ESSAY

STARE DECISIS AND THE CONSTITUTION: AN ESSAY ON CONSTITUTIONAL METHODOLOGY

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In this Essay, Professor Richard Fallon explains and defends the constitutional status of stare decisis. In part, Professor Fallon responds to a recent article by Professor Michael Stokes Paulsen, who argues that Supreme Court adherence to precedent is a mere "policy," not of constitutional stature, that Congress could abolish by statute. In particular, Paulsen argues that Congress could enact legislation denying precedental effect to Supreme Court decisions establishing abortion rights. In reply, Professor Fallon contends that Paulsen's argument depends on contradictory premises. If stare decisis lacked constitutional stature, then under Paulsen's methodological assumptions it also would be indefensible as a "policy," because a mere policy could not legitimately displace results that the Constitution otherwise would require. In defending the constitutional status of stare decisis, Professor Fallon develops arguments based on the text, structure, and history of the Constitution. But he emphasizes that the "legitimacy" of stare decisis is supported, partly independently, by its entrenched status and by the contribution that it makes to the justice and workability of the constitutional regime. More generally, Professor Fallon argues that constitutional legitimacy rests upon the relatively contestable bases of widespread acceptance and reasonable justice, and not upon "consent" to be governed by the written Constitution.

INTRODUCTION

The doctrine of stare decisis presents a puzzle in constitutional cases. If a court believes a prior decision to be correct, it can reaffirm that decision on the merits without reference to stare decisis. The force of the doctrine thus lies in its propensity to perpetuate what was initially judicial error or to block reconsideration of what was at least arguably judicial error.[1] This, obviously, can be an effect of great con-

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[1] See Michael Stokes Paulsen, Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of *Roe* and *Casey*?, 109 Yale L.J. 1535, 1538 n.8 (2000) ("The essence of the doctrine . . . is adherence to earlier decisions, in subsequent cases . . . even though the court in the subsequent case otherwise would be prepared to say, based on other interpretive criteria, that the precedent decision's interpretation of law is *wrong*."); see also Larry Alexander, Constrained by Precedent, 63 S. Cal. L. Rev. 1, 4 (1989) (focusing only on "constraint by incorrectly decided precedents" (emphasis omitted)); Frederick

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sequence. For example, the Supreme Court has suggested that its reaffirmations of such landmark decisions as *Roe v. Wade*[2] and *Miranda v. Arizona*[3] rested on stare decisis, not an endorsement of the original holdings' correctness.[4] Nonetheless, the Court repeatedly has used the term "policy" to describe stare decisis,[5] thereby raising a question about the doctrine's precise constitutional status. This question in turn gives rise to another: If stare decisis were a mere policy, not constitutionally mandated or at least constitutionally authorized as a constitutive element of constitutional adjudication, then by what right could the Court follow the dictates of that policy in contravention of what the Constitution (as correctly interpreted) requires?

A recent article by Michael Stokes Paulsen invites fresh attention to these issues.[6] Seizing on the Court's pronouncements that stare decisis is a mere judicial "policy," Professor Paulsen provocatively argues that, under the Necessary and Proper Clause,[7] Congress possesses the authority to repeal the doctrine through legislation.[8] If the Constitution neither commands a rule of stare decisis nor uniquely authorizes the federal judiciary to establish such a rule, Paulsen writes, there is no constitutional impediment to congressional legislation displacing or modifying stare decisis. Going one step further, Paulsen acknowledges that a motivation for his argument is to over-

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Schauer, Precedent, 39 Stan. L. Rev. 571, 575 (1987) ("If we are truly arguing from precedent, then the fact that something was decided before gives it present value despite our current belief that the previous decision was erroneous.").

The doctrine takes its name from the Latin maxim "*stare decisis et non quieta movere*—stand by the thing decided and do not disturb the calm." James C. Rehnquist, The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution, and the Supreme Court, 66 B.U. L. Rev. 345, 347 (1986).

2 410 U.S. 113 (1973).

3 384 U.S. 436 (1966).

4 See Dickerson v. United States, 120 S. Ct. 2326, 2335-36 (2000) (upholding *Miranda* on basis of stare decisis); Planned Parenthood v. Casey, 505 U.S. 833, 861 (1992) (affirming that *Roe* should be upheld on basis of stare decisis, "with whatever degree of personal reluctance any of us may have" for this result).

5 See, e.g., Agostini v. Felton, 521 U.S. 203, 235-36 (1997) ("As we have often noted, '[*s*]*tare decisis* is not an inexorable command,' but instead reflects a policy judgment that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.'" (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991), and Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting))); Seminole Tribe v. Florida, 517 U.S. 44, 63 (1996) (recognizing that "we always have treated *stare decisis* as a 'principle of policy'" (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940))).

6 Paulsen, supra note 1.

7 U.S. Const. art. I, § 8, cl. 18 ("The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

8 Paulsen, supra note 1, at 1540-41.

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turn constitutional cases upholding abortion rights,[9] and he suggests that it might be constitutionally permissible for Congress to eliminate stare decisis in abortion cases alone.[10]

Beginning with a critical analysis of Paulsen's argument, I hope in this Essay to shed more general light on constitutional stare decisis.[11] Stare decisis, I shall argue, is a doctrine of constitutional magnitude, but one that is rooted as much in unwritten norms of constitutional practice as in the written Constitution itself. More generally still, I shall argue that the contestable foundations of stare decisis—involving unwritten norms that are validated by a mixture of acceptance and reasonable justice, not the active consent of the governed—provide a fascinating window through which to examine the similarly contestable foundations of the rest of constitutional law.

As I begin my argument, I should be clear about the limits of constitutional stare decisis as I understand it: "[S]tare decisis is not an inexorable command[;]" it requires only that "a departure from precedent . . . be supported by some special justification."[12] I also acknowledge that the Supreme Court not infrequently overrules its own precedents[13] and that Justices who disagree with the Court's ruling in

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[9] Id. at 1539.

[10] Id. at 1596-97.

[11] The appropriate role of stare decisis in *statutory* cases raises different questions, since the Supreme Court's statutory rulings are subject to override by Congress. See, e.g., Neal v. United States, 516 U.S. 284, 295 (1996) ("One reason that we give great weight to *stare decisis* in the area of statutory construction is that 'Congress is free to change this Court's interpretation of its legislation.'" (quoting Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 (1977))); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (stating:

> Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true even where the error is a matter of serious concern, *provided correction can be had by legislation.*

(emphasis added) (citation omitted)); Thomas R. Lee, Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court, 52 Vand. L. Rev. 647, 703-04 (1999) ("Amidst all the contradictions and retractions in the modern Court's doctrine of precedent, one point has achieved an unusual degree of consensus: that stare decisis 'has great weight . . . in the area of statutory construction' but 'is at its weakest' in constitutional cases." (omission in original) (footnote omitted)). In this Essay, I put statutory cases entirely to one side and focus exclusively on constitutional cases.

[12] Dickerson v. United States, 120 S. Ct. 2326, 2336 (2000) (internal quotation marks omitted); see also Henry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723, 757 (1988) ("[P]recedent binds absent a showing of substantial countervailing considerations.").

[13] See, e.g., Agostini v. Felton, 521 U.S. 203, 235-36 (1997) (overruling Aguilar v. Felton, 473 U.S. 402 (1985)); Seminole Tribe v. Florida, 517 U.S. 44, 72 (1996) (overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)).

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one case often will persist in their dissents through subsequent cases.[14] Against this background, among the greatest effects of stare decisis is to justify the Court in treating some questions as settled, at least for the time being. The doctrine liberates the Justices from what otherwise would be a constitutional obligation to reconsider every potentially disputable issue as if it were being raised for the first time[15]—even if, were they to do so, some of the Justices might conclude that the prior resolution reflected error. In determinations about *when* to apply stare decisis, I assume that practical costs and benefits are large, authorized considerations.[16] The doctrine gives the Justices a warrant (of some weight) to affirm initially erroneous decisions that would be costly to overrule. It is not my purpose, however, to specify the precise influence that stare decisis ought to exercise in particular types of constitutional cases.[17]

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14 Well-known examples include the persistent refusals of some Justices to accept *Roe v. Wade*'s recognition of a "fundamental" right to abortion, see, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 950-53 (1992) (Rehnquist, C.J., concurring in part and dissenting in part), and the often reiterated insistence of Justices Brennan and Marshall that the death penalty is per se unconstitutional, see, e.g., Sorola v. Texas, 493 U.S. 1005, 1011 (1989) (Brennan, J., joined by Marshall, J., dissenting from denial of certiorari). For more on this practice, see Richard H. Fallon, Jr., The Supreme Court, 1996 Term—Foreword: Implementing the Constitution, 111 Harv. L. Rev. 54, 110-11 & 111 n.324 (1997) (discussing Justices' refusals to accept precedent as controlling); Maurice Kelman, The Forked Path of Dissent, 1985 Sup. Ct. Rev. 227, 248-58 (discussing refusal to acquiesce as option for Justices initially in dissent).

15 See Fallon, supra note 14, at 111-13 ("Some questions, once having been resolved, are subsequently assumed to be off the table, even though they were sharply contested in the past and could conceivably become controverted again."); Monaghan, supra note 12, at 744 ("Many constitutional issues are so far settled that they are simply off the agenda."); cf. Benjamin N. Cardozo, The Nature of the Judicial Process 149 (1921) ("[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him.").

16 See *Casey*, 505 U.S. at 854 (stating:

> [W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.).

17 Within the general category of constitutional cases, it is sometimes suggested that "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved." Payne v. Tennessee, 501 U.S. 808, 828 (1991). But this view has attracted dissents. See, e.g., id. at 851-52 (Marshall, J., dissenting) (worrying that "limiting full protection of the doctrine of *stare decisis* to 'cases involving property and contract rights'. . . sends a clear signal that essentially *all* decisions implementing the personal liberties protected by the Bill of Rights and the Fourteenth Amendment are open to reexamination"). For a historical perspective, see Lee, supra note 11, at 687-703. Drawing a different line, a bare majority of the Court stated in *Casey* that stare decisis carries special force when a precedent resolved an "intensely divisive controversy," such as that involved in Roe v. Wade, 410 U.S. 113 (1973). *Casey*, 505 U.S. at 866.

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I
PROFESSOR PAULSEN'S PREMISES

Professor Paulsen's argument that Congress could repeal stare decisis rests on two premises. The first, more implicit than explicit, is that questions of constitutional meaning must be resolved by reference to the plain language of the written Constitution, as glossed by the original understanding of those who wrote and ratified it and by inferences from constitutional structure.[18] In order for a principle or policy to achieve constitutional status under this premise, it must be traceable to the written Constitution by one of these interpretive strategies. The second, explicitly stated premise is that stare decisis is only a constitutional "policy" and is not, in Paulsen's terms, a rule of constitutional "dimension"[19] or "stature."[20] In support of the second premise, Paulsen relies heavily on quotations from Supreme Court decisions.[21] But he also suggests that the first premise buttresses the

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By contrast, the dissenting Justices in *Casey* rejected this "truly novel principle" as unsupported and untenable. Id. at 958 (Rehnquist, C.J., dissenting).

Apart from the question whether stare decisis should carry different weight in different kinds of cases, it is clear that some Justices attach greater significance to stare decisis than do others. See Michael J. Gerhardt, The Role of Precedent in Constitutional Decisionmaking and Theory, 60 Geo. Wash. L. Rev. 68, 76 (1991) (discussing "apparent lack of consistency in the Justices' standards or reasons for overruling precedents" and invoking stare decisis).

[18] See Paulsen, supra note 1, at 1570-82; see also id. at 1550 ("Nothing in the text, history or structure of the Constitution . . . supports the conclusion that the Constitution itself prescribes a judicial policy of stare decisis . . . ."). Paulsen occasionally refers to other possible sources of constitutional authority, including "judicial precedent," id. at 1550, 1570, or "customary practice," id. at 1550. But these references are undermined by the thesis on which he relies to establish that stare decisis is a "policy" rather than a doctrine of constitutional status. According to Paulsen, precedent properly performs an "'information' function (providing prior and potentially persuasive thinking to a present interpreter)." Id. at 1544. But his thesis necessarily denies that precedent is in any stronger way constitutive of what the Constitution currently means or how it currently should be interpreted or applied—a point borne out in his citation to previous writing of his own that is more explicit about this matter. See id. at 1548-49 & 1548 n.38 (citing Michael Stokes Paulsen, Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Proposals from the Twenty-Third Century, 59 Alb. L. Rev. 671, 680-81 (1995)). Paulsen describes the cited pages of the previous article as

> arguing that under the reasoning of *Marbury* and *The Federalist No. 78*, "the Constitution must always be given preference over the faithless acts of mere government agents contrary to the Constitution. If this proposition is true, it follows that no court should ever deliberately adhere to what it is fully persuaded are the erroneous constitutional decisions of the past. To do so is to act in deliberate violation of the Constitution."

Id. at 1549 n.38 (quoting Paulsen, supra).

[19] Id. at 1550.

[20] Id. at 1550, 1583; see also id. at 1543-51 (developing supporting arguments).

[21] Two quotations receive special prominence. See id. at 1547-49. The first is from Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992):

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second: Because stare decisis cannot (he believes) be defended as a constitutional rule by reference to the Constitution's language, history, and structure, it is not a principle of constitutional status.[22] From these premises, Paulsen draws his conclusion: The judgment whether stare decisis should be observed is a *discretionary* one, subject to congressional control under the Necessary and Proper Clause.

As will soon become clear, I believe that Professor Paulsen's second premise (that stare decisis lacks constitutional stature) is mistaken and that the first (involving constitutional methodology), although not flatly wrong, is likely to prove misleading. But I begin with a narrower point: Far from supporting one another, Paulsen's two premises stand in a relation of considerable tension. If the Constitution neither mandates a principle of stare decisis nor authorizes the Supreme Court to apply one (as his second premise insists), Paulsen's framework includes no plausible basis on which stare decisis legitimately could displace the result that the Constitution (interpreted in light of the sources specified by his first premise) otherwise would require.[23] To put the point slightly more sharply, Paulsen assumes that stare decisis is a constitutionally permissible judicial policy, even though it sometimes produces results contrary to those that the Constitution

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> "Even when the decision to overrule a prior case is not, as in the rare, latter instance, virtually foreordained, it is common wisdom that the rule of *stare decisis* is not an 'inexorable command,' and certainly it is not such in every constitutional case, see Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405-11 (1932) (Brandeis, J., dissenting). See also Payne v. Tennessee, 501 U.S. 808, 842 (1991) (Souter, J., joined by Kennedy, J., concurring); Arizona v. Rumsey, 467 U.S. 203, 212 (1984). Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."

Paulsen, supra note 1, at 1547.

The second quotation Paulsen sets out is from Agostini v. Felton, 521 U.S. 203, 235 (1997):

> "As we have often noted, '*[s]tare decisis* is not an inexorable command,' Payne v. Tennessee, 501 U.S. 808, 828 (1991), but instead reflects a policy judgment that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right,' Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). That policy is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions."

Paulsen, supra note 1, at 1547.

22 See Paulsen, supra note 1, at 1570-82.

23 Paulsen appears to be aware of the anomaly and hints that the Constitution indeed may forbid the Court to decide constitutional cases based on the authority of past decisions that were erroneous on the merits. See id. at 1548 n.38. For an explicit argument to this effect, see generally Gary Lawson, The Constitutional Case Against Precedent, 17 Harv. J.L. & Pub. Pol'y 23 (1994).

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otherwise dictates. Yet this position—which reflects the conjunction of his two premises—is virtually self-refuting and should engender suspicion from the outset. If the Constitution does not authorize the Supreme Court to apply a rule of stare decisis in constitutional cases, then reliance on stare decisis to supersede the Constitution's meaning would contravene the Constitution itself.

In response to this argument, Paulsen might object that stare decisis could be a constitutionally "authorized" policy without being constitutionally mandated. If so, it might be legitimate both for the Supreme Court to apply a rule of stare decisis and for Congress to repeal that rule. I shall say more about this possibility below.[24] For now, suffice it to note the peculiarity of a suggestion that the Constitution might authorize the Supreme Court to enforce its own precedents in the face of otherwise applicable constitutional mandates, but make it a policy question—to be resolved either by the Court or by Congress—whether the Court ought to do so. To see the suggestion's oddity, imagine that Congress were to pass a statute purporting to make the rule of stare decisis absolute: Once a decision is rendered, the Court must abide by it in perpetuity, even if its error becomes manifest. It is hard to believe that a statute mandating this "policy" would pass constitutional muster; a directive specifying the weight to be accorded to a particular source of constitutional authority would threaten the core judicial power "to say what the law is."[25] If so, however, a statute requiring the Court to give less (or no) weight to stare decisis should be equally suspect; it would intrude just as much on the Court's capacity to identify and pronounce the controlling constitutional law.[26] Indeed, within Paulsen's preferred analytical framework, such a statute would have virtually the same practical effect as a statute directing the Court to accord greater significance in constitutional

[24] See infra Part IV.

[25] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[26] Paulsen anticipates this objection and argues, unpersuasively in my view, that Congress's power to eliminate the force of stare decisis need not imply a power to enhance its authority. See Paulsen, supra note 1, at 1594-96. According to Paulsen, a rule mandating adherence to stare decisis would "limit[ ] the freedom of judges to decide cases on their merits," in contravention of Article III, whereas the abrogation of stare decisis would "*confine* judges to deciding cases *on the merits*, without regard to extrinsic policy considerations." Id. at 1596. The fallacy of this argument lies in its unsupported assumption that stare decisis is simply irrelevant to the constitutional "merits." As I have suggested already and shall argue more fully below, if stare decisis were wholly irrelevant to the constitutional merits, its invocation to support a result contrary to that commanded by the Constitution would be itself unconstitutional. But if stare decisis is relevant to the constitutional merits, even if not necessarily dispositive in every case, then congressional efforts to mandate either greater or lesser authority for constitutional stare decisis stand on the same footing and involve similar if not identical constitutional considerations.

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adjudication to the "original understanding" of constitutional language—surely an overstepping of the bounds that separate judicial from legislative power.[27]

II
DEFENDING THE CONSTITUTIONAL STATUS OF STARE DECISIS

If, despite Professor Paulsen's disclaimers, stare decisis is ultimately unsupportable unless constitutionally mandated or authorized as a constituent element of constitutional adjudication, I believe that the appropriate response, as indicated by prevailing norms of constitutional practice and supported by theories of law and "legitimacy" that I shall discuss below,[28] is to look warily at the claim that stare decisis is a mere "policy" that lacks properly constitutional status. In developing my argument that stare decisis is constitutionally defensible, even when perpetuating what otherwise would be constitutional error, I should be clear that my dispute is not with the position that Paulsen formally adopts in "Abrogating Stare Decisis by Statute."[29] My quarrel, rather, is with what I take to be his premises' logical implication that the "policy" of stare decisis is not constitutionally supportable at all.[30] Indeed, to a considerable extent my argument in this Part and the one that follows is independent of Paulsen's altogether. My immediate aim is to explore the foundations of stare decisis in American constitutional law and, in particular, to defend stare decisis against the actual or possible objection that it is a constitutionally indefensible practice because it is inconsistent with the Constitution's text, structure, and original understanding.

Stated in simple form, my argument is both obvious and familiar: Article III's grant of "the judicial Power" authorizes the Supreme Court to elaborate and rely on a principle of stare decisis and, more generally, to treat precedent as a constituent element of constitutional adjudication.[31] That constitutional authorization is itself part of "the

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[27] Proposals to reduce or eliminate the force of constitutional stare decisis need not necessarily identify constitutional "meaning" with the original understanding. For example, it would be possible to equate constitutional meaning with the best "moral reading" of constitutional language. See Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 2-38 (1996) (describing "moral reading" approach to constitutional interpretation).

[28] See infra Parts II.A, II.B (discussing constitutional practice); Part III (discussing legitimacy).

[29] Paulsen, supra note 1.

[30] See supra Part I.

[31] See, e.g., Anastasoff v. United States, 223 F.3d 898, 899-900 (8th Cir.) (holding that Article III incorporates doctrine of precedent and that judicially established rule barring

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supreme Law of the Land"[32] and adequately justifies the Justices in sometimes failing to enforce what otherwise would be the best interpretation of particular constitutional provisions.

Crucially, two kinds of arguments converge to support this conclusion. One set of arguments appeals to the text, original understanding, and structure of the written Constitution.[33] By contrast, another set of arguments treats the entrenched status of stare decisis and the policy arguments that support it as additional, constitutionally relevant considerations tending to establish the doctrine's constitutional validity.[34]

A. Text, History, and Structure

It is possible to defend the position that the Constitution authorizes judicial reliance on stare decisis by reference to the types of legal authorities that Professor Paulsen believes uniquely relevant, including the Constitution's text, evidence concerning its original understanding, and its structure. Especially in marshalling evidence concerning the original understanding, however, I think it important to acknowledge that my approach—like Paulsen's—is inherently discriminating. Recent historical work has shown that many, if not most, members of the founding generation anticipated a far narrower judicial role than we now take for granted in resolving reasonably disputable constitutional issues.[35] Insofar as we treat evidence of historical

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citation of unpublished opinions is therefore unconstitutional), vacated as moot on reh'g en banc, 235 F.3d 1054 (8th Cir. 2000); Michael C. Dorf, Dicta and Article III, 142 U. Pa. L. Rev. 1997, 1997 (1994) ("[T]he precept that like cases should be treated alike . . . [is] rooted both in the rule of law and in Article III's invocation of the 'judicial Power' . . . ."); Monaghan, supra note 12, at 754 (acknowledging availability of such argument).

[32] U.S. Const. art. VI, § 2.

[33] These arguments come within the category that Akhil Amar recently has labeled "documentarian." Akhil Reed Amar, The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine, 114 Harv. L. Rev. 26, 26 (2000) (describing "documentarians" as those whose approach to constitutional interpretation emphasizes "the amended Constitution's specific words and word patterns, the historical experiences that birthed and rebirthed the text, and the conceptual schemas and structures organizing the document").

[34] These arguments more nearly approximate Professor Amar's "doctrinalist" category. See id. at 27 (identifying "doctrinalist" mode of constitutional interpretation that "strive[s] to synthesize what the Supreme Court has done, sometimes rather loosely, in the name of the Constitution").

[35] See, e.g., Sylvia Snowiss, Judicial Review and the Law of the Constitution 13-44 (1990) (arguing that during early, formative years of American constitutional history, it was widely believed that judicial nullification of statutes should occur only in cases of plain unconstitutionality); Larry D. Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215, 240 (2000) (describing concept of judicial review as constrained to situations "where the legislature unambiguously violated an established principle of fundamental law"); Gordon S. Wood, The Origin of Judicial Review Revisited, or How the Marshall Court Made More out of Less, 56 Wash. & Lee L. Rev.

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understandings as relevant to the judicial resolution of particular substantive questions, and especially to questions of appropriate judicial methodology, we draw on historical understandings, often selectively, for current purposes. As I shall explain below, the "legitimacy" of constitutional practice is not in any way compromised by our failure to follow the commands or even necessarily the expectations of the founding generation on a consistent basis.[36] Nor is selective reference to original understandings a necessary mark of hypocrisy. Constitutional law can, and does, have multiple sources.[37]

Within a framework in which contemporary interpretive norms furnish the standards of relevance and persuasiveness, familiar sources can be adduced to suggest that "the judicial Power" was understood historically to include a power to create precedents of some degree of binding force.[38] Alexander Hamilton specifically referred to rules of precedent and their intrinsic relation to the judicial power in *The Federalist* No. 78: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents . . . ."[39] Historians record that the doctrine of precedent either was established or becoming established in state courts by the time of the Constitutional Convention.[40]

787, 798-99 (1999) (asserting that "for many Americans in the 1790s . . . [judicial review] remained an extraordinary and solemn political action . . . to be invoked only on the rare occasions of flagrant and unequivocal violations of the Constitution" and was "not to be exercised in doubtful cases of unconstitutionality and was not yet accepted as an aspect of ordinary judicial activity").

36 See infra Part III.B.

37 See Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189, 1194-1209 (1987) (discussing relevance to constitutional adjudication of constitutional language, original understanding, constitutional structure or theory, precedent, and value arguments).

38 The Eighth Circuit recently developed such an argument in Anastasoff v. United States, 223 F.3d 898, 900-04 (8th Cir.) (invalidating rule barring citation to unpublished precedents), vacated as moot on reh'g en banc, 235 F.3d 1054 (8th Cir. 2000). For further discussion of *Anastasoff*, see infra note 115.

39 The Federalist No. 78, at 399 (Alexander Hamilton) (Bantam Books 1982). Paulsen so recognizes. See Paulsen, supra note 1, at 1571-72 (citing The Federalist No. 78).

40 See, e.g., Morton J. Horwitz, The Transformation of American Law, 1780-1860, at 8-9 (1977) (reporting that colonial courts employed "a strict conception of precedent" and "believed that English authority settled virtually all questions for which there was no legislative rule"); see also 1 William Blackstone, Commentaries *69 ("[I]t is an established rule to abide by former precedents . . . .").

Interestingly, "[l]egal historians generally agree that the doctrine of stare decisis [was] of relatively recent origin" at the time of the founding and had begun to emerge only during the eighteenth century. Lee, supra note 11, at 659; see also id. at 659-61 (discussing historical development of stare decisis). The earlier view—rooted in the so-called "declaratory theory" of law—was that "prior decisions were not law in and of themselves but were merely evidence of it." Id. at 660.

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Although stare decisis was initially a common law doctrine, its extension into constitutional law finds support in early constitutional history. As Paulsen recognizes, "[t]he idea that '[t]he judicial Power' establishes precedents as binding law, obligatory in future cases," traces at least to the early nineteenth century, "perhaps presaged by certain Marshall Court opinions."[41] Indeed, a recent study concludes that "the notion of a diminished standard of deference to constitutional precedent [as distinguished from common law precedents] was generally rejected by founding-era commentators."[42] Consistent with this view, Justice Story's influential Commentaries on the Constitution—also cited by Paulsen[43]—maintains that the "conclusive effect of judicial adjudications[ ] was in the full view of the framers of the constitution."[44]

As both historical practice and evidence from the founding era suggest, the location in the judicial branch of a power to invest precedents with binding authority also accords with the structure of the Constitution. Under the Constitution, the judiciary, like the executive branch, has certain core powers not subject to congressional regula-

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41 Paulsen, supra note 1, at 1578 n.115.

42 Lee, supra note 11, at 718. According to Professor Lee, James Madison relied largely on judicial precedent to explain why he had come to accept the constitutionality of the Bank of the United States—and indeed as President signed a bill establishing a second such bank—despite opposing the Bank's initial chartering on constitutional grounds. See id. at 664-65, 709-12. In the historical context, it seems doubtful how much weight Madison would have placed on judicial precedent alone. His more general view appears to have been that the meaning of vague constitutional language both could and should be fixed by the construction put on it by the American people, acting through relevant political institutions, including Congress as well as the courts. See Drew R. McCoy, The Last of the Fathers: James Madison and the Republican Legacy 79-81 (1989) (arguing that Madison believed that constitutional precedents set by Congress should be binding); H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885, 940 (1985) (describing Madison's conviction that, though the "words of the Constitution did not authorize" a national bank, "Congress, the President, the Supreme Court, and (most important, by failing to use their amending power) the American people had for two decades accepted the existence and made use of the" institution, thereby demonstrating persuasive "widespread acceptance"). At the very least, however, Madison believed that established practices—possibly including judicial practices—are relevant in determining how the Constitution should be interpreted. See Powell, supra, at 939 ("[Madison] consistently thought that '*usus*,' the exposition of the Constitution provided by actual government practice and judicial precedents, could 'settle its meaning . . . .'" (footnotes omitted)).

43 See Paulsen, supra note 1, at 1578.

44 Joseph Story, Commentaries on the Constitution of the United States § 378 (Fred B. Rothman & Co. 1991) (1833). Admittedly, Story—who wrote at a time of shifting and sometimes conflicting intellectual currents—was an ardent nationalist whose views on important issues of constitutional methodology diverged sharply from those of leading Jeffersonians and their successors. See Powell, supra note 42, at 942, 946. At the very least, however, his view was prominent and well reasoned and was destined to prove influential.

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tion under the Necessary and Proper Clause.[45] For example, it is settled that the judicial power to resolve cases encompasses a power to invest judgments with "finality;"[46] congressional legislation purporting to reopen final judgments therefore violates Article III.[47] And there can be little doubt that the Constitution makes Supreme Court precedents binding on lower courts.[48] If higher court precedents bind lower courts, there is no structural anomaly in the view that judicial precedents also enjoy limited constitutional authority in the courts that rendered them.

Beyond attempting to parry arguments such as these, a critic of stare decisis might emphasize—as Professor Paulsen has—that the Supreme Court has characterized stare decisis as a mere "policy."[49] In my view, however, it would be a mistake to ascribe too much significance to that language. Undeniably, the Court has said repeatedly that stare decisis is "'not an inexorable command.'"[50] But this need imply no more than that stare decisis, like many principles of constitutional stature, is capable of being overridden.[51] That a principle is not

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45 See, e.g., Plaut v. Spendthrift Farm, 514 U.S. 211, 218-19 (1995) (recognizing congressional interference with finality of judicial judgments as abridging core judicial power). See generally Gary Lawson & Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L.J. 267 (1993) (affirming that Necessary and Proper Clause does not license Congress to infringe on core powers and responsibilities of other branches).

46 See generally Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 99-123 (4th ed. 1996) (discussing, inter alia, "the requirement of finality" for case to be justiciable in Article III court). The "finality" doctrine traces to Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792), in which a reporter's footnote listed circuit court opinions holding that the constitutional separation of powers requires that the decisions of Article III courts be final and not subject to executive revision. See id. at 410 n.3.

47 See *Plaut*, 514 U.S. at 218-19.

48 See, e.g., Agostini v. Felton, 521 U.S. 203, 237 (1997) ("We reaffirm that '[i]f a precedent of this Court has direct application in a case . . . the Court of Appeals should follow the case which directly controls . . . .'" (alteration in original) (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989))); Hutto v. Davis, 454 U.S. 370, 374-75 (1982) (per curiam) (stating that "unless we wish anarchy to prevail" in federal court system created by Constitution, "a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be"). But see Michael Stokes Paulsen, Accusing Justice: Some Variations on the Themes of Robert M. Cover's *Justice Accused*, 7 J.L. & Religion 33, 77-78 (1989) (arguing that lower court judges are not literally bound to enforce higher court precedent that they regard as fundamentally wrong, but may instead recuse themselves).

49 See Paulsen, supra note 1, at 1543-51.

50 *Agostini*, 521 U.S. at 235 (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991)); accord Seminole Tribe v. Florida, 517 U.S. 44, 63 (1996) (same).

51 Constitutional principles are frequently subject to "balancing," and even the most robust can often be overcome in the face of a "compelling" governmental interest. See, e.g., Fallon, supra note 14, at 68-69, 77-83, 88-90 (discussing instances in which Supreme

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absolute, or that a principle reflects judgments that include concerns of policy, does not entail that it lacks constitutional authorization.

B. *The Pertinence of Entrenched Status*

Although I have thus far pointed to many of the same kinds of authorities in making my argument that Professor Paulsen cites in advancing his, I believe it also matters enormously that stare decisis is a principle with deep roots in historical and contemporary practice.[52] Within the American legal system, arguments that deeply entrenched practices violate the Constitution seldom succeed. When practices have become "thoroughly embedded in our national life"[53] or "part of our national culture,"[54] courts tend to feel that it would be both hubristic and inappropriately disruptive for the judicial branch, as constituted at a particular time, to mandate their dismantling.[55]

In this institutional context, the relative entrenchment of stare decisis in constitutional practice counts as an argument supporting its constitutionally authorized status and, by entailment, the legitimacy of judicial decisions that could not be justified in the absence of stare decisis.[56] The Supreme Court invokes stare decisis with great regularity. Indeed, I am aware of no Justice, up through and including those currently sitting, who persistently has questioned the legitimacy of

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Court has considered strength of governmental interest when applying various kinds of balancing tests to constitutional issues).

[52] On the historical roots of stare decisis, see generally Lee, supra note 11.

[53] Robert H. Bork, The Tempting of America: The Political Seduction of the Law 158 (1990).

[54] Dickerson v. United States, 120 S. Ct. 2326, 2336 (2000).

[55] See, e.g., Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (endorsing Justice Frankfurter's assertion that "'a systematic, unbroken, executive practice, long pursued . . . and never before questioned . . . may be treated as a gloss on [the Constitutional grant of] "Executive Power"'"(second omission in original) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring))); Washington v. Davis, 426 U.S. 229, 248 (1976) (rejecting proposed rule that "would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes"); Bork, supra note 53, at 156-58 (arguing that it is "entirely proper" for court to conclude that certain practices or outcomes are "so accepted by the society, so fundamental to the private and public expectations of individuals and institutions" that they should not be overturned by judicial decree).

[56] Interestingly, Professor Paulsen—despite his more characteristic emphasis on the Constitution's plain language, its original understanding, and its structure—says explicitly at one point that those who would uproot entrenched practices bear an "extremely heavy burden of persuasion." Paulsen, supra note 1, at 1583. Paulsen deploys this argument to support his view that Congress could eliminate stare decisis by statute. According to him, arguments purporting to deny Congress this power are incompatible with a number of accepted practices, including congressional specification of judicial rules of decision and congressional abrogation of "prudential" standing requirements. See id. at 1582-90. For discussion of why these admittedly accepted practices do not support Paulsen's thesis concerning stare decisis, see infra notes 99-101 and accompanying text.

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stare decisis or failed to apply it.[57] Occasionally a Justice will protest that to accord too much weight to the doctrine would be incompatible with the judicial oath.[58] But these protests are best understood as involving the appropriate strength of stare decisis, not whether the doctrine should exist at all.[59]

If entrenched status somehow supports the constitutional status of stare decisis, there is an obvious question of how this consideration fits with such other relevant factors as text, original history, and constitutional structure. Responding in highly general terms, I would say this: Where a practice reasonably can be viewed as consistent with the Constitution's language—as glossed by accepted interpretive practices—it is possible and often appropriate to say that while contrary arguments based on the original understanding and on constitutional structure have probative force, their force is not great enough to carry

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[57] There have been occasional complaints and expressions of doubt. For example, Marshall's successor as Chief Justice, Roger Taney, once suggested that the Court might dispense with stare decisis in constitutional cases. See The Passenger Cases, 48 U.S. (7 How.) 283, 470 (1849) (Taney, C.J., dissenting). But Taney's suggestion occurred in a solitary dissent, and he subsequently appeared to accept and apply a more standard position. See Lee, supra note 11, at 717-18 & 718 n.377 (noting Taney's adherence, in later case, The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851), to constitutional precedent, especially in contract or property cases, even though it was "'arbitrary'" and "'unjust'" (quoting id. at 457)).

[58] See, e.g., South Carolina v. Gathers, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) (stating that, when deciding what weight should be accorded entrenched precedent, "I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face"); William O. Douglas, Stare Decisis, 49 Colum. L. Rev. 735, 736 (1949) ("A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it."); see also Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 Geo. L.J. 217, 319 n.349 (1994) ("The Constitution and federal statutes are written law (*not* common law); judges are bound by their oaths to interpret that law as they understand it, not as it has been understood by others . . . .").

[59] Invocation of the judicial oath is question-begging and analytically unhelpful. Executive officials also take oaths. The ultimate question must be what the Constitution, as properly interpreted, requires officials—including Supreme Court Justices—to do. It is by no means obvious that the Constitution requires Justices to follow their personal views of how the Constitution best would be interpreted without regard to the positions taken by other Justices and other officials in reaching past decisions. Indeed, an obvious practical objection to this position—especially if it were generalized to all oath-taking officials—is that it would invite something approaching chaos. See Monaghan, supra note 12, at 750 (explaining that stare decisis enhances political stability by removing divisive and threatening questions from agenda and preventing "failure of confidence in the lawfulness of fundamental features of the political order").

As noted above, it is beyond the ambition of this Essay to assess the precise weight that should be given to stare decisis in particular cases. See supra note 17 and accompanying text.

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the day in light of countervailing evidence and other pertinent considerations.[60]

Prominent among the pertinent considerations is normative or functional desirability.[61] An entrenched practice that is normatively reprehensible should be viewed as vulnerable in a way that a more attractive practice is not.[62] A judgment that stare decisis is normatively defensible and indeed desirable thus influences my assessment of the doctrine's constitutional status, as I believe it should help to shape the approach of a reviewing court. In the absence of stare decisis, the Supreme Court would need to bear the burden of reconsidering in every case the constitutional foundations of every applicable doctrine. As past debates have revealed, numerous pillars of contemporary law would be thrown into doubt if the underlying issues needed to be reviewed afresh without a presumption of stability.[63] These include holdings that the Bill of Rights applies to the states; that the Fourteenth Amendment establishes one-person, one-vote requirements; that various regulatory agencies are permissible under the separation of powers; that equal protection norms bind the federal government; that the Due Process Clause incorporates a demand for substantive fairness; and many more.[64] Within our constitutional regime, it is healthy for there to be some degree of ferment and reconsideration at any particular time. But it would overtax the Court and the country alike to insist, as a matter either of constitutional principle or congressional dictate, that everything always must be up for grabs at once.[65]

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[60] See Fallon, supra note 37, at 1237-43, 1248-51 (offering and defending approach to constitutional interpretation that prescribes search for coherence among various relevant considerations); see also Ronald Dworkin, Law's Empire 52-53, 98-99, 252-53 (1986) (describing legal interpretation generally as effort to impose single, coherent interpretive order on relevant materials).

[61] See Fallon, supra note 37, at 1204-09, 1262-68 (discussing pertinence of "value arguments" to constitutional decisionmaking).

[62] The plainest example is Brown v. Board of Education, 347 U.S. 483 (1954), in which John W. Davis, representing South Carolina, defended racial segregation based partly on its entrenched status and purportedly foundational role in the social order. See Monaghan, supra note 12, at 761. Clearly "other overriding considerations eviscerated the strength of this claim." Id.

[63] See Fallon, supra note 14, at 111-13 (discussing stare decisis as at least part of reason that contentious questions of constitutional law, once settled, are considered "off the table," so that settled doctrine becomes "a focal point for stable equilibrium").

[64] See Monaghan, supra note 12, at 727-39 (arguing that holdings such as these could not be sustained under approach requiring decision in accord with original understanding and, accordingly, that their continuing authority rests largely on stare decisis).

[65] Cf. Charles Fried, Constitutional Doctrine, 107 Harv. L. Rev. 1140, 1156 (1994) (concluding "that respect for precedent protects expectations, engenders reliance, and procures stability, but it does this first of all by assuring the public that it is ruled by law so con-

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My view, I should emphasize, does not rest on the premise that past Supreme Courts almost always have reached optimal decisions. Nor does it presuppose that the Justices who sit on the Court from time to time are presumptively wiser than the Constitution's framers and ratifiers.[66] My argument, instead, is that a good legal system requires reasonable stability; that while decisions that are severely misguided or dysfunctional surely should be overruled, continuity is presumptively desirable with respect to the rest; and, again, that it would overwhelm Court and country alike to require the Justices to rethink every constitutional question in every case on the bare, unmediated authority of constitutional text, structure, and original history.

III
CONSTITUTIONAL METHODOLOGY AND JUDICIAL LEGITIMACY

Although I now have maintained that courts should take a relatively deferential stance in reviewing the constitutionality of entrenched legal practices, I fear that my position may appear question-begging. Indeed, on one possible view, my argument might amount to little more than an assertion that precedent itself supports judicial reluctance to overturn precedent and that I approve of the courts' characteristic outlook. But I mean to say more. I mean to say that entrenched precedent acquires force or weight as a matter of constitutional *law*.[67] As will soon become clear, my argument to this effect is indeed partly circular, but the circle is large enough to be informative and, I hope, ultimately persuasive.

A. The Legal Relevance of Practice

My argument for the legal relevance of entrenched practice begins with an assumption widely shared among legal philosophers: The foundations of law lie in acceptance.[68] Our Constitution is law, but

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ceived"); Monaghan, supra note 12, at 748-52 (discussing Court's function in promoting social stability and relationship between stability and Court legitimacy).

66 Cf. Amar, supra note 33, at 133 (criticizing constitutional adjudication based largely on judicial doctrine on the ground that "[t]he Constitution is wiser than the Court").

67 See David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 883 (1996) (arguing that judicial precedent functions as operative constitutional law of United States).

68 The classic modern argument to this effect is that of H.L.A. Hart. See H.L.A. Hart, The Concept of Law 100-23 (2d ed. 1994). Although Hart suggested that the relevant social practices could be described by reference to "rules" and a "rule of recognition," this terminology is probably misleading. See Frederick Schauer, Amending the Presuppositions of a Constitution, in Responding to Imperfection: The Theory and Practice of Con-

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not solely or even principally because it says so or because the framers commanded that we should obey it. The Constitution is law because relevant officials and the overwhelming preponderance of the American people accept it as such.

In constitutional debates, questions of judicial role in interpreting and applying the law are often framed as involving "legitimacy."[69] This is an elusive term, the full meaning of which is by no means always self-evident. But I take "legitimacy" debates to probe issues both of fidelity to positive law and of moral or political justification: By what moral right or justification does an institution of government (such as the Supreme Court) claim authority or exercise its authority in a particular way?[70]

Although this is a searching question, it is an adequate response—at least in the ordinary case—that a claim or exercise of authority accords with the positive law of a legal system that is reasonably just.[71] Decent human lives require law and a legal system.[72] This being so, legal systems tend to be what Joseph Raz has described as "self-validating."[73] There is a general moral obligation of citizens to accept and support reasonably just political institutions cur-

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stitutional Amendment 145, 150 (Sanford Levinson ed., 1995) ("There is no reason to suppose that the ultimate source of law need be anything that looks at all like a rule . . . or even a collection of rules, and it may be less distracting to think of the ultimate source of recognition . . . as a *practice*."). Hart's deep point, however, does not depend on whether relevant practices are best described as rule governed. His crucial insight is that law is rooted in social practices and attitudes. Even Professor Dworkin, the modern jurisprudential writer widely regarded as Hart's great rival, seems to agree that the starting point for understanding law must be accepted legal "practice." See Dworkin, supra note 60, at 254-58, 397-99.

[69] See, e.g., Dickerson v. United States, 120 S. Ct. 2326, 2343 (2000) (Scalia, J., dissenting) (attacking *Miranda* as lacking constitutional support, and criticizing Court's refusal to overrule it as "'illegitimate exercise of raw judicial power'" (quoting Oregon v. Elstad, 470 U.S. 298, 370 (1985) (Stevens, J., dissenting)); Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992) (stating, in discussion of constitutional judicial authority, that "the Court's power lies . . . in its legitimacy"); id. at 996-98 (Scalia, J., dissenting) (arguing that Court in *Casey* wrongly defined legitimacy and misinterpreted effect on legitimacy caused by upholding *Roe*); Joseph D. Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 Nw. U. L. Rev. 100, 102 (1985) (arguing that legitimacy issue arises when Supreme Court "invalidates official conduct without finding an actual constitutional violation").

[70] Cf. David Copp, The Idea of a Legitimate State, 28 Phil. & Pub. Aff. 3, 3-5 (1999) (using term "legitimacy" in roughly this way to analyze notion of "legitimate state").

[71] Cf. John Rawls, A Theory of Justice 96 (rev. ed. 1999) ("Obligatory ties presuppose just institutions, or ones reasonably just in view of the circumstances.").

[72] See generally Thomas Hobbes, Leviathan 98-102 (Michael Oakeshott ed., Collier Books 1962) (1651) (asserting intolerability of human life in absence of recognized legal authority capable of maintaining order).

[73] Joseph Raz, On the Authority and Interpretation of Constitutions: Some Preliminaries, in Constitutionalism: Philosophical Foundations 152, 173-74 (Larry Alexander ed., 1998).

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rently in existence in the territory that they inhabit,[74] at least unless there is reasonable prospect that better institutions can be established relatively swiftly and nonviolently. In this context, the legitimacy of a constitutional order such as ours arises from the conjunction of acceptance and reasonable justice.[75]

Within a framework such as this, the written Constitution of the United States possesses legitimacy rooted in its widespread acceptance and reasonable justice. But when lawful status is predicated on these bases, it becomes an open question whether other, unwritten norms also might attain legal or even "constitutional" legitimacy on the same grounds. In this Essay, I have meant to advance an affirmative answer to this question: The legitimate authority of the Supreme Court to apply a principle of stare decisis in constitutional cases can be supported at least partly on grounds of acceptance and reasonable justice and prudence.[76] The Court openly and notoriously has claimed such an authority virtually from the beginning of the republic.[77] Doubts about the validity of stare decisis seldom have been expressed from the bench, by the bar, or by the attentive public. On the contrary, the public appears to have embraced a variety of judicial interpretations—including some of initially doubtful provenance—as reflective of the Constitution that they accept and even venerate. Notable examples include decisions embodying the principle of one-person, one-vote, applying equal protection norms to the federal government (as well as the states), and enforcing the Establishment Clause's guarantee of the separation of church and state against the states.[78] In addition, the doctrine of stare decisis is functionally desir-

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74 See Rawls, supra note 71, at 99 (identifying "fundamental natural duty . . . of justice" that "requires us to support and to comply with just institutions that exist and apply to us"). This assertion rests directly on what Rawls characterizes as a "natural duty" of justice, id., but it is in no sense incompatible with, and indeed can be buttressed by, other arguments, including an "argument from consequences" and an "argument from communal obligations," Chaim Gans, Philosophical Anarchism and Political Disobedience 89 (1992). Rawls himself acknowledges that "those who assume public office, say, or those who, being better situated, have advanced their aims within the system" have additional obligations rooted in a "principle of fairness" that is distinct from, but in no way inconsistent with, the more fundamental and generally applicable duty of justice. Rawls, supra note 71, at 100.

75 See Raz, supra note 73, at 173 ("As long as they remain within the boundaries set by moral principles, constitutions are self-validating in that their validity derives from nothing more than the fact that they are there." (emphasis omitted)).

76 See Kent Greenawalt, The Rule of Recognition and the Constitution, 85 Mich. L. Rev. 621, 653-54 (1987) (observing that authority of precedent rests on acceptance).

77 See supra Part II.A.

78 See Fallon, supra note 14, at 111-12 (noting questions about correctness of these decisions if examined as matters of "first principle").

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able. It promotes stability, protects settled expectations, and conserves judicial resources.[79]

The entrenched status of stare decisis thus furnishes an argument—only partly circular—that the doctrine should not be regarded as vulnerable to immediate delegitimization based, for example, on the possibility that new evidence might be discovered that would show it to be contrary to the original understanding of Article III. Within constitutional practice, stare decisis has acquired a lawful status that is partly independent of the language and original understanding of the written Constitution.[80]

This is a strong claim, but one that should not be put too baldly. I use the term "partly independent" advisedly, for I do not mean to suggest that the Supreme Court can decide cases without regard to the written Constitution. On the contrary, within my understanding of accepted constitutional practice, the lawfulness of stare decisis depends on what I might describe as its "reconcilability" with the written Constitution. It is crucial that stare decisis can be seen as an authorized aspect of the "judicial Power" conferred by Article III, even though—what is equally crucial—the norms defining the "judicial Power" are themselves largely unwritten and owe their status to considerations going well beyond the "plain meaning" of the Constitution's language and its "original understanding."

B. Addressing a Challenge

To some, I recognize, the circle in which I have traveled—justifying accepted legal practice partly by reference to accepted legal practice—will seem inadequate or unacceptable. According to a familiar view, the legitimacy of the written Constitution does not depend on fuzzy notions of "acceptance" and "reasonable justice," but on the solid foundation of consent: The people of the United States have consented to be governed by the written Constitution, as originally understood by those who ratified it, and not by any other purported source of judicial authority.[81]

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[79] See, e.g., Monaghan, supra note 12, at 750.

[80] Cf. Greenawalt, supra note 76, at 653-54 (noting that authority of precedent cannot be derived directly from Constitution).

[81] See, e.g., Edwin Meese, III, The Supreme Court of the United States: Bulwark of a Limited Constitution, 27 S. Tex. L. Rev. 455, 465 (1986) ("The Constitution represents the consent of the governed to the structures and powers of the government. The Constitution is the fundamental will of the people; that is the reason the Constitution is the fundamental law."); see also Daniel A. Farber, The Originalism Debate: A Guide for the Perplexed, 49 Ohio St. L.J. 1085, 1098 (1989) (describing "[t]he majoritarian argument for originalism" as reflecting premise that "the Constitution gets its legitimacy solely from the majority will as expressed at the time of enactment").

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Discomfiting as it is to acknowledge, this argument fails. Few living Americans actually have consented to be bound by the written Constitution. Many members of an earlier generation did so, but that generation is long dead. Although that earlier generation undoubtedly intended to bind its posterity,[82] people living today are not bound by the intent or command of a past generation, any more than we are bound by the commands or intent of King George III or the authorities that adopted the Articles of Confederation.[83]

With active consent missing from the picture, the legitimacy of the written Constitution—and, I would add, of at least some of the supplementary constitutional law of the United States—must inhere in the weaker, more passive notion of acceptance coupled with reasonable justice. Whereas consent connotes active volition, assent, or agreement traceable to an identifiable act or moment, acceptance can be, and often is, less consciously aware or approving.[84] This is an important difference, rife with potential repercussions, to which I must now turn.

C. Legitimacy and Contestability

In offering a defense of stare decisis that is partly rooted in acceptance and unwritten constitutional norms, I have hoped to provide the doctrine with a stronger foundation than Professor Paulsen's methodology appears to grant it. But it now may be obvious that my argument, along with the proffered theory of constitutional legitimacy that supports it, leaves stare decisis in a position that is still somewhat precarious. Claims that norms acquire constitutional status and validity through "acceptance" are almost inherently contestable. The mass public undoubtedly pays little heed to the intricacies of judicial practice. Exactly what the public has accepted is therefore debatable. Closer to the center of legal practice, lawyers and judges are much more attuned to currently prevailing practices. Among judges and

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[82] See U.S. Const. pmbl. ("We the People of the United States, in Order to . . . secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.").

[83] At least some members of the generation that wrote and ratified the Constitution, including Thomas Jefferson and Thomas Paine, recognized this fact. See Stephen Holmes, Passions and Constraint: On the Theory of Liberal Democracy 138-50 (1995) (describing anti-aristocratic sentiments and faith in scientific progress that led both men to reject "precommitment" as foundation of authority); id. at 141 (characterizing Jefferson as concluding that "[a] constituent assembly in Philadelphia . . . can no more legislate for future Americans than for Australians or Chinese").

[84] Cf. Paul Brest, The Misconceived Question for the Original Understanding, 60 B.U. L. Rev. 204, 225-26 (1980) (noting that most Americans have displayed no more than passive "acquiescence" toward constitutional regime).

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lawyers, however, methodological disagreement is rampant.[85] Merely to participate in legal practice is not necessarily to accept the legitimacy of all that judges and Justices do in the name of the law.

Substantive and methodological disagreement by no means thwarts the aspiration to ground claims of constitutional legitimacy in contemporary practices and attitudes. As Professor Dworkin has argued, it is impossible to understand or participate in constitutional debate without treating some norms and practices as paradigms of constitutional legality.[86] Based on our understanding of what must be regarded as required or acceptable, we can develop arguments about the implications of widely shared reference points for other, more debated questions.[87] We also can understand, grapple with, and sometimes be persuaded by the arguments of others.

As constitutional debate proceeds, we inevitably must entertain arguments that what once had seemed to be fixed points should instead be regarded as aberrations or mistakes, which cannot be reconciled in principle with other, more firmly rooted aspects of constitutional law.[88] Sometimes these arguments may prove persuasive. As a result, it goes nearly without saying that constitutional stare decisis is potentially subject to criticism and reconsideration. Those who find the doctrine unwise, unjust, or imprudent are entitled to object to it on that basis.

In some ways this is an unsettling conclusion—especially since it touches not only stare decisis, but the entirety of constitutional law. There is a natural yearning for a firmer foundation on which to base claims of legal and constitutional legitimacy. But with respect both to the written Constitution and to purported, unwritten constitutional norms, there is no place to look beyond existing constitutional practice and arguments about what is accepted and what is reasonably just and prudent. Competing arguments must be met, not transcended.

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[85] See generally Dworkin, supra note 60, at 3-4, 13 (emphasizing that law is "argumentative" practice). For a discussion of varieties of constitutional theories and their differing methodological commitments, see generally Richard H. Fallon, Jr., How to Choose a Constitutional Theory, 87 Cal. L. Rev. 535 (1999).

[86] See Dworkin, supra note 60, at 72, 89-90 (asserting that "[p]aradigms anchor interpretations" and explaining why their status as such is provisional only).

[87] See id. at 87-90, 254-58 (arguing that judges decide hard cases by determining how those cases should be resolved within theory that best fits and rationalizes relevant practices and authorities).

[88] See id. at 65-73, 98-101 (maintaining that interpretation includes "reforming" stage in which interpreter can identify "mistake[s]"); see also id. at 89-90 ("Suddenly what seemed unchallengeable is challenged, a new or even radical interpretation . . . is developed . . . . Paradigms are broken, and new paradigms emerge.").

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IV
THE UNCONSTITUTIONALITY OF PROFESSOR PAULSEN'S PROPOSAL

A. Complete Abrogation of Stare Decisis

Against the background of my briefly sketched theory of judicial legitimacy, Professor Paulsen's proposal that Congress, by statute, could mandate an end to stare decisis in constitutional cases is plainly unconstitutional. Constitutional stare decisis is not, and cannot be, the mere subconstitutional policy that Professor Paulsen depicts. If not of constitutional stature (in the sense of being constitutionally authorized), stare decisis could not displace what otherwise would be the best interpretation of the written Constitution binding on the Supreme Court as "the supreme Law of the Land"[89] under broadly accepted and controlling norms of legal practice. If stare decisis is constitutionally valid at all, it must be constitutionally mandated or at least constitutionally authorized.[90]

With the issue framed in these terms, stare decisis merits recognition as constitutionally authorized. As described above, the considerations supporting this conclusion include, but are not limited to, the doctrine's entrenched status and its normative desirability.[91] Stare decisis is also reasonably consistent with the Constitution's language and structure, and the evidence concerning the original understanding by no means mandates its rejection.[92]

It is a partially separate question whether the constitutionally authorized practice of stare decisis is subject to congressional regulation under the Necessary and Proper Clause.[93] In some cases, the Constitution may authorize the courts to propound rules of "constitutional common law" that are subject to congressional override.[94] As I suggested above, however, it would be highly peculiar to believe that the doctrine of stare decisis could occupy this category.[95] Questions involving the force (as well as the validity) of stare decisis go to the

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89 U.S. Const. art. VI, § 2.

90 See supra notes 23-24, 31-32 and accompanying text.

91 See supra Parts II.B, III.A.

92 See supra Part II.A.

93 See Monaghan, supra note 12, at 754-55 (noting that "[o]nce it is acknowledged that *stare decisis* should play a role in constitutional adjudication," question remains whether it "inheres in 'the judicial power' of Article III" or "possess[es] the nature of constitutional common law" subject to congressional override).

94 See Henry Paul Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 2-3 (1975) (describing legal "rules drawing their inspiration and authority from, but not required by, various constitutional provisions" and thus "subject to amendment, modification, or even reversal by Congress").

95 See supra notes 24-27 and accompanying text.

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heart of the judicial power to determine the constitutional law of the United States in cases properly before the courts. The power to say what the Constitution means or requires—recognized since *Marbury v. Madison*[96]—implies a power to determine the sources of authority on which constitutional rulings properly rest.[97] To recognize a congressional power to determine the weight to be accorded to precedent—no less than to recognize congressional authority to prescribe the significance that should attach to the original understanding—would infringe that core judicial function.[98]

In defense of his contrary view, Professor Paulsen rightly notes that Congress enjoys broad powers to enact rules that affect judicial decisionmaking and sometimes dictate particular judgments.[99] For example, deeply rooted practice recognizes congressional authority to enact jurisdictional rules, rules of evidence, subconstitutional rules of decision, and statutes of limitations.[100] But none of Paulsen's examples establishes a congressional power to determine how the Court should decide what the Constitution does or does not require in a case

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96 5 U.S. (1 Cranch) 137 (1803).

97 This argument again must appeal to entrenched understandings of the judicial role. Article III does not specify the sources of authority to which the courts properly appeal, and early judicial practice suggests an inchoate and fluid, rather than a fixed, understanding both of the judicial role, see Adrian Vermeule, Judicial History, 108 Yale L.J. 1311, 1336-37 (1991), and of the nature and scope of judicial review, see Snowiss, supra note 35, at 1-9 (noting uncertain and limited expectations among founding generation).

98 I do not mean to suggest that the courts are the only actors in the constitutional scheme with any role in determining constitutional meaning. As I have argued elsewhere, the courts can, and indeed sometimes must, share responsibility for implementing the Constitution successfully. See Fallon, supra note 14, at 141-42 ("[I]mplementing the Constitution . . . is a project that necessarily involves many people (not just courts) and often calls for accommodation and deference."). Judicial deference to other institutions is sometimes constitutionally appropriate—though, with respect to constitutional issues, the courts determine for themselves how much deference to accord and are not subject to congressional dictate.

I agree with Michael McConnell that Congress should be viewed as having a limited capacity to substitute its reasonable interpretive judgments for those of the judicial branch when legislating pursuant to Section 5 of the Fourteenth Amendment. See Michael W. McConnell, Institutions and Interpretation: A Critique of *City of Boerne v. Flores*, 111 Harv. L. Rev. 153, 194-95 (1997). But this position, which rests largely on Section 5's distinctive language and history, was rejected by the Supreme Court in City of Boerne v. Flores, 521 U.S. 507 (1997) (striking down Religious Freedom Restoration Act as not within Congress's Section 5 power). Although I would not endorse the *Boerne* decision as written, the Court's opinion strongly supports the proposition that the power to render authoritative constitutional determinations—and thus, presumably, to identify relevant sources of constitutional authority—resides exclusively in the judicial branch. See id. at 524 ("The power to interpret the Constitution in a case or controversy remains in the Judiciary.").

99 See Paulsen, supra note 1, at 1582-90.

100 See id.

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properly before it.[101] On the contrary, Professor Paulsen's proposed statute is unique. It calls for a paring of the judicial power recognized—indeed ensconced—since *Marbury*. And, by no means irrelevant, it would threaten chaos.

If stare decisis were abolished without limit in constitutional cases,[102] the first question presented would be whether the practice of judicial review, recognized in *Marbury* itself, was constitutionally authorized. A second would be, if so, how that power should be exercised—whether the Constitution contemplates de novo review of constitutional issues or whether, for example, legislative judgments should be set aside only in cases of clear mistake.[103] A third, in any case calling for the application of the Bill of Rights to the states, would be whether the Fourteenth Amendment should be construed to "incorporate" the Bill of Rights (which initially applied only to the federal government).[104] And so the process would continue, literally without surcease, for no question ever could be deemed to have been settled definitively.[105] Indeed, doubts even might arise about whether

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101 Professor Paulsen's strongest example involves Congress's recognized power to displace what the Court has characterized as "prudential" limitations on standing doctrine that go beyond the absolute constitutional requisites under Article III. See id. at 1585-86. To be constitutionally valid, prudential standing limitations would have to be authorized constitutionally, but the Court has held that they are subject to displacement by Congress. See, e.g., Fed. Election Comm'n v. Akins, 524 U.S. 11, 19-20 (1998) (finding that Federal Election Campaign Act's conferral of standing on "[a]ny party aggrieved" overrode otherwise applicable "prudential" limitations on standing (internal quotation marks omitted)); Bennett v. Spear, 520 U.S. 154, 162-66 (1997) (holding prudential restrictions overcome by Endangered Species Act's citizen-suit provision). There is, however, a large difference between standing questions, involving which parties should be able to raise constitutional issues, and "merits" questions of constitutional law. It is one thing for Congress to tell a court *whether* to decide an issue, another for Congress to tell a court *how* to go about deciding a constitutional issue. Cf. Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1373 (1953) (noting that although Congress has power over federal jurisdiction, "if Congress directs an Article III court to decide a case, I can easily read into Article III a limitation on the power of Congress to tell the court *how* to decide it").

102 This is the result that Professor Paulsen contemplates, as summarized in his subsequent writings: "The judicial policy of stare decisis, to the extent not constitutionally mandated, is hereby abrogated in federal cases as to issues of federal constitutional . . . interpretation." De-precedenting *Roe*, 3 Green Bag 2d 348 (2000) (providing statutory language proposed by Paulsen). Paulsen also furnishes a more formal version of his proposed statute, which he would propose to codify at 28 U.S.C. § 1652a. See id.

103 See, e.g., James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 144 (1893) (arguing that courts should not invalidate statutes unless "those who have the right to make laws have not merely made a mistake, but have made a very clear one"). This approach arguably would have some support in the "original understanding." See supra note 35 and accompanying text.

104 See supra notes 63-64 and accompanying text.

105 See supra note 65 and accompanying text.

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the appropriate processes of judicial reasoning could be settled by past practice and authority.

This dark corridor down which Professor Paulsen invites Congress to direct the judicial branch is the path of unreason, not reasoned justice under law.[106] As Charles Fried has noted, reasoning of any kind requires continuity, at least in the minimal sense of "commitment to one's own thought."[107] This being so, the Court, as a collective institution, must be allowed to rely on its own prior processes of reasoning, to accept that past decisions affect what is reasonably doable in the present, and to go forward in ways that it deems fair and acceptable under the circumstances. To quote Professor Fried again: "If reasoning implies continuity for him who engages in it, all the more must it do so for those to whom it is addressed and who are asked to accept it."[108]

B. Abrogation of Stare Decisis for Abortion Cases Only

In critiquing Professor Paulsen's proposal, I so far have argued in quite general terms, on the assumption that he means to justify congressional abrogation of stare decisis in *all* constitutional cases, with only passing reference to his admitted source of motivation: Paulsen wishes to trigger Supreme Court rejection of the abortion rights recognized in *Roe v. Wade*[109] and *Planned Parenthood v. Casey*,[110] and he suggests that a statute abolishing stare decisis only in abortion cases might pass constitutional muster.[111] Yet a statute so limited would be no more constitutionally acceptable than a general statute. On the contrary, consideration of the issues presented by a statute repealing stare decisis only in abortion cases helps to cast the difficulties with Paulsen's broader proposal in sharper relief.

Although Paulsen has not suggested what a statute dealing only with abortion cases might look like, we can suppose first that Congress might try to direct the Supreme Court to "decide cases challeng-

[106] This claim is by no means undermined by practices in the French legal system and in public international law, both of which purport to deny that stare decisis has legally binding effect. Despite their formal positions, both the French legal system and international tribunals have evolved complex practices in which the authority of prior judicial decisions is implicitly, even if not explicitly, acknowledged. See Raj Bhala, The Myth About Stare Decisis and International Trade Law *(Part One of a Trilogy)*, 14 Am. U. Int'l L. Rev. 845, 849-53 (1999) (discussing precedent in international trade law); Mitchel de S.-O.-l'E. Lasser, Judicial (Self-)Portraits: Judicial Discourse in the French Legal System, 104 Yale L.J. 1325, 1350-51, 1391-92 (1995) (discussing French legal system).

[107] Fried, supra note 65, at 1156.

[108] Id.

[109] 410 U.S. 113 (1973).

[110] 505 U.S. 833 (1992).

[111] Paulsen, supra note 1, at 1596-97.

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ing the constitutionality of abortion legislation without regard to the doctrine of stare decisis." The obvious first question would be what the statute meant. If the Court accepted the statute's validity, would it need to consider afresh all of the most basic issues of constitutional law as they specifically bear on the abortion question—whether the Constitution authorizes judicial review; if so, whether it authorizes a doctrine of "substantive due process"; and so forth? Echoing my arguments against a more general statute purporting to repeal stare decisis,[112] these questions suggest that the strands of constitutional doctrine—most and perhaps all of which incorporate the principle of stare decisis—are broadly interwoven. It would be hard to recognize a congressional power to pluck a single thread without threatening the doctrinal fabric as a whole.

In anticipation of this difficulty, Congress might attempt to cut as narrowly as possible. It might, for example, enact a directive that, in resolving abortion cases, the Court should "accord no precedential significance to *Roe v. Wade* or any other authority specifically ruling on the constitutionality of abortion legislation." But this statute, too, should be deemed unconstitutional. First, if the Court could rely on cases *denying* substantive due process claims, such as *Bowers v. Hardwick*,[113] but not on the most directly supportive precedents, the statute would represent a blatant attempt to skew the substantive outcome of judicial deliberations, not merely an effort to promote a reassessment of the underlying question. To be sure, defenders of constitutional abortion rights still could appeal to the precedents that the Court thought adequate to support *Roe* in the first instance. But an added arsenal of authorities denying substantive due process claims—including some endorsing a methodology that would afford protection only to rights protected by relatively specific traditions—now would be available to the other side.[114]

Second, once the constitutional foundations of stare decisis are recognized, a statute directing its selective repeal stands nakedly ex-

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112 See supra notes 102-05 and accompanying text.

113 478 U.S. 186 (1986) (finding no constitutionally protected right to engage in private, consensual acts of homosexual sodomy).

114 See, e.g., Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (asserting that in order to be protected by substantive due process, rights must be "objectively, 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty'" (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (Powell, J., plurality opinion), and Palko v. Connecticut, 302 U.S. 319, 325 (1937))); Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (Scalia, J., plurality opinion) ("In an attempt to limit and guide interpretation of the [Due Process] Clause, we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' . . ., but also that it be an interest traditionally protected by our society.").

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posed as a command by Congress to the Court to pay no heed to authorities that are at least entitled to consideration as a matter of constitutional law. If it so chooses, Congress can appeal to the Court to reconsider its abortion decisions by enacting a resolution calling upon the Justices to do so. Congress can file amicus curiae briefs in abortion cases that come before the Court. In addition, Congress enjoys the effective power to provoke a reconsideration of *Roe* and *Casey* any time that it so chooses, simply by enacting anti-abortion legislation that would trigger a constitutional challenge. But Congress cannot direct the Supreme Court, in a case properly before it, to ignore a consideration of constitutional import, as stare decisis must be recognized to be. Once again, the pervasive entrenchment of stare decisis stands as an obstacle to the doctrine's selective, congressionally mandated disestablishment.[115]

CONCLUSION

I said at the outset that stare decisis presents constitutional puzzles. As should now be clear, those puzzles extend deep into the foundations of constitutional law. To think clearly about stare decisis in constitutional cases, it is necessary to think about issues of judicial legitimacy and about the underlying assumptions of legitimacy arguments. Upon close examination, judicial legitimacy does not turn on consent to be governed by the written Constitution (and it alone), as is often thought, but on contemporary acceptance and the reasonable justice of the prevailing regime of law.

In light of longstanding acceptance and considerations of justice and prudence, stare decisis deserves recognition as a legitimate, constitutionally authorized doctrine beyond Congress's power to control. Or so I have argued. I can make no more definitive claim, for about acceptance and justice there is room for argument virtually without end. In this regard, however, the foundations of stare decisis are no

115 My arguments do not speak directly to the issue in Anastasoff v. United States, 223 F.3d 898 (8th Cir.), vacated as moot on reh'g en banc, 235 F.3d 1054 (8th Cir. 2000). In *Anastasoff*, the subsequently vacated panel decision held that a judicially developed rule denying precedential effect to unpublished opinions violated Article III. Unlike a total elimination of stare decisis effect, the special treatment of unpublished opinions does not threaten the overall fabric of constitutional doctrine by putting everything at issue at once. And unlike a denial of precedential effect to opinions addressing particular subjects (or resolving particular issues in a particular way), the rule challenged in *Anastasoff* was not an attempt to manipulate or alter substantive outcomes and was unlikely to have any systematic effect in doing so. Finally (and relatedly), the rule involved in *Anastasoff* did not constitute an assault on the traditional, entrenched core of stare decisis—it involved a judicially, rather than congressionally, mandated adjustment at the doctrine's fringes. In light of these considerations, the conclusion that Article III mandates the result reached by the original panel decision in *Anastasoff* seems to me to be constitutionally doubtful, at best.

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more necessarily tenuous than those of other constitutional doctrines. However much we might wish for some more solid rock of support, our entire constitutional order rests on the potentially shifting sands of acceptance and reasonable justice.

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