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## CONTROLLING PRECEDENT: CONGRESSIONAL REGULATION OF JUDICIAL DECISIONMAKING

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## **CONTROLLING PRECEDENT: CONGRESSIONAL REGULATION OF JUDICIAL DECISIONMAKING**

Gary Lawson

**Abstract:** Professor Michael Stokes Paulsen has recently urged enactment of a congressional statute that would limit the judicial use of precedent in constitutional cases. Although I share Professor Paulsen's general views on precedent, his proposed statute is unconstitutional. Congress does not have power to regulate by statute the decisionmaking processes of federal courts, even when those decisionmaking processes are themselves unconstitutional. Congress' sole remedy is impeachment and removal of judges who improperly decide cases. This assessment of congressional power calls into question many familiar practices, such as statutes regulating scope of review, statutes prescribing rules of evidence for courts, and statutes regulating judicial remedies.

## CONTROLLING PRECEDENT: CONGRESSIONAL REGULATION OF JUDICIAL DECISIONMAKING

Gary Lawson\*

Modern federal courts scholars have been fascinated by the question of Congress' power to control the jurisdiction of the federal courts.<sup>1</sup> This fascination is not difficult to explain: the question is theoretically profound and raises fundamental issues about the roles of Congress and the federal courts in the constitutional order.<sup>2</sup> As a practical matter, however, the question has proven to be of limited significance. Despite a recent spate of legislation restricting access to courts by prisoners and immigrants,<sup>3</sup> people talk about wholesale jurisdiction-stripping far more than they actually do it.

By contrast, Congress routinely regulates the manner in which federal courts exercise their jurisdiction. A host of federal statutes seek to guide, and even control, the process of decisionmaking that federal courts employ to decide cases within their jurisdiction. This crucial aspect of congressional power, however, has been largely neglected by federal courts scholars – and by the courts themselves, who have quietly acquiesced in wide-ranging congressional efforts

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\* Professor, Boston University School of Law. I am grateful to Akhil Amar, John Harrison, Mike Paulsen, and Larry Yackle for their generous advice on this article; it is a reflection on me rather than on them that I failed to follow much of it. Much of the groundwork for this article was laid while I was a Professor at Northwestern University School of Law, and I am indebted to that institution for its support.

<sup>1</sup> A list of major works on the topic since 1984 recently filled a page-long footnote. See David E. Engdahl, Intrinsic Limits of Congress' Power Regarding the Judicial Branch, 1999 **B.Y.U.L. Rev.** 75, 75 n.2.

<sup>2</sup> The President, of course, is a player in this matter as well: any federal statute concerning the jurisdiction of the federal courts must survive the presentment process. See U.S. Const. art. I, § 7, cl. 2-3.

<sup>3</sup> For a thoughtful series of articles describing and evaluating these statutes, see Symposium: Congress and the Courts: Jurisdiction and Remedies, 86 **Geo. L.J.** 2445-2636 (1998).

to control the judicial decisionmaking process.<sup>4</sup> Given the relative importance of questions concerning control of jurisdiction and control of decisionmaking, the widespread neglect of the latter is noteworthy.

There are signs, however, that congressional regulation of the judicial process may finally be attracting significant academic attention. In recent years, four of the nation's most insightful constitutional scholars have addressed some aspect of this topic. In 1995, Professor Martin H. Redish concluded, as part of a wide-ranging study of judicial independence, that Congress has broad power to prescribe substantive and procedural rules for the judiciary but that separation-of-powers principles place important limits on that power when its exercise affects the way in which cases are decided.<sup>5</sup> According to Professor Redish, the decisional independence principle precludes direct legislative control of judicial outcomes,<sup>6</sup> while the political commitment principle<sup>7</sup> forbids Congress from using the trappings and prestige of the federal courts to hide substantive legislative decisions from the electorate.<sup>8</sup>

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<sup>4</sup> See, e.g., *Miller v. French*, 120 S. Ct. 2246 (2000) (broadly upholding Congress' power to regulate the substance and form of judicial decisions concerning injunctions in prison litigation). See *infra* note 130.

<sup>5</sup> Martin H. Redish, Federal Judicial Independence: Constitutional and Political Perspectives, 46 *Mercer L. Rev.* 697 (1995).

<sup>6</sup> See *id.* at 707-14.

<sup>7</sup> This principle requires that legislation carry "some meaningful level of normative political commitment by the enacting legislators, thus enabling the electorate to judge its representatives." **Martin H. Redish, *The Constitution as Political Structure*** 136 (1995).

<sup>8</sup> For example, Professor Redish argues that if Congress adopts standard "A" as a substantive rule of decision, it cannot then regulate the judicial decisionmaking process in a way that effectively requires "B" as the outcome in adjudications – even if Congress could have directly prescribed "B" as the governing substantive standard. See Redish, *supra* note 5, at 715-16. Cf. Lawrence G. Sager, Klein's First Principle: A Proposed Solution, 86 *Geo. L.J.* 2525, 2529 (1998) (suggesting that *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), stands for the analogous principle that "[t]he judiciary will not permit its articulate authority to be subverted to serve ends antagonistic to its actual judgment; the judiciary will resist efforts to make it seem to support and regularize that with which it in fact disagrees").

In 1999, Professor David Engdahl identified the sweeping clause of article I, section 8<sup>9</sup> as the constitutional source of congressional power to regulate the jurisdictional, structural, and decisional affairs of the federal courts.<sup>10</sup> Professor Engdahl urges courts to decide for themselves whether congressional measures regulating the judiciary in fact aid or hinder the “carrying into Execution” of the judicial power, which he argues calls into question the validity of such familiar statutes as the Anti-Injunction Act, some of the Federal Rules of Evidence, and a host of other measures designed to regulate the remedies and procedures employed by the federal courts.<sup>11</sup>

Two recent articles specifically consider the power of Congress to regulate the use of precedent by federal courts. Professor Michael Stokes Paulsen has urged adoption of a statute that would forbid the federal courts from giving prior court decisions any weight beyond their persuasive value in future cases involving the constitutionality of abortion regulations (or in constitutional cases more generally).<sup>12</sup> He agrees with Professor Engdahl that the sweeping clause is the key constitutional provision for analyzing congressional power over the courts, but he finds in that clause a power at least broad enough to restrict the use of precedent in constitutional cases.<sup>13</sup> And Professor John Harrison has argued for a similar, though perhaps

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<sup>9</sup> See U.S. Const. art. I, § 8, cl. 18 (declaring that Congress shall have power “[t] make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”). Professor Engdahl, in accordance with modern practice, calls this clause the “necessary and proper clause.” The founding generation, however, uniformly termed it the “sweeping clause.”

<sup>10</sup> See Engdahl, supra note 1.

<sup>11</sup> See id. at 158-74.

<sup>12</sup> 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).

<sup>13</sup> See id. at 1590-94.

narrower, congressional power under the sweeping clause to mandate any norm of precedent that courts could reasonably adopt for themselves.<sup>14</sup>

All of these authors make critical contributions to an exploration of this issue, but each of them misses an important piece of the puzzle. Professor Redish correctly draws attention to the importance of background norms of separation of powers, but he does not discuss the central role played by the sweeping clause in any assessment of congressional power to regulate the courts. Professor Engdahl neatly articulates the role of the sweeping clause, but his analysis of that clause is incomplete. Professor Engdahl emphasizes the requirement that laws regulating the judiciary must be “for carrying into Execution” the judicial power, but he pays scant attention to the separate requirement that such laws be “necessary and proper” for that purpose. As I have elsewhere explained at length, in conjunction with Patricia B. Granger, the term “proper” in the sweeping clause is an important limitation on the scope of the power granted to Congress by that clause.<sup>15</sup> Professor Paulsen places the issue of congressional power in its appropriate practical and historical context and recognizes the need to take account of the word “proper” in the sweeping clause, but he fails to see that the term “proper” draws much of its content from background separation-of-powers principles, more or less (to complete the circle) in accordance with Professor Redish’s analysis. Professor Harrison similarly does not give due regard to the extent to which separation-of-powers concerns, and in particular Professor Redish’s principle of decisional independence, are codified in the sweeping clause.

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<sup>14</sup> John Harrison, The Power of Congress Over the Rules of Precedent, -- **Duke L.J.** – (2000) (forthcoming). Professor Harrison’s analysis may lead to a narrower view of congressional power than does Professor Paulsen’s because the former pays more attention than the latter to the requirement that congressional statutes actually “carry[] into Execution” the judicial power. On the other hand, this may be more a difference of focus than of substance.

<sup>15</sup> See Gary Lawson & Patricia B. Granger, The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 **Duke L.J.** 267 (1993).

What is needed for a full exploration of Congress' power to regulate the affairs of the federal courts is a (no pun intended) proper synthesis that gives due account to the text of the sweeping clause, the background norms that animate it, and the structural and historical context in which it is located. The result of that synthesis is that Professor Paulsen's proposed precedent-limiting statute is clearly unconstitutional; Congress may not by statute tell the federal courts whether or in what way to use precedent.<sup>16</sup>

I do not reach that conclusion because of any great fondness for the doctrine of stare decisis. As Professor Paulsen notes,<sup>17</sup> he and I are among the tiny handful of academics who think it is affirmatively unconstitutional for federal courts to rely on precedent in constitutional cases.<sup>18</sup> Nonetheless, Congress does not have the power to tell the federal courts how to go about their business of deciding cases, even if the courts' own methods for deciding cases (such as reliance on precedent) are unconstitutionally wrong. This does not mean that the federal courts' use of precedent or other decisionmaking methodologies is therefore uncontrollable. To the contrary, the Constitution prescribes two very important, and very powerful, methods for controlling the actions of the federal courts. But the enactment of a congressional statute along Professor Paulsen's lines is not one of them.

Part I of this article briefly explores some preliminary methodological matters that are essential for a proper understanding of this issue. Part II describes more carefully the scope and limits of congressional power over the affairs of the federal courts and explains why Professor

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<sup>16</sup> I concentrate on Professor Paulsen rather than Professor Harrison because the former's proposal is more specific and far-ranging. Professor Harrison's characteristically insightful analysis is primarily concerned with identifying the sources and status of rules of precedent. The resolution of our dispute probably requires addressing some complex questions about the nature of decisionmaking that cannot be pursued here. See infra note 58.

<sup>17</sup> See Paulsen, supra note 12, at 1548 n.38.

<sup>18</sup> See Gary Lawson, The Constitutional Case Against Precedent, 17 **Harv. J.L. & Pub. Pol'y** 23 (1994).

Paulsen's proposed statute exceeds those limits. Part III applies that analysis to some of the existing statutes – several with very impressive pedigrees – that currently regulate the decisionmaking practices of the federal courts. Part IV then briefly sets forth the two constitutionally permissible methods for controlling the decisionmaking methodologies of the federal courts.

## I

Five preliminary points set the framework for a correct understanding of congressional power to regulate the affairs of the federal courts. First, this article seeks to determine the original meaning of the various clauses in the Constitution that define and limit the power of Congress to regulate judicial decisionmaking. Under my strict originalist approach (which is markedly stricter than the approach employed by most originalists), the search for original meaning is precisely that: it is not a search for explanations or justifications of current or past doctrine. Court decisions and legislative and executive practices are neither constitutive nor generally good evidence of constitutional meaning, and I treat them accordingly. Moreover, I make no normative claims about the extent to which original meaning should guide decisions. Originalism, as I apply it here, is a theory of interpretation, not a theory of adjudication.<sup>19</sup> What people do with the Constitution's meaning once they have it is their own business.

Although the participants in this debate have a substantial range of methodological disagreements, they share enough common premises to let the game proceed without a more

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extensive discussion of methodology (though I will address some fine points along the way). Professors Paulsen and Harrison both employ some variant of originalism, though the latter's variant may be a bit more eclectic than mine. Professor Redish styles himself a nonoriginalist textualist, and Professor Engdahl's methodology, as with most of his work, defies easy classification.<sup>20</sup> On structural issues, however, Professors Redish and Engdahl strongly emphasize the central role of the original written text and the inferences that are fairly drawn from it. While one could perhaps imagine serious differences emerging between originalist and nonoriginalist textualists on structural matters -- if, for example, the nonoriginalists adopted some kind of evolutionary theory of departmental powers -- in practice those differences have proved to be relatively small.<sup>21</sup> Accordingly, I can (and do) take for granted some basic premises about originalist methodology as applied to structural issues. That may change, of course, if

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<sup>19</sup> For a deeper exploration of the crucial difference between interpretation and adjudication, and the decidedly contingent links between them, see Gary Lawson, On Reading Recipes . . . and Constitutions, 85 **Geo. L.J.** 1823 (1997).

<sup>20</sup> For Professor Redish, any interpretation of the Constitution must be consistent with the document's language and overall structure, though he rejects strict reliance on founding-era understandings. See **Redish**, supra note 7, at 6-16; Martin H. Redish, Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis, 72 **S. Cal. L. Rev.** 673, 679-82 (1999). Of course, most modern originalists also reject any strict reliance on direct historical evidence of founding-era beliefs. The ultimate originalist inquiry is hypothetical: what would a fully informed public at the time of ratification, knowing everything that there is to know about the Constitution and the world around it, have understood a particular term or clause to mean? Too great a focus on actual historical understandings can cloud this inquiry; one must always be prepared to ask whether an expressed understanding would have been different had the utterer known or thought about X, Y, and Z. Professor Redish may have more in common with originalists than he realizes, though to pursue this would take us far afield. For a brief self-description of Professor Engdahl's distinctive methodology, see David E. Engdahl, What's in a Name? The Constitutionality of Multiple "Supreme" Courts, 66 **Ind. L. Rev.** 457, 504-10 (1991).

<sup>21</sup> The differences are small because Professors Redish and Engdahl do not seek to superimpose on the Constitution's structural design some theory of government radically different from that embodied in the original document. Accordingly, the inferences that they draw from the constitutional structure are not grossly different from the inferences that would be drawn by a strict originalist. The gap between originalists and Professors Redish and Engdahl could be much larger on other issues in which, for example, the meaning of the Fourteenth Amendment plays a central role. Professors Redish and Engdahl also depart significantly from an originalist understanding of the scope of Congress' powers under the commerce clause and sweeping clause, but that may reflect more a difference in application than in underlying methodology.

someone enters this debate from a widely divergent perspective, but there will be time enough to address those concerns if and when it becomes necessary.<sup>22</sup>

Second, it is important to be clear on exactly which clauses of the Constitution are relevant to this inquiry. Apart from the appointments clause, which enables the federal courts to receive from Congress the power to appoint inferior federal officers,<sup>23</sup> there is only one clause of the Constitution that confers power on the federal courts to act: the Article III vesting clause, which provides that “[t]he judicial Power of the United States shall be vested in one Supreme Court and such inferior Courts as Congress may from time to time ordain and establish.”<sup>24</sup> Other clauses define the classes of disputes in which this power may be exercised<sup>25</sup> or require the use of certain practices and procedures,<sup>26</sup> but the vesting clause is the Constitution’s sole affirmative grant of power to the federal courts to act in a judicial capacity.<sup>27</sup>

Similarly, there is only one clause of the Constitution (apart from the appointments clause) that empowers Congress to regulate the affairs of the judicial department: the sweeping clause, which provides that Congress shall have power “[t]o make all Laws which shall be

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<sup>22</sup> Of course, there really won’t be time enough to do so then. Before one gets to the relative merits of originalism and other interpretative approaches, one must be able to define precisely what an originalist (or any other) inquiry entails. Even to identify the relevant questions for such a project would require a book (which I am planning), though a few of those questions unavoidably surface below. For some very preliminary thoughts on the mechanics of originalism, see Steven G. Calabresi & Saikrishna B. Prakash, The President’s Power to Execute the Laws, 104 **Yale L.J.** 541, 550-59 (1994); Mark D. Greenberg & Harry Litman, The Meaning of Original Meaning, 86 **Geo. L.J.** 569 (1998); Lawson, supra note 19.

<sup>23</sup> See U.S. Const. art. II, § 2, cl. 2.

<sup>24</sup> Id. art. III, § 1, cl. 1.

<sup>25</sup> See id. art. III, § 2, cls. 1-2.

<sup>26</sup> See Gary Lawson & Christopher D. Moore, The Executive Power of Constitutional Interpretation, 81 **Iowa L. Rev.** 1267, 1273 n.18 (1996).

<sup>27</sup> For a definitive discussion of this point, see Steven G. Calabresi, The Vesting Clauses as Power Grants, 88 **Nw. U.L. Rev.** 1377 (1994).

necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>28</sup> This conclusion will seem strange to many contemporary observers – including many who hold federal judicial commissions. Courts and scholars have long assumed that Congress’ power to “constitute Tribunals inferior to the supreme Court”<sup>29</sup> carries with it, by implication, some measure of power to regulate the affairs of those inferior courts.<sup>30</sup> Professor Engdahl, however, has recently demonstrated that the tribunals clause and the sweeping clause mean exactly what they say. The former gives Congress power to create inferior courts, while the latter gives Congress power to regulate the affairs of those courts (and the Supreme Court as well).<sup>31</sup> It is unnecessary to rehearse here Professor Engdahl’s structural and historical arguments, because the conclusion emerges upon careful reflection. The tribunals clause no more carries with it implicit powers than does the bankruptcy clause<sup>32</sup> or the postal roads clause.<sup>33</sup> The sweeping clause is the explicit textual source of Congress’ power to pass ancillary

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<sup>28</sup> **U.S. Const.** art. I, § 8, cl. 18.

<sup>29</sup> *Id.* art. I, § 8, cl. 9.

<sup>30</sup> Similarly, the assumption has long been that Congress acquires some measure of power over the Supreme Court’s jurisdiction from the clause declaring that the Supreme Court “shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” *Id.* at art. III, § 2, cl. 2.

<sup>31</sup> *See* Engdahl, *supra* note 1, at 104-19. Similarly, in a discussion that ought to have a seismic impact on federal courts scholarship, Professor Engdahl elegantly demonstrates that the exceptions clause refers to a congressional power to regulate the Supreme Court’s appellate jurisdiction but does not confer that power. *See id.* at 119-32. Note that the conventional account, which locates congressional power to regulate judicial affairs in the tribunals clause, only generates congressional power over the lower federal courts. By contrast, whatever power Congress derives from the sweeping clause extends as well to the Supreme Court.

Anyone who is skeptical that such long-established understandings could be so thoroughly undermined by a modern law review article should consider this a challenge to rebut Professor Engdahl’s claims on the basis of original meaning.

<sup>32</sup> *See* **U.S. Const.** art. I, § 8, cl. 4.

<sup>33</sup> *See id.* art. I, § 8, cl. 7.

legislation “for carrying into Execution” any constitutionally granted powers. The reference in the sweeping clause to “all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof,” which clearly includes the “judicial Power” vested in the federal courts, makes it clear beyond cavil that the sweeping clause is the specific textual vehicle for congressional legislation with respect to the operations of the judicial department. And because the sweeping clause is the source of congressional power in this area, that clause also defines the scope and limits of Congress’ power.

Third, the sweeping clause contains two important limitations on the scope of its granted power. As Professor Engdahl emphasizes, any laws enacted by Congress to regulate the affairs of a coordinate department<sup>34</sup> must be “for carrying into Execution” the powers vested in that department. Moreover, any law for carrying into execution federal powers must be “necessary and proper” for that purpose. A law is “necessary” if it bears a suitable causal relationship to the end in question; how close a “fit” between means and ends this requires is a matter of considerable controversy.<sup>35</sup> For present purposes, however, the more important term in the sweeping clause is the word “proper.” Patricia B. Granger and I have elsewhere explored at considerable length the original meaning of the word “proper” in the sweeping clause.<sup>36</sup> In brief, a “proper” executory law must conform to the Constitution’s terms and design, including the background norms of federalism, separation of powers, and individual rights that underlie the

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<sup>34</sup> Pursuant to my obsession with the terminology of the founding generation, see *supra* note 9: The founders almost uniformly used the term “departments” to refer to the legislative, executive, and judicial institutions of the national government, reserving the term “branches” for the different houses of the legislative department. See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 *Harv. L. Rev.* 1153, 1156 n.6 (1992).

<sup>35</sup> Compare Randy Barnett, *Necessary and Proper*, 44 *U.C.L.A. L. Rev.* 745 (1997) (urging a strict interpretation of necessity) with Lawson & Granger, *supra* note 15, at 286-88 (intimating that Chief Justice Marshall may have been right in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), to offer a more generous account of necessity).

<sup>36</sup> See Lawson & Granger, *supra* note 15.

document. A statute that trenches on prerogatives that (for want of a better word) properly belong to another department or institution is improper and therefore beyond Congress' enumerated powers.<sup>37</sup>

Fourth, the centrality of the sweeping clause to this inquiry has important methodological implications. Professor Paulsen is skeptical of the use of abstract conceptions of separation of powers as a tool of constitutional interpretation, objecting that “[t]here is no freestanding ‘Separation of Powers Clause’ that contains its own statute-invalidating set of rules or standards; there is only the collection of texts that make up the system.”<sup>38</sup> That is not entirely right. The sweeping clause is precisely (in part) just such a “separation of powers clause.” Professor Paulsen is correct that the Constitution adopts a specific, blended scheme for allocating governmental power rather than some pure theoretical model<sup>39</sup> and that one must be careful to avoid reading overly general conceptions of separation of powers into the Constitution. But there is simply no way to understand, for example, the “executive” and “judicial” powers or the scope of congressional authority to regulate the execution of these powers without reference to theoretical background norms about the Constitution’s separation of powers. One can criticize particular conclusions about how broadly or narrowly the background separation-of-powers norms cut, but that does not mean that some such norms do not operate at a constitutional level. Nor are such norms “freestanding.” A “proper” separation of powers argument is as fully textual

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<sup>37</sup> All of the relevant inquiries under the sweeping clause are objective; the Constitution does not commit interpretation of the sweeping clause exclusively to Congress. See id. at 276-85.

<sup>38</sup> Paulsen, supra note 12, at 1582 n.121.

<sup>39</sup> See Arnold I. Burns & Stephen J. Markman, Understanding Separation of Powers, 7 **Pace L. Rev.** 575 (1987).

as is, for example, an argument about the meaning of the word “officer” in the appointments clause.<sup>40</sup>

The fifth, and final, preliminary point concerns the practical and historical context of the debate concerning congressional power over judicial affairs. Professor Paulsen devotes much of his analysis to a demonstration that his proposed precedent-restricting statute is consistent with long-established doctrinal understandings about congressional power to regulate the judicial process.<sup>41</sup> He is entirely right about this. Congress routinely regulates the manner in which courts decide cases, from choice-of-law rules to rules of evidence to standards of review. A conclusion that Congress cannot forbid certain uses of precedent does indeed call into question many of these long-held assumptions about congressional power and is clearly more radical in its implications than Professor Paulsen’s proposal, which requires at most a very modest extension of well-settled law. Professor Paulsen has history, practice, and doctrine on his side. Indeed, he has everything except the Constitution.

## II

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<sup>40</sup> See **U.S. Const.** art. II, § 2, cl. 2. But if one must discern background understandings in order to determine the contours of a “proper” approach to separation of powers, federalism, and individual rights, what textual work does the sweeping clause perform? See Lawrence Lessig, Translating Federalism; *United States v. Lopez*, 1995 **Sup. Ct. Rev.** 125, 201 (raising this objection in connection with “proper” principles of federalism). That is a separate topic, but the short answer is threefold. First, the sweeping clause gives these background principles textual grounding, if one cares about such things (as Professor Paulsen and I do). It is, as Professor Paulsen intimates, more difficult to claim constitutional status for a free-standing norm than to use such norms to interpret language that is well structured to receive them. Second, channeling the inquiry through a text shapes the inquiry into the appropriate background norms. Third, if the sweeping clause is the primary vehicle through which these norms are constitutionalized, then the norms may not apply (or may not apply in the same way) to legislation enacted pursuant to the District or territories/property clauses or by direct exercises of the other article I, section 8 powers. For more discussion of my obsession with the sweeping clause, see infra notes 74 & 75.

<sup>41</sup> See Paulsen, supra note 12, at 1582-90.

Start with some easy cases. Congress clearly has the power to affect the process of judicial decisionmaking in many ways. Courts, for example, must apply valid congressional statutes as substantive law in cases to which they apply and even give them preference over many other sources of substantive law with which they may conflict.<sup>42</sup> What else could “legislative Powers” possibly mean? Thus, whenever it enacts a substantive statute, Congress controls to some extent – and possibly to a dispositive extent – how courts will decide cases.

It is just as clear, however, that Congress cannot enact a statute instructing a federal court to decide a specific case in a specific way. Everyone, including Professor Paulsen, agrees with this much.<sup>43</sup> Nor could Congress pass a general statute providing, for example, that in any case raising a question concerning the constitutionality of a statute restricting abortion, the court must rule for/against the plaintiff.

Why not? Why can’t Congress tell the federal courts how to decide specific cases, or classes of cases, given that Congress has the undoubted power to determine to a large extent the substantive law that courts must apply? Perhaps discovering the true reasons for the obvious can help us analyze the non-obvious.

One wrong turn is to say that such an outcome-directing statute would violate the fifth amendment by depriving the losing party of “life, liberty, or property without due process of law,”<sup>44</sup> because due process of law requires a fair chance to win in an impartial forum. This is right as far as it goes, but it does not go far enough. It would mean that if the interests at stake in

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<sup>42</sup> See **U.S. Const.** art. VI, § 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”).

<sup>43</sup> See Paulsen, *supra* note 12, at 1568. See also *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871).

<sup>44</sup> **U.S. Const.** amend. V.

the case were not “life, liberty, or property,” then Congress could direct the outcome even in a particular case.<sup>45</sup> Furthermore, it would mean that Congress only lost the power to direct case outcomes in 1791, when the fifth amendment was ratified. Neither conclusion is unthinkable, but both are odd enough to give one pause.

The due process clause is simply the wrong place to look for answers to these kinds of problems. The bill of rights today is usually the first resort for a limitation on congressional power when, as an original matter, it should be second in line. The Constitution limits the power of federal institutions primarily through the scheme of enumerated powers. The bill of rights in 1791 did not significantly alter the legal landscape; it merely clarified, and to a very limited extent expanded, the range of limitations on the federal government that was already part of the constitutional design in 1789.<sup>46</sup> Outside of federal territories and enclaves, very few statutes were constitutional in 1790 but unconstitutional in 1792.

Instead of running to the due process clause, we should first look to the scheme of enumerated powers. The place to begin an inquiry concerning the powers of the federal judiciary is with the enumerated powers -- or, more precisely, the enumerated power -- of the federal judiciary. The only clause that affirmatively empowers the federal judiciary to act in a judicial capacity is the vesting clause of article III, which states that “[t]he judicial Power of the United States shall be vested in one Supreme Court and such inferior Courts as Congress may from time to time ordain and establish.”<sup>47</sup> Any power exercised by a federal court must stem either from

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<sup>45</sup> See Redish, supra note 5, at 709.

<sup>46</sup> For an elaboration of this point, see Gary Lawson, The Bill of Rights As an Exclamation Point, 33 **U. Rich. L. Rev.** 511 (1999).

<sup>47</sup> **U.S. Const.** art. III, § 1, cl. 1.

this grant of the “judicial Power” or from a federal statute that is “necessary and proper for carrying into Execution” the judicial power.

Historical research tells us almost nothing about what this “judicial Power” was likely to be understood to entail in 1789.<sup>48</sup> Professor Paulsen notes, for example, that the claim that the judicial power “includes the power to vest precedent with authoritative, decision-altering weight, independent of its persuasiveness”<sup>49</sup> was not made “by anyone in the Constitutional Convention; nor by any prominent (or even obscure) framer or ratifier at the time of the drafting, debate over, and early implementation of the Constitution; nor even by any prominent opponent in the ratification debates or Anti-Federalist literature.”<sup>50</sup> This is not a surprising conclusion; one could say the same about virtually every proposition concerning the meaning of the “judicial Power.” “The judicial Power” simply was not a term that received serious attention during the founding period.<sup>51</sup> Nor does the silence necessarily reflect consensus. The “judicial Power” in 1789 was not a term with a lengthy, well-understood history. Indeed, the notion of “judicial Power” as a

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<sup>48</sup> Lest one lose focus, one must always remember that originalism is a search for hypothetical rather than actual historical understanding. See supra note 20. But history is not irrelevant; it is generally hard to determine what a hypothetical audience would have thought without reference to what real audiences actually thought.

<sup>49</sup> Paulsen, supra note 12, at 1571.

<sup>50</sup> Id. I assume that Professor Paulsen was as unimpressed as was I by the Eighth Circuit’s recent attempt to ground precedent in the Constitution’s original meaning. See Anastasoff v. United States, 223 F.3d 898 (8<sup>th</sup> Cir. 2000) (holding unconstitutional a rule forbidding precedential reliance on unpublished opinions).

<sup>51</sup> See Lawson & Moore, supra note 26. Mr. Moore spent a good portion of his third year of law school looking for direct historical sources concerning the meaning of the “judicial Power,” and neither he nor I came up with anything interesting. Others who have undertaken the quest have fared little better. See James S. Liebman & William F. Ryan, “Some Effectual Power”: The Quantity and Quality of Decisionmaking that Article III and the Supremacy Clause Demand of the Federal Courts, 98 Colum. L. Rev. 696 (1998). Professors Liebman and Ryan, however, have demonstrated that the sparse sources that exist tend to support an inference of decisional independence. See infra notes 64-66 and accompanying text.

distinct aspect of governmental power, rather than as a manifestation of legislative or executive power, was a relatively recent innovation in the late eighteenth century.<sup>52</sup>

About all that we can say with certainty about the “judicial Power” is that it is the power to decide cases in accordance with governing law.<sup>53</sup> But why isn’t a law that directs the outcome in a case part of that governing law? After all, to say that courts have the power to decide cases is not necessarily to say that no other institution can guide, or even direct, that power. The Constitution does not expressly say that “no other Institution of the federal Government shall instruct the Courts in their Exercise of the judicial Power.” Indeed, the sweeping clause provides superficially plausible grounds for claiming the contrary.

The reason that Congress cannot direct the outcome in a particular case (or class of cases) is that such a law would not be “necessary and proper” for carrying into execution the judicial power. It probably fails even a generous test of necessity. And it would not be “proper” because it would violate a constitutional background norm that says that each department of the national government must be independent of the other departments in its exercise of enumerated functions unless the Constitution directs otherwise.<sup>54</sup> That principle, in turn, is gleaned from our best understanding of what a fully informed public in 1789 would have regarded as a “proper” scheme of separated powers in the context of the Constitution.

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<sup>52</sup> See **Redish**, *supra* note 7, at 103-05 (discussing pre-American conceptions of separated powers that did not include the judicial power as a distinct governmental function). For an intriguing discussion of early eighteenth-century linkages between legislative and judicial powers, see Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 **Harv. L. Rev.** 1381 (1998).

<sup>53</sup> See **Lawson & Moore**, *supra* note 26, at 1273.

<sup>54</sup> One could also try to say that such a law would not really be “for carrying into Execution” the judicial power. That assumes, however, that the judicial power includes an independent power to reach legal conclusions without legislative direction, which is precisely the proposition about to be established. Once one has established that proposition, the requirement that executory laws actually carry the judicial power into execution begins to have bite.

Where the text of the Constitution directs a particular allocation of governmental power, that allocation must be respected -- even when that allocation violates pure theoretical conceptions of separated powers (as is arguably the case, for example, with the presentment clause of article I, section 7, which gives the executive a direct role in the legislative process). But what happens when the text is silent? One possible answer is that the sweeping clause gives Congress authority to fill in all gaps without limitation.<sup>55</sup> Another possible answer, however, is that there are certain background principles that define the “proper” allocation of powers in the absence of direct constitutional specification. The latter answer is overwhelmingly more plausible. The whole point of vesting three distinct kinds of governmental power in three distinct institutions is to create independent power centers. Just as the vesting clauses generate a principle of departmental coordinacy, under which each department has a distinct obligation to construe the laws and Constitution,<sup>56</sup> they also generate a principle of departmental independence, under which each department should be understood to operate outside the direct control of other departments unless the Constitution instructs to the contrary. This principle of departmental independence is, at a minimum, a good starting point for determining whether a statutory allocation of power is constitutionally “proper” when the Constitution is otherwise silent.

The case for this principle of decisional independence, as Professor Redish aptly terms it,<sup>57</sup> is very strong. I have elsewhere, in conjunction with Christopher D. Moore, defended at

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<sup>55</sup> Peter Strauss has come very close to endorsing this position on occasion. See Peter Strauss, Formal and Functional Approaches to Separation-of-Powers Problems— A Foolish Inconsistency?, 72 *Cornell L. Rev.* 488, 492-93 (1987).

<sup>56</sup> See Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 *Geo. L.J.* 217, 228-29 (1994).

<sup>57</sup> See Redish, supra note 5, at 699.

length the proposition that federal courts, in the exercise of their power of constitutional review, are generally not obliged to give deference to the constitutional views of Congress or the President.<sup>58</sup> Many of those arguments support the additional proposition that Congress cannot alter that background principle by ordinary legislation pursuant to the sweeping clause.

First, “all three departments of the national government are equally created by the Constitution, are ‘coequal in title and rank as representatives of the People,’ and all owe allegiance first and foremost to the Constitution that empowers them.”<sup>59</sup> This postulate of coordinacy most reasonably entails a principle of decisional independence among the departments, especially as no department is expressly granted a power of constitutional interpretation but all three departments possess such power by implication from other granted powers. It would be exceedingly odd (even though not entirely unthinkable) if Congress could undo this structural coordinacy by a simple statute.

Second, one of the obvious purposes of the Constitution’s intricate scheme of separated powers “is to ensure that government action takes place only when distinct actors with distinct roles and functions all agree that the action is permissible.”<sup>60</sup> Interpretative independence is a

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<sup>58</sup> See Lawson & Moore, supra note 26, at 1274-79. There are important exceptions to this general principle of interpretative independence. Most importantly, one must distinguish between legal deference, which gives weight to the views of another actor simply because of that actor’s status, and epistemological deference, which gives weight to the views of another actor because there are reasons to believe that that actor’s views are good evidence of the right answer. Epistemological deference can shade into legal deference if an actor’s status is, by itself, reason enough to think that the actor is more likely than the court to get the right answer. For a more elaborate discussion of legal and epistemological deference, see id. at 1277-79, 1300.

The distinction between legal and epistemological deference probably underlies most of my disagreements with Professor Harrison on this topic, but that would require a separate article to explore.

<sup>59</sup> Id. at 1275-76 (quoting Paulsen, supra note 56, at 229).

<sup>60</sup> Lawson & Moore, supra note 26, at 1276. There are times, of course, when the Constitution expressly permits action by fewer than three departments. The President, for example, has nothing to say about the House or Senate’s selection of their own officers. See U.S. Const. art. I, § 2, cl. 5 (“The House of Representatives shall chuse their Speaker and other Officers”); id. art. I, § 3, cl. 4 (“The Vice President of the United States shall be President of the

natural corollary of this constitutional scheme of divided powers. It would be exceedingly odd (even though not entirely unthinkable) if Congress could undo this structural requirement of departmental consensus by a simple statute.

Third, at least in a case in which Congress' own power is at issue, allowing Congress to dictate the outcome of the case would permit Congress to be the judge in its own cause.<sup>61</sup> This would violate one of the most venerable precepts in Anglo-American law,<sup>62</sup> which makes it an unlikely (though not impossible) candidate for a "proper" eighteenth-century understanding of Congress' powers. More pointedly, "the Constitution on a few occasions specifically and expressly makes certain actors the judges of the scope of their powers."<sup>63</sup> The best inference is that those express grants are exceptions from the normal rule of departmental coordinacy and independence. It would be exceedingly odd (even though not entirely unthinkable) if Congress could undo this careful allocation of interpretative authority by a simple statute.

Fourth, a specific proposal to permit Congress to regulate the manner in which federal courts decide cases was rejected by the Constitutional Convention. By a six-to-two vote, the convention defeated a provision that would have provided that, in all cases outside the Supreme Court's original jurisdiction, "the judicial power shall be exercised in such manner as the Legislature shall direct."<sup>64</sup> The rejection of this proposal, which preserved "the otherwise

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Senate"); *id.* art. I, § 3, cl. 5 ("The Senate shall chuse their other Officers"). Whether the courts have any role in that process is a tale for another time.

<sup>61</sup> See Lawson & Moore, *supra* note 26, at 1276-77.

<sup>62</sup> See *id.* at 1276.

<sup>63</sup> *Id.* For discussion of these clauses, see Lawson & Granger, *supra* note 15, at 277-78.

<sup>64</sup> 2 **The Records of the Federal Convention of 1787**, at 425 (Max Farrand, ed., 1911) (Aug. 27, 1787).

constitutionally sacrosanct quality of federal judging,”<sup>65</sup> supports the principle of decisional independence.<sup>66</sup>

None of these (or other related) propositions about the Constitution, separation of powers, or the sweeping clause can be absolutely demonstrated by smoking-gun evidence, but all of them, based on our best inferences about the scheme of the Constitution, are knowable with a high degree of confidence. Professor Redish is entirely right to glean a principle of “decisional independence” for the federal courts as a background norm that helps define the “proper” separation of powers. The Constitution gives the federal judiciary the power to decide cases in accordance with governing law, and Congress cannot direct the exercise of that power under the guise of the sweeping clause.

What if the substantive law does not directly command a decision for one party but is so narrowly tailored that it effectively prescribes the outcome for a pending case or ongoing controversy? This is a swamp that I had hoped to avoid until a subsequent article, but two commentators on this manuscript have pushed me into it here.

The nondelegation doctrine, in its originalist form, limits the extent to which statutes can leave important issues unresolved.<sup>67</sup> Does the Constitution also impose a maximum as well as a minimum degree of specificity on regulatory statutes? The Constitution’s prohibitions on bills of

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<sup>65</sup> Liebman & Ryan, supra note 51, at 754 n.271.

<sup>66</sup> See id. How strongly it supports the principle depends on how much weight one wants to assign to this kind of Convention maneuvering and how confidently one can trust the historical records. The short answers are, respectively, “not that much” and “tolerably well when the result coheres with other sources.” On the latter point, see James H. Hutson, The Creation of the Constitution: The Integrity of the Documentary Record, 65 **Tex. L. Rev.** 1 (1986) (discussing problems with the reliability of founding-era sources); Lawson & Granger, supra note 15, at 334-35 (defending certain limited uses of these sources despite their potential inaccuracy).

<sup>67</sup> See Gary Lawson, Who Legislates?, 1995 **Pub. Int. L. Rev.** 147.

attainder<sup>68</sup> forbid one form of specificity, but is there a broader constitutional rule against statutes that, in effect, control the outcome of court proceedings?<sup>69</sup> The classic case is State of Pennsylvania v. Wheeling & Belmont Bridge Co.<sup>70</sup> The Court had previously held that a particular bridge over the Ohio River was enjoined as a nuisance because of its potential to obstruct navigation.<sup>71</sup> Congress responded with a statute declaring “that the bridges across the Ohio River at Wheeling, in the State of Virginia, and at Bridgeport, in the State of Ohio, abutting on Zane’s Island, in said river, are hereby declared to be lawful structures in their present positions and elevations, and shall be so held and taken to be anything in the law or laws of the United States to the contrary notwithstanding.”<sup>72</sup> In a suit to lift the injunction to permit construction of a new bridge with essentially the same dimensions as the old one, a divided Court applied the statute and accordingly lifted the injunction. Was this an impermissible congressional attempt to control the judicial process, akin to a statute saying “Decide a motion for termination of the injunction in favor of the Wheeling and Belmont Bridge Company”?

In terms of effect, the statute declaring the bridges to be lawful was pretty clearly the same as a statute declaring the company the advance winner of a subsequent lawsuit for termination of the injunction; the bridge was only a continuing nuisance if it was in fact an

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<sup>68</sup> **U.S. Const.** art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 1.

<sup>69</sup> Pure appropriations measures, most notably private bills, are often quite specific. Those statutes do not raise concerns relevant to this article because they do not normally prescribe judicial outcomes. The particular specificity problem that I am addressing here concerns the relationship between the legislative and judicial departments. Whether there might be similar problems in the relationship between the legislative and executive departments is yet another matter.

<sup>70</sup> 59 U.S. (18 How.) 421 (1855).

<sup>71</sup> *See* State of Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1852).

<sup>72</sup> Act of Aug. 31, 1852, § 6, 10 Stat. 112. Section 7 of the statute further declared the bridges to be post roads, but the Court avoided basing its decision on this designation.

obstacle to navigation, and the congressional statute purported to determine that fact. Congress clearly could have passed a general statute defining the criteria for obstructions to navigation (thereby preempting contrary state or general tort law). Congress just as clearly could not have simply declared the bridge company to be the winner in the upcoming litigation. On which line does the actual statute in Wheeling Bridge fall? It is not sufficient to say that upholding the law would elevate form over substance.<sup>73</sup> That is clearly true, but for originalists, form often matters as much or more than substance. Many statutes effectively preordain the outcomes of litigation; there is little point in passing the statutes if they do not.

I do not propose to resolve these issues here (though I hope to resolve them in the future as part of a larger study of the Constitution's rules for statutory form and generality). For now, I make just one observation about the inquiry. If the Constitution contains a rule about the extent to which statutes either must or must not resolve issues for litigation, the rule must stem from the sweeping clause; there is no other text at hand to do the trick.<sup>74</sup> Cases like Wheeling Bridge then

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<sup>73</sup> See Sager, supra note 8, at 2526-27.

<sup>74</sup> Why can't one simply say that the principle of decisional independence is part of the "judicial Power" (and the "executive Power"), and thus limits Congress' authority, with or without reference to the sweeping clause? One probably can, but only up to a point. If there was a thick, well understood conception of the judicial power in the late eighteenth century, one could avoid most of these questions simply by reference to that conception. But there was not, so any background principles that do not find textual expression must operate at a fairly high level of generality. That poses the "Paulsen problem" of letting free-standing norms run amok. The Constitution is an "impure" compromise that is certainly based on understandings about separated powers but does not uniformly embody a single coherent theory. For example, the presentment clauses give the President some degree of legislative power, the President of the Senate clause does the same for the Vice President, and the appointments clause gives courts some measure of the executive/legislative appointment power. More pointedly, the sweeping clause expressly authorizes Congress to legislate with respect to the other departments' powers. That express authorization limits the extent to which one can say that the very nature of the judicial and executive powers precludes legislative interference; the Constitution quite obviously contemplates some measure of interference, regardless of what some "pure" theory might tell us. The question then becomes what degree of departure from purity the Constitution contemplates, and that question can only be answered by carefully examining the enumerated powers that permit interference. Perhaps one can derive a rule against direct legislative control of judicial (or executive) outcomes from the very existence of a scheme of separated powers, but any limitations on legislation that stray very far from that extreme probably need some "internal" constitutional grounding – even if those internal norms direct our attention to external understandings. Hence, the "necessary and proper" and "for carrying into Execution" requirements of the sweeping clause must do most of the heavy work in structural constitutional analysis.

pose a special puzzle. The statute in Wheeling Bridge was at least arguably a direct exercise of Congress' power to regulate interstate commerce and not an executory law for implementing the commerce power. Can it really be the case that the Constitution imposes different rules of specificity (or generality) based on something as contingent as whether Congress can enact the statute in question without the sweeping clause? The answer is yes, which is why background principles of generality, such as the nondelegation doctrine and whatever specificity rule the Constitution may contain, do not apply to legislation under the District clause or the territories/property clause.<sup>75</sup> The same is true of legislation under the other article I, section 8 powers, with this important difference: Congress almost never needs the sweeping clause to legislate for the District of Columbia, territories, or federal property, but it almost always needs the sweeping clause to effectuate its other powers. The statute in Wheeling Bridge, if it is truly an exercise of the commerce power, is one of the few examples of a self-contained, self-executing statute under the commerce clause. If a statute requires any penalty or enforcement

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<sup>75</sup> This explains why Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992), does not present the same problems as Wheeling Bridge. The statute at issue in Robertson, which essentially defined certain timber harvesting activities as compliant with applicable federal laws, regulated timber harvesting on federal lands and was thus an exercise of the property clause power. Perhaps one can read a specificity requirement into that clause's authorization of "needful Rules and Regulations respecting the . . . Property belonging to the United States," U.S. Const. art. IV, § 3, cl. 2 (emphasis added), but that is a much tougher task than finding such a requirement in the sweeping clause.

Does this mean that Congress can prescribe judicial outcomes under the District or territories/property clauses? (Such a statute clearly could not be a direct exercise of any of Congress' other powers.) The answer is a somewhat involved "no (or at least mostly no)." If one can simply rule out direct legislative control of judicial outcomes as inherent in a scheme of separated powers, see supra note 74, then the question is easy. If not, matters get complicated. Prior to 1791, the unqualified language of the District clause arguably did permit Congress to control judicial outcomes, though such a statute probably would not have survived even the minimal requirement of needfulness under the territories/property clause. The ratification of the Bill of Rights in 1791 had some interesting, and probably unintended, effects on Congress' power over the District, territories, and federal property. The first nine amendments extended some of the principles of limited government into the otherwise general legislative authority of Congress over these areas. To the extent that life, liberty, or property are at stake in the litigation, the extension of due process principles to the District and territories might well forbid legislative control of judicial judgments. And in cases that do not involve life, liberty, or property, the question turns on whether one can fairly characterize the right to a judicial decision that is not predetermined as a "right[] . . . retained by the people." U.S. Const. amend. IX.

provisions, those provisions must be enacted pursuant to the sweeping clause, and one must then ask whether it is “proper” to authorize enforcement of a statute that violates norms of generality (if indeed the substantive statute does so). As for the other article I, section 8 powers: some of them seem to require by their terms some measure of generality,<sup>76</sup> others contemplate highly specific legislation,<sup>77</sup> and still others are ambiguous.<sup>78</sup> A full study of this question thus requires a careful analysis of each of Congress’ enumerated powers – which is one of the many reasons that I do not want to say any more about it here.

So Congress can (to an extent) provide the federal courts with substantive law but cannot directly command the outcome of a case. What about the identification of the relevant facts and law and the process of reasoning to a case outcome? Is that process of decisionmaking subject to congressional control by statute?

The judicial power of course includes the power to reason to the outcome of a case. One cannot decide cases without bringing to bear some decisionmaking methodology for identifying and applying the relevant facts and law, so a grant of the judicial power must include a grant of the power to reason from facts and law to conclusions. Can Congress control that reasoning power by using the sweeping clause to dictate the decisionmaking methodology that courts must employ? The answer, as an inference from the principle of departmental independence, must be no. The process of decisionmaking is so tied up with the process of reaching a decision that it must be the “proper” province of the judicial department in the same way and to the same degree

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<sup>76</sup> See **U.S. Const.** art. I, § 8, cl. 4 (authorizing Congress “[t]o establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States”).

<sup>77</sup> See *id.* art. I, § 8, cl. 7 (giving Congress power “[t]o establish Post Offices and post Roads”).

<sup>78</sup> *Id.* art. I, § 8, cl. 14 (authorizing Congress “[t]o make Rules for the Government and Regulation of the land and naval forces”).

as the power to reach an outcome. Indeed, it is almost silly to say that the core of the judicial power is merely the power to reach a result, without reference to the process by which that result is reached. Accordingly, Congress can pass substantive laws, but it cannot tell the courts how to identify, construe, and apply them. And because we are dealing with a simple absence of congressional power, the purported justification for the exercise of the power is irrelevant. Even if the courts are applying a wrongheaded, or even unconstitutionally wrongheaded, method of decisionmaking, the sweeping clause does not empower Congress to prescribe a different process.

This conclusion straightforwardly rules out a statute regulating the courts' use of precedent. The proof of any proposition, including propositions of law, requires three elements: principles of admissibility (what counts toward proving a proposition?), principles of significance (how much does the admissible evidence count?), and standards of proof (how much evidence is needed to establish the truth of the proposition?).<sup>79</sup> Each element is essential to the disposition of any legal question, and congressional regulation of any element therefore violates the principle of departmental independence and is thus not "proper." This rules out statutes concerning the selection of materials for consideration (principles of legal admissibility), statutes concerning the weight or relevance to be given to various materials (principles of significance) or statutes concerning the amount of proof needed, either at trial or on appeal, to establish the legal truth of a proposition (standards of proof). Professor Paulsen's proposed statute squarely regulates both the admissibility and significance of precedent in judicial decisionmaking and is

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<sup>79</sup> See generally Gary Lawson, Proving the Law, 86 *Nw. U.L. Rev.* 863 (1992) (discussing the structure of propositional proof).

therefore unconstitutional. And that is true even if Congress is right and the courts are wrong about how best to decide cases.

Professor Paulsen’s case against this “structural argument,” as he aptly terms it, is as elegantly simple as the argument itself: (1) unless the Constitution prescribes a specific methodology, such as a specific method for assigning weight to precedent, the choice of a methodology is ultimately a judgment of policy, and judge-made policies cannot prevail over congressional statutes, (2) the structural argument leads to an unchecked judiciary, which is “at odds with the Constitution’s most fundamental structural postulate,”<sup>80</sup> and (3) the structural argument is inconsistent with a wide range of doctrinal understandings, including some from the founding era. In Part IV of this article, I will demonstrate that proposition (2) is incorrect. Proposition (3) is correct, but it is relevant to this argument only to the extent that it bears on original meaning. In Part III, I will show that Professor Paulsen’s doctrinal examples say little about original meaning.

The essence of Professor Paulsen’s critique of the structural argument is therefore proposition (1), which is nicely summed up in the following passage:

The [structural] argument claims the existence of penumbral judicial powers to prescribe rules of policy that trump the rules of law that the courts would otherwise find to be contained in the Constitution, statutes, and treaties of the United States. Unless the argument is that the Constitution dictates a specific doctrine of stare decisis -- and neither the courts nor any credible scholar has ever made such a claim, to my knowledge -- the claim would have to be that the judiciary is constitutionally empowered to devise one of its own choosing, without limitation, by virtue of Article III’s grant of “[t]he judicial Power” and the idea of separation of powers generally. That is pushing penumbras too far and misusing the idea of separation of powers.<sup>81</sup>

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<sup>80</sup> See Paulsen, supra note 12, at 1581.

<sup>81</sup> Id. at 1581-82.

Apart from the last sentence, Professor Paulsen has it exactly right. The federal courts have precisely the power to choose decisionmaking methodologies free of statutory control. If one wants to call that power “penumbral” rather than, say, “derived from background principles that define the ‘proper’ scope of Congress’ power to legislate for other departments,” so be it. And if one wants to call the prescription of decisionmaking methodologies a matter of “policy” rather than, say, “the determination of meta-norms for lawfinding and factfinding,” so be that too.

The stakes in this debate are quite high. Suppose that Congress enacts a statute that says: “In deciding cases, the federal courts may not consider any federal statute that is not cited by the parties in their briefs. In construing such statutes, the courts shall treat statements in congressional committee reports as conclusive evidence of statutory meaning [subject, perhaps, to certain rules for choosing among reports if there are inconsistent statements in different reports].” Is any part of this statute unconstitutional?

The first sentence determines the manner in which the courts must identify relevant federal statutory law. In the absence of such a statute, the courts would have to determine for themselves which of the numerous federal statutes on the books constitute relevant law for the cases before them. Can it be said that the Constitution prescribes a specific method for ascertaining the relevant law? I doubt it. There may be certain methods that are clearly beyond the pale of the judicial power and therefore unconstitutional (such as picking relevant statutes by random lot or astrological divination), but any assessment of relevance requires an inescapable element of judgment and is therefore an unlikely candidate for codification, especially indirect codification through a vesting of the “judicial Power.” In that sense, the choice of a methodology

for ascertaining the relevant law would have to fall on Professor Paulsen’s “nonconstitutional policy” side of the ledger.

The same can be said concerning the statute’s second sentence, which prescribes a method for determining statutory meaning. Even if one believes that the Constitution mandates an original public meaning approach to statutory interpretation, there are many different ways to identify and process evidence of that meaning. The choice among those methods, including how much weight to give to particular forms of legislative history, is surely a question of nonconstitutional policy, in Professor Paulsen’s terms.

Now consider some powers of the President under article II -- an analogy which Professor Paulsen briefly acknowledges.<sup>82</sup> The President has the power to execute the laws, including power to exercise a measure of enforcement discretion. The Constitution clearly does not mandate any one method for exercising such discretion (though it places some methods out of bounds), so the selection of enforcement priorities is, within a very broad range, a matter of nonconstitutional policy. May Congress therefore enact a statute providing, for example, “In exercising enforcement discretion under statute X, the President may not consider the extent to which prosecutions under this statute will burden resources for prosecutions under other statutes”?<sup>83</sup>

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<sup>82</sup> See id. at 1579 n.119.

<sup>83</sup> Professor Paulsen suggests that there may be a disanalogy between presidential powers under article II and judicial powers under article III if the “executive Power” by its nature contains an element of discretion that is not present in the “judicial Power.” See id. at 1580 n.119. That is certainly true, but it has a boomerang effect on Professor Paulsen’s argument. If the judiciary does not have discretion to choose decisionmaking methodologies under article III, then the choice of a methodology must be a matter of constitutional command rather than of nonconstitutional policy, which undermines Professor Paulsen’s case for congressional power. In fact, however, there are inescapable elements of discretion under both article II and article III. There may be differences in the degree of discretion, but I doubt whether Professor Paulsen wants to draw constitutional distinctions based on those differences in degree.

I am quite confident that Professor Paulsen would endorse a constitutional power in Congress to enact each of these statutes (or if he objected, the objection would involve the specific form or content of the statute and another could be drawn up that did not raise those concerns). I am equally persuaded that both statutes are “improper” and therefore unconstitutional. Our difference, quite bluntly, is that I believe that the sweeping clause is a textual vehicle for implementing the principle of departmental independence, while Professor Paulsen views such a principle as a free-floating abstraction without constitutional grounding. The ultimate question is therefore: who is right about the sweep of the sweeping clause with respect to congressional statutes affecting the allocation of power among federal institutions? With all due respect, the case for departmental independence is at least as strong as the case for departmental coordinacy, which Professor Paulsen has developed so thoughtfully in his prior work. The principle of departmental independence is part of the “proper” allocation of powers under the federal Constitution. That principle entails an independent judicial power to ascertain, interpret, and apply the relevant law. Congress cannot tell courts how to reason any more than it can tell courts how to decide.

### III

Professor Paulsen’s most compelling point is that a statute regulating the use of precedent is not very different (if it is different at all) from a host of statutes, many of ancient vintage, that seem to do precisely what the principle of decisional independence flatly forbids. The point is entirely correct in its factual claims about modern practice, and it has bite from two directions. First, if Congress has been regulating the judicial decisionmaking process since the start of the

United States government, doesn't that tell us something important about the original understanding of the sweeping clause? Second, just how far does the principle of decisional independence cut? Does it mean that all of the numerous federal statutes invoked by Professor Paulsen, from the Anti-Injunction Act to section 706 of the Administrative Procedure Act, are unconstitutional? If the answer is yes, then the consequences of applying a principle of decisional independence would be quite extraordinary.

#### A. The Significance of Congressional Practice

The first question is the easiest to address. The numerous examples of congressional statutes offered by Professor Paulsen say little, if anything, about the original public understanding of the sweeping clause, even if we are to take early legislative enactments as good evidence of original public meaning.<sup>84</sup>

A great many congressional statutes currently regulate the standards of proof that courts must employ when deciding certain issues. The bulk of these statutes, such as Rule 52(a) of the Federal Rules of Civil Procedure,<sup>85</sup> sections 706(2)(A) and 706(2)(E) of the Administrative Procedure Act,<sup>86</sup> and the numerous organic statutes that prescribe a scope of review for appeals

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<sup>84</sup> Just how much such enactments should count in determining original public meaning is a question that can be answered only in the context of a detailed specification of the mechanics of a jurisprudence of original public meaning. For now, it is enough to note that they are surely admissible evidence, even if they ultimately prove to be of little significance.

<sup>85</sup> Fed. R. Civ. Proc. 52(a) (stating that findings of fact of federal district courts "shall not be set aside unless clearly erroneous").

<sup>86</sup> 5 U.S.C. § 706(2)(A) & (E) (1994) ("The reviewing court shall . . . hold unlawful and set aside agency actions, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . [or] (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute").

from federal agency action,<sup>87</sup> purport to mandate a deferential standard of review to lower courts or administrative agencies, though Congress occasionally mandates a nondeferential standard.<sup>88</sup> These statutes are direct, profound regulations of the judicial decisionmaking process and thus directly challenge the principle of decisional independence. As far as original meaning is concerned, however, they are essentially irrelevant. All of these statutes are of distinctively modern origin and therefore, as indicia of original meaning, come “shrouded in an aura of incorrectness.”<sup>89</sup> Enactments of early Congresses carry some weight concerning original meaning because the members of those bodies were part of the original public.<sup>90</sup> As one gets farther from the moment of framing, however, the reliability of subsequent generations of lawmakers goes down, and possibly quite dramatically. Certainly by the twentieth century, one would hardly view enactments of Congress as plausible indications of original constitutional meaning. And the statutes prescribing standards of proof are essentially twentieth-century phenomena.<sup>91</sup>

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<sup>87</sup> See, e.g., 5 U.S.C. § 7703(c) (1994) (directing courts to set aside conclusions of the Merit Systems Protection Board if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . or . . . unsupported by substantial evidence”).

<sup>88</sup> See 5 U.S.C. § 552(a)(4)(B) (1994) (prescribing de novo review for agency determinations under the Freedom of Information Act).

<sup>89</sup> I owe this delicious phrase to Charles J. Cooper, in a conversation sometime in 1985. Mr. Cooper was referring specifically to decisions of the Warren Court, but his assessment is easily generalizable to the twentieth-century constitutional world.

<sup>90</sup> The weight or significance of their views, of course, are blunted by their institutional position in Congress. Members of Congress are not disinterested spectators on constitutional issues; their own powers, and those of their constitutional competitors, are on the line. Accordingly, enactments of early Congresses may be less reliable, rather than more reliable, indicators of original meaning than some other sources.

<sup>91</sup> The APA, for example, was enacted in 1946, which was not a time distinguished by its fidelity to original meaning. The organic statutes that preceded the APA did not date from much earlier. For a comprehensive discussion of the development of the doctrine of deference to administrative agencies, see Gordon G. Young, Public Rights and the Federal Judicial Power: From Murray’s Lessee Through Crowell to Schor, 35 **Buffalo L. Rev.** 765 (1986).

By contrast, the Rules of Decision Act, which declares that “[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply,”<sup>92</sup> originated as section 34 of the Judiciary Act of 1789.<sup>93</sup> The statute seems squarely to regulate the admissibility of legal materials and thus directly to control the decisionmaking process. In fact, however, the Rules of Decision Act is not a regulation of the judicial decisionmaking process because it does not create any new legal rule for courts to follow. The primary obligation of courts is to decide cases in accordance with governing law. That necessarily requires a determination of which law governs. “The laws of the several states . . . in cases where they apply” are clearly part of that governing law; if they apply, and if they are not preempted by a hierarchically superior source of law such as the Constitution or a federal statute or treaty, courts have an obligation to apply them. This obligation does not stem from, or even gain any force from, the Rules of Decision Act; it stems directly from the obligation to employ “[t]he judicial Power” of deciding cases in accordance with governing law. The Rules of Decision Act is an exhortation rather than a regulation, along the lines of “decide cases correctly” or “observe National Vinegar Month.” It does not change the legal landscape – beyond, perhaps, expressing a congressional sentiment against implied preemption of state law – and thus does not implicate the principle of decisional independence. This declaratory role was understood in the founding era,<sup>94</sup> and the Rules of Decision Act therefore does not reflect any underlying theory of the sweeping clause.

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<sup>92</sup> 28 U.S.C. § 1652 (1994).

<sup>93</sup> Act of Sept. 24, 1789, ch. XX, § 34, 1 Stat. 73, 92.

<sup>94</sup> This understanding of the Rules of Decision Act – and the early materials that support it – was set forth by Justice Scalia in an important but generally overlooked opinion in 1987. See *Agency Holding Corp. v. Malley, Duff*

Congress routinely legislates concerning the remedies that federal courts can employ. The most obvious example is the Anti-Injunction Act,<sup>95</sup> which dates back to 1793.<sup>96</sup> Professor Paulsen relies on this early example of congressional regulation as support for his broad reading of the sweeping clause.<sup>97</sup> When all is said and done, it may well be that the power to award a remedy is so bound up with the power to decide a case that Congress has no more power to regulate remedies than to regulate the decisionmaking process.<sup>98</sup> The differences between determining liability and determining remedies, however, are large enough so that evidence of practice with respect to remedies counts for little, if anything, concerning original understandings of congressional power to regulate more direct aspects of the case-deciding process, such as the use of precedent.

Similarly, statutes abrogating prudential standing doctrines, which Professor Paulsen regards as “perhaps the most direct analogy to a statute abrogating stare decisis,”<sup>99</sup> tell us nothing about original understanding. Not only are the statutes concerning prudential standing a twentieth-century invention, but the prudential standing doctrine itself is a twentieth-century

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& Associates, Inc., 483 U.S. 143, 162 (1987) (Scalia, J., concurring). But I actually owe these insights about the Rules of Decision Act to Lee Liberman, to whom I am grateful.

<sup>95</sup> 28 U.S.C. § 2283 (1994) (“A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”).

<sup>96</sup> Act of Mar. 2, 1793, ch. XXII, § 5, 1 Stat. 333, 334-35.

<sup>97</sup> See Paulsen, supra note 12, at 1585.

<sup>98</sup> See infra notes 127-30 and accompanying text.

<sup>99</sup> Paulsen, supra note 12, at 1585.

invention of highly dubious character.<sup>100</sup> Moreover, standing goes to the power of a court to hear the case, not to the manner in which a case within the court's jurisdiction should be decided.

That leaves the Full Faith and Credit Act,<sup>101</sup> which dates back to 1790.<sup>102</sup> This statute certainly regulates the judicial decisionmaking process by prescribing a choice-of-law rule and, more importantly, by specifying the manner in which the applicable law must be proved.<sup>103</sup> The full faith and credit clause expressly authorizes Congress to pass such laws for state courts,<sup>104</sup> but if Congress has the same power with respect to federal courts, it must come from the sweeping clause. Accordingly, the Full Faith and Credit Act does stand as a founding-era example of congressional regulation of judicial decisionmaking. But that hardly constitutes such an overwhelming indication of the original understanding that it undermines the principle of

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<sup>100</sup> If courts properly have jurisdiction over a case, it is hard to see where they get the power to refuse to decide it. Some variant of prudential standing can perhaps be defended as an exercise of remedial equitable discretion, *cf.* Steven G. Calabresi & Gary Lawson, Equity and Hierarchy: Reflections on the Harris Execution, 102 *Yale L.J.* 255, 257-65 (1992) (discussing remedial equitable discretion in the context of abstention doctrines), but such a doctrine would have to be calibrated to the circumstances of particular cases and would not implicate the jurisdiction of the courts.

<sup>101</sup> 28 U.S.C. § 1738 (1994) (“The records and judicial proceedings of any court of any . . . State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.”).

<sup>102</sup> Act of May 26, 1790, ch. XI, 1 Stat. 122.

<sup>103</sup> See 28 U.S.C. § 1738 (“The records of judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certification of a judge of the court that the said attestation is in proper form.”). This feature of the statute is more significant than the statute’s direct choice of law rule because the obligation to apply state law probably exists independently of statute, for the same reasons that the Rules of Decision Act is merely declaratory. See supra notes 83-85 and accompanying text. Moreover, John Harrison has suggested to me that choice of law rules are distinguishable from rules governing other aspects of judicial decisionmaking because they are rules of law rather than rules about rules of law. If precedent is a sound (epistemological) guide to such matters, Professor Harrison is almost certain to be right about this.

<sup>104</sup> The clause provides that “the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” **U.S. Const.** art. IV, § 1. Linguistically, one could read this language as an express authorization to legislate for federal courts as well as state courts, but the context of the full faith and credit clause makes such a reading dubious.

decisional independence. It is more likely that the founders got one wrong than that the Constitution does not contain a principle of decisional independence.

One can therefore glean little, if anything, about the original meaning of the sweeping clause from early congressional practice concerning regulation of judicial decisionmaking. That practice was too sparse and episodic to warrant any strong conclusions.

#### B. The Legality of Congressional Practice

So how much damage does the principle of decisional independence do to the United States Code? The question turns out to be very complicated – too complicated to answer in full in a single article. I can only sketch out some general considerations that must guide the inquiry.

Consider what appears to be the simplest case: congressional statutes that regulate the standard of proof that courts must employ. Numerous statutes providing for judicial review of federal agency action specify that certain kinds of agency decisions must be given some measure of deference by reviewing courts. Factual findings of administrative agencies are almost always subject to statutorily-mandated deferential review, and policy decisions may be reversed only if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>105</sup> The specification of a standard of proof is an essential part of the judicial decisionmaking process, so these statutes represent a direct challenge to the principle of decisional independence. Indeed, they are hard to distinguish from a statute that flatly requires decision in favor of a specific party. There is not much distance between “decide the case in

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<sup>105</sup> 5 U.S.C. § 706(2)(A) (1994). For a brief description of what this standard means in practice, see Gary Lawson, Outcome, Procedure, and Process: Agency Duties of Explanation for Legal Conclusions, 48 *Rutgers L. Rev.* 313 (1996).

favor of X” and “decide the case in favor of X unless you determine that X’s position approaches lunacy.” Are all such statutes unconstitutional?

The straightforward answer is yes, but the path to that answer is far from clear. The principle of decisional independence would seem quite obviously to deny Congress the power to dictate something as fundamental to the case-deciding process as the standard of proof, but there are two considerations that require pause. First, at least in cases in which the government is the defendant, one must deal with the doctrine of sovereign immunity. Under conventional doctrine, the federal government and its instrumentalities are immune from suit unless Congress expressly overrides the government’s sovereign immunity and permits suit.<sup>106</sup> Moreover, conventional doctrine says that Congress can condition its waivers of sovereign immunity to alter the usual rules of judicial proceedings, including denial of a right to an Article III adjudicator.<sup>107</sup> If this implication from the doctrine of sovereign immunity is correct, then perhaps Congress can regulate the standard of proof, or other aspects of the judicial decisionmaking process, in cases that reach the courts only because of a waiver of sovereign immunity.

There are two reasons, however, why this argument might not salvage statutes that regulate the standard of proof for reviewing agency decisions. First, the argument depends on the validity of the doctrine of federal sovereign immunity. If suits against the government do not actually require congressional permission, then Congress obviously cannot claim any power to condition the suits on the alteration of baseline rules concerning judicial review. Academic

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<sup>106</sup> For a brief overview of the development of the doctrine of federal sovereign immunity and the “strict construction” rule that applies to statutory waivers, see **Gregory C. Sisk, *Litigation with the Federal Government*** 104-35, 143-59 (2000).

<sup>107</sup> See *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855).

commentators are virtually unanimous in their condemnation of sovereign immunity,<sup>108</sup> but the true answer may be more complex than a simple up-or-down assessment. Even if governmental accountability is a constitutional requirement,<sup>109</sup> the form of that accountability may be variable; the legitimacy of sovereign immunity may depend on the status of other doctrines, such as official immunity, the political question doctrine, and other bodies of law that regulate one's ability to challenge governmental action.<sup>110</sup> Guy Seidman and I plan to explore these issues in a subsequent article. Until that analysis is fully developed, I do not want to opine on the legitimacy of federal sovereign immunity as an original matter.

Second, even if one accepts that suits against government agencies require congressional permission, the standard move from a power to permit suit to a power to permit suit only on certain conditions is wrong. The move rests on the proposition that the greater power to control jurisdiction includes the lesser power to control the manner in which that jurisdiction is exercised. But the power to control the decisionmaking process is not a lesser power than the power to control jurisdiction. It is a qualitatively different power that is either on the same level or, more likely, on a different scale than the power over jurisdiction. Congress controls the "jurisdiction" of the executive department by choosing which statutes to enact and by allocating funds, but that does not authorize Congress to specify, for instance, who should be prosecuted

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<sup>108</sup> See Gary Lawson & Guy Seidman, Downsizing the Right to Petition, 93 *Nw. U.L. Rev.* 739, 763 n.126 (1999).

<sup>109</sup> For an interesting argument to this effect, see James E. Pfander, Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government, 91 *Nw. U.L. Rev.* 889 (1997). Guy Seidman and I have elsewhere criticized Professor Pfander's claim that the first amendment right to petition bears on the constitutionality of sovereign immunity. See Lawson & Seidman, supra note 108, at 763-66; but see James E. Pfander, Restoring the Right to Petition, 94 *Nw. U.L. Rev.* 219 (1999) (defending his thesis). Professor Pfander, however, can be completely wrong about the relevance of the right to petition while being completely right about a constitutional baseline rule of governmental accountability.

<sup>110</sup> See Gary Lawson & Guy Seidman, The Hobbesian Constitution: Governing without Authority, 95 *Nw. U.L. Rev.* --, -- (2000) (forthcoming).

under each substantive statute. The legislative power includes the power to determine (to some extent) the sphere of activity over which the executive power acts, but once that sphere is determined, the executive power is self-executing. Similarly, Congress has some power (how much it is unnecessary to say here) to determine the jurisdiction of the various federal courts, but once that jurisdiction is conferred and the judicial power's sphere of activity is established, that power is self-executing.<sup>111</sup> Accordingly, the power to authorize suit, to the extent that such power exists in Congress, carries with it no ancillary power to prescribe the manner in which such suits must be heard and decided. Any such congressional power must find authorization in the sweeping clause and therefore must be "necessary and proper" for effectuating the federal judicial power.<sup>112</sup>

In any event, many statutes prescribing standards of proof do not involve suits against the government. Rule 52(a) of the Federal Rules of Civil Procedure, for instance, obligates federal appellate courts to defer to findings of fact by district courts unless those findings are "clearly erroneous."<sup>113</sup> This standard purports to govern all civil suits, including suits between private parties and suits in which the government is the plaintiff. One therefore cannot escape the need to determine the constitutionality of legislatively-specified standards of proof.

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<sup>111</sup> On the self-executing character of the judicial power, see Engdahl, *supra* note 1, at 83-90.

<sup>112</sup> One could reach the same results by applying some variant of the "unconstitutional conditions" doctrine, which forbids Congress from doing indirectly what it may not do directly. The precise contours, origins, and viability of that doctrine is a matter of ongoing controversy. Put less delicately, the subject is an odoriferous swamp. In one memorable two-year period, the doctrine generated, without any resolution, two major articles in the *Harvard Law Review*, see Richard A. Epstein, *The Supreme Court, 1987 Term, Foreword: Unconstitutional Conditions, State Power and the Limits of Consent*, 102 *Harv. L. Rev.* 4 (1988); Kathleen M. Sullivan, *Unconstitutional Conditions, 102 Harv. L. Rev.* 1413 (1989); and a full symposium in the *San Diego Law Review*, see *Unconstitutional Conditions Symposium*, 26 *San Diego L. Rev.* 175-345 (1989). When one looks for constitutional grounding for the unconstitutional conditions doctrine, however, one is led inexorably to the sweeping clause. Accordingly, direct analysis under the sweeping clause is much cleaner.

<sup>113</sup> Fed. R. Civ. Proc. 52(a).

A second consideration that might affect the constitutionality of legislation prescribing a standard of proof is the distinction between questions of fact and questions of law. Although Congress has occasionally legislated a standard of proof for propositions of law,<sup>114</sup> most legislative standards of proof concern review of factual findings. Professor Paulsen (whose proposed statute regulates the law-finding rather than fact-finding process) discounts the significance of any proposed distinction between law and fact on the ground that “deciding questions of fact and questions of law are both part of the core judicial function of deciding cases and controversies.”<sup>115</sup> Professor Paulsen may well be right, but the answer is not as clear as he suggests.

I have spent much of my professional life arguing that, for purposes of determining principles of proof, there is no theoretically valid distinction between law and fact.<sup>116</sup> The founding generation, alas, did not have the benefit of my wisdom. It adopted a Constitution that expressly recognizes a distinction between questions of law and fact. The so-called exceptions clause of article III provides that the Supreme Court “shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”<sup>117</sup> The clause clearly assumes that there is a distinction, at least in some contexts, between questions of law and fact. Furthermore, the seventh amendment limits judicial review of jury

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<sup>114</sup> See Paulsen, supra note 12, at 1588-89.

<sup>115</sup> Id. at 1588.

<sup>116</sup> See Lawson, supra note 78; Gary Lawson, Proving Ownership, 11 *Soc. Phil. & Pol’y* 139 (1994); Gary Lawson, Legal Indeterminacy: Its Cause and Cure, 19 *Harv. J.L. & Pub. Pol’y* 411 (1996).

<sup>117</sup> **U.S. Const.** art. III, § 2, cl. 3 (emphasis added). It is “so-called” because it does not in fact authorize Congress to make exceptions to the Court’s appellate jurisdiction but merely cross-references the power granted by the sweeping clause. See Engdahl, supra note 1, at 119-32.

decisions with respect to any “fact found by a jury.”<sup>118</sup> And this is apart from the background assumptions of the surrounding legal order, which obviously sought to distinguish law from fact for many important legal purposes, as our legal system continues to do today. One must therefore take very seriously the idea that the Constitution places greater limits on congressional power to regulate the judicial decisionmaking process with respect to law-finding than with respect to fact-finding.

In the end, I would conclude that Professor Paulsen is right that law-finding and fact-finding are equally fundamental to the judicial process, but with a sense of unease that might prompt reconsideration. Given, then, that (1) the law-fact distinction probably does not affect congressional power to regulate judicial decisionmaking under the sweeping clause, (2) sovereign immunity, even if valid as a doctrine, does not permit Congress to exercise control over suits that it permits, and (3) many standard-of-proof statutes purport to regulate suits that do not implicate federal sovereign immunity, the bottom line must be that federal statutes that prescribe a standard of proof for federal courts are per se unconstitutional. That conclusion encompasses, inter alia, Federal Rule of Civil Procedure 52(a), section 706 of the Administrative Procedure Act, and all of the organic statutes that prescribe standards of review for appeals from agency decisions. This does not mean that courts may never give deference to the views of other actors, such as administrative agencies or lower courts. The permissibility of judge-made deference doctrines is another question altogether that turns on the distinction between legal and epistemological deference.<sup>119</sup> But Congress may not prescribe for the federal courts the amount of evidence that is required to prove legal propositions.

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<sup>118</sup> **U.S. Const.** amend. VII (emphasis added).

<sup>119</sup> See supra note 58.

If Congress cannot prescribe the standard of proof for legal propositions, does that mean that Congress cannot prescribe as well the admissibility or the weight of various pieces of evidence? The question is critical for two reasons. First, Professor Paulsen's proposed precedent-limiting statute is really a rule of evidence for propositions of law: in deciding certain classes of cases, the courts may not give decisive weight to prior decisions. Thus, the power of Congress to prescribe rules of admissibility or significance is the specific issue that Professor Paulsen has put before us. Second, if Congress cannot regulate the admissibility or weight of evidence, the consequences are very large – perhaps even larger than the consequences of invalidating congressional specification of a standard of proof. The Federal Rules of Evidence would be the most obvious casualty, and the Full Faith and Credit Act (at least those parts of it that prescribe the manner in which state laws and decisions must be proved) would not be far behind. Subject only to some lingering doubts about the constitutional significance of a law-fact distinction in this context, the unavoidable conclusion is that these statutes are unconstitutional. The process of reasoning to a decision involves formulating and applying rules of admissibility, rules of significance, and standards of proof. If Congress can regulate any stage of this process, it can effectively shape the process of decisionmaking. The principle of decisional independence forbids this. Nor can Congress mandate that courts apply specific presumptions; a presumption is a direct regulation of the significance of certain pieces of evidence. And that is true whether or not the presumption is “irrebuttable.”

Rules of procedure, however, are another matter. There is no question that procedure can affect substance, so that seemingly “procedural” rules can have an impact on substantive

decisionmaking. The fact is familiar from many contexts.<sup>120</sup> Nonetheless, the distinction between substance and procedure is deeply engrained in our legal system. Procedural rules concerning such matters as forms of pleading, methods for executing judgments, empanelling of juries, etc. are surely precisely the kinds of laws “for carrying into Execution” the judicial power that the sweeping clause is designed to authorize. It is possible, of course, for some of these procedural rules to affect the process of decisionmaking in fairly direct ways; the order in which proof must be presented, for example, surely has the potential to affect decisions. How can we tell whether a congressional regulation of judicial procedure trenches so deeply into the decisionmaking process that it violates the principle of judicial independence?

Professors Engdahl and Redish have conveniently provided the solution. Professor Engdahl points out that any congressional regulations of judicial procedure must, by an objective standard, be “for carrying into Execution” the judicial power.<sup>121</sup> If the rule hinders rather than helps the execution of the judicial power, it is unconstitutional. Professor Redish adds that such procedural rules would be unconstitutional if they “so interfere with the courts’ performance of the judicial function . . . as to invade the courts’ ‘judicial power’ under Article III.”<sup>122</sup> Although that proposition may sound absurdly circular (“a congressional rule unconstitutionally intrudes on the judicial power if it so intrudes on the judicial power as to be unconstitutional”), it is as sound a formulation of what is a “proper” procedural statute as we will find. This kind of circularity is common, and unavoidable, in many separation-of-powers contexts. For instance,

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<sup>120</sup> As a mundane example: the Administrative Procedure Act exempts “rules of agency . . . procedure” from notice-and-comment requirements. 5 U.S.C. § 553 (b) (1994). When do rules of procedure, such as rules regulating the order in which evidence should be presented, shade into regulations of substance? The courts have no good answer, and neither do I. See Gary Lawson, Federal Administrative Law 273-76 (1998).

<sup>121</sup> See Engdahl, supra note 1, at 172-74.

<sup>122</sup> Redish, supra note 5, at 725.

the correct test for whether a statute vesting policymaking discretion in the executive is an improper, and therefore unconstitutional, delegation of legislative power is: “Congress must make whatever policy decisions are sufficiently important to the statutory scheme at issue so that Congress must make them.”<sup>123</sup> An “officer of the United States” under the appointments clause is, essentially, any employee who is important enough to be called an “officer of the United States.”<sup>124</sup> A principal officer under the appointments clause is, essentially, an officer who is important enough to be considered principal.<sup>125</sup> There are matters for which the Constitution simply does not provide a bright line rule, so that one cannot avoid the exercise of judgment based on shades and degrees. The point at which procedural rules slip into substantive regulations of judicial decisionmaking is one of them. Accordingly, procedural rules must be assessed on a case-by-case basis to determine whether they unduly regulate the decisionmaking process.<sup>126</sup>

That leaves congressional regulation of judicial remedies. The fashioning of a remedy is an essential aspect of deciding a case.<sup>127</sup> A law expanding the range of potential remedies available to a court is hard to challenge, but a law restricting a court’s power to apply its

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<sup>123</sup> Gary Lawson, The Rise and Rise of the Administrative State, 107 **Harv. L. Rev.** 1231, 1239 (1994).

<sup>124</sup> See Buckley v. Valeo, 424 U.S. 1, 126 (1976) (defining an officer – correctly, in my view -- as “any appointee exercising significant authority pursuant to the laws of the United States”).

<sup>125</sup> This was Justice Souter’s view in Edmond v. United States, 520 U.S. 651, 666 (1997) (Souter, J., concurring), in contrast to the majority’s evident position that “[g]enerally speaking, the term ‘inferior officer’ connotes a relationship with some higher ranking officer or officers below the President: whether one is an ‘inferior’ officer depends on whether he has a superior.” Id. at 662. Although it feels strange to side with Justice Souter over Justice Scalia, the former has the better of the argument on this point.

<sup>126</sup> For a thoughtful study of the line between substance and procedure, with a focus on the constitutionality of legislative presumptions, see D. Michael Risinger, “Substance” and “Procedure” Revisited, with Some Afterthoughts on the Constitutional Problem of “Irrebuttable Presumptions”, 30 **U.C.L.A. L. Rev.** 189 (1982).

<sup>127</sup> See Engdahl, supra note 1, at 170-71.

traditional range of remedies is a fairly blatant interference with the decisionmaking process. Such laws either fail to “carry[] into Execution” the judicial power, are not “proper,” or both. Professor Engdahl’s brief but thoughtful analysis on this point seems largely right.<sup>128</sup> That means, inter alia, that the Anti-Injunction Act is unconstitutional, as are the provisions of the Prison Litigation Reform Act of 1995<sup>129</sup> that do not simply declare existing law.<sup>130</sup>

Professor Paulsen is entirely right that these conclusions represent “an extraordinary challenge to congressional power and . . . an extraordinary departure from settled law . . . .”<sup>131</sup> His proposal to regulate by statute the courts’ use of precedent is tame by comparison. But it is still wrong.

#### IV

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<sup>128</sup> Id. at 170-72. He is wrong in his defense of Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), to the extent that his discussion goes beyond Bivens’ claims about remedies to include the proposition that the Constitution provides a direct substantive source of liability. But that is another article.

<sup>129</sup> Pub. L. 104-124, 110 Stat. 1321-66 to 1321-77 (1996) (codified at 18 U.S.C. § 3626 (1994 Supp. IV)).

<sup>130</sup> The key provision of this statute provides that prison injunctions must be lifted “if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.” 18 U.S.C. § 3626(b)(2). To the extent that this formulation departs from traditional rules for lifting injunctions, it is invalid. The precise question in Miller – whether Congress can provide for an automatic stay of injunctions, see 18 U.S.C. § 3626(e)(2) – piggybacks on this issue. The most interesting provision of this statute, however, is the provision forbidding courts from terminating injunctions if they make “written findings” that the substantive terms of § 3626(b)(2) are satisfied. Can Congress attach special significance to the “writtness” of judicial findings (or require courts to announce their decisions in Latin or to spray shaving cream on litigants who raise frivolous evidentiary objections)? The answer depends on whether such statutes merely prescribe rules of procedure. See supra notes 120-26 and accompanying text..

<sup>131</sup> Paulsen, supra note 12, at 1590.

Professor Paulsen raises the specter of an “uncontrollable judiciary”<sup>132</sup> and “an uncheckable judicial power to prescribe rules at variance with the Constitution,”<sup>133</sup> which suggests that the alternative to his statute is a regime in which courts are free to choose any method of decisionmaking, and any theory of precedent, without external control. This is not true. Even without Professor Paulsen’s statute, the Constitution prescribes two methods for controlling judicial use of precedent or any other decisionmaking methodology. Professor Paulsen even alludes to these methods, both of which are near and dear to his (and my) heart.

First, Congress does indeed have the power to control judicial uses of precedent, but only through the constitutionally prescribed method of impeachment. The reach of the impeachment power is beyond the scope of this article,<sup>134</sup> but that power does allow Congress to impeach and remove a judge based on that judge’s decisionmaking process. Consider, for example, a judge who decides cases based on the race of the parties, or the number of letters in the parties’ names, or the positions of planetary bodies. Professor Paulsen would have no trouble with the proposition that such judges could be impeached and removed from office,<sup>135</sup> and he would be right.

The Constitution provides for impeachment for “Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>136</sup> The phrase “high Crimes and Misdemeanors” is a term of art that is not

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<sup>132</sup> Id. at 1581.

<sup>133</sup> Id.

<sup>134</sup> Chris Moore and I have elsewhere discussed the impeachment power at some length in the context of presidential refusals to enforce unconstitutional statutes. See Lawson & Moore, supra note 26, at 1307-12. Much of that discussion, as we then recognized, see id. at 1311-12, is applicable to judicial impeachments and removals as well.

<sup>135</sup> See Paulsen, supra note 12, at 1600-01.

<sup>136</sup> **U.S. Const.** art. II, § 4.

coextensive with the universe of indictable crimes.<sup>137</sup> It refers generally to abuse of office or neglect of duty,<sup>138</sup> and judges who egregiously fail to decide cases in accordance with law are both abusing their offices and neglecting their duty.<sup>139</sup> If Congress views a particular methodology as akin to reliance on astrology, impeachment and removal of a judge for consistent application of that methodology seems to be well within Congress' constitutional power.

This conclusion is not beyond question. Professor Redish has forcefully defended a much more limited role for the impeachment power, based largely on the principle of decisional independence.<sup>140</sup> He (rightly) worries that an extensive impeachment power could blunt the force of an independent judiciary.<sup>141</sup> I cannot join issue with him here,<sup>142</sup> but suffice it to say that Professor Redish explicitly rejects an originalist approach to determining the range of the impeachment power.<sup>143</sup> It is one thing to use the principle of decisional independence to give content to a "proper" distribution of governmental powers. It is another thing altogether to use the principle to undercut a well-understood (in 1789) understanding of the phrase "high Crimes and Misdemeanors." Because the ultimate originalist inquiry is hypothetical rather than

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<sup>137</sup> See Lawson & Moore, supra note 26, at 1307 n.191 (noting the scholarly consensus on this point).

<sup>138</sup> See id. at 1308-09.

<sup>139</sup> How "egregiously" must the judges flaunt the law in order to trigger the possibility of impeachment? That is a topic for another article, which I have no plans or desire to write. It is enough for now to establish that decisionmaking methodologies are fair game in principle for the impeachment power and that a consistent pattern of application of faulty methodologies is an impeachable offense, even if a single, random faulty decision would not be.

<sup>140</sup> See Redish, supra note 20.

<sup>141</sup> See id. at 685-86.

<sup>142</sup> Chris Moore's and my prior discussion of this topic, see Lawson & Moore, supra note 26, at 1307-12, was in large measure a response to some of Professor Redish's earlier-expressed views.

<sup>143</sup> See Redish, supra note 20, at 680-82.

historical, however, it is not impossible that even an established understanding could be wrong -- because, for example, it failed to grasp certain essential features of the overall constitutional structure. Accordingly, Professor Redish's position cannot be casually dismissed by originalists. But if one is going to bring constitutional principles to bear on this inquiry (and one should), the principle of coordinacy, which is as fundamental as the principle of decisional independence, cuts in favor of the rather clear original understanding of the impeachment power. If it is unlikely that the Constitution, with its careful scheme of divided power, permits Congress to control the process of judicial decisionmaking by statute, it is just as unlikely that the Constitution provides no mechanism at all for controlling rogue judicial decisionmaking.

If courts are indeed abusing the doctrine of precedent, then Congress can control that abuse through the impeachment process -- with all of the cumbersome mechanisms that that process entails. But Congress can no more circumvent its responsibilities to police the judicial department under the impeachment clauses by passing ordinary legislation than it can circumvent its responsibilities to police the executive department under the impeachment power by passing ordinary legislation, such as laws providing for independent counsels.

Second, the President has the power to control judicial abuses of precedent through the power to refuse to enforce judgments. Professor Paulsen has elsewhere defended a presidential power to refuse to enforce judgments that the President believes are unconstitutional.<sup>144</sup> Chris Moore and I have elsewhere defended a somewhat lesser presidential power to refuse to enforce judgments when the President believes with a very high degree of confidence that they are

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<sup>144</sup> See Paulsen, *supra* note 56.

unconstitutional.<sup>145</sup> In either case, the President has some degree of power to ensure that the judicial decisionmaking process stays within proper bounds.

Neither of these methods of control, of course, is as sweeping or as easy to implement as Professor Paulsen's statute. But that is the Framers' fault – or, perhaps, their wisdom.

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<sup>145</sup> See Lawson & Moore, supra note 26, at 1324-29.