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Congressional Originalism

Amy Coney Barrett
Notre Dame Law School, abarrett@nd.edu

John Copeland` Nagle
Notre Dame Law School, jnagle1@nd.edu

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ARTICLES

CONGRESSIONAL ORIGINALISM

Amy Coney Barrett[*]
John Copeland Nagle[**]

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INTRODUCTION

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

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* Diane and M.O. Miller, II Research Chair in Law & Professor of Law, Notre Dame Law School.

** John N. Matthews Professor, Notre Dame Law School. We are grateful to Nick Barber, A.J. Bellia, Barry Cushman, Oran Doyle, Richard Ekins, Michael Gerhardt, Abner Greene, Tara Grove, Bill Kelley, Randy Kozel, Kurt Lash, Mike Paulsen, Adam Perry, Jeff Pojanowski, Steve Sachs, and Adam Tucker for comments offered on an earlier draft. Thanks also to Jessica Ettinger, Jon Heintz, and Mike LeFevour for excellent research assistance.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I. ORIGINALISM IN CONGRESS

A. *Originalism as a Theory of Law*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 Berman and Toh characterize this as the mainstream neo-originalist position. Berman & Toh, *supra* note 9, at 574–75. Not all originalists, however, embrace it. Gary Lawson takes no position on it. *See* Lawson, *supra* note 9 (declining to express a view about whether historical meaning binds judges). Moreover, John McGinnis and Michael Rappaport disclaim it. McGinnis and Rappaport do not insist that interpreters should follow the original public meaning because it is the law; rather, their argument for originalism is consequentialist. *See* John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693 (2010) (arguing for originalism on the ground the supermajoritarian process of constitution-making is likely to generate good constitutional law); Berman & Toh, *supra* note 9, at 561 (claiming that McGinnis and Rappaport present their argument for originalism as a theory of adjudication rather than a theory of law); Mike Rappaport, *Should We Follow the Original Meaning Because It Is the Law?*, ORIGINALISM BLOG (Oct. 24, 2013, 7:59 AM), http://originalismblog.typepad.com/the-originalism-blog/2013/10/in-response-to-my-priorposton-my-new-book-with-john-mcginnis originalism-and-the-good-constitution-a-commentator-takes-iss.html (expressing doubt that the Constitution's original meaning is "the law"). McGinnis and Rappaport extend this consequentialist argument to legislators, who, like judges, should adhere to the original public meaning not because it is "the law," but because doing so yields desirable results. *See* McGinnis & Rappaport, *supra*, at 1697-98 (asserting that the Constitution's supermajoritarian nature "requires interpreters to choose the meaning that gained consensus among the Constitution's enactors"); *id.* at 1741 n.138 (specifically including legislatures in that universe of interpreters because legislatures have a "duty to . . . determine the Constitution's meaning."); Mike Rappaport, *Berman and Toh on the New and Old Originalism: Part II—McGinnis and Rappaport*, ORIGINALISM BLOG (Dec. 10, 2013, 8:02 AM), http://originalismblog.typepad.com/the-originalism-blog/2013/12/berman-and-toh-on-the-new-and-old-originalism-part-ii-mcginnis-and-rappaport.html ("The normatively [sic] desirability of the Constitution is not intended as a constraint on judges only or principally, but on all actors.").

16 Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 552 (1994) (emphasis added).

17 *See, e.g.*, Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMM. 291, 292–93 (2007) (claiming that the Constitution's original meaning is "binding law"); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1130 (2003) ("The meaning of the words and phrases of the Constitution *as law* is necessarily fixed as against private assignments of meaning") (emphasis added); Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 360–61 (1988) (asserting that constitutional interpretation aims to determine "what consistent, coherent *rules of law* our forefathers laid down for the governance of those elected to rule over us") (emphasis added); *Original Intent and a Living Constitution* (C-Span television broadcast Mar. 23, 2010) 15:43 to 18:08, http://ww.c-spanvideo.org/program/292678-1 (remarks of Justice Scalia) ("The validity of government depends upon the consent of the governed . . . [s]o what the people agreed to when they adopted the Constitution . . . is what ought to govern us."); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 111 (1999) ("[O]riginalism both enforces the *authoritative* decision of the people acting as sovereign and, equally important, preserves the possibility of simi-

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

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

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

B. *Originalism in Congress*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27 *See supra* note 25.

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

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

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

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29 *Id.* at 130.

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

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

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

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

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

II. ORIGINALISM AND THE CHALLENGE OF SUPER PRECEDENT

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

A. *Super Precedent*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Originalists have responded to this critique in a variety of ways. Some have bitten the bullet, maintaining that a Justice must remain true to the text regardless of the consequences.[47] Others have tried to reconcile originalism and stare decisis, either by explaining why some important precedents thought to be at odds with the text are actually consistent with it[48] or by offering a general theory about why original-

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

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

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

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

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

A. *Judicial Agenda Control*

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

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

49 *See, e.g.*, Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1473–77 (2007) (maintaining that "a popular sovereignty-based originalist" can follow at least some erroneous precedents without sacrificing her normative commitment to popular sovereignty); Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 2–3 (2011) (arguing that an originalist interpretation of the Constitution can accommodate the doctrine of stare decisis). The problem of stare decisis is conceptually easier for those who justify originalism on consequentialist grounds because following precedent rather than original meaning does not involve setting "the law" aside. The consequences of overruling deeply rooted precedent simply provide an exception to the general rule that the benefits of following the original public meaning outweigh the costs. *See* John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 836–37 (2009) (arguing that an originalist should follow nonoriginalist precedent rather than overrule it when, *inter alia*, the costs of overruling would be borderline catastrophic—as they would be with respect to paper money—or when the principles would be supported by constitutional amendment in the absence of the cases—as they would be with respect to race and gender discrimination). For those who accept the proposition that the original meaning constitutes the law, a particularly promising justification for choosing to follow precedent that conflicts with the original public meaning is that the Constitution itself authorizes courts to do so. *See* Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 861–64 (2015) (asserting that if the doctrine of stare decisis "was part of the law at the Founding," it might legitimately authorize or even require us to treat some unauthorized departures from precedent "*as if* the Court's opinion correctly states the law"). Whether the original Constitution incorporates this strong form of stare decisis, however, is an as-yet-unexplored historical question.

50 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989). Joel Alicea flags the problem that precedent can pose for a legislative originalist and posits that Congress could follow Justice Scalia in making a pragmatic exception to originalism. Alicea, *An Originalist Congress?*, *supra* note 22; *see also* Alicea, *Questioning The Eminent Tribunal*, NATIONAL REVIEW ONLINE (Oct. 24, 2011), http://www.nationalreview.com/node/281116 (opining that originalism carries "real political liabilities for a member of the political branches" but that "[a] great many of these liabilities can be alleviated by 'adulterat[ing]' one's theory of originalism with a respect for precedent, as Justice Antonin Scalia once put it . . . .").

51 *See* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1730 (2013) ("[O]ther features of the federal judicial system, working together, do more than the constraint of horizontal stare decisis to keep the Court's case law stable.").

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

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

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

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

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

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

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

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

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

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

56 367 U.S. 643, 673–74 (1961).

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

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

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

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

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

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

60 *See* Citizens United v. FEC, 130 S. Ct. 876, 919–20 (2010) (Roberts, C.J., concurring) (asserting that the Court had not considered whether to overrule precedent in other corporate speech cases because "[n]ot a single party in any of those cases asked [it] to" and "the Court generally does not consider constitutional arguments that have not properly been raised") (citation omitted); SUP. CT. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

61 The Court will grant a petition for certiorari if four justices favor doing so. *See* Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975, 981 (1957) (discussing the origins of the "rule of four").

62 *See, e.g.*, United States v. Texas, No. 15-674, 2016 U.S. LEXIS 841 (U.S. Jan. 19, 2016) (granting certiorari and directing the parties to address the additional question of whether federal immigration law guidance violates the Take Care Clause); Citizens United v. FEC, 129 S. Ct. 2893, 2893 (2009) (requesting supplemental briefing on whether the Court should overrule two of its prior precedents); Montejo v. Louisiana, 556 U.S. 778, 792, 797 (2009) (overruling Michigan v. Jackson, 475 U.S. 625 (1986), after calling for supplemental briefing on the question whether it should be overruled); Payne v. Tennessee, 498 U.S. 1076 (1991) (ordering supplemental briefing on the question whether two controlling precedents should be overruled).

63 *See, e.g.*, *Citizens United*, 558 U.S. at 396 (Stevens, J., dissenting) (asserting that ordering the parties to address whether precedent should be overruled is "unusual and inadvisable for a court"). *See generally* Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665 (2012) (describing the controversial nature of the practice). The number of Justices required to order briefing or argument on a question not raised by the parties appears to be a matter of internal practice, for it is not addressed by the Supreme Court Rules. Given that the practice is controversial, it is unlikely that it could be done without the support of a majority.

64 *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962) (commending the techniques that the Court employs to avoid unnecessarily deciding constitutional questions); Alexander M. Bickel, *The Supreme*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. SUPER PRECEDENT IN CONGRESS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. *The Oath*

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

While the oath to "support . . . the Constitution" implicates matters other than constitutional interpretation,[90] it is widely understood

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

89 5 U.S.C. § 3331 (2016).

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

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

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

91 Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587 (1975); *see also* Paulsen, *supra* note 80, at 260 ("Can one 'support' the Constitution and simultaneously abet what one considers to be a violation of *any* of its provisions?"). For affirmations of this duty from legislators themselves, see, e.g., 159 CONG. REC. S6771 (daily ed. Sept. 24, 2013) (statement of Sen. Lee) ("We, as Senators of the United States, having taken an oath under article VI of the Constitution to uphold the Constitution of the United States, are never excused from our responsibility to look out for, protect, and defend the Constitution of the United States."); 81 CONG. REC. app. 378–79 (1937) (extension of remarks of Sen. Alva B. Adams, reprinting radio address of Sen. Royal S. Copeland) (arguing that "since all members of Congress likewise take an oath to support the Constitution, they must, when a proposed law is before them, decide whether they have the constitutional power to pass the legislation").

92 William Baude maintains that the President can sign a new law that he knows, or believes, is unconstitutional without violating his oath to support and defend the Constitution. *See* William Baude, *Signing Unconstitutional Laws*, 86 IND. L.J. 303, 304–05 (2011). Baude argues that "[t]here is simply no constitutional provision, and no plausible interpretation of the President's oath, that flatly forbids signing unconstitutional bills into law." *Id.* at 304–05. His argument is not limited to the situation in which the constitutional flaw inheres in precedent conflicting with the text; it is a broader one about the President's duty to uphold the Constitution. Baude contrasts the constitutional harm resulting from signing a law containing an unconstitutional provision with "the President's broad duty to enforce the Constitution," which "frequently *requires* him to help pass legislation—especially in the national-security and individual-rights contexts." *Id.* at 305. Faced with a bill that both violates and enforces the Constitution, Baude suggests that the President enjoys the discretion to determine the proper course. We are not so sure. But because different considerations shape the President's duty—for example, his oath is differently worded and his role in the legislative process is different—we do not address Baude's argument in our discussion of the implications of the oath for a Member of Congress.

93 *See* Nat'l Endowment for Arts v. Finley, 524 U.S. 569, 605 n.3 (1998) (Souter, J., dissenting) ("[m]embers of Congress must take an oath or affirmation to support the Constitution . . . and we should presume in every case that Congress believed its statute to be consistent with the constitutional commands."); Edward v. Aguillard, 482 U.S. 578, 610–11 (1987) (Scalia, J., dissenting) (noting that each of the state legislators who had passed a law "had sworn to support the Constitution").

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

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

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

B. Precedent and the Oath

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

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

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

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

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

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

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

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

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

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

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

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

Precedent established by the political branches does not implicate judicial supremacy, but it presents a variation of the same problem.[101] Consider another discussion of the relationship between precedent and the oath, this one also involving the Bank of the United States. While Representative James Madison argued in 1791 that the Bank was unconstitutional, President James Madison signed a bill creating the Second Bank of the United States in 1816.[102] Reflecting later on his decision and criticizing Jackson's, Madison insisted that it is consistent with the oath for an office holder to act in accordance with settled precedent rather than with the office holder's own understanding of the Constitution. (The precedent on which Madison himself relied in 1816 was political, for *McCulloch v. Maryland* was not decided until 1819.[103]) Madison wrote Pennsylvania Representative Charles Ingersoll:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. *Super Precedent and Congressional Agenda Control*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> *Waiving the question* of the constitutional authority of the Legislature to establish an incorporated bank as being precluded in my judgment by repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation . . . .[116]

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

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

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

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

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

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

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

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

While Presidents have traditionally been the focus of the fidelity versus precedent debate, members of Congress have taken similar positions. David Currie observes that throughout the nineteenth century—when, as he describes it, everyone was an originalist[121]—members

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

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

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

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

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

122 *Id.* at xiii n.7.

123 *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

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

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

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

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

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

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