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Originalism, Popular Sovereignty and Reverse Stare Decisis

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ESSAYS

ORIGINALISM, POPULAR SOVEREIGNTY, AND *REVERSE* STARE DECISIS

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INTRODUCTION

THE rise of originalist methodology during the Rehnquist Court triggered renewed interest in the role of precedent in constitutional cases.[1] Although all theories of constitutional interpretation must confront the issue of stare decisis,[2] originalism has generated

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[1] See, e.g., Richard H. Fallon, Jr., Stare Decisis and the Constitution: An Essay on Constitutional Methodology, 76 N.Y.U. L. Rev. 570, 570 (2001); Gary Lawson, The Constitutional Case Against Precedent, 17 Harv. J.L. & Pub. Pol'y 23, 23–24 (1994); Thomas R. Lee, Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court, 52 Vand. L. Rev. 647, 647 (1999); Michael Stokes Paulsen, Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of *Roe* and *Casey*?, 109 Yale L.J. 1535, 1599–602 (2000); Bradley Scott Shannon, May Stare Decisis Be Abrogated by Rule?, 67 Ohio St. L.J. 645, 645 (2006); Lawrence B. Solum, The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights, 9 U. Pa. J. Const. L. 155, 155–59 (2006); Lee J. Strang, An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good, 36 N.M. L. Rev. 419, 419–21 (2006); Norman R. Williams, The Failings of Originalism: The Federal Courts and the Power of Precedent, 37 U.C. Davis L. Rev. 761, 762–68 (2004).

[2] Translated literally from Latin, the phrase means "to stand by things decided." Black's Law Dictionary 1443 (8th ed. 2004). In general, the doctrine involves a policy choice by judges to follow an earlier ruling despite current misgivings about its correctness in order to further considerations of stability, certainty, and predictability. A weak version of stare decisis treats prior cases as presumptively correct but subject to being overruled for any number of reasons. A stronger view treats precedent as having a binding effect on the current Court, subject to being overruled only for the most compelling of reasons, including unworkability or prior factual error. The Supreme Court has long embraced the general concept of stare decisis, but does not treat it as an "inexorable command." See Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting). It requires only that "a departure from precedent . . . be supported by some 'special justification.'" Dickerson v. United States, 530 U.S. 428, 443 (2000) (internal quotation marks omitted); see also Henry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723, 757 (1988) ("[P]recedent binds absent a showing of substantial countervailing considerations.").

particular attention given the potential for radical discontinuity between original meaning and current constitutional jurisprudence.[3] This potential discontinuity creates a crisis of legitimacy for originalists, for it forces them to choose between interpretive (original meaning) and formalist (rule of law[4]) legitimacy.[5]

Although the problem is particularly acute for originalists, all interpretive methods must confront the tension that arises when precedent and "proper" interpretation diverge. Resolving this tension requires a normative theory that weighs the costs of interpretive error against the benefits of following precedent. Presumably, the benefits of stare decisis become less justified as the costs of interpretive error increase. Accordingly, an ultimate theory of stare decisis necessarily reflects the normative commitments underlying a particular interpretive approach.

For a strong defense of stare decisis on rule of law grounds, see Solum, supra note 1, at 155–59.

[3] Compare Randy E. Barnett, Trumping Precedent with Original Meaning: Not as Radical as It Sounds, 22 Const. Comment. 257, 258–62 (2005) (favoring "original public meaning" as normatively superior to and more candid than the doctrine of precedent), with David A. Strauss, Originalism, Precedent, and Candor, 22 Const. Comment. 299, 299–301 (2005) (favoring a common law notion of precedent over originalism, asserting that it provides a workable and more candid framework for full consideration of "morality, policy, [and] fairness"). Originalism has evolved over the past two decades from a theory of original intent to its current incarnation as a theory of original meaning. See Vasan Kesavan & Michael Stokes Paulsen, The Interpretive Force of the Constitution's Secret Drafting History, 91 Geo. L.J. 1113, 1114 (2003); Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 862–63 (1989). For the purposes of this Essay, I accept the definition given by legal theorist Lawrence Solum:

> [An originalist judge] should make a good faith effort to determine the original meaning, where original meaning is understood to be the meaning that (i) the framers would have reasonably expected (ii) the audience to whom the Constitution is addressed (ratifiers, contemporary interpreters) (iii) to attribute to the framers, (iv) based on the evidence (public record) that was publicly available.

Solum, supra note 1, at 185.

[4] The key values promoted by the rule of law are stability, certainty, and predictability. See Solum, supra note 1, at 178.

[5] See Michael J. Gerhardt, The Role of Precedent in Constitutional Decisionmaking and Theory, 60 Geo. Wash. L. Rev. 68, 133–34 (1991) ("[F]aithful adherents to original understanding face an inescapable dilemma. They either can strive to overrule the better part of constitutional doctrine and thereby thrust the world of constitutional law into turmoil, or they must abandon original understanding in numerous substantive areas in order to stabilize constitutional law."); Scalia, supra note 3, at 861.

Because originalism is an interpretive method and not a normative constitutional theory, different originalists advance different normative grounds for their interpretive approach.[6] The role of stare decisis in originalist jurisprudence thus depends on which normative theory drives it. In this Essay, I address the most common and most influential justification for originalism: popular sovereignty and the judicially enforced will of the people.[7] Founders, including James Madison, expressly grounded their interpretive theories on the sovereign authority of the people, and originalist jurists generally do the same. Despite the general influence of popular sovereignty-based originalism, however, no theory of stare decisis has yet emerged that specifically addresses the costs of judicial error under this particular theory.

In fact, it is debatable whether the doctrine of stare decisis *can* be reconciled with popular sovereignty-based originalism. Stare decisis is rooted in preconstitutional English common law and flourished in a milieu that presupposed parliamentary sovereignty and the authority of political actors to correct all errors of judicial review.[8] The emergence of popular sovereignty[9] and the enforce-

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[6] Over the past few decades, scholars have advanced a number of normative justifications for originalism, from viewing it as a means of ensuring judicial restraint to using it as a tool for constructing a libertarian Constitution. See, e.g., 1 Bruce Ackerman, We the People: Foundations 3–32 (1991) [hereinafter Ackerman, Foundations] (advocating originalism under the theory of popular sovereignty); Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 295–307 (1998) (advocating the same theory in the context of the Bill of Rights); Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 1–5 (2004) (advocating originalism based on libertarian theory); Edwin Meese III, Toward a Jurisprudence of Original Intent, 11 Harv. J.L. & Pub. Pol'y 5, 10–11 (1988) (advocating originalism as furthering judicial restraint). For a discussion of the various justifications for originalism, see Keith E. Whittington, Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review 2–5 (1999).

[7] See Ackerman, Foundations, supra note 6, at 3–32; 2 Bruce Ackerman, We the People: Transformations 3–31 (1998) [hereinafter Ackerman, Transformations]; Amar, supra note 6, at 295–306; Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review 227–48 (2004); Scalia, supra note 3, at 862–64. But see Barnett, supra note 6, at 11–31 (embracing originalism but rejecting the theory of popular sovereignty). Some scholars view originalism as furthering the normative goals of legal formalism. See, e.g., Solum, supra note 1, at 184–86.

[8] See, e.g., Lee, supra note 1, at 659–60; Strang, supra note 1, at 447–52.

[9] For a comprehensive account of the rise of popular sovereignty in the period prior to the adoption of the Constitution, see Gordon S. Wood, The Creation of the American Republic 1776–1787, at 344–89 (1969).

able entrenchment of fundamental law expressed in a written constitution, however, alters and greatly amplifies the costs of judicial error. Because constitutional principles are immune from the ordinary political process, unmediated commitment to stare decisis in such a system threatens the legitimacy of judicial review. For this reason, some originalist scholars have advocated abandoning the doctrine altogether.[10] On the other hand, the prospect of widespread reversals of constitutional law serves as an independent reason to reject originalism as a practical theory of constitutional interpretation.[11]

Preserving legitimacy under popular sovereignty-based originalism, however, does not require the complete abandonment of stare decisis. Popular sovereignty is based on the normative theory of democratic rule—government by the majoritarian consent of the governed.[12] A theory of stare decisis that takes into account the majoritarian commitment of popular sovereignty may justify upholding an erroneous precedent, depending on the costs imposed on the

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[10] See Paulsen, supra note 1, at 1599–602 (arguing, in the context of Supreme Court abortion decisions, that Congress can and should abrogate stare decisis by statute); see also Steven G. Calabresi, The Tradition of the Written Constitution: Text, Precedent, and Burke, 57 Ala. L. Rev. 635, 636–38 (2006) (arguing that original meaning should trump precedent); Gary Lawson, Controlling Precedent: Congressional Regulation of Judicial Decision-Making, 18 Const. Comment. 191, 194–95 (2001).

[11] See, e.g., Scalia, supra note 3, at 861; Theodore P. Seto, Originalism vs. Precedent: An Evolutionary Perspective, 38 Loy. L.A. L. Rev. 2001, 2020–21 (2005).

[12] See The Federalist No. 22, at 193 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) ("[It is a] fundamental maxim of republican government, which requires that the sense of the majority should prevail."); John Locke, Second Treatise §§ 95–99 (1689), *reprinted in* 1 The Founders' Constitution 98–99 (Philip B. Kurland & Ralph Lerner eds., 1987) ("When any number of Men have so *consented to make one Community* or Government, they are thereby presently incorporated, and make *one Body Politick*, wherein the *Majority* have a Right to act and conclude the rest."); Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* 1 The Founders' Constitution, supra, at 677 ("[I]t is my principle that the will of the Majority should always prevail. If they approve the proposed Convention in all it's [sic] parts, I shall concur in it chearfully [sic], in hopes that they will amend it whenever they shall find it work [sic] wrong."). Under such a system, the only thing that trumps a mere majority is a *super*majority. See 2 Joseph Story, Commentaries on the Constitution §§ 878–880, 886–889 (1833), *reprinted in* 2 The Founders' Constitution, supra, at 404–06 ("[T]he departure from the general rule, of the right of a majority to govern, ought not to be allowed but upon the most urgent occasions; and an expression of opinion by two thirds of both houses in favour of a measure certainly afforded all the just securities, which any wise, or prudent people ought to demand in the ordinary course of legislation.").

majoritarian political process. The cost of judicial error increases with the severity of the intrusion into the democratic process, and this accordingly increases the need for strong pragmatic justifications if precedent is to control. On the other hand, where erroneous precedents do not threaten or frustrate majoritarian government, the pragmatic considerations of stare decisis are more applicable. Allowing majoritarian politics to play a role in determining the strength of prior precedent is not a new idea: it was first suggested by James Madison, one of the authors of the Constitution and a committed popular sovereigntist.[13]

Although standard theories of stare decisis grant precedent at least presumptive validity,[14] a popular sovereignty-based theory occasionally requires treating precedent as presumptively *invalid.* Presumptive invalidity, or what I call *reverse* stare decisis, is generally required when an erroneous prior decision either maintains a structural error in the political process or completely immunizes an issue from majoritarian politics. Structural problems undermine the legitimacy of law, while erroneous immunizations require a supermajoritarian response where none may be possible. Such precedents not only lack legitimacy under a system of popular sovereignty, but they are also the judicial errors most likely to endure. As such, erroneous decisions of this kind are presumptively in need of overturning unless especially strong reasons exist to maintain the precedent. In brief, the theory of *reverse* stare decisis maintains that erroneous decisions that maximally interfere with the democratic process ought to be reversed unless there are strong reasons not to do so.

In Part I of this Essay, I will address the relationship between popular sovereignty and majoritarian democracy. Popular sovereignty holds that laws created by ordinary political majorities are *less* legitimate than the supermajoritarian law of the Constitution due to their more attenuated relationship to the actual will of the people. Although constituting only a diluted expression of the people's will, over time majoritarian acceptance of originally erroneous judicial precedents can grant those precedents a degree of

[13] See infra notes 31–40 and accompanying text.

[14] Some go much further. See Solum, supra note 1, at 186 (arguing in favor of binding precedent).

legitimacy they would not otherwise have. In theory, then, upholding such precedents on the basis of stare decisis does not necessarily result in judicial enforcement of an illegitimate law, because the law has gained legitimacy by the passage of time and the consent of the governed. James Madison himself embraced a "majoritarian response" theory of stare decisis, despite (or, perhaps, because of) his belief in popular sovereignty. A necessary corollary of Madison's theory, however, is that judicial errors which *prevent* a majoritarian political response lack the minimal degree of legitimacy necessary for the application of stare decisis.

Part II will construct a taxonomy of judicial error based on the costs imposed on the majoritarian political process. Judicial errors fall along two main parameters: judicial intervention versus nonintervention, and errors of allocation versus errors of immunity. Cases where the Court erroneously fails to intervene generally allow the continued functioning of the political process and thus impose lower costs in terms of popular sovereignty. Similarly, cases involving the proper allocation of government power generally involve which institution of government may act, not whether government may act at all. Errors along this parameter thus allow the continued functioning of the political process. On the other hand, errors of intervention that involve issues of immunity (constitutional rights) generally remove the subject from majoritarian action. Judicial errors in this category impose the highest costs in terms of popular sovereignty and thus should presumptively be overruled.

Part III will apply the taxonomy created in Part II to particular test cases and consider the proper role of stare decisis in a number of controversial judicial decisions. For example, New Deal precedents as well as recent decisions upholding race-based diversity programs in public universities both allow political majorities to disagree with the Court's rulings and thus are amenable to stare decisis. On the other hand, cases like *Lochner v. New York* and *Roe v. Wade* remove an issue from the political process altogether. A Justice believing either decision is an erroneous reading of the Constitution should apply *reverse* stare decisis and overrule it absent special reason to uphold the precedent.

Part IV will defend the controversial aspects of Part III. First, I will explain why a principled originalist committed to the norma-

tive theory of popular sovereignty should *ever* apply stare decisis in a constitutional case. Second, I will address why *reverse* stare decisis *always* should be applied to a case erroneously entrenching a constitutional right or wrongfully leaving in place flaws in the political process. Finally, I will explain why, in spite of the high costs associated with such cases, *reverse* stare decisis is only a presumptive rule, and not an invariable command.

I. POPULAR SOVEREIGNTY AND MAJORITARIANISM

According to the theory of popular sovereignty, the will of the people is distinct from and superior to the ordinary actions of government.[15] Popular sovereignty under the U.S. Constitution presupposes the normative value of democratic majoritarianism and builds upon it by creating an independent and supermajoritarian process by which certain legal norms can be entrenched, or immunized, from the ordinary political process.[16] These entrenched norms may be altered only by way of a second supermajoritarian procedure such as that provided in Article V of the Constitution.[17] As the product of a more deeply democratic process, constitutional rules have earned the right to be treated as the will of the people and accordingly trump those laws passed through the ordinary political process.[18]

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[15] 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 Wood, supra note 9, at 344–89; see also Ackerman, Foundations, supra note 6, at 3–32; Ackerman, Transformations, supra note 7, at 3–17; Amar, supra note 6, at 129–33; Whittington, supra note 6, at 127–52.

[16] See The Federalist No. 49 (James Madison), supra note 12, at 348 ("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.").

[17] For the purposes of this Essay, I accept Article V as the proper mode of constitutional change. Some scholars, however, have made important arguments regarding the right of the people to amend their Constitution outside of Article V. See, e.g., Akhil Reed Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. Chi. L. Rev. 1043, 1043–44 (1988).

[18] See Ackerman, Foundations, supra note 6, at 6–7.

Although popular sovereignty under the Constitution follows supermajoritarian rules, the theory itself is based on the right of a political majority to determine policy in a democratic government.[19] In a constitutional democracy, the laws of the Constitution trump the laws of the mere majority, not because majoritarian laws are illegitimate,[20] but because a variety of factors tend to undermine the link between the will of political actors and the actual majoritarian will of the people.[21] If the people could be directly appealed to, a mere majority would suffice for the creation of fundamental law. For example, when the people meet in a constitutional convention, the vote of the majority prevails.[22] The superma-

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[19] For example, 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 (1776), *reprinted in* 1 The Founders' Constitution, supra note 12, at 6; see also Debate in Virginia Ratifying Convention (June 5, 1788) (statement of Mr. Lee), *reprinted in* 4 The Founders' Constitution, supra note 12, 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.").

[20] Dualism (a system of government that treats "higher" constitutional law as binding upon "ordinary" majoritarian law) does not reject the legitimacy of the outputs of majoritarian government. It simply asserts the superiority of allowing the people to speak independently through a process that maximizes both deliberation and majoritarian consent (as with the process dictated by Article V). Popular sovereignty does not, for example, presuppose the illegitimacy of governments based on parliamentary supremacy. It merely asserts the superior legitimacy of governments bound by the expressed will of the people. See Ackerman, Foundations, supra note 6, at 6–10 (comparing the dualist American Constitution with the "monist" approach of the English Parliament).

[21] See Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1427 (1987) (discussing popular sovereignty and "agency costs" in ordinary political representation).

[22] For example, a number of states ratified the original Constitution by majority vote, despite the existence of state constitutional provisions seemingly requiring a supermajority vote. See Amar, supra note 17, at 1049. Professor Amar 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: What the Constitution Really Says About Your Rights 3–33 (1998); Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment

joritarian rules of Article V provide for the highest degree of democratic input by the people directly while still realistically allowing for constitutional change.[23] In this way, Article V reflects popular sovereignty's assumption that more deeply democratic laws have greater legitimacy.[24]

Popular sovereignty thus provides an answer to one of the most vexing problems in modern constitutional law: the countermajoritarian difficulty.[25] Famously posed by Professor Alexander Bickel in *The Least Dangerous Branch*,[26] the countermajoritarian difficulty questions the legitimacy of invalidating a majoritarian law passed in a properly functioning democratic process.[27] Popular sovereignty theory resolves the difficulty by grounding judicial review in the more deeply democratic law of the people.[28] Any legislative action that diverges from this higher law is an inferior expression of the people's will and deserves invalidation.

A. The Costs of Judicial Error Under Popular Sovereignty

Just as divergence from the people's will delegitimizes ordinary law and authorizes judicial invalidation,[29] divergence from the peo-

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Outside Article V, 94 Colum. L. Rev. 457, 487–94 (1994); Akhil Reed Amar, A Few Thoughts on Constitutionalism, Textualism, and Populism, 65 Fordham L. Rev. 1657 (1997).

[23] See The Federalist No. 43 (James Madison), supra note 12, at 315 ("[Article V] guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults."); 3 Joseph Story, Commentaries on the Constitution § 1821 (1833), *reprinted in* 4 The Founders' Constitution, supra note 12, at 584 ("The great principle to be sought is to make the changes practicable, but not too easy; to secure due deliberation, and caution; and to follow experience, rather than to open a way for experiments, suggested by mere speculation or theory."); see also Ackerman, Foundations, supra note 6, at 230–31 (discussing the "economy of virtue" created by the dualist structure of the Constitution under Article V).

[24] In other words, it is the ultimately majoritarian basis of the Constitution and its rules for amendment that establish the legitimacy of the document under the theory of popular sovereignty.

[25] See Whittington, supra note 6, at 20 ("Postulating an interpretive method that could overcome the countermajoritarian difficulty [has become] the chief task of constitutional theory.").

[26] Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962).

[27] Id. at 16–23.

[28] See Ackerman, Foundations, supra note 6, at 12–13.

[29] See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

ple's will delegitimizes judicial precedent and justifies overruling it. Prior decisions that erroneously identify the original meaning of the Constitution lack the very characteristic that, under popular sovereignty, justifies judicial review. This is why some originalist scholars reject stare decisis altogether. But if popular sovereignty is based on the normative value of majoritarian democracy, then that suggests that some judicial errors are more problematic than others, depending on the degree of interference with both supermajoritarian and mere majoritarian politics.

Consider, for example, two hypothetical cases that we will assume for present purposes constitute judicial error.[30] The first erroneously declines to invalidate a federal charter for a national bank. The second erroneously provides slave owners a property right in their slaves enforceable in U.S. territories. The bank case undermines the supermajoritarian Constitution's limit on the power of the federal government on a particular issue. It does not, however, interfere with the right of an ordinary majority to establish national policy, for it leaves the political process free to repeal the bank's charter or veto its renewal if it wishes. The slave case, however, is more problematic. It not only violates the right of the supermajority to determine fundamental law, but it also thwarts the right of ordinary majorities to ban slavery in the territories. The only way to reverse this error is through the supermajoritarian process of constitutional amendment and, if the nation is divided on the issue, that remedy is foreclosed.

Consider a different judicial error. Suppose the Court erroneously upholds a federal program regulating home-grown wheat. The Court's decision does not require government regulation, but allows it if preferred by a political majority. Over time, a vast array of governmental programs and bureaucratic institutions emerge that rely on this erroneous precedent. The cost of judicial error in terms of supermajoritarian will is somewhat offset by the continued

[30] Throughout this Essay, I use examples based upon presumed error. The endeavor is to determine what popular sovereignty-committed originalist judges and government officials ought to do once they have determined a prior judgment reflects an incorrect interpretation of the Constitution. Exactly how such judgments are made requires an exploration of the methods of originalism—a subject beyond the scope of this Essay. For an excellent discussion of popular sovereignty and the methods of originalism, see Whittington, supra note 6, at 110–59.

power of the majority to decide whether to exercise the power authorized by the precedent. On the other hand, overruling the case and reestablishing the original meaning of the Constitution would potentially impose significant rule of law costs in terms of the values of stability, certainty, and predictability. In this case, the costs of overruling the decision may outweigh the costs of maintaining the erroneous precedent, given the continued ability of the majority to reject the Court's interpretation of federal power.

These examples highlight how different judicial errors may impose different costs in terms of popular sovereignty and illustrate how stare decisis might be justified in a case with sufficiently low costs. This idea is not new. James Madison advocated his own "majoritarian response theory" of precedent and applied it to the Second Bank of the United States despite his continued misgivings about the constitutionality of the Bank.

B. Madison's Majoritarian Theory of Precedent

Madison originally opposed the incorporation of the Bank of the United States on the grounds that its charter exceeded congressional authority.[31] His views did not prevail at the time, and Congress granted a charter for a period of twenty years, after which Congress allowed the charter to expire. In 1816, Congress passed a charter for the Second Bank of the United States, and this time *President* Madison signed the bill.[32] Madison's perceived turnabout opened him to charges of inconsistency, which he denied.[33] In fact, Madison never wavered from his belief that the Bank was unconstitutional.[34] Nevertheless, consistent political support since the time of the Bank's first enactment revealed what Madison called a

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[31] See James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), *in* James Madison: Writings 480–90 (Jack N. Rakove ed., 1999).

[32] For a general history of the First and Second Banks of the United States, see Mark R. Killenbeck, *M'Culloch v. Maryland*: Securing a Nation 31–72 (2006).

[33] See infra note 43 and accompanying text.

[34] See James Madison, Detached Memoranda (1819), *reprinted in* James Madison: Writings, supra note 31, at 756 (indicating Madison's objection to Chief Justice Marshall's statement in *McCulloch* "imputing concurrence of those formerly opposed to change of opinion, instead of precedents superseding opinion").

"course of practice" that justified both judicial and executive deference.[35]

In a letter written later in life (though at a time when the Bank issue remained hotly debated), Madison explained that the duty to respect precedent is no different for members of the political branches than it is for the courts.[36] In a nonconstitutional case, the reason that courts follow precedent is the traditional maxim that "the good of society requires that the rules of conduct of its members should be certain and known."[37] Recognizing that this rule preceded the American constitutional republic, Madison then rhetorically asked, "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?"[38] True, officials take an oath to follow the Constitution, but they also take an oath to follow the law without rejecting the proper application of stare decisis in a statutory case.[39] According to Madison, the necessity of "regarding a course of practice" is as important and as justifiable in a constitutional case as in an ordinary statutory case. Madison then noted there may be some cases where the application of stare decisis would be inappropriate: "That there may be extraordinary and peculiar circumstances controlling the rule in both cases, may be admitted; but with such exceptions the rule will force itself on the practical judgment of the most ardent theorist."[40]

What these "extraordinary" exceptions to the rule might be will become clearer once we consider Madison's explanation of when the rule *ought* to be applied.

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[35] For a discussion of Madison's commitment to popular sovereignty, originalism, and precedent, see Alan Gibson, The Madisonian Madison and the Question of Consistency: The Significance and Challenge of Recent Research, 64 Rev. Pol. 311, 318–24, 334–38 (2002).

[36] Letter from James Madison to Charles Ingersoll (June 25, 1831), *in* The Mind of the Founder: Sources of the Political Thought of James Madison 390–93 (Marvin Meyers ed., Brandeis University Press 1981) (1973).

[37] Id. at 391. Here Madison quotes the Latin maxim *misera est servitus ubi jus est aut vagum aut incognitum* ("Wretched is the Slavery, where Law is either uncertain or unknown"). Benjamin Franklin, The Political Thought of Benjamin Franklin 126 (Ralph Ketchum ed., 1965).

[38] Letter from James Madison to Charles Ingersoll (June 25, 1831), *in* The Mind of the Founder, supra note 36, at 391.

[39] Id. at 391–92.

[40] Id. at 392.

C. Madison's Rules for Stare Decisis

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 and under the varied ascendancy of parties."[41] Because the Bank had received this kind of majoritarian support from the political branches in the years after its first enactment, Madison concluded that he was duty bound not to oppose the new Bank bill, despite his personal views on the matter. In fact, to veto the Bill "would have been a defiance of all the obligations derived from a course of precedents amounting to the requisite evidence of the national judgment and intention."[42]

Madison had not abandoned his misgivings about the Bank, and he criticized Chief Justice Marshall for implying otherwise in *McCulloch v. Maryland*.[43] However, the Bank had long been left to

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[41] Id.

[42] Id. at 393. Madison's argument applies to all government officials who have taken an oath to uphold the Constitution. Both the judiciary and political branches were bound to consider the role of majoritarian ratification in deciding whether to bow to precedent despite continued personal misgivings.

[43] 17 U.S. (4 Wheat.) 316 (1819). According to Madison's notes on *McCulloch* in the Detached Memoranda, "[R]easoning of Supreme Ct—founded on erroneous views &—I. as to the ratification of Const: by people if meant people collectively & not by States. 2. imputing concurrence of those formerly opposed to change of opinion, instead of precedents superseding opinion." James Madison, Detached Memoranda, *in* James Madison: Writings, supra note 31, at 756. Here Madison obviously takes umbrage at Chief Justice Marshall's suggestion in *McCulloch* that men like James Madison, who had formerly believed that chartering a Bank exceeded the constitutional powers of Congress, had changed their minds. See *McCulloch*, 17 U.S. (4 Wheat.) at 402. Madison's decision to sign the bill establishing the Second Bank of the United States has often been mischaracterized as signaling a changed view regarding the constitutionality of the Bank. See, e.g., Richard S. Arnold, How James Madison Interpreted the Constitution, 72 N.Y.U. L. Rev. 267, 287–88 (1997); 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, 318 (2005); Gerard N. Magliocca, Veto! The Jacksonian Revolution in Constitutional Law, 78 Neb. L. Rev. 205, 216–17 (1999). However, as his notes and letters make clear, Madison never changed his mind but simply bowed to the force of precedent in this particular case. As an example of his unwavering rejection of broad interpretations of federal power, Madison refused to sign the Bill for Internal Improvements, citing the same reasons he gave for rejecting the national Bank. Compare James Madison, Speech Opposing the National Bank, *in* James Madison: Writings, supra note 31, at 486 (objecting to the latitude of interpretation regarding federal power used by advocates of the Bank) with James Madison, Veto Message to Con-

the political process, and, at the time Madison signed the Bank bill, no political majority had ever objected to the Bank. Indeed, even after *McCulloch*, nothing prevented political majorities from disagreeing with the Court as President Jackson did when he vetoed renewal of the Bank in 1832, in part on constitutional grounds.[44]

To Madison, majoritarian acceptance not only could ratify an arguably erroneous precedent, but the availability of a political response significantly reduced the costs of judicial error. As Madison assured a frustrated Spencer Roane in the aftermath of *Cohens v. Virginia*:[45]

> [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.[46]

Here Madison points out that Congress could refuse to exercise erroneously expanded power or reduce the jurisdiction of the federal courts should they try to unduly expand their own power.

Importantly, Madison's theory of majoritarian acceptance of precedent presupposes the opportunity for majoritarian dissent. A judicial decision *preventing* any action by the political branches by definition precludes majoritarian ratification of an originally erroneous precedent. The possibility that the Court might engage in

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gress, *in* James Madison: Writings, supra note 31, at 720 (objecting to the "inadmissible latitude of construction" of federal power used by advocates of the Improvements Bill). Indeed, it may have been in part to respond to Madison's veto that Chief Justice Marshall devoted so much space in *McCulloch* to countering Madison's rule of strict construction. See Gerald Gunther, Introduction *to* John Marshall's Defense of *McCulloch v. Maryland* 6–7 (Gerald Gunther ed., 1969) (discussing how the *McCulloch* decision was written in the midst of the debate over internal improvements and strict construction of federal power).

[44] President Andrew Jackson 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* 3 A Compilation of the Messages and Papers of the Presidents 1139, 1144–45 (James D. Richardson ed., 1897).

[45] 19 U.S. (6 Wheat.) 264 (1821).

[46] Letter from James Madison to Spencer Roane (May 6, 1821), *in* The Mind of the Founder, supra note 36, at 364–65.

repeated removal of issues from majoritarian control probably did not occur to Madison at the time. The most controversial decisions by the Supreme Court to that date involved either jurisdictional issues (as in *Cohens*) or federalism decisions allocating authority over certain matters into the hands of the national Congress (as in *McCulloch*).[47] In fact, in Madison's lifetime, the Supreme Court intervened to wholly immunize a subject from the political process in only a single case, *Marbury v. Madison*[48]—a case whose judgment was widely accepted. Madison could not have anticipated the explosion of judicial intervention in the twentieth century. Although we cannot know the particular exceptions that Madison had in mind, his rule for respecting precedent simply does not apply to the individual rights jurisprudence of the modern court.

Madison's view about cases that did not immunize an issue from a majoritarian response illustrates that even an ardent popular sovereigntist like Madison would allow the application of stare decisis. Under Madison's approach, precedents that allow room for majoritarian agreement or disagreement can supply presumptive legitimacy to precedents otherwise in conflict with the original understanding of the people who ratified the Constitution.[49] In this way,

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[47] The most controversial cases handed down during Madison's lifetime involved questions of allocation, including whether the federal government had power to charter a bank in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, or whether the Supreme Court had jurisdiction to hear claims against the states, as in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), and *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). See generally Gunther, supra note 43, at 1–21 (discussing Chief Justice Marshall's controversial opinions in *McCulloch* and *Cohens* and public reaction). Although Madison criticized the judicial reasoning in these cases, he did not share the outrage of states' rights advocates. See Letter from James Madison to Spencer Roane (May 6, 1821), *in* James Madison: Writings, supra note 31, at 774 ("[W]hatever may be the latitude of Jurisdiction assumed by the Judicial power of the U.S. it is less formidable to the reserved sovereignty of the States than the latitude of power which it has assigned to the National Legislature . . . .").

[48] 5 U.S. (1 Cranch) 137, 162 (1803). *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138–39 (1810) (invalidating state sale of land under the Impairment of Contract Clause), and *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 650–54 (1819) (striking down state law under the Impairment of Contract Clause), might count as additional examples, but it is not clear that Chief Justice Marshall would have applied the limitations of the Contract Clause against both the state and federal governments—particularly since the Clause itself binds only the states.

[49] See also John Quincy Adams, Correspondence Between John Quincy Adams, Esquire, President of the United States, and Several Citizens of Massachusetts Concerning the Charge of a Design to Dissolve the Union Alleged to Have Existed in

as Professor Larry Kramer recently suggested, citizens play a role not only in adopting a constitution, but also in its *enforcement*.[50] Allowing this role for majoritarian response in determining the strength of precedent did not, however, change Madison's mind about the Bank[51] or transform constitutional meaning into a majoritarian enterprise. Affirmative political acceptance merely supplied the minimum degree of democratic legitimacy necessary to allow for the application of stare decisis and the maintenance of precedent.[52]

In sum, the costs of judicial errors under popular sovereignty depend on the degree of interference with the majoritarian political process. The greater the wrongful constraint on political majorities, the greater the costs in terms of constitutional illegitimacy. On the other hand, where judicial error allows the opportunity for majoritarian political affirmation, upholding a precedent on the basis of stare decisis may be justified. It is of particular relevance for those who embrace an originalist theory of popular sovereignty that Founders like James Madison believed that judicial errors might warrant the application of stare decisis in cases involving later majoritarian ratification.[53]

II. THE PARAMETERS OF JUDICIAL ERROR

Having explored the relationship between popular sovereignty and majoritarianism, we are now in a position to explore the nature

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That State (Boston, Press of the Boston Daily Advertiser 1829). Adams was convinced that Congress had no power to annex the Louisiana Territory without an amendment to the Constitution. According to Adams:

> I opposed it as long and as far as my opposition could avail. I acquiesced in it, after it had received the sanction of all the organized authority of the Union, and the tacit acquiescence of the people of the United States and of Louisiana. Since which time, so far as this precedent goes, and no farther, I have considered the question as irrevocably settled.

Id. at 28–29.

[50] See Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004).

[51] See supra note 43 and accompanying text.

[52] Madison's approach thus must be distinguished from theories which allow for a common law development of constitutional meaning. See, e.g., David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 879 (1996).

[53] In a later Section, I address *how* the courts ought to apply such precedent. See Section IV.A.

of judicial error in terms of the costs imposed on the political process. In doing so, I concentrate on constitutional cases and instances of horizontal stare decisis. Vertical stare decisis refers to the binding effect of precedent on lower courts. Serious rule of law costs would follow if lower courts were free to ignore precedent established by a higher court of appeal.[54] At the same time, the appellate process itself substantially mitigates the costs of adhering to an erroneous precedent, because it can always be addressed by the court of last resort. Thus, maintaining vertical stare decisis imposes few costs in terms of popular sovereignty and provides maximal rule of law benefits. The same is true for cases involving statutory construction, where judicial error can be remedied through the political process. In these categories, even the strongest stare decisis imposes little cost in terms of normative legitimacy.

A. Intervention v. Nonintervention & Immunity v. Allocation

Judicial error can be categorized along two major parameters: intervention versus nonintervention and immunity versus allocation. First, courts may wrongfully *intervene* in the political process or they may wrongfully *fail* to intervene. Second, judicial error may involve a question of immunity (*whether* the government has any power over a given subject) or a question of allocation (*which* governmental institution has power over a given subject). Each of these potential errors creates different costs in terms of the ultimate majoritarian values of popular sovereignty.

Nonintervention allows democratic majorities to form and reform in ordinary law and policy. When the judiciary correctly chooses not to intervene, a majoritarian resolution of the issue is normatively justified because the people had not constitutionally entrenched that particular norm. However, assuming that the Court's nonintervention was incorrect and the people had in fact entrenched a particular norm, then leaving the issue in the political arena undermines the legitimacy of the system by allowing a mere majority to trump norms entrenched by a democratically superior process. Unless the Court overturns itself, remedying this situation

[54] See Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 817, 818 (1994) (describing vertical stare decisis in federal courts); see also Solum, supra note 1, at 188.

requires a second, and presumably clearer, expression by a supermajority. If the case involves a recently entrenched principle, then perhaps a supermajority still exists, as may have occurred with the Eleventh Amendment.[55] Or, if the error involved failing to enforce a long-respected constitutional norm, broad public repudiation of the decision might reach supermajoritarian levels sufficient for a constitutional amendment. Of course, Article V poses substantial hurdles, and success obviously cannot be certain. As I shall develop later, in some situations the costs of nonintervention are so high that the erroneous precedent is presumptively in need of reversal.

But erroneous interventions are even more problematic than erroneous noninterventions. An erroneous intervention occurs when the Court itself entrenches a constitutional norm because it believes incorrectly that the supermajoritarian Constitution supports it. Where failing to intervene generally allows a somewhat legitimate majoritarian process to control the issue, wrongful interventions often remove the issue from politics altogether. Worse, remedying the error requires a supermajoritarian consensus on an issue that has not previously merited supermajoritarian action. Though a mere majority can respond to erroneous nonintervention by statutory enactment, a mere *minority* often can block any response to an erroneous intervention.

A second parameter for judging judicial error distinguishes between errors of allocation and errors of immunity. Errors of allocation involve decisions that choose which among the institutions of government has authority to resolve a given policy issue. Horizontal allocation, or separation-of-powers cases, divides power between the President, Congress, and the courts, while vertical allocations are federalism cases that divide power between the federal and state governments. Erroneous horizontal allocation between the President and Congress is less problematic than erroneous allocation of power to the courts because courts are insulated from the political process. Nevertheless, to the degree that Congress retains power over the Court's jurisdiction, the majoritarian process may ameliorate even this kind of allocation error. In terms of federal-

[55] See Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 479 (1793) (upholding the jurisdiction of federal courts to hear private civil suits against a state), and subsequent U.S. Const. amend. XI (declaring that the Constitution shall not be construed to allow suits between a state and a citizen from another state).

ism, erroneous allocation to the federal government is more problematic than erroneous allocation to the states, because mobilizing a national majority is more difficult than state-by-state majoritarian resolution.[56] Nevertheless, all vertical allocation errors can be addressed, at some level, by the political process. For example, Madison applied stare decisis to an erroneous allocation of power to the federal government to charter a bank in light of long-term majoritarian ratification of the disputed power.

Errors of immunity, on the other hand, involve decisions which potentially immunize an issue from political control. Justice Jackson provided a famous illustration of this category in his opinion in *West Virginia State Board of Education v. Barnette*:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[57]

Jackson's declaration is inspirational in cases where the Court correctly enforces the considered will of the people. In cases where the Court errs, however, the result is deeply problematic. An erroneous *failure* to immunize an act from political control thwarts a supermajority decision to place the subject beyond majoritarian control. The costs of this error are mitigated to the degree that the political process can make up for the Court's error. An erroneous decision to immunize, however, imposes far higher costs, for it places the issue beyond any majoritarian response. Since by definition no supermajoritarian consensus exists on the issue, a resort to constitutional amendment is unrealistic, especially given the ability of a small minority to derail efforts at constitutional change.

In general, the least problematic judicial errors are those which involve the least interference with the political process and are the easiest to remedy. The most problematic judicial errors are those

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[56] For the same reason, erroneous allocation to local (municipal) government is less problematic than erroneous allocation to state governments. See, e.g., Romer v. Evans, 517 U.S. 620 (1996).

[57] 319 U.S. 624, 638 (1943).

which involve the greatest degree of interference with the political process and are the most difficult to remedy.

B. Putting It Together: A Taxonomy of Judicial Errors

1. Errors of Allocation

In a constitutional case, judicial errors of allocation are the least problematic in terms of democratic legitimacy. Such errors, either across the branches of the federal government or vertically between the federal and state governments, all still allow room for a majoritarian response and thus impose the fewest costs in terms of popular sovereignty.

Suppose that the Supreme Court erroneously fails to strike down a state law challenged under the Dormant Commerce Clause. Such a decision leaves the matter to state political majorities, unless and until a national political majority intervenes. This kind of error is not cost*less*, because a supermajority had sought to remove the issue from state control. However, the variety of options left to the political process, including congressional action, mitigates the costs of the error. More problematic would be wrongful allocation of power *exclusively* to the states on a matter the people wished left to federal control. Although this allows majoritarian decisionmaking on a state-by-state basis, coordination problems may preclude the most appropriate or beneficial resolution of the issue. Moving up the scale, erroneous allocation of power to the federal government on a matter properly reserved to the states imposes somewhat greater costs. The error leaves the matter in the hands of national majorities, which are more difficult to garner than at the state level. Here, the costs of such error are mitigated somewhat by the opportunity of local majorities to participate in national politics, and by structural representation of the states in the election of the national government. Collective majoritarian action thus remains possible, either in support or in opposition, if more difficult.

Also, the checks and balances inherent in the horizontal separation of powers can reduce the costs of erroneous judicial allocation. Wrongful allocation to either political branch can be rejected or affirmed by later majorities (in addition to the ordinary checks and balances between the two). For example, political majorities can mobilize to elect a President who they believe will reject the exer-

cise of an erroneously allocated power. Judicial failure to curtail the Court's own power raises an interesting issue. Presumably, such a case would involve a matter appropriately belonging to the political branches but wrongfully taken up by the courts. If the error can be responded to by the political process, then the damage to constitutional legitimacy is minimized.[58] If not, then this kind of error raises the same kind of serious cost discussed below in the category of erroneous *immunity* from the political process and ought to be presumptively reversed.

In sum, most errors of allocation leave significant maneuvering room for political majorities. Although wrongful allocation of power to the federal government imposes costs in terms of majoritarian participation, even there political mobilization is possible. Therefore, the costs of allocation errors generally provide the weakest counterbalance to the pragmatic considerations of stare decisis. If stare decisis is to play any role in constitutional decisionmaking, this is the most appropriate place.[59]

The only exception to this rule would be a wrongful allocation of political power to the Court itself in a manner immunized from political response. This error raises the most serious concerns of constitutional legitimacy and ought to be treated as presumptively in need of being overruled.

2. *Errors of Immunity*

The issue in immunity cases is whether an act is immunized from political control at both the state and national levels. Errors of relative immunity involve a principle of equality, while errors of

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[58] For example, Madison maintained that Congress could respond to undue assertions of federal court jurisdiction, presumably through the mechanism of its Article III power to control lower court jurisdiction and its power to make exceptions to the appellate power of the Supreme Court. See Letter from James Madison to Spencer Roane (May 6, 1821), *in* James Madison: Writings, supra note 31, at 775 ("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.").

[59] I do not mean to underplay the costs associated with errors of allocation. It can be difficult, if not impossible, to mobilize fellow state majorities in cases involving erroneous allocation of power to the federal government. My point is that such error imposes relatively low costs in terms of democratic legitimacy and thus, if anywhere, this is the area where stare decisis might play a role. It is not surprising, for example, that this is the area where Madison found room for stare decisis.

absolute immunity involve a principle of constitutional right. In either case, erroneous nonintervention, or failure to immunize the issue from political resolution, generally imposes far lower costs than erroneous intervention. Erroneous intervention in this category imposes the highest costs in terms of constitutional legitimacy and always warrants the presumption of *reverse* stare decisis.

a. Failure to Intervene

When the Court erroneously fails to intervene on any matter involving immunity, it abandons the issue to the political process. As such, the costs of the error in terms of majoritarian democracy may be mitigated by political mobilization. For example, if the Court erroneously concludes that one does not have a right to nondiscriminatory treatment by a private employer, the political process may still provide statutory protection. Similarly, even if the Court errs in denying a constitutional right to physician-assisted suicide, the same right might be provided by statute (at a state, if not federal level). As such, these errors are the least dangerous and least counterbalance the benefits of stare decisis.

One exception involves a failure to intervene on a matter involving political process concerns. Here, popular sovereignty-based originalism can borrow a page from footnote four of *United States v. Carolene Products Co.*[60] That case represents the Supreme Court's abandonment of the unenumerated liberty of contract and played an important role in the New Deal Court's newfound deference to the political branches across a variety of fronts.[61] In footnote four, Justice Stone suggested that three important areas remained where the Court should continue to patrol the political process: denials of specific text-based rights, laws that interfered with the political process, and laws that discriminated against discrete and insular minorities.[62]

The categories of footnote four highlight principles of constitutional interpretation under the theory of popular sovereignty. Ac-

[60] 304 U.S. 144, 152 n.4 (1938).

[61] For a discussion of the New Deal Court's deference to the political branches across a variety of fronts, see Kurt T. Lash, The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal, 70 Fordham L. Rev. 459 (2001).

[62] 304 U.S. at 152 n.4.

cording to the New Deal Court, the problem with judicial enforcement of liberty of contract was the lack of textual enumeration—suggesting the Court was enforcing its own economic values and not that of the people themselves. The second and third paragraphs of footnote four reflect a commitment to preserve the legitimacy of the political process.[63] This reflects the obvious point that the New Deal Court's newfound deference to the political process was warranted only to the degree that the process was functioning properly.[64] There is no countermajoritarian difficulty when the Court ensures that laws reflect the actual will of the majority—and not the outcome of a rigged game. Put another way, when the Court fails to ensure the proper functioning of the political process, *that failure itself* raises legitimacy concerns. Erroneous failure to intervene in a matter affecting the proper functioning of the political process not only fails to reflect the will of the people, it also allows the continued undermining of even ordinary majoritarian politics. As such, this kind of erroneous precedent should be presumptively reversed—*reverse* stare decisis. Such error can occur either in failures to intervene in cases involving discriminatory laws affecting political participation, such as voting rights, or laws generally impinging upon the right to participate in the majoritarian political process, such as freedom of speech.

In sum, erroneous failure to intervene generally imposes the fewest costs in term of the majoritarian values underlying popular sovereignty. As such, the pragmatic considerations of stare decisis counsel standing by the earlier precedent. One exception involves failures to intervene in matters affecting the proper functioning of the political process. Errors in this category reflect neither the supermajoritarian will of the people nor the will of a simple majority, and should receive *reverse* stare decisis.

b. Erroneous Intervention

Given the majoritarian values of popular sovereignty, the most problematic judicial error involves erroneous judicial entrenchment of a constitutional right. This not only thwarts legitimate po-

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[63] Id.

[64] See John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 75–77 (1980).

litical action at all levels of government, but remedying the error requires the action of a supermajority on a matter that has never before achieved supermajoritarian consensus. Further, when constitutional amendment is the only remedy, mere minorities can effectively block it. As is true for all errors, new presidential appointments may help remedy the situation by potentially adding Justices with "correct" views of the Constitution, but this remedy is both unreliable and may itself be thwarted by an improper application of the principle of stare decisis. Accordingly, all errors of this kind should be subject to presumptive reversal absent especially strong reasons to stand by the decision.

III. APPLYING THE TAXONOMY TO TEST CASES

Having created a taxonomy of judicial error, we are ready to apply a popular sovereignty-based theory of stare decisis to specific cases and issues. Below, I address some of the more controversial judicial opinions and consider how the doctrine of stare decisis might be applied by a Justice who believes the precedent is in error.

A. Allocation Cases

Erroneous nonintervention in an allocation case leaves in place a particular distribution of power. The case might involve a separation-of-powers dispute or an issue involving the proper division of power between the state and federal governments. Generally, such errors can be addressed to some degree by the political process.

For example, consider the independent counsel provisions of the Ethics in Government Act of 1978.[65] In *Morrison v. Olson*, the Supreme Court upheld the Act against a number of constitutional challenges, all of which involved separation-of-powers issues.[66] The decision drew a strong dissent from Justice Scalia and has received substantial scholarly criticism.[67] Suppose that the Act had not been

[65] See 28 U.S.C. § 595 (1994) (expired 1999).

[66] 487 U.S. 654, 659–60 (1988).

[67] Id. at 697 (Scalia, J., dissenting); see also Joseph E. diGenova, The Independent Counsel Act: A Good Time to End a Bad Idea, 86 Geo. L.J. 2299 (1998); Katy J. Harriger, The History of the Independent Counsel Provisions: How the Past Informs the Current Debate, 49 Mercer L. Rev. 489, 512–17 (1998); Thomas W. Merrill, Beyond

allowed to expire and, in a new case, a Justice of the Supreme Court believes that the *Morrison* Court erred in failing to invalidate the independent counsel provisions of the Act. If that Justice nevertheless upholds the Act on the grounds of stare decisis, then this decision would not impose undue costs in terms of majoritarian legitimacy. The Court's decision in *Morrison* left room for the political process to address the issue, which in fact it did by allowing the Act to lapse in 1999.

Similarly, in federalism cases, the Supreme Court has refused to invalidate state laws that subsidize local industries, despite the significant impact such funding has on the national marketplace.[68] This "market participant doctrine" has been criticized by scholars as an unjustifiable exception to Dormant Commerce Clause doctrine.[69] Even if in error, however, it is not automatically illegitimate to uphold these cases on the basis of stare decisis, given that both the political process of the states and national government continue to control when and how a state enters the marketplace. The power retained by the political process significantly ameliorates the costs imposed on majoritarian democracy.

One of the most controversial allocation issues in the last hundred years was the Supreme Court's "switch in time" that upheld New Deal economic programs and vastly expanded the powers of the national government. Decisions like *NLRB v. Jones & Laughlin Steel Corp.*,[70] *United States v. Darby*,[71] and *Wickard v. Filburn*[72] not only created an era of Commerce Clause doctrine, they opened the door to the modern administrative state. Originalists have long

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the Independent Counsel: Evaluating the Options, 43 St. Louis U. L.J. 1047, 1061–63 (1999); H. Richard Uviller, Poorer but Wiser: The Bar Looks Back at its Contribution to the Impeachment Spectacle, 68 Fordham L. Rev. 897, 898 (1999).

[68] See, e.g., South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984); Reeves, Inc. v. Stake, 447 U.S. 429, 440–41 (1980).

[69] See, e.g., Theodore Y. Blumoff, The State Proprietary Exception to the Dormant Commerce Clause: A Persistent Nineteenth Century Anomaly, 1984 S. Ill. U. L.J. 73, 102–19; Karl Manheim, New-Age Federalism and the Market Participant Doctrine, 22 Ariz. St. L.J. 559, 561–62 (1990); Michael J. Polelle, A Critique of the Market Participation Exception, 15 Whittier L. Rev. 647, 647–48 (1994); A. Dan Tarlock, National Power, State Resource Sovereignty and Federalism in the 1980's: Scaling America's Magic Mountain, 32 U. Kan. L. Rev. 111, 132–33 (1983).

[70] 301 U.S. 1, 36–41 (1937).

[71] 312 U.S. 100, 115–24 (1941).

[72] 317 U.S. 111, 127–29 (1942).

questioned the legitimacy of the New Deal revolution,[73] and nonoriginalists have used that controversy as a reason to avoid originalism altogether.[74]

The New Deal cuts to the heart of the originalist struggle with stare decisis. If the Court erroneously allocated authority to the federal government, that allocation lacks the supermajoritarian consent of the people and thus undermines popular sovereignty. Reversing those cases, however, potentially requires invalidating everything from Social Security to the Clean Water Act.[75] If the stare decisis considerations of legal stability, certainty, and predictability apply anywhere, they seem to apply here.

The New Deal Revolution did not, however, remove economic issues from majoritarian control. Although the Court opened the door to progressive economic policies, it did not entrench such policies. Thus, it remained a choice of later political majorities, albeit national ones, whether to exercise the regulatory powers bestowed on the government by the New Deal Court. Even then, state majorities play a critical, if lesser role, in determining how and when federal power is exercised.[76] So, even if the major decisions of the New Deal Court were in error, they may not have imposed enough damage to constitutional legitimacy so as to require the abandonment of stare decisis.[77]

On the other hand, erroneous *limitations* on federal power would receive the same stare decisis. When the Supreme Court for the first time in sixty years struck down a federal law as exceeding the Commerce Clause power, the case received significant criti-

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[73] On the current Court, Justice Clarence Thomas has repeatedly criticized New Deal precedents on originalist grounds. See United States v. Lopez, 514 U.S. 549, 585 (1995) (Thomas, J., concurring) ("In an appropriate case, I believe that we must further reconsider our 'substantial effects' test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause . . . .").

[74] Thomas W. Merrill, *Bork v. Burke*, 19 Harv. J.L. & Pub. Pol'y 509, 523 (1996).

[75] Id.

[76] Through, for example, the structural representation of the states in Congress and the Electoral College.

[77] At the same time, there would be no justification for *extending* the doctrinal scope of erroneous precedents. Thus, an originalist Justice might uphold New Deal precedents on the basis of stare decisis, but limit them to their facts and decline to develop the doctrine beyond the factual context of the original decision. One can uphold a case, while denying the persuasiveness of its reasoning—and thus decline to apply that reasoning in otherwise analogous areas.

cism, both on and off the Court.[78] Cases like *United States v. Lopez*,[79] *United States v. Morrison*,[80] and the anti-commandeering cases of *New York v. United States*[81] and *Printz v. United States*[82] all involve allocation-of-power issues. As such, although regulating firearms possession and protecting women from criminal assault have been placed beyond federal control by the Court, these issues remain in the hands of local majorities. Moreover, national majorities have a variety of options for encouraging state action, including conditional federal funding, which can be very powerful. Therefore, even if these decisions were in error, the majoritarian norms underlying popular sovereignty are not completely undermined, leaving room for stare decisis.

B. Immunity Nonintervention Cases

Immunity cases involve a claimed constitutional right. When the Court declines to intervene in such a case, it leaves the matter under the control of political majorities. As such, the general rule in such cases allows for stare decisis, with the exception of the situations outlined in footnote four of *Carolene Products*, wherein failing to intervene preserves a political-process distortion.

One of the most controversial refusals to intervene in an immunity case is the *Slaughter-House Cases* decision.[83] There, the Court rejected a variety of claimed constitutional violations and declined to invalidate a Louisiana slaughterhouse monopoly. The most lasting impact of *Slaughter-House* is its extremely narrow reading of the Privileges or Immunities Clause.[84] The case has received volumes of analysis and scholarly criticism,[85] with a number of histori-

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[78] See, e.g., Herbert Hovenkamp, Judicial Restraint and Constitutional Federalism: The Supreme Court's *Lopez* and *Seminole Tribe* Decisions, 96 Colum. L. Rev. 2213, 2222 (1996); Jodi Fowler Jayne, Note, Constitutional Law: *United States v. Morrison*: The Gender Motivated Violence Act Takes a Beating by the Supreme Court's New Commerce Clause Jurisprudence, 54 Okla. L. Rev. 805 (2001).

[79] 514 U.S. 549, 552 (1995).

[80] 529 U.S. 598, 601–02 (2000).

[81] 505 U.S. 144, 149 (1992).

[82] 521 U.S. 898, 935 (1997).

[83] 83 U.S. 36 (1872).

[84] Id. at 78–79.

[85] See, e.g., Michael Les Benedict, Preserving Federalism: Reconstruction and the Waite Court, 1978 Sup. Ct. Rev. 39, 56–61; Loren G. Beth, The *Slaughter-House Cases*—Revisited, 23 La. L. Rev. 487 (1963); Michael J. Gerhardt, The Ripple Effects

ans arguing that the framers of the Fourteenth Amendment intended the Privileges or Immunities Clause to protect a broad array of fundamental rights.[86]

Assuming the Court erred in *Slaughter-House*, the costs of that error have been ameliorated in two different ways. First, the Court left the issue of commercial monopolies in the hands of local majorities. Second, much of the content presumably intended for the Privileges or Immunities Clause has been transferred to the Due Process Clause.[87] Potentially, then, the will of the people may have been achieved by another, if not wholly intended, means. In any event, the economic policies debated in *Slaughter-House* remain subject to majoritarian control.

More recently, the Court refused to intervene in *Kelo v. City of New London*.[88] There, the Court rejected a Takings Clause claim against a forced transfer of property from one private owner to another. Assuming the Court erred, it nevertheless left political options open for majorities to prevent this particular exercise of eminent domain.[89] Thus, the countermajoritarian costs of *Kelo* are lower than those arguably imposed in *McCulloch*, because in that case only a national majority could respond, forcing local majori-

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of *Slaughter-House*: A Critique of a Negative Rights View of the Constitution, 43 Vand. L. Rev. 409 (1990); Robert J. Kaczorowski, Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction, 61 N.Y.U. L. Rev. 863, 937–38 (1986); Walter F. Murphy, *Slaughter-House*, *Civil Rights*, and Limits on Constitutional Change, 32 Am. J. Juris. 1 (1987).

[86] See, e.g., Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights (1986); Amar, supra note 6, at 181–87.

[87] See, e.g., Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (the Establishment of Religion Clause); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (the Free Exercise Clause); Gitlow v. New York, 268 U.S. 652, 666 (1925) (the Freedom of Speech Clause).

[88] 545 U.S. 469 (2005).

[89] The political area has witnessed a wide variety of responses to the *Kelo* decisions. President George W. Bush issued an executive order instructing the federal government to use eminent domain "for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken." Exec. Order No. 13,406, 71 Fed. Reg. 36,973 (June 23, 2006). In Congress, Senator John Cornyn (R-TX) introduced the "Protection of Homes, Small Businesses, and Private Property Act of 2005," S. 1313, 109th Cong. (2005). States also have taken steps to counter the impact of the decision. In the national elections of November 2006, a number of anti-*Kelo* initiatives were on various state ballots and passed.

ties to acquiesce.[90] Accordingly, the costs do not seem so high as to automatically preclude application of stare decisis.[91]

Failures to intervene in cases involving claims of *relative* immunity (equal protection cases) also leave room for the political process and thus allow for stare decisis. For example, the Court's failure to strike down the admissions program at the University of Michigan Law School in *Grutter v. Bollinger*[92] left room for the political process to invalidate such programs as a matter of state law.[93] Thus, the underlying values of popular sovereignty are not so undermined as to prevent stare decisis. Applying stare decisis, of course, still allows the precedent to be overruled if special considerations outweigh the presumptive benefit of standing by the prior decision.[94]

C. Immunity Nonintervention in Political Process Distortion Cases

Erroneous failures to intervene to rectify a distortion in the political process, however, do preclude application of stare decisis. Prior examples involved situations where a properly functioning political process could somewhat ameliorate the countermajoritarian costs of judicial error. Failing to rectify a problem with the political process has the double effect of ignoring the people's supermajoritarian will *and* thwarting the will of actual majorities.

Distortions in the political process can occur in different ways. Clearly, an erroneous failure to protect an adult citizen's right to vote is entitled to presumptive reversal. A failure to preserve the right to political discourse[95] likewise should receive *reverse* stare decisis due to its impact on the people's right to informed deci-

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[90] This is because local majorities may respond to *Kelo*, whereas they were forced to accept the Court's decision in *McCulloch*.

[91] Nor, on the other hand, would the case automatically receive the benefits of stare decisis. Unlike the case of the national bank, *Kelo* does not represent a principle that has long received bipartisan support.

[92] 539 U.S. 306, 343 (2003).

[93] As seems to have occurred. See All Things Considered (National Public Radio broadcast Nov. 10, 2006), http://www.npr.org/templates/story/story.php?storyID=6469307 (reporting on the passage of a Michigan initiative banning race-based admission programs).

[94] See, for example, the Court's discussion of *Plessy* and stare decisis in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 862–63 (1992).

[95] For example, a decision upholding a modern version of the Sedition Acts of 1798.

sionmaking. More controversially, if a Justice believed that the Court erroneously denied the free speech challenge to the Bipartisan Campaign Reform Act of 2002 in *McConnell v. Federal Election Commission*,[96] she should presumptively reverse it. After all, a precedent that erroneously leaves in place an unconstitutional interference with the proper function of the political process lacks legitimacy on both the supermajoritarian *and* the ordinary majoritarian levels.

D. Immunity Intervention Cases

Of all the categories of judicial error, none threatens constitutional legitimacy under the principles of popular sovereignty more than erroneous intervention that creates a constitutional immunity. By removing the subject from the political process altogether, the Court precludes any majoritarian response. Only two avenues remain open: judicial appointments and constitutional amendment. The former is problematic due to the lack of majoritarian accountability, and the latter is insufficient since, by definition, the subject lacks supermajoritarian consensus.

1. Potential Routes of Response

a. Judicial Appointments

As highlighted by Roosevelt's court-packing plan, one political option for an intransigent Court has been the appointment of Justices more amenable to upholding particular policies. Suppose, for example, the Court strikes down the Pledge of Allegiance as an unconstitutional establishment of religion due to the inclusion of the words "under God." The Court's decision might become a major campaign issue in the next presidential election cycle, with the winning candidate promising to nominate Justices who will overrule the decision and restore the Pledge. In this way, the political process can mobilize in response to an erroneous judicial intervention on a matter of immunity.

But the mere possibility of "transformative appointments" is insufficient to overcome the costs involved in applying stare decisis when this kind of error occurs. First, under Article III, all Justices

[96] 540 U.S. 93 (2003).

are insulated from the political process and enjoy lifetime tenure subject only to the discarded option of impeachment.[97] Second, the doctrine of stare decisis itself would apply as much to the new Justice as to the old. Recent history demonstrates that new Justices can thwart the expectations of the President who nominated them, sometimes even by applying stare decisis to preserve the very error the President hoped to reverse. In sum, the ordinary political process cannot always remedy judicial error in this category of cases, nor are transformative appointments certain to redress the error.

b. Constitutional Amendment

Constitutional amendments have occasionally been utilized not only in cases of evolving supermajoritarian consensus, but also in response to perceived judicial error. The clearest example is the rapid response to the Court's decision to allow a federal court to hear a private right of action against a state.[98] Within months, the Eleventh Amendment had been proposed, drafted, and ratified.[99] The Eleventh Amendment, however, came in response to a *failure* of the Court to intervene on a matter of *allocation*, and the same supermajority that insisted on the Tenth Amendment's protection of state autonomy remained in office and could easily respond to the perceived threat of *Chisholm*.

Compare this to the judicial intervention of *Dred Scott v. Sandford*.[100] In one of the most infamous decisions in constitutional history, the Supreme Court struck down the Missouri Compromise, holding along the way that a black man had no rights a white man need respect.[101] The case ignited a firestorm of criticism and helped propel the nation down the road to civil war.[102] Bitter division over the issue of slavery precluded any supermajoritarian response in

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[97] Since the unsuccessful attempt to impeach Justice Samuel Chase in 1805, no other Supreme Court Justice has faced a serious threat of impeachment.

[98] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 420 (1793).

[99] For a general discussion of the history behind the adoption of the Eleventh Amendment, see William A. Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 Stan. L. Rev. 1033 (1983).

[100] 60 U.S. (19 How.) 393 (1857).

[101] Id. at 407.

[102] For a modern discussion of the history and implications of the *Dred Scott* decision, see Mark A. Graber, *Dred Scott* and the Problem of Constitutional Evil (2006).

the form of an amendment. It was only after the Civil War and the *exclusion* of the southern states from Congress that the votes could be found to propose the Thirteenth Amendment.[103]

Dred Scott illustrates the serious costs imposed by erroneous intervention on a matter of immunity. By definition, the people have not reached supermajoritarian consensus on the issue. Thus, as do all erroneous constitutional decisions, the decision thwarts the right of the people to determine fundamental law. In addition, the error removes the matter from the ordinary political process. Finally, and most insidiously, the nature of the case makes it unlikely that a supermajority exists that can mobilize and enact a constitutional amendment in response. Of all judicial errors, then, erroneous intervention on a matter of immunity requires the application of *reverse* stare decisis—presumptive reversal.

2. Roe *and* Brown

Modern cases that possibly involve errors of wrongful intervention are *Roe v. Wade*[104] and *Brown v. Board of Education*.[105] These two cases are regularly presented as examples of the risks of applying originalism unmediated by stare decisis because that practice might overturn these landmarks of modern American jurisprudence.[106] Nevertheless, under a theory of popular sovereignty-based originalism, if in fact these two decisions are in error, they should be treated as *presumptively* in need of reversal.

Despite all the controversy surrounding the *Roe* decision, it is not a difficult case in terms of stare decisis and popular sovereignty. The liberalization of abortion laws was the subject of majoritarian politics in a number of states in 1973, and as others have pointed out, it may have been better to allow that process to continue rather than trigger the political firestorm of *Roe*. Instead, the

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[103] For a discussion of the irregular procedures used to ensure the ratification of the Thirteenth and Fourteenth Amendments, see Ackerman, Transformations, supra note 7, at 99–103.

[104] 410 U.S. 113 (1973).

[105] 347 U.S. 483 (1954).

[106] See, e.g., Monaghan, supra note 2, at 727–29 (discussing originalism's problem dealing with cases like *Roe* and *Brown*); Larry G. Simon, The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?, 73 Cal. L. Rev. 1482, 1532 (1985) (using *Brown* as a test case against originalism); see also Seto, supra note 11, at 2019–21.

decision cut off the process of legislative review of the issue and seriously undermined the perceived legitimacy of the Court in the eyes of a significant portion of the public. The divisiveness of the issue precluded any supermajoritarian response, and to the extent that political mobilization has occurred, it has resulted in a deeply politicized judicial appointment process. Reversing *Roe*, on the other hand, would return the issue of abortion regulation to state and federal majorities. *Roe* thus stands as a prime example of a precedent which, if erroneous, triggers the doctrine of *reverse* stare decisis.

The case most often presented against originalism is *Brown v. Board of Education*.[107] The legal and cultural status of the case gives it such presumptive authority that any interpretive theory that calls the decision into question is immediately suspect.[108] Should the case receive the presumptive protection of stare decisis, even if the opinion was in error? Or, from the originalist perspective, if the decision in *Brown* conflicts with the original public meaning of the Fourteenth Amendment, should *reverse* stare decisis apply?

Brown raises the problem of the "good error." These are cases which, even if in error from an originalist perspective, nevertheless are widely viewed as advancing the common good or eradicating a perceived evil.[109] In a pluralistic democratic republic, however, questions of good and evil are necessarily contested issues.[110] As such, according to popular sovereignty theory, these contested issues should remain subject to resolution in the political process until consensus on the issue becomes so wide and so deep as to trigger the supermajoritarian process of constitutional amendment. Until that time, the majority should control the issue. Therefore, like any other case creating an immunity, if *Brown* was erroneous, it is sub-

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[107] 347 U.S. 483.

[108] Of course, my analysis does not involve determining whether *Brown* was incorrect, but rather what a Justice of the Supreme Court should do in case it was. In fact, there *are* originalist defenses of the decision; see Michael W. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947, 1131–40 (1995).

[109] For an approach that favors stare decisis in such cases, see Strang, supra note 1, at 479–81.

[110] See John Rawls, Political Liberalism 3–4 (Columbia Univ. Press 2005) (1993) (discussing the "fact" of pluralism and the implications for resolving contested issues of good and evil through the use of public reason).

ject to *reverse* stare decisis and should be overruled absent some compelling reason to maintain the precedent.[111]

But recall, judicial error that creates an immunity simply raises a *presumption* that the error should be reversed. That presumption may, under certain circumstances, be overcome by countervailing interests—interests which must be reconciled with the majoritarian aims of popular sovereignty. In certain situations, a judicial error has in fact received majoritarian support over an extended period of time. Such cases are rare precisely because this category of judicial error immunizes the decision from an ordinary political response. Hence, it is far more difficult to signal majoritarian approval. Nevertheless, it is possible that decisions like *Brown*, even if originally in error, have come to express, over time, a principle broadly and repeatedly embraced by political majorities. In fact, *Brown* poses such a powerful challenge to originalism because the invalidation of racial segregation has achieved almost universal acceptance, despite the fact that it may not fit perfectly with an originalist view of the Constitution. In such a case of de facto supermajoritarian political ratification, the general presumption in favor of overruling the decision may be overcome by rule of law considerations without unduly undermining constitutional legitimacy. However, while this exception to the general rule might apply to *Brown*, it cannot reasonably apply to *Roe*, where the public remains deeply divided over the issue of regulated abortion.

IV. CONCERNS

We have established that certain cases impose higher costs than others in terms of the majoritarian values of popular sovereignty. We also have established two categories of cases that carry especially high costs, namely wrongful failures to intervene when the political process is being subverted and wrongful intervention to create a constitutional immunity. Finally, we have concluded that

[111] Nor would leaving the issue of segregation to the political process necessarily require the continuation of substantive evil. Although the Court struggled over the next decade to have its decision enforced, in the 1960s the political process enacted voting rights legislation and prohibited private discrimination in public accommodations. Although one cannot discount the rhetorical effect of the Court's opinion in *Brown*, the civil rights legislation of the 1960s provides an illustration of how the political process can work even in the absence of constitutional command.

these latter categories should be treated as *presumptively* in need of reversal.[112]

However, some important issues remain. To begin with, even if certain cases carry a lower cost than others due to the room allowed for majoritarian politics, how can a principled originalist *ever* uphold such a case on the basis of stare decisis, given his commitment to the original meaning of the Constitution? Second, even if erroneously entrenched rights impose high costs in terms of popular sovereignty, why must those cases *always* be presumptively in need of reversal, regardless of potentially high costs to the rule of law? Finally, if wrongfully entrenched immunities carry such a high cost in terms of popular sovereignty values, why is *reverse* stare decisis only a *presumptive* rule? In what situation could such a

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[112] For those who are keeping score, here then are the results: assuming error, these cases nevertheless could stand under the doctrine of stare decisis: *Gonzales v. Raich*, 545 U.S. 1 (2005) (allowing federal control of medicinal marijuana); *Kelo v. City of New London*, 545 U.S. 469 (2005) (permitting takings); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding state control of diversity admissions programs); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (allowing state control of physician-assisted suicide); the New Federalism cases, including *United States v. Lopez*, 514 U.S. 549 (1995); the New Deal cases, including *Wickard v. Filburn*, 317 U.S. 111 (1942); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (allowing separate but equal public transportation); *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (refusing to incorporate the Second Amendment and apply it to the states); the *Slaughter-House Cases*, 83 U.S. 36 (1872).

Assuming error, these cases would receive *reverse* stare decisis: a failure to strike down a law like the Sedition Act; any denial of the equal right to vote, such as *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003) (upholding the Bipartisan Campaign Reform Act of 2002); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down diversity admissions program); *Troxel v. Granville*, 530 U.S. 57 (2000) (immunizing certain parental rights); *Roe v. Wade*, 410 U.S. 113 (1973) (immunizing a right of abortion); *Breedlove v. Suttles*, 302 U.S. 277 (1937) (upholding a poll tax), overruled by *Harper v. Virginia State Board of Elections*, 383 U.S. 633 (1966); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (immunizing a right of marital privacy); *Brown v. Board of Education*, 347 U.S. 483 (1954) (immunizing a right of school integration); *Lochner v. New York*, 198 U.S. 45 (1905) (immunizing a freedom of contract); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (excluding African-Americans from citizenship).

The above list does not track any particular partisan agenda, at least not in terms of the current policy preferences associated with the political left and right. The list does skew away from libertarian preferences, however, by applying stare decisis to allocation decisions but not (generally) to immunity decisions. This allows broad assertions of government power such as those upheld at the time of the New Deal to remain in place, while throwing into doubt judicial immunization of matters involving personal autonomy. Political liberals and conservatives, however, both benefit from a principled application of stare decisis under a theory of popular sovereignty.

presumption be overcome and justify an originalist judge's decision to uphold an erroneously entrenched constitutional right?

A. How a Principled Originalist Justice Can Vote to Uphold an Erroneous Precedent

Though some erroneous constitutional cases impose fewer costs than others, the fact remains that they do not reflect the original meaning of the Constitution. That being the case, how can a principled originalist ever uphold such a decision without subverting the normative theory of popular sovereignty? Perhaps even "low cost" errors cannot escape presumptive illegitimacy.

It is not my purpose to establish the illegitimacy of an untempered approach to originalism. Instead, the effort is to show how a principled popular sovereignty-based originalist can still apply stare decisis in at least some situations without unduly sacrificing normative constitutional legitimacy. Establishing the possibility of such a rapprochement provides significant side benefits for both originalists and advocates of stare decisis. A total rejection of stare decisis in any case that fails to reflect the original meaning of the Constitution opens the door to major destabilization of wide swaths of legal doctrine.[113] Some originalists, including one member of the current Supreme Court,[114] believe the expansion of federal power at the time of the New Deal was illegitimate and violates the original understanding of federal power; but even the most strong-willed originalist might pause before invalidating the entire administrative state.[115] Originalists thus appear to be faced with an unpleasant choice: either take a principled stance with such dire implications for the rule of law that it endangers originalism as a viable theory of interpretation, or apply an inconsistent and unprincipled stare decisis.[116] Finding a principled way for an originalist

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[113] The invalidation of the post-New Deal administrative state alone would impose untold costs in terms of the rule of law.

[114] Justice Clarence Thomas is reportedly particularly reluctant to apply stare decisis to an erroneous constitutional precedent. In Justice Scalia's words, Justice Thomas "'does not believe in *stare decisis*, period.'" Ken Foskett, Judging Thomas: The Life and Times of Clarence Thomas 281–82 (2004).

[115] See Scalia, supra note 3, at 861 ("In its undiluted form, at least, [originalism] is medicine that seems too strong to swallow.").

[116] See Monaghan, supra note 2, at 724.

to apply stare decisis thus makes originalism more attractive and avoids the inevitable temptation towards selective, subjective application.

Most of all, the doctrine of stare decisis advocated in this Essay is itself based on principles of popular sovereignty. The doctrine is applied in cases where the earlier error allowed the political process room to maneuver and register its approval or disapproval. For example, if a majority believed that the New Deal expansion of power was illegitimate, it could refuse to wield the sword offered to it by the Court. Thus, all laws passed under such a case bear the imprimatur of majoritarian consent.[117] Laws created under such a system, then, are problematic but cannot be considered completely illegitimate, even from the perspective of a popular sovereigntist. As Madison noted, this legitimacy increases with the passage of time and acceptance of the decision by different political parties.

A principled popular sovereigntist might claim that any departure from the original meaning of the Constitution must presumptively need reversal, or, even more strongly, must be reversed. But this position is not self-evident. One of the fundamental principles of popular sovereignty is that the people retain the right to alter or amend their constitution as they see fit. Thus, a popular sovereigntist need not be bound by the rules of Article V. Indeed, some popular sovereigntists claim that the people cannot be so constrained, and that popular sovereignty must allow for situations where a majority might act outside the parameters of Article V.[118] The point is not that majoritarian ratification alone constitutes legitimate constitutional change, but that the authority of the Constitution itself is based upon, and subordinate to, the fundamental value of popular sovereignty.

The goal of popular sovereignty-based interpretive theories is to identify the people's majoritarian will, as opposed to that of their representatives. Because ordinary law only imperfectly represents the will of the people, we have created a supermajoritarian process to better represent it. But, as some of the most influential popular sovereigntists concede, even the ordinary political process can occasionally represent the will of the people in a manner superior to

[117] Presuming a properly functioning political process.

[118] See Amar, supra note 17, at 1043.

that expressed by the original understanding of the constitutional text.[119] Thus, when the Court erroneously allows the political process to control a given subject, the resulting situation remains partially, if imperfectly, legitimate in terms of popular sovereignty. Accordingly, in a case where the costs of reversal are at their highest and the costs to popular sovereignty of upholding the case are at their lowest, a Justice may adhere to stare decisis without completely undermining democratic legitimacy. Nor is such an approach to precedent a modern invention. As discussed earlier, this approach was advocated by the father of the Constitution, James Madison.

Under Madison's approach, the legitimacy of prior precedent increases as time passes and as the decision receives serious longstanding support by multiple legislative assemblies. Madison, for example, acquiesced to the Bank because that institution had received long-term bipartisan support. Not all precedents, however, deserve similar deference. In the following passage, Madison carefully distinguishes legislative actions which reflect no more than a momentary and ill-considered "impression" from those that receive serious and consistent affirmation. Only the latter should be treated as binding:

> In resorting to legal precedents as sanctions to power, the distinctions should ever be strictly attended to, between such as take place under transitory impressions, or without full examination & deliberation, and such as pass with solemnities and repetitions sufficient to imply a concurrence of the judgment & the will of those, who having granted the power, have the ultimate right to explain the grant. Altho' I cannot join in the protest of some against the validity of all precedents, however uniform & multiplied, in expounding the Constitution, yet I am persuaded that Legislative precedents are frequently of a character entitled to little respect, and that those of Congress are sometimes liable to peculiar distrust. They not only follow the example of other Leg-

[119] Bruce Ackerman, for example, argues that the political mobilization which occurred at the time of the New Deal trumps the original (limited) meaning of federal power. See Ackerman, Transformations, supra note 7, at 381. Larry Kramer has made a related point regarding the role of populist movements in changing constitutional norms. See Kramer, supra note 7, at 73–93.

> islative assemblies in first procrastinating and then precipitating their acts; but, owing to the termination of their session every other year at a fixed day & hour, a mass of business is struck off, as it were at shorthand, and in a moment. These midnight precedents of every sort ought to have little weight in any case.[120]

By embracing only those precedents that receive serious and extended majoritarian support, Madison limits the doctrine of stare decisis to those cases most likely to raise reliance concerns of the type generally informing the doctrine of stare decisis.[121]

Proper application of stare decisis in this situation also prevents judicial expansion of an erroneous precedent. When a court upholds a prior decision on the basis of stare decisis, it can do so in a manner that grants the prior decision full force or minimal force. Full-force stare decisis involves adhering to both the holding and rationale of the prior decision and allows for doctrinal growth across analogous areas. Minimal, or "discount" stare decisis, on the other hand, involves adhering only to the holding itself in the context of the particular facts of the prior case, thus preventing any attempt to extend the reasoning of the case to analogous situations. Application of discount stare decisis suggests, and the Court may be explicit about this, that there exists a superior analysis more in line with the original meaning of the constitutional text, but that rule of law considerations counsel upholding the prior judgment.

In a statutory case, few costs are imposed on political majorities if the court applies its reasoning across a broad array of similar cases. Constitutional cases, however, are a different matter. Not only should the Court avoid applying erroneous constitutional reasoning in later cases, but it would be inappropriate to expand the reach of prior erroneous precedents to situations that have not received long-term bipartisan acceptance. Erroneous constitutional precedents generally therefore should receive no more than discount stare decisis. In so doing, although the prior erroneous decision is not reversed, the Court puts litigants and government offi-

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[120] See Letter from James Madison to Spencer Roane (May 6, 1821), *in* The Mind of the Founder, supra note 36, at 365–66.

[121] For a discussion of the role of reliance in determining the strength of prior precedent, see *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 855–56 (1992) (plurality opinion).

cials on notice that it finds the rationale of the prior case defective and inapplicable in other areas of law. Once again, Madison provides an example: although he acquiesced to the Bank of the United States, he declined to follow the reasoning others provided in favor of the Bank in the closely related area of federal regulation of internal improvements.[122] There, Madison continued to follow what he believed was the proper reading of limited federal power.

In sum, an originalist committed to the principles of popular sovereignty may justifiably follow Madison's example and apply at least discount stare decisis in upholding erroneous cases that still allow for majoritarian action. These cases allow the political process room to respond, thus providing a sufficient degree of legitimacy to the maintenance of the status quo. This approach has the additional side benefit of presenting a principled form of originalism that avoids the significant costs to the rule of law that would result if *all* erroneous constitutional precedents were reversed.

B. Why Erroneous Intervention in Immunity Cases Must Always Receive the Presumption of Reverse *Stare Decisis*

Reverse stare decisis dictates that a prior erroneous decision ought to be reversed absent a special need to maintain the precedent. Under ordinary stare decisis, the burden is on those who wish to overturn the prior decision. Under *reverse* stare decisis, the burden is on those who wish to maintain prior precedent. Because there are very few situations that justify adhering to an erroneous creation of immunity, a Justice has a duty to overrule such prior judicial error in almost all cases. Obviously, this approach entails significant costs in terms of the rule of law, depending on the number of cases that a majority of Justices believe qualify for *reverse* stare decisis. Why then, despite these costs, must *all* such cases be treated as presumptively in need of reversal?

The reason that most failure to intervene cases should receive the protection of stare decisis is that those errors leave room for the political process. Though an imperfect representation of popu-

[122] See James Madison, Veto Message to Congress (Mar. 3, 1817), *in* James Madison: Writings, supra note 31, at 718–20 (explaining his reasons for vetoing "[a]n act to set apart and pledge certain funds for internal improvements").

lar will, the majoritarian process, if properly functioning, carries with it sufficient legitimacy to justify a status quo wherein the majority can register its agreement or disagreement with the Court's decision. In cases where the Court immunizes a subject from the political process, however, there is little opportunity for even this low-level assertion of popular will.[123] Accordingly, the status quo in this kind of case generally lacks the minimal level of legitimacy under popular sovereignty that would justify maintaining the precedent. For the same reason, judicial nonintervention that results in maintaining a broken political process also lacks sufficient legitimacy because it renders suspect the outputs of majoritarian politics. Despite the important goals of stability, certainty, and predictability, such rule of law values deserve judicial regard only under conditions of minimal normative legitimacy. Similarly, considerations of reliance and the perceived legitimacy of the Court cannot justify the continuation of a wholly illegitimate precedent. In terms of popular sovereignty, reliance in such a case cannot be considered reasonable, and the public perception of the Court, if anything, is at least equally undermined by the illegitimate removal of a matter from public debate and majoritarian decisionmaking.

C. Why Reverse *Stare Decisis Is Only Presumptive*

Given the above, it might seem as if the principles of popular sovereignty *always* call for the reversal of judicial errors that entrench a constitutional right or maintain a flawed political process. Though the standard rationales for following stare decisis do not apply to such cases, there is nevertheless a rare exception that may warrant judicial enforcement.

Essentially, although cases of entrenched right generally cut off majoritarian will, this may not always be the case. For example, some scholars suggest that the ratification of the Thirteenth and Fourteenth Amendments violated the proper application of Article V.[124] Without exploring the merits of the claim, suppose that the Thirteenth Amendment did not in fact follow the proper rules of

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[123] Obviously, regulation of the issue within the constitutional boundaries set by the Court does not count as majoritarian expression of agreement or disagreement. Majorities have no choice in the matter.

[124] See Ackerman, Transformations, supra note 7, at 99–103.

Article V. Nevertheless, one cannot plausibly claim that the issue of slavery remains in doubt in the minds of a majority (or even a significant minority) of American citizens, though it did in 1865. As such, a principled originalist Justice could apply stare decisis to cases relying on the Thirteenth or Fourteenth Amendment, even if she believed their original enactment failed to meet the conditions of Article V. In theory, then, a majoritarian consensus may develop in regard to a matter originally removed from the political process. This is what occurred with regard to the holding of *Brown*, even if that decision conflicts with the original understanding of the Fourteenth Amendment. Such cases, however, would be rare indeed.[125]

D. Instrumental Concerns: Stare Decisis and the Incidence of Judicial Error

One final point ought to be made regarding the instrumentalist reasons for adopting a majoritarian approach to stare decisis. If a principled popular sovereigntist could uphold erroneous precedent under certain conditions, would such an approach result in less correct interpretations of the Constitution? If, in fact, the approach results in greater entrenchment of judicial error, then the benefit of a peaceful judicial conscience seems rather thin gruel.

In fact, basing the strength of precedent on the values underlying popular sovereignty minimizes the impact of erroneous decisions and maximizes the opportunity to reverse those decisions imposing the greatest costs in terms of constitutional legitimacy. Under popular sovereignty, "judicial error" is defined in reference to the degree of departure from the considered will of the people. Erroneous failure to intervene in the political process, even if entrenched through later application of stare decisis, nevertheless leaves room for majoritarian opposition to the Court's error. This is an imperfect representation of the people's will but one which nevertheless ameliorates the effect of judicial error and brings the legal status quo closer to the will of the people than would otherwise be the case. Judicial errors that remove a subject from majoritarian politics are *always* subject to review and presumptive rever-

[125] Presumably, stare decisis would apply to such a case only to the degree that the development of majoritarian will on the matter is indisputable. Allowing for doctrinal growth presumably would require the development of *super*majoritarian acceptance.

sal. Assuming the current Court errs at the same rate as prior Courts, all correct reversals restore the will of the people, and all *incorrect* reversals place the matter in the hands of political majorities. The costs of the latter, once again, are thus ameliorated by the operation of the political process.

Finally, there is good reason to think that a Court embracing this approach to originalism and stare decisis would err at a lower rate than would otherwise be the case. Reconciling originalism and stare decisis creates a workable doctrine that is both normatively attractive and judicially workable. To the extent that this method permits the Court to seriously consider and apply a popular sovereigntist approach to originalism, the result will be increased fidelity to the sovereign will of the people.[126]

CONCLUSION

Regardless of instrumental concerns, political actors who take an oath to uphold the Constitution must reconcile the doctrine of stare decisis with their understanding of what it means to enforce that Constitution. A principled popular sovereignty-based originalist, however, need not abandon either constitutional principles or

[126] This approach also avoids what Professor Solum refers to as the "ratchet" problem whereby formalist-originalist Justices are willing to "lock in" erroneous realist precedents (for example, those of the Warren Court) through the application of stare decisis, but do not receive similar deference to their decisions by a later realist Court. See Solum, supra note 1, at 193. Professor Solum suggests this "self-defeating formalism" can be avoided by imposing a duty to apply stare decisis when faced with a formalist precedent, but releasing the Justice from the obligation when faced with a nonformalist precedent. Id. at 193–94. A popular sovereignty-based originalist, however, could not adopt such an approach because erroneous intervention in an immunity-creating case, even when the error is made in good faith by a formalist-originalist Justice, nevertheless lacks the minimal legitimacy required under a popular sovereignty theory of judicial review.

The approach presented in this paper avoids the one-way ratchet problem without abandoning normative legitimacy. No case, originalist or realist, that erroneously intervenes in the political process receives the benefit of stare decisis. In terms of erroneous failures to intervene, an originalist Court majority might apply stare decisis to realist errors in a manner that a later nonoriginalist realist majority would not reciprocate. If, however, a later realist majority refuses to apply stare decisis to an originalist precedent and intervenes, then either they have restored the original meaning of the Constitution, or their decision is in error. If the latter, this becomes a case that a future originalist majority has no reason to respect. Over time, then, erroneous intervention in immunity cases would tend to be rectified, regardless of the political valence of the decision.

stare decisis. Once placed in the context of the values underlying popular sovereignty, current enforcement of original meaning is not always necessary and, in fact, on occasion may not be advisable. Popular majorities may provide a sufficient degree of constitutional legitimacy to allow considerations of the rule of law to come to the fore. Making room for stare decisis in the practice of originalism does not make one unprincipled or inconsistent; it merely reflects a normatively grounded theory of constitutional interpretation.

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