that stare decisis should be stronger with respect to statutory than with respect to constitutional interpretation.⁴⁵ If the Constitution bears on this question at all, however, it bears against that orthodox position. Its command to courts concerning the Constitution and federal statutes is the same: they are both the supreme law of the land.⁴⁶ To the extent that horizontal stare decisis results from the fact that courts are courts, or that they exercise the judicial power, there is once again no source for any distinction among sources of law.

Moreover, the same judicial power is vested in the Supreme Court and in the inferior tribunals that Congress constitutes. The natural inference is that if rules of stare decisis result from the nature of courts or of the judicial power, the rules of horizontal stare decisis should be the same for all federal courts, too. But they are not. For reasons that are hard to identify (and that are virtually impossible to tie to the Constitution), the federal district courts regard their own precedents as persuasive authority only.⁴⁷

Similar difficulties arise with respect to vertical stare decisis, which determines a lower court's obligation to follow the doctrine of a superior court. The answer to the question of its structure and force may seem obvious: the scope of vertical stare decisis is determined by appellate jurisdiction and it is absolute. Surely we can attribute that rule to the Constitution.

In fact, it is not obvious either that appellate jurisdiction determines the scope of stare decisis or that the force of vertical precedent is absolute. On the first point, appellate jurisdiction and stare decisis, we need to remember that for most of the country's history the Supreme Court of the United States did not have appellate jurisdiction over the entire field of federal-question cases (putting aside the other heads of jurisdiction in Article III). First, under the Judiciary Act of 1789 and its successors, as late as 1914, the Court did not have appellate jurisdiction over cases in which a state court decided in favor of a federal claim.⁴⁸ Thus, in the infamous *Ives* case, when the New York Court of Appeals held that New York's workers' compensation stat-

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

46. See U.S. CONST. art. VI, cl. 2.

47. See 18 MOORE ET AL., *supra* note 43, § 134.02[1][d].

48. See Act of September 24, 1789, ch. 20, § 25, 1 Stat. 73.

ute violated the Fourteenth Amendment, the Supreme Court had no appellate jurisdiction.⁴⁹ The Court would have been able to review a decision sustaining the New York law against federal challenge (the kind of jurisdiction it had in *Lochner v. New York*⁵⁰), but it had no jurisdiction when the federal claim prevailed. Second, for most of the nineteenth century, the Court had no general appellate jurisdiction over criminal convictions in the lower federal courts. The Court could, however, address questions that arose in criminal prosecutions under limited circumstances, including certain habeas corpus proceedings and upon certificate of division of a Circuit Court.⁵¹

While the *Ives* context gave rise to more practical difficulties than did the Court's limited jurisdiction for criminal appeals, this inquiry is about precedent in the federal courts, so I will consider the problem that could have arisen in federal criminal cases. Suppose that the Supreme Court, presented with a certificate of division by a Circuit Court, had interpreted a federal criminal statute in a particular fashion. In a later case in a Circuit Court where there was no division of opinion, was the Court's precedent binding? If precedent follows appellate jurisdiction the answer was no, because there was no appellate jurisdiction.⁵² If that answer is incorrect, then the rules of stare decisis do not simply follow from appellate jurisdiction. They reflect some other principle not mentioned by the Constitution.

The *Ives* problem concerns the scope of vertical stare decisis. There is also the question of its force. Again, the assumption that its force is absolute is more doubtful than may seem. What is a lower court to do when it believes that the higher court would not follow the higher court's clear precedent? If the lower court is to do what it thinks the higher court would do, then the rule of vertical stare decisis is not absolute. While the Supreme Court's current answer is that the lower court is to follow the precedent and not predict overruling, the

49. See *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 298 (1911); see also Edward Hartnett, *Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 TEX. L. REV. 907, 933-37 (1997). *Ives* played an important role in prompting Congress to extend the Court's jurisdiction to include all cases from state courts that involve federal questions. See *id.*

50. 198 U.S. 45 (1905).

51. See *supra* note 32.

52. As noted, this problem was more likely to arise in the state-federal context under section 25 of the Judiciary Act of 1789 and its successors. Suppose that a state court upheld a state statute against federal challenge, and the Supreme Court, on review under section 25, affirmed. In a later case presenting the same question, the Supreme Court would have no appellate jurisdiction over a state court judgment accepting the federal challenge and holding the state statute invalid.

case enunciating that rule made no attempt to ground it in the Constitution, and it is not clear where in the Constitution one would point in order so to ground it.⁵³

One may object that constitutional norms routinely have debatable applications, often applications that are highly debatable precisely because the norm seems to give no guidance. The fact that there are hard cases does not mean that there is no law. The questions I have posed, however, are not hard, or at least should not be. They are quite basic. Indeed, it is difficult to think of a question that would be any easier than whether the rules are the same at different levels. The problem here is that all the questions are hard, and all the answers seem equally unrelated to the Constitution, because there is no constitutional text or structure to apply.

2. *History.* Sometimes the force of historical practice may be so strong that it must be read into the Constitution despite what otherwise would be the natural import of the text and structure. Thus, it is necessary to consider the possibility that rules of stare decisis are simply built into the Article III judicial power as originally understood. The argument would be that Americans at the time of the Framing were so familiar with judicial stare decisis that they simply assumed that to have a judiciary was to have precedent. History all by itself would supply the lack of text or structure.⁵⁴

53. See *DeQuijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). The Court announced the rule but gave no explanation:

We do not suggest that the Court of Appeals on its own authority should have taken the step of renouncing *Wilko*. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Id. at 484. Justice Stevens, in dissent, characterized the court of appeals' action as "an indefensible brand of judicial activism," but did not mention the Constitution. *Id.* at 486 (Stevens, J., dissenting) (footnote omitted). Also, the Supreme Court is without means of enforcing this requirement. Lower courts that violate the rule but guess right about what the Supreme Court will do will be affirmed, while perhaps at the same time being told that they misbehaved by deciding the case correctly.

54. *Alden v. Maine*, 527 U.S. 706 (1999), is probably the closest thing in contemporary Supreme Court doctrine to a constitutional rule resting wholly on history. At stake in *Alden* was Congress's power under the Commerce Clause to create a cause of action for money damages against a state, with the cause of action to operate in state court. See *id.* at 711-12. As the Court explained, the provision of the text that explicitly deals with state sovereign immunity, the Eleventh Amendment, does not bar what Congress had done. See *id.* at 743. The Amendment is formulated as a limitation on the judicial power of the United States, see U.S. CONST. amend. XI, and it is "a truism as to the literal terms of the Eleventh Amendment" that it does not apply in state court. *Id.* at 735-36. "As we have explained, however, the bare text of the Amendment is not an exhaustive description of the States' constitutional immunity from suit." *Id.* The Court's

It would be odd if the text and the times that produced it were so far to diverge that the text would give no hint about a practice that was simply taken for granted. As just discussed, however, the Constitution seems quite innocent of judicial precedent. In that respect, it matches the times that produced it, not because Americans in the late eighteenth century were unfamiliar with precedent, but because they were familiar with judicial practices that hardly matched any constitutional obligation on the part of courts to follow their prior decisions. Courts would have had a hard time doing that, because their information about their prior cases was at best unsystematic and often nonexistent. Reports of American decisions were few, unofficial, and often unreliable.⁵⁵ The infrastructure of judge-made law with which we are so familiar was not yet in place, so it would have been unreasonable to find in the Constitution a requirement that judge-made law be followed.

It also is unlikely that there was widespread agreement as to norms of vertical precedent when the Constitution was adopted, because judicial structures were very much in flux. While the Constitution provides for one supreme federal court and inferior federal courts, the hierarchical judicial structure that we know so well was only beginning to come into focus. As Ritz explains, when the Constitution was being framed and ratified, the highest judicial tribunal in eleven of the thirteen states was primarily a trial court; appellate review was at best a secondary function.⁵⁶ The allocation of judicial authority was primarily horizontal, among different courts, rather than vertical with a clear appellate hierarchy.⁵⁷ It is hard to imagine that people familiar with such judiciaries thought that rules about vertical stare decisis were part and parcel of the judicial power, because it is hard to imagine that they had firmly settled views about judicial structures they had never seen.

earlier explanation consisted of a little structure, *see id.* at 748-52, and a lot of history, *see id.* at 745-48.

55. Wilfred Ritz investigated in detail the beginnings of modern law-reporting systems in the states, which he defines as a system “in which the decisions of a court, and the reasons for the decisions, are published on a regular and timely basis, so as to be generally available to all courts, the legal profession, and the public.” WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE* 46 (1990). He dates the earliest such systems, for New York and the Supreme Court of the United States, to 1804. Georgia did not have one until 1847. *See id.* at 47.

56. *See id.* at 36.

57. *See id.* at 44.

This is not to deny that Americans at the time of the Framing expected courts generally to follow precedent. They did.⁵⁸ I do mean to deny that during the Framing era the idea of judicial power was thought logically to imply the creation of precedent. As I will explain presently, the force of precedent came, not from anything intrinsic to the judicial power, but from the common law rules of stare decisis.

If I am right on this point, the United States Court of Appeals for the Eighth Circuit recently went badly wrong when it addressed the constitutional status of stare decisis. In *Anastasoff v. United States*,⁵⁹ the Eighth Circuit held unconstitutional its internal rule under which unpublished panel opinions have no precedential weight. The court concluded that “[t]he Framers of the Constitution considered these principles [of stare decisis] to derive from the nature of judicial power,”⁶⁰ so that the court was constitutionally required to give precedential weight to one of its prior unpublished opinions. *Anastasoff*'s claim about the meaning of the term judicial power, although it may seem innocuous, is very strong. It implies, for example, that an American lawyer around the time of the Framing would have asserted that civil law tribunals, which did not have the common law doctrine of precedent, were exercising something other than judicial power.⁶¹ The case cites no one who employed that usage of “judicial

58. Brutus, probably the most penetrating Anti-Federalist critic of the proposed constitution's judicial system, expected that the projected federal courts would rely on their earlier decisions. He painted a disturbing picture, in which the courts would quietly expand federal power through a series of adjudications in low-profile lawsuits:

They will be able to extend the limits of the general government gradually, and by insensible degrees, and to accommodate themselves to the temper of the people. Their decisions on the meaning of the constitution will commonly take place in cases which arise between individuals, with which the public will not be generally acquainted; one adjudication will form a precedent to the next, and this to a following one.

Letter of Brutus in the *New York Journal* (Mar. 20, 1788), in XVI JOHN P. KAMINSKI & GASPARE J. SALADINO, *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 434 (1986).

59. No. 99-3917EM, 2000 U.S. App. LEXIS 21179 (8th Cir. Aug. 22, 2000).

60. *Id.* at *8.

61. Blackstone recognized that judicial lawmaking through the rule of stare decisis was a distinctive feature of the English common law. After summarizing his discussion of custom enshrined in judicial decisions as the “chief corner stone of the laws of England,” he explained that “[t]he Roman law, as practiced in the time of it's [sic] liberty, paid also a great regard to custom; but not so much as our law.” 1 WILLIAM BLACKSTONE, *COMMENTARIES* *73. For an example of a civil law jurisdiction that did not have the English rules of precedent, Blackstone would have had to look no further than the north of the Kingdom of Great Britain, which as he recognized had its own legal system distinct from that of England. *See id.* at *98 (“[T]he municipal or common laws of England are, generally speaking, of no force or validity in Scotland . . .”). In Blackstone's time, Scotland did not have the English doctrine of precedent. T.B. Smith, recounting the history of stare decisis in Scotland, described the Scottish approach to judicial

power,” and I am not aware of anyone who did. Blackstone did not.⁶² Nor did Alexander Hamilton, who as Publius wrote as if the courts of all legal systems had judicial power, whether or not they followed common law principles of *stare decisis*.⁶³

authority: “the citing of precedents was well established in Scotland in eighteenth century practice,” and “the judges, while not regarding themselves as bound by their previous decisions, tended to follow them if satisfied that they were sound and had established a practice.” T.B. SMITH, *THE DOCTRINES OF JUDICIAL PRECEDENT IN SCOTS LAW* 10 (1952). That is not *stare decisis* as practiced at Westminster Hall. According to Smith, “[i]t was in the nineteenth century that doctrines of *stare decisis* began to take root in the Scottish system.” *Id.*

62. For example, Blackstone referred to the fact that the French had “vested their judicial power in their parliaments, a body separate and distinct from both the legislative and executive,” 1 BLACKSTONE, *supra* note 61, at *269, without suggesting that French courts followed English principles of *stare decisis*. In the third volume of the *Commentaries* there is a chapter “Of Courts in General.” 3 *id.* at *22. In it, Blackstone described the fundamental features of the judiciary:

In every court there must be at least three constituent parts, the *actor*, *reus*, and *judex*: the *actor*, or plaintiff, who complains of the injury done; the *reus*, or defendant, who is called upon to make satisfaction for it; and the *judex*, or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain and by its officers supply the remedy.

3 *id.* at *25. Blackstone’s interchange of the Latin word *judex* and the English phrase judicial power suggests that he understood the latter in a generic sense that would include the case-deciding authority of any government, whether or not it followed precedent.

Elsewhere Blackstone also seems not to have believed that judicial power entails *stare decisis*. He explained:

The original power of judicature, by the fundamental principles of society, is lodged in the society at large; but as it would be impracticable to render complete justice to every individual, by the people in their collective capacity, therefore every nation has committed that power to certain select magistrates, who with more ease and expedition can hear and determine complaints; and in England this authority has immemorably been exercised by the king or his substitutes.

1 *id.* at *266-67. All nations, whether or not their courts follow precedent, thus have the “power of judicature.” Maybe Blackstone meant to distinguish between the power of judicature and the judicial power, but the index entry on “judicial power” refers to this page, on which the words “judicial power” do not appear, but “power of judicature” does, 4 *id.* at Index.

63. “If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be marked among the number.” THE FEDERALIST NO. 80, at 535 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Hamilton did not pause to explain that his axiom did not apply to governments where the courts do not follow precedent because such governments have no judicial power.

Pierre DuPonceau, a prominent member of the Philadelphia bar in the early national period, also apparently used the term “judicial power” without meaning to confine it to systems with precedent. In his 1824 lectures on federal jurisdiction, DuPonceau said:

Jurisdiction, in its most general sense, is the power to make, declare, or apply the law; when confined to the judiciary department, it is what we denominate the *judicial power*. It is the right of administering justice through the laws, by the means which the laws have provided for that purpose.

PIERRE S. DUPONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES 21 (1824). He did not mention setting or following precedent. *See id.*

The case's implausible claim about Framing-era language use arises from two errors. One mistake is fairly straightforward: deducing from the expectation that courts would follow precedent a belief that being a court logically entails following precedent. Blackstone did state that courts follow precedent.⁶⁴ He also stated that "in some cases, (as in proof of any general customs, or matters of common tradition or repute,) the courts admit of *hearsay* evidence."⁶⁵ But the hearsay rule and its exceptions are not built into the judicial power.

More subtle is the second mistake. As the Eighth Circuit explains, around the time of the Framing some commentators maintained that adherence to precedent would help keep the judicial power within its proper sphere: bound by precedent, courts would be less likely to read their policy views into the law and thereby encroach on the legislative power.⁶⁶ *Stare decisis* thus would reinforce the constitutional structure, helping to keep the judiciary from in effect exercising legislative authority. From that belief the court of appeals in *Anastasoff* inferred a belief that *stare decisis* was logically implied by the grant to the courts of only the judicial power. Again, the inference is unwarranted. Hamilton also maintained that life tenure, with removal only through impeachment, would reinforce the constitutional structure by strengthening judicial independence.⁶⁷ Life tenure thus would help keep the legislature from in effect exercising judicial authority. Hamilton nevertheless knew better than to believe that every court with judicial power therefore has life-tenured judges; he distrusted the state courts precisely because many of them did not.⁶⁸

64. See 1 BLACKSTONE, *supra* note 61, at *69.

65. 3 *id.* at *368.

66. *Anastasoff* cites Blackstone and Hamilton for the proposition that adherence to precedent will keep the judiciary within its proper bounds. See *Anastasoff v. United States*, No. 99-3917EM, 2000 U.S. App. Lexis 21179, at *10-14. Hamilton did say that. See FEDERALIST NO. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (asserting that, to avoid arbitrary discretion in the courts, the judiciary must be "bound down by strict rules and precedents"). Blackstone did not, at least not in the passage cited in *Anastasoff*. That discussion is indeed about the separation of powers, but it is not about precedent. Rather, Blackstone's point is that judicial independence secures judicial adherence to "certain and established rules, which the crown itself cannot now alter but by act of parliament." 1 BLACKSTONE, *supra* note 61, at *267 (footnote omitted). The rule of law and the rule of cases are not the same.

67. Hamilton maintained that life tenure would keep the judges from an "improper complaisance" with the branch that would reappoint them were their terms shorter. THE FEDERALIST NO. 78, *supra* note 66, at 529.

68. "State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws." *Id.* NO. 81, at 547.

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. The next section elaborates this view.

C. The Source of Current Rules of Precedent

Norms of stare decisis that the federal courts follow cannot plausibly be attributed to the Constitution itself. Nevertheless, those courts claim to follow such rules, and I am assuming that stare decisis is part of the body of rules and principles that the courts are bound to apply on pain of being lawless. The rules of precedent must be some kind of law.

One could reach what I will suggest is the correct answer through process of elimination. As just discussed, it is very hard to find rules of precedent in the Constitution.⁶⁹ It would be even harder to find them in a treaty. And while the federal courts sometimes are obliged to follow the substantive law of a state, that state could not regulate their internal operations.⁷⁰ That leaves two possibilities. Norms of stare decisis could be general law (as it is now known, federal common law), or they could result from federal statutes. There is good reason to believe that most of what we know as the law of precedent in federal court is general law, while some of it comes from the courts' reading of the applicable statutory rules.

General Law. Federal courts sometimes follow principles of decision that are not constitutional, statutory, treaty-based, or found in the law of one of the United States or any foreign country. The right name of those principles is a matter of some difficulty, but their existence is not. From their foundation, the federal courts have applied decisional principles that do not come from written federal law or from the states, for example, in the exercise of their admiralty juris-

69. *See supra* Part I.B.

70. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 802 (1995) (stating that the Constitution prevents the states from imposing congressional qualifications additional to those in its text; such authority is not within the states' pre-Tenth Amendment "original powers"); *Hanna v. Plumer*, 380 U.S. 460, 463-64 (1965) (holding that in a civil action in federal court where jurisdiction rests on diversity of citizenship, service of process shall be made pursuant to Federal Civil Rule of Procedure 4(d)(1), not according to state law); *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819) (explaining that the states lack power, by taxation or otherwise, to control the operations of the constitutional laws enacted by Congress to implement the powers vested in the national government).

diction. The Supreme Court applies unwritten norms that are not state law when it decides cases between states in its original jurisdiction.⁷¹

Like other commentators, I regard admiralty and interstate law as leading examples of the category of general or federal common law.⁷² Whether one says that the federal courts were applying general or federal common law in diversity cases before *Erie* depends on the interpretation one places on the system associated with *Swift v. Tyson*.⁷³ According to one account, the applicable norms varied from state court to federal court because the federal courts independently interpreted the law of the states.⁷⁴ According to another account, federal courts diverged from state courts because federal courts were following a choice-of-law rule that sometimes told them to apply the general law conceived of as a body of rules and principles separate from the law of any state. At times, *Swift* itself seems to take this approach, as when it points out that the question at stake is not governed by a New York statute or a fixed local usage peculiar to New York, but rather by general principles of commercial law.⁷⁵ Only the

71. See, e.g., Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 915-17 (1986). Professor Field, like many others, moves easily from the observation that the law of admiralty and the law governing interstate disputes is neither state law nor written federal law to the conclusion that it is judge-made, which in turn leads her to the conclusion that the federal courts have some lawmaking power. See *id.* The primary scholarly challenge to this reasoning comes from Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996), who rejects the deduction of judicial power to make law by challenging the premise that the applicable norms do not come from written federal law. Professor Clark argues, for example, that the norms that govern interstate cases come from the Constitution's principle of state equality. See *id.* at 1322-31.

Understanding admiralty and interstate law as general law avoids attributing legislative power to the courts in the literal sense. It assimilates the account of judicial policymaking where there is no written law to the standard account of judicial policymaking that fills in gaps in written law. In both instances, there is an applicable norm that is given to the courts by an outside source but that is not fully determinate in its application. In my view, judicial legislation is a metaphor based on the very real similarities between that process and what legislatures do. It is not to be taken literally. If the question is whether the federal courts have any legislative power strictly speaking, my answer is of course not, simply because the Constitution vests all the legislative power it grants in Congress. See U.S. CONST. art. I, § 1. Including unwritten principles of general law in the range of norms that courts at once apply and shape makes it possible to treat judicial legislation as a metaphor throughout the federal courts' jurisdiction, including their jurisdiction over admiralty and interstate disputes.

72. See, e.g., Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 345 (1992) (noting that admiralty and interstate cases are decided under federal common law).

73. 41 U.S. (16 Pet.) 1 (1842).

74. See, e.g., *Burgess v. Seligman*, 107 U.S. 20, 33 (1883) (stating that, in the application of state laws in cases where jurisdiction is based on diversity, federal courts must use their own judgments in interpreting those laws).

75. See *Swift*, 41 U.S. at 18-19.

latter approach involves general law in the sense in which I am using the term. I will use the term general law to emphasize that the norms involved are authoritative and binding on the courts and hence, although in some sense made by judges, are not made just as judges please.

Dominant judicial understandings of the place of general law in the American legal hierarchy have changed over time. Admiralty is the leading example. In exercising their admiralty jurisdiction, the federal courts have always employed legal rules and standards that are not necessarily the law of any state or foreign country and that do not come from written federal law. That is as true today as it was in 1795. At least since *Southern Pacific Co. v. Jensen*,⁷⁶ however, admiralty law has been treated as federal law for purposes of the Supremacy Clause.⁷⁷ It was not so treated during the nineteenth century. Rather, it had the same status as the general commercial law: federal courts would apply it pursuant to choice of law rules, but it did not override inconsistent state law, and state court decisions based on it were not subject to review in the Supreme Court of the United States under section 25 of the Judiciary Act, which gave the Court appellate jurisdiction only over federal question cases.⁷⁸ For present purposes, it is unnecessary to make much of this development, because I will be considering norms of precedent only as they are applied by federal courts. Hence, the status of those norms relative to state law is an issue that need not be addressed.

Norms of general law have several features which are illustrated by the law of admiralty. First, general law norms are unwritten, which follows from their status as neither state, foreign, nor written federal

76. 244 U.S. 205 (1917).

77. *See id.* at 215.

78. "A case in admiralty does not, in fact, arise under the Constitution or laws of the United States." *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545 (1828). The older understanding of the general law is presented in lucid detail in William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984). Judge Fletcher's leading example of the status of general law is the law of marine insurance, which as he explains was found to be within the admiralty jurisdiction first by Justice Story on circuit, *see De Lovio v. Boit*, 7 F. Cas. 418, 444 (C.C.D. Mass. 1815) (No. 3776), and eventually by the Supreme Court, *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 35 (1870). While most American judges in the first part of the nineteenth century appear to have agreed that a uniform body of marine insurance doctrine would be valuable, the status of marine insurance as a subject of the general commercial law presented a serious obstacle: because the Supreme Court had no appellate jurisdiction over marine insurance cases in the state courts, uniformity could be achieved only by conscious coordination among independent jurisdictions. *See Fletcher, supra*, at 1558-75.

law.⁷⁹ Second, they are authoritative rules in the sense that the courts are bound to apply them just as they are bound to apply federal statutes or state law.⁸⁰ Third, despite the second feature, they are to some extent judge-made in that the norms are formulated at a sufficiently high level of abstraction as to require the exercise of some policy judgment in their application.⁸¹ The second and third features of general law are no more and no less inconsistent with one another in this context than in any other. Even in the absence of *stare decisis*, courts make law in the sense with which we are familiar when they resolve a concrete dispute on the basis, for example, of a federal statute, the gaps in which they fill in part by reference to their views of desirable policy.⁸² When a legal norm has gaps, there is no contradiction between saying that it is binding on the courts in that they fail of their duty in not applying it, and that it admits of judicial lawmaking in that the courts properly fill the gaps in part by reference to their views as to proper results. A norm that a court felt free simply to disregard

79. One leading source notes:

The "general" maritime law in the United States, insofar as it remains unmodified by statute, contains, then, two parts. First, is the corpus of traditional rules and concepts found by our courts in the European authorities Second are rules and concepts improvised to fit the needs of this country, including, of course, modifications of the first component.

GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* 47 (2d ed. 1975); see also Fletcher, *supra* note 78, at 1517 ("The law merchant, usually described as part of the common law, was the general law governing transactions among merchants in most of the trading nations of the world. The maritime law was an even more comprehensive and eclectic general law than the law merchant.").

80. It may be more exact to say that the general law applied in federal courts was and is authoritative and as binding as the ordinary private law of most states insofar as that law is not contained in statutory codifications. I agree with Justice Holmes that those rules are authoritative law, and that they are more absolutely binding and less subject to judicial revision the more abstractly they are conceived. Perhaps a state's highest court could properly reject the doctrine of consideration, but it still would be lawless for one to reject the very principle of the obligation of contract, holding that private bargains are not to be enforced by the government. Admiralty law was and is binding in this fashion, and indeed Holmes's aphorism about molar and molecular motions was delivered in *Jensen*, an admiralty case. See *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

81. Probably the most prominent recent example of a case in which the courts reshaped substantive admiralty law is *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 409 (1970), in which the Court rejected its earlier doctrine that admiralty law knew no remedy for wrongful death. (Although now 30 years old, *Moragne* is recent by the standards of the admiralty.)

82. This formulation follows that of H.L.A. Hart:

[I]n any legal system there will always be certain legally unregulated cases in which on some point no decision either way is dictated by the law and the law is accordingly partly indeterminate or incomplete. If in such cases the judge is to reach a decision . . . he must exercise his *discretion* and *make* law for the case instead of merely applying already pre-existing settled law.

H.L.A. HART, *THE CONCEPT OF LAW* 272 (2d ed. 1994).

would not be binding and in any application would be wholly judge-made because its application would result entirely from judicial choice and not at all from legal compulsion. Fourth, they originate in custom, both private and judicial. The law of admiralty comes from the practices of maritime traders and the courts of maritime countries.⁸³ Finally, general law is like state law in that it is hierarchically inferior to written federal law. When Congress, in an exercise of one of its enumerated powers, legislates on an issue previously controlled by general law, Congress's rule prevails.⁸⁴

The norms of precedent as the federal courts know them consist mainly of unwritten principles that are characterized as binding law but that reflect substantial judicial input, custom, and practice. Those are the hallmarks of general law. As one would expect, given its origins, courts and commentators have understood the general principle of stare decisis, the high-level abstraction from which the particular norms of precedent are developed, as a principle of the common law. Justice Curtis, for example, referred to "the maxim of the common law, *stare decisis*."⁸⁵ Of the same opinion was the venerable Judge Zephaniah Swift of Connecticut, pioneer of American treatise-

83. Gilmore and Black discuss the origins of maritime law in custom in their treatise. See GILMORE & BLACK, *supra* note 79, at 3-11. Chief Justice Marshall in *American Insurance*, just after stating that admiralty is not federal law, *see supra* note 78, explained that "the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise." *American Ins. Co.*, 26 U.S. (1 Pet.) at 546. More recently the Supreme Court has noted that "[m]aritime law, the common law of seafaring men, provides an established network of rules and distinctions that are practically suited to the necessities of the sea." *United States v. Webb, Inc.*, 397 U.S. 179, 191 (1970).

84. The *Jensen* episode is the best-known admiralty example. *Jensen* held that because admiralty was federal law, the states could not replace its traditional rules of employer liability with a no-fault system of workers' compensation. *See Jensen*, 244 U.S. at 217-18. The Court also rejected Congress's attempts to authorize state legislation in the field, *see Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 227-28 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920), but the former case made clear that the problem was one of delegation, not of the immutability of maritime law in the face of legislation by the appropriate legislature, *see W.C. Dawson & Co.*, 264 U.S. at 227-28. In response, Congress adopted its own scheme of workers' compensation, which abrogated the traditional admiralty rules about employer liability. *See Longshoremen's & Harbor Workers' Compensation Act*, ch. 509, 44 Stat. 1424 (1927) (codified as amended at 33 U.S.C. §§ 901-950. (1994)).

85. *Carroll v. Lessee of Carroll*, 57 U.S. (16 How.) 275, 286 (1850) (concluding that dicta of a state court is not controlling as precedent). In similar fashion, Chief Judge Drake of the Court of Claims in 1873 noted that "[o]ne of the foundation-stones of common-law jurisprudence is the maxim *stare decisis*." *Thompson v. United States*, 9 Ct. Cl. 187, 199 (1873) (Drake, C.J., dissenting); *see also Palmer's Adm'r v. Mead*, 7 Conn. 149, 158 (1828) ("There is not in the common law a maxim more eminently just, and promotive of the public convenience, than that of *stare decisis*.").

writing.⁸⁶ Norms of this sort are not intrinsically resistant to congressional modification.

2. *Stare Decisis and the Statutory Structure of the Courts of Appeals.* The rules of stare decisis in the federal courts of appeals are slightly complicated. Those tribunals can decide cases in panels, generally consisting of three judges, or in en banc sittings that include a larger group, usually all of the judges in regular active service.⁸⁷ All the courts of appeals maintain that very different rules of stare decisis apply depending whether the court is sitting as a panel or en banc. Panels are absolutely bound by the courts' precedents. En banc sittings are not. The different circuits may disagree as to the precedential weight that the en banc court is to accord to prior panel opinions, and some of them may have no explicit doctrine on this subject. All, however, agree that a panel precedent does not absolutely bind an en banc sitting the way it binds another panel.⁸⁸

Panel opinions must have less than absolutely binding force in en banc sittings if those sittings are to perform the function of enabling a majority of the judges in regular active service to determine the court's doctrine. Were en banc courts bound by panel precedent as panels are bound, they would be able to establish case law only when deciding questions of first impression. That would interfere substantially with the full court's control of doctrine.

According to the Supreme Court, the principle that a majority of the full court of appeals is supposed to be able to control its doctrine is derived from the statutes setting up the courts of appeals and enabling them to sit both in panels and en banc. In 1960, the Supreme Court faced the question whether, under the structural statutes as they then stood, a circuit judge's vote should be counted in an en banc proceeding when the judge had taken senior status between the en

86. See 1 ZEPHANIAH SWIFT, A DIGEST OF THE LAWS OF THE STATE OF CONNECTICUT 9 (1822) ("[S]tare decisis is a fundamental maxim of the common law.").

87. See 28 U.S.C. § 46 (1994). All but two of the courts of appeals sit either in three-judge panels or all together. The Federal Circuit is authorized to sit in "panels of more than three judges," *id.* § 46(c), and en banc sittings of the Ninth Circuit normally consist of the chief judge and ten judges chosen by lot. See 9TH CIR. R. 35-3.

88. See MOORE ET AL., *supra* note 43, ¶ 134.02[1][c]. To say that en banc sittings are not absolutely bound as panels is not to say that they are subject to no rule of stare decisis. The D.C. Circuit, for example, takes the position that when it sits en banc, its existing panel precedent is entitled to some respect as a matter of stare decisis but is not absolutely binding. See, e.g., *Critical Mass Energy Project v. Nuclear Reg. Comm'n.*, 975 F.2d 871, 876 (D.C. Cir. 1992) (en banc) (holding that while one panel may not overrule another, an en banc court may overrule a panel on a question of law if the earlier decision was fundamentally flawed).

banc hearing and entry of judgment by the full court. The Court said no. It found the entry of judgment to be the crucial moment, and at that moment the senior judge was not a judge in regular active service. He therefore should not have participated in shaping the court's doctrine because "the evident policy of the statute was to provide 'that the active circuit judges shall determine the major doctrinal trends of the future for their court.'"⁸⁹

The federal judiciary's current rules of precedent cannot plausibly be attributed to the Constitution. Most of them are general law, or in the current phrase, federal common law. At least one of them, says the Supreme Court, is deduced from statutory policy. General law and statutes are not, by reason of their place in the legal hierarchy, immune from congressional alteration.

II. THE SOURCE AND SCOPE OF CONGRESSIONAL POWER OVER STARE DECISIS

Whether Congress has power to legislate concerning precedent in federal court depends on the answers to two further questions. First is whether there is an affirmative grant of authority that fits the bill. Second is whether any seeming grant is fool's gold because it would be inconsistent with the separation of legislative and judicial power. The natural objection to congressional power over stare decisis is the concern that such a power would enable the legislature to control doctrine and case outcomes so as to constitute an invasion of the judicial sphere.

As this part explains, it is not difficult to sketch a congressional power over stare decisis that flows naturally from the Necessary and Proper Clause and that does not threaten judicial independence: Congress may act on the basis of the courts' own traditional criteria for fashioning rules of precedent and must, like the courts, respect the principle that norms of stare decisis must be adopted on their systemic merits, not in order to produce particular outcomes. Moreover, a power over stare decisis limited by this principle would pose no threat to the judicial power. Rules of stare decisis are justified on the basis of their systemic effects, for example, with respect to stability in the law, and emphatically not with respect to their effects on particular doctrinal disputes. To adopt or apply a rule of precedent in order

89. *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 690 (1960) (quoting Chief Judge Clark's dissenting opinion in the lower-court decision under review, *American-Foreign S.S. Corp. v. United States*, 265 F. 2d 136, 155 (2d Cir. 1958)).

to reach a doctrinal result, let alone in order to make a particular lawsuit come out for the plaintiff or defendant, is illicitly to manipulate the concept of precedent. Thus, when legislating on the basis of the courts' well-established criteria for rules of precedent, Congress would not be legislating with an eye to results and would not be seeking to take over the judicial power.

A. *Congressional Power Under the Necessary and Proper Clause*

Throughout their long experience with stare decisis, American judges and commentators have explained why rules of stare decisis are a good idea and suggested criteria with which to evaluate them. In the process they have provided almost ready-made an explanation of why Congress, pursuant to the Necessary and Proper Clause, may legislate in this field. Every argument in favor of a rule of stare decisis is an argument that such a rule would lead to improved performance of the judicial function; Congress's necessary and proper power is precisely the power to provide those rules that will enable the other two branches to do their jobs more effectively.⁹⁰

90. The presence of the Necessary and Proper Clause makes it easy to reject another possible objection to congressional action in this area. The objection would be that the courts have power to adopt rules of precedent, not in the lawmaking capacity that comes with their function of deciding cases, but in the lawmaking capacity they exercise when they adopt rules of procedure outside of the context of any case. One might think, that is, that although formulation of stare decisis norms is indeed an exercise of genuinely legislative power, this is an exception to the vesting of the legislative power in Congress, just as the impeachment provisions are an exception to the vesting of judicial power in the courts. If the courts have this little bit of the legislative power, Congress may not exercise it, any more than a court may decide whether to convict and remove a civil officer who has been impeached by the House of Representatives. Whatever power the courts may have to adopt genuinely legislative rules of procedure in the absence of congressional action, the position that they may do so contrary to an act of Congress cannot be sustained. Rules of procedure are necessary and proper to carry into execution the judicial power, and the authority to adopt laws of that description is explicitly vested in Congress. That explicit grant prevails over any implicit grant to the courts, especially where the latter would constitute an exception to the structure created by the Vesting Clauses (This *expressio unius* point is central to Professor Van Alstyne's argument, in his fundamental article on Congress's authority to carry the other two powers into execution, that the scope of "inherent" executive and judicial authority is limited by the fact that Congress is given power to do what is necessary to make the executive and judicial powers function best. See William Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of "The Sweeping Clause,"* 36 OHIO ST. L.J. 788, 793-94 (1975).). Consistent with this reasoning, Congress has been adopting rules of procedure for the courts or authorizing them to do so since the Judiciary Act of 1789. See, e.g., Judiciary Act of 1789, ch. XX, § 17, 1 Stat. 73, 83 (authorizing retrials "for reasons for which new trials have usually been granted in the courts of law" and empowering the courts "to make and establish all necessary rules for the orderly conducting [of] business in the said courts, provided such rules are not repugnant to the laws of the United States"). The Court has recognized that Congress's power trumps any inherent judicial authority to adopt rules of procedure. See *Palermo v. United*

Consider the basic argument in favor of some form of horizontal stare decisis. If one believes that the incremental process of lawmaking through cases is a good way of aggregating dispersed information into a correct answer, then precedent should be followed.⁹¹ If earlier cases are generally right, then it is a waste of effort to require the courts to reinvent the doctrinal wheel every time an issue comes before them, and having a rule that they should be followed will economize on judicial resources.⁹² And if one believes that stability in doctrine is valuable to the legal system, independent of legal accuracy, one may well believe that it is worth sacrificing some of the latter to obtain the former.⁹³ Horizontal stare decisis is a good idea, goes the argument, because rules of precedent will enable the courts to provide generally accurate and stable legal rules while economizing on scarce decisional resources.⁹⁴

Rules of stare decisis enable the courts better to achieve their purpose, which means that such rules would carry the judicial power into execution. The power to do that is placed in Congress's hands by

States, 360 U.S. 343, 353-54 n.11 (1959) ("The power of this Court to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress.").

91. Judge Easterbrook has argued that precedent disperses decisionmaking through individual cases, economizes on information, washes out judicial idiosyncrasies, and so increases the likelihood that precedent will be correct. See Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 423 (1988).

92. See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 599 (1987) (arguing that the rule-like nature of stare decisis saves judicial time).

93. It is a commonplace that stability and predictability are central reasons for adherence to precedent. "The 'interest in stability and orderly development of the law' that undergirds the doctrine of *stare decisis*, therefore counsels adherence to settled precedent." *Quill Corp. v. North Dakota*, 504 U.S. 298, 317 (1992) (Stevens, J., concurring) (quoting *Runyon v. McCrary*, 427 U.S. 160, 190-91 (1976)) (refusing to overturn a previous Supreme Court decision that held a state could not require an out-of-state mail-order house without representatives or outlets in the state to collect taxes on goods purchased in the state). Moreover, some judges appeal to those considerations in arguing for more particular principles of precedent. Consider, for example, Justice Scalia's concurrence in *Intel Containers International Corp. v. Huddleston*, 507 U.S. 60 (1993). The case involved the dormant Commerce Clause doctrine, which Scalia believes to have been a mistake as an original matter and to which he adheres only for reasons of stare decisis. See *id.* at 78 (Scalia, J., concurring). He has announced his willingness to apply the part of the doctrine that he believes to be clear for reasons of stare decisis. See *id.* at 78-79 (Scalia, J., concurring). In *Intel*, however, he explained that he was unwilling to apply multifactor or balancing tests despite the precedents supporting them. See *id.* (Scalia, J., concurring). Adherence to precedent is good, he argued, because it makes for stability and predictability, but vague and unpredictable tests cannot provide stability and predictability and therefore do not deserve strong respect as precedents. See *id.* (Scalia, J., concurring).

94. The rule-like nature of stare decisis, under which precedent is followed even when, all things considered, it would not be followed in the absence of the rule, makes an independent contribution to judicial economy. It relieves the courts of the obligation they otherwise would have to make sure, every time, that last year's wheel was indeed round.

the Necessary and Proper Clause.⁹⁵ As Chief Justice Marshall explained, when the people gave the national government “those great powers on which the welfare of a nation essentially depends,” they also gave Congress authority “to insure, as far as human prudence could insure, their beneficial execution.”⁹⁶ Like the Constitution, Marshall did not confine Congress to carrying into execution its own powers. His examples of legislation that had been adopted under the Necessary and Proper Clause included “the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court,” laws that he found “certainly conducive to the due administration of justice.”⁹⁷ David Currie points out that a number of provisions of the first federal crimes act, including the perjury provision that Marshall cited in *M’Culloch* and the ban on bribing federal judges, “were plainly necessary and proper to the operation of the federal courts.”⁹⁸ More recently, the Supreme Court has confirmed that Congress’s necessary and proper power extends to providing for the internal operation of the federal courts by adopting rules of procedure.⁹⁹ Just as the White House staff enables the president better to exercise the executive power, rules of precedent enable the courts better to exercise the judicial power.

We can more clearly understand how rules of precedent would be a natural exercise of the necessary and proper power, and how the judgments Congress could make in employing that power would resemble those now made by the courts themselves, by examining some of the issues that currently arise with respect to stare decisis. That examination will illustrate how the weight of the considerations underlying norms of precedent varies from context to context, and so

95. That Clause gives Congress power “[t]o make all Laws which shall be necessary and proper for carrying into Execution [its own powers and] the foregoing Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. I, § 8, cl. 18.

96. *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

97. *Id.* at 417. In discussing those statutes Marshall focused on the more specific point that, although conducive to the due administration of justice, they are not absolutely necessary to it: “But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.” *Id.* In similar fashion, courts can and do function without following precedent, but proponents of stare decisis maintain that they function better with it.

98. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, at 96-97 (1997).

99. *See Hanna v. Plumer*, 380 U.S. 460, 472 (1965) (“For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts . . .”).

creates room for the kind of judgment Congress elsewhere exercises when it acts to carry out the powers of the other two branches.¹⁰⁰

The ramified structure of the federal judiciary regularly affects the weight of the considerations underlying *stare decisis*. District courts are generally one-judge tribunals staffed with judges who specialize in applying the law and supervising litigation, not in the resolution of doctrinal tangles. Thus, a district court may be less likely to resolve a difficult legal question correctly than is a collegial body made up of specialists in doctrine, and therefore it may be appropriate that district court decisions have only persuasive authority. On the other hand, the need for stability may override these considerations, or may do so to some extent; one reasonably could favor some rule of *stare decisis* for district court opinions, perhaps a weaker rule than is followed by the Supreme Court of the United States with respect to its own precedents. Depending on how Congress evaluated these considerations, it could keep the current rule or modify it.

In a similar fashion, the complicated structure of the courts of appeals gives rise to many interactions among the basic desiderata and hence to many possible rules of *stare decisis*. Perhaps the most fundamental question is whether the federal appellate courts should be treated as one tribunal or several for purposes of precedent. Currently they are treated as several. While that may reflect simple historical accident, someone asked to provide a justification probably would say that a single three-judge panel should not have the power that comes with setting nationwide precedent. That is a reasonable position, but it is also one from which Congress reasonably could depart, striking a different balance. Treating the courts of appeals as one court would produce nationwide uniformity and enhance predict-

100. A closely related example of congressional action under the horizontal sweeping power that balances competing considerations comes in the Federal Rules of Evidence, which routinely do so. Rule 407, for example, limits the admissibility of remedial measures taken after an accident. *See* FED. R. EVID. 407. While such measures may indeed be indicators of prior negligence, admitting them as evidence would deter defendants from increasing safety. As the Court has explained:

Much of the law of evidence and of discovery is concerned with limitations on a party's right to have access to, and to admit in evidence, material which has probative force. It is obviously a reasonable exercise of power over the rules of procedure and evidence for Congress to determine that only statements of the sort described in [the statutory provision at issue] are sufficiently reliable or important for purposes of impeachment [of a witness] to justify a requirement that the Government turn them over to the defense.

Palermo v. United States, 360 U.S. 343, 354 n.11 (1959) (holding that the sole standard that controls production of a government's witness in a case is 18 U.S.C. § 3500 (1994)).

ability. Whether the costs of concentrated power would be too high is a legitimate subject for debate. Federal Circuit panels currently set nationwide precedent, and Ninth Circuit panels set precedent for a population several times that of the United States when the Constitution was adopted. If a compromise were desirable, Congress could direct the courts of appeals to give one another's decisions strong but not absolute precedential force.

Another familiar complexity involves the *stare decisis* rules for courts that are authorized to sit in panels of varying size. These days, the rules of precedent reflect the assumption that the authority to develop doctrine is vested in the court as a whole, and that smaller groups of judges are agents of the full court. The rule of absolute inter-panel *stare decisis* also may reflect the view that inaction by the full court is equivalent to endorsement of what a panel has done, so that only the full court (or a group large enough to reflect its views more accurately than would a panel) may overrule an earlier decision.

Once again, the current rules are not the only way to arrange matters. Congress could decide that the en banc mechanism is too unwieldy to justify the gains, if there are any, from having more judges consider a point of law. It could eliminate full-court sittings just as it has created them. It could also adjust the interpanel rules, providing that one panel could overrule another if some standard were met, or that panels are bound only by en banc precedent. The latter rule would reverse the current presumption that inaction by the full court constitutes endorsement of the prior rule and replace it with the presumption that the current full court will agree with a current panel unless it indicates otherwise. All of these rules reflect varying resolutions of the trade-offs among stability, accuracy, and efficiency. Any reasonable trade-off would be calculated to enable the courts better to perform their function. For that reason, any rule a court sensibly could adopt, Congress could adopt pursuant to the necessary and proper power.¹⁰¹

One more wrinkle in the current regime illustrates how standard arguments for some rules of precedent are readily transferred to the necessary and proper power. While the Federal Circuit's jurisdiction

101. See *M'Culloch*, 17 U.S. (4 Wheat.) at 421:

But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.

is defined in terms of issues about which that court is designed to be expert, the jurisdiction extends to whole cases. It is thus common, for example, for the Federal Circuit to hear appeals in cases that involve both patent and trademark questions. But while patent law is within the Federal Circuit's expertise as defined by its jurisdiction, trademark law is not. Current Federal Circuit practice is to decide issues outside its special sphere according to the case law of the regional court of appeals in which the district court sits; it thus would apply Sixth Circuit trademark law to a case from the Northern District of Ohio, but it would decide patent questions under its own precedents.¹⁰²

This rule rests on the policy in favor of uniform doctrine within the geographic limits of the regional courts of appeals.¹⁰³ It is a relative of the *Erie* doctrine, which is designed to enhance predictability, in addition to reducing forum shopping. Again, the argument is that the judicial function will be more effectively performed if the Federal Circuit does not make any more law than it has to. Congress could share that conclusion, or it could decide that the gains from having another look at legal issues outweigh the costs in predictability; that judgment may underlie the current division of the courts of appeals into many circuits.

So far I have discussed possible modifications of current judge-made norms of stare decisis. It is also possible to produce examples of rules that the courts have not adopted but that Congress could. Here too, the mode of reasoning is the mode appropriate to the Necessary and Proper Clause, because the argument in favor of a stare decisis norm is that it would enhance the operation of the judicial power. The proposal of the Federal Courts Study Committee mentioned above provides an example.¹⁰⁴ Under that rule, when a conflict has arisen among the circuits, the Supreme Court would transfer a case presenting the issue to a court of appeals that had not yet addressed it, which would decide the case en banc and set precedent for the entire federal system, subject to the Court's review. That rule of prece-

102. See, e.g., *Registration Control Sys. v. Compusystems, Inc.*, 922 F.2d 805, 807 (Fed. Cir. 1990). This practice has produced its own system of epicycles, including, for example, the question whether the Federal Circuit will apply its own law or that of the regional courts of appeals on "mixed" questions of patent and non-patent law. The Federal Circuit, sitting en banc, has recently held that it will follow its own course in determining whether patent law conflicts with non-patent federal law or state law. See *Midwest Indus., Inc. v. Karavan Trailers, Inc.*, 175 F. 3d 1356, 1358-59 (Fed. Cir. 1999) (en banc).

103. See *Midwest Indus.*, 175 F.3d at 1359.

104. See *supra* note 6 and accompanying text.

dent would produce desirable nationwide uniformity while economizing on the Supreme Court's time and attention. Because of the random selection, it would not rest on any debatable judgments concerning the competence of the different circuits.

Congress also could extend and refine the experiment with specialized jurisdiction represented by the Federal Circuit. It could provide that Federal Circuit precedent concerning trademark issues is to be followed in all the other circuits, even in cases not appealable to the Federal Circuit itself. The reasoning would be that the specialized court has general expertise in intellectual property that derives in large part from its patent jurisdiction. That expertise would justify a rule of precedent that would be a half-way house between exclusive Federal Circuit jurisdiction over trademark and the current approach.

It would be more difficult, however, for Congress to justify a rule under which trademark cases from the Sixth Circuit, for example, were to bind the entire federal system. Because there is nothing special about the Sixth Circuit's knowledge of trademark law, it is hard to see how such a rule advances the interest in correct decisions in addition to that of nationwide uniformity. The interest in uniformity by itself would be just as well served by a rule under which the first court of appeals to decide a trademark question would bind the others. As this example suggests, the weaker the rationale for the proposed rule becomes, the more difficult it is to support the rule under the Necessary and Proper Clause.

Congress is probably much more likely to tinker with the role of the Federal Circuit than to enact general rules of horizontal stare decisis, but it has the power to do so. It could abolish stare decisis altogether, believing that the loss of stability is outweighed by the gains in accuracy that come from a fresh look. Or it could set a hurdle for overruling, requiring that the current court follow precedent unless convinced that the precedent is erroneous to some specified degree. Congress thus could determine how strongly the thumb of precedent is to press down on the scale of doctrine.

In deciding whether to follow a prior case, courts often consider factors other than the degree to which they believe the earlier case to have been rightly or wrongly decided. For example, some cases maintain that the earlier rule's administrability is an important consideration.¹⁰⁵ From time to time other factors have been suggested. Probably

105. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985) (rejecting the precedent established by *National League of Cities v. Usery*, 426 U.S. 833 (1976), as

the most provocative recent example is *Casey*, in which the Court maintained that the case for following precedent is stronger when the earlier decision has been the subject of considerable controversy.¹⁰⁶ Congress could eliminate that criterion, judging for example that the gains it promises for public confidence in the judiciary are outweighed by the distorting effect such a rule would have on incentives for political activity. In similar fashion, it could reject the distinction between constitutional and statutory precedents that some cases have endorsed.¹⁰⁷

B. Congressional Power and Judicial Power

As suggested above, familiar reasoning concerning rules of precedent also provides an answer to the central objection to my thesis: that a power over precedent would enable the legislature so to control the courts' decisions as to usurp the judicial power.¹⁰⁸ That objection has two variants, the first of which can be put aside fairly easily. According to this first variant, for Congress to give the courts rules of precedent would be for it to interfere with the judiciary's reasoning process. Deciding the weight that an earlier case deserves is a question only a court can answer.

In a sense that is correct, but not in a sense that represents a genuine difficulty here. True enough, deciding on the weight to be given a prior case is an exercise of the judicial function insofar as that decision reflects the application of a rule. The rule could be, for example, that well-established precedents are stronger than recent ones.

"unsound in principle and unworkable in practice").

106. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 867 (1992) ("So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question." (citation omitted)).

107. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("Stare decisis is not an inexorable command; rather it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.' This is particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'" (citations omitted)).

108. The contemporary case most naturally associated with this difficulty is *Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995), which held that Congress could not reopen damages judgments entered by the federal courts. See *id.* at 240. Understood more broadly, *Plaut* is an instance of the principle that Congress may not exercise the judicial power or interfere with the courts' exercise thereof. Other cases and formulations of the principle also may come to mind. *City of Boerne v. Flores*, 521 U.S. 507 (1997), for example, could seem relevant because it can be taken to stand for the proposition that the courts and not Congress have the last word on the meaning of the Constitution. See *id.* at 536. I will not attempt to canvass all the possible ways of putting the objection, however, because no case is actually on point and all the various formulations have the same central idea: that a power over precedent would give Congress too much control over doctrine.

If that were the rule, to determine whether a case was well-established or recent would be an exercise of the adjudicative function, and for a legislature to purport to make that determination would be very problematic. But there is also a way in which determining the weight to be accorded a precedent is a legislative and not an adjudicative function. Adopting the rule that well-established precedents are entitled to more respect than recent ones is legislative, as would be rejecting that rule and instead deciding that recent precedents should have more force than old and possibly outmoded cases. Of course, to adopt a rule is to produce the results entailed in its applications, but that does not make every legislature a court every time it chooses one norm over another.

More troublesome is the possibility that Congress could shape rules of precedent so as to control doctrine in areas where it may not legislate, especially those governed by the Constitution. Imagine, for example, that in 1952 Congress had decided to maintain sectional tranquility by providing that the dictum in *Plessy* concerning school segregation was not to be questioned.

To say that a power may be misused, however, is by no means to say that it does not exist. All power is subject to misuse, and virtually any government function can be carried out irresponsibly. In order to show that the separation of judicial and legislative power rules out congressional legislation with regard to norms of precedent, it would be necessary to show either that there are no unproblematic examples of such legislation or that congressional power is so fraught with abuse as to be inadmissible. Neither is the case. On the first point, *stare decisis* as we know it consists largely of examples of rules that reflect systemic considerations unrelated to particular doctrinal results. The basic principle itself is substantively neutral as to possible answers because it simply embraces the judicial answer that came first in time. To legislate in the interests of stability is no more an attempt to control the substantive shape of the law than is the judicial practice of following precedent that the judges now believe to have been incorrect.¹⁰⁹ To adopt a rule about whether and how much to follow earlier cases is not to decide on particular outcomes.¹¹⁰

109. Indeed, adherence to precedent is routinely endorsed on the grounds that it enhances judicial neutrality, which is to say decision on the basis of law rather than result. *See, e.g., Payne*, 501 U.S. at 827 (explaining that adherence to precedent promotes evenhanded development of legal principles); *id.* at 848-49 (stating that adherence to precedent is fundamental to the rule of law) (Marshall, J., dissenting).

110. I assume that the difficulty at issue would arise were Congress to seek deliberately to

As to the second point, there is no reason to think that a congressional power over precedent is likely to get out of control. It is no more difficult here than anywhere else to enunciate permissible and impermissible uses of the congressional power at stake, so the possibility of abuse does not imply that the power must be rejected. The systemic considerations of accuracy, economy, and stability on which *stare decisis* currently rests, and the doctrines the courts have developed on the basis of those considerations, demonstrate in principle and in practice that the power can be used in an unproblematic fashion.

Problematic exercises of the power over precedent are those in which the legislature is acting in order to influence results and not for systemic reasons. Policing that principle, while of course sometimes difficult, presents familiar problems which the courts are well-equipped to address. First, legislation concerning *stare decisis* is not the only context that may call for some vigilance to ensure that Congress is seeking to implement the other two powers rather than exercise them itself. On the contrary, that possibility is routinely in the background when Congress legislates to carry the executive or judicial powers into execution. When it establishes the military hierarchy Congress may also seek to influence decisions that are properly left to the commander in chief.¹¹¹ Much closer to the power over *stare decisis* is the power to adopt rules of evidence. Congress could draft them so as to affect case outcomes in ways it is not supposed to.¹¹² There is nothing unique about precedent in this respect.

Next, the Supreme Court's contemporary doctrinal arsenal includes a tool for detecting this kind of land-mine. Under Section 5 of the Fourteenth Amendment, Congress may enforce Section 1, but may not bind the courts with its views as to what Section 1 means.¹¹³ That distinction is clear enough in principle, but telling the two apart

shape judicial doctrine. While a rule of precedent inevitably has some effects on doctrine, causing some cases to come out as they otherwise would not, such effects cannot mean that Congress lacks the power to adopt such a rule. The quorum rule for the Supreme Court, 28 U.S.C. § 1 (1994), also can have that effect.

111. An example of a statute that likely crossed the line from implementation to interference was a provision in the Army appropriation act for 1868 providing that all orders from the president or secretary of war to the armed forces were to be given through the General of the Army, then U.S. Grant. See Act of March 2, 1867, ch. clxx, § 2, 14 Stat. 485, 486-87.

112. See William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291, 295 n.13 (1996) (explaining that Congress may adopt rules of evidence subject to separation of powers limitations and citing *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872)).

113. See *City of Boerne*, 521 U.S. at 519.

can be tricky. That is especially so because Congress has the power, says the Court, to adopt prophylactic rules that forbid both actual violations of Section 1 and otherwise innocent state action that may be difficult to distinguish from actual violations.¹¹⁴ In response to this problem, the Court has enunciated a special form of the *M'Culloch* means-end analysis, one in which it carefully examines the proportionality between the problem Congress is ostensibly solving by adopting a supposed prophylactic rule and the proposed solution.¹¹⁵ *City of Boerne* thus provides a doctrinal model for examination of rules of precedent. Such rules must be proportioned to the doctrine-neutral, systemic considerations on which they may legitimately rest, and not to the impermissible purpose of affecting results.

Finally, the courts' close acquaintance with stare decisis should reinforce their ability to separate the truly systemic from the ad hoc. Judges appear to have no difficulty in concluding that a supposed rule of stare decisis has been trumped up for the occasion in order to produce a result and not for the reasons normally associated with rules of precedent. "The Court's reliance upon *stare decisis* can best be described as contrived," Justice Scalia wrote in *Casey*,¹¹⁶ and in case anyone somehow missed the point he went on to charge that the principle the majority was standing by "is not a principle of law . . . but a principle of *Realpolitick*."¹¹⁷ The more a congressional rule of precedent appears to be designed for this day and train only, the more likely the courts will be to regard it as an impermissible intrusion on their authority. Certainly a statute that dealt with a particular subject matter would be very carefully examined in order to determine whether it rested on an impermissible purpose. The courts should be quite capable of protecting themselves from congressional incursion.

In short, under the Necessary and Proper Clause, Congress may consult the criteria the courts consult in formulating rules of precedent and may adopt any rule a court reasonably could adopt. It

114. *See id.* at 518.

115. Under *City of Boerne*, prophylactic rules adopted by Congress pursuant to Section 5 must be congruent with, and proportional to, the aim of implementing Section 1. That inquiry is designed to ensure that Congress is genuinely enforcing, and not rewriting, the substantive provisions. The *City of Boerne* test appears to be more stringent than the ordinary rules regarding means-end fit under *M'Culloch* and its successors. The Court thus seems to be especially vigilant in guarding its own institutional role against congressional incursions and no doubt would bring that vigilance to the examination of legislative rules of stare decisis.

116. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 933 (1992) (Scalia, J., dissenting).

117. *Id.* at 998 (Scalia, J., dissenting).

should not surprise us that the genuine legislative power, vested in Congress and Congress alone by Article I, is at least as broad as the demi-legislative power possessed by the judges.¹¹⁸ If there are indeed rules of stare decisis, then it is natural that they be under the control of the primary rulemaking body.

118. The body of the Constitution begins, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." U.S. CONST. art. I, § 1.