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Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent

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STARE DECISIS IN ECONOMIC PERSPECTIVE: AN ECONOMIC ANALYSIS OF THE SUPREME COURT'S DOCTRINE OF PRECEDENT

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The Supreme Court's doctrine of stare decisis has been a consistent target of cynical criticism. Unfortunately, the Court's own articulation of its doctrine often fuels the fire. In this Article, Professor Lee builds on the economic justifications offered in support of a general rule of stare decisis to develop an economic model to measure the various strands of the Court's doctrine. The model consists of a social loss function composed of three kinds of costs: litigation costs, adjustment costs, and error costs. Professor Lee hypothesizes that the various strands of the Court's doctrine may be understood as attempts to minimize the sum of the above costs. After developing the intuition behind the economic model, the Article applies the model to explain a number of the Supreme Court's recent decisions overruling precedent. By translating the Court's rhetoric in those cases into economic terms, the Article offers an objective yardstick for evaluating doctrinal principles that have heretofore lacked a systematic framework for analysis.

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> "If *stare decisis* be one aspect of law, as it is, to disregard it in identic situations is mere caprice."[1]

INTRODUCTION

Justice Felix Frankfurter's observation on the Supreme Court's doctrine of precedent provides the framework for an important question: is stare decisis an "aspect of law" capable of reasoned application, or is it merely a "capricious" exercise of raw power? The accepted view to date among Supreme Court watchers has been the cynical one. Indeed, commentators variously condemn the Court's doctrine of precedent as a "backwater of the law,"[2] "a mask hiding

1. United States v. International Boxing Club of N.Y., Inc., 348 U.S. 236, 249 (1955) (Frankfurter, J., dissenting); *see also* Justice William O. Douglas, Stare Decisis, Address Before the Bar of the City of New York (Apr. 12, 1949), *in* 49 COLUM. L. REV. 735, 736 (1949) (asserting that "[*s*]*tare decisis* serves to take the capricious element out of law").

2. Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 422 (1988). Despite this and other epithets, Judge Easterbrook concludes that the absence of a "principled theory" of stare decisis is a necessary evil. *Id.* at 422, 423 (asserting that we "never can have[] a comprehensive theory of precedent, any more than

other considerations,"[3] "a hoax designed to provide cover for a particular outcome,"[4] and a matter of "convenience to both conservatives and liberals," whose "friends . . . are determined by the needs of the moment."[5] Conventional wisdom, in other words, has assumed that the Court's doctrine of stare decisis is not an "aspect of law" but is merely a formulaic litany of opposing factors used to "thrust" and "parry" depending on the individual Justice's views on the merits of the case.[6]

Unfortunately, the Court's own articulation of its doctrine fuels the fire of cynical criticism. For instance, while some Supreme Court opinions suggest that stare decisis cannot require blind adherence to plainly erroneous decisions, others assert that mere error is an

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we can have a complete theory of the 'just price' of wheat, or of when to spend more time studying the attributes of securities").

3. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 743 (1988).

4. Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 681 (1995).

5. Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 402 (1988); *see also* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2232 (1999) (chiding the dissent for using stare decisis "as a weapon rather than a guide"); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 72 (1991) (noting that "conservatives criticize the Warren Court's disregard for precedents, but not the Rehnquist Court's assault on liberal precedents," while "liberals denounce the Rehnquist Court's attacks on their icons, but not the Warren and Burger Courts' overrulings of conservative precedents" (footnotes omitted)). For a discussion and historical response to these and other criticisms, see generally Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 648 (1999) (discussing historical responses to stare decisis).

6. The "thrust" and "parry" construct borrows from Professor Llewellyn's famous article criticizing the various canons of statutory construction on this same basis. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950). For a response to Llewellyn, see Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 27 (Amy Gutmann ed., 1997) ("Mostly, ... Llewellyn's 'Parries' do not contradict the corresponding canon but rather merely show that it is not absolute."). Economic analysis helps to provide a defense of the Court's doctrine of stare decisis that is analogous to Justice Scalia's defense of the statutory canons. On the surface, the Court's overruling rhetoric is often inconsistent, but the apparent contradictions can be understood largely as necessary limitations on principles that are limited in their scope and application. For example, assumptions about expected costs ordinarily may dictate retention of erroneous precedent. Nevertheless, in special cases those assumptions may break down, and understandably the general rule may give way to an exception which is easily justifiable in economic terms.

insufficient basis for reversal of course.[7] When some Justices hold that a precedent "undermined" by subsequent authority or deemed "unworkable" in practice is vulnerable to reversal,[8] dissenters rejoin that the degree of deterioration or unworkability merely reflects the majority's views on the merits of the issue.[9] Finally, while the Court now seems settled on the notion that constitutional precedent deserves less deference than its statutory counterpart, for more than a century the constitutional or statutory nature of a decision had no effect on the Court's willingness to overrule itself.[10] Moreover, none of these strands of the Court's doctrine of precedent has any clearly articulated theoretical basis. No jurist or scholar has offered a yardstick of theory or logic to identify when error may be a sufficient basis for reversal or when a decision is sufficiently undermined or unworkable to justify setting it aside.

This Article proposes that the cynical response to the Court's principles of precedent is not a necessary one. It seeks to take the doctrine seriously as an "aspect of law" and to do so with the tools of economic analysis. To date, economic commentary has offered some important background insights on the costs and benefits of a system of precedent,[11] but the existing literature primarily has focused on identification of the economic functions generally associated with a system of precedent. None of the commentary has attempted to use economic analysis to explain specific strands of the doctrine of stare decisis articulated by the Supreme Court. This Article takes up that challenge.

Part I begins by examining and building on the economic justifications offered in support of a general rule of stare decisis. The resulting economic model identifies the costs and benefits of abiding by past decisions and hypothesizes that the Court's overruling rhetoric can be understood to sanction departure from stare decisis only when the benefits of such a move outweigh its costs. Subsequent Parts use the economic model to explain the complex and sometimes conflicting strands of the modern Supreme Court's doctrine of precedent. Part II analyzes the apparent conflict in the Court's

7. *See infra* Part II.

8. This Article uses the terms "overrule," "overturn," and "reverse" synonymously.

9. *See infra* Parts III and IV.

10. *See* Lee, *supra* note 5, at 703–33.

11. *See, e.g.*, Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976); Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93 (1989).

rhetoric describing its power to overturn precedent based on a current perception of error. Parts III and IV take up the Rehnquist Court's frequent suggestion that "unworkable" or "undermined" authority is particularly susceptible to reversal. Finally, Part V considers the modern dichotomy that allocates deference based on the statutory or constitutional nature of the precedent. In each Part, the economic model explains the doctrine espoused by the Court and adds some structure to its sometimes empty overruling rhetoric.

I. AN ECONOMIC MODEL OF PRECEDENT

Judge Easterbrook has lamented the startling absence of any "consistent theory" of stare decisis:

> Few Justices hint at a theory of precedent; no Justice has produced a consistent theory; although the academy is awash with competing theories of substantive law, there is no contest in the theory of stare decisis. Not because one candidate has swept the boards, but because no one has a principled theory to offer.[12]

Despite the initial warning that "it should frighten us that we do not have a theory" of precedent, however, Judge Easterbrook eventually gives in to the conclusion that a "comprehensive theory" is impossible.[13]

In a sense, Easterbrook is right. Any decision whether to retain or discard a precedent raises diverse policy considerations that are frequently at odds with each other and are likely to change over time. As explained in detail below, the decision to retain a precedent may give rise to certain costs associated with perpetuating a legal error, while a decision to discard it may result in increased adjustment and litigation costs. Because the magnitude of these cost considerations inevitably will vary with the nature of the precedent and the parties, the questions of whether and when precedent should be retained afford no universal answer. Thus, as Easterbrook notes, "we do not have—never can have—a comprehensive theory of precedent, any more than we can have a complete theory of the 'just price' of wheat, or of when to spend more time studying the attributes of securities."[14]

The difficulty (impossibility?) of determining a universal optimum for precedent, however, should hardly foreclose further analysis. To the contrary, a closer look at the specific cost factors that

12. Easterbrook, *supra* note 2, at 422.
13. *Id.* at 423.
14. *Id.*

may affect the advisability of retaining precedent in any particular case is in order. By cataloging the various cost factors involved in a decision whether to follow precedent, this Article offers a positive economic analysis[15] of the Supreme Court's doctrine of stare decisis.

The resulting "theory" is one of cost-minimization. Specifically, the hypothesis is that the complex and apparently conflicting rules dictating when to set aside precedent may be understood as attempts to minimize a social loss function composed of various public and private costs. Admittedly, the theory fails to offer the untenable—a concrete rule for divining an optimum point of precedent in any particular case. But this Article does reach beyond the existing literature in offering a comprehensive methodology for understanding the sometimes empty rhetoric used by the Supreme Court.

A. Cost-Saving Functions of Stare Decisis

Adherence to precedent performs a number of important cost-saving functions. For one thing, stare decisis conserves public and private litigation expenses. One oft-cited iteration of the public cost-saving function was offered by Justice (then-Judge) Cardozo, who stated that "[t]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."[16] Under this formulation, a general rule of adherence to precedent purportedly "expedites the work of the courts by preventing the constant reconsideration of settled questions."[17]

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15. Although the Article's methodology is largely positive, it ventures into the normative in Part V in comparing the modern Court's dichotomy between constitutional and statutory precedent to the historical approach that prevailed prior to the 1920s. The history of the Court's differential treatment of constitutional and statutory precedent is outlined in detail in Lee, *supra* note 5, at 703–33.

16. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921), *quoted in* Hubbard v. United States, 514 U.S. 695, 711 (1995) (plurality opinion); Commissioner v. Fink, 483 U.S. 89, 105 (1987) (Stevens, J., dissenting); Johnson v. Transportation Agency, 480 U.S. 616, 644 n.4 (1987) (Stevens, J., concurring).

17. Robert von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 410 (1924); *see also* RICHARD A. POSNER, OVERCOMING LAW 125 (1995) (noting that "if judges considered every case afresh they would, if conscientious, have to work harder" but also acknowledging the countervailing consideration that "following precedent requires research"); *id.* at 142 (asserting that the proposition that "abandonment or erosion of stare decisis increase[s] work loads" is "plausible although not certain"); Easterbrook, *supra* note 2, at 423 (asserting that "[p]recedent decentralizes decisionmaking" and "economizes on information"); Macey, *supra* note 11, at 102 (noting that stare decisis enables judges "to *avoid* having to rethink the merits of particular legal

Justice Cardozo's efficiency argument seems best suited to justifying a system of "vertical" stare decisis, under which lower courts are bound by decisions of higher ones. Absent a rule of deference to higher authority, the judiciary's workload would become almost unbearable.[18] Lower courts could hardly go about the business of *applying* the rules and standards applicable to the factually complex cases before them if the governing principles of law were always open to reconsideration. In this sense, stare decisis facilitates the conservation of "adjudicative resources" at the lower-court level by permitting courts to "resolve more cases" than they could without such a rule.[19]

But this Article focuses on the "horizontal" dimension of stare decisis, which concerns the extent to which the Supreme Court considers itself bound by its own decisions. At this level, Justice Cardozo's formulation of the public cost-saving functions of a system of precedent appears to lose much of its punch. To be sure, a system that required reconsideration of Supreme Court precedent in any case that could call it into question would be extraordinarily costly; but a system of mandatory reconsideration is scarcely a reasonable baseline of comparison.[20]

Instead, the proper point of comparison is to a standard that would more liberally *permit* the Court to reconsider its past decisions whenever there are five votes for reversal. Does the current system perform any significant public cost-saving functions in comparison to such a discretionary regime? At one level, the cost savings appear to be insignificant. The modern Court has almost complete discretion

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doctrine" in many cases).

18. *See supra* note 16 and accompanying text.

19. Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63, 77 (1989); *see also* Ronald A. Heiner, *Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules*, 15 J. LEGAL STUD. 227, 229 (1986) (asserting that "precedents make it easier (or less costly) for judges to decide because .... they can rely on earlier analysis in the form of a stock of already accumulated experience from past cases"); Macey, *supra* note 11, at 111 (asserting that stare decisis "allows judges to maximize leisure time" by "free-rid[ing] on the earlier efforts of other judges"). Other economic analyses of stare decisis similarly focus their attention on arguments aimed at a requirement of vertical deference to precedent and have little or no application to the horizontal question that is the focus of this Article. Macey, for example, suggests that "stare decisis enables higher courts to select cases for review more efficiently" because "cases that depart dramatically from established precedent can be easily identified and singled out for special attention." Macey, *supra* note 11, at 108.

20. No one would advocate a *requirement* that the Court reconsider all of its precedents in any case in which they are relevant, "right down to a daily reconsideration of the very foundations of judicial review established in *Marbury v. Madison*." Lee, *supra* note 5, at 654.

over the volume and content of its docket.[21] In this regime, a rule that limits the Court's discretion to reverse itself arguably performs no significant cost-saving function. When the Court itself decides which cases merit the investment of its limited resources, the claim that stare decisis permits the Court to "resolve more cases" seems weak. Indeed, a doctrine that creates barriers to self-reversal arguably demands a *greater* investment in judicial resources, in that such a doctrine requires the Court to navigate and develop a now-complex web of impediments to changes in precedent and injects the Court into artificial attempts to distinguish existing authority instead of forthrightly overruling it.[22]

On another level, however, a rule of horizontal stare decisis surely does perform an adjudicative cost-saving function. A system that enhances the stability of the Court's body of precedent discourages expenditures on litigation aimed at disrupting it. Conversely, a more highly discretionary regime would signal a greater receptiveness to arguments directed at overruling precedent, thus encouraging increased expenditures directed at overruling previous decisions.[23] More fundamentally, rules of stare decisis enhance the level of stability and certainty in the law, thereby decreasing the incentive for litigation at all levels of the judicial system. The notion that uncertainty promotes litigation is hardly a new one.[24] The insight offered here is simply that a rule of stare decisis increases certainty

21. *See* 28 U.S.C. § 1254 (1994); *see also* Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81, 94–98 (1989) (discussing the changes enacted by the Supreme Court Case Selections Act, Pub. L. No. 100-352, §§ 2(a)–(b), 3–4, 102 Stat. 662, 662–63 (1988) (codified at 28 U.S.C. §§ 1254–1258 (1994)), which allows the Supreme Court to exercise almost complete discretion over its docket).

22. *See* POSNER, *supra* note 17, at 125.

23. The effects of the Supreme Court's decision in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), which many perceived as a signal of the Court's willingness to overrule *Roe v. Wade*, 410 U.S. 113 (1973), are at least anecdotal evidence of this point. One commentator estimated that "[m]agazine and news stories on abortion tripled from 1988 to 1989 (the year *Webster* was decided)," that "more than 350 anti-abortion bills were introduced in 43 state legislatures" in the year following the decision, and that "[t]his flurry of activity" continued for several years. Neal Devins, *Judicial Matters*, 80 CAL. L. REV. 1027, 1062–63 (1992) (reviewing GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991)); *see also* Anne Kornhauser, *Abortion Case Has Been Boon to Both Sides: With New Membership and Funding, Rivals Gird for Next Round*, LEGAL TIMES (Wash., D.C.), July 3, 1989, at 1 (noting the increased activity by pro- and anti-abortion groups alike in the wake of *Webster*).

24. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 610, 611 (5th ed. 1998); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 63–64 (1982).

and thus reduces the incentive for litigation.[25]

Stare decisis also conserves litigation costs in another way. Initially, adopting a new legal rule may spawn litigation aimed at testing the contours of the rule and at refining its scope. If such refinement litigation eventually tapers off as the contours of the rule develop, then the costs of such litigation would be a sunk cost of an existing precedent and would be incurred only in the event of the adoption of a new rule. Accordingly, the costs associated with litigation aimed at refining a new rule also must be counted as a marginal cost of a departure from stare decisis.

The cost savings associated with a system of stare decisis extend beyond those incurred in litigation. Increased certainty not only discourages litigation; it also enables more efficient planning in reliance on precedent.[26] Again, compare the effects of the current system of stare decisis, which establishes some barriers to self-reversal by the Supreme Court, to a more freely discretionary regime. The current system reduces the degree of upheaval in the Court's body of precedent, thus enabling "the political branches and the people" more efficiently to "plan against the background of known rules."[27] A more discretionary system, by comparison, would make planning and reliance more costly and less efficient.[28]

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25. *See* Ehrlich & Posner, *supra* note 11, at 265 ("According to the economic analysis of the settlement of legal disputes out of court, an increase in the predictability of the outcome of litigation should result in an increase in the settlement rate[,] ... [which] should reduce the total costs of legal dispute resolution." (citations omitted)); Macey, *supra* note 11, at 107 (arguing that a system of stare decisis "maximize[s] the public-good attributes of precedent by lowering the uncertainty that plagues the legal system," and thus "permit[s] better planning by legal actors, and result[s] in less litigation").

26. *See* Kornhauser, *supra* note 19, at 78 (asserting that "[p]lanning requires each agent to formulate expectations about the future, including any future legal obligations," and that these expectations depend on a rule of stare decisis); Macey, *supra* note 11, at 107 (noting that the certainty advanced by stare decisis "permit[s] better planning by legal actors"); Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 HARV. J.L. & PUB. POL'Y 67, 70 (1988) (asserting that a "doctrine of precedent" promotes efficient decisionmaking and "predictability in our affairs"); *see also* RICHARD A. WASSERSTROM, THE JUDICIAL DECISION 60–66 (1961) (offering certainty as a major justification for stare decisis); Theodore M. Benditt, *The Rule of Precedent*, *in* PRECEDENT IN LAW 89, 91, 95 (Laurence Goldstein ed., 1987) (offering a general overview of the doctrine of precedent).

27. Easterbrook, *supra* note 2, at 430.

28. *See* Lawrence E. Blume & Daniel L. Rubinfeld, *The Dynamics of the Legal Process*, 11 J. LEGAL STUD. 405, 408–10 (1982) (noting the choice between following precedent and avoiding transition costs and disregarding precedent in order to keep pace with changing circumstances). Some commentators have questioned the significance of the costs of adjustment to precedent by suggesting that economic actors may be able to protect themselves through market mechanisms, *compare* Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 511, 543–50 (1986) (arguing that

The adoption of a new legal regime by the Court may impinge on institutional investments based on an abandoned precedent. When the Court adopts a newly restrictive conception of governmental power or a newly expansive conception of individual rights, it may threaten institutions that are built around the presumed validity of the current precedential regime. Existing institutions, both governmental and private, assume, for example, the validity of federal criminal laws prohibiting drug possession and of certain state restrictions on attorney advertising. Reversal of the precedents on which these assumptions are built would give rise to substantial adjustment costs as these institutions adjust to a new regime.[29]

The literature notes a final cost-saving function of stare decisis involving the avoidance of errors in the judicial system. Jonathan Macey, for example, has argued that stare decisis "enables judges to reduce the uncertainty associated with making decisions" by permitting them to "check their results against the results reached by similar judges."[30] From the "assumption that other judges usually are correct when they reach legal decisions," Macey concludes that "judges generally employ stare decisis because it enables them to *avoid* having to rethink the merits of particular legal doctrine."[31] Judge Easterbrook reaches a similar conclusion, noting that a rule of adherence to precedent "cuts down on idiosyncratic conclusions by subjecting each judge's work to the test of congruence with the conclusions of those confronting the same problem," and "increases . . . the chance of the court's being right."[32] The idea here is that a rule of stare decisis reduces not only litigation costs and adjustment costs, but also error costs, which are the costs associated with an erroneous judicial decision. Although error costs are an important element of the economic model, the error-cost saving function would

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investors can protect themselves against the risk of legal change through pricing, diversification, and insurance), *with* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1056, 1090–91 (1997) (questioning the extent to which market remedies are effective), or by asserting that efficiency favors encouraging anticipation of legal change over deference to reliance, *see* Kaplow, *supra*, at 511.

29. *See* Blume & Rubinfeld, *supra* note 28, at 418 (suggesting "that it may make sense to change precedent slowly if the transition costs of change are high"); Kornhauser, *supra* note 19, at 83 (defining adjustment costs as "costs that the agents incur when the court changes the legal rule," which "might arise because, when the legal rule changes, an agent may make a radical change in her behavior and such radical changes often require new investments or other costly adaptations").

30. Macey, *supra* note 11, at 102.

31. *Id.*

32. Easterbrook, *supra* note 2, at 423; *see also* Stone, *supra* note 26, at 70 (asserting that stare decisis brings increased attention to the "stakes" of resolving a legal dispute).

be fully advanced by a *permissive* standard of stare decisis—one that would accord unfettered discretion to the Court to reverse itself whenever it sees fit. A permissive standard would fully enable members of the Court to "check their results against the results reached" by their predecessors, to "avoid having to rethink the merits of particular legal doctrine," and thus to "increase the chance of the court's being right." The current doctrine's limitations on the Court's discretion to overrule itself certainly perform litigation- and adjustment-cost saving functions, but they do not seem to economize on error costs.[33]

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33. In addition to the cost-saving functions outlined here, there are undoubtedly other benefits that are less susceptible of reduction to an economic model. For instance, stare decisis helps to preserve the integrity and legitimacy of the Supreme Court by minimizing the appearance that the Court's construction of federal statutory and constitutional provisions depends on its ideological make-up. *See* Vasquez v. Hillery, 474 U.S. 254, 265–66 (1986) (noting that stare decisis "contributes to the integrity of our constitutional system of government, both in appearance and in fact," by preserving the presumption "that bedrock principles are founded in the law rather than in the proclivities of individuals"); Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970) (suggesting that stare decisis preserves the perception of "the judiciary as a source of impersonal and reasoned judgments"); Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 484 (noting that for the Court to function effectively, the public must be willing to accept the Court in this role, and that "this acceptance in turn depends on the public perception that in each case the majority of the Court is speaking for the Constitution itself rather than simply for five or more lawyers in black robes"). I have not attempted to capture this notion in my economic model, both because it is difficult to objectify and reduce to a form that would lend itself to economic analysis, and because it is often subject to a parallel, countervailing argument that the Court's legitimacy is actually *undermined* by a rule that restricts its ability to correct itself. *See* Payne v. Tennessee, 501 U.S. 808, 834 (1991) (Scalia, J., concurring) (arguing that "the notion that an important constitutional decision with plainly inadequate rational support *must* be left in place for the sole reason that it once attracted five votes" would undermine the Court's legitimacy); Flood v. Kuhn, 407 U.S. 258, 293 n.4 (1972) (Marshall, J., dissenting) (" 'The jurist concerned with "[p]ublic confidence in, and acceptance of[] the judicial system" might well consider that, . . . a decision contrary to the public sense of justice as it is, operates . . . to diminish respect for the courts and for law itself.' " (quoting Peter L. Szanton, *Stare Decisis; A Dissenting View*, 10 HASTINGS L.J. 394, 397 (1959) (quoting Herber C. Kaufman, *A Defense of Stare Decisis*, 10 HASTINGS L.J. 283, 288 (1959)) (alterations in original))); Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting) (noting that frequent overrulings "tend[] to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only").

My model also ignores what might be called "*deontological* justifications of stare decisis"—justifications rooted in the theory that adjudicative consistency "has some inherent moral value, without regard to the consequences of that practice." Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2037 (1996); *see also* Heidi M. Hurd, *Justifiably Punishing the Justified*, 90 MICH. L. REV. 2203, 2210 (1992) (defining "deontological" moral theories as theories that hold "that the goodness of an act lies not in its consequences but in the inherent quality of the act itself"); Peters, *supra*, at 2044 (distinguishing "consequentialist justifications" of stare decisis from "deontological justifications" and arguing that the latter are illegitimate).

B. *Costs of Stare Decisis*

If anything, limitations on the Court's capacity to overrule itself threaten to increase error costs. In comparison to a purely discretionary regime, a system that limits the Court's freedom to alter its precedent may insulate a clearly erroneous precedent from further scrutiny and prevent its correction. This tendency must be counted as the principal cost of any system of stare decisis. Thus, the "assumption that other judges usually are correct when they reach legal decisions"[34] is reasonable in most cases, but no one argues that the Court is infallible. As Judge Easterbrook has noted, "[a]lthough the system of precedent impounds information and wisdom greater than any judge can bring to bear, no particular decision does so. A given case may have been tossed off between sandwiches or based on a factual blunder."[35]

Moreover, the possibility of "error" in the Court's precedents does not necessarily depend on a finding of a "blunder" by the Court in the first instance. A misdirection in the Court's precedents may stem from a failure by counsel to present a complete and accurate record of relevant materials or, when relevant, from changes over time in circumstances that were thought to have justified the Court's initial decision.[36]

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34. Macey, *supra* note 11, at 102.

35. Easterbrook, *supra* note 2, at 423; *see also* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 82 (1990) (asserting that although "stare decisis may advance 'justice' in a variety of senses, by making judicial decisions more acceptable to the lay public and by reducing uncertainty," it also should be understood to "impede the search for truth"). Indeed, "stare decisis has the potential to import injustice irremediably into the law." Peters, *supra* note 33, at 2033–34 (noting that the effects of a strict rule of stare decisis "can be cumulative: A single erroneous court decision, if followed, becomes two erroneous decisions, then three, and soon a 'line' of cases"). The error-cost effects of many decisions may be avoided by the process of aggressively distinguishing precedent that a judge finds troubling. *See* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1400–01 (1995) (noting that a judge intent on avoiding the implications of a precedent "will examine the facts and record in the precedent and the instant case minutely to unveil critical differences between them" and will consider "why applying the precedential policy in light of these fact disparities would provoke disastrous and clearly unintended consequences for the parties and the policy"). The propriety of this process, which undoubtedly is often "carried . . . to a very high pitch of ingenuity," Max Radin, *The Trail of the Calf*, 32 CORNELL L.Q. 137, 143 (1946), has implications that overlap substantially with the discussion herein of the theoretical basis for various strands of the Court's overruling rhetoric. Nevertheless, not all precedents are distinguishable on their facts, and my focus here is on those indistinguishable cases.

36. *See* Blume & Rubinfeld, *supra* note 28, at 409–10 (noting that "as economic, technological, and social conditions change, existing legal rules may be less socially desirable than other possible rules"); Easterbrook, *supra* note 2, at 423 (noting that

For these reasons and others, cases arise in which the Court's precedents will be in error and in which a strict rule of stare decisis gives rise to certain costs that a purely discretionary regime would avoid. Such "error costs" may take several forms. In the common-law arena—and, to a limited extent, in constitutional cases—commentators have theorized that judicial precedent "evolves" toward the adoption of efficient rules.[37] If that premise is accepted, stare decisis may stand in the way of the evolutionary process; it may freeze in place an inefficient rule that a more efficient one would otherwise replace.[38] These inefficiencies are the most palpable forms of "error costs" under the economic model.

In some cases, however, the "error" in a precedent may have nothing to do with its substantive efficiency. Some constitutional provisions are inefficient by design.[39] Judge Posner has asserted, for example, that the Fifth Amendment right against self-incrimination advances no legitimate economic function.[40] As for statutes, interest-

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"[j]udges often decide cases on the basis of predictions about the effects of the legal rule" and concluding that "[w]e can examine these effects—both for other strands of doctrine and for the world at large—and improve on the treatment of the earlier case"); *see also* Planned Parenthood v. Casey, 505 U.S. 833, 863–64 (1992) (plurality opinion of O'Connor, Kennedy, and Souter, JJ.) (suggesting that *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and *Brown v. Board of Education*, 347 U.S. 483 (1954), were "comprehensible as the Court's response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, ... had not been able to perceive").

37. *See, e.g.*, Martin J. Bailey & Paul H. Rubin, *A Positive Theory of Legal Change*, 14 INT'L REV. L. & ECON. 467, 472–74 (1994); John C. Goodman, *An Economic Theory of the Evolution of Common Law*, 7 J. LEGAL STUD. 393, 394–95 (1978); William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 259–84 (1979); Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 641–43 (1996); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 51 (1977).

38. The doctrine of stare decisis is itself the product of common-law evolution over the course of at least a couple of centuries. *See* Lee, *supra* note 5, at 659–66. Thus, the premise of this Article—that stare decisis rules can be understood as rules of cost-minimization—is itself dependent on a theory that common-law rules "evolve" in such a way as to produce economically efficient standards.

39. *See* Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 15 (1987) (conceding that not "every provision of the Constitution is efficiency enhancing"); *cf.* POSNER, *supra* note 24, at 676 (asserting that "[a]lthough the U.S. Constitution is rightly venerated, we should not suppose it immune from the interest-group pressures that beset the ordinary legislative process"). For a discussion of an economic model of the constitutional amendment process under Article V, see generally Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111 *passim* (1993).

40. *See* Posner, *supra* note 39, at 15 (asserting that "no economic reason has ever been offered for why government should not be allowed to penalize a person who refuses to

group dynamics suggest that legislation is aimed at the redistribution of wealth and does not have any necessary correlation to what is economically efficient.[41] In this context, a precedent may be in error in the sense that it fails to implement the intent of the underlying constitutional or statutory provision; yet the "error" itself may be substantively more efficient than the alternative. Under such circumstances, the "error costs" associated with the precedent in question are much more elusive. They are simply the "costs" associated with the Court's failure to implement the intent of the controlling legal document.[42]

Error costs also may encompass certain transaction costs associated with extra-judicial efforts to overturn erroneous precedent. To the extent that rules of stare decisis threaten to enshrine a decision that is erroneous in substance or in its failure to implement the intent of the controlling legal document, legal actors will seek other methods of correction, either by private contracts that seek to avoid the effects of the law[43] or by efforts to amend statutes or the Constitution.[44] In either event, purely discretionary rules of precedent could mitigate the transaction costs associated with such

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give testimony, merely because the testimony might show that the person has committed a crime").

41. *See* POSNER, *supra* note 24, at 569 (asserting broadly that "[a]lthough the correlation is far from perfect, judge-made rules tend to be efficiency-promoting while those made by legislatures tend to be efficiency-reducing"); Todd Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large Number Externality Problems*, 46 CASE W. RES. L. REV. 961, 1015 (1996) (asserting that "[t]he empirical evidence supporting the view that much legislation is passed to favor special interests at the expense of the public at large is overwhelming"); *cf.* Paul H. Rubin, *Common Law and Statute Law*, 11 J. LEGAL STUD. 205, 207–11 (1982) (recognizing the inefficiency of legislation as compared to judicial decisions but also asserting that scholars have failed to recognize certain similarities between the processes that produce the two types of law).

42. For a lively debate on the appropriate methodology of divining the meaning of a statutory provision, compare Scalia, *supra* note 6, at 3–47 (articulating the "textualist" approach to statutory interpretation), with William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509 *passim* (1998) (reviewing A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, *supra* note 6, and critiquing Justice Scalia's textualist approach); *see also* Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1838 (1998) (questioning the judiciary's competence to draw intentionalist inferences from legislative history).

43. *See* Macey, *supra* note 11, at 109; *see also* Ehrlich & Posner, *supra* note 11, at 278 (asserting that "the effect of imprecision in deterring socially valuable activity" will be less when transaction costs are low). A corollary of this point is that error costs may be more significant when transaction costs are high. *See infra* notes 61–68 and accompanying text (discussing the rules of property).

44. *See* Easterbrook, *supra* note 2, at 423.

attempts at extra-judicial "correction." So long as the expected cost of convincing a majority of the nine Justices of the Supreme Court remains less than the expected cost of securing passage of a statute or of a constitutional amendment, extra-judicial transaction costs add to the error costs associated with a system of stare decisis.

The above error costs are the principal barrier to an ironclad requirement of stare decisis. In the absence of significant error costs, the cost savings cataloged above clearly point toward adherence to precedent as the efficient outcome. When such error costs are at stake, economic analysis suggests that the optimal outcome will depend on the relative magnitude of the litigation-cost, adjustment-cost, and error-cost effects of the decision whether to retain the precedent in question.

C. *Stare Decisis and the Social Loss Function*

With the above background, it may prove useful to summarize the various cost considerations relevant to a system of stare decisis through the articulation of a formal loss function. The loss function L may be expressed as the sum of the three types of expected costs discussed above, namely expected litigation costs, LC, expected adjustment costs, AC, and expected error costs, EC:

$$L = LC + AC + EC$$

As noted above,[45] LC is a function of the quantity of litigation, which in turn is a function of the degree of uncertainty in the Supreme Court's precedents. Thus, a decision to abandon precedent can be expected to increase uncertainty, which in turn increases the quantity of litigation as well as expected litigation costs. AC also is expected to increase as a result of a decision to overrule a precedent. Generally, when the Court abandons one of its decisions, private and public actors will be forced to incur additional costs in response to the replacement precedent. Increases in LC and AC are the principal costs associated with a decision to abandon precedent; conversely, adherence to precedent produces cost savings in the form of LC and AC. EC, on the other hand, represents the primary cost of following precedent. EC may encompass the cost associated with retaining a substantively inefficient rule, the cost of failing to implement the intent of the controlling legal document, and the transaction costs

45. *See supra* Section A.

associated with extra-judicial attempts to overturn an erroneous decision.

The hypothesis of this Article is that the Supreme Court's doctrine of stare decisis may be explained as an effort to minimize this loss function. Specifically, the economic model suggests that the Court should follow precedent when the savings in litigation costs and adjustment costs expected to flow from such a move outweigh the expected error costs associated with the precedent. In terms of the above loss function, where X represents the decision to overturn a precedent and Y represents the decision not to overturn it, the cost-minimizing solution is to choose X (overturn precedent) if and only if:

$$EC(Y) > AC(X) + LC(X)$$

The balance of this Article evaluates this hypothesis by examining various strands of the Court's doctrine of precedent and testing them against the loss function. For the most part, the Article concludes that the Court's standards further the cost-minimization goal set forth above. In other words, the Court generally recognizes exceptions to the rule of stare decisis only when the expected error costs associated with keeping a precedent outweigh the litigation and adjustment costs expected to result from overruling that precedent.

Admittedly, the cost elements of the loss function do not lend themselves to precise, objective measurement, and the loss function does not purport to answer the call for a theory that precisely identifies the optimum point of precedent in every case. Nevertheless, the loss function is a valuable tool; it adds some structure to an area of the law that otherwise appears to many as doctrinal "cover" for an issue that is dominated by unprincipled variations on the degree of deference paid to precedent.[46] By translating the malleable and apparently empty rhetoric of the current doctrine into economic-cost terms, the economic model provides an opportunity to move the stare decisis discussion beyond its current level of cynicism and toward a debate about concrete cost considerations.

II. ECONOMICS AND "ERROR" IN PRECEDENT

The most basic question that any system of precedent must

46. *See* Cooper, *supra* note 5, at 402; Gerhardt, *supra* note 5, at 72; Monaghan, *supra* note 3, at 743.

answer is whether a prior decision is entitled to deference when it is later thought to be in error.[47] Despite the fundamental nature of this question, the Court's jurisprudence is in substantial disarray as to the effect of a perceived error in precedent. On one hand, the Court has indicated that stare decisis cannot compel senseless compliance with plainly erroneous decisions. Justice Scalia, for one, has flatly rejected "the notion that an important constitutional decision with plainly inadequate rational support *must* be left in place for the sole reason that it once attracted five votes."[48] Other members of the Court have offered variations on this theme. In several cases, Justice Stevens has approvingly quoted Justice Cardozo for a standard that purportedly would enable the Court to overrule prior decisions on the basis of their inconsistency with the current Justices' " ' "sense of justice," ' " the " ' "social welfare," ' " or the " ' "*mores* of their day." ' "[49] Elsewhere, Justice Stevens has suggested that the error-correction bar is substantially higher—that the Court's precedents should be set aside only if deemed "egregiously incorrect."[50] Finally, Justice

47. The introductory discussion here borrows from Lee, *supra* note 5, at 654.

48. Payne v. Tennessee, 501 U.S. 808, 834 (1991) (Scalia, J., concurring).

49. Johnson v. Transportation Agency, 480 U.S. 616, 645 n.4 (1987) (Stevens, J., concurring) (quoting Runyon v. McCrary, 427 U.S. 160, 191 (1976) (Stevens, J., concurring) (quoting CARDOZO, *supra* note 16, at 150, 152)). This same standard appears in Justice Kennedy's opinion for the Court in *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989). In *Patterson*, the Court revisited its decision in *Runyon*, in which it had held that the Civil Rights Act, 42 U.S.C. § 1981 (1994), forbids racial discrimination in private contracts. The *Patterson* Court refused to overrule *Runyon*, noting that "it has sometimes been said that a precedent becomes more vulnerable as it becomes outdated and after being ' "tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare." ' " *Patterson*, 491 U.S. at 174 (quoting *Runyon*, 427 U.S. at 191 (Stevens, J., concurring) (quoting CARDOZO, *supra* note 16, at 150)). The *Patterson* Court, however, found *Runyon* to be "not inconsistent with the prevailing sense of justice in this country" and "entirely consistent with our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin." *Id.* Accordingly, it concluded that this standard provided no basis for abandoning *Runyon*. *See id.* at 175.

50. *Compare* Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 153 (1981) (Stevens, J., concurring) (adhering to *Edelman v. Jordan*, 415 U.S. 651, 659–77 (1974), despite his view that it incorrectly interpreted the Eleventh Amendment, on the ground that it "had previously been endorsed by some of our finest Circuit Judges [and that] it therefore cannot be characterized as unreasonable or egregiously incorrect"), *with* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 304 (1985) (Stevens, J., dissenting) (indicating that "additional study has made it abundantly clear" that *Edelman* "can properly be characterized as 'egregiously incorrect' ").

Justice Harlan offered a comparable standard in his concurring opinion in *Monroe v. Pape*, 365 U.S. 167, 192–202 (1961) (Harlan, J., concurring), *overruled on other grounds by* Monell v. Department of Soc. Servs., 436 U.S. 658 (1978). In support of his view that the Court should adhere to its decisions in *United States v. Classic*, 313 U.S. 299, 321–29 (1941), and *Screws v. United States*, 325 U.S. 91, 94–100 (1945), that municipalities are

White's opinion for the Court in *Mitchell v. W.T. Grant Co.*[51] concluded that it was the Court's "prerogative" and also its "duty to re-examine a precedent where its reasoning or understanding of the Constitution is fairly called into question."[52]

On the other hand, an exception to the rule of stare decisis that encourages a reexamination of the reason or justice of precedent threatens to swallow the rule. Accordingly, members of the modern Court occasionally have rejected the mere perception of error as a basis for overturning precedent. Under this view, reversal requires "special justification," and such justification presupposes something more than the conclusion that the Court's prior decision was irrational or unjust.[53] The decision to set aside precedent must be supported by "reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong."[54] "[O]therwise," Justice Scalia has stated, "the doctrine would be no doctrine at all,"[55] and would accord an " 'arbitrary discretion in the courts.' "[56]

At first glance, these apparent contradictions seem to provide ample fodder for the various epithets aimed at the Court's overruling rhetoric. If the Court cannot provide a uniform, consistent answer to this most fundamental question of stare decisis, the cynical criticism commonly directed at the Court's doctrine of precedent seems

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immune from suit under the provision now codified at 42 U.S.C. § 1983 (Supp. III 1997) (previously codified at 18 U.S.C. § 52 (1946)), Justice Harlan suggested that "the policy of *stare decisis* ... require[s] that it appear *beyond doubt* from the legislative history of the 1871 statute that *Classic* and *Screws* misapprehended the meaning of the controlling provision, before a departure from what was decided in those cases would be justified." *Monroe*, 365 U.S. at 192 (Harlan, J., concurring) (emphasis added) (footnote omitted).

51. 416 U.S. 600 (1974).

52. *Id.* at 627–28. In *Mitchell*, the Court rejected a due process challenge to a state procedure allowing a seller to sequester property upon an allegation of default by the buyer, without prior notice to the buyer pending a hearing on the merits of the seller's claim. The Court previously had invalidated similar procedures in *Fuentes v. Shevin*, 407 U.S. 67, 81–82 (1972).

53. *See* Planned Parenthood v. Casey, 505 U.S. 833, 864 (1992) (plurality opinion of O'Connor, Kennedy, and Souter, JJ.) (asserting that the view has been "repeated in our cases[] that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided"); *see also* Gerhardt, *supra* note 5, at 145 (asserting that the current Court has embraced two stare decisis standards, one that permits the overruling of precedents "deemed erroneously reasoned" and another that "demand[s] something more than erroneous reasoning").

54. Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment).

55. *Id.* (Scalia, J., concurring in part and concurring in the judgment).

56. *Id.* (Scalia, J., concurring in part and concurring in the judgment) (quoting THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

"understandable, perhaps even understated."[57] If the Court cannot decide whether reversal for error is essential or is anathema to a system of stare decisis, perhaps the "doctrine" is no more than cover to be manipulated one way or the other, depending on whose ideological ox is being gored.

This legal realist critique of the Court's treatment of error is tempting, but it is not the only explanation for the apparent contradictions noted above. The economic model suggests that there may be some method to the Court's madness. Indeed, economic analysis suggests that there *should not* be a single, universal answer to the question whether error is a sufficient basis to set aside precedent.[58] Error may or may not be a sufficient justification to overrule; it all depends on the relative costs and benefits at stake. This Part analyzes the economic considerations that explain the Court's apparent equivocation concerning its power of self-correction and then examines those considerations in the context of two recent cases in which the Court decided to overrule a prior decision.

A. The Costs of Error Correction

In the first place, the costs of abandoning a precedent will vary depending on the circumstances. As noted above,[59] a decision to set aside a precedent ordinarily is assumed to decrease the level of certainty in the system and, thus, to encourage increased expenditures on litigation. But that assumption will not be reliable in all cases; sometimes there will be no reason to anticipate an increase in litigation expenses because the existing precedent is already so uncertain. Adjustment costs will also vary depending on the nature of the precedent. Again, the usual assumption is that a change of course from precedent will produce adjustment costs. But that assumption may not hold in cases in which the precedent does not form the basis for reasonable reliance.

When either or both of the usual assumptions about the costs of an overruling decision break down, the economic model suggests that reversal is more likely to be economically efficient. In other words, error-cost savings will more likely be worth the price of reversal when the elements of that price are reduced. As noted in detail below,[60] this theory can explain several strands of the Court's doctrine of stare

57. Lee, *supra* note 5, at 659.

58. To borrow Judge Easterbrook's words, "[N]o one can quantify how bad is bad enough." Easterbrook, *supra* note 2, at 424.

59. *See supra* notes 23–25 and accompanying text.

60. *See infra* Parts III, IV, and V.

decisis. One straightforward application of the point is offered here. The Court often has adverted to the notion of enhanced protection of "rules of property," on one hand, and of diminished protection of "rules of procedure," on the other.[61] Enhanced deference to rules of property may be understood to hinge on the prediction that the adjustment costs associated with overturning precedents establishing such rules will be high.

Consider *United States v. Title Insurance & Trust Co.*[62] *Title Insurance* involved a suit by the United States on behalf of certain Mission Indians to grant them full title in land situated in southern California.[63] The Indians' claim was based on a purported entitlement growing out of their " 'continuous and undisturbed' " occupancy and use of the land in question.[64] The title insurance company, which claimed fee title in the land based on a patent from the United States, defended on the ground that the Indians' claim had been forfeited by the failure to bring it before a commission established by statute to provide for "the ascertainment and adjudication of private land claims in the ceded territory."[65] The United States apparently conceded that the Indians had not presented their claims to the commission, but argued that the Court should not construe the statute in question to extinguish claims by Indians to less than fee title—such as claims for a right of occupation, use, and enjoyment.[66] The defendants' primary response was to point to the Court's rejection of similar arguments some two decades earlier in *Barker v. Harvey*.[67]

The Court in *Title Insurance* rejected the United States's request to overrule *Barker*, using strong adjustment-cost terms:

> The decision [in *Barker*] was given twenty-three years ago

61. Payne v. Tennessee, 501 U.S. 808, 828 (1991) (asserting that "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved," while the "opposite is true in cases . . . involving procedural and evidentiary rules").

62. 265 U.S. 472 (1924).

63. *See id.* at 481.

64. *Id.* at 482 (quoting the plaintiff's bill).

65. *Id.* at 481–82.

66. *See id.* at 476. The United States argued that "[g]eneral acts of Congress do not apply to [Indians] at all unless so worded as clearly to manifest an intention to include them" and that the statute in question did not manifest such a clear intention. *Id.* Instead, the federal government argued, applying the statute to the Indians would have required the Court to conclude that Congress entertained the absurd assumption that "wild savages, or at best semi-civilized children" would become "aware of the proceedings of Congress" and would "appear[] unaided before a white man's court." *Id.*

67. 181 U.S. 481 (1901); *see Title Insurance*, 265 U.S. at 482.

> and affected many tracts of land in California, particularly in the southern part of the State. In the meantime there has been a continuous growth and development in that section, land values have enhanced, and there have been many transfers. Naturally there has been reliance on that decision. The defendants in this case purchased fifteen years after it was made. It has become a rule of property, and to disturb it now would be fraught with many injurious results.[68]

Reliance on *Barker* was both obvious and widespread. Numerous tracts of land had been transferred in reliance on the determination that any future claims to a right of occupation, use, and enjoyment by Indians had been extinguished by their failure to bring such claims before the commission established by statute. A decision overruling *Barker* would have caused the purchasers of the parcels of land at issue to incur substantial adjustment costs in defending against the Indians' claims on the merits and in seeking indemnity for the cloud on defendants' title against the sellers and their title company.

The adjustment costs of overruling *Barker* would not be limited to those incurred by the defendant-buyers; the uncertainty created by upsetting a rule of property like that established in *Barker* would increase the transaction costs associated with the process of acquiring real property. If buyers, sellers, title insurers, real estate agents, and others involved in the real estate business perceive that they cannot rely conclusively on the validity of case-law rules of title, then they would undertake additional precautions aimed at clarifying the strength of the title passed to a potential seller. Indeed, such costs would bear directly upon buyers and sellers in the form of higher premiums for title insurance and higher closing fees; some otherwise economically beneficial transactions might even be thwarted if the increased transaction costs were high enough.

Economic analysis also explains the proposition that the Court's adherence to stare decisis is weakest in cases "involving procedural and evidentiary rules."[69] The adjustment costs associated with overruling procedural and evidentiary rules should be predictably low. Consider two recent decisions in which the Court reversed precedents on the ground that they established merely procedural rules: *Payne v. Tennessee*[70] and *United States v. Gaudin*.[71] *Payne*

68. *Title Insurance*, 265 U.S. at 486.
69. Payne v. Tennessee, 501 U.S. 808, 828 (1991).
70. 501 U.S. 808 (1991).
71. 515 U.S. 506 (1995).

overruled the decisions in *Booth v. Maryland*[72] and *South Carolina v. Gathers*,[73] which had held that the Eighth Amendment bars admission of victim-impact evidence during the penalty phase of a capital trial.[74] The *Gaudin* Court overruled its decision in *Sinclair v. United States*[75] by holding that the materiality of an alleged misrepresentation to the government is a question of fact for the jury and not a question of law for the judge.[76]

In both instances, the Court suggested that an evidentiary or procedural rule is susceptible to reversal because it does not control any "primary conduct"[77] or "serve as a guide to lawful behavior."[78] Both decisions can be understood in economic terms: procedural and evidentiary rules can easily be replaced without engendering any significant adjustment costs. If no decisions are made in reliance on a rule, then there are no adjustment costs that flow from its replacement. Thus, neither private nor governmental actors should be expected to incur additional planning costs in response to a change in the law regarding the admission of victim-impact evidence in capital trials or regarding whether the judge or jury decides the question of the "materiality" of an alleged misrepresentation to the government.[79]

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72. 482 U.S. 496 (1987), *overruled by Payne*, 501 U.S. at 808.

73. 490 U.S. 805 (1989), *overruled by Payne*, 501 U.S. at 808.

74. *See Payne*, 501 U.S. at 830.

75. 279 U.S. 263 (1929), *overruled by Gaudin*, 515 U.S. at 521.

76. *See Gaudin*, 515 U.S. at 522–23.

77. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 234 (1995) (asserting that "reliance on a case that has recently departed from precedent is likely to be minimal, particularly where, as here, the rule set forth in that case is unlikely to affect primary conduct in any event"); *see also* Hohn v. United States, 524 U.S. 236, 253 (1998), *overruling* House v. Mayo, 324 U.S. 42 (1945) (per curiam). The Court in *Hohn* overruled the *House* Court's conclusion that the Court lacked certiorari jurisdiction to review refusals to issue probable cause certificates. Further, the *Hohn* Court noted that the rule involved was procedural and did not alter primary conduct. *Hohn*, 524 U.S. at 251–53.

78. *Gaudin*, 515 U.S. at 521, *overruling Sinclair*, 279 U.S. at 263; *see Payne*, 501 U.S. at 828. *Sinclair* had held that the element of "pertinency" under the statute defining contempt was to be decided by courts as a matter of law and not by the jury. *Sinclair*, 279 U.S. at 298–99. The statute in *Sinclair* defined contempt as refusal to answer a " 'question pertinent to [a] question under [congressional] inquiry.' " *Id.* at 285 (quoting 2 U.S.C. § 192). *Gaudin* held that the element of "materiality" under the relevant statute was a matter of fact for the jury. *See Gaudin*, 515 U.S. at 522–23.

79. *See* Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197, 202–03 (1991) (refusing to overrule *Parden v. Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964), *overruled in part by* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219 (1999), *and in part by* Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468 (1987)). *Parden* held that a state-owned railroad was not immune to an action in state court under the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51–60. *See Parden*, 377 U.S. at 198. In determining that it

The dichotomy between rules of property and rules of procedure illustrates the thesis of this Article: the Court's equivocation as to whether the perception of error is a sufficient basis for reversal is fully consistent with the economic model. This fundamental question cannot be answered in the abstract. But if the costs ordinarily associated with an overruling decision are unlikely to materialize, then the expected error-cost savings associated with reversal may well justify abandoning the usual presumption of deference to precedent.

B. The Benefits of Error Correction

Just as the costs of abandoning precedent will vary with the circumstances, so too will the benefits. First, not all errors are created equal. At one level, error may be defined to encompass any failure to implement the will of the lawmaker as expressed in the statutory or constitutional provision. But, because some errors may encompass substantive inefficiencies that go beyond the failure to follow the controlling legal document, by definition they are more costly, and, thus, their correction will perform a more significant error-cost saving function.

Second, not all perceived errors are actual errors. Just as the Court that established the precedent in question may have erred in arriving at its decision, so too the current Court may be wrong in its evaluation of the propriety of the precedent. If the later Court errs in its assessment that an earlier opinion is erroneous, overruling the precedent will be doubly costly in that (1) it will give rise to litigation and adjustment costs; and (2) instead of producing error-cost savings, it will give rise to additional error costs.

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should reaffirm *Parden*, the *Hilton* Court spoke in terms of adjustment costs: "*Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decisions, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." *Hilton*, 502 U.S. at 202. Because state law excludes railroad employees from workers' compensation coverage and relies instead on FELA's protective measures for those workers, the Court noted that an injured railway worker "may be precluded from seeking . . . [a] remedy . . . for his injuries." *Id.* at 203. Overruling *Parden*, the Court noted, "would require these States to reexamine their statutes, meanwhile putting at risk all employees and employers who have been acting on the assumption that they are protected in the event of injuries caused by an employer's negligence." *Id.* *Compare* Mitchell v. United States, 119 S. Ct. 1307, 1316 (1999) (Scalia, J., dissenting) (suggesting that *Griffin v. California*, 380 U.S. 609, 615 (1965), which held that the Self Incrimination Clause barred a prosecutor or judge from commenting on a defendant's refusal to testify, may be immune from being overruled because it "has found 'wide acceptance in the legal culture' " (quoting *Mitchell*, 119 S. Ct. at 1316)), *with id.* at 1321–22 (Thomas, J., dissenting) (urging that *Griffin* be overruled).

At least two elements of the Court's treatment of error in precedent seem aimed at minimizing this risk. First, and most obviously, are the variations on the notion that the Court must be especially confident in its identification of an error before it acts to correct it. This notion is one explanation for the apparent contradiction in the Court's treatment of error in precedent. A decision that has "plainly inadequate rational support"[80] or is "egregiously incorrect"[81] may be ripe for reversal, but the "mere demonstration" that an opinion is more than likely "wrong" is insufficient to justify its rejection.[82]

Economic analysis provides ample support for this dichotomy. Reversal on a showing of error under a mere preponderance standard would accord an " 'arbitrary discretion in the courts' "[83] that would produce consistent inefficiencies. If the current Court's confidence in its perception of error barely exceeds the preponderance standard, an overruling decision will be doubly costly in the sense noted above in almost one-half of the cases (assuming that a $0.5 + \epsilon$ level of confidence means that the Court will be wrong in its assessment of error in $0.5 - \epsilon$ of the cases). Any cost-savings gained in the other half of the cases (actually, in $0.5 + \epsilon$ of the cases, in which the Court will be correct in its assessment of error) would be unlikely to outweigh the double costs expected to be incurred in the first half. If the Court reserves the prerogative of self-reversal for opinions that are perceived to be "egregiously incorrect" or to have "plainly inadequate rational support," it is more likely to avoid imposing the double costs associated with a misperception of error.

One practical difficulty with this standard is that its utility

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80. *See Payne*, 501 U.S. at 834 (Scalia, J., concurring); *supra* note 48 and accompanying text.

81. *See* Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 153 (1081) (Stevens, J., concurring); *supra* note 50 and accompanying text.

82. Hubbard v. United States, 514 U.S. 695, 716, 717 (1995) (Scalia, J., concurring in part and concurring in the judgment); *cf.* Monroe v. Pape, 365 U.S. 167, 192 (1961) (Harlan, J., concurring) (opining that stare decisis requires "that it appear beyond doubt" that an earlier decision is in error before its reversal is justified), *overruled on other grounds by* Monell v. Department of Soc. Servs., 436 U.S. 658 (1978). The requirement of certainty traces its origins at least as far back as Blackstone, who recognized an exception to stare decisis when the earlier decision is "*evidently* contrary to reason," "*clearly* contrary to the divine law," or "*manifestly* absurd or unjust." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *69–70 (emphasis added); *see also* Lee, *supra* note 5, at 661–62 (discussing Blackstone's writings within the historical perspective of stare decisis).

83. *Hubbard*, 514 U.S. at 716 (Scalia, J., concurring in part and concurring in the judgment) (quoting THE FEDERALIST NO. 78, *supra* note 56, at 471).

depends on the current Court's willingness to exercise a certain degree of humility in judging the merits of earlier Courts' precedents.[84] Unfortunately, the natural tendency of many of us (including, perhaps, some members of the Court) is to conclude that our own views are obviously correct and that those with whom we disagree are "egregiously incorrect." If this attitude prevails in every case in which the Court identifies any error in precedent, the error-correction bar will have been lowered to the mere preponderance level, and the double-cost risk noted above will materialize.

Second, the Court has offered another limitation on its power of error correction: the Court should reserve its prerogative of error correction for cases in which the initial error stemmed from a failure to appreciate circumstances and factors that are later brought to the Court's attention,[85] or from a lack of full briefing or consideration of an issue.[86] These standards are economically justifiable on grounds similar to those noted above. Abandoning an earlier opinion on the basis of a more complete record or briefing than in the earlier case is less likely to be based on mere second guessing of the substantive merits of the earlier decision. Confining the power of error correction to such cases will thus avoid the double-cost problem noted above.[87]

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84. For an interesting discussion of the role of humility in judging, see Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV. 127, 185–98 (1998).

85. *See* Planned Parenthood v. Casey, 505 U.S. 833, 863–64 (1992) (plurality opinion of O'Connor, Kennedy, and Souter, JJ.) (suggesting that a reversal of course in precedent may be called for when an overruling decision "rest[s] on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions"); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 410–11 (1932) (Brandeis, J., dissenting) (suggesting that stare decisis is weakened in cases in which the decision "is dependent upon the determination of what in legal parlance is called a fact"), *overruled in part by* Helvering v. Mountain Producers Corp., 303 U.S. 376 (1938), *and in part by* Helvering v. Bankline Oil Co., 303 U.S. 362 (1938).

86. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 571, 572 (1993) (Souter, J., concurring in part and concurring in the judgment) (suggesting that the Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), is subject to reconsideration because "the *Smith* rule was not subject to 'full-dress argument' prior to its announcement," and "a constitutional rule announced *sua sponte* is entitled to less deference than one addressed on full briefing and argument"); *Monell*, 436 U.S. at 709 n.6 (Powell, J., concurring) ("I think we owe somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations.").

87. Although this standard has a prophylactic dimension to it, it too is subject to some degree of manipulation. The opposing opinions in *Casey*, for example, disagreed about whether two of the most esteemed overruling decisions in the Court's history, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), which effectively overruled *Lochner v. New York*, 198 U.S. 45 (1905), and *Brown v. Board of Education*, 347 U.S. 483 (1954), which overruled *Plessy v. Ferguson*, 163 U.S. 537 (1896), were consistent with this standard. The

In sum, the Court's apparent inconsistency as to the extent of its prerogative of self-correction is fully consistent with the economic model. When the usual price of reversal (increased *LC* or *AC*) is diminished or when the expected benefit of reversal (decreased *EC*) is especially clear error may well be a sufficient basis for overturning precedent. More detailed illustrations of the circumstances in which this may be true are offered in subsequent Parts of this Article.

III. ECONOMICS AND UNWORKABLE PRECEDENT

The Supreme Court has frequently suggested that its capacity for error correction is enhanced when the precedent in question is "unworkable." Aside from the general invocation of the notion that unworkable decisions are more vulnerable to reversal, however, the Court has offered little guidance as to the *extent* of unworkability that justifies abandoning a precedent or even as to the *theoretical basis* for this strand of the doctrine.

The competing opinions in *United States v. Dixon*[88] illustrate the point.[89] *Dixon* overruled *Grady v. Corbin*,[90] which had announced a "same conduct" test under the Double Jeopardy Clause of the Fifth Amendment.[91] The "same conduct" test under *Grady* prohibited a subsequent prosecution when, "to establish an essential element of an offense charged in that prosecution, [the government] will prove conduct that constitutes an offense for which the defendant has already been prosecuted."[92] Before *Grady*, the Court had applied only the "same element" test announced in *Blockburger v. United States*,[93] under which double jeopardy barred additional punishment and successive prosecution only if the second offense contained an

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plurality reasoned that they were consistent, in that "[e]ach case was comprehensible as the Court's response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive." *Casey*, 505 U.S. at 863–64 (plurality opinion of O'Connor, Kennedy, and Souter, JJ.). Chief Justice Rehnquist's dissent argued to the contrary: "*West Coast Hotel* ... did not state that *Lochner* had been based on an economic view that had fallen into disfavor," but "simply recognized ... that '[t]he Constitution does not speak of freedom of contract.' " *Id.* at 960–61 (Rehnquist, C.J., dissenting) (quoting *West Coast Hotel*, 300 U.S. at 391). Moreover, the Chief Justice noted, "the same arguments made before the Court in *Brown* were made in *Plessy* as well." *Id.* at 962 (Rehnquist, C.J., dissenting).

88. 509 U.S. 688 (1993).

89. The background discussion of *Grady* borrows substantially from Lee, *supra* note 5, at 657–58.

90. 495 U.S. 508 (1990), *overruled by Dixon*, 509 U.S. at 688.

91. U.S. CONST. amend. V; *see Dixon*, 509 U.S. at 711–12.

92. *Grady*, 495 U.S. at 521–22.

93. 284 U.S. 299 (1932).

element that was also included in the first offense.[94] *Dixon* abandoned *Grady*'s same conduct test and reverted to the *Blockburger* test as the sole inquiry under the Double Jeopardy Clause.[95]

The majority and dissenting opinions in *Dixon* engaged in a vacuous debate about whether *Grady* had produced sufficient "confusion" to sustain the unworkability exception to stare decisis.[96] According to Justice Scalia's opinion for the Court, *Grady* was "unworkable" and "unstable in application."[97] Specifically, Justice Scalia noted that the Court had recognized a "large exception" to the test announced in *Grady*, that lower courts had complained that *Grady* was "difficult to apply," and that Supreme Court decisions interpreting *Grady* had resulted in divided opinions.[98] Justice Souter's dissent acknowledged "that two Court of Appeals decisions ha[d] described [*Grady*] as difficult to apply,"[99] but he confidently declared that this was not the "type of 'confusion' ... that can somehow obviate our obligation to adhere to precedent."[100]

Neither the majority nor the dissent in *Dixon* offered any explanation of the significance of the apparent "confusion" under *Grady*, much less a basis for their competing views of the level of confusion necessary to justify a change in precedent. This Part uses the economic model to develop a substantive basis for the Court's suggestion that unworkable precedent is particularly vulnerable to reversal. After offering a theoretical explanation for this strand of the Court's doctrine of precedent, this Part tests the theory by applying it to the *Dixon* case and to other recent cases in which the unworkability notion has come into play.

A. Unworkable Precedent and the Economic Model

The economic model suggests that confusion in applying a precedent is significant because it undermines some of the principal economic functions of precedent. Adherence to precedent is usually the cost-minimizing course of action, in part because a change of course tends to increase the expected cost and volume of litigation. But when precedent produces confusion in the form of unpredictable

94. *See id.* at 304.
95. *See Dixon*, 509 U.S. at 711–12.
96. *See id.* at 709–12; *id.* at 759–61 (Souter, J., dissenting in part).
97. *Id.* at 709–10.
98. *Id.*
99. *Id.* at 759 (Souter, J., dissenting in part).
100. *Id.* at 760 (Souter, J., dissenting in part).

results, the costs resulting from retaining the "unworkable" decision generally may outweigh the uncertainty created by overturning the precedent. Precedent that yields random, unpredictable outcomes will encourage a litigant to pursue litigation and eschew settlement.[101] The costs associated with such encouragement may well outweigh the increased litigation expenses ordinarily thought to accompany a decision overruling precedent.

A similar analysis focuses on the adjustment cost element of the economic model. Ordinarily, adherence to precedent minimizes adjustment costs by encouraging efficient reliance on the law and by avoiding the costs associated with adjustment to a new legal regime. But again, this expectation does not apply to precedent that is "unworkable." If the precedent in question is incapable of predictable application in the lower courts, efficient reliance will not be possible. Indeed, unworkable decisions are by definition uncertain, so their retention should be expected to require ongoing and inefficient expenditures on measures aimed at divining their application and effect.[102] Although adjustment to the replacement regime may impose some costs, those costs may be outweighed by the costs associated with the previous, unprincipled approach.

Thus, when precedent is unworkable, the condition for reversal $[EC(Y) > AC(X) + LC(X)]$ more likely will be satisfied because the overruling of an unworkable precedent is less likely to give rise to significant adjustment and litigation costs than would its retention. In terms of the model, although the general presumption is that $EC(Y) < AC(X) + LC(X)$, that presumption will not apply to unworkable precedents because, even assuming that the magnitude of the EC variable is unaffected by the unworkability of a decision, $AC^U + LC^U < AC^W + LC^W$ (where U denotes unworkable precedent and W denotes workable precedent). Indeed, the unworkability necessary to justify reversal may be defined under the model as the degree of uncertainty of application that renders $EC(Y) > AC^U(X) + LC^U(X)$.

101. *See supra* note 24 and accompanying text.

102. *Cf.* Ehrlich & Posner, *supra* note 11, at 271 (noting that "[h]igher levels of ability and training are required to master implicit rules" and thus predicting "that lawyers will be more numerous" when legal rules are predominantly "implicit").

B. *Unworkable Precedent in the Rehnquist Court*

1. *United States v. Dixon*

United States v. Dixon's reversal of *Grady v. Corbin* may be understood in the economic terms set forth above. Rejection of *Grady*'s "same conduct" test might add generally to the level of uncertainty in the law of double jeopardy by increasing the perception that the Court's precedents are susceptible to reversal. But any marginal increase in litigation costs resulting from this general *decrease* in certainty likely would be outweighed by a more specific, offsetting *increase* in certainty associated with abandoning an unworkable decision like *Grady*.

Several specific cases that followed on the heels of *Grady* provide anecdotal evidence of this effect. For example, in *United States v. Felix*[103] the Court decided whether a previous conviction for attempt to manufacture methamphetamine barred a subsequent prosecution for conspiracy to manufacture the same substance.[104] Despite " 'longstanding authority' to the effect that prosecution for conspiracy is not precluded by prior prosecution for the substantive offense,"[105] *Grady* stood as an enticement to litigate the question on the ground that prosecution for conspiracy would involve proof of conduct that constituted the underlying substantive offense.

As *Felix* itself illustrates, an unworkable precedent like *Grady* can lead to a predictable increase in litigation expenses in two ways. First, unworkable precedents encourage litigation—and arguments within litigation—that would not be raised in the absence of the precedent. *Grady*'s effect on the incentives for litigation were real and palpable; everyone acknowledged that if *Blockburger*[106] was the sole test for double jeopardy, the defense's double jeopardy claim would have bordered on the frivolous.[107] As the Court noted in *Felix*, however, a "literal[]" application of *Grady* would support the double

103. 503 U.S. 378 (1992).

104. *See id.* at 384.

105. *Dixon*, 509 U.S. at 709 (quoting *Felix*, 503 U.S. at 390).

106. Blockburger v. United States, 284 U.S. 299 (1932); *see supra* notes 93–94 and accompanying text.

107. Two effects of *Grady* should be distinguished. First, as a supplemental test to that in *Blockburger*, 284 U.S. at 304, *Grady* inevitably would encourage more litigation than would *Blockburger* alone. Two alternative formulations of the double jeopardy protection would necessarily give rise to more litigation than would one test alone. But that isolated fact does not render *Grady* unworkable. Rather, it is only to the extent that *Grady*'s test encourages litigation by its confusion and inconsistency that it can be said to be unworkable under stare decisis jurisprudence.

jeopardy defense, since *Grady* "said that the Double Jeopardy Clause bars a prosecution where the Government, 'to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.' "[108] So long as *Grady*'s same conduct test remained, it stood as an enticement for double-jeopardy arguments that would otherwise be left unasserted.

Second, unworkable precedent like *Grady* tends to increase litigation expenses by expanding the scope, complexity, and cost of resolution of the litigation once it has begun. Even if Felix and his counsel made the initial determination to pursue a double jeopardy challenge in the absence of *Grady*, resolution of that challenge would have been relatively inexpensive. It probably would have been rejected summarily by the trial judge and, if made part of an appeal, by the Court of Appeals in an unpublished, per curiam opinion.

Indeed, *Felix*'s gloss on *Grady* further exacerbated the uncertainty and incentive for costly litigation on double jeopardy issues. After *Felix*, *Grady*'s already ambiguous "same conduct" test was further clouded by *Felix*'s admonition that the test was not to be read "literally."[109] Lower courts understandably found the *Grady/Felix* standard "difficult to apply,"[110] and expressly noted that the *Blockburger* test would have forestalled protracted litigation over double jeopardy.[111]

As noted above, judicial adjustment to a replacement precedent often may be an additional source of increased litigation expenditures. Even if that condition generally cuts against abandoning precedent, it should have had little impact on the calculus in *Dixon*. The expected increase in litigation from a new regime is especially low when the decision omits one of a set of alternative tests. When, as in *Dixon*, we already have judicial experience under the new regime, start-up litigation costs will be low and should not stand as a significant impediment to abandoning precedent.

Dixon also illustrates the point that reversal of unworkable precedent is unlikely to produce significant adjustment costs.

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108. *Felix*, 503 U.S. at 388 (quoting Grady v. Corbin, 495 U.S. 508, 521 (1990)).

109. *Id.*

110. Sharpton v. Turner, 964 F.2d 1284, 1287 (2d Cir. 1992) (citing United States v. Calderone, 917 F.2d 717, 722 (2d Cir. 1990) (Newman, J., concurring), *cert. granted and judgment vacated*, 503 U.S. 978 (1992); *id.* at 726 (Miner, J., dissenting)).

111. *See id.* at 1287 (concluding that "[p]rior to *Grady*," the court "would have been entirely confident that under the previous regime of *Blockburger*," defendant's "double jeopardy claim would fail").

Initially, one might assume that double-jeopardy rules are unlikely to affect the primary behavior of potential criminal defendants, so that the reliance effects of a double-jeopardy precedent may be less than those in other areas of the law.[112] But that is not to say that reliance effects are not implicated. Criminal defendants undoubtedly rely on the state of the law of double jeopardy in deciding whether to accept plea bargains. Likewise, prosecutors rely on double-jeopardy rules in their day-to-day decisions regarding the nature and extent of the charges to bring. The economic model generally predicts that upsetting a double-jeopardy precedent would increase uncertainty and would thus discourage efficient reliance by prosecutors.

Significantly, the economic model indicates that this prediction will not hold when the precedent is unworkable. Indeed, with *Grady* on the books, prosecutors would have difficulty knowing when they must simultaneously prosecute all charges arising out of a single criminal transaction or occurrence and when they may leave some charges for a future prosecution.[113] In the face of this uncertainty, prosecutors may make inefficient decisions to use scarce resources to prosecute crimes that may turn out not to be worth the effort. A clearer rule would allow prosecutors to allocate their resources more efficiently without fear that an initial decision to file only a narrow set of charges might unexpectedly preclude prosecution of related charges in the future. Thus, the predictable result of abandoning this unpredictable precedent would be to clarify the double-jeopardy standard for prosecutors and to enable them to exercise their prosecutorial discretion under a more predictable rule of law.[114]

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112. *See* POSNER, *supra* note 24, at 243 (acknowledging that "[t]he notion of the criminal as a rational calculator will strike many readers as unrealistic, especially when applied to criminals having little education or to crimes not committed for pecuniary gain," but insisting that "a better test of a theory than the realism of its assumptions is its predictive power" and noting that "[a] growing empirical literature on crime has shown that criminals respond to changes in opportunity costs, in the probability of apprehension, [and] in the severity of punishment" (citing Isaac Ehrlich, *Crime, Punishment, and the Market for Offenses*, J. ECON. PERSP., Winter 1996, at 43, 55–63; D.J. Pyle, *The Economic Approach to Crime and Punishment*, 6 J. INTERDISC. ECON. 1, 4–8 (1995))).

113. *See Grady*, 495 U.S. at 540 (Scalia, J., dissenting) (noting that after *Grady*, prosecutors wishing to "use facts sufficient to prove one crime in order to establish guilt of another crime must bring both prosecutions simultaneously; but that those who wish to use only *some of* the facts establishing one crime—not enough facts to 'prove conduct that constitutes an offense'—can bring successive prosecutions," and asserting that prosecutors and trial judges will find it impossible to draw this line (quoting *id.* at 510)).

114. As noted above, criminal defendants may also rely on the state of double-jeopardy law during plea bargaining. If uncertainty as to the possibility of future prosecutions interferes with efficient plea bargaining, reversal of an unworkable, and hence uncertain, precedent would enhance certainty and thus improve the efficiency of the

The investment ordinarily associated with reaction to a new legal regime also would be minimal in this context. Since rejection of *Grady* merely involves retention of *Blockburger*, rather than substitution of an entirely new legal standard, adjustment costs in the form of new institutional investments in a replacement regime will be slight, or perhaps nonexistent.[115]

2. *Seminole Tribe v. Florida*

The analysis of the litigation-cost issues presented in *Dixon* is equally applicable to other cases in which the Court has overturned precedent because of its unworkability. The Court in *Seminole Tribe v. Florida*,[116] for example, overruled as unworkable the decision in *Pennsylvania v. Union Gas Co.*,[117] which had held that Congress had the power under the Commerce Clause to abrogate a State's Eleventh Amendment immunity so long as it expressed a "clear statement" of its intent to do so.[118] *Union Gas*'s unworkability stemmed from the lack of a majority opinion. Justice White's concurrence agreed with the judgment reached by Justice Brennan's plurality opinion, but his refusal to sign on to Brennan's rationale left lower courts to wonder whether the clear statement principle was good law. Under the circumstances, the *Seminole Tribe* Court suggested that *Union Gas* was ripe for reversal because it was "of questionable precedential

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plea-bargaining process.

115. A further argument for *Dixon*'s reversal of *Grady* may be made in error-cost terms. *Grady* is vulnerable to a challenge on substantive efficiency grounds. By increasing the scope of the double-jeopardy protection, *Grady* limits the flexibility of prosecutors in determining the breadth of charges to include in their initial proceeding. In so doing, *Grady* tends to induce inefficiencies as prosecutors pursue expansive criminal proceedings that include charges which might never be prosecuted otherwise.

A proponent of *Grady* might counter that a comprehensive criminal proceeding including all potential charges arising out of a given transaction could be *more* efficient than two, or more, successive proceedings. But that argument improperly assumes that the successive proceedings ultimately would be pursued. *Grady*'s principal substantive inefficiency is in interfering with a prosecutor's discretion. Because the prosecutor has an incentive to use his resources efficiently, we may assume that he will forego potential charges arising out of a transaction that is the subject of a criminal proceeding only when the expected benefit of that decision—which includes some prediction as to the likelihood that the additional charges will be made part of a successive prosecution—exceeds the expected cost—which includes the foregone economies of scale associated with a consolidated proceeding. That is not to say that the prosecutor will *always* choose the narrowest possible charge at the initial proceeding. The inefficiency lies in the fact that a rational prosecutor will *sometimes* choose a pared-down set of charges and that *Grady* interferes with that decision.

116. 517 U.S. 44 (1996).

117. 491 U.S. 1 (1989), *overruled by Seminole Tribe*, 517 U.S. at 66.

118. *See id.* at 15 (plurality opinion).

value, largely because a majority of the Court expressly disagreed with the rationale of the plurality."[119]

This conclusion can be understood in terms of the economic model: rejection of *Union Gas* was unlikely to increase litigation costs by increasing uncertainty because the lack of majority support for the decision had already created an uncertain state of affairs. Notably, as in *Dixon*, the rejection of *Union Gas* would not be expected to spawn the litigation costs associated with the replacement of precedent by a new rule. This expectation stems from the narrow holding of the case: *Seminole Tribe* did not replace the clear statement rule with any competing principle, but rather simply repossessed from Congress the purported power to abrogate Eleventh Amendment immunity.

3. Justice Scalia's Concurrence in *Itel Containers International Corp. v. Huddleston*

The economic model also may explain Justice Scalia's approach to the unworkability of the Court's dormant Commerce Clause[120] precedents. In *Itel Containers International Corp. v. Huddleston*,[121] Justice Scalia reiterated his "view that the Commerce Clause contains no 'negative' component, no self-operative prohibition upon the States' regulation of commerce."[122] Nevertheless, in light of stare decisis, Justice Scalia indicated that he would "enforce a self-executing, 'negative' Commerce Clause in two circumstances: (1) against a state law that facially discriminates against interstate commerce; and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court."[123]

In the two circumstances that Justice Scalia identified, the usual assumptions about the cost effects of reversal prevail. The prohibition against state laws that facially discriminate against interstate commerce establishes a relatively bright line that is capable of consistent application; therefore, rejecting that prohibition would increase litigation and adjustment costs by increasing uncertainty and by undercutting private and institutional reliance on the rule.

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

120. The dormant Commerce Clause prohibits states from burdening interstate commerce. *See infra* notes 206–08 and accompanying text.

121. 507 U.S. 60 (1993).

122. *Id.* at 78 (Scalia, J., concurring in part and concurring in the judgment) (citing American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 202–03 (1990) (Scalia, J., concurring in the judgment); Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue, 483 U.S. 232, 263 (1987) (Scalia, J., concurring in part and dissenting in part)).

123. *Id.* at 78–79 (Scalia, J., concurring in part and concurring in the judgment).

Similarly, state laws that are "indistinguishable"[124] from laws previously held unconstitutional rest on the presumed validity of established precedents. Accordingly, the same litigation- and adjustment-cost effects would flow from a refusal to follow those precedents to their logical conclusions.

Outside of those two circumstances, however, Justice Scalia concluded that the Court's dormant Commerce Clause jurisprudence is unworkable in the sense that it establishes "vague and open-ended tests" that "are so uncertain in their application (and in their anticipated life span) that they can hardly be said to foster stability or to engender reliance deserving of *stare decisis* protection."[125] In economic terms, Justice Scalia's argument is the now-familiar point that reversal of unworkable precedent will not produce significant litigation or adjustment costs because the precedent itself is uncertain. Because individual and governmental actors cannot reasonably be expected to have efficiently structured their business and institutional arrangements around the Court's "vague and open-ended" dormant Commerce Clause tests, abandoning those tests would not produce significant adjustment costs. Nor would it give rise to any significant litigation costs, particularly when the replacement for the standard in question would be no prohibition at all.[126]

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124. *Id.* at 79 (Scalia, J., concurring in part and concurring in the judgment).

125. *Id.* at 79–80 (Scalia, J., concurring in part and concurring in the judgment).

126. *Cf.* Rutan v. Republican Party, 497 U.S. 62, 110–11 (1990) (Scalia, J., dissenting). In *Rutan*, Justice Scalia argued that the Court should overrule *Branti v. Finkel*, 445 U.S. 507 (1980), which held that patronage dismissals are unconstitutional unless "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518. As in *Itel Containers*, Justice Scalia's argument in *Rutan* in support of reversal turned on the perceived unworkability of the *Branti* standard:

> What [*Branti*] means is anybody's guess. The Courts of Appeals have devised various tests for determining when "affiliation is an appropriate requirement." These interpretations of *Branti* are not only significantly at variance with each other; they are still so general that for most positions it is impossible to know whether party affiliation is a permissible requirement until a court renders its decision.
>
> A few examples will illustrate the shambles *Branti* has produced. A city cannot fire a deputy sheriff because of his political affiliation, but then again perhaps it can, especially if he is called the "police captain." A county cannot fire on that basis its attorney for the department of social services, nor its assistant attorney for family court, but a city can fire its solicitor and his assistants, or its assistant city attorney, or its assistant state's attorney, or its corporation counsel.

Rutan, 497 U.S. at 111–12 (Scalia, J., dissenting) (citations and footnotes omitted). As in *Itel Containers*, Scalia's argument may be rephrased in economic terms. There simply is no cost basis for preserving *Branti* if its incapability of principled application (1) suggests that its reversal may actually decrease litigation expenses; and (2) indicates that there are

IV. ECONOMICS AND UNDERMINED AUTHORITY

A further strand of the Supreme Court's doctrine of precedent holds that its capacity for error correction is enhanced when an earlier decision has been "undermined," although not actually overruled, by subsequent authority.[127] The logic of this standard has been criticized in academic commentary,[128] and, as with the doctrine of unworkable precedent, the Court's opinions offer little explanation of the standard's theoretical basis.

Consider the recent Establishment Clause case *Agostini v. Felton*.[129] *Agostini* overruled the Court's earlier decision in *Aguilar v. Felton*,[130] which had held that a federal program sending public school teachers into parochial schools to provide remedial education to disadvantaged children violated the Establishment Clause.[131] In abandoning *Aguilar*, the *Agostini* majority relied on the notion that "*stare decisis* does not prevent us from overruling a previous decision where there has been a significant change in or subsequent development of our constitutional law"[132] and reasoned that

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no significant reliance interests at stake.

127. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 235–36 (1997) (suggesting that the Court's prior decisions holding that the Establishment Clause precluded federal funding of programs on parochial school premises were ripe for reversal because there had been a "significant change in or subsequent development of our constitutional law"); Seminole Tribe v. Florida, 517 U.S. 44, 66 (1996) (noting that *Union Gas* was a "solitary departure from established law" and was of "questionable precedential value, largely because a majority of the [*Union Gas*] Court expressly disagreed with the rationale of the plurality"), *overruling* Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989); United States v. Gaudin, 515 U.S. 506, 521 (1995) (noting that *Sinclair v. United States*'s "underpinnings" had been "eroded . . . by subsequent decisions of this Court"), *overruling* Sinclair v. United States, 279 U.S. 263 (1929); United States v. Dixon, 509 U.S. 688, 704, 709–10 (1993) (abandoning the Double Jeopardy Clause "same conduct" test under *Grady v. Corbin*, 495 U.S. 508 (1990), and asserting that *Grady* was "wholly inconsistent with earlier Supreme Court precedent" and that *Grady*'s foundations were undermined by *United States v. Felix*, 503 U.S. 378 (1992), which "recognize[d] a large exception" that "avoid[ed] a 'literal' (*i.e.*, faithful) reading of *Grady*" (quoting *Felix*, 503 U.S. at 88)); Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989) (stating that the special justification necessary to overturn a precedent may be established by a showing that intervening developments in the law remove or weaken "the conceptual underpinnings from the prior decision" or make "the decision irreconcilable with competing legal doctrines or policies").

128. *See, e.g.*, Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. (forthcoming May 2000) (manuscript at 122, on file with the *North Carolina Law Review*) (asserting that a "less grandiloquent[]" version of this strand of the Court's doctrine is the notion that "[i]t's okay to overrule precedent if you do it in two (or more) steps").

129. 521 U.S. 203 (1997).

130. 473 U.S. 402 (1985), *overruled by Agostini*, 521 U.S. at 235–37.

131. *See Agostini*, 521 U.S. at 208–09.

132. *Id.* at 235–36.

subsequent "bona fide changes" in the Court's Establishment Clause jurisprudence had undermined *Aguilar*.[133]

As in *United States v. Dixon*,[134] Justice Souter was the principal dissenter.[135] Justice Souter's response to the majority again revealed the analytical emptiness of the Court's treatment of undermined authority. To Justice Souter, the doctrinal changes that the majority had identified were insufficient to justify abandoning *Aguilar*.[136] The degree of doctrinal change, in Justice Souter's view, had been "exaggerated" by the majority and fell short of that necessary to mark *Aguilar* as undermined precedent.[137] The competing opinions effectively argue past each other on this point; neither stops to offer a theoretical basis for the notion that undermined authority is of weakened precedential value, much less to articulate why the degree of doctrinal change in *Aguilar*'s wake was or was not enough to justify its reversal. Economics may be used to fill this theoretical void. This Part offers an economic basis for understanding this strand of the Court's doctrine of precedent and then illustrates the theory by applying it to some recent cases.

A. The Economics of Undermined Authority

The economic foundations of this strand of the Court's doctrine of precedent overlap substantially with those that form the basis of the unworkability strand. Here again, reversal of undermined authority seems unlikely to engender the two costs ordinarily associated with a change in precedent.

First, reversal of a decision that has been substantially undermined by subsequent authority is unlikely to increase litigation costs; in fact, the converse is probably true. To see why, consider the effects on incentives for litigation of a precedent that is doctrinally irreconcilable with subsequent decisions. Although preserving a precedent ordinarily would be expected to enhance certainty and thus to diminish the incentive for litigation, keeping a precedential pariah may have the opposite effect. Litigants on one side of a controversy may look to the recent precedents to support their position, but their opponents will hold out the hope of succeeding in reliance on the now-undermined decision.

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133. *Id.* at 238–39.
134. *See supra* Part III.B.1.
135. *See Aguilar*, 473 U.S. at 414; *Agostini*, 521 U.S. at 240–54 (Souter, J., dissenting).
136. *See Agostini*, 521 U.S. at 252 (Souter, J., dissenting).
137. *Id.* at 250–52 (Souter, J., dissenting).

So long as lower courts are forced to choose between two sets of competing decisions, there will be cause for the mutual optimism that is the prerequisite to extended—and expensive—litigation.[138] Only by forthrightly overruling the undermined precedent can the Court remove the grounds for mutual optimism that threaten to enhance litigation costs.[139] In this sense, the usual assumption about the litigation-cost effects of reversal is turned on its head; reversal of undermined authority should decrease litigation costs over time. Undermined authority, then, might be thought of in economic terms as precedent that creates grounds for mutual optimism between opponents in litigation.

Second, reversal of an undermined decision is unlikely to upset private or institutional reliance interests. A precedent whose doctrinal basis has eroded is unlikely to establish a predictable foundation for significant reliance. Again, certainty and reliance may in one sense be *enhanced* by reversal.[140] Competing sets of precedents may induce private and public actors to invest in inefficient measures aimed at complying with both. Removing the offending decision will increase certainty and allow for more efficient reliance.[141]

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138. *See* Shavell, *supra* note 24, at 63–64; *see also* POSNER, *supra* note 24, at 610 (concluding that "litigation will occur only if both parties are optimistic about the outcome of the litigation"); *id.* at 611 (suggesting that "full exchange of the information . . . is likely to facilitate settlement by enabling each party to form a more accurate . . . estimate of the likely outcome of the case"); Thomas R. Lee, *Pleading and Proof: The Economics of Legal Burdens*, 1997 BYU L. REV. 1, 15 n.36 (discussing the effects of mutual optimism on the economic rationale for the default rule assigning the burden of proof in civil cases to plaintiffs).

139. The same result might be achieved gradually over time as the undermined precedent deteriorates further and makes the transition from "undermined" to "abandoned" authority. In the meantime, however, a decision that is weakened but not removed will generate the litigation costs noted here.

140. In a second sense, there may be a risk in some cases of upsetting certain reliance interests even in the case of an undermined precedent. The reliance interests at issue here are those constructed around the precise facts of the undermined decision. In our current system, the *result* of a Supreme Court decision—unless and until it is overturned by the Court itself—entitles private actors to reliance, even if more recent authority calls into question the *rationale* of the decision. *See* Hubbard v. United States, 514 U.S. 695, 721–22 (1995) (Rehnquist, C.J., dissenting) (asserting that parties and lower courts must expect that the "precise holding" of Supreme Court decisions will be retained even when the rationale of such decisions has been eroded). Thus, even if the undermined decision's rationale does not generally contribute to a predictable body of law that will enable efficient reliance, overturning the precise result of the case may undercut specific investment in reliance on the result of that decision.

141. The Court also has occasionally made reference to another strand of the doctrine of stare decisis that is linguistically similar to that of undermined authority but that may not share its economic foundations: a decision that itself undermines *prior* authority may be especially susceptible to reversal. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200,

At the extreme, a thoroughly undermined precedent may be reversed with minimal risk of significant litigation or adjustment costs. Thus, as with unworkable authority, the cost-minimizing condition for reversal $[EC(Y) > AC(X) + LC(X)]$ is more likely to be satisfied for undermined authority because $AC(X)^U + LC(X)^U < AC(X)^N + LC(X)^N$ (where U denotes undermined precedent and N denotes non-undermined precedent). Again, a decision is sufficiently undermined to justify reversal at the point at which $EC(Y) > AC^U(X) + LC^U(X)$.

B. *Undermined Authority in the Rehnquist Court*

An examination of recent cases in which the Rehnquist Court has set aside earlier precedents on the ground that they had been undermined by more recent authority illustrates these economic considerations. This Section discusses three prominent decisions recently handed down.

1. *Agostini v. Felton*

Justice O'Connor's argument for the majority in *Agostini* can be

231–32 (1995) (opinion of O'Connor, J., joined by Kennedy, J.) (asserting that " '*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience' " (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940))); *see also* POSNER, *supra* note 17, at 122 (noting that although judges who "flout precedent ... will be criticized," successive judges who do so "will be criticized less ... both because their flouting will be defensible as a method of correcting or punishing the misbehavior of their predecessors and because they will have a 'precedent' for not following precedent"). In one sense, "undermining" authority may be the economic equivalent of "undermined" authority at least if it is confined to cases in which the undermining decision creates uncertainty and introduces grounds for mutual optimism as indicated above. But, this strand of the doctrine threatens to extend itself well beyond these sound bases. If the effect of the purportedly undermining decision is merely to upend the rule of an earlier precedent and to replace it with a contrary principle adopted in a subsequent case and not to create uncertainty about whether the former or recent decision controls in any given case, then there may be no basis for this strand of the doctrine beyond whatever cathartic effects may flow from the feeling that turnabout is fair play. In such cases, there may be other cost considerations that sustain a reversal, such as the fact that the undermining decision was handed down only recently and has not engendered any significant reliance interests. *See, e.g.*, Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 381–82 (1977), *overruling* Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973). *Bonelli* had set aside a rule of property that had governed for almost a century, *see Bonelli*, 414 U.S. at 319–21, and the *Corvallis Sand* Court concluded that "a return to the former [regime that prevailed prior to *Bonelli*] would more closely conform to the expectations of property owners than would adherence to the latter." *Corvallis Sand*, 429 U.S. at 381–82. But, the mere fact that a decision itself disregarded prior precedent does not seem to be a legitimate basis for assigning it diminished precedential strength.

restated in economic terms. Preservation of the pre-*Agostini* state of the Court's Establishment Clause doctrine arguably would have created more uncertainty and a greater incentive for litigation than *Agostini* itself did. In Justice O'Connor's view, *Aguilar v. Felton* was premised on the notions that (1) a public employee working on the premises of a parochial school would presumptively "inculcate religion in her work"; and that (2) public aid directed to an educational function of a parochial school "impermissibly finances religious indoctrination."[142] After the Court's later decisions in *Zobrest v. Catalina Foothills School District*[143] and *Witters v. Washington Department of Services for the Blind*,[144] however, the Court noted that the above notions were insufficient to sustain the conclusion that a governmental program granting aid to parochial schools on equal footing with other schools effectively advanced religion in violation of the Establishment Clause. *Zobrest* upheld the use of a federally funded sign-language interpreter by a student in a Catholic high school and, in so doing, rejected the presumption that a government employee in a parochial school setting necessarily would result in state-sponsored indoctrination.[145] *Witters* upheld the use of a state-sponsored vocational tuition grant by a blind person who chose to use the grant to attend a Christian college and become a pastor, missionary, or youth director. There, the Court disavowed the notion that all government aid that directly facilitates the educational function of religious schools is invalid.[146]

The *Agostini* majority's position could be restated to rest on the conclusion that undermined precedent is not as economically valuable as other precedent. Whereas litigation expenses ordinarily would be expected to increase as a result of the substitution of new precedent for old, that expectation arguably would not hold in *Agostini*. Before *Agostini*, Establishment Clause jurisprudence provided a significant incentive for litigation over the constitutionality of government programs benefiting parochial schools. On one hand, *Zobrest* and *Witters* offered some assurance that such a program could be sustained—without fear of an "absolute bar to the placing of a public

142. *Agostini*, 521 U.S. at 222.

143. 509 U.S. 1 (1993).

144. 474 U.S. 481 (1986).

145. *See Zobrest*, 509 U.S. at 13 (disavowing the notion that "the Establishment Clause lays down [an] absolute bar to the placing of a public employee in a sectarian school").

146. *See Witters*, 474 U.S. at 487 (noting that the benefit to the religious institution was the result of "the genuinely independent and private choices" of individuals and not of the decision of the state).

employee in a sectarian school"[147]—so long as it provided aid neutrally to eligible recipients " 'without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.' "[148] But unless overruled, *Aguilar* stood as an arrow in the quiver of any potential litigant wishing to argue that a government benefit improperly constituted "direct aid" to religious schools.[149] The resulting uncertainty would directly encourage litigation to a degree that would outweigh the indirect effect of the general "uncertainty" created by any individual decision to set aside precedent.

Justice O'Connor also might have argued that rejection of *Aguilar* could decrease adjustment costs. With *Aguilar*, *Zobrest*, and *Witters* all on the books, a governmental entity hardly could be expected to make efficient decisions about an anticipated benefits program. In contemplating any such program, the government would have to invest not only legal resources in an attempt to divine the proper reconciliation of the three cases—*Aguilar*, *Zobrest*, and *Witters*,—but also other resources to design the program in such a way as to navigate the shoals of the competing precedents. Moreover, the adjustment-cost effects of *Agostini* would be minimized further because that case merely adopted one of two competing tests already in existence, rather than jettisoning the existing doctrine in favor of a brand new one.

As noted above,[150] reversal of even an abandoned precedent might ordinarily be expected to undercut reliance specifically built around the result of the decision in question. Even this consideration, however, is of minimal significance in *Agostini*. *Aguilar* was a decision *proscribing* the provision of Title I services within parochial schools; such a decision should not be expected to sustain the same sort of institutional investment that would be built around a decision *authorizing* governmental action.[151] And although there undoubtedly had been some investment in facilities for providing government

147. *Zobrest*, 509 U.S. at 13.

148. *Witters*, 474 U.S. at 487 (quoting Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782 n.38 (1973)).

149. *See* School Dist. v. Ball, 473 U.S. 373, 393 (1985) (distinguishing the permissible provision of " 'indirect, remote, or incidental' " aid from the impermissible provision of more significant and direct aid (quoting *Committee for Public Education*, 413 U.S. at 771 (internal quotations omitted))), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

150. *See supra* note 140 and accompanying text.

151. The implication of this analysis, of course, is that an efficient system of stare decisis has an inherent bias—all other things being equal—in favor of conduct-authorizing precedent as compared to conduct-proscribing precedent.

services off the premises of the parochial schools,[152] the existence of such sunk costs is not an argument for imposing further such costs.

In fact, the potential for avoiding future investment in such facilities can be understood as a significant error-cost saving associated with setting aside the decision in *Aguilar*. Thus, in addition to making the point that the costs of overturning *Aguilar* were exceptionally low (if not negative), Justice O'Connor's opinion can be read to assert that the anticipated benefits were extraordinarily high. In addition to yielding the standard benefit associated with restoring consistency between the Court's precedents and the intent of the Constitution, *Agostini* corrected other, more quantifiable, inefficiencies. Indeed, Justice O'Connor spelled out the substantive efficiency costs of *Aguilar* in extensive detail. She noted that since the 1986–87 school year, the New York City Board of Education had spent more than $100 million in attempting to comply with *Aguilar*'s mandate by "providing computer-aided instruction, leasing sites and mobile instructional units, and transporting students to those sites."[153] These and other costs could be avoided by setting *Aguilar* aside.

The above catalog of the relevant cost considerations before the Court in *Agostini* sets the stage for a meaningful debate about the propriety of a departure from stare decisis. Instead of a pointless debate about whether the degree of doctrinal change after *Aguilar* was in some abstract sense "sufficient," the economic model enables more concrete debate. Justice Souter's dissenting position is difficult to justify under such a framework. First, Justice Souter conceded that the costs of *Aguilar* were substantial:

> When *Aguilar* was decided everyone knew that providing Title I services off the premises of the religious schools would come at substantial cost in efficiency, convenience, and money. Title I had begun off the premises in New York, after all, and dissatisfaction with the arrangement was what led the city to put the public school teachers into the

152. *See, e.g.*, Jeff Gauger, *District 66 Board Approves Plan for Offering Remedial Education*, OMAHA WORLD HERALD, Aug. 27, 1985, *available in* 1985 WL 3817079 (discussing the Omaha school district's plan to comply with *Aguilar* by transporting private school students to public schools for remedial classes); Joan McQueeney Mitric, *Catholic Schools Seek Sites for U.S.-Funded Special Aid to Pupils*, WASH. POST, Oct. 24, 1985, at Md.1 (discussing the busing system used by Maryland public schools to comply with *Aguilar*); Neill S. Rosenfeld, *Classroom Vans Draw High Bids*, NEWSDAY (New York), Apr. 16, 1986, at 35, *available in* 1986 WL 2359073 (discussing the use of mobile classrooms to comply with the *Aguilar* decision).

153. *Agostini*, 521 U.S. at 213.

> religious schools in the first place. When *Aguilar* required the end of that arrangement, conditions reverted to those of the past and they have remained unchanged: teaching conditions are often poor, it is difficult to move children around, and it costs a lot of money.[154]

Thus, support for Justice Souter's position as to the stare decisis effects of *Aguilar* would require some rebuttal of the litigation- and adjustment-cost points noted above. Such a rebuttal is difficult under the circumstances.

Justice Souter's principal stare decisis argument in dissent was that the majority had "exaggerated" the principles enunciated in *Witters* and *Zobrest* and, therefore, that *Aguilar* had not been sufficiently "abandoned" to merit reversal.[155] According to Souter's reading of the cases,

> [s]ince *Aguilar* came down, no case has held that there need be no concern about a risk that publicly paid school teachers may further religious doctrine; no case has repudiated the distinction between direct and substantial aid and aid that is indirect and incidental; no case has held that fusing public and private faculties in one religious school does not create an impermissible union or carry an impermissible endorsement; and no case has held that direct subsidization of religious education is constitutional or that the assumption of portion of a religious school's teaching responsibility is not direct subsidization.[156]

Justice Souter's assertions are difficult to contest in the absence of a theoretical standard for measuring the vulnerability of undermined precedent. But the economic foundations of this doctrine reveal the weakness of his position.

Justice Souter did not argue with the proposition that the Establishment Clause *principles* that controlled *Witters* and *Zobrest* were different from the standards that controlled *Aguilar*. The former found the "neutrality" of the programs at issue sufficient to sustain them; the latter struck down Title I as "direct aid" to religion despite its neutrality. It is true, as Justice Souter noted, that since *Aguilar*, "no case has held that there need be no concern about a risk that publicly paid school teachers may further religious doctrine."[157] But that assertion merely restates the fact that *Aguilar* had not yet

154. *Id.* at 254 (Souter, J., dissenting) (citation omitted).
155. *Id.* at 253 (Souter, J., dissenting).
156. *Id.* at 253–54 (Souter, J., dissenting).
157. *Id.* at 253 (Souter, J., dissenting).

been overruled. Moreover, that argument misses the point of the doctrine of undermined authority. The significance of *Witters* and *Zobrest* is not that they expressly repudiated the rule enunciated in *Aguilar*. Rather, it is that they established a competing line of authority that created an uncertain doctrine that rendered efficient reliance impossible. Indeed, it is precisely because no case had expressly repudiated *Aguilar* that reversal of its conflicting rationale might be expected to decrease litigation and adjustment costs.[158]

The economic model makes the stare decisis question in *Agostini* an easy one. The *Agostini* dissenters would have a difficult time arguing that the degree of decay in *Aguilar*'s rationale was insufficient to produce the predicted effects on litigation and adjustment costs. In any event, a debate about those issues would have been much more satisfying than an interchange about whether the degree of erosion was "enough" in some abstract, undefined sense.

2. *Hubbard v. United States*

The Court's decision in *Hubbard v. United States*[159] also turned on an application of the notion that undermined authority is vulnerable to reversal. *Hubbard* overruled *United States v. Bramblett*,[160] which had held that 18 U.S.C. § 1001—a statute that criminalizes false statements made "in any matter within the jurisdiction of any department or agency of the United States,"[161]—applied to statements made in the legislative, executive, and judicial departments. The *Hubbard* Court held that the statute does not apply to statements made in judicial proceedings.[162] Although *Hubbard* produced three different opinions as to the stare decisis effects of *Bramblett*, a majority of the Court essentially agreed with the basic principle that *Bramblett* had been sufficiently eroded to

158. Justice Souter's own treatment of the stare decisis question in *Agostini* reveals the weakness of his position. Ultimately, Justice Souter conceded that the "cost of compliance" with the standard set forth in *Aguilar* is "high," but he insisted that it is worth the price—that "constitutional lines are the price of constitutional government." *Id.* at 254 (Souter, J., dissenting). Justice Souter's argument, in other words, eventually devolves to the point that *Aguilar* was right and that a correct interpretation of the Constitution must be retained regardless of the price. Although the substantive merits of *Aguilar* are well beyond the scope of this Article, it should be noted that the debate as to the merits of a precedent is distinct from the debate as to whether it is entitled to deference even if wrong. Only the latter question is of stare decisis significance.

159. 514 U.S. 695 (1995).

160. 348 U.S. 503 (1955), *overruled by Hubbard*, 514 U.S. at 695.

161. 18 U.S.C. § 1001 (1952) (current version at *id.* (Supp. IV 1998)).

162. *See Hubbard*, 514 U.S. at 715.

justify its reversal.[163]

Justice Stevens's opinion—a plurality on this issue joined by Justices Ginsburg and Breyer—noted that the lower courts had responded to *Bramblett* by creating a "judicial function exception," which gave § 1001 "only a limited application within the Judicial Branch."[164] Justice Stevens's principal stare decisis argument in favor of this result was that the judicial function exception was an "intervening development" in the law, a circumstance long acknowledged to justify departure from adherence to precedent.[165] Although the *Hubbard* Court declined to sanction this exception, its reversal of *Bramblett* achieved substantially the same result.

Chief Justice Rehnquist's dissenting argument quarreled with Justice Stevens's characterization of the judicial function exception as an "intervening development of the law." In the Chief Justice's view, only changes "in the case law of this Court" qualify as intervening developments for stare decisis purposes; doctrinal changes in the law of "the lower federal courts" are irrelevant.[166]

The economic model again provides the tools for a concrete evaluation of the debate between Justice Stevens and Chief Justice Rehnquist in *Hubbard.* Instead of an abstract debate about which developments are sufficiently significant in an undefined sense, the economic model dictates a discussion about whether overruling *Bramblett* would be likely to (1) produce significant adjustment and litigation costs; and (2) yield substantial error-cost savings. In support of the majority's position, the argument could be made that reversal of a decision that already has been substantially eroded in the lower courts would not give rise to the litigation or adjustment costs usually associated with reversal. Because the lower courts already limited § 1001's application to the judicial branch, a decision reinforcing that position would enhance consistency and stability in the law. Consequently, the "reversal" of course in *Bramblett* avoided the adjustment and litigation costs that normally would be associated with its retention.[167]

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163. *See id.* at 711–15 (plurality opinion); *id.* at 716–17 (Scalia, J., concurring in part and concurring in the judgment).

164. *Id.* at 713 (plurality opinion).

165. *Id.* (plurality opinion).

166. *Id.* at 719 (Rehnquist, C.J., dissenting).

167. As Justice Stevens put it, overruling *Bramblett* "preserve[s] the essence" of the judicial function exception and "to that extent[] promote[s] stability in the law." *Id.* at 713 (plurality opinion). Chief Justice Rehnquist offered an opposing argument that can be understood to suggest that the majority had overlooked certain other costs of its decision. Specifically, he argued that treating a lower court's decision that contravened Supreme

While the usual costs of reversal were minimal, the benefit of setting aside *Bramblett* was arguably enhanced. As Justice Scalia noted in his concurrence, the judicial function exception "demonstrates how great a potential for mischief federal judges have discovered in the mistaken reading of 18 U.S.C. § 1001, a potential we did not fully appreciate when *Bramblett* was decided."[168] Specifically, Justice Scalia expressed the "serious concern that the *threat* of criminal prosecution under the capacious provisions of § 1001 will deter vigorous representation of opposing interests in adversarial litigation."[169] In economic terms, Justice Scalia might have argued that *Bramblett* was not only wrong, but clearly so, and that its error went beyond the failure to follow the intent of Congress.

3. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*

The Court's decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*[170] also involved application of the notion that undermined authority is susceptible to reversal. *College Savings Bank* invalidated a provision of the Trademark Remedy Clarification Act (TRCA) that purported to subject states to liability in suits for false and misleading advertising[171] on the grounds that the provision violated the states' sovereign immunity guaranteed by the Constitution. Specifically, the majority indicated that the Court's cases had "recognized only two circumstances in which an individual may sue a State": (1) when Congress has authorized such a suit "in the exercise of its power to enforce the Fourteenth Amendment"; and (2) when a state unequivocally has "waive[d] its sovereign immunity by consenting to suit."[172] The Court held that because neither of these conditions was met, the State of Florida was constitutionally immune from a suit challenging representations it had made when it began operating a program that offered certificates of deposit designed to finance the costs of a college education.[173]

Court precedent as an intervening development justifying an abandonment of stare decisis would create an "inducement[]" to the lower courts to ignore the Court's precedents. *Id.* at 721 (Rehnquist, C.J., dissenting). The result, in economic terms, would be increased adjustment and litigation costs that may be anticipated to flow from the implicit invitation that accompanied the majority's decision.

168. *Id.* at 716 (Scalia, J., concurring in part and concurring in the judgment).
169. *Id.* at 717 (Scalia, J., concurring in part and concurring in the judgment).
170. 119 S. Ct. 2219 (1999).
171. 15 U.S.C. § 1125(a) (1994).
172. *College Savings Bank*, 119 S. Ct. at 2223.
173. *See id.* at 2233.

The majority's recognition of only two inroads on sovereign immunity foreclosed a third exception that had been recognized in the Court's earlier decision in *Parden v. Terminal Railway of the Alabama State Docks Department.*[174] *Parden* had upheld the State of Alabama's liability under a provision of the Federal Employers' Liability Act subjecting to suit "every common carrier by railroad . . . engaging in commerce between . . . the several States."[175] *Parden* turned on Congress's power to "condition[] the right to operate a railroad in interstate commerce upon amenability to suit in federal court" and on the fact that Alabama had constructively waived its sovereign immunity "by thereafter operating a railroad in interstate commerce."[176]

Relying principally on *Parden* in defending the TRCA, the petitioner in *College Savings Bank* argued that if Congress retained the power to condition the right to "run[] an enterprise for profit . . . in a field traditionally occupied by private persons or corporations [and] . . . sufficiently removed from 'core [state] functions,' " then the TRCA's attempt to subject states to liability for that type of activity passed constitutional muster.[177] The petitioner relied on the theory that a state constructively waives its sovereign immunity by operating such an enterprise.[178] The Court rejected this argument on the ground that "the constructive-waiver experiment of *Parden* was ill conceived" and was "fundamentally incompatible" with subsequent sovereign immunity decisions.[179] Because the majority saw *Parden* as "an anomaly in the jurisprudence of sovereign immunity," it "expressly overruled" whatever portions of the case's holding that might have survived later decisions.[180]

The Court in *College Savings Bank* split five to four, and the stare decisis debate was predictably empty. The majority opinion repeatedly emphasized that *Parden* was inconsistent with other decisions (1) "requiring that a State's express waiver of sovereign immunity be unequivocal"[181]; (2) repudiating *Parden*'s premise "that

174. 377 U.S. 184 (1964), *overruled in part by College Savings Bank*, 119 S. Ct. at 2219, *and in part by* Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468 (1987).

175. 45 U.S.C. § 51 (1994).

176. *Parden*, 377 U.S. at 192.

177. *College Savings Bank*, 119 S. Ct. at 2228 (quoting Reply Brief for United States at 3, *College Savings Bank* (No. 98-149)).

178. *See id.*

179. *Id.* at 2228.

180. *Id.*

181. *Id.* (citing Great N. Life Ins. Co. v. Read, 322 U.S. 47, 54–55 (1944)).

state sovereign immunity is not constitutionally grounded"[182]; and (3) precluding Congress from abrogating sovereign immunity even by a clear statement in a statute enacted pursuant to the commerce power.[183]

Justice Scalia's opinion for the majority placed special emphasis on *Seminole Tribe*'s clear statement rule.[184] He argued that "[f]orced waiver and abrogation are not even different sides of the same coin—they are the same side of the same coin," and that "[t]here is little more than a verbal distinction between saying that Congress can make Florida liable to private parties for false or misleading advertising ... of its prepaid tuition program, and saying the same thing but adding at the end 'if Florida chooses to engage in such advertising.' "[185] Because *Seminole Tribe* and other decisions had weakened *Parden*, its reversal merely fulfilled the "handwriting on the wall which even an inept cryptologist would recognize as spelling out" the Court's decision.[186]

Justice Breyer's dissent responded that the precise holding of *Parden* had been "unanimous[]" and "clear."[187] While conceding that *Seminole Tribe* had invalidated "a general congressional 'abrogation' power,"[188] Justice Breyer argued that *Parden* rested on a narrower doctrinal foundation that was necessary to allow Congress to "effectively ... regulate *private* conduct" without allowing a gap in enforcement for states that choose to compete in "ordinary commercial ventures."[189] Beyond this general assertion, however, Justice Breyer made little attempt to quarrel with the logic of the majority's conclusion that *Parden* had been sufficiently undermined to justify its reversal. It is difficult to fault him. The current rhetoric of undermined authority provides no logical basis for a meaningful debate on this issue.

The economic model provides such a platform. It suggests that the question whether *Parden* has been sufficiently undermined turns on whether its reversal is likely to give rise to significant adjustment and litigation costs. Instead of a shouting match about the degree of *Parden*'s deterioration, the economic understanding of undermined

182. *Id.* at 2229 (citing Seminole Tribe v. Florida, 517 U.S. 44, 54–55 (1996)).
183. *See id.* at 2224 (citing *Seminole Tribe*, 517 U.S. at 72–73).
184. *See supra* Part III.B.2.
185. *College Savings Bank*, 119 S. Ct. at 2229–30.
186. *Id.* at 2227 n.2.
187. *Id.* at 2234, 2235 (Breyer, J., dissenting).
188. *Id.* at 2235 (Breyer, J., dissenting).
189. *Id.* (Breyer, J., dissenting).

authority dictates a debate over the adjustment- and litigation-cost effects of abandoning *Parden*.

Thus, Justice Scalia might have argued that continued retention of *Parden* in the face of inconsistent authority would only enhance mutual optimism and increase the incentive for litigation. Instead of increasing litigation costs, rejecting *Parden* could have the opposite effect. Indeed, although adopting a new regulatory regime ordinarily might be expected to give rise to certain start-up interpretation costs, here following the undermined precedent of *Parden* already would produce those costs because it would require courts to draw the line as to whether a state is competing "in a field traditionally occupied by private persons or corporations . . . in activities sufficiently removed from 'core [state] functions.' "[190]

For his part, Justice Breyer might have responded in dissent that *Parden* was not so undermined that it could not sustain important reliance interests. In fact, Justice Breyer might have noted that *Parden* is distinguishable in an important sense from the prototypically undermined decision. Whereas *Parden* is ideologically inconsistent with *Seminole Tribe* and other more recent sovereign immunity decisions, it conceivably could coexist logically with those cases. The prototypical undermined decision cannot establish a predictable foundation for significant reliance because it is always offset by a competing line of authority. Efficient reliance is impossible because economic actors face the impossible task of conforming their conduct to two conflicting lines of authority.

Here, however, Justice Breyer might have argued that *Parden*'s more specific exception to the general principle announced in *Seminole Tribe* could sustain reasonable reliance. Although *Seminole Tribe* precludes general congressional abrogation of state sovereign immunity and although the logic of *Seminole Tribe* conflicts with that which produced *Parden*, *Parden* purported to carve out a specific exception that would allow Congress to condition state participation in profit-making, non-core state functions on a constructive waiver of sovereign immunity. Until the specific exception recognized in *Parden* was overruled, it could—and did—provide the foundation for structural investment in congressional regulation of such activity.[191]

190. *Id.* at 2228 (quoting Reply Brief for United States at 3, *College Savings Bank* (No. 98-149)).

191. *See, e.g.*, 11 U.S.C. § 106(a) (1994) (subjecting states to federal bankruptcy court judgments); 15 U.S.C. § 1122(a) (1994) (subjecting states to suit for violation of the Lanham Act, 15 U.S.C. §§ 1051–1127 (1994 & Supp. IV 1998)); 17 U.S.C. § 511(a) (1994), *amended by* Act of Aug. 5, 1999, Pub. L. No. 106-44, § 1(g)(6), 113 Stat. 221, 222 (1999)

The specific adjustment costs associated with undermining such reliance are the principal argument in favor of the dissenting view of the stare decisis question in *College Savings Bank*. Once again, an economic foundation provides a meaningful platform for a concrete debate, even if it falls short of yielding an objectively verifiable answer.

V. ECONOMICS AND THE CONSTITUTIONAL/STATUTORY DICHOTOMY

The Rehnquist Court frequently has suggested that the Court's constructions of the Constitution deserve a lesser degree of deference than its interpretations of statutes.[192] In contrast to other longstanding strands of the Court's doctrine of precedent, however, the notion of diminished deference to constitutional precedent is of relatively recent origin.[193] During the first century and a half of the Supreme Court's existence, the statutory or constitutional nature of a decision generally was not deemed relevant to its susceptibility to reversal. Indeed, the modern Court's dichotomy between constitutional and statutory precedent was not an accepted part of the doctrine of stare decisis until about the 1920s.[194]

In this Part, I first develop the economic case for the Court's current approach. Next, I identify some countervailing cost considerations that cut in favor of the historical approach. Ultimately, I conclude that the economic model favors the historical approach in that the economic arguments in favor of the modern dichotomy are overbroad.

A. Economics and the Dichotomy in the Modern Court

The modern Court offers two principal justifications for a diminished standard of deference to constitutional precedent. First, the Court has suggested that deference to erroneous constitutional precedent at the expense of the underlying—and controlling—document would violate the judicial oath to uphold the Constitution.[195] Justice Douglas articulated the point as follows: "A

(subjecting states to suit for copyright infringement); 35 U.S.C. § 271(h) (1994) (subjecting states to suit for patent infringement).

192. *See* Lee, *supra* note 5, at 703–06.

193. *See id.* at 708–28.

194. *See id.*

195. *See* South Carolina v. Gathers, 490 U.S. 805, 824–25 (1989) (Scalia, J., dissenting). The *Gathers* Court followed *Booth v. Maryland*, 482 U.S. 496, 508 (1987), which held that the Eighth Amendment bars admission of victim-impact evidence during the penalty

judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it."[196]

The Court's second justification emphasizes the unique difficulty of overturning constitutional decisions outside the judicial process. Modern decisions often paraphrase Justice Brandeis, "whose memorable prose [on this point] has since become a mandatory part of the burial rite for any constitutional precedent"[197]:

> *Stare decisis* is not, like the rule of *res judicata*, a universal, inexorable command.... *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.[198]

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phase of a capital trial. *See Gathers*, 490 U.S. at 806–12. The *Gathers* majority position was short-lived. Two years later, Justice Souter voted with the *Gathers* dissenters and the Court overruled *Booth*'s construction of the Eighth Amendment. *See* Payne v. Tennessee, 501 U.S. 808, 811–30 (1991).

196. Douglas, *supra* note 1, at 736; *see also* Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) (asserting that the only "correct" rule of decision is "the Constitution itself and not what we have said about it"); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 29–30 (1994) (arguing that the "judicial power" conferred under Article III includes a "structural inference" that "the Constitution is supreme ... over all competing sources of law," including precedent); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 319 n.349 (1994) ("The Constitution and federal statutes are written law (*not* common law); judges are bound by their oaths to interpret that law as they understand it, not as it has been understood by others.").

197. Lee, *supra* note 5, at 704.

198. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–08 (1932) (Brandeis, J., dissenting) (citations and footnotes omitted), *overruled in part by* Helvering v. Mountain Producers Corp., 303 U.S. 376 (1938), *and in part by* Helvering v. Bankline Oil Co., 303 U.S. 362 (1938). The *Burnet* Court upheld Coronado's exemption from federal income taxes on the theory that the company was an "instrumentality" of state government because it produced its oil under a lease of state school lands. *See id.* at 397–401. The majority in *Burnet* found that this conclusion followed necessarily from *Gillespie v. Oklahoma*, 257 U.S. 501 (1922), and it thus "adhere[d] to the rule there approved." *Burnet*, 285 U.S. at 398. For a related argument for the notion of a weak standard of

The notion of greater respect for statutory decisions depends on a corollary of this second argument. Because "Congress, not th[e] Court, has the responsibility for revising its statutes," the Rehnquist Court has indicated an increased reluctance to overturn statutory precedent.[199] The Court's interpretation of congressional inaction has changed over time, varying from the strong position that silence signifies tacit "approval" of the precedent in question,[200] to the more modest notion that inaction "may be probative to varying degrees" even if it "cannot be regarded as acquiescence under all circumstances."[201]

Are these arguments in favor of the modern constitutional/statutory dichotomy reducible to economic terms? Perhaps they can be framed in error-cost terms under the social loss function. The first rationale, which seeks refuge in the "moral high ground of the judicial oath to uphold the Constitution,"[202] seems susceptible to a powerful counter-argument:

> The judge's oath extends, at least by implication under the Supremacy Clause, to federal statutes and treaties made under its provisions. Thus, if the judge's oath implies a duty to support his own interpretation of the Constitution, "however different from that put on it by his predecessors," the same obligation logically applies to questions of statutory interpretation. The logical end of the judicial oath argument, then, is not a reduced standard of deference to constitutional decisions, but a wholesale abandonment of stare decisis.[203]

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constitutional stare decisis, see *New York v. United States*, 326 U.S. 572, 590–91 (1946) (Douglas, J., dissenting) (asserting that "it is a wise policy which largely restricts [stare decisis] to those areas of the law where correction can be had by legislation," since "[o]therwise the Constitution loses the flexibility necessary if it is to serve the needs of successive generations").

199. Neal v. United States, 516 U.S. 284, 296 (1996). *But see* State Oil Co. v. Khan, 522 U.S. 3, 20–21 (1997) (noting that "the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress 'expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.' " (quoting National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978))), *overruling* Albrecht v. Herald Co., 390 U.S. 145, 146–54 (1968) (holding that vertical maximum price fixing is a per se violation of § 1 of the Sherman Act, 15 U.S.C. § 1).

200. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 488–89 (1940) (refusing to rescind the application of the Sherman Act to labor unions because Congress was aware of the issue and did not legislate).

201. Johnson v. Transportation Agency, 480 U.S. 616, 629 n.7 (1987).

202. Lee, *supra* note 5, at 704.

203. *Id.* at 710–11 (quoting Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), *reprinted in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL

Thus, the logical difficulty with the first rationale is that the judge's oath logically extends with equal force to the Constitution and statutes alike, and therefore provides no basis for distinguishing constitutional and statutory precedent.

Perhaps the argument turns on the assumption that the oath to uphold the Constitution is somehow more important than the oath to follow statutes. Perhaps Justice Douglas's point depends on a hypothesis that constitutional errors are more costly than statutory errors in terms of their magnitude. If constitutional decisions have a predictably broader impact than their statutory counterparts, then the social cost of a constitutional error EC^C may be more significant than the social cost of a statutory error EC^S. If so, a lesser degree of deference to constitutional decisions could be justified under the economic model because the condition for reversal of constitutional precedent $[EC^C(Y) > AC(X) + LC(X)]$ would be more likely to be satisfied than the condition for reversal of statutory precedent $[EC^S(Y) > AC(X) + LC(X)]$.

The organic nature of our Constitution may lend support to this conclusion. Constitutional decisions frequently "establish [or, depending on the decision, disestablish] governmental structures"; they are "the framework for all political interactions."[204] Decisions on such fundamental matters are likely to have widespread effects on a broad range of individuals and institutions.[205]

Consider the Court's decisions as to the scope of governmental powers—such as the federal government's power under the Commerce Clause and state governments' powers under the Commerce Clause's so-called "dormant" counterpart.[206] The Court's expansive construction of the Commerce Clause provides the foundation for much of the regulatory infrastructure of the modern administrative state, as well as for private investment and commercial

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THOUGHT OF JAMES MADISON 390, 391 (Marvin Meyers ed., rev. ed. 1981)).

204. Easterbrook, *supra* note 2, at 431. For reasons noted below, Judge Easterbrook suggests that the "structural" dimension of constitutional decisions actually undermines the modern dichotomy. *See infra* notes 224–25 and accompanying text.

205. *But see infra* Section B.1 (rejecting the unassailability of this conclusion).

206. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 575, 577–78, 580–81 (1997) (discussing the prohibition of the dormant Commerce Clause); Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 391–92 (1983), *implicitly overruling* Public Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83, 84–90 (1927) (holding that the states had power under the dormant Commerce Clause to regulate retail electric rates but not wholesale rates); *see also* United States v. Lopez, 514 U.S. 549, 552–59 (1995) (discussing the history of Congress's power under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3).

transactions that are premised on its existence.[207] Also significant are the Court's dormant Commerce Clause decisions, which likewise sustain state infrastructures that are premised on the existence of state power within their current domains.[208]

The nature of the error costs associated with such extensive constitutional precedents will include not only the amorphous failure to implement the will of the lawmaker as expressed in the underlying legal text, but also the more concrete expenditure of resources aimed at extra-judicial correction of such errors. Actual instances of such extra-judicial correction may be relatively rare,[209] but the relevant "transaction cost" component of error costs must also encompass the costs of the many failed attempts at correction of Supreme Court decisions through the political process.[210] Such costs are real and concrete and, arguably, may be more significant when the precedent is of constitutional dimension. If constitutional decisions have broader application than their statutory counterparts, the extent of and incentive for efforts at extra-judicial correction should be greater in the constitutional realm, so that $EC^C > EC^S$.

Even if the *magnitude* of constitutional error were rejected as a basis for a diminished standard of stare decisis, the modern Court's approach might nevertheless be understood in error-cost terms. Under the second rationale set forth above, constitutional errors are deemed more costly than other errors not because of their magnitude, but because of their longevity. Errors in statutory construction may be erased even without any action by the Court, because " 'Congress

207. *See Lopez*, 514 U.S. at 574 (Kennedy, J., concurring) (asserting that "the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point").

208. The above analysis may fail to account for certain long-term error costs associated with an improperly expansive conception of governmental power. An argument could be made, for example, that the short-term adjustment costs associated with rescinding governmental regulatory power would be outweighed by the long-term efficiencies flowing from deregulation.

209. The handful of constitutional amendments overruling specific Supreme Court precedents include U.S. CONST. amend. XI (restricting the application of *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), to forbid certain suits against states in federal court); *id.* amend. XIV, § 1 (abrogating *Scott v. Sanford*, 60 U.S. (19 How.) 393, 399–454 (1857), which held that freedmen were not citizens of the United States and therefore lacked the right to sue in federal courts); *id.* amend. XVI (abrogating *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 553–86 (1895), which held invalid the unapportioned federal income tax); *id.* amend. XXVI (abrogating *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970), which held that Congress could not set the minimum voting age in state elections).

210. For a discussion of several such amendments, see Boudreaux & Pritchard, *supra* note 39, 152–61 (offering a public-choice analysis of the failed "child labor amendment," the "equal rights amendment," the "term limits amendment," and others).

is free to change th[e] Court's interpretation of its legislation.' "[211] But constitutional errors are much less likely ever to be corrected without some intervention by the Court because "[r]evision of a constitutional interpretation ... requires the cumbersome route of constitutional amendment," and this process is thought to be nearly "impossible as a practical matter."[212] If error costs associated with constitutional decisions are more likely to persist without external correction, a diminished standard of deference might be appropriate because expected EC^C may be greater than expected EC^S over time.

The comparative ease of extra-judicial reversal of statutory precedent may also affect the error-cost element in another way. Until now, the analysis has proceeded on the assumption that the current Court's perception of error is itself accurate and certain. In other words, the assumption is that the Court operates with perfect certainty and accuracy when it determines that an earlier decision is in error. In reality, of course, the Court likely will proceed in the face of some degree of uncertainty as to whether or not an earlier decision truly fails to implement the intent of the governing text, whether constitutional or statutory. If so, the relative ease of congressional reversal of statutory precedent, as compared to the difficulty of amending the Constitution, may suggest a relevant difference in the Court's level of certainty as to the likelihood of an error.

In statutory cases, the Court has suggested that congressional failure to reverse an arguably erroneous precedent gives rise to an inference. The nature of that inference may range from one of tacit congressional approval[213] to the notion that silence "may be probative to varying degrees" even if it is not the equivalent of "acquiescence under all circumstances."[214] Setting aside the difficult questions of whether such an inference reasonably reflects current political reality and whether it undermines constitutional prerequisites to

211. Neal v. United States, 516 U.S. 284, 295 (1996) (quoting Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977)). The *Neal* Court refused to overrule *Chapman v. United States*, 500 U.S. 453, 455–68 (1991), which held that a sentencing court is required by statute to take into account the weight of "blotter paper" with its absorbed LSD in determining whether the weight of the LSD justifies a mandatory minimum sentence. *See Neal*, 516 U.S. at 295–96.

212. Mitchell v. W.T. Grant Co., 416 U.S. 600, 627 (1974) (Powell, J., concurring) (refusing to overrule precedent that had rejected a Due Process Clause challenge to a state procedure allowing the sequestration of property without prior notice or opportunity for a hearing pending a hearing on the merits of the seller's claim that the buyer had defaulted).

213. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 488–89 (1940) (refusing to rescind the application of the Sherman Act to labor unions because Congress was aware of the issue and did not legislate); *supra* note 200 and accompanying text.

214. Johnson v. Transportation Agency, 480 U.S. 616, 629 n.7 (1987).

congressional lawmaking, this inference suggests that the Court's confidence in the accuracy of its statutory precedents should increase over time. If Congress's failure to take action to correct the Court's construction of a statute has some degree of probity as to congressional "acquiescence" to the decision in question, the Court should have greater confidence in the accuracy of its statutory precedents than it would in its constitutional decisions, because the mechanism for reversal of constitutional decisions is much more cumbersome and difficult to implement. Indeed, if the Court's comparatively greater confidence in its statutory decisions translates into fewer errors in the statutory realm, then there may be a further error-cost justification for the modern treatment of statutory precedent.

B. *Economics and the Historical Approach to Constitutional and Statutory Precedent*

Having made the economic case for the modern Court's approach to constitutional precedent, I now evaluate whether countervailing economic considerations may justify the historical rejection of that approach. If error-cost considerations tend to justify the modern notion of diminished constitutional precedent, how can we explain the historical rejection of that approach?

1. Constitutional and Statutory Error Costs

The error-cost premises that underlie the Court's statutory/constitutional dichotomy are vulnerable for several reasons. First, the notion that constitutional errors are more significant in their magnitude may be true in many cases, but it is not necessarily so. Like many constitutional precedents, some statutory decisions may have broad-ranging effects on a wide array of governmental and private institutions. Examples include decisions construing the preemptive effect of congressional statutes[215] or determining the content and application of regulatory machinery in statutes like the

215. *See, e.g.*, American Airlines, Inc. v. Wolens, 513 U.S. 219, 221–35 (1995) (holding that a section of the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1305(a)(1) (1988) (current version at 49 U.S.C. § 41713(b)(1) (1994)), preempted state law claims brought under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILL. COMP. STAT. ANN. 505/1–505/12 (West 1999)); Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 223 (1983) (holding that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011–2296 (1976) (current version at *id.* §§ 2011–2297g-4 (1994 & Supp. III 1997)), did not preempt California regulation of the construction of nuclear power plants).

Voting Rights Act,[216] Title IX,[217] or even the Americans with Disabilities Act.[218] Such precedents turn entirely on matters of statutory construction, but have the potential to authorize a wide range of governmental regulation, enforcement, and investment. Thus, they are likely to have broad application to both governmental institutions and individuals alike.

Conversely, some constitutional decisions will have only narrow application and thus cannot be thought to give rise to broad-ranging error costs in the sense noted above.[219] For example, when the Court rules on the constitutionality of introducing victim-impact evidence in capital trials,[220] or of screening a child witnesses from the view of a defendant charged with child sex abuse,[221] it affects criminal defendants in certain kinds of cases, but it does not establish precedent on which underlying bureaucracies are structured.

Because there is no necessary connection between the constitutional character of a decision and its breadth of application, the modern rule that constitutional precedent is of lesser value than statutory precedent is difficult to justify on the basis of the expected magnitude of constitutional errors. Direct consideration of the relative breadth of a particular precedent may be economically justifiable, but the constitutional or statutory dimension of the decision is an imperfect proxy for such a consideration.[222]

The notion that constitutional errors are more persistent than statutory errors is vulnerable on similar grounds. Several critics of the modern approach have noted that its primary rationale proves too much. Although some, or perhaps even much, constitutional precedent is not susceptible to statutory reversal, the point is not applicable across the board. Specifically, the Court's "nonactivist decisions"—those declining to extend individual constitutional rights—are in some sense subject to "correction" by the legislative process.[223] So long as Congress acts pursuant to a constitutional grant

216. 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994).
217. 20 U.S.C. §§ 1681–1688 (1994).
218. 42 U.S.C. §§ 12101–12213 (1994 & Supp. III 1997).
219. *See supra* notes 204–10 and accompanying text.
220. *See* Payne v. Tennessee, 501 U.S. 808, 811–30 (1991).
221. *See* Coy v. Iowa, 487 U.S. 1012, 1014–22 (1988).
222. Moreover, the conclusion that a particular precedent has broad application may suggest other, countervailing cost considerations that may militate in favor of *greater* deference. Specifically, a decision to overrule a broadly applicable precedent may give rise to significantly greater adjustment costs than those decisions associated with abandoning a more narrow precedent.
223. Maltz, *supra* note 33, at 471.

of power, subsequently enacted statutes may effectively overrule "the results (if not the decisions)" of precedents that reject "autonomy or equality claims."[224]

At a minimum, this analysis suggests that the modern notion of a diminished standard of deference to constitutional precedent is overbroad. To put the point in economic terms, even if the constitutional nature of a precedent is *generally* an accurate proxy for relatively high error costs, the proxy is imperfect. More fundamentally, the notion of a relatively large and persistent EC^C over time seems to disregard the purpose and structure of the amendment procedures in the Constitution itself. As Judge Easterbrook has noted, Article V of the Constitution intentionally establishes a "hard" amendment process, and the "[r]eady overruling of constitutional cases interferes with" the twin objectives of that process: ensuring the stability of governmental institutions and assuring super-majoritarian support for any constitutional standard.[225]

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224. Monaghan, *supra* note 3, at 742. *But see* City of Boerne v. Flores, 521 U.S. 507, 534–35 (1997) (declaring unconstitutional the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994)); *id.* at 548 (O'Connor, J., dissenting) (suggesting that stare decisis should be particularly weak in constitutional cases, since, "as this case so plainly illustrates—' " 'correction through legislative action is practically impossible' " ' " in such cases (quoting Seminole Tribe v. Florida, 517 U.S. 44, 63 (1996) (quoting *Payne*, 501 U.S. at 828 (quoting Burnet v. Coronado Oil & Gas. Co., 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting))))); Paulsen, *supra* note 128 (manuscript at 166 n.168) (asserting that "[b]ehind the (weak) reasoning of *City of Boerne* lies thinly-veiled judicial hostility to Congress asserting any role as interpreter and enforcer of the Bill of Rights, if that role involves Congress's assertion that the Court has misinterpreted the Constitution in an important way," and that the decision "may be taken as a judicial supremacist statement that Congress may not pass an otherwise constitutional statute if it insults the Court's sense of its own dignity and supremacy").

225. Easterbrook, *supra* note 2, at 430–31 (arguing that a relaxed stare decisis standard not only reduces the "stability of governmental institutions," but also, in constitutional cases, "saps the drive for change in the constitutional text," thereby undermining the requirement of super-majoritarian approval of constitutional rules); *see also* Lee, *supra* note 5, at 703–08 (discussing the possible justifications for the Court's "diminished standard of deference to constitutional decisions"). For discussion of the notion that constitutional rights are intentionally more durable than their statutory counterparts, see Boudreaux & Pritchard, *supra* note 39, at 117 (concluding that not all interest groups seek "constitutional protections for their desired privileges" because "constitutional provisions cost more" than their statutory counterparts and indicating that the difference is "by design"); W. Mark Crain & Robert D. Tollison, *Constitutional Change in an Interest-Group Perspective*, 8 J. LEGAL STUD. 165, 168–70 (1979) (" '[A] constitutional provision confers more durable protection than is possible by ordinary legislative action.' " (quoting William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 892 (1975))); Dennis C. Mueller, *Constitutional Rights*, 7 J.L. ECON. & ORG. 313, 329 (1991) ("A right created by a simple majority vote in the postconstitutional stage is less secure than one protected by the constitution, since it can be taken away by a majority vote.").

In economic terms, this point may be reduced to the assertion that EC^C is actually *less* than EC^S. The argument turns on the notion that although a decision to overturn a purportedly erroneous constitutional precedent arguably saves the specific error cost associated with that precedent, it also gives rise to a general error cost of a different sort. To see why, recall that *EC* is defined as a failure by the Court to implement the intent of the governing statute or constitutional provision. On constitutional issues, Article V evinces a general intent to make cumbersome the process of doctrinal change.[226] Thus, a doctrine that opens the door to relatively unfettered reversal of constitutional precedents on the sole basis that they are perceived to be in error introduces a general error in the form of a collision with the principles of Article V that may well counter-balance the specific error costs associated with any particular precedent.

A related point hearkens back to the uncertainty discussion detailed above.[227] If the decision whether to reverse any particular precedent is understood to turn in part on the Court's degree of confidence that the precedent is in fact in error, Article V suggests that the "standard of proof" ought to be higher in constitutional cases than in statutory ones. Article V, in other words, suggests that the design of the Constitution is to entrench constitutional principles until altered by the super-majoritarian processes it prescribes. Consequently, a higher tolerance for supposed errors in constitutional precedent is more consistent with this design.

Finally, EC^C may be less than EC^S from the standpoint of the transaction-cost component of error costs. This assertion may seem contrary to the above suggestion that Article V dictates a difficult and costly process for any particular attempt at extra-judicial correction of constitutional precedent. But if Article V's costly procedures serve as a barrier to the amendment process, then expected total expenditures on extra-judicial correction may be lower for constitutional precedent than for statutory precedent. In other words, even if the cost of any particular attempt at extra-judicial correction is predictably higher for a constitutional precedent, the expected transaction cost component of the EC^C variable would be lower because fewer constitutional decisions would be challenged outside the judicial process.[228]

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226. *See* Easterbrook, *supra* note 2, at 430.

227. *See supra* Part II.

228. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 335–36 (1991) (criticizing prior empirical studies that reinforced the mistaken assumption of congressional apathy toward the Court's statutory

2. Constitutional and Statutory Adjustment Costs

The economic justification for the modern rule of diminished deference to constitutional precedent is also suspect in its myopic focus on the error-cost element of the loss function. Even assuming for the sake of argument that $EC^C > EC^S$, that assumption alone does not necessarily sustain the conclusion that the modern rule is economically optimal. Other cost factors may cut in the opposite direction and favor a rule of enhanced deference to constitutional precedent. Specifically, even if $EC^C > EC^S$, the condition for abandoning precedent $[EC(Y) > AC(X) + LC(X)]$ may not be more likely to be satisfied for constitutional precedent if $AC^C > AC^S$.

On one hand, it seems difficult to generalize about the comparative adjustment-cost effects of constitutional and statutory precedent. If the assertion that constitutional precedents generate more significant error costs than statutory decisions is overbroad, the same criticism would apply to a conclusion that reversal of constitutional decisions will engender more substantial adjustment costs.

On the other hand, the logic of the error-cost argument in support of a standard of diminished deference to constitutional authority suggests that any expected error-cost savings generally may be offset by corresponding adjustment costs. Recall that the error-cost argument stems from the assertion that constitutional precedents are generally organic in nature and have broader application than their statutory counterparts.[229] Even if we ignore the over- and under-inclusiveness of this argument, it fails to acknowledge the fact that the same breadth of application would tend to generate significant error-cost savings and would also give rise to significant adjustment costs. Thus, when constitutional decisions establish the framework for other laws and governmental institutions, reversal of such decisions would give rise to substantial adjustment costs as public and private actors are forced to restructure the laws and institutions that are built around the abandoned regime.

In terms of the model, the cases where $EC^C > EC^S$ should be the same cases where $AC^C > AC^S$. If so, the condition for abandoning precedent $[EC(Y) > AC(X) + LC(X)]$ may not be more likely to be satisfied for constitutional precedent because any enhanced error-cost savings will be offset by increased adjustment costs. Consider again

decisions and asserting that his research revealed that Congress closely monitors the Court's statutory decisions).

229. *See supra* notes 204–05 and accompanying text.

the Commerce Clause example.[230] Although precedents establishing the basis for federal regulation under the Commerce Clause or state regulation under its dormant counterpart may give rise to substantial error costs when they are erroneous, a decision to overturn them likewise would be costly from an adjustment cost perspective. Thus, although the Court was willing to breathe some new life into the Commerce Clause's restriction on federal legislative power in *United States v. Lopez*,[231] at least two Justices suggested that the reliance interests advanced by the doctrine of stare decisis prevented them from going further and unraveling the bulk of the Court's expansive Commerce Clause precedents.[232]

Structural adjustment costs are not confined to cases expressly defining the scope of governmental power. Similar, albeit narrower, adjustment costs would flow from any decision that indirectly restricts the scope of state powers acknowledged under current case law, for example, by overruling a decision that a certain provision of the Bill of Rights is not incorporated against the states[233] or by adopting a more expansive conception of an individual constitutional right.[234] Accordingly, any decision implicitly authorizing governmental action by rejecting an argument for recognition of an individual constitutional right provides the basis for structural reliance.[235]

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230. *See supra* notes 206–08 and accompanying text.

231. 514 U.S. 549 (1995).

232. *See id.* at 574 (Kennedy, J., concurring) (asserting that stare decisis serves to caution the Court against questioning settled principles regarding Congress's power to regulate commercial transactions); *see also id.* at 601 & n.8 (Thomas, J., concurring) (suggesting that although the Court's Commerce Clause decisions since the 1930s are inconsistent with the original meaning of the Clause, "[c]onsideration of *stare decisis* and reliance interests may convince us that we cannot wipe the slate clean").

233. *See, e.g.*, Benton v. Maryland, 395 U.S. 784, 793–96 (1969) (making the Double Jeopardy Clause of the Fifth Amendment applicable to the states), *overruling* Palko v. Connecticut, 302 U.S. 319 (1937).

234. *See* Easterbrook, *supra* note 2, at 431 & n.27 (raising dormant Commerce Clause and incorporation cases as prototypical examples of decisions that have "widespread effects on planning").

235. As Judge Easterbrook has noted, even constitutional decisions that do not have "structural effects" on government institutions may nevertheless have "widespread effects on planning." *Id.* at 431. Judge Easterbrook offers *Miranda v. Arizona*, 384 U.S. 436 (1966), as an example, and argues that it is a

> structural decision on which other doctrines and institutions depend. For example, to the extent *Miranda* makes it harder to obtain convictions, courts respond by increasing the sentences of those who are convicted, so as to keep general deterrence constant. The higher sentence levels are built into the guidelines that control sentencing in federal courts, and into the penalty structures of state law. One could not change *Miranda* without being prepared to rethink criminal sentences. So too with civil liability. We can contemplate "good faith immunity" for the police with more equanimity, given *Miranda* and the

Rejection of a commercial speech claim, for example, invites institutional reliance in the form of enforcement mechanisms aimed at the commercial activity in question. Consider the Court's attorney-advertising jurisprudence, which substantially limits the permissible scope of attorney-advertising regulations, but specifically upholds state bar associations' power to regulate in-person solicitation of clients[236] and to prohibit direct mail solicitation of victims during the first thirty days after an accident.[237] State bar associations have adopted regulations and enforcement mechanisms that presuppose the validity of these precedents.[238] Any decision to overturn them would undercut these regulatory frameworks and enforcement mechanisms and produce significant structural adjustment costs.

Again, a point of caution is in order: just as the constitutional dimension of a decision is an imperfect proxy for error costs,[239] it also fails as a proxy for high adjustment costs. Although a decision *restricting* the reach of the federal government's authority under the Commerce Clause or the states' authority under its dormant counterpart would undermine institutional and structural investment built around the earlier, more expansive regime, the same would not necessarily hold when the Court moves in the opposite direction. A decision *expanding* governmental authority would not be expected to undercut structural reliance interests to any significant degree.

C. *Applying the Model*

The net effect of the above discussion is that the economic model does not sustain a diminished standard of deference to constitutional precedent in all cases. Erroneous constitutional precedents may sustain more significant and more durable error costs than their statutory counterparts. Then again, they may not. Indeed, even in cases where $EC^C > EC^S$, error-cost savings associated with reversal may be offset by predictably higher adjustment costs. Thus, while the economic model can be manipulated to justify a general depreciation of the precedential weight of constitutional decisions, a more comprehensive understanding of the competing economic factors at

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pressure it places on police to behave, than we could if only the pre-*Miranda* voluntariness doctrines governed interrogations.

Easterbrook, *supra* note 2, at 431–32.

236. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 468 (1978).

237. *See* Florida Bar v. Went For It, Inc., 515 U.S. 618, 635 (1995).

238. *See, e.g.*, ALABAMA RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1996); COLORADO RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1999).

239. *See supra* note 225 and accompanying text.

stake seems to reject this approach.

As I have noted elsewhere, the current Court's notion of a diminished standard of deference to constitutional authority represents a rhetorical departure from earlier doctrine.[240] But although the Rehnquist Court now seems settled on this rhetorical device, the results of the Court's decisions may be explained under a straightforward application of other strands of the doctrine. The Rehnquist Court's practice to date suggests that the constitutional dimension of a decision has been insufficient by itself to justify its reversal.[241] A number of the Court's recent constitutional overrulings easily could be justified under the notion that "rules of procedure" are of diminished precedential value,[242] while others might be explained under the principle that accords reduced deference to undermined authority.[243] In each instance, the Court easily could have abandoned earlier constitutional authority under doctrinal

240. *See* Lee, *supra* note 5, at 712–30.

241. *See id.* at 729–30.

242. *See, e.g.*, United States v. Gaudin, 515 U.S. 506, 521 (1995), *overruling* Sinclair v. United States, 279 U.S. 263 (1929). *Gaudin* held that "materiality" was a factual matter for the jury to decide and not a matter of law for the court to resolve. *See Gaudin*, 515 U.S. at 521. The Court also noted that *Sinclair*'s precedential value was minimal because it established a "procedural rule . . . which d[id] not serve as a guide to lawful behavior." *Id.* In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), the Court overruled *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), and held that all race-based governmental classifications must be analyzed under a strict scrutiny standard. *See Adarand*, 515 U.S. at 227–31. In language similar to that of the *Gaudin* Court, the *Adarand* Court noted "that reliance on a case that has recently departed from precedent is likely to be minimal, particularly where, as here, the rule set forth in that case [*Metro Broadcasting*] is unlikely to affect primary conduct in any event." *Id.* at 234. Likewise, *Payne v. Tennessee*, 501 U.S. 808 (1991), suggested that the Court's prior decisions precluding victim-impact evidence in capital cases under the Eighth Amendment were ripe for rejection because cases "involving procedural and evidentiary rules" do not sustain significant reliance interests. *Id.* at 828.

243. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 235–36 (1997) (suggesting that the Establishment Clause decisions precluding federal funding of programs on parochial school premises were subject to reversal because there had been a "significant change in, or subsequent development of, our constitutional law"); Seminole Tribe v. Florida, 517 U.S. 44, 66 (1996) (noting that *Union Gas* was "a solitary departure from established law" and was of "questionable precedential value, largely because a majority of the [*Union Gas*] Court expressly disagreed with the rationale of the plurality"), *overruling* Pennsylvania v. Union Gas Co., 491 U.S. 1, 7 (1989) (upholding Congress's power to abrogate a state's Eleventh Amendment immunity by unequivocally expressing its intent to do so); *Gaudin*, 515 U.S. at 521 (noting that *Sinclair*'s "underpinnings" had been "eroded . . . by subsequent decisions of this Court"), *overruling Sinclair*, 279 U.S. at 263; United States v. Dixon, 509 U.S. 688, 704, 709–10 (1993) (asserting that *Grady v. Corbin*, 495 U.S. 508 (1990), was "wholly inconsistent with earlier Supreme Court precedent" and that *Grady*'s foundations were undermined by *United States v. Felix*, 503 U.S. 378 (1992), which "recognize[d] a large exception" that "avoid[ed] a 'literal' (i.e., faithful) reading of *Grady*"), *overruling Grady*, 495 U.S. at 508.

strands that find sound theoretical support under the economic model.

CONCLUSION

For at least the past few decades,[244] academic commentary has almost universally condemned the Supreme Court's doctrine of precedent as incoherent and disingenuous.[245] In some cases, the cynical view is undoubtedly accurate; not every application of the Court's principles of stare decisis can be championed as a triumph of reason.

But if the Court's doctrine of stare decisis largely "has been with us since the founding era,"[246] then perhaps it deserves a chance to be taken seriously. This Article does so by theorizing that principles of stare decisis are designed to minimize a social loss function consisting of the principal costs at stake in any given decision as to whether to abandon a prior precedent. Under the economic model developed here, the Court's equivocation as to whether error is a sufficient basis for reversal can be understood to dictate a case-by-case inquiry into the relative magnitude of competing considerations of adjustment and litigation costs on the one hand, and error costs on the other. Other strands of the Court's doctrine can be understood as particularized applications of this same approach.

Admittedly, the economic model falls short of providing objective, universal answers to the questions of whether and when a precedent deemed in error may be set aside. That criticism, however, should be neither surprising nor fatal to the model's utility. Economic analysis allows the stare decisis debate to move from vacuous *ipse dixit* to an analysis of the concrete cost considerations that underlie the various strands of the Court's doctrine of precedent. Thus, instead of unanswerable assertions about whether a precedent has been sufficiently weakened by complaints from lower-court judges about its unworkability, or by subsequent Supreme Court decisions that undermine its theoretical foundations, the model dictates a debate over a precedent's effects on litigation expenses, adjustment costs, and error costs. Identification of the concrete cost considerations that underlie the doctrines of unworkability and

244. As I have noted elsewhere, the cynical view is not unique to the modern era. *See* Lee, *supra* note 5, at 734 n.459 (citing DANIEL CHAMBERLAIN, THE DOCTRINE OF STARE DECISIS: ITS REASONS AND ITS EXTENT 26 (1885); EUGENE WAMBAUGH, THE STUDY OF CASES § 95, at 106–07 (1894)).

245. *See supra* notes 2–6 and accompanying text.

246. Lee, *supra* note 5, at 651.

undermined authority may not yield an objectively verifiable answer, but it does facilitate a debate that extends beyond the empty rhetoric that now dominates the Court's treatment of these issues.