

## May Congress Abrogate Stare Decisis by Statute?

*James Durling*

### INTRODUCTION

On January 3, 2017, Congressman Steve King introduced a bill that would bar federal courts, including the Supreme Court, from citing a number of the Court's decisions on the Patient Protection and Affordable Care Act<sup>1</sup> (ACA) "for the purpose of precedence [sic]."<sup>2</sup> The bill cites Article 3, Section 2 of the Constitution, which allows Congress to restrict the Court's appellate jurisdiction,<sup>3</sup> as legal justification for Congress's power to regulate rules of precedent.<sup>4</sup> Not surprisingly, media commentators quickly questioned the bill's constitutionality.<sup>5</sup> What these early news stories overlooked, however, is that King's

- 
1. Pub. L. No. 111-148, 124 Stat. 119 (2010).
  2. See H.R. 177, 115th Cong. (2017); see also Press Release, Steve King, King Introduces Bill to Prohibit Supreme Court from Citing Obamacare (Jan. 3, 2017), <http://steveking.house.gov/media-center/press-releases/king-introduces-bill-to-prohibit-supreme-court-from-citing-obamacare> [<http://perma.cc/HQQ9-LL3F>].
  3. See U.S. CONST. art. III, § 2. Scholars have previously considered a closely related question of whether stripping the Supreme Court of its appellate jurisdiction over some cases would eliminate the binding precedential effect of its decisions in that area. Compare, e.g., Paul M. Bator, *Withdrawing Jurisdiction from Federal Courts*, 7 HARV. J.L. & PUB. POL'Y 31, 33 (1984) (considering whether *Roe v. Wade*, 410 U.S. 113 (1973), would remain binding precedent if the Court's ability to review state court decisions with respect to *Roe* were removed), with, e.g., Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 258-59 n.170 (1985) (explaining why Supreme Court opinions can cease to be viewed as binding precedent).
  4. See H.R. 177, 115th Cong. (2017).
  5. See, e.g., Editorial, *King Tells the Supreme Court How To Do Its Job*, DES MOINES REG. (Jan. 9, 2017, 5:30 PM), <http://www.desmoinesregister.com/story/opinion/editorials/2017/01>

proposal does not raise a novel legal question. On the contrary, over a decade ago, Michael Paulsen published an article in the *Yale Law Journal* arguing that Congress could do exactly what the bill proposes.<sup>6</sup> Over the ensuing years, scholars have debated Paulsen's argument, without resolving the core question posed by his article.<sup>7</sup>

King's bill gives us an opportunity to reconsider this debate. Previous studies have taken one of two different approaches to congressional power in this area: either Congress has the power to change rules of precedent or it does not. But in focusing on constitutional precedents, like *Roe v. Wade*<sup>8</sup> and *Planned Parenthood v. Casey*,<sup>9</sup> these past discussions have generally assumed that Congress has the same authority over constitutional and statutory precedent. King's bill, however, pushes us to move beyond this false equivalence. By referencing both constitutional cases, like *National Federation of Independent Businesses v. Sebelius*,<sup>10</sup> and statutory cases, like *King v. Burwell*<sup>11</sup> and *Burwell v. Hobby Lobby Stores, Inc.*,<sup>12</sup> the bill illustrates a gap in the literature. In short, Congress's authority over stare decisis in statutory cases may differ from its authority in constitutional ones.<sup>13</sup>

---

/09/editorial-king-tells-supreme-court-how-do-its-job/96352340 [http://perma.cc/MMV8-8ALG]; Elie Mystal, *Rep. Steve King Proposes Bill To Prevent Supreme Court from Citing Its Own Precedent*, ABOVE THE LAW (Jan. 4, 2017, 12:28 PM), <http://abovethelaw.com/2017/01/rep-steve-king-proposes-bill-to-prevent-supreme-court-from-citing-its-own-precedent> [http://perma.cc/79FQ-LWYP]; Eugene Volokh, *Republican Congressman Trying To Undermine Hobby Lobby Decision — and it Just Gets Weirder*, WASH. POST (Jan. 4, 2017), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/04/republican-congressman-trying-to-undermine-hobby-lobby-decision-and-it-just-gets-weirder> [http://perma.cc/B6ZP-HPUC].

6. See Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey*, 109 YALE L.J. 1535 (2000).
7. Compare, e.g., John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503, 504 n.7 (2000) (agreeing with Paulsen), with, e.g., Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001) (disagreeing with Paulsen); Thomas Healy, *Stare Decisis and the Constitution: Four Questions and Answers*, 83 NOTRE DAME L. REV. 1173, 1196-1207 (2008) (same); Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-making*, 18 CONST. COMM. 191 (2001) (same).
8. 410 U.S. 113 (1973).
9. 505 U.S. 833 (1992).
10. 132 S. Ct. 2566 (2012).
11. 135 S. Ct. 2480 (2015).
12. 134 S. Ct. 2751 (2014).
13. Nicholas Rosenkranz has briefly argued that Congress "could . . . do away with . . . stare decisis in statutory cases" by prescribing an interpretive rule: "The United States Code shall be interpreted de novo in each case." See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2125 (2002). But Rosenkranz's

Thinking about Congress’s power over the rules of precedent—and specifically, distinguishing its power in statutory cases from its power in constitutional ones—also gives us insight into other attempts to regulate judicial interpretation. For example, in early 2016, Republicans in Congress introduced the “Separation of Powers Restoration Act” (SPRA), a bill that would eliminate *Chevron*<sup>14</sup> and *Auer*<sup>15</sup> deference to agency interpretations of statutes and regulations.<sup>16</sup> The SPRA passed the House in July 2016,<sup>17</sup> and House Republicans quickly reintroduced and passed the bill in the most recent session of Congress.<sup>18</sup> As *Chevron* and *Auer* deference do not implicate questions of constitutional interpretation, the SPRA, like some provisions of King’s bill, may prove more amenable to judicial review.<sup>19</sup> And although the SPRA, as currently drafted, does not prohibit courts from citing *Chevron* and *Auer* for “purpose of precedent,” it is not difficult to imagine Congress taking that next step—especially if courts resist the clear purpose of the SPRA to eliminate judicial deference to administrative agencies.<sup>20</sup> Past scholars have argued that the Supreme Court

---

rule neither addresses whether Congress can target specific statutory precedents nor considers whether such a rule would abrogate both the statutory and the methodological stare decisis effect of the decision. See *infra* notes 79-81 and accompanying text (distinguishing statutory from methodological stare decisis). Similarly, although Rosenkranz argues that Congress “probably” cannot eliminate “[v]ertical stare decisis,” see Rosenkranz, *supra*, at 212 n.167, this Essay argues that Congress does have such a power. When a statute directly abrogates the precedential effect of a Supreme Court decision, lower courts need no longer follow it. See *infra* notes 81-86 and accompanying text. Likewise, Thomas Healy has conceded that “it is conceivable that a statute abrogating stare decisis in statutory cases could be seen simply as a redefinition of the substantive law” and thus be constitutionally permissible. Healy, *supra* note 7, at 1198 n.138. But he does not elaborate on whether Congress has power over judicial interpretation.

14. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).
15. *Auer v. Robbins*, 519 U.S. 452 (1997).
16. See H.R. 4768, 114th Cong. (2016); S. 2724, 114th Cong. (2016).
17. See Brent Owens, *US Congress Considers Law That Would Overturn Chevron Deference*, FRESH LAW BLOG (Aug. 11, 2016), <http://www.freshlawblog.com/2016/08/11/us-congress-considers-law-that-would-overturn-chevron-deference> [<http://perma.cc/6NGX-SYBX>].
18. See H.R. 5, 115th Cong. (2017); see also Michael Macagnone, *House Passes Bill Ending Chevron Deference*, LAW360 (Jan. 11, 2017, 8:55 PM), <http://www.law360.com/articles/879235/house-passes-bill-ending-chevron-deference> [<http://perma.cc/3DBJ-UDG2>].
19. See *infra* notes 88-91 (discussing Congress’s less defined power over constitutional interpretation).
20. Whether repealing *Chevron* and *Auer* deference even matters is a separate question. See Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1799 (2010) (arguing that *Chevron* is only one “canon” driving judicial deference to agency interpretations).

should overrule *Chevron*<sup>21</sup> or have discussed Congress's proposed legislation,<sup>22</sup> but they have not considered whether Congress actually has the power to abrogate *Chevron* as a methodological precedent.

Despite the limited scholarly discussion, Congress's power to abrogate substantive stare decisis—the narrow holding on the meaning of the statutory provision—and methodological stare decisis—the broader methodological approach to an interpretive question—could be quite important.<sup>23</sup> Past studies have shown that courts often construe congressional overrides of judicial interpretations narrowly. As a result, courts frequently follow substantive or methodological stare decisis stemming from these “shadow precedents” in opposition to congressional intent.<sup>24</sup> These articles have considered ways in which Congress might limit shadow precedents—by drafting override laws more precisely in order to abrogate a decision's methodology<sup>25</sup>—and they have argued that courts should exercise restraint in following stare decisis in statutory cases when Congress has overridden the previous judicial decision.<sup>26</sup> But none of

- 
21. See, e.g., Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 841-43 (2010); Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1205-13 (2016).
  22. See Andrew Hessick, *Legislative Efforts to Overturn Chevron*, YALE J. ON REG.: NOTICE & COMMENT (Mar. 19, 2016), <http://yalejreg.com/nc/legislative-efforts-to-overturn-chevron-by-andy-hessick> [<http://perma.cc/B9C4-G39W>].
  23. Admittedly, it is unclear how often courts follow methodological stare decisis. See, e.g., Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation*, 119 YALE L.J. 1750, 1823 (2010) [hereinafter Gluck, *The States as Laboratories of Statutory Interpretation*] (noting that the Supreme Court does not appear to follow methodological stare decisis). But at a minimum, the Supreme Court appears to do so in some cases. See Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1990 n.320 (2011) [hereinafter Gluck, *Intersystemic Statutory Interpretation*] (describing *Chevron* as an example of methodological stare decisis).
  24. See, e.g., Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 887-81 (2012) [hereinafter Widiss, *Undermining Congressional Overrides*]; Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 531-34 (2009) [hereinafter Widiss, *Shadow Precedents*]. A recent article has shown that citations to decisions decline more when they are judicially overruled than when they are legislatively overridden, which might suggest that courts respond better to clear directives. See Brian J. Broughman & Deborah A. Widiss, *After the Override: An Empirical Analysis of Shadow Precedent* (Ind. Legal Stud. Research Paper No. 312, Sept. 1, 2016), <http://ssrn.com/abstract=2584048> [<http://perma.cc/Z8CX-QFMD>].
  25. See Widiss, *Shadow Precedents*, *supra* note 24, at 562-66.
  26. See James J. Brudney, *Distrust and Clarify: Appreciating Congressional Overrides*, 90 TEX. L. REV. 205 (2012); Lawrence M. Solan, *Precedent in Statutory Interpretation*, 94 N.C. L. REV. 1165, 1228-33 (2016); Widiss, *Shadow Precedents*, *supra* note 24, at 566-80.

these studies have asked the simple question of whether Congress can directly abrogate the precedential effect of statutory decisions.

Regardless of whether Paulsen is correct that Congress can abrogate *constitutional* precedent, this Essay argues that Congress has a strong claim of authority to abrogate precedent in *statutory* cases. The distinction parallels Congress's substantive lawmaking power: Congress can overrule the Supreme Court's interpretation of a statute by amending it, but it cannot overrule the Court's interpretation of the Constitution without going through the additional steps required by Article V.<sup>27</sup> Likewise, although some have proposed that Congress could legislate federal rules of statutory interpretation,<sup>28</sup> no one has argued that Congress could do so for constitutional interpretation.<sup>29</sup>

Because Congress can overrule judicial interpretations of statutes and assuming that it can prescribe how courts should interpret statutes,<sup>30</sup> why should Congress not be able to enact a law freeing courts from feeling bound by prior statutory decisions?<sup>31</sup> Admittedly, distinguishing Congress's power over stare decisis in statutory cases from its power in constitutional cases does not resolve the question entirely: we still do not know whether Congress can abrogate constitutional precedents. But by distinguishing these statutory and constitutional cases, we at least resolve the issue in the statutory context.

This Essay proceeds in two Parts. Part I describes the previous two scholarly theories of congressional power over the rules of precedent. Part II shows why we should distinguish Congress's power over constitutional cases from its power over statutory cases and argues that Congress has a stronger claim to regulate stare decisis in the latter context. The Essay concludes by emphasizing

---

27. U.S. CONST. art. V (describing the process for amending the Constitution).

28. See Rosenkranz, *supra* note 13, at 2140-41.

29. See *infra* notes 80-84 and accompanying text.

30. Because the Court has never struck down one of Congress's interpretive rules as violating separation of powers, this is not an unrealistic assumption. See *infra* notes 69-74.

31. Like Paulsen, I assume that such a bill would only prohibit courts from feeling "bound" by prior precedent, meaning that courts could still cite the decisions for their persuasive value. See Paulsen, *supra* note 6, at 1593. Although King's bill does not clearly adopt this narrow view of abrogating precedent, this Essay will adopt such a construction under principles of constitutional avoidance. Admittedly, the notion of feeling "bound" by precedent is itself ambiguous, but it is a description accepted by others. See, e.g., Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 755 (1988). In addition, whether the Court ever feels bound by its past precedent is itself an unresolved empirical question. See Frederick Schauer, *Stare Decisis and the Selection Effect*, in PRECEDENT IN THE UNITED STATES SUPREME COURT 121-33 (Christopher J. Peters ed., 2013). But at the very least, we might think that King's bill would free lower courts to disregard the ACA decisions as binding precedent.

the importance of congressional power over stare decisis in statutory cases matters.

## I. TWO THEORIES OF CONGRESSIONAL POWER OVER THE RULES OF PRECEDENT

In essence, past scholarship has taken one of two views regarding whether Congress may alter judicial rules of precedent. Some have embraced the possibility; others have rejected it. This Essay will briefly consider each position in turn.

### A. Congressional Authority

Michael Paulsen and John Harrison are the two leading proponents of Congress's power to limit the effect of precedent.<sup>32</sup> Although their views differ on the breadth of Congress's power, they each embrace Congress's prerogative to abrogate precedent in both statutory and constitutional cases. Paulsen and Harrison begin by arguing that the Constitution does not require stare decisis—or in Paulsen's case, that stare decisis is affirmatively unconstitutional.<sup>33</sup> Instead, they note that stare decisis is a federal common law rule based on judicial policy.<sup>34</sup> Paulsen discusses the Supreme Court's opinion in *Casey* at length to illustrate this point.<sup>35</sup>

Furthermore, both Paulsen and Harrison view Article I, Section 8 of the Constitution—the “Necessary and Proper Clause” or the “Sweeping Clause”—as authorizing Congress to regulate the rules and procedures of judicial decision making.<sup>36</sup> For example, Paulsen finds additional “[p]recedents” for this power in such legislative enactments as the Rules of Decision Act, the Full Faith and Credit Act, the Anti-Injunction Act, the Federal Rules of Evidence, and the legislative abrogation of the Court's judicial standing doctrine.<sup>37</sup> Harrison and Paulsen also tie their conclusions to Congress's apparently greater power to alter the Supreme Court's appellate jurisdiction under the Necessary

---

32. See Harrison, *supra* note 7; Paulsen, *supra* note 6.

33. See Harrison, *supra* note 7, at 513-25; Paulsen, *supra* note 6, at 1543-51; see also Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2731-34 (2003) (discussing the unconstitutionality of precedent).

34. See Harrison, *supra* note 7, at 505; Paulsen, *supra* note 6, at 1543-51.

35. See Paulsen, *supra* note 6, at 1551-67.

36. See Harrison, *supra* note 7, at 532-39; Paulsen, *supra* note 6, at 1567-70.

37. See Paulsen, *supra* note 6, at 1584-89.

and Proper Clause and Article 3, Section 2—the provision cited in King’s bill.<sup>38</sup> As a subsidiary claim to their Necessary and Proper Clause arguments, they argue that Article III does not grant the courts autonomy to develop rules of stare decisis.<sup>39</sup> Accordingly, congressional action limiting stare decisis would not violate the separation of powers.

Both Paulsen and Harrison admit that Congress does not have unlimited power over judicial interpretation. Paulsen, for example, does not consider whether Congress could “[f]orbid citation to prior opinions” entirely.<sup>40</sup> Instead, he limits his argument to whether Congress can abrogate the binding effect of stare decisis.<sup>41</sup> Among other things, Paulsen’s hypothetical law would still allow judges to consider the persuasiveness of a prior opinion’s reasoning.<sup>42</sup>

As a final note, some might wonder whether the selective abrogation of stare decisis—as King’s bill would do with the ACA decisions—affects the constitutionality of his proposal. In Paulsen’s view, it would not.<sup>43</sup> Abrogating stare decisis does not impede the ability of courts to decide cases on their merits. Indeed, one might argue that courts more faithfully follow their Article III duty “to say what the law is” when they are not bound by stare decisis.<sup>44</sup> In addition, the Supreme Court already practices “*selective* stare decisis” as “[p]recedent is followed, except when it isn’t.”<sup>45</sup> Selectively abrogating stare decisis by statute simply adopts this existing inconsistency in a more structured way.

### B. Judicial Autonomy

Richard Fallon, Thomas Healy, and Gary Lawson have all published prominent critiques of Paulsen’s and Harrison’s theory of congressional power. Although they differ in their exact criticisms, they all share the core view that Congress may not abrogate judicial rules of stare decisis—and perhaps may not

---

38. See Harrison, *supra* note 7, at 514; Paulsen, *supra* note 6, at 1593; see also *supra* note 3 (noting disagreement about whether appellate jurisdiction stripping also strips the Court’s past decisions of their binding precedential effect).

39. See Harrison, *supra* note 7, at 539-43; Paulsen, *supra* note 6, at 1570-82.

40. Paulsen, *supra* note 6, at 1590 (noting that such an inquiry “lies beyond the scope of this article”).

41. *Id.* at 1593.

42. *Id.*

43. See Paulsen, *supra* note 6, at 1596-98.

44. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

45. Paulsen, *supra* note 6, at 1598.

even regulate them.<sup>46</sup> Healy and Lawson agree with Paulsen and Harrison that *stare decisis* is not constitutionally required.<sup>47</sup> In fact, Lawson goes even further in saying that the Constitution *prohibits* *stare decisis*.<sup>48</sup> Their disagreement with Paulsen and Harrison is therefore not based on the nature of *stare decisis* itself, but on the meaning of the Necessary and Proper Clause.<sup>49</sup> Lawson approaches the issue as a question of the Clause's original meaning,<sup>50</sup> finding that it does not empower Congress to infringe upon the judiciary's "decisional independence"<sup>51</sup> or to dictate judicial methodology.<sup>52</sup> In contrast, Healy approaches the question using a variety of legal arguments. In the end, however, he reaches a similar conclusion by focusing on the role of *stare decisis* in preserving the "legitimacy" of judicial decisions.<sup>53</sup> Like Lawson, Healy believes that "control over methodology is essential" to judicial decision making.<sup>54</sup>

Fallon does not appear to disagree with Healy's and Lawson's critiques, but he is not willing to accept "the claim that *stare decisis* is a mere 'policy' that lacks . . . constitutional status."<sup>55</sup> Although he admits that *stare decisis* may not be constitutionally required, in his view, it still "adequately justifies" the Supreme Court in not applying "what otherwise would be the best interpretation of particular constitutional provisions."<sup>56</sup>

## II. DISTINGUISHING STATUTORY AND CONSTITUTIONAL STARE DECISIS

Although the scholars discussed above have more to say on the question of Congress's power over *stare decisis*, what is perhaps more interesting is what they do not say. In particular, they do not meaningfully distinguish congres-

---

46. See Fallon, *supra* note 7, at 591-96; Healy, *supra* note 7, at 1196-1207; Lawson, *supra* note 7, at 194-95, 219-29.

47. See Healy, *supra* note 7, at 1178-83; Lawson, *supra* note 7, at 194.

48. See Lawson, *supra* note 7, at 194.

49. See Lawson, *supra* note 7, at 201-214; Healy, *supra* note 7, at 1196-1207.

50. See Lawson, *supra* note 7, at 195.

51. *Id.* at 205.

52. See *id.* at 210-11.

53. See Healy, *supra* note 7, at 1199.

54. *Id.* at 1200.

55. Fallon, *supra* note 7, at 577.

56. *Id.* at 578. Fallon suggests that selective abrogation may be even more constitutionally problematic, but does not elaborate on this claim. See *id.* at 595-96. Neither Healy nor Lawson directly address selective abrogation as distinct from total abrogation.



sional power over stare decisis in statutory cases from its power over stare decisis in constitutional ones.<sup>57</sup>

The cases cited in Congressman King’s bill highlight the distinction between statutory and constitutional stare decisis. On one end of the statutory-constitutional spectrum is *King v. Burwell*, which considered the purely statutory question regarding the meaning of the phrase “an Exchange established by the State” in the ACA.<sup>58</sup> Likewise, in *Burwell v. Hobby Lobby*, the Court, without reaching the First Amendment question, considered a purely statutory question regarding the meaning of the Religious Freedom Restoration Act of 1993.<sup>59</sup> On the other end of the spectrum, *National Federation of Independent Businesses v. Sebelius* addressed in part whether the individual mandate was a constitutional exercise of Congress’s power to regulate commerce<sup>60</sup> or to impose taxes.<sup>61</sup>

We should note, however, that some questions may create both statutory and constitutional precedent, such as the Court’s ruling in *Sebelius* that the ACA’s individual mandate was a lawful exercise of Congress’s taxing power.<sup>62</sup> As a statutory matter, the case now stands as a substantive precedent construing the individual mandate as a tax rather than a penalty<sup>63</sup> and as methodological precedent allowing courts to adopt saving constructions of constitutionally

---

57. Healy concedes that “it is conceivable that a statute abrogating stare decisis in statutory cases could be seen simply as a redefinition of the substantive law.” Healy, *supra* note 7, at 1198 n.138. Interestingly, however, he qualifies his concession by noting that “the extent to which Congress can use the substantive law to direct specific judicial outcomes is unclear.” *Id.* As discussed below, the Court has recently recognized a broad understanding of Congress’s power to direct specific judicial outcomes. See *infra* notes 95-99 and accompanying text. Likewise, Rosenkranz simply notes that “if [Paulsen] is right,” Congress’s power over statutory stare decisis “follows a fortiori.” Rosenkranz, *supra* note 13, at 2126 n.169.

58. 135 S. Ct. 2480, 2487 (2015).

59. 134 S. Ct. 2751, 2759 (2014).

60. Admittedly, the Court’s Commerce Clause analysis might already be non-binding dicta. See David Post, *Dicta on the Commerce Clause*, VOLOKH CONSPIRACY (July 1, 2012), <http://volokh.com/2012/07/01/dicta-on-the-commerce-clause/> [<http://perma.cc/TR9Y-TTFG>].

61. 132 S. Ct. 2566, 2578-79 (2012).

62. *Id.* at 2594.

63. To be precise, the Court construed the individual mandate as a “penalty for statutory purposes” under the Anti-Injunction Act of 1867 (AIA) and as a “tax for constitutional purposes.” Erin Morrow Hawley, *The Jurisdictional Question in Hobby Lobby*, 124 YALE L.J. F. 63, 63 (2014). Although Morrow describes one holding as “statutory” and the other as “constitutional,” both are ultimately about the statutory meaning of the individual mandate.

dubious statutes.<sup>64</sup> But the case also stands as a constitutional precedent reaffirming Congress's broad taxing powers.<sup>65</sup>

As suggested in the Introduction,<sup>66</sup> there may be very good reasons to treat statutory *stare decisis* differently from constitutional *stare decisis*.<sup>67</sup> For example, in the statutory context Congress already has the power to overrule Supreme Court decisions by amending the statute in question<sup>68</sup>—a power it does not have in the constitutional context. But perhaps more importantly, Congress may also have the power to prescribe rules of statutory interpretation for courts<sup>69</sup>—a power it probably does not have over constitutional interpretation.<sup>70</sup> Congress has enacted interpretive rules in Chapter 1 of the U.S. Code, also known as the Dictionary Act, where it prescribes “Rules of Construction.”<sup>71</sup> Although most of these rules of interpretation might be more accurately described as definitions,<sup>72</sup> some involve more methodological rules of grammar.<sup>73</sup> In addition, Congress has codified a few other interpretive rules in scattered sections of the U.S. Code.<sup>74</sup> Perhaps these interpretive rules themselves violate separation of powers, but such a ruling would certainly conflict with current understandings of Congress's power over statutory interpretation.<sup>75</sup> This Essay does not provide an independent defense of interpretive

64. *See id.* at 2593.

65. *See id.* at 2598.

66. *See supra* notes 27-30 and accompanying text.

67. Because “federal common law is not qualitatively different from textual interpretation,” Congress presumably has similar powers over rules of *stare decisis* for federal common law as it does for statutory cases. Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985); *see* Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity*, 78 MICH. L. REV. 311, 332-333 (1980).

68. Indeed, the Supreme Court appears to justify the greater weight it affords to statutory *stare decisis* based on Congress's power to correct its decisions. *See* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1366-67 (1988).

69. *See* Rosenkranz, *supra* note 13, at 2143.

70. *See infra* notes 88-94 and accompanying text.

71. *See* 1 U.S.C. §§ 1-8 (2012).

72. *See id.* at §§ 2-8.

73. *See id.* at § 1 (clarifying singular/plural distinction and gender).

74. *See, e.g.*, 21 U.S.C.A. § 853(o) (2012) (prescribing that criminal forfeiture provision “shall be liberally construed to effectuate its remedial purposes”); *see also* LAWRENCE SOLAN, *THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION* 6-34, 6-42 (2010) (providing additional examples).

75. *See, e.g.*, Danieli Evans, *What Would Congress Want? If We Want To Know, Why Not Ask?*, 81 U. CIN. L. REV. 1191, 1213-16 (2013); Rosenkranz, *supra* note 13, at 2143.

rules; it merely notes that current practice views them as compatible with the judicial power.<sup>76</sup>

If Congress may overrule decisions interpreting statutes and if it may prescribe rules of statutory interpretation, Congress would also appear to have the power to prescribe a rule of interpretation requiring courts to ignore a past Supreme Court decision. Similar to Paulsen's approach, this is not to say that courts could not look to the reasoning of prior Supreme Court cases as persuasive authority, but they could not follow the "super-strong presumption" of stare decisis famously invoked in past cases.<sup>77</sup> Put another way, courts would interpret federal statutes as courts in civil law jurisdictions do.<sup>78</sup>

In addition, beyond limiting the Court from citing the narrow interpretive holding of a case, Congress might also prevent it from citing its opinions as precedent for the use of interpretive canons, a phenomenon some have called "methodological stare decisis."<sup>79</sup> The most famous example of methodological stare decisis is *Chevron*, which is both a statutory precedent about the meaning of "stationary source" in the Clean Air Act<sup>80</sup> and a methodological precedent regarding judicial deference toward agency interpretations of statutes.<sup>81</sup> If Congress banned the Court from citing *Chevron*, then it would eliminate both the narrow holding and the broader canon—at least as binding precedent.

Finally, it is important to note that such a law would eliminate both the horizontal precedential effect of the decision—the Supreme Court would not have to follow its prior decision—and also the vertical precedential effect—lower courts would not have to follow the Supreme Court's decision.<sup>82</sup> In contrast to other scholars,<sup>83</sup> this Essay does not view the abrogation of vertical stare decisis as controversial. At least currently, federal courts do not appear to

---

76. This is even more true at the state level. See Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO L.J. 341 (2010).

77. See, e.g., *Flood v. Kuhn*, 407 U.S. 258 (1972).

78. See, e.g., Vincy Fon & Francesco Parisi, *Judicial Precedents in Civil Law Systems: A Dynamic Analysis*, 26 INT'L REV. L. & ECON. 519, 522 (2006).

79. Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO L.J. 1863, 1872 (2008); see also Gluck, *Intersystemic Statutory Interpretation*, *supra* note 23, at 1994.

80. 467 U.S. 837 (1984); see also Gluck, *Intersystemic Statutory Interpretation*, *supra* note 23, 1990 n.320.

81. See Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM L. REV. 1727, 1799 (2010).

82. See, e.g., Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 790 (2012) (distinguishing vertical and horizontal stare decisis).

83. See, e.g., Rosenkranz, *supra* note 13, at 2125 n.167.

view vertical stare decisis as constitutionally compelled, as federal appellate courts often produce “unpublished” opinions which have no binding precedential effect on district courts or future appellate courts.<sup>84</sup> Some commentators have questioned the constitutionality of issuing unpublished opinions,<sup>85</sup> but they are still a firmly established aspect of judicial practice.<sup>86</sup> Moreover, it is telling that when the Supreme Court issued Federal Rule of Appellate Procedure 32.1 in 2006, it only prevented appellate courts from “prohibit[ing] or restrict[ing] the citation” of judicial opinions.<sup>87</sup> The Rule does not prevent appellate courts from limiting the binding precedential effect of such opinions. In this way, Rule 32.1 tracks this Essay’s theory that the binding precedential effect of opinions can be limited, but their persuasive value cannot.

In contrast to its prominent role in statutory interpretation, Congress has less well-established power over constitutional interpretation.<sup>88</sup> One potential issue is whether the Constitution requires a certain interpretive approach—in which case, Congress would not be able to alter it.<sup>89</sup> For example, if one believes that the Constitution requires originalist methodology,<sup>90</sup> Congress

---

84. See Erica S. Weisgerber, Note, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 GEO. L.J. 621, 622 (2009).

85. See, e.g., Bradley Scott Shannon, *May Stare Decisis Be Abrogated by Rule?*, 67 OHIO ST. L.J. 645, 650 n.23 (2006); Weisgerber, *supra* note 84.

86. Courts not only limit the precedential effect of decisions before releasing them, but also change precedent after the fact by amending portions of opinions or withdrawing them entirely. In this way, courts can retroactively eliminate the stare decisis effect of opinions, either in part or whole. See, e.g., Peter W. Martin, *Judges Revising Opinions After Their Release*, CITING LEGALLY (Apr. 29, 2014, 5:56 PM), <http://citeblog.access-to-law.com/?p=157> [<http://perma.cc/F3W9-KZFZ>]; Shaun Martin, *Jackson v. Ryan (9th Cir. – Sept. 27, 2011)*, CAL. APP. REP. (Sept. 27, 2011, 1:11 PM), <http://calapp.blogspot.com/2011/09/jackson-v-ryan-9th-cir-sept-27-2011.html> [<http://perma.cc/5EYX-2FK5>].

87. FED. R. APP. P. 32.1(a).

88. Admittedly, some rules of statutory interpretation may blur the line between statutory law and constitutional law. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 600-01, 619-29 (1992) (noting the “quasi-constitutional” status of some rules of statutory interpretation). There are a few rules of constitutional interpretation that Congress clearly cannot change. See U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

89. See, e.g., Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO L.J. 1113, 1129 (2003) (arguing that the Constitution requires originalism).

90. See *id.*

would not be able to require the Court to interpret the Constitution according to a living constitutionalist methodology.<sup>91</sup>

But even if the Constitution does not require a particular mode of constitutional interpretation—or if we cannot agree on whether or which methodology it requires—the question remains whether a congressionally-prescribed rule of constitutional interpretation would violate the separation of powers. It is difficult to predict how the Court might approach the constitutional issue,<sup>92</sup> let alone to provide a normative theory for how the Court should resolve such a case. But the heated disagreement in the scholarly literature—drawing critiques from both liberals<sup>93</sup> and conservatives<sup>94</sup>—suggests that Congress does not have a clear power over the judiciary’s interpretation of the Constitution.

At the very least, however, there is recent evidence to support this Essay’s view that Congress may permissibly interfere with the interpretation of statutes. Last term, in *Bank Markazi v. Peterson*,<sup>95</sup> the Court upheld a statute that changed settled law in the midst of litigation by specific reference to the pending case.<sup>96</sup> As the dissent noted, Congress was legislating a rule of decision for a particular case.<sup>97</sup> Put another way, Congress was telling the Court how to interpret the statute by codifying its own interpretation of the law.

Nevertheless, the six-justice majority held that “Congress . . . may amend the law and make the change applicable to pending cases, even when

- 
91. Admittedly, an originalist might think that Congress *can* prescribe a rule of constitutional interpretation that requires judges to use originalism. Although it may seem strange for Congress to codify something that the Constitution already requires, the Court has recognized Congress’s power to codify constitutionally required rules in other areas. See, e.g., *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) (finding that the Rules of Decision Act prescribes what the Constitution already requires).
92. One data point is *City of Boerne v. Flores*, 521 U.S. 507 (1997), where the Court held that Congress could not use its powers under Section Five of the Fourteenth Amendment to define constitutional rights more or less broadly than the Court. This suggests judicial preeminence and independence in constitutional interpretation. See Laurence H. Tribe, *Transcending the Youngstown Triptych: A Multidimensional Reappraisal of Separation of Powers Doctrine*, 126 YALE L.J. F. 86, 90 (2016).
93. See Fallon, *supra* note 7.
94. See Lawson, *supra* note 7.
95. 136 S. Ct. 1310 (2016); see also *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429 (1992).
96. 22 U.S.C. § 8772(b) (2012) (defining “financial assets” as “the financial assets . . . in the United States District Court for the Southern District of New York in *Peterson et al. v. Islamic Republic of Iran et al.*, Case No. 10 Civ. 4518 (BSJ) (GWG)”).
97. See 136 S. Ct. at 1332 (Roberts, C.J., dissenting) (noting that the statute “decides a particular pending case . . . changing the law—for these proceedings alone—simply to guarantee that respondents win.”).

the amendment is outcome determinative.”<sup>98</sup> It “perceive[d] in [the statute] no violation of separation-of-powers principles, and no threat to the independence of the Judiciary.”<sup>99</sup> Whether or not one agrees with this specific interference with judicial decision making,<sup>100</sup> if the Court is willing to allow Congress to prescribe rules of decision mid-trial, then it seems plausible that they would accept more general congressional regulation of statutory interpretation,<sup>101</sup> including the abrogation of stare decisis in statutory decisions.<sup>102</sup> In doing so, Congress would only be “making legal rules” in general, rather than “authoritatively applying” them in specific cases.<sup>103</sup>

## CONCLUSION

The Essay seeks to reframe a decade-old debate. We should revisit the question of whether Congress may abrogate stare decisis because Congress might attempt to do so in years to come. But more importantly, we need to reconsider Congress’s power by distinguishing its authority to regulate stare decisis in statutory cases from its power to regulate stare decisis in constitutional ones. There are reasons to think that King’s bill will never pass either chamber of Congress, let alone be signed into law.<sup>104</sup> But other pending legislation, like the SPRA, may have better legislative prospects and may rest on constitutionally firmer ground because these bills only deal with statutory decisions. This Essay does not attempt to settle definitively whether abrogation of stare decisis for statutory decisions is constitutional. Rather, it merely offers strong reasons to believe that it is.

---

98. *Id.* at 1317.

99. *Id.*

100. *See id.* at 1329-1338 (Roberts, C.J., dissenting).

101. *See* Evan C. Zoldan, *Bank Markazi and the Undervaluation of Legislative Generality*, 35 *YALE L. & POL’Y REV. INTER ALIA* 1 (2016) (noting the importance of “legislative generality”).

102. The Court has also allowed Congress to override its statutory decisions and apply the override retroactively so long as the statute does not require courts to reopen final judgments. *See* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226-27 (1995).

103. *See* John Harrison, *Legislative Power and Judicial Power*, 31 *CONST. COMMENT.* 295, 298 (2016).

104. *See* Tierney Sneed, *GOP Bill Would Ban Supreme Court from Citing Its Own Obamacare Cases*, *TALKING POINTS MEMO* (Jan. 3, 2017), <http://talkingpointsmemo.com/dc/steve-king-obamacare-supreme-court> [<http://perma.cc/G75W-P232>] (quoting Timothy Jost as noting that *Sebelius* “contained very strong statements about state rights,” *King* “included language in which the court basically limited deference to administrative agencies,” and *Hobby Lobby* “was all about religious liberty”).

## MAY CONGRESS ABROGATE STARE DECISIS BY STATUTE?

That Congress *may* regulate the interpretation of statutes of course does not mean that it *should*. Indeed, given the long-standing disagreements over statutory interpretation, it may be a very bad idea for Congress to force its way into the debate. Nevertheless, if we think that bills like the SPRA are misguided, then we should fight them politically in Congress rather than depend upon judges to rule them unconstitutional.

*James Durling is a member of the Yale Law School J.D. Class of 2018. Thanks to Samir Doshi, Josh Revesz, Rich Medina and the editors of the Yale Law Journal Forum for their excellent suggestions. Special thanks to Megan McGlynn and Jenna Pavelec. All errors are my own.*

Preferred Citation: James Durling, *May Congress Abrogate Stare Decisis by Statute?*, 127 YALE L.J. F. 27 (2017), <http://www.yalelawjournal.org/forum/may-congress-abrogate-stare-decisis-by-statute>.