STARE DECISIS IN AN ORIGINALIST CONGRESS

The 2012 election has highlighted contrasting theories of American constitutionalism. Several of the Republican presidential candidates made issues of constitutional interpretation central to their campaigns, from the appropriate respect the Tenth Amendment ought to command to the constitutionality of President Barack Obama's healthcare reform law.[1] Although one might expect that every Republican presidential candidate would promise to repeal the healthcare law,[2] it is noteworthy that none has said the law's constitutionality depends on the Supreme Court's judgment. The implication is that the statute must be repealed as unconstitutional irrespective of how the Supreme Court rules.[3] An implied consensus emerged among the Republican presidential candidates that the political branches have an independent duty to evaluate the constitutionality of legislation.[4] Former House Speaker

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1. *See* Robert Hendin, *10th Amendment up for debate within the Republican presidential field*, CBS NEWS (Aug. 12, 2011), http://www.cbsnews.com/8301-503544_162-20091529-503544.html; *see also* Susan Page, *Labor Day forum starts busy month for Republican candidates*, USA TODAY, Sept. 6, 2011, http://www.usatoday.com/news/politics/story/2011-09-05/Labor-Day-forum-starts-busy-month-for-Republican-candidates/50267530/1 (describing GOP candidates declaring the healthcare reform statute unconstitutional).

2. *See* Louise Radnofsky, *Repeal Health Law? It Won't be Easy*, WALL ST. J., Oct. 29, 2011, http://online.wsj.com/article/SB10001424052970203687504576655130486204862.html.

3. Representative, and former candidate, Michele Bachmann made this point explicitly. *E.g.*, Reid J. Epstein, *Michele Bachmann: 'We still need full-scale repeal of Obamacare*,' POLITICO (Sept. 28, 2011, 6:22 PM), http://www.politico.com/news/stories/0911/64665.html.

4. Amusingly, liberal commentators have met the Republican argument in the 2010 and 2012 election cycles that the Supreme Court is not the only relevant constitutional interpreter with a combination of confusion and condescension. *See* Joel Alicea, *Questioning the Supreme Court's Judicial Supremacy*, NAT'L REV. ONLINE, Oct. 25, 2011, http://www.nationalreview.com/articles/281166/questioning-supreme-court-s-supremacy-joel-alicea [hereinafter Alicea, *Questioning Supremacy*] (describing liberal reactions to candidates asserting a constitutional judgment).

Newt Gingrich went even further and explicitly called for a rejection of judicial supremacy.[5]

This is a remarkable development. Political scientists and legal commentators have long discussed the phenomenon that Mark Tushnet has labeled the "judicial overhang": the notion that "[l]egislators may define their jobs as excluding consideration of the Constitution precisely because the courts are there."[6] It is a notion deeply rooted in judicial supremacy over constitutional interpretation. After all, the thinking goes, if the Supreme Court is the ultimate authority on constitutional meaning, why should the political branches bother to take their jobs as constitutional interpreters seriously?[7] Examples of this attitude abound. During the debate over the healthcare bill, then-House Speaker Nancy Pelosi reacted to a reporter's question concerning the bill's constitutionality by asking the reporter, "Are you serious?"[8] Speaker Pelosi's reaction was not entirely surprising given that only a few years earlier she described a decision of the Supreme Court as binding to the point that the decision was "almost as if God ha[d] spoken."[9]

But how are political actors to evaluate the constitutionality of legislation? The rhetoric of the Republican presidential candidates repeatedly harkens back to the views of the

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5. *See id.*

6. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 58 (1999).

7. Even the most ardent of judicial supremacists must acknowledge that the political branches play a role in constitutional interpretation. After all, Congress necessarily interprets the Constitution whenever it passes legislation. *See* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 568 (2009) ("However, every Congressional enactment passed under the commerce power, and every appropriation under the General Welfare Clause, involves an implicit interpretation of these clauses, whether or not any court ever considers them.").

8. Matt Cover, *When Asked Where the Constitution Authorizes Congress to Order Americans To Buy Health Insurance, Pelosi Says: 'Are You Serious?'*, CNSNEWS.COM (Oct. 22, 2009), http://www.cnsnews.com/node/55971.

9. *Congress assails domain ruling*, WASH. TIMES, July 1, 2005, http://www.washingtontimes.com/news/2005/jul/1/20050701-010419-9346r/?page=1.

Founders,[10] implying a crude form of originalism. Indeed, former Speaker Gingrich stated he would adhere to originalism when making constitutional judgments as President.[11] The idea of originalist interpretation by the political branches was given an emphatic and articulate voice by then-Senator-elect Mike Lee in his 2010 speech to the Federalist Society National Lawyers Convention. Lee offered the following pledge: "I will not vote for a single piece of legislation that I can't reconcile with the text and the original understanding of the U.S. Constitution."[12]

Senator Lee's pledge, set against the backdrop of the move toward extrajudicial constitutional interpretation, leads to an important question. If Congress did abide by originalism when evaluating legislation, how would it treat legislative precedents? Would Congress feel unrestrained by the constitutional judgments of past legislators, or would a form of stare decisis develop within Congress?[13] The answer depends in part on whether Congress would adopt a theory of originalism that accepts the legitimacy of precedent.[14] As a practical matter,

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10. Gina Smith, *GOP presidential hopefuls court voters at SC forum*, HERALD (S.C.), Sept. 6, 2011, http://www.heraldonline.com/2011/09/06/3342710/white-house-rivals-court-voters.html (describing how the GOP presidential candidates "worked to distinguish themselves from the pack and prove their salt as strict adherers to the U.S. Constitution and the ideology of the nation's founding fathers" at the American Principles Project Palmetto Freedom Forum).

11. Alicea, *Questioning Supremacy*, supra note 4.

12. Mike Lee, U.S. Senator-Elect, Address at the 2010 Federalist Society National Lawyers Convention (Nov. 19, 2010) (audio/video available at http://www.fedsoc.org/publications/pubid.2020/pub_detail.asp).

13. Many of the constitutional judgments of past Congresses also would have judicial precedents because the Court regularly rules on many of the most important pieces of legislation, but the focus of this Note is on the deference that Congress owes past legislative constitutional judgments.

14. Originalist theorists differ strongly on this point. John McGinnis and Michael Rappaport have argued that the Constitution was enacted against a background assumption that precedent would play a role in constitutional interpretation, and, thus, originalism and precedent are not mutually exclusive. *See* John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 806–29 (2009). Justice Antonin Scalia does not contend that precedent and originalism are reconcilable, but he sees precedent as a necessary "pragmatic *exception*" to originalism. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 140 (Amy Gutmann ed., 1997). Judge Robert Bork combines the pragmatic exception approach with an appeal to the historical understanding of

however, no originalist legislator could demand a wholesale return to original meaning; it is implausible that Congress would restrict its own powers in such a radical way and endanger politically popular statutory law. Assuming, then, that an originalist Congress was one that accepted the legitimacy of constitutional precedent, would it have any obligations to follow the precedents laid down by past Congresses?

The answer to this question is the project of this Note. It is important to stress, however, the limited nature of the inquiry. The concern here is with the normative status of legislative precedents for an originalist Congress: Should an originalist legislator give any weight to previous legislative constitutional judgments? This Note does not attempt to articulate the specific criteria an originalist legislator (or judge, for that matter) should use in deciding whether to retain a particular precedent. That question is a distinct inquiry for another day.

Part I briefly reviews the literature on originalist extrajudicial constitutional interpretation as well as the scholarship on legislative stare decisis. Part II examines five common arguments for adherence to precedent in a judicial setting and analyzes their salience in an originalist legislative context. Finally, the Conclusion looks back on the analysis in Part II and offers a view about the relevance of stare decisis for an originalist Congress that seeks to take constitutional interpretation seriously. This Note argues that stare decisis matters a great deal less for an originalist Congress than it does for the Supreme Court. Although that answer might not surprise many, what is surprising is that there remain good arguments for giving at least a modicum of respect to precedent in the originalist legislative context. As it is with originalism gener-

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precedent and the "judicial power" granted to the courts in Article III. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 155–59 (1990). Jonathan Mitchell recently offered an interesting and nuanced way of justifying adherence to some precedents but not others, which depends on a particular reading of the Supremacy Clause. *See generally* Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1 (2011). By contrast, originalists Michael Stokes Paulsen and Gary Lawson reject precedent in one form or another. *See* Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007). *See generally* Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005).

ally, so it is with legislative precedents: "We will have the dead at our councils."[15]

I. EXTRAJUDICIAL ORIGINALISM

Since its modern emergence in the 1970s,[16] originalism has focused almost exclusively on the judiciary.[17] The tunnel vision of originalist scholars led the late Gary Leedes to complain that originalists "permit the electorally accountable officials substantial leeway. The Congress can interpret the tenth amendment and the necessary and proper clause virtually as it pleases."[18] To be sure, much has been written on legislative constitutional interpretation generally,[19] but scholars have resisted exploring the implications of originalism for Congress.[20]

Michael Ramsey's *Presidential Originalism* at least raised the issue of how originalism applies outside of the courts,[21] but his analysis does not account for the complexity of originalist theory.[22] Neal Katyal's brief discussion of congressional

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15. G.K. CHESTERTON, ORTHODOXY 85 (1908).

16. Modern originalist theory really began with an article by then-Professor Robert Bork. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). The conventional narrative on the development of originalism is told well by Keith Whittington. *See generally* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB POL'Y 599 (2004).

17. Whittington, *supra* note 16, at 601.

18. Gary C. Leedes, *A Critique of Illegitimate Noninterpretivism,* 8 U. DAYTON L. REV. 533, 539 (1983).

19. *See also* JEREMY WALDRON, LAW AND DISAGREEMENT (1999). *See generally* TUSHNET, *supra* note 6.

20. *See* Joel Alicea, *Originalism and the Legislature*, 56 LOY. L. REV. 513, 515–18 (2010) [hereinafter Alicea, *Originalism and the Legislature*].

21. *See* Michael D. Ramsey, *Presidential Originalism?*, 88 B.U. L. REV. 353, 358–62 (2008).

22. For example, Ramsey examines the implications of what he calls "conceptual originalism" for presidential constitutional interpretation. *Id.* at 360. By conceptual originalism, Ramsey refers to theories that see adherence to the original meaning as a "necessary consequence of the nature of interpretation or the nature of constitutional authority . . . ." *Id.* Ramsey concludes that this strain of originalism has little relevance for the presidency because the Supreme Court does not follow originalism. *See id.* at 360–61. As Ramsey puts it, "[I]f the original meaning is not the law of the land, according to the supreme interpreter of that law, in what sense can the original meaning be said—even by an originalist—to bind the

originalism in *Impeachment as Congressional Constitutional Interpretation* employs an instrumentalist view of originalism whose primary objective is empowering current legislative majorities.[23] This strain of originalism, once popular,[24] has long since fallen by the wayside as other theories have risen to take its place.[25] Thus, both Ramsey and Katyal are insufficiently attentive to the nuances of originalism, which detracts from their analyses. Two works by the author of this Note—*Originalism and the Legislature*[26] and *An Originalist Congress?*[27]—attempt to discuss originalist congressional constitutional interpretation while grappling with the intricacies of originalism. Both papers examine several schools of originalist thought and argue that the internal logic of originalism requires going beyond the judiciary and demanding that Congress be originalist.[28]

The natural question is how would Congress go about the business of being originalist? No scholarship has addressed this question, which provides the motivating force behind this Note. As stated above, precedent is an obvious starting point for discussing how an originalist Congress should evaluate legislation.

On the general topic of legislative stare decisis, some work has indeed been done. Mark Tushnet's *Legislative and Execu-*

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president?" *Id.* at 360. Ramsey's analysis blindly assumes judicial supremacy, but he provides no reason why an originalist president would ignore the binding of originalism simply because the Supreme Court says nonoriginalism is appropriate. Not only is this assumption without warrant, it is undermined by historical examples of presidents choosing to exercise constitutional judgment despite contrary judicial pronouncements. President Jackson's veto of the bank bill is just one example. *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 59–61 (2007).

23. Neal Kumar Katyal, *Impeachment as Congressional Constitutional Interpretation*, 63 LAW & CONTEMP. PROBS. 169, 172–79 (2000).

24. *See* Whittington, *supra* note 16, at 599–603.

25. *See id.* at 603–07.

26. *See* Alicea, *Originalism and the Legislature*, *supra* note 20.

27. Joel Alicea, *An Originalist Congress?*, NAT'L AFF., Winter 2011, at 31 [hereinafter Alicea, *An Originalist Congress*].

28. *See generally* Alicea, *Originalism and the Legislature*, *supra* note 20; *see also* Alicea, *An Originalist Congress*, *supra* note 27, at 40–45.

tive Stare Decisis does an excellent job exploring the political science behind extrajudicial stare decisis, but it is a largely descriptive piece.[29] For the most part, it does not address whether Congress *should* adhere to stare decisis in its interpretations, which is the subject of this Note. Katyal's article on impeachment is the only other relevant scholarship in the area of legislative stare decisis, and it offers a sophisticated argument for lesser reliance on precedent in a legislative context.[30] But Katyal's essay does not assume an originalist Congress, which affects the analysis of legislative stare decisis.[31] Nor does Katyal address some of the arguments in favor of judicial stare decisis that are most interesting to consider in the context of an originalist Congress.[32] Thus, there remains a gap in the literature on congressional constitutional interpretation, a gap that this Note attempts to fill.

II. STARE DECISIS AND ORIGINALIST CONGRESSIONAL CONSTITUTIONAL INTERPRETATION

Before turning to the analysis of legislative stare decisis in an originalist context, it is important to understand why originalism plays a distinctive role in the analysis. For an originalist, fidelity to the text's original meaning is obligatory.[33] Of course, an originalist might think that the original

29. See generally Mark Tushnet, *Legislative and Executive Stare Decisis*, 83 NOTRE DAME L. REV. 1339 (2008).

30. Katyal, *supra* note 23, at 182–88.

31. *See infra* Part II.

32. *See infra* Part II.A, B, D.

33. *See* Whittington, *supra* note 16, at 599 ("Originalism regards the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present."). This is true no matter which school of originalist thought is under examination. Whittington, for instance, belongs to a group of theorists who see the original meaning as binding partly as a result of the political theory undergirding its existence—popular sovereignty. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 110–59 (1999). Judge Bork, by contrast, sees originalism as the only way to base constitutional interpretation on "neutral principles" that maintain the balance between majority and minority tyranny. Bork, *supra* note 16, at 1–4. For a discussion of other schools of originalist thought and their respective justifications for originalism, *see generally* Alicea, *Originalism and the Legislature*, *supra* note 20. I

meaning of the Constitution encompasses the common law principle of stare decisis,[34] but even if the Constitution authorizes the use of precedent, given the binding status of the original meaning, it is clear that the original meaning should be preferred to precedent as a general rule. Otherwise, the original meaning would be relegated to something on par with precedent, in which case it is difficult to see how originalism would be distinct from other forms of interpretation where the original meaning plays a role but is not considered binding.[35] In other words, for an originalist, the default rule is to follow the original meaning, but he might have good reason to depart from the original meaning and follow precedent in a particular case.[36] Because of this ordering, where the original meaning and precedent are in conflict, the burden is on precedent to show that the original meaning ought not govern.[37] If stare decisis is a norm in favor of following precedent, it is obvious from what has been said that originalism makes stare decisis a weaker principle in the constitutional context than it is in the statutory one.

In his article, Katyal discusses congressional use of precedent abstracted from any particular theory of interpretation,

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should note that I am no longer convinced that the labels I apply to those schools are accurate, or that I would necessarily group some of the people within those schools the same way were I to write the article again. It nevertheless provides a good roadmap of several important strains of originalism (and, in the case of Professor Randy Barnett's theory, a strain that may not be originalist but is often regarded as so).

34. *See* McGinnis & Rappaport, *supra* note 14, at 806–29 .

35. *See, e.g.*, STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 110 (2005) (listing six different interpretive tools used in constitutional interpretation, of which the original meaning is one but has no privileged status).

36. Justice Antonin Scalia captured this ranking well when he famously said of the original meaning that he "adulterate[s] it with the doctrine of *stare decisis* . . . ." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989). He has also stated that stare decisis is a "pragmatic *exception*" to his theory of originalism, implying that the original meaning has primacy in interpretation. SCALIA, *supra* note 14, at 140.

37. This standard is easily met in many cases. As Judge Bork once said: "Whatever might have been the proper ruling after the Civil War, if a judge today were to decide that paper money is unconstitutional, we would think he ought to be accompanied not by a law clerk but by a guardian." BORK, *supra* note 14, at 155.

but the analysis above makes it clear that having a theory in mind could alter the decisional calculus. For an originalist legislator, the arguments in favor of stare decisis begin from a standpoint of relative weakness compared with some other theories of constitutional interpretation. Justice Stephen Breyer, for instance, has repeatedly characterized his theory of constitutional interpretation as being a six-factored approach, precedent being one of the considerations.[38] Under Justice Breyer's paradigm, even where precedent and the original meaning conflict, there is no reason to begin with a predisposition against precedent.[39] How one evaluates the force of the arguments in favor of legislative stare decisis will, therefore, necessarily be colored by the theory of constitutional interpretation adopted by the legislature in question. This will become clearer with some of the arguments presented below, which put forward a few of the most common reasons why the judiciary ought to follow precedent.

A. The Rule of Law

In his masterpiece *The Concept of Law*, the legal philosopher H.L.A. Hart responded to the contentions of legal realism by insisting that, although it is important to acknowledge that there will be policy choices made by judges "at the fringe," the public only accepts those choices because of the "prestige gathered by courts from their unquestionably rule-governed operations over the vast, central areas of the law."[40] By "rule-governed operations," Hart was referring in large part to the constraining force of precedent "over the great mass of ordinary cases . . . ."[41]

Hart's point touches on the argument made by many American legal scholars that "judicial adherence to constitutional precedent supports a consensus about the rule of law, specifically the belief that all organs of government, including the

38. BREYER, *supra* note 35, at 110.
39. *See id.*
40. H.L.A. HART, THE CONCEPT OF LAW 150 (1961).
41. *Id.* at 124.

Court, are bound by the law."[42] Professor Henry Monaghan has said that the goal of stare decisis is to "contain, if not minimize, the existing cynicism that constitutional law is nothing more than politics carried on in a different forum."[43]

Monaghan's argument—tracking that of Hart—seems to be that stare decisis promotes the *appearance* of judicial impartiality. Professor Earl Maltz makes a somewhat different but related claim: "[B]ecause judges believe that law should be made by reference to 'neutral' principles of precedent, those principles in fact have a strong influence on decision making."[44] For Maltz, stare decisis not only creates the appearance of impartiality, but it also helps judges to actually be impartial by creating a cultural norm that influences their thinking. Both the Monaghan and Maltz arguments go to the idea of the rule of law: Society must perceive judges to be impartial, and judges in fact ought to be impartial.

All of this might well be true in the judicial context, but how would these arguments about the rule of law translate to an originalist Congress? Maltz's argument is that a norm in favor of following precedent creates a habit of mind for judges that helps them to be impartial, and it is a laudable goal to have legislators be impartial when they evaluate their own constitutional powers. In fact, as I have argued elsewhere, an originalist legislator commits methodological suicide when he allows the political pressures of popular opinion to influence his judgment of original meaning.[45] One might think that congressional stare decisis would be useful for inculcating a mindset of impartiality among legislators, but the analysis at the beginning of Part II shows that no such norm in favor of following precedent can exist for an originalist in the constitutional context. The originalist legislator begins with the original meaning, and if there is a precedent that conflicts with that meaning, the default action is

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42. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 752 (1988).

43. *Id.* at 753.

44. Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 371 (1988).

45. Alicea, *An Originalist Congress*, *supra* note 27, at 43–44.

to abandon the precedent unless there are compelling reasons not to do so. Maltz's argument is thus inapplicable to an originalist in constitutional interpretation because no norm in favor of precedent is possible (though there is a great deal to be said for it in statutory interpretation). Moreover, the originalist legislator accrues the salutary effects of stare decisis by binding himself to a method that is ostensibly divorced from politics. In looking to the original meaning rather than precedent, he is substituting historical facts for previously decided cases, preserving the rule of law ideal that Maltz prizes.

Maltz's argument for stare decisis may be inapposite for originalists irrespective of their governmental branch, but Monaghan's argument that following precedent creates an important appearance of impartiality is surely true in the judicial context. Here, however, the difference between branches plays a key role. Simply put, there is no expectation that legislators will be impartial. There is a concern that the actions of the Court are "politics carried on in a different forum,"[46] but with Congress there is no subterfuge—the public expects politics all the way down. This is why Judge Bork said that Congress's constitutional judgments "cannot be principled" in the originalist sense.[47] Monaghan's point only relates to appearances, and his point is easily dismissed in the legislative context because the public does not expect impartiality from the legislative branch.

B. Stability for Entrenched Constitutional Judgments

Monaghan's second justification for stare decisis is that it promotes "system-wide stability and continuity by ensuring the survival of governmental norms that have achieved un-

46. Monaghan, *supra* note 42, at 753.

47. Bork, *supra* note 16, at 10. Although I think Judge Bork reflects the popular view that Congress is not impartial, I disagree with his view that Congress cannot be principled in its constitutional judgments. To concede that Congress's constitutional judgments are unprincipled is, as mentioned above, a form of methodological suicide. *See* Alicea, *An Originalist Congress*, *supra* note 27, at 43–44.

surpassed importance in American society."[48] Monaghan is concerned with the idea of a judiciary that endangers landmarks in the constitutional and statutory landscape: "To permit or vindicate challenges to these traditions would 'incite radical and even revolutionary attacks on the legal status quo.'"[49] He probably has in mind decisions like *Brown v. Board of Education*[50] or similarly foundational constitutional judgments. Stare decisis ensures that those judgments remain intact because overturning them could lead to a crisis of legitimacy.

Implicitly, what seems to be driving Monaghan's concern is the potential lack of popular approval for overturning these precedents in a judicial context. These concerns are well founded, as shown by Justice Scalia and Judge Bork's stated refusal to reconsider deeply entrenched constitutional precedents.[51] A Supreme Court nominee might secretly believe a certain landmark constitutional judgment should be overturned, and it is possible that four Justices could end up on the Court sharing his view without anyone knowing about it until a decision was announced. This would be disruptive and upsetting because it would deprive the electorate of a constitutive part of the constitutional fabric without any input.

By contrast, for Congress to pass legislation disregarding a fundamental constitutional judgment made by an earlier Congress likely would require the election of 218 House members and sixty Senators (assuming contemporary filibuster rules remain) who were committed to the legislation. If the coalition won a majority of Congress and managed to pass the legislation ignoring a landmark legislative precedent, it would be hard to argue that the constitutional judgment was in any sense

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48. Monaghan, *supra* note 42, at 749.

49. *Id.* at 750 (quoting H. Jefferson Powell, *Parchment Matters: A Meditation on the Constitution as Text*, 71 IOWA L. REV. 1427, 1433 (1984)).

50. 347 U.S. 483 (1954).

51. *See, e.g.*, BORK, *supra* note 14, at 155; SCALIA, *supra* note 14, at 139 ("The demand that originalists alone 'be true to their lights' and forswear *stare decisis* is essentially a demand that they alone render their methodology so disruptive of the established state of things that it will be useful only as an academic exercise and not as a workable prescription for judicial governance.").

a "governmental norm[] that ha[d] achieved unsurpassed importance in American society."[52]

This argument only goes so far. It is possible that a constitutional issue could arise during a session of Congress that was not discussed during the previous election season. In that case, there could be a surprise change in a fundamental constitutional judgment. The opportunity to overturn a surprise change after an intervening election, however, ameliorates the potential harm. The people get to have a say on the matter shortly after the surprise occurs, whereas the Court's decisions are not as subject to popular reaction or correction due to lifetime tenure and other obvious institutional features. If those favoring a return to the status quo ante are unable to muster the political pressure to overturn the surprise change, it is doubtful that the old constitutional norm was truly fundamental. The relative trauma of a dramatic constitutional change is more easily tempered in the congressional context.

Monaghan's legitimacy rationale for stare decisis is thus largely inapplicable in the legislative context, although there are other reasons why it might be wise for Congress to refrain from disturbing a fundamental constitutional norm.[53] Moreover, note that Monaghan's rationale says nothing about constitutional judgments that are too recent to be considered fundamental. As regards the system legitimacy argument, a newly elected Republican majority in 2013 would have no obligation to respect the constitutional judgment of the 111th Congress when it passed the healthcare reform bill. The relevance of the system legitimacy argument to congressional constitutional interpretation is thus quite limited.[54]

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52. Monaghan, *supra* note 42, at 749.

53. *See infra* Part II.C, E.

54. Although changing a fundamental constitutional judgment might not affect the institutional legitimacy of Congress, it could—and probably would—affect how the electorate views the political party that altered the constitutional landscape. It is very likely that, as a practical matter, this political factor will be part of Congress's decision. Few things, however, could be more antithetical to originalism than permitting political self-interest to dictate a constitutional result, *see* Alicea, *An Originalist Congress*, *supra* note 27, at 43–44, and because this Note assumes an originalist legislator who takes originalist constitutional interpretation seriously, I do not dwell on this significant political influence. The reader may

C. Predictability and Reliance

One of the most oft-repeated rationales for stare decisis is the need for the law to be predictable so people can plan their affairs: "[P]eople should be able to predict the legal consequences of their actions. Such predictability can only be obtained if judges can be expected to follow precedent in making their decisions."[55] As a corollary to this line of reasoning, it is contended that to depart from precedent is unfair to those who relied on the state of the law remaining fixed.[56] Stare decisis helps minimize detrimental reliance on the law.

Katyal and Maltz disagree about whether the predictability argument makes sense, but ultimately the argument has force for an originalist Congress. Katyal convincingly argues that this virtue of stare decisis would translate into congressional constitutional interpretation. He points to the interaction of constitutional law and practical decisions in society:

> The Takings Clause, for example, is a powerful inducement for investment and capital formation. The First Amendment helps ensure that people will become journalists. Judicial precedents have obvious force in securing these rights, but adherence to legislative precedent may also help contribute to stability in both the corporate and individual sectors.[57]

At the same time, Katyal qualifies the value of legislative stare decisis by noting that "predictability may be elusive" because of the many issues Congress addresses and the innumerable variations of fact patterns.[58] This latter point does not seem like a particularly strong argument from Katyal because the same could be said of virtually any institution setting precedents. Even the Court, with its ability to limit its

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object that I assumed the compatibility of originalism and precedent based largely on political realities, *see supra* note 14 and accompanying text, but I made that assumption as a matter of brute fact in order to bypass the debate about reconciling originalism and precedent. I did not argue—and do not argue—that it is *legitimate* for Congress to accept the value of precedent in order to curry political advantage or avoid political liabilities.

55. Maltz, *supra* note 44, at 368.

56. *See id.*

57. Katyal, *supra* note 23, at 187.

58. *Id.* at 186–87.

docket, will nonetheless find itself confronted with myriad scenarios that do not nicely conform to a stated precedential principle.[59] The inability to account for all future applications of a precedent is hardly an argument against the value of precedent as much as it is an acknowledgment of the variety of human affairs. The solution is to work by analogy and hope that the precedents provide sufficient guidance.[60]

Maltz is skeptical of the predictability argument in general. He argues that "the difficulty with [the] argument is that it relates to the *timing* of change in law rather than the fact of change itself."[61] Under this reasoning, "the remedy is not to require that the unjust precedent remain intact, but rather to make the announcement of a new rule *entirely* prospective—a practice which, although rare, is not unknown."[62] Maltz believes that if institutions make their constitutional judgments apply prospectively when they depart from precedent, it greatly reduces the harms of detrimental reliance.

Maltz is correct in that his solution deals with many of the harms of detrimental reliance; it would not, however, solve the problem of individuals who engaged in long-term investments based on the law. His argument misses the larger point—that is, the problem of uncertainty created by frequent changes in the law. A climate of uncertainty is problematic economically and as a matter of vindicating individual rights.[63] Prospective application does nothing to cure these ailments. In a legislative context, where changes in the law would tend to be prospective,[64] the problem of uncertainty remains. Indeed, because of the vast amounts of legislation

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59. The Court's difficulty formulating a test for obscenity is a well-known example of this problem. *See* Miller v. California, 413 U.S. 15, 37–39 (1973) (Douglas, J., dissenting).

60. According to Hart, precedents and statutory framework will usually provide clear guidance. *See* HART, *supra* note 40, at 124.

61. Maltz, *supra* note 44, at 368.

62. *Id.* at 369.

63. *See* Katyal, *supra* note 23, at 187.

64. This might be part of the basis for the canon of construction that statutes are not held to be retroactive unless they explicitly say so. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

and wide areas of life that Congress attends to every year,[65] frequent changes in congressional constitutional judgments could have a greater unpredictability effect as compared with the modest Supreme Court docket.[66] Congress would do well to keep in mind the need for stability and certainty in the law when deciding which constitutional judgments to reexamine.

D. Efficiency

Justice Benjamin Cardozo, arguing in favor of stare decisis as a method of conserving judicial resources, wrote that "the 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 a secure foundation of the courses laid by others who had gone before him."[67] Maltz, despite having a few reservations,[68] ultimately concedes that "the ability to rely on precedent no doubt simplifies the task of judging."[69]

One would expect the institutional distinction to be particularly relevant here. It is axiomatic that Congress has far greater resources at its disposal than the Court does, and therefore it seems that concerns about efficiency are not as acute in the legislative context. But this conclusion does not take into consideration the innumerable programs, policies, and appropriations that Congress oversees—all of which would have to be reexamined for conformity with originalism if respect for precedent were absent. The reason for this is that Congress does not have a limited docket, as the Court does. Instead, Congress is supervising, authorizing, and funding policies all the time. In addition, whereas only five votes are necessary to

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65. Lisa Lerner & Laura Litvan, *No Congress Since '60s Makes as Much Law as 111th Affecting Most Americans*, BLOOMBERG, Dec. 22, 2010, http://www.bloomberg.com/news/2010-12-22/no-congress-since-1960s-makes-most-laws-for-americans-as-111th.html.

66. Henry T. Scott, Note, *Burkean Minimalism and the Roberts Court's Docket*, 6 GEO. J.L. & PUB. POL'Y 753, 753–55 (2008) (discussing the relatively light caseload of the Roberts Court).

67. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921).

68. Maltz, *supra* note 44, at 370.

69. *Id.*

secure a constitutional judgment at the Court, hundreds of legislators must agree before a congressional judgment is made. No Congress, no matter how well-staffed, could possibly handle the task of reexamining the constitutionality of each of these policies and programs.[70]

For an originalist Congress, the scale of the problem would be even greater. Doing originalism well requires a great deal of work, so much so that one of the principal criticisms of originalist jurisprudence is that it is more of a historian's art than a lawyer's.[71] True, a mini-cottage industry has sprung up to research the original meaning of constitutional provisions,[72] but a great many areas of the Constitution that originalist scholars have left unexplored could feature prominently in originalist congressional constitutional interpretation.[73] All of these would require extensive research and analysis, consuming an enormous amount of resources in the process. Congress would be paralyzed by its efforts to take originalism seriously.

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70. Some have noted that Congress is often overwhelmed enough as it is. United States v. Locke, 471 U.S. 84, 118–19 (1985) (Stevens, J., dissenting) ("Congress is too busy to do all of its work as carefully as it should.").

71. *See* Stephen Breyer, *Making Our Democracy Work: The Yale Lectures*, 120 YALE L.J. 1999, 2013 (2011) ("In one typical case, for example, the historical approach would have had us decide how the Ex Post Facto Clause applied to a modern circumstance by examining a late eighteenth-century American judge's views about what a mid-eighteenth-century English treatise writer (Blackstone) thought about a seventeenth-century parliamentary trial of an English bishop. The truth of the matter is, in my opinion, that none of us could be certain how to answer this historical question. If history is determinative, the Court should be made up of nine historians, not nine judges—though I suspect that even nine historians would have disagreed in the Ex Post Facto Clause case.").

72. *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 650 (1999) ("[T]he past fifteen years has yielded a boon tide of originalist scholarship that has established the original meanings of several clauses that had previously been shrouded in mystery primarily for want of serious inquiry.").

73. For instance, there has been virtually no scholarship on the original meaning of the excise taxation power in art. I, sec. 8, cl. 1. Yet several important programs employ excise taxes, including the original Social Security Act of 1935. *See* Joel Alicea, *Obamacare and the Excise Tax*, NAT'L REV. ONLINE, Sept. 1, 2010, http://www.nationalreview.com/articles/245270/obamacare-and-excise-tax-joel-alicea. The only article to consider the original meaning of the tax in depth remains a short, non-academic publication. *See id.*

If Congress is to perform its day-to-day tasks, it must assume the constitutionality of the majority of the programs and policies it previously approved and currently oversees. This can only be accomplished by adhering to precedent in those cases. It is critically important to stress that this does not mean Congress should give a free pass to all programs and policies; there will surely be major areas of the government that merit constitutional reexamination. Congress should carefully select which areas are most important and prioritize investigating their constitutionality over the lesser policies that must be presumed constitutional—at least for the moment—if the legislature is to function. "Most important" might mean those programs that are most ideologically objectionable to the party in power, those that are most expensive, those that most clearly stray from original meaning, or those that set a dangerous nonoriginalist precedent for future Congresses. There are many factors that might determine which programs merit closer constitutional scrutiny, but Congress must be selective or risk being overwhelmed by its own good intentions.

Nor does this conclusion mean that Congress would be abandoning the default rule that the original meaning is to be favored over precedent. Rather, it simply would be recognizing the reality of limited resources, which is a compelling reason to decline to follow the original meaning. As Justice Scalia would say, Congress would not be making stare decisis its originalist philosophy; it would be making "a pragmatic *exception*" *to* that philosophy.[74]

E. Tradition and Intellectual Humility

The final set of justifications for stare decisis present related arguments stemming from the thought of Edmund Burke. Katyal ascribes one these arguments to Anthony Kronman, describing the argument this way: "The past should be respected for its own sake, for fidelity to tradition is part of what sets humans apart from other beings as cultural entities."[75] For Burke, who we are is,

74. SCALIA, *supra* note 14, at 140.

75. Katyal, *supra* note 23, at 186.

in a very real sense, the product of what our forebears bequeathed to us and what we pass on to our descendants. The past is constitutive of the present. That is what makes society "a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born."[76] Once one recognizes the importance of tradition, a related argument comes into focus, one of intellectual humility:

> We are afraid to put men to live and trade each on his own private stock of reason, because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages.[77]

These two arguments suggest that constitutional interpreters ought to be wary of overthrowing settled judgments. Not only would they be abandoning the past that informs their present, but they also might be striking out in a new direction untried by experience, something that always requires caution.

Katyal contends that the argument from tradition "applies equally to the judicial and legislative sectors."[78] For Katyal:

> When Congress takes up [a question of constitutional interpretation], it does so within a cultural-legal tradition. To break away and ignore what has come before slights our commitment to this tradition, and places us in a world divorced from context. . . . For Congress to approach these questions with the arrogance of a philosopher is not only foolish, it ignores our identity as humans.[79]

One might argue that the same holds true for Burke's counsel of intellectual humility. Congress ought not venture out into unchartered constitutional waters without pausing to reflect on the danger that those turbulent seas pose to the ship of state. Respect for tradition and intellectual humility would seem to apply irrespective of branch.

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76. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 85 (J.G.A. Pocock ed., Hackett Publishing Co. 1987) (1790).

77. *Id.* at 76.

78. Katyal, *supra* note 23, at 187.

79. *Id.*

All of this is true as far as it goes, but there is a significant qualifier to such a conclusion: Burke respected tradition only if it could truly be called tradition. A decade-old constitutional precedent does not a tradition make. Burke explained this in a marvelous passage in *Reflections on the Revolution in France*: "[W]e cherish [our prejudices] because they are prejudices; and the longer they have lasted the more generally they have prevailed, the more we cherish them."[80] Burke indicates that only those ideas or practices that have stood the test of time and that have gained widespread acceptance merit the kind of respect due to a real tradition.[81] It is likely that few constitutional precedents would meet those criteria. Some might be long-lasting but have been controversial for much of their existence, while others may be relatively recent but have quickly become part of the national constitutional fabric. For purposes of congressional constitutional interpretation, it is important to recognize that although Congress ought to respect tradition for its own sake, not all constitutional precedents qualify for that respect.

Similarly, although intellectual humility counsels against embarking on newfangled constitutional adventures, over-

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80. BURKE, *supra* note 76, at 76. Of course, Burke does not mean "prejudices" in the modern, pejorative sense of the word, which is tinged with animus toward minority groups. He is instead referring to a society's common perceptions and received wisdom about things like human nature and the function of society.

81. One might argue that the Burkean approach introduces a great deal of arbitrariness. What, after all, makes precedent constitutive of us as a people? A similar criticism has been levied against Justice Scalia's approach to precedent, which requires deciding which precedents are widely accepted or relied upon in our constitutional fabric. *See, e.g.*, Laurence H. Tribe, *Comment*, *in* A MATTER OF INTERPRETATION, *supra* note 14, at 65, 82–83. Such criticisms are not as powerful in the congressional context, however, because of the reality of elections. If Congress determines that a constitutional judgment is not a tradition that merits Burkean deference, the People might disagree and express that disagreement at the next election. Similarly, if Congress refuses to overturn a constitutional judgment on the basis of tradition, a popular movement can form to pressure Congress into changing the constitutional norm. The People and their representatives, through the political process, will determine which constitutional judgments are constitutive of the nation. This electoral check does not exist—or at least does not exist to nearly the same degree—in the judicial context, which is why the criticism of Justice Scalia's approach to precedent has more bite in that institutional setting.

turning precedent does not necessarily mean one is striking out on a novel constitutional course. There are many examples of current constitutional precedents that are actually radical departures from long-held constitutional traditions, and overturning those precedents would be reverting back to what had been tradition. In such instances, there is a body of national experience with the old ways that existed before the current precedent was put into place, and Congress is in a good position to evaluate the consequences of abandoning the current precedent and restoring the old order. Intellectual humility loses much of its force in that context.

Burkean respect for tradition and the concomitant value of intellectual humility are thus equally applicable to the legislature as they are to the judiciary, but these justifications for stare decisis do not apply equally across the plane of precedent. A more nuanced view is required.

CONCLUSION

Stare decisis, understood as an "obligation to follow precedent," is a default rule.[82] By now it should be clear that the idea of stare decisis, properly understood, does not apply in an originalist congressional constitutional context. As with originalism generally, the default rule in Congress would be against precedent where it conflicts with the original meaning. The analysis above identifies several reasons why an originalist Congress ought to respect precedents in certain situations, but it does not change the presumption in favor of original meaning. Rather, it provides reasons to depart from the original meaning with regard to certain precedents.

Although the Court might, for reasons of institutional legitimacy, be wise to avoid overturning constitutional judgments that have become entrenched norms within the society, the legitimacy argument applies weakly in the congressional context. The disruptive effects of overturning such precedents are far less serious for Congress because of the political accountability that comes with elections.

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82. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

That does not mean that Congress should go about reexamining all precedents that do not conform to the original meaning. The scale of such a project makes it unrealistic, and Congress would have to assume the constitutionality of many programs and policies to function. But this is a rule of prudence; Congress still would be free to reexamine any precedent it wished to so long as it does not overwhelm its own capacity. The efficiency argument thus does not present a general rule in favor of precedent; rather, it counsels against being overly ambitious in the legislative quest to restore original meaning.

The same can be said of the need to avoid frequent changes in the law. Uncertainty in the legal regime is undesirable for a number of reasons, but this does not mean that Congress cannot change many constitutional precedents and still maintain a relatively stable legal landscape. The argument indicates the need to select appropriate precedents to reexamine so as not to throw the legal system into chaos; it does not provide a reason to defer to precedent generally.

Finally, Burkean respect for tradition counsels against overturning precedents that are constitutive of our constitutional inheritance, but few precedents can be said to have achieved that exalted status. Likewise, the intellectual humility argument loses much of its force where overturning a precedent would return the country to an earlier constitutional order. This might be the case with a great many of the precedents that conflict with original meaning because the original meaning arguably governed for much of the country's history.[83]

The result, then, is that although an originalist Congress might feel more constrained to tackle the constitutional precedents that have become constitutive of who we are as a people,

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83. Antonin Scalia, *Foreword*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 43 (Steven G. Calabresi ed., 2007) (describing originalism as the once "dominant mode of interpretation in the courts"). I have argued elsewhere that it is probably incorrect to equate modern originalism with the originalism of the nineteenth century, *see* Alicea, *An Originalist Congress*, *supra* note 27, at 38–40, but Justice Scalia is likely correct in saying that some version of the original meaning was the dominant constitutional tradition for much of the nation's history.

nothing in the nature of constitutionalism prevents it from reexamining most constitutional decisions. The only caveat is that prudential concerns, such as efficiency and predictability, argue in favor of a slower, more cautious approach to reevaluating constitutional judgments. The default rule for an originalist Congress remains adherence to the original meaning, but perhaps Senator Lee's pledge not to vote "for a single piece of legislation that [he] can't reconcile with the text and the original understanding of the U.S. Constitution"[84] is a bit too strong. Subtle differences among constitutional precedents require different approaches to reexamination in light of the original meaning, and Congress would do well to heed such distinctions. In this way, the vision of originalism for congressional constitutional interpretation takes its cue from Burke, who described in brilliant prose a system that is

> never old or middle-aged or young, but, in a condition of unchangeable constancy, moves on through the varied tenor of perpetual decay, fall, renovation, and progression. Thus, by preserving the method of nature in the conduct of the state, in what we improve we are never wholly new; in what we retain, we are never wholly obsolete.[85]

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84. Mike Lee, U.S. Senator-Elect, Address at the 2010 Federalist Society National Lawyers Convention (Nov. 19, 2010), (audio/video available at http://www.fedsoc.org/publications/pubid.2020/pub_detail.asp).

85. BURKE, *supra* note 76, at 30.