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THE COST OF JUDICIAL ERROR: STARE DECISIS AND THE ROLE OF NORMATIVE THEORY

*Kurt T. Lash**

Changes in constitutional doctrine impose costs in terms of the values traditionally associated with the rule of law. Stability, predictability, and public confidence in the presumptive legitimacy of current law all can be undermined by departures from, or formal overruling of, prior precedent. The prudential doctrine of stare decisis is meant to ameliorate these costs by counseling judicial adherence to precedent even in those cases where a judge believes the prior decision was wrong.[1] Although consistently described as a discretionary policy, as opposed to an "inexorable command," the Supreme Court of the United States has long embraced the doctrine of stare decisis as an appropriate consideration any time the Court considers overruling past precedent. However, because the Court's actual application of the doctrine has been both sporadic and seemingly inconsistent, some scholars (and Justices) have accused the Court of methodological hypocrisy and bad faith.[2]

Much of this criticism assumes that, if members of the Supreme Court find certain rule of law values dispositive in one case, they should find those same considerations dispositive in all cases. Failure to do so suggests either incompetence or insincerity. This Article argues that, on the contrary, stare

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1 *See* Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 283–84, 286–88 (1990).

2 *See* Randy J. Kozel, Stare Decisis *as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 414 (2010) ("The various factors that drive the doctrine are largely devoid of independent meaning or predictive force. Fairly or not, this weakness exposes the Court to criticism for appearing results-oriented in its application of *stare decisis*."); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 743 (1988) (describing the Supreme Court's doctrine of stare decisis "as a mask hiding other considerations"); *see also* Lawrence v. Texas, 539 U.S. 558, 587 (2003) (Scalia, J., dissenting) (complaining that the majority "should be consistent rather than manipulative in invoking the doctrine" of stare decisis).

decisis ought not be applied in the same manner in all cases. In fact, occasionally stare decisis should not apply at all.

Before the Court considers whether and how to apply stare decisis in a constitutional case, it must first determine whether the application of the doctrine is appropriate. This initial determination requires an application of normative interpretive theory. When viewed through the lens of theory, some judicial errors impose such high costs that application of the doctrine of stare decisis is inappropriate, and those errors should simply be rectified. Even in those constitutional cases where theory allows the maintenance of judicial error to be a legitimate option, considerations of normative theory affect how the Court ought to balance the costs of upholding against the costs of overruling erroneous precedent. In cases where theory suggests the costs of judicial error are relatively low, avoiding substantial harm to the rule of law might reasonably suggest that the Court should "stand by" the flawed decision. Where theory suggests the costs of error are high, however, only the most severe disruption to the rule of law can justify maintaining a flawed precedent.

This balancing of normative theory and stare decisis occurs in all judicial applications of stare decisis, though not always in a transparent manner. This Article suggests that such balancing is perfectly appropriate but that it needs to be more deeply theorized and more transparently applied.

I begin by considering some of the high-profile cases of the Rehnquist and Roberts Courts that dealt with the issue of maintaining a flawed precedent. This is not meant to be an exhaustive account, but merely a review of those cases that highlight the Court's different approaches to stare decisis in different cases. On their faces, these decisions seem to apply different and almost contradictory theories of stare decisis. When viewed through the lens of normative theory, however, the decisions reflect not so much contradictory applications of stare decisis as varying assessments of the cost of maintaining judicial error. The impact of this counter-balancing consideration of normative theory is especially evident in the Roberts Court's decision to overrule *Austin v. Michigan State Chamber of Commerce*[3] in *Citizens United v. Federal Election Commission*.[4]

Building upon the implicit theory of *Citizens United*, the final Part sketches a more complete theory of stare decisis that takes into consideration both the rule of law considerations of stare decisis and the normative considerations that flow from the traditional theory of popular sovereignty.

I. The Rehnquist Court

A. *Setting the Stage:* Planned Parenthood v. Casey

The joint plurality opinion of Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter in *Planned Parenthood of Southeastern Pennsylvania*

3 494 U.S. 652 (1990).

4 558 U.S. 310 (2010); *see infra* Section II.B.

v. Casey[5] is equally famous and infamous for its attempt to justify the Court's continued adherence to "the essential holding of *Roe v. Wade*."[6] The opinion is worth a somewhat extended discussion given its important role in later discussions of stare decisis in both the Rehnquist and Roberts Courts.

The plurality began with normative theory. Rejecting interpretive approaches that limited protected rights to those listed in constitutional text or those traditionally protected at law, the plurality defined due process liberty as "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[7] The plurality arrived at this definition through the application of "reasoned judgment,"[8] which, in this case, involved extracting an overarching principle of liberty from twentieth-century due process precedents characterized by the plurality as representing "[o]ur law" and "[o]ur cases."[9]

Having applied normative interpretive theory to identify the underlying right, the plurality conceded that *Roe* represented "an extension" of the right,[10] and hinted that not all of the plurality members believed that this particular extension was correctly decided.[11] The nature of *Roe*'s potential error, however, was limited. According to the plurality, "[e]ven on the assumption that the central holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the woman's liberty."[12]

In light of this minor potential error, the plurality proceeded to consider whether the principles of stare decisis counseled upholding *Roe*.[13] Here, the plurality invoked the familiar dictum that stare decisis is not an " 'inexorable command' "[14] but involves "a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."[15] The plurality then listed four specific considerations: (1) whether the precedent "def[ies] practical workability,"[16] (2) whether overruling the precedent would impose a "special hardship" on those relying on past precedent,[17] (3) whether post-precedent legal develop-

5 505 U.S. 833, 843–911 (1992).

6 *Id.* at 846.

7 *Id.* at 848–51.

8 *Id.* at 849.

9 *Id.* at 851.

10 *Id.* at 853.

11 *Id.* ("[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.").

12 *Id.* at 858.

13 *Id.* at 854–69.

14 *Id.* at 854 (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting)).

15 *Id.*

16 *Id.* (citing Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965)).

17 *Id.* (citing United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924)).

ments had "left the old rule no more than a remnant of abandoned doctrine,"[18] and (4) "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[19]

A wealth of literature already exists analyzing the plurality's treatment of stare decisis.[20] For the purposes of this Article, it is important only to point out that the so-called "prudential and pragmatic considerations"[21] are suffused with normative constitutional theory. Firstly, the plurality expands consideration of relevant reliance interests beyond the traditional subjects of "property or contract" in order to include consideration of "[t]he ability of women to participate equally in the economic and social life of the Nation" and how that ability "has been facilitated by their ability to control their reproductive lives."[22] This is a consideration sounding in a normative theory of equal protection, and has been recognized as such.[23] Secondly, the plurality concludes that upholding *Roe* will not lead to further judicial error (another factor in their stare decisis analysis) on the grounds that *Roe* appropriately built on normatively correct precedents like *Griswold v. Connecticut* and *Eisenstadt v. Baird*.[24] Thus, to the degree that *Roe* erred, it was not in its normative theory of constitutional liberty, but in its failure to fully appreciate "the strength of the state interest in fetal protection."[25]

In short, the plurality adopts and applies a normative "Living Constitution" theory of constitutional interpretation—one that justifies judicial iden-

18 *Id.* at 855 (citing Patterson v. McClean Credit Union, 491 U.S. 164, 173–74 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008)). Not all of these "pragmatic" considerations are divorced from underlying normative interpretive theory. For example, in discussing the reliance interest, the plurality appears to view the right to abortion through the lens of a normative theory of equal protection law. *See id.* at 855–56 ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." (citing ROSALIND POLLACK PETCHESKY, ABORTION AND WOMAN'S CHOICE 109, 133 n.7 (rev. ed. 1990))).

19 *Id.* at 855 (citing *Burnet*, 285 U.S. at 412 (Brandeis, J., dissenting)).

20 For a small sample, see Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling* Planned Parenthood of Southeastern Pennsylvania v. Casey, 22 CONST. COMMENT. 311 (2005); William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis:* Casey, Dickerson *and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53; Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535 (2000).

21 *Casey*, 505 U.S. at 854.

22 *Id.* at 856.

23 *See, e.g.*, Reva B. Siegel, *Equality and Choice: Sex Equality Perspectives on Reproductive Rights in the Work of Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 63, 74 (2013) ("Where *Casey* drew upon the conceptual framework of the sex equality argument for abortion rights[,] . . . [t]he Court's liberal Justices have now begun to reason about abortion by appeal to the authority of the Equal Protection Clause . . . .").

24 *Casey*, 505 U.S. at 858 (citing Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965)).

25 *Id.*

tification and enforcement of unenumerated conceptions of personal liberty and equal protection regardless of textual mandate or original meaning.[26] This theory suggests that the costs imposed by *Roe*'s error, if any, were minimal.[27]

This plurality's living constitutionalist normative theory of judicial power is most strikingly presented in the final section of its joint opinion, where it addresses the costs of making any move that might cause the people to question the leadership of the Supreme Court.

> The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands. . . .
>
> . . . .
>
> . . . Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution. . . .
>
> . . . .

26 *See, e.g.*, DAVID A. STRAUSS, THE LIVING CONSTITUTION 1, 3–5 (2010) (introducing the book by explaining that a "'living constitution' is one that evolves, changes over time, and adapts to new circumstances, without being formally amended" and that "[o]ur constitutional system—I'll maintain—has become a common law system, one in which precedent and past practices are, in their own way, as important as the written U.S. Constitution itself").

27 This normative view of the proper exercise of judicial review presumably explains the plurality's recasting of the New Deal Court's rejection of *Lochnerian* liberty of contract as driven by new "factual assumptions" rather than—as the New Deal Court itself explained—by the fact that "liberty of contract" was a judicially created right with no basis in the text of the Constitution. *Compare Casey*, 505 U.S. at 861–62 (describing the New Deal Court's reversal of *Lochnerian* liberty of contract as justified by the Court's realization that prior decisions were based on "false factual assumptions" regarding liberty), *with* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (deferring to legislative regulation of economic matters, but suggesting that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth" (citing Lovell v. City of Griffin, 303 U.S. 444, 452 (1938); Metro. Cas. Ins. Co. v. Brownell, 294 U.S. 580, 584 (1935); Stromberg v. California, 283 U.S. 359, 369–70 (1931))), *and* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) ("The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.").

> . . . Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.[28]

Whether or not one agrees with the plurality's conception of judicial authority under a written Constitution, this passage strongly reflects how the plurality's normative vision of American constitutional liberty informs its application of stare decisis. Not only does the plurality apply normative theory to determine the cost of maintaining judicial error,[29] but it also applies normative theory in assessing the cost of overruling precedent.[30] Living Constitutionalists see the Court as more than an enforcer of values identified through the democratic process in the past, but rather as a generator of values to be applied in the future.[31] In this case, for example, the source of the liberty right upheld in *Casey* was derived from "[o]ur [the Court's] precedents,"[32] rather than from text or even common law. Because the plurality sees the Court as playing a critical role in the development of American liberty, it therefore insists that the people's "belief in themselves"[33] cannot be readily separated from their belief in the Supreme Court—a Court empowered to "speak before all others"[34] in defining constitutional ideas. Maintaining this leadership role requires public confidence, a confidence that is undermined anytime the people are informed (even *correctly*) that a prior Court has erred on a matter of critical importance.[35] In this way, the plurality's normative theories of constitutional interpretation and judicial power come together in a remarkable paragraph which asserts that the people will lose faith in themselves if the Supreme Court too often identifies prior judicial error.[36] Even a single admission of judicial error in a deeply controversial case can dangerously undermine the people's critically important faith in the Court, since "to overrule under fire in the absence of the most compelling reason . . . would subvert the Court's legitimacy beyond any serious question."[37]

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28 *Casey*, 505 U.S. at 865–68.
29 *See id.* at 856.
30 *See id.* at 865–68.
31 *See supra* note 26 and accompanying text.
32 *Casey*, 505 U.S. at 851.
33 *Id.* at 868.
34 *Id.*
35 *See id.* at 866.
36 *Id.* ("There is, first, a point beyond which frequent overruling would overtax the country's belief in the Court's good faith.").
37 *Id.* at 866–67 (citing Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955)).

Oddly, the plurality's emphasis on stare decisis and public confidence completely disappears in its discussion of why precedents like *City of Akron*[38] and *Thornburgh*[39] are appropriately overruled. The plurality removes these cases from what they believe is the "essential holding" of *Roe* and proceeds to overrule them for no other reason than they are wrong.[40] There is no discussion of reliance, workability, or public confidence in the Court.[41]

B. The Cost of Error in a Constitutional System: Seminole Tribe v. Florida *and* Agostini v. Felton

1. *Seminole Tribe v. Florida*

In *Seminole Tribe of Florida v. Florida*,[42] the Supreme Court overruled its prior decision in *Pennsylvania v. Union Gas Co.*, which had allowed Congress to abrogate state sovereign immunity through the use of the commerce power.[43] In an opinion written by Chief Justice Rehnquist and joined by two members of the *Casey* plurality, Justices Kennedy and O'Connor, the Court addressed whether the principles of stare decisis counseled standing by the flawed opinion in *Union Gas*.[44] The Chief Justice noted how the traditional principles of stare decisis support "'the evenhanded, predictable, and consistent development of legal principles, . . . reliance on judicial decisions, and . . . the actual and perceived integrity of the judicial process.'"[45] These principles "counsel[ed] strongly against reconsideration of our precedent."[46] Nevertheless, stare decisis was no more than a "principle of policy" and not an "inexorable command."[47] Chief Justice Rehnquist then listed three con-

38 City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 442–51 (1983) (invalidating information and waiting period requirements).

39 Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986).

40 *Casey*, 505 U.S. at 882 (O'Connor, Kennedy, & Souter, JJ.) ("To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus, those cases go too far, are inconsistent with *Roe*'s acknowledgment of an important interest in potential life, and are overruled.").

41 This raises a theoretical difficulty in understanding the reasoning of the plurality. If the only error in *Roe* involved the under-appreciated state interest in potential life, then this is the only "error" to which stare decisis could apply. If every member of the plurality agreed with the "essential holding" of *Roe*, then there was no need to rely on the doctrine of stare decisis at all. On the other hand, to the degree that *Roe* erred in recognizing the state interest in potential life, stare decisis would apply to this "erroneous" portion of *Roe* only if the Court wished to "stand by" that previous error. However, the Court did not: it overruled the cases whose outcomes were directed by their failure to properly acknowledge the state interest in potential life.

42 517 U.S. 44 (1996).

43 Pennsylvania v. Union Gas Co., 491 U.S. 1, 13–19 (1989).

44 *Seminole Tribe*, 517 U.S. at 66.

45 *Id.* at 63

46 *Id.*

47 *Id.*

siderations affecting the application of stare decisis, only one of which involved *Casey*-like pragmatic considerations:

> [W]hen governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent. Our willingness to reconsider our earlier decisions has been particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible.[48]

Here, Chief Justice Rehnquist highlights a problem with applying the doctrine of stare decisis in a legal system containing entrenched principles of fundamental law. In parliamentary-style common law systems, judicial errors remained subject to alteration by the ordinary actions of legislative assemblies.[49] Under the American constitutional system, however, constitutional rules can be changed only by way of the extraordinary process of constitutional amendment.[50] Because remedying judicial errors involving constitutional interpretation remains beyond the ordinary reach of the democratic process, this heightens the potential "cost" of such errors. This, in turn, suggests that stare decisis considerations in constitutional cases do not carry as great of a relative weight as they do in cases involving nothing more than statutory interpretation.

In *Seminole Tribe*, Chief Justice Rehnquist believed that the inability of the democratic process to respond to the Court's error suggested that considerations of stare decisis did not outweigh the value of enforcing the proper interpretation of congressional power.[51] This was particularly true where overruling the case would restore a prior, well-established line of precedent. As the Chief Justice explained:

> In the five years since it was decided, *Union Gas* has proved to be a solitary departure from established law. Reconsidering the decision in *Union Gas*, we conclude that none of the policies underlying *stare decisis* require our continuing adherence to its holding. The decision has, since its issuance, been of questionable precedential value, largely because a majority of the Court expressly disagreed with the rationale of the plurality. The case involved the interpretation of the Constitution and therefore may be altered only by constitutional amendment or revision by this Court. Finally, both the result in *Union Gas* and the plurality's rationale depart from our established understanding of the Eleventh Amendment and undermine the accepted function of Article III. We feel bound to conclude that *Union Gas* was wrongly decided and that it should be, and now is, overruled.[52]

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48 *Id.* (citations omitted) (internal quotation marks omitted).

49 *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 409–10 (1932) (Brandeis, J., dissenting) ("In cases involving the Federal Constitution the position of this court is unlike that of the highest court of England, where the policy of *stare decisis* was formulated and is strictly applied to all classes of cases. Parliament is free to correct any judicial error; and the remedy may be promptly invoked." (footnotes omitted)).

50 *See* U.S. CONST. art. V.

51 *See Seminole Tribe*, 517 U.S. at 63–66.

52 *Id.* at 66 (citations omitted).

Absent from Chief Justice Rehnquist's analysis was any *Casey*-like consideration of workability, reliance,[53] or public confidence in a Court that "speaks before all" on matters of constitutional meaning. Nor did Chief Justice Rehnquist's relatively abbreviated discussion of stare decisis generate objection from the dissent. Justice David Souter, for example, acknowledged there was nothing about the *Union Gas* decision that especially warranted standing by the decision.[54]

2. *Agostini v. Felton*

One of the more dramatic doctrinal shifts during the Rehnquist Court involved the Supreme Court's interpretation and application of the Establishment Clause. Following the Court's initial incorporation of the Establishment Clause into the Due Process Clause of the Fourteenth Amendment in *Everson v. Board of Education*,[55] the Court quickly developed a three-part test that in its application had the effect of banning all government aid to religious schools.[56] In cases like *Aguilar v. Felton*,[57] and its companion case *School District of Grand Rapids v. Ball*,[58] the Supreme Court struck down Great Society programs that provided equal educational aid in the form of schoolteachers to inner city schools, both religious and secular.[59] Twelve years later, the defendants in *Aguilar* sought release from the original injunction on the grounds that the Court's approach to the Establishment Clause had so changed in the intervening years as to render the original decision invalid.[60] In *Agostini v. Felton*, a majority of the Supreme Court agreed and formally overruled both *Aguilar* and *Ball*.[61]

Once again pointing out that stare decisis was no more than prudent policy and not an "inexorable command," Justice O'Connor's opinion for the Court repeated the admonition from *Seminole Tribe* that stare decisis "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions."[62] Justice O'Connor also noted that stare decisis does not stand in the way of overruling a precedent "where there has been a significant change

53 It is possible that considerations of *reasonable* reliance may be implicit in the Court's emphasis of the decision's recent vintage and odd-man-out status.

54 *Seminole Tribe*, 517 U.S. at 100 (Souter, J., dissenting). Justice Souter's primary reason for dissenting involved his disagreement with the Court's general doctrine of state sovereign immunity. *Id.*

55 Everson v. Bd. of Educ., 330 U.S. 1, 14–16 (1947).

56 *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (articulating a three-part test for determining if government aid violates the Establishment Clause of the First Amendment as incorporated into the Fourteenth Amendment).

57 473 U.S. 402 (1985).

58 473 U.S. 373 (1985).

59 *See Aguilar*, 473 U.S. at 406–07, 409.

60 Agostini v. Felton, 521 U.S. 203, 208–09 (1997).

61 *Id.* at 235–36.

62 *Id.* at 235.

in, or subsequent development of, our constitutional law,"[63] a point also raised by the plurality in *Casey*.[64] Having already established the changed nature of the law, Justice O'Connor concluded there was no need to address the pragmatic concerns of stare decisis *at all*.[65]

C. *The Flip Side of* Casey*:* Lawrence v. Texas

In *Lawrence v. Texas*,[66] the Supreme Court identified and enforced a constitutional right to consensual homosexual sodomy and, in so doing, overruled *Bowers v. Hardwick*.[67] Writing for the majority, Justice Anthony Kennedy began by locating the right in the Court's broader substantive due process privacy jurisprudence and concluded that *Bowers* erred in failing to locate sexual autonomy within that jurisprudence.[68] After canvassing the evolution of societal regulation of sodomy, Justice Kennedy concluded that modern society remained divided on the issue, but had moved in a more permissive direction, thus undermining the Court's claim in *Bowers* that such claims were "insubstantial in our Western civilization."[69] Next, Justice Kennedy noted that cases decided since *Bowers*, such as *Planned Parenthood v. Casey*, pointed towards a broader understanding of the right to sexual autonomy than that presented in *Bowers*.[70] In terms of the constitutional harm that would attend following *Bowers*, Justice Kennedy argued that "[i]ts continuance as precedent demeans the lives of homosexual persons," even if sodomy laws go unenforced.[71] Finally, Justice Kennedy noted that the decision in *Bowers* had come under considerable fire from both academic and international quarters.[72]

Having considered *Bowers* from the perspective of jurisprudence and normative theory, Justice Kennedy then briefly turned to the doctrine of

63 *Id.* at 235–36.

64 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992).

65 Here is the relevant passage in full:

> As discussed above, our Establishment Clause jurisprudence has changed significantly since we decided *Ball* and *Aguilar*, so our decision to overturn those cases rests on far more than "a present doctrinal disposition to come out differently from the Court of [1985]." We therefore overrule *Ball* and *Aguilar* to the extent those decisions are inconsistent with our current understanding of the Establishment Clause.

Agostini, 521 U.S. at 236 (citation omitted). In dissent, Justice Souter did not object to the idea that a change in law obviated the need to apply stare decisis. Instead, he disagreed that there had been a fundamental change in the law. *Id.* at 253–54 (Souter, J., dissenting).

66 539 U.S. 558 (2003).

67 478 U.S. 186 (1986).

68 *See Lawrence*, 539 U.S. at 564–68.

69 *Id.* at 573.

70 *Id.* at 574 (discussing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) and Romer v. Evans, 517 U.S. 620 (1996)).

71 *Id.* at 575.

72 *Id.* at 576.

stare decisis. Following the obligatory statement that the doctrine is not an "inexorable command," Justice Kennedy focused on the *Casey* plurality's consideration of societal reliance.[73] Where the *Casey* plurality found substantial reliance on the right identified in *Roe*, here "there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so."[74] In fact, "*Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding."[75] Justice Kennedy concluded, "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."[76]

Justice Kennedy ended his opinion with a passage that echoes the *Casey* plurality's normative view of the Supreme Court as "speaking before all others" on matters involving constitutional liberty:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[77]

Justice Kennedy means, of course, that *the Supreme Court* in every generation can see how prior generations were blind and invoke the principles of the Constitution in *the Court's* search for greater freedom. Justice Kennedy's opinion and his treatment of stare decisis thus reflect *Casey*'s normative vision of the role of the Supreme Court in a constitutional democracy (one "speaking before all") and a normative vision of constitutional interpretation (one embracing a Living Constitution).

In dissent, Justice Antonin Scalia noted that he did not believe "in rigid adherence to *stare decisis* in constitutional cases," but that the Court "should be consistent rather than manipulative in invoking the doctrine."[78] Pointing to the *Casey* plurality's admonition not to "overrule under fire," Justice Scalia noted that Justice Kennedy ignored this supposedly critical consideration of stare decisis.[79] In fact, Justice Kennedy's discussion of "the widespread opposition to *Bowers* . . . [was] offered as a reason in favor of *overruling* it."[80] Scalia concluded:

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73 *Id.* at 577.

74 *Id.*

75 *Id.*

76 *Id.* at 578.

77 *Id.* at 578–79.

78 *Id.* at 587 (Scalia, J., dissenting).

79 *Id.* (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 866–67 (1992)).

80 *Id.*

> To tell the truth, it does not surprise me, and should surprise no one, that the Court has chosen today to revise the standards of *stare decisis* set forth in *Casey*. It has thereby exposed *Casey*'s extraordinary deference to precedent for the result-oriented expedient that it is.[81]

D. *Summary*

A couple of points emerge from this necessarily abbreviated canvass of applications of stare decisis during the Rehnquist Court. First, and most obviously, the Court's description and application of stare decisis varied from case to case. Secondly, where left-leaning decisions emphasized the role of the Court as primary arbiter of the content of individual liberty, right-leaning applications tended to emphasize the inability of the democratic process to respond to errors of constitutional interpretation. I do not mean this to be understood as universally true (something that would require a much more detailed empirical investigation) but only as a tentative suggestion that interpretive methodology can affect the contours and application of stare decisis. This point will be developed more in depth later on. Finally, one can find evidence that the perceived cost of judicial error (as determined by normative theory) plays a role in the Court's application of stare decisis (as seen, especially, in the discussions of constitutional harm in *Casey* and *Lawrence*).

II. The Roberts Court

A. *Avoiding the Issue: The Second Amendment Cases*

The Second Amendment cases involved a dramatic alteration in constitutional doctrine. Surprisingly, though, the majority opinions in both cases avoided having to address the issue of stare decisis. In *District of Columbia v. Heller*,[82] Justice Antonin Scalia narrowly construed *United States v. Miller*[83] in a manner that avoided having to overrule the case.[84] In *McDonald v. City of Chicago*,[85] Justice Samuel Alito dismissed *Cruikshank*[86] as a decision handed down prior to the Court's construction of selective incorporation, thus rendering the issue of Second Amendment incorporation, from the perspective of the majority anyway, one of first impression.[87] This has become something of a pattern during the Roberts Court, as majorities have generally cho-

81 *Id.* at 592.

82 554 U.S. 570 (2008).

83 307 U.S. 174 (1939).

84 *Heller*, 554 U.S. at 625 ("We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of the scope of the right. We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment." (footnote omitted) (citation omitted)).

85 130 S. Ct. 3020 (2010).

86 United States v. Cruikshank, 92 U.S. 542 (1875).

87 *McDonald*, 130 S. Ct. at 3031.

sen to narrowly distinguish or reconfigure precedents rather than directly overrule them.[88]

Although avoided by the majority opinion in *McDonald*, the issue of stare decisis received considerable attention in the concurrences and dissents. Justice Clarence Thomas, for example, argued that the individual right to bear arms was a privilege or immunity of citizens of the United States, and therefore felt obligated by principles of stare decisis to address *Cruikshank*'s ruling to the contrary.[89] Rather than invoking any *Casey*-style pragmatic principles, Justice Thomas limited his analysis to whether *Cruikshank* was correct as a matter of the original meaning of the Fourteenth Amendment. Concluding it was not, his discussion of stare decisis was at an end.[90] Writing in dissent, Justice John Paul Stevens raised stare decisis only once and then only in support of a broader principle of judicial self-restraint in the face of a disputed historical record.[91]

B. *Stare Decisis and the Theory of Popular Sovereignty:* Citizens United

The Roberts Court found itself obligated to consider the doctrine of stare decisis when it expressly overruled *Austin v. Michigan State Chamber of Commerce*,[92] in *Citizens United v. Federal Election Commission*.[93] In brief, the majority struck down on First Amendment grounds portions of the 2002 Bipartisan Campaign Reform Act that prohibited independent political expenditures by corporations. Because *Austin* suggested such regulations were consistent with the First Amendment, the case was overruled.

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88 *See, e.g.*, Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2623–24 (2013) (rejecting the reasoning of *Katzenbach v. Morgan* regarding the principle of equal sovereignty and narrowing the degree of deference afforded to Congress without overruling the precedent); Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2419–21 (2013) (formally following precedent but narrowing the deference afforded to university officials under *Grutter v. Bollinger*); Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2599 (2012) (refiguring without overruling Supreme Court precedents on the coercive use of the taxing power).

89 *McDonald*, 130 S. Ct. at 3084 (Thomas, J., concurring).

90 *Id.* at 3088 ("In my view, the record makes plain that the Framers of the Privileges or Immunities Clause and the ratifying-era public understood—just as the Framers of the Second Amendment did—that the right to keep and bear arms was essential to the preservation of liberty. The record makes equally plain that they deemed this right necessary to include in the minimum baseline of federal rights that the Privileges or Immunities Clause established in the wake of the War over slavery. There is nothing about *Cruikshank*'s contrary holding that warrants its retention.").

91 *Id.* at 3102 (Stevens, J., dissenting). In his concurrence, Justice Scalia noted Justice Stevens's use of *Lawrence* as an "exemplar" of stare decisis and concluded that whatever Stevens's theory of stare decisis, "it is surely not very confining." *Id.* at 3053 (Scalia, J., concurring).

92 494 U.S. 652 (1990). The Court also overruled that part of *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), that relied on *Austin*. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365–66 (2010).

93 *Citizens United*, 558 U.S. at 310.

Writing for the majority, Justice Kennedy began by pointing out the link between the protection of speech and the normative principle of constitutional popular sovereignty:

> Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office."[94]

Canvassing the Court's precedents, Justice Kennedy noted that the Court had long protected the speech of corporations[95] and, prior to *Austin*, had followed the principle that "the First Amendment does not allow political speech restrictions based on a speaker's corporate identity."[96] *Austin*, wrote Justice Kennedy, departed from this principle by upholding, for the first time, "a direct restriction on the independent expenditure of funds for political speech."[97] Throughout his analysis of *Austin*, Justice Kennedy highlighted that the precedent conflicted with the democracy-enhancing protections of the First Amendment.[98]

Turning to the issue of stare decisis, Justice Kennedy noted that precedent "is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error."[99] In addition to workability, "'the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.'"[100] In addition, the Court should consider whether "'experience has pointed up the precedent's shortcomings.'"[101] Finally, Justice Kennedy emphasized that "'[t]his Court has not hesitated to overrule decisions offensive to the First Amendment.'"[102]

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94 *Id.* at 339 (quoting Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989) (internal quotation marks omitted)) (citing Buckley v. Valeo, 424 U.S. 1, 14–15 (1976) (per curiam) ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential.")).

95 *Id.* at 342.

96 *Id.* at 347 (citing First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978)).

97 *Id.* (quoting *Austin*, 494 U.S. at 695 (Kennedy, J., dissenting)).

98 *See, e.g.*, *id.* at 355 ("The purpose and effect of this law is to prevent corporations, including small and nonprofit corporations, from presenting both facts and opinions to the public. This makes *Austin*'s antidistortion rationale all the more an aberration. '[T]he First Amendment protects the right of corporations to petition legislative and administrative bodies.'" (alteration in original) (quoting *Bellotti*, 435 U.S. at 792 n.31)).

99 *Id.* at 362.

100 *Id.* at 362–63 (quoting Montejo v. Louisiana, 556 U.S. 778, 792–93 (2009)).

101 *Id.* at 363 (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009)).

102 *Id.* (quoting Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 500 (2007) (Scalia, J., concurring)).

Justice Kennedy's opening analysis had already made it clear that "*Austin* was not well reasoned."[103] The lessons of experience and "[r]apid changes in technology" suggested that the Court should not and, indeed, *could not* shut down "political speech in certain media or by certain speakers."[104] Finally, Justice Kennedy insisted that "[n]o serious reliance interests are at stake."[105]

> [R]eliance interests are important considerations in property and contract cases, where parties may have acted in conformance with existing legal rules in order to conduct transactions. Here, though, parties have been prevented from acting—corporations have been banned from making independent expenditures. Legislatures may have enacted bans on corporate expenditures believing that those bans were constitutional. This is not a compelling interest for *stare decisis.* If it were, legislative acts could prevent us from overruling our own precedents, thereby interfering with our duty "to say what the law is."[106]

Justice Kennedy concluded, since "[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations," *Austin* "should be and now is overruled."[107]

In a concurrence joined by Justice Samuel Alito, Chief Justice John Roberts wrote "separately to address the important principles of judicial restraint and *stare decisis* implicated in this case."[108] The Chief Justice began by rejecting the dissent's insistence that the statutes be construed in such a manner as to allow the Court to avoid the constitutional issue. "It should go without saying," wrote Chief Justice Roberts, "that we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right. . . . There is a difference between judicial restraint and judicial abdication."[109]

Agreeing with the majority that the First Amendment principles were clear, the Chief Justice noted that "[w]hat makes this case difficult is the need to confront our prior decision in *Austin.*"[110] After reciting the standard rule of law considerations furthered by adherence to stare decisis, Roberts noted that, although "we have long recognized that departures from precedent are inappropriate in the absence of a 'special justification,'" it nevertheless remained the case that "*stare decisis* is neither 'an inexorable command'

103 *Id.*

104 *Id.* at 364.

105 *Id.* at 365.

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

107 *Id.*

108 *Id.* at 373 (Roberts, C.J., concurring).

109 *Id.* at 375 (citation omitted); *see also id.* at 329 (majority opinion) ("It is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications. Indeed, a court would be remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling.").

110 *Id.* at 376 (Roberts, C.J., concurring).

nor a 'mechanical formula of adherence to the latest decision.'"[111] Applying the doctrine required a careful balancing of interests:

> When considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*. . . . It follows that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent.[112]

Factors affecting that balance included (1) situations in which "the precedent under consideration itself departed from the Court's jurisprudence," (2) "when [the precedent's] rationale threatens to upend our settled jurisprudence in related areas of law," and (3) cases "when the precedent's underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake."[113] In this case, *Austin* was an "'aberration' insofar as it departed from the robust protections we had granted political speech in our earlier cases,"[114] and it was "uniquely destabilizing" in its potential application to political speech by a variety of individuals and entities, including "newspapers and other media corporations."[115] The costs of on-going constitutional harm in such a situation were simply too much. According to Chief Justice Roberts,

> Because *Austin* is so difficult to confine to its facts—and because its logic threatens to undermine our First Amendment jurisprudence and the nature of public discourse more broadly—the costs of giving it *stare decisis* effect are unusually high.[116]

C. *Summary*

The lead and concurring opinions in *Citizens United* provide clear examples of an applied doctrine of stare decisis that balances the costs of constitutional harm against the value of a stable jurisprudence. Constitutional errors not only impose significant costs due to their being generally beyond the reach of political majorities; such costs are amplified when the error itself interferes with the proper functioning of the political process. In short, some constitutional harms are greater than others and this fact figures into the proper balancing of interests in the application of stare decisis.

The evaluation and "imputing" of constitutional harm in the application of stare decisis is not always as clearly acknowledged as it was in *Citizens United*, but one can find it in the privacy cases of the Rehnquist Court (com-

111 *Id.* at 377 (quoting Lawrence v. Texas, 539 U.S. 558, 577 (2003); Arizona v. Rumsey, 467 U.S. 203, 212 (1984); Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

112 *Id.* at 378.

113 *Id.* at 378–79.

114 *Id.* at 379 (quoting *id.* at 355 (majority opinion)).

115 *Id.* at 380, 382.

116 *Id.* at 382.

pare *Casey* and *Lawrence*) and in those cases where the Court highlights the high cost of judicial error in a constitutional case (*Agostini* and *Seminole Tribe*). Given that different members of the Court embrace different normative theories of constitutional interpretation and judicial power, it is to be expected that different majorities would emphasize different costs and strike different balances. These differences do not necessarily suggest an unprincipled application of stare decisis so much as they illustrate why application of the doctrine seems to vary from case to case.

In Part III, I propose a way of thinking about stare decisis that reflects how the doctrine is commonly applied, but which brings a greater degree of transparency to its application.

III. Normative Stare Decisis

A. Counting the Cost of Judicial Error

It is inevitable that normative constitutional theory will affect the application of stare decisis. Normative theory, articulated or not, affects not only a judge's assessment of whether error exists, it also affects the assessment of the degree of harm imposed by such error. This is why, even after identifying judicial error, majority opinions applying stare decisis often include discussion regarding the degree to which the flawed precedent conflicts with the majority's view of the proper interpretation of the Constitution. This is not an example of "double counting," nor does it necessarily reflect an abandonment of the requirement of more than simple disagreement before overruling precedent. Instead, it reflects the Court's longstanding description of stare decisis as process by which the court "gauge[s] the respective costs of reaffirming and overruling a prior case."[117]

The problem, to the degree that one exists, involves the less than transparent way in which normative theory affects the outcome in any particular application of the doctrine of stare decisis. If the Court's underlying normative theory of judicial error remains unclear or unstated, then its balance will remain unpersuasive and unpredictable—both costs that a proper application of stare decisis is meant to avoid whenever possible. I do not mean to say that the Court generally hides its assessment of the costs of judicial error. In fact, as evidenced by the opinions described above, the Court often embeds such an assessment in their discussion of stare decisis. What remains generally unarticulated, however, is the background theory which itself controls the Court's assessment of cost.

Perhaps the clearest example of this can be seen in the different outcomes in *Casey* and *Lawrence*. In *Casey*, unarticulated normative theory resulted in a conclusion that the constitutional error in *Roe* was minimal and thus was easily outweighed by the costs incurred to the equal rights of women and concerns about the perceived legitimacy of the Court if *Roe* were overruled. In *Lawrence*, the majority seemed to apply the same unarticulated nor-

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

mative theory, this time concluding the costs of constitutional error in *Bowers* were so high as to warrant overruling the case regardless of the costs to the rule of law. Although it seems clear that a normative assessment of the costs of error controlled the differing outcomes in these two cases, absent a transparent explanation of why that was the case, the outcomes in *Casey* and *Lawrence* appear inconsistent and the reasoning outcome-driven.

The Court's approach to constitutional error in cases like *Seminole Tribe* and *Citizens United* likewise reflects normative judgments, though ones emphasizing a different set of costs associated with judicial error. *Seminole Tribe* emphasized the injury to the body politic when the constitutional errors of the Court cannot be remedied through the ordinary political process. *Citizens United* emphasized the costs of errors that affect individual participation in the political process. These concerns are both related to the normative theory of popular sovereignty whereby fundamental constitutional norms are left to the determination of the people with judicial review serving to follow those determinations rather than to reconstruct them. Once again, however, neither Justice Kennedy's majority opinion nor Chief Justice Roberts's concurrence provided a clear and transparent explanation of how normative theory drives the application of stare decisis. Nevertheless, the implicit normative theory of popular sovereignty underlying the Roberts Court's treatment of stare decisis in cases like *Citizens United* illuminates how normative theory *does* affect the application of stare decisis and points the way towards a theory of how normative theory *ought* to affect stare decisis.

B. A Popular Sovereignty Based Theory of Stare Decisis

The theory of popular sovereignty is foundational to the system of American constitutional law. Although not without its critics,[118] the theory asserts that as a historical matter, the American Constitution reflected the Founding generation's embrace of popular sovereignty as the highest form of just government. As documented by Gordon Wood, the colonists came to view ultimate sovereign power as residing in the people who stand apart from the ordinary institutions of government.[119] Government officials, as mere agents of the people, have no sovereign authority of their own but exercise only those powers delegated to them by the people by way of a written Constitution. According to this theory of constitutional government, when the courts invalidate government action as inconsistent with the Constitution, they do so on the grounds that the will of the people (as principals) is superior to the will of the people's representatives (their agents).

Although sometimes described as a system that protects minorities against the tyranny of the majority, popular sovereigntist constitutional gov-

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118 *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 11 (2004) (criticizing popular sovereignty as a normative theory of constitutional law).

119 For an excellent presentation of the historic roots of popular sovereignty and the role the theory played in the adoption of the federal Constitution, see GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 344–89 (1969).

ernment actually protects the will of the *super-majority* over the will of the mere majority (or mere transient political majorities). The Philadelphia Convention decided matters according to majoritarian voting procedures in the state conventions and the document became operational upon the ratification of a two-thirds majority of the existing states. According to Article V, any future amendments must clear two supermajoritarian hurdles; the first requiring a proposal passed by two-thirds of both houses of Congress (or generated by a convention called into being by two-thirds of the states) and the second requiring ratification votes by three-fourths of the state legislatures or state conventions.[120]

Democracy itself is based on a normative theory of government by the majority.[121] Popular sovereignty theory builds upon this idea by privileging those policy commitments made by sufficiently "thicker" majorities speaking through the mechanisms of Article V.[122] Importantly, popular sovereignty does not posit that mere majoritarian-generated policy is normatively illegitimate, only that it is *less* representative of the will of the people than those policies which have received supermajoritarian consent. In other words, poli-

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120 U.S. CONST. art. V.

121 *See* THE FEDERALIST NO. 49, at 313–14 (James Madison) (Clinton Rossiter ed., 1961) ("As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems strictly consonant to the republican theory to recur to the same original authority, not only whenever it may be necessary to enlarge, diminish, or new-model the powers of the government, but also whenever any one of the departments may commit encroachments on the chartered authorities of the others. . . . [I]t must be allowed to prove that a constitutional road to the decision of the people ought to be marked out and kept open, for certain great and extraordinary occasions."). According to the Virginia Declaration of Rights:

> That Government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community;—of all the various modes and forms of Government that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of mal-administration;—and that, whenever any Government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish it, in such manner as shall be judged most conducive to the publick weal.

Virginia Declaration of Rights (June 12, 1776), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 6 (Philip B. Kurland & Ralph Lerner eds., 2000); *see also* Debate in Virginia Ratifying Convention (June 5, 1788) (statement of Mr. Patrick Henry), *reprinted in* 4 THE FOUNDERS' CONSTITUTION, *supra*, at 580–81 ("This, sir, is the language of democracy—that a majority of the community have a right to alter government when found to be oppressive.").

122 Even those theorists who posit amending the Constitution outside of Article V continue to embrace the foundational principle of majoritarian government. Professor Akhil Reed Amar, for example, believes that the underlying theory of popular sovereignty allows the federal Constitution to be changed by majority vote in a national plebiscite. *See* AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE 3–33 (1998); Akhil Reed Amar, *A Few Thoughts on Constitutionalism, Textualism, and Populism*, 65 FORDHAM L. REV. 1657 (1997); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 487–94 (1994).

cies enacted by way of majoritarian politics are *democratic* as a matter of normative theory, but nevertheless remain inferior to the "higher" (more thickly democratic) laws generated by the special processes of constitutional enactment and amendment.

If democratic acceptance (either "thick" or "thin") is what establishes normative legitimacy of a legal system based on popular sovereignty, then judicial errors impose greater or lesser costs to the degree that they undermine the democratic "ground" of a legal norm. Consider two judicial errors. The first erroneously upholds a law passed by democratic majorities that the Constitution, if properly construed, would not allow. For example, think of a federal law passed pursuant to the commerce power that allows private individuals to sue states for money damages in federal court without the state's consent. According to the normative theory of popular sovereignty, such a law imposes serious costs on the body politic by failing to recognize the democratically "thicker" law of the Constitution. Yet, according to that same theory, such an error does not rob the law of the basic legitimacy afforded to all democratically enacted law.

Consider, however, another example. Suppose a judicial error wrongly strikes down a law in a manner that removes the subject from the political process altogether. For example, suppose the Supreme Court prohibits ordinary state-level political majorities from agreeing to equally fund religious and secular educational institutions when the Constitution, if properly interpreted, allows state political majorities to debate and decide such issues for themselves. According to the normative theory of popular sovereignty, this judicial error imposes far higher costs than our first example. Not only has the Court failed to enforce the democratically thicker rule of the Constitution, it has done so in a manner that denies even ordinary (thin) political majorities from deciding the issue. The resulting law thus lacks even the thinnest veneer of democratic legitimacy under the theory of popular sovereignty.[123]

As noted in the opening sections of this Article, the Supreme Court sometimes characterizes constitutional errors as especially costly due to the inability of ordinary political majorities to remedy the Court's error.[124] In fact, this is not always the case. For example, suppose the Court wrongly upholds a federal law that imposes a penalty on any person failing to purchase government-mandated insurance. In such a case, ordinary political majorities could at least partially remedy the error by repealing the unconstitutional mandate or electing representatives who promise to do the same.

123 Although a majority vote among members of the Supreme Court might provide a veneer of democratic legitimacy to rules that bind only members of the Court, it cannot provide the same legitimacy for a rule binding anyone outside the Court's chambers.

124 *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 63 (1996) ("Our willingness to reconsider our earlier decisions has been 'particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible.'" (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991) (internal quotation marks omitted))).

This would not prevent future legislatures from repeating the error, but it would have the effect of allowing each political majority in the here and now to prevent the imposition of an unconstitutional penalty.

On the other hand, judicial errors that prohibit democratic decision making *do* in fact prevent ordinary political majorities from remedying the Court's error, even for a time. The only recourse in such a case would be judicial impeachment (an historically discarded tool) or constitutional amendment. Unfortunately, because a mere minority can thwart the enactment of a constitutional amendment, a majority might never have the opportunity to reestablish a democratically legitimate rule either as a matter of constitutional law or transient political policy.

In other words, when viewed through the lens of American popular sovereignty, different judicial errors impose different kinds of costs on the body politic. Some judicial errors *thin out* constitutional rules in terms of their democratic legitimacy by wrongly leaving them to the control of mere transient political majorities. Other errors potentially erase democratic legitimacy entirely by placing the issue beyond the reach of majoritarian government. For this latter group, the costs imposed by preserving judicial error may be so high as to presumptively outweigh any rule of law benefits gained by maintaining the erroneous precedent.

C. A Framework for Evaluating Judicial Error

In prior work,[125] I have presented a framework for evaluating judicial errors which distinguishes erroneous precedents along two dimensions. The first distinguishes errors of *intervention* from errors of *nonintervention*.[126] The second distinguishes errors of *immunity* from errors of *allocation*.[127] Different combinations of these errors impose different degrees of cost in terms of the normative values of popular sovereignty.[128]

Intervention versus nonintervention distinguishes precedents that erroneously strike down a law from those that erroneously fail to strike down a law.[129] The former would include precedents like *Aguilar v. Felton*[130] (if viewed as erroneously decided). The latter would include *Pennsylvania v. Union Gas Co.*[131] In terms of the cost of constitutional error, *Agostini*[132] imposes far higher costs than *Union Gas* since the law at issue in *Union Gas* could be repealed by the ordinary political process, whereas the prohibition on equal educational funding imposed by *Agostini* could only be overcome by constitutional amendment or by being overruled by a later Court.

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125 *See* Kurt T. Lash, *Originalism, Popular Sovereignty, and* Reverse *Stare Decisis*, 93 VA. L. REV. 1437 (2007).

126 *See id.* at 1454–57.

127 *Id.*

128 *See id.* at 1457–61.

129 *See id.* at 1454–55.

130 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

131 491 U.S. 1 (1989), *overruled by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

132 521 U.S. 203.

Immunity versus allocation distinguishes cases involving individual rights immunized from government control from cases involving the proper allocation of government control.[133] Immunity cases would include *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[134] the Second Amendment Cases,[135] *Citizens United*,[136] and *United States v. Cruikshank*.[137] Allocation cases, on the other hand, involve separation of powers and federalism cases where the Supreme Court must decide which institution of government has been allocated constitutional power.[138] Examples here would include *Morrison v. Olson*[139] and that aspect of *National Federation of Independent Business v. Sebelius*[140] that struck down an attempt to coerce the states into accepting an expansion of Medicaid.[141]

When combined with the above analysis, it is clear that flawed precedents involving both intervention and immunity impose the highest costs in terms of popular sovereignty theory. *Failing* to intervene in a matter involving a claimed individual right leaves consideration of the immunity to the political majorities.[142] These majorities may disagree with the decision of the Supreme Court and may act on the basis of that disagreement.[143] Erroneous intervention on the same matter, however, precludes a majoritarian political response.[144]

The cost of judicial error in allocation cases varies depending on the nature of the error. Erroneous allocation to state control allows for a degree of local decision making by majorities in every state,[145] whereas erroneous allocation to federal decision making requires a "mobiliz[ation]" of a national-level majority.[146] The latter being a more difficult task, this suggests that erroneous allocations to federal control impose higher costs than erro-

133 *See* Lash, *supra* note 125, at 1455–57 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

134 505 U.S. 833 (1992).

135 *See supra* Section II.A.

136 Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

137 92 U.S. 542 (1875).

138 *See* Lash, *supra* note 125, at 1455.

139 487 U.S. 654, 659–60 (1988) (upholding the independent counsel provisions of the Ethics in Government Act of 1978 against a separation of powers challenge).

140 132 S. Ct. 2566 (2012).

141 *Id.* at 2608.

142 *See* Lash, *supra* note 125, at 1454.

143 Examples here would include state-level "RFRA" statutes passed in the aftermath of the Court's failure to apply strict scrutiny in *Employment Division v. Smith*, 494 U.S. 872, 888 (1990), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, and state responses to the Court's failure to intervene in *Kelo v. City of New London*, 545 U.S. 469, 472, 489–90 (2005), the Takings Clause case. *See, e.g.*, Planned Indus. Expansion Auth. of Kan. City v. Ivanhoe Neighborhood Council, 316 S.W.3d 418, 426 (Mo. Ct. App. 2010) (Missouri enacting a law "in response" to *Kelo*).

144 *See* Lash, *supra* note 125, at 1455.

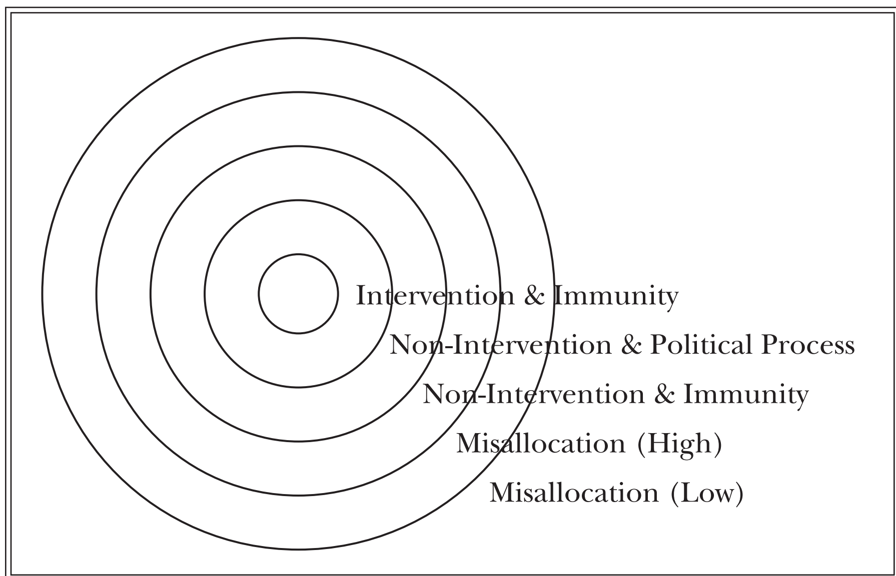
145 *See id.* at 1457.

146 *See id.* at 1456.

neous allocations to local control.[147] Regardless, since either error allows for some degree of majoritarian response, the costs of all allocation errors are lower than those imposed by erroneous intervention in an immunity case.[148]

Finally, because the costs of judicial error under a theory of popular sovereignty wax and wane depending on the degree to which the political process is prevented from responding, it is possible that failure to intervene in cases involving majoritarian interference with the political process would be viewed as imposing just as high a cost as erroneous intervention in a matter of claimed immunity. For example, a judicial error involving a failure to strike down an act criminalizing speech critical of the national government is as problematic from a popular sovereignty standpoint as is a judicial error that strikes down a law regulating the number of hours bakers can work in a given week. Both wrongfully suppress majoritarian decision making, with the sedition imposing especially high costs given its entrenchment of the sitting government and policies across a wide range of issues.

Just to visualize the hierarchy of costs represented in the above examples, the costs of judicial error in terms of the theory of popular sovereignty might look something like the following series of concentric circles, with the center representing errors of the highest cost and the periphery representing those imposing the lowest cost.



Having established a rough hierarchy of judicial error, we are now in a position to consider how this hierarchy might inform a comprehensive theory of stare decisis. As an initial matter, one could reject the doctrine of stare

147 *See id.*
148 *See id.*

decisis altogether in constitutional cases on the grounds that it has no place in a theory of popular sovereignty committed to enforcing the original instructions of the people.[149] Despite the Supreme Court's historical commitment to popular sovereignty,[150] however, no member of the Court has taken this position. Instead, nominees to the Supreme Court are regularly and successfully pressed in their confirmation hearings to affirm their commitment to the doctrine of stare decisis.[151] Moreover, even those Justices most committed to an originalist understanding of the Constitution occasionally apply the doctrine of stare decisis and have never officially disavowed its application in a constitutional case.[152] Nevertheless, as pointed out in the first sections of this Article, a number of opinions by members of the Rehnquist and Roberts Courts indicate an awareness of the special problems posed by application of stare decisis in constitutional cases due to the inability of

149 *See, e.g.*, Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289 (2005) ("[*S*] *tare decisis*, understood as a theory of adhering to prior judicial precedents that are contrary to the original public meaning, is completely irreconcilable with originalism."); *see also* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 24 (1994) ("[T]he practice of following precedent is not merely nonobligatory or a bad idea; it is affirmatively inconsistent with the federal Constitution.").

150 *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected."); *id.* at 177 ("Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable."); THE FEDERALIST NO. 78, at 467–68 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental.").

151 For example, during their confirmation hearings, both Chief Justice John Roberts and Justice Samuel Alito pledged their allegiance to the doctrine of stare decisis. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of Judge John G. Roberts, Jr.) ("Judges have to have the humility to recognize that they operate within a system of precedent . . . ."); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 318 (2006) (statement of Judge Samuel A. Alito, Jr.) ("[*S*] *tare decisis* is . . . a fundamental part of our legal system . . . .").

152 *See* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 326 & n.49 (2005) ("Both Justice Scalia and Justice Thomas embrace statutory stare decisis." (citing Rasul v. Bush, 542 U.S. 466, 493 (2004) (Scalia, J., dissenting), *superseded by statute*, Detainee Treatment Act of 2005, Pub L. No. 109-148, 119 Stat. 2739; Fogerty v. Fantasy, Inc., 510 U.S. 517, 538–39 (1994) (Thomas, J., concurring))).

democratic majorities to respond to judicial error.[153] This concern reflects an underlying embrace of the normative theory of democratic government in general and popular-sovereignty-based democratic government in particular.[154]

As the above categories illustrate, even though popular sovereignty theory suggests judicial errors can impose significant costs in terms of democratic legitimacy and the availability of a political response, it is not in fact always the case that "correction through legislative action is practically impossible."[155] Most nonintervention and allocation errors allow for some degree of democratic response and thus create a possible scenario in which judicial errors are accepted and built upon by successive democratic majorities.[156] Although this would not carry the same degree of "thick democratic legitimacy" as would a proper interpretation of the Constitution, it nevertheless would carry a *thin* degree of democratic legitimation. In such cases, upholding erroneous precedent maintains a degree of normative democratic legitimacy, to the point that a conscientious judge could uphold erroneous precedent on stare decisis grounds without fatally undermining the basic normative principle of democratic government.[157]

The idea that popular sovereignty allows for political legitimation of erroneous precedent is not a new idea. As James Madison pointed out, political majorities may accept an erroneous interpretation of the Constitution and, in so doing, provide a degree of democratic legitimacy to an otherwise erroneous precedent.[158] According to Madison, it is a "safe [rule of] construction" that a precedent should be presumptively followed "which has the uniform sanction of successive legislative bodies, through a period of years

153 *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 235 (1997) ("The doctrine of *stare decisis* . . . is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 63 (1996); Payne v. Tennessee, 501 U.S. 808, 828 (1991); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 94 (1936) (Stone & Cardozo, JJ., concurring))); *Seminole Tribe*, 517 U.S. at 63 ("Our willingness to reconsider our earlier decisions has been 'particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible.'" (quoting *Payne*, 501 U.S. at 828 (internal quotation marks omitted))).

154 See, for example, Justice Kennedy's use of popular sovereignty theory in his opinion in *Citizens United v. Federal Election Commission*, 558 U.S. 310, 339 (2010) ("'In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential.'" (quoting Buckley v. Valeo, 424 U.S. 1, 14–15 (1976) (per curiam))).

155 *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting) ("[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.").

156 *See* Lash, *supra* note 125, at 1453–61.

157 This would be particularly true where an Article III judge believes consideration of stare decisis is "baked into" the idea of Article III judicial power.

158 *See* Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), *in* THE MIND OF THE FOUNDER 469, 496–500 (Marvin Meyers ed., 1973).

and under the varied ascendancy of parties."[159] This was as true for constitutional precedents as for statutory precedents.[160] To Madison, majoritarian acceptance not only could legitimate an arguably erroneous precedent, but the availability of a political response could significantly reduce the costs of judicial error. As Madison assured a frustrated Spencer Roane in the aftermath of *Cohens v. Virginia*[161]:

> [T]here is as yet no evidence that they express either the opinions of Congress or those of their Constituents. There is nothing therefore to discourage a development of whatever flaws the doctrines may contain, or tendencies they may threaten. Congress if convinced of these may not only abstain from the exercise of Powers claimed for them by the Court, but find the means of controuling those claimed by the Court for itself.[162]

In the case of the national bank (which Madison believed had been unconstitutionally chartered), later congressional majorities could refuse to extend the bank's charter, or a majority of electors could vote for a President who would refuse to support the bank.[163] Likewise, a Congress concerned about judicial usurpation in *Cohens* could exercise its power to reduce the jurisdiction of the Supreme Court over cases arising in state court.

Madison's theory of majoritarian acceptance of otherwise erroneous precedent makes sense only when there is the opportunity for majoritarian dissent. A judicial decision preventing any action by the political branches by definition prevents majoritarian ratification of an originally erroneous precedent.[164] In fact, there is good reason to regard cases of entrenched constitutional error as presumptively subject to *de novo* review under any interpretive approach based on the normative theory of popular sovereignty.[165] In other words, in cases where it is in fact true that "correction through legislative action is practically impossible,"[166] this should not counsel careful application of stare decisis. It presents good reason *not* to apply stare decisis. On the other hand, Madison's acceptance of democratically legitimated precedent presents an example of how a theorist otherwise committed to the normative theory of popular sovereignty may nevertheless find room for the application of stare decisis even in cases involving constitutional error.

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159 *See id.* at 499.

160 *Id.* at 497–98 ("Can it be of less consequence that the meaning of a Constitution should be fixed and known, than that the meaning of a law should be so?").

161 19 U.S. (6 Wheat.) 264 (1821).

162 Letter from James Madison to Spencer Roane (May 6, 1821), *in* THE MIND OF THE FOUNDER, *supra* note 158, at 462, 465.

163 President Andrew Jackson, for example, vetoed an attempt to renew the Charter of the Second Bank of the United States in 1832, in part because he disagreed with the Court about the bank's constitutionality. *See* Veto Message to the Senate (July 10, 1832), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 576, 581–86 (James D. Richardson ed., 1896).

164 *See* Lash, *supra* note 125, at 1460.

165 *Id.* at 1460–61.

166 *See supra* notes 48–51 and accompanying text.

D. *Recent Application of Stare Decisis Through the Lens of Popular Sovereignty*

When viewed through the lens of normative theory, the seemingly inconsistent application of stare decisis by members of the Rehnquist and Roberts Courts becomes more understandable. A multimember court that operates on the basis of majoritarian consensus will inevitably issue opinions reflecting the different normative commitments of its members and compromised presentations of the same. To the degree that judicial majorities reflect different aggregate normative theories of law and interpretation, the rule of law values captured by the application of stare decisis will be more or less decisive.

For example, the varying applications of stare decisis in *Casey* and *Lawrence* seem directly related to the majority's different assessments of the degree of judicial error in *Roe* (small) and *Bowers* (large).[167] These assessments, in turn, reflected an aggregate normative theory of constitutional liberty and the role of the Court in enforcing the same. From a popular sovereignty standpoint, the majority in both cases erred in not considering the costs of constitutional error in a case involving both judicial intervention and individual immunity. Judicial error in such a case does not allow for a "practical" political response. Popular sovereignty theory suggests that stare decisis in such a case is either presumptively inappropriate or, at most, should be applied only in cases involving the highest degree of disruption to the rule of law.[168]

For this reason, from the position of popular sovereignty theory, it was perfectly appropriate for the majority to decline consideration of the rule of law factors generally associated with stare decisis in *Agostini*. The disputed precedent in that case, *Aguilar v. Felton*, constitutionally prohibited the political process from deciding whether to provide equal educational assistance to both religious and secular schools.[169] If erroneous, such a precedent entrenched constitutional error and prohibited the political process from affording the precedent even the thinnest degree of democratic legitimacy. In such a case, Justice O'Connor was right to point out that stare decisis "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions,"[170] even if the statement is true only in cases like *Agostini*.

On the other hand, the majority was wrong when it made the same statement in *Seminole Tribe*. Although the majority correctly noted the costs asso-

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167 *See supra* Sections I.A, I.C.

168 This Article describes a method of assessing judicial error for those judges committed to the normative theory of popular sovereignty. What is missing in the analysis of the *Casey* plurality is an account of how to assess greater and lesser costs according to whatever normative theory guided the plurality in upholding the "essential holding" in *Roe* but not the precedents of *Akron* and *Thornburgh*. *See supra* Section I.A.

169 *See supra* subsection I.B.2.

170 Agostini v. Felton, 521 U.S. 203, 235 (1997) (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 63 (1996); Payne v. Tennessee, 501 U.S. 808, 828 (1991); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 94 (1936) (Stone & Cardozo, JJ., concurring)).

ciated with judicial error in a constitutional case,[171] it was not true that the political process was unable to respond to the purported error in *Union Gas*. Later Congresses could have rejected the Court's interpretation of the Commerce Clause and repealed any laws relying on that power to subject states to individual suits for money damages. Or, if successive majorities of both parties embraced and built upon the precedent in *Union Gas*, political acceptance of the error might have eventually counseled upholding the error in the same way that President Madison ultimately acquiesced to political ratification of the Bank of the United States.[172] Of course, at the time the Court decided *Seminole Tribe*, no such record of political acceptance had developed and, from the perspective of popular sovereignty theory, the Court was right to accord the precedent little relative weight. This is especially true in a case where the error precluded a lower-level (state-level) political response.

Finally, *Citizens United* could be viewed as the same kind of case as *Seminole Tribe*. In both cases, the Court confronted a potentially erroneous precedent that left a matter to political control that ought to have been treated as entrenched by the Constitution. In most such cases, the values of stare decisis should be seriously considered, particularly where the political process has embraced prior judicial error. However, even though Justice Kennedy's opinion in *Citizens United* addresses the issue of stare decisis, he appeared to presumptively dismiss its application. Justice Kennedy asserted that "'[t]his Court *has not hesitated* to overrule decisions offensive to the First Amendment,'"[173] and he dismissed the idea that legislative reliance should play any role in deciding whether to uphold *Austin*.[174] Moreover, Justice Kennedy's conclusion appears to be based solely on the merits, rather than representing a balancing of the values of stare decisis against the costs of upholding judicial error.[175] The fact that Chief Justice Roberts added a concurring opinion precisely suggests that he also believed the issue of stare decisis had not been adequately discussed in the majority opinion.[176]

From the perspective of popular sovereignty theory, however, Justice Kennedy's opinion in *Citizens United* was entirely correct to downplay, or even dismiss, the application of stare decisis. Unlike an ordinary nonintervention

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171 *See supra* subsection I.B.1.

172 *See* Letter from James Madison to Charles Jared Ingersoll, *supra* note 158, at 496.

173 Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 363 (2010) (emphasis added) (quoting Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 500 (2007) (Scalia, J., concurring)).

174 *Id.* at 365 ("This is not a compelling interest for *stare decisis*. If it were, legislative acts could prevent us from overruling our own precedents, thereby interfering with our duty 'to say what the law is.'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))).

175 *Id.* (noting that since "[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations," *Austin* "should be and now is overruled").

176 *Id.* at 373 (Roberts, C.J., concurring) (explaining that he "write[s] separately to address the important principles of judicial restraint and *stare decisis* implicated in this case").

case which allows for potential political ratification,[177] *Citizens United* involved a precedent which potentially undermined the proper functioning of the political process. Consider again Justice Kennedy's introduction of the case:

> Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. See *Buckley* [*v. Valeo*, 424 U.S. 1, 14–15 (1976)] ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential"). The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.[178]

Here, Justice Kennedy highlights the values of popular sovereignty and democratic governance that he believes underlie all of American constitutional law. According to this normative theory, judicial errors that prevent a democratic response are presumptively illegitimate.[179] Errors that thwart the proper functioning of the democratic process cannot be *democratically* legitimized for the same reason.[180] An erroneous failure of the Court to intervene in order to protect the democratic process falls outside the category of precedents that can benefit from the application of stare decisis.[181] To the degree that Justice Kennedy's opinion reflects an underlying theory of popular sovereignty, he was entirely correct to downplay the role of stare decisis. Indeed, his statement that "'[t]his Court *has not hesitated* to overrule decisions offensive to the First Amendment'"[182] should not be merely descriptively accurate; it would be normatively compelled.

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177 *See* Lash, *supra* note 125, at 1454–55, 1459–60.

178 *Citizens United*, 558 U.S. at 339–40 (majority opinion) (citations omitted) (internal quotation marks omitted).

179 *See* Lash, *supra* note 125, at 1454–61.

180 Here, popular sovereignty theory echoes the categories of legislation subject to heightened judicial review found in footnote four of *Carolene Products*. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938). In addition to protecting rights placed by the people themselves in the text of the Constitution, and guaranteeing the rights of "discrete and insular minorities" who might be shut out of the political process, the Court suggests the need for heightened review of any law that interferes with the proper functioning of the democratic process. *See id.* The Court will revisit a similar precedent arguably interfering with the political process this term in *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*. 701 F.3d 466 (6th Cir. 2012), *cert. granted sub nom.* Schuette v. Coal. to Defend Affirmative Action, 133 S. Ct. 1633 (2013) (considering whether a state may constitutionally ban racial preferences, and potentially revisiting the holding of Washington v. Seattle School District No. 1, 458 U.S. 457 (1982), regarding a restructuring of the political process).

181 *See* Lash, *supra* note 125, at 1459–60.

182 *Citizens United*, 558 U.S. at 363 (emphasis added) (quoting Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 500 (2007) (Scalia, J., concurring)).

Conclusion

This Article suggests that far from suggesting incompetency or bad faith, varying application of the doctrine of stare decisis is perfectly appropriate in a system that allows for the application of normative constitutional theory. Since different judicial errors impose different costs, such variation would exist even if every member of the Supreme Court embraced the same normative theory of constitutional law and judicial review. The fact that the members of the Court embrace different normative theories only multiplies the situations in which different cases will apply stare decisis in different ways.[183]

That said, those decisions of the Supreme Court which apply stare decisis have not done so in a manner that is sufficiently transparent in terms of explaining the role of normative theory in balancing the costs of judicial error against the benefits of upholding precedent. This could be due to a combination of factors, from the necessity to undertheorize opinions issued by multimember majorities, to a resistance to commit to any one particular normative theory of constitutional law. Whatever the reason, it is inevitable that normative theory, whether transparently presented or not, will play a role in the Supreme Court's application of stare decisis.

This Article traces the outlines of one such theoretical approach. Based on a foundational principle of American constitutional law, a popular sovereigntist approach to stare decisis both helps to explain the Court's varying application of stare decisis and provides a guide to a more consistent application of the doctrine in the future. It also presents a normative basis for determining when and how stare decisis ought to apply in a given case. Even if persuasive, however, more work needs to be done in terms of identifying how judicial error impacts the proper functioning of the political process. For example, it may not always be true that allocation errors that leave matters to state-level decision making have a lower cost where doing so prevents the formation of national majorities and entrenches collective action problems. Likewise, cases like *Citizens United*[184] pose difficult problems regarding whether striking down or upholding prior precedent best protects the proper functioning of the political process.[185]

That said, it seems better to transparently grapple with the role of normative theory in the application of stare decisis rather than pretend it is not there, downplay its significance, or criticize the Court for failing to apply stare decisis the same way in all cases. Different cases carry different costs—a fact that we should insist Justices take into consideration in deciding whether to maintain judicial error.

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183 *See* Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 Tex. L. Rev. 1843, 1846 (2013) ("Precedents are neither good nor bad; it is interpretive method that makes them so.").

184 558 U.S. 310.

185 The campaign finance law struck down in *Citizens United*, for example, was passed as an attempt to remedy the democratically distorting effect of corporate wealth in the political process. *See id.* at 320–21, 365–66.