

PERPETUAL DISSENTS

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INTRODUCTION

“I adhere to my belief that the death penalty is in all circumstances cruel and unusual punishment.”¹ “I continue to believe that campaign finance laws are subject to strict scrutiny.”² “I am not yet ready to adhere to . . . *Seminole Tribe*.”³ Statements of this sort—made by dissenters who cling to their losing views in subsequent cases—are familiar to readers of recent Supreme Court opinions. Strangely, however, the practice of “perpetual dissent” has received little attention from the legal academy. Though much has been written on the value of dissent generally⁴ and on the Court’s allegiance (or lack thereof) to the rule of stare decisis,⁵ few have stopped to ponder the practice of continually repeating resistance to a decision even years after the decision has become law.⁶

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¹ *Blystone v. Pennsylvania*, 494 U.S. 299, 324 (1990) (Brennan, J., dissenting).

² *Fed. Election Comm’n v. Beaumont*, 539 U.S. 146, 164 (2003) (Thomas, J., dissenting).

³ *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 699 (1999) (Breyer, J., dissenting).

⁴ See, e.g., PERCIVAL E. JACKSON, *DISSENT IN THE SUPREME COURT: A CHRONOLOGY* 4 (1969). See generally CASS SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 176-82 (2003); William J. Brennan, Jr., *In Defense of Dissents*, 37 *HASTINGS L.J.* 427 (1986); Richard Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 *DUKE L.J.* 243 (1998).

⁵ See, e.g., William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson, and the Consequences of Pragmatic Adjudication*, 2002 *UTAH L. REV.* 53 (2002); Deborah Hellman, *The Importance of Appearing Principled*, 37 *ARIZ. L. REV.* 1107 (1995); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 *VAND. L. REV.* 647 (1999).

⁶ Twenty years ago, Maurice Kelman wrote an essay on the subject entitled *The Forked Path of Dissent*, 1985 *SUP. CT. REV.* 227 (1985). Since then, very little has been said about the practice of perpetual dissents, although several scholars have referred to it within specific contexts. See, e.g., Ronald J. Krotoszynski, Jr., *An Epitaphios for Neutral Principles in Constitutional Law: Bush v. Gore and the Emerging Jurisprudence of Oprah!*, 90 *GEO. L.J.* 2087, 2108-14 (2002); Michael Mello, *Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death as a Punishment*, 22 *FLA. ST. U. L. REV.* 591 (1995); Neil Siegel, *State Sovereign Immunity and Stare Decisis: Solving the Prisoners’ Dilemma Within the Court*, 89 *CAL. L. REV.* 1165 (2001).

And yet the practice should give us pause. On the one hand, history has glorified many great dissenters on the Supreme Court (Justice Holmes in *Lochner*, Justice Harlan in *Plessy*) whose views were eventually redeemed and whose words seem all the wiser in the present when echoed from the past.⁷ It is understandable, then, why an individual Justice would feel the need to continue resisting a decision that she thinks is wrong; perhaps repetition is a key part of the dissenter's ultimate dream of vindication.

On the other hand, opting to repeat a dissent because of continued distaste for a controlling precedent—regardless of the reason for the distaste—is difficult to reconcile with the deeply-rooted American principle that a court ordinarily must follow its previous decisions to preserve its public legitimacy. As Justice Powell has explained, “restraint in decisionmaking and respect for decisions once made are the keys to preservation of an independent judiciary and public respect for the judiciary’s role as a guardian of rights.”⁸ The rule of “stare decisis,” shorthand for the Latin maxim meaning “stand by the thing decided and do not disturb the calm,”⁹ is a bedrock principle of American jurisprudence. Many people, including several Justices themselves, believe that this commitment to precedent underlies the Court’s legitimacy, and it is only from this legitimacy that the Court derives its power.¹⁰

Different Justices hold different views on stare decisis, and possess varying degrees of commitment to the principle. This Essay does not purport to validate one view or challenge another. It does not take on the general problem of stare decisis, questioning when a Justice should vote to overrule a precedent. Instead, it asks a different question: If a Justice is committed to stare decisis—in whatever degree—should he be more willing to overrule precedents from which he dissented originally?

Justices seem to be answering yes, at least in modern times. A review of the dissents on the Rehnquist Court reveals that the perpetual dissent is

⁷ Richard Primus has suggested that some dissents become authoritative precedents without actually being adopted by a majority of the Court. This happens, he suggests, when redeeming courts make the dissents canonical authority. Primus, *supra* note 4, at 245-48.

⁸ Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 288 (1990); see also Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173 (2005); Kevin M. Stack, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235 (1996).

⁹ John Wallace, *Stare Decisis and the Rehnquist Court: The Collision of Activism, Passivism and Politics in Casey*, 42 BUFF. L. REV. 187, 189 (1994) (“The term *stare decisis* is an abbreviated form of the Latin phrase *stare decisis et non quieta moevre*”); see also W. M. Lile, *Some Views on the Rule of Stare Decisis*, 4 VA. L. REV. 95 (1916).

¹⁰ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865-69 (1992); *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991) (“*Stare decisis* is the preferred course because it promotes the evenhanded predictable and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”); *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986) (“[*Stare decisis*] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government both in appearance and in fact.”).

more the norm these days, rather than the exception. Perpetual dissents are not confined to Justices of any particular ideology and are certainly not confined to any particular subject matter. Indeed, as this Essay will reveal, every single member of the Rehnquist Court has stuck with a dissenting view in a subsequent case at least once, and the object of these perpetual dissents ranges from abortion¹¹ to state sovereign immunity¹² to the Federal Arbitration Act.¹³

With a practice this rampant, several questions come to mind: When should a Justice continue to fight what he considers to be a wrong decision, and when should he acquiesce? Do perpetual dissents ever have value or do they represent simple judicial stubbornness? If perpetual dissents increase in frequency over time, what will the consequences be for the Court as an institution, for the doctrine of *stare decisis*, and for the Justices themselves?

This Essay seeks to ignite the conversation by tackling these questions and raising others. Part I discusses the prevalence of perpetual dissents on the Rehnquist Court, an era of the Court's recent history selected for methodological purposes and ease of discussion. After demonstrating that such dissents are common, Part II continues the descriptive project by attempting to identify when the Justices perpetually dissent and when they do not.

Parts III and IV then start a normative discussion on when and whether perpetual dissents should be used. Part III asks whether a perpetual dissent can be justified. It explores the possible value of a repeated dissent and then discusses the potential adverse consequences. In Part IV, I offer my own thoughts as to when a perpetual dissent is proper and when it is not. I argue that authoring a perpetual dissent is problematic because the Justice is not construing the law, but is instead pursuing a sort of "self *stare decisis*"—elevating his commitment to an internally consistent personal jurisprudence over a commitment to adhere faithfully to the Court's precedents. Though these dissents possibly have value as a signal to legislatures or as a discussion starter, I submit that those functions are not the type traditionally assigned to judges, and thus one feels comfortable with perpetual dissents only to the extent one is comfortable with a Justice acting outside of his traditional role.

An alternative to the perpetual dissent is a separate writing that acknowledges a continued disagreement, but accepts the first decision as law.

¹¹ See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting) ("[T]hose who believe that a 5-to-4 vote on a policy matter by unelected lawyers should not overcome the judgment of 30 state legislatures have a problem, not with the *application* of *Casey*, but with its *existence*.").

¹² See, e.g., *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 665 (1999) (Stevens, J., dissenting) ("Until this expansive and judicially crafted protection of States' rights runs its course, I shall continue to register my agreement with the views expressed in the *Seminole* dissents and in the scholarly commentary on that case.").

¹³ See, e.g., *Buckeye Check Cashing v. Cardenga*, 546 U.S. 440, 449 (2006) (Thomas, J., dissenting) ("I remain of the view that the Federal Arbitration Act . . . does not apply to proceedings in state court." (citation omitted)).

The only time this sort of “concurrence under duress” approach is inadequate and must be replaced with a perpetual dissent, I suggest, is when a Justice thinks the issue is an exceedingly important one in which the country will benefit from a continued discussion. But this, of course, is really a political statement, and it is such an extraordinary judicial step that it should be thought of, if you will, as an act of judicial civil disobedience. If a perpetual dissent is ever justified, therefore, it must be used only rarely and always deliberately. Thus used, perpetual dissents could become a powerful communication device. If, however, they continue to be used on a whole host of issues and without a discernable pattern, any potential value of a perpetual dissent will be stifled by its over-use, and, moreover, the institutional consequences of such a heavy practice could be cause for alarm.

I. THE PREVALENCE OF MODERN PERPETUAL DISSENTS

A. *What Is a Perpetual Dissent?*

Dissents in general have not always been common practice on the Supreme Court. Indeed, it was not unusual as late as the 1930s for a Justice to disagree with a majority of the Court but nonetheless decide not to record his dissent (a practice known as “silent acquiescence”).¹⁴ According to political scientists, the early 1940s and the New Deal era brought a “radical and apparently permanent change” from unanimity to “surging rates of concurring and dissenting opinions.”¹⁵ While the first half of the twentieth century saw a fair number of dissents, the boon of separate opinions is a relatively recent phenomenon. Today’s Court, all seem to agree, is one where dissenting and concurring opinions have become the norm.¹⁶

As separate opinions on the Court became more common, dissenters also frequently began to repeat losing views on an issue in subsequent cases.¹⁷ Perhaps the most famous example of the perpetual dissent is the

¹⁴ G. Edward White, *The Internal Powers of the Chief Justice: The Nineteenth-Century Legacy*, 154 U. PA. L. REV. 1463, 1503 (2006).

¹⁵ Thomas G. Walker et al., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361, 361 (1988); see also LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 24 (1988); Lee Epstein et al., *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI., 362, 362 (2001); M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent* 33-39 (Univ. of Chicago Law Sch. Law & Econ., Olin Working Paper No. 263, 2007) available at <http://ssrn.com/abstract=1019074>.

¹⁶ See Epstein et al., *supra* note 15, at 362, 363 fig.1; see also Linda Greenhouse, *Ideas & Trends: Divided They Stand; The High Court and the Triumph of Discord*, N.Y. TIMES, July 15, 2001, § 4, at 1.

¹⁷ Although the deluge of separate opinions since the 1940s substantially increased the opportunities for a justice to dissent perpetually, it would be error to assert that no one engaged in the practice

long-standing practice of Justices Brennan and Marshall to dissent in every death penalty case after 1976 when the Court upheld the constitutionality of capital punishment—a view they repeated more than 2100 times, by one commentator’s count.¹⁸ Though this might be the most dramatic example of a perpetual dissent, Justices Brennan and Marshall are certainly not alone, nor do traditionally liberal Justices have a corner on the market. Traditionally conservative Justices are just as likely to dissent perpetually on issues such as abortion,¹⁹ capital sentencing reform,²⁰ or punitive damages.²¹

Though a “dissent” typically means an opinion rejecting the disposition reached by a majority of the Court, I also include concurring opinions that disagree with the Court’s reasoning even if ultimately reaching the same outcome. Justice Scalia, who has offered the same definition for dissent, explains, “[l]egal opinions are important, after all, for the reasons they give, not the results they announce [T]o get the reasons wrong is to get it all wrong, and that is worth a dissent, even if the dissent is called a concurrence.”²²

Perpetual dissents, thus defined, come in all shapes and sizes—from the “perfunctory notation” to the reiteration “renewed with fresh vigor and elaboration.”²³ I define the phrase to include those opinions that reiterate a past dissenting view and then offer a rationale different from the majority’s (either to concur or dissent). I exclude from my concept of a perpetual dissent instances where a Justice accepts a precedent reluctantly but refuses to extend it, or when a Justice argues that the court incorrectly applied precedent (however misguided) in the present case. The critical feature of a perpetual dissent, according to my definition, is when a Justice refuses to accept the rule of a prior decision (one in which he originally dissented) as controlling authority.²⁴

before that time. See Kelman, *supra* note 6, at 249-50 (referencing examples of “repetitious dissent” in the 1800s).

¹⁸ See Mello, *supra* note 6, at 593.

¹⁹ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., dissenting) (“We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases.”).

²⁰ See, e.g., *Tennard v. Dretke*, 542 U.S. 274, 293 (2004) (Scalia, J., dissenting) (“I have previously expressed my view that this ‘right’ to unchanneled sentencer discretion has no basis in the Constitution. I have also said that the Court’s decisions establishing this right do not deserve *stare decisis* effect” (citation omitted)).

²¹ See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (Thomas, J., dissenting) (“I would affirm the judgment below because I continue to believe that the Constitution does not constrain the size of punitive damage awards.” (internal quotation marks and citation omitted)).

²² Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 33.

²³ See Kelman, *supra* note 6, at 230.

²⁴ To illustrate this distinction, compare the dissents of Chief Justice Rehnquist and Justice Scalia in *Stenberg v. Carhart*, 530 U.S. 914 (2000). The Chief acknowledged the legitimacy of *Casey* in his dissent, but found that the majority misapplied its holding. *Id.* at 952 (Rehnquist, C.J., dissenting). Justice Scalia, on the other hand, condemned *Casey*, calling it “a 5-to-4 vote on a policy matter by un-

At this point, one might start to wonder what the options look like for a Justice who is asked to apply a precedent in which she dissented originally and one she continues to believe is wrong. No one on the Court continues to dissent on every issue that he has lost before; sometimes, they acquiescence to the new rule, despite residual hostility towards it. The second Justice Harlan offers perhaps the most famous contrast to the perpetual dissenter.²⁵ A known critic of *Mapp v. Ohio*²⁶ and *Miranda v. Arizona*,²⁷ Justice Harlan routinely joined subsequent cases that required application of those precedents,²⁸ and he even argued for their retroactive application despite his original dissent and strong opposition to them.²⁹ To be sure, Harlan did not gleefully follow these Warren Court rules that he considered illegitimate. He would often write separately to explain, for example, that “[t]he passage of time has not made the *Miranda* case any more palatable to me than it was when the case was decided.”³⁰ But, he still felt bound to accept the prior decision as precedent, explaining “purely out of respect for *stare decisis*, I reluctantly feel compelled to acquiesce”³¹

A modern day example of such acquiescence can be found in *Clark v. Martinez*,³² a recent immigration case. *Clark* involved an alien detained in the United States for a long period of time pending removal because no other country agreed to receive him.³³ Three years before *Clark*, the Court had concluded in *Zadvydas v. Davis*³⁴ that the government could not detain an alien indefinitely without violating the Due Process Clause.³⁵ It thus read the removal statute to contain an implicit limitation on how long an alien could be detained.³⁶ Four Justices (Justices Kennedy, Thomas, Scalia, and Chief Justice Rehnquist) vigorously dissented, claiming that the majority had strayed from the text and “written a statutory amendment of its own.”³⁷

elected lawyers.” *Id.* at 955 (Scalia, J., dissenting). Scalia’s approach is what I would call a perpetual dissent, while the Chief’s approach is not. The difference is that one continues to decry the legitimacy of a precedent, while the other recognizes the decision as deserving of precedential effect (despite any residual hostility to it).

²⁵ See Kelman, *supra* note 6, at 274-76.

²⁶ 367 U.S. 643 (1961).

²⁷ 384 U.S. 436 (1966).

²⁸ See Donald A. Dripps, *Justice Harlan on Criminal Procedure: Two Cheers for the Legal Process School*, 3 OHIO ST. J. CRIM. L. 125, 161 (2005).

²⁹ TINSLEY YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER ON THE WARREN COURT 135 (1992).

³⁰ *Orozco v. Texas*, 394 U.S. 324, 327 (1969) (Harlan, J., concurring).

³¹ *Id.* at 328.

³² 543 U.S. 371 (2005).

³³ *Id.* at 373-76. For further discussion of *Clark*, see Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 346-50 (2005).

³⁴ 533 U.S. 678 (2001).

³⁵ *Id.* at 690.

³⁶ *Id.* at 689.

³⁷ *Id.* at 705.

When *Clark* (involving a different category of aliens) came before them, the *Zadvydas* dissenters did something interesting. Justice Thomas, joined by Chief Justice Rehnquist, dissented again, claiming that *Zadvydas* had been wrongly decided and did not deserve stare decisis effect.³⁸ To the surprise of many, however, Justice Scalia (a *Zadvydas* dissenter) actually authored the majority opinion in *Clark*, which Justice Kennedy joined. Justice Scalia expressed concern that the opposite holding would establish “the dangerous principle that judges can give the same statutory text different meanings in different cases.”³⁹ For the sake of consistency, therefore, Justice Scalia applied a rule that he had once condemned as illegitimate.⁴⁰

B. *Perpetual Dissents on the Rehnquist Court*

So, when do the Justices choose to dissent perpetually and when do they capitulate to the majority? In attempting to distill some pattern, I reviewed all of what I have deemed “dissents” from 1986 (the year Chief Justice Rehnquist was appointed) to 2005 (the year of Chief Justice Roberts’s appointment). The results are surprising, as I found perpetual dissents from every member of the Rehnquist Court and on a wide variety of subject matter.

I chose the Rehnquist Court as my focus for two reasons. First, since this era of the Court’s history had a very consistent membership over time, these Justices had ample opportunity to see issues repeat on their docket, and thus the time period offers us an excellent petri dish for exploring occurrences of perpetual dissents. Further, this petri dish is an important one; to the extent this trend of longevity in service continues, the abundance of perpetual dissents may persist as well.⁴¹

For simplicity’s sake, I have broken down my research into two groups of Justices: those who frequently engage in perpetual dissent, and those who seem to dissent only occasionally. Unsurprisingly, several of the frequent perpetual dissenters are those Justices, like Justice Thomas, with relatively weaker views on stare decisis—those who place adherence to

³⁸ *Clark*, 543 U.S. at 401 (Thomas, J., dissenting).

³⁹ *Id.* at 386 (majority opinion).

⁴⁰ As I will discuss more fully below, the fact that *Clark* and *Zadvydas* were cases of statutory interpretation is not insignificant. Justice Scalia has made it explicit elsewhere that “[d]eparture from our rule of *stare decisis* in statutory cases is always extraordinary.” *Rasul v. Bush*, 542 U.S. 466, 506 (2004) (Scalia, J., dissenting). Whereas, by contrast, “claims of *stare decisis* are at their weakest in [Constitutional law], where our mistakes cannot be corrected by Congress.” *Vieth v. Jubelirer*, 541 U.S. 267, 305 (2004) (Scalia, J., dissenting).

⁴¹ In the way of a brief disclaimer, please note that my descriptive claims are based on a survey of the Court’s opinions, but I do not employ a particular empirical method. I do not claim to have exhausted the field of perpetual dissents; my goal is only to discuss the ramifications of a currently widespread practice of the Court through illustrative examples.

prior precedent below other allegiances, such as originalism. Even a Justice with a weaker view of *stare decisis*, however, will perpetually dissent only on some issues and not on others. And, conversely, a Justice with a stronger allegiance to *stare decisis* (Justice Souter, for example) still perpetually dissents on occasion. The goal of this Essay is not to keep track of who perpetually dissents more than whom. The interesting observation, instead, is that all of the Justices perpetually dissent for some reason or another; and the quest of this Essay is to explore potential justifications for the practice.

1. The Big Perpetual Dissenters

During Rehnquist's tenure as Chief Justice, Justices Brennan, Marshall, Stevens, Scalia, and Thomas were the most prolific authors of perpetual dissents. Justices Brennan and Marshall are likely the most famous due to their oft-repeated condemnation of the death penalty.⁴² These two Justices, however, registered their continued disagreement on quite a few additional topics during the Rehnquist Court, including the scope of the Eleventh Amendment,⁴³ the applicability of *Younger* abstention to civil proceedings,⁴⁴ and the propriety of summarily reversing decisions.⁴⁵

Though perhaps not as well-known, Justice Stevens's repertoire of perpetual dissents is equally varied. The most noted example of his perpetual dissent is his decision (along with three of his colleagues) to continually record a disdain for the Rehnquist Court's federalism jurisprudence, specifically the *Seminole Tribe* decision.⁴⁶ He has explained that "[d]espite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent,"⁴⁷ and "[u]ntil this expansive and judicially crafted protection of States' rights runs its course, I shall continue to register my agreement with the views expressed in the *Seminole Tribe* dissents and in the scholarly commentary"⁴⁸

Sovereign immunity is not the only area that has drawn Justice Stevens's repeated criticism. Largely alone, he continues to this day to dissent perpetually from the Court's practice of denying *in forma pauperis* status to indigent litigants who have "abused the writ of cert" by filing too many

⁴² See, e.g., *Blystone v. Pennsylvania*, 494 U.S. 299, 324 (1989) (Brennan, J., dissenting); *Boyd v. California*, 494 U.S. 393, 370 (1989) (Marshall, J., dissenting).

⁴³ See, e.g., *Dellmuth v. Muth*, 491 U.S. 223, 233 (1988) (Brennan, J., dissenting).

⁴⁴ See, e.g., *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 373 (1989) (Brennan, J., dissenting).

⁴⁵ See, e.g., *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 50 (1990) (Marshall, J., dissenting); *Rhodes v. Stewart*, 488 U.S. 1, 4-5 (1988) (Marshall J., dissenting).

⁴⁶ See Siegel, *supra* note 6, at 1182.

⁴⁷ *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 97 (1999) (Stevens, J., dissenting).

⁴⁸ *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 665 (1999) (Stevens, J., dissenting).

petitions.⁴⁹ And, though less of a persistent campaign, he has also perpetually dissented in cases involving election law,⁵⁰ the Sixth Amendment,⁵¹ the First Amendment,⁵² the Twenty-First Amendment,⁵³ and even on a small question of administrative law.⁵⁴

Justice Thomas chooses different subjects on which to persistently reiterate his disagreement with precedent. He has repeated his position that the Court's dormant Commerce Clause cases are illegitimate,⁵⁵ and that it is time to "rethink" the modern interpretation of the Establishment Clause.⁵⁶ Justice Thomas has often sustained a view that a prior decision is incorrect and undeserving of stare decisis effect; he has said so much with respect to *Casey* in the context of abortion,⁵⁷ *Penry* with respect to the Eighth Amendment,⁵⁸ *Buckley* in the campaign finance arena,⁵⁹ and *Central Hudson* when it is used to evaluate commercial speech.⁶⁰ And, as we saw in the *Clark* case discussed above, Justice Thomas is also willing to dissent per-

⁴⁹ See, e.g., *Azukbuko v. Zobel*, 127 S. Ct. 686, 686 (2006) (Stevens, J., dissenting); *In re Bauer*, 528 U.S. 16, 17 (Stevens, J., dissenting); *In re Kennedy*, 525 U.S. 153, 154 (1999) (Stevens, J., dissenting); *Glendora v. Porzio*, 523 U.S. 206, 207 (1998) (Stevens, J., dissenting); *Brown v. Williams*, 522 U.S. 1, 1 (1997) (Stevens, J., dissenting).

⁵⁰ See, e.g., *Shaw v. Hunt*, 517 U.S. 899, 918 (1996) (Stevens, J., dissenting) ("As I have explained on prior occasions, I am convinced that the Court's aggressive supervision of state action designed to accommodate the political concerns of historically disadvantaged minority groups is seriously misguided.").

⁵¹ See, e.g., *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 727-28 (1990) (Stevens, J., concurring) ("For the reasons stated in my dissent in *Walters v. National Assn. of Radiation Survivors* . . . I remain convinced that such regulation may not be so pervasive as to deny the individual the right to consult and retain independent counsel." (citation omitted)).

⁵² See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656, 674 (2004) (Stevens, J., concurring) ("I continue to believe that the Government may not penalize speakers for making available to the general World Wide Web audience that which the least tolerant communities in America deem unfit for their children's consumption.").

⁵³ See, e.g., *Newport v. Iacobucci*, 479 U.S. 92, 97 (1986) (Stevens, J., dissenting) ("As I have previously written, the reasoning in the *per curiam* summary disposition in *New York State Liquor Authority v. Bellanca* is blatantly incorrect." (internal quotation marks and citation omitted)).

⁵⁴ See, e.g., *IRS v. Fed. Labor Relations Auth.*, 494 U.S. 922, 938 (1990) (Stevens, J., dissenting) ("I have previously endorsed the view that the Circular is not an applicable law, and I still think that conclusion is correct.").

⁵⁵ See, e.g., *Am. Trucking Ass'n v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 439 (2005) (Thomas, J., concurring); *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 68 (2003) (Thomas, J., dissenting).

⁵⁶ See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (2004) (Thomas, J., concurring).

⁵⁷ See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 982 (2000) (Thomas J., dissenting).

⁵⁸ See, e.g., *Tennard v. Dretke*, 542 U.S. 274, 294 (2004) (Thomas, J., dissenting).

⁵⁹ See, e.g., *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 266 (2003) (Thomas, J., concurring in part and dissenting in part); *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 164 (2003) (Thomas, J., dissenting).

⁶⁰ See, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 377 (2002) (Thomas, J., concurring); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 197 (1999) (Thomas, J., concurring); *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 504 (1997) (Thomas, J., dissenting).

petually in some statutory cases, including, for example, his recurring statements in dissent that the Federal Arbitration Act does not apply to proceedings in state court.⁶¹

Justice Scalia is perhaps most famous for “continu[ing] to dissent from this enterprise of devising an Abortion Code, and from the illusion that we have authority to do so.”⁶² But he has also perpetually dissented on the Court’s role in restricting punitive damages;⁶³ the use of victim impact evidence;⁶⁴ Eighth Amendment restrictions on capital sentencing;⁶⁵ First Amendment protection for pornography;⁶⁶ the constitutionality of campaign finance reform;⁶⁷ the application of the Double Jeopardy Clause to bar successive punishment (as opposed to successive prosecution);⁶⁸ questions of what statute of limitations to use when a federal statute is silent;⁶⁹ and administrative law questions on deference due to agency interpretations.⁷⁰

2. The “Recreational Users” of the Perpetual Dissent

Though the above Justices are the “heavy users” of the perpetual dissent, every member of the Rehnquist Court dabbled in the practice on one issue or another. Chief Justice Rehnquist persistently registered his disagreement with the Court’s abortion cases,⁷¹ its dormant Commerce Clause

⁶¹ See, e.g., *Doctor’s Assocs. v. Casarotto*, 517 U.S. 681, 689 (1996) (Thomas, J., dissenting).

⁶² *Hodgson v. Minnesota*, 497 U.S. 417, 480 (1989) (Scalia, J., dissenting); see also *Stenberg*, 530 U.S. at 952 (Scalia, J., dissenting); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 250 (1989) (Scalia, J., dissenting).

⁶³ See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (Scalia, J., dissenting).

⁶⁴ See, e.g., *South Carolina v. Gathers*, 490 U.S. 805, 823 (1989) (Scalia, J., dissenting), *overruled by* *Payne v. Tennessee*, 501 U.S. 808 (1991).

⁶⁵ See, e.g., *Brown v. Payton*, 544 U.S. 133, 147-48 (2005) (Scalia, J., concurring); *Smith v. Texas*, 543 U.S. 37, 49 (2004) (Scalia, J., dissenting); *Tennard v. Dretke*, 542 U.S. 274, 293-94 (2004) (Scalia, J., dissenting); *Buchanan v. Angelone*, 522 U.S. 269, 279 (1998) (Scalia, J., concurring).

⁶⁶ See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656, 676 (2004) (Scalia, J., dissenting); *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 787-88 (2004) (Scalia, J., concurring).

⁶⁷ See, e.g., *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 257 (2003) (Scalia, J., concurring in part and dissenting in part).

⁶⁸ See, e.g., *United States v. Ursery*, 518 U.S. 267, 297 (1996) (Scalia, J., concurring); *Witte v. United States*, 515 U.S. 389, 406-07 (1995) (Scalia, J., concurring).

⁶⁹ See, e.g., *Reed v. United Transp.*, 488 U.S. 319, 334 (1989) (Scalia, J., concurring).

⁷⁰ See, e.g., *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 24 (2004) (Scalia, J., concurring) (registering his continual disagreement with the Court’s decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001)).

⁷¹ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865-69 (1992) (Rehnquist, C.J., dissenting). Although, as noted above, the Chief later modified his view on this issue in his dissent in *Stenberg*. See *supra* note 24.

jurisprudence as it pertains to hazardous waste removal,⁷² and its interpretation of the Free Exercise Clause with respect to unemployment compensation for those who quit their jobs for religious reasons.⁷³ Justice O'Connor also repeated her dissent on the Court's interpretation of the Free Exercise Clause,⁷⁴ as well as in cases involving First Amendment protection for attorney advertising,⁷⁵ and in cases holding that the Federal Arbitration Act applies to state proceedings.⁷⁶ Justice Breyer perpetually dissented in the Court's Sixth Amendment sentencing reform cases,⁷⁷ the sovereign immunity *Seminole Tribe* line of cases,⁷⁸ and the Court's interpretation of the Commerce Clause.⁷⁹

Justices Kennedy, Souter, and Ginsburg appear more hesitant to engage in a perpetual dissent, but they have each still done it with respect to at least one issue. Justice Kennedy reiterated his resistance to *Austin* and *Buckley* in the Court's campaign finance cases.⁸⁰ Justice Ginsburg continues to adhere to her position that "the Court has no warrant to reform state laws governing awards of punitive damages."⁸¹ And Justice Souter engages in perpetual dissents to withhold "any implicit approval of the holding in *Seminole Tribe*."⁸²

Finally, Justices Powell, White, and Blackmun retired towards the beginning of the Rehnquist Court, and thus (like Justices Brennan and Marshall) this Essay captures only a few of the years where they may have had the opportunity to dissent perpetually. Yet even within this time period,

⁷² See, e.g., *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 349-50 (1992) (Rehnquist, C.J., dissenting).

⁷³ See, e.g., *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 146-47 (1987) (Rehnquist, C.J., dissenting).

⁷⁴ See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 544-45 (1997) (O'Connor, J., dissenting) ("I remain of the view that *Smith* was wrongly decided. . . . Indeed, if I agreed with the Court's standard in *Smith*, I would join the opinion.")

⁷⁵ See, e.g., *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 481 (1988) (O'Connor, J., dissenting).

⁷⁶ See, e.g., *Perry v. Thomas*, 482 U.S. 483, 494 (1987) (O'Connor, J., dissenting).

⁷⁷ See, e.g., *Blakely v. Washington*, 542 U.S. 296, 329 (2004) (Breyer, J., dissenting) ("The Justices who have dissented from *Apprendi* have written about many of these matters in other opinions. At the risk of some repetition, I shall set forth several of the most important considerations here. They lead me to the conclusion that I must again dissent." (citations omitted)).

⁷⁸ See, e.g., *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 772 (2002) (Breyer, J., dissenting); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 699 (1999) (Breyer, J., dissenting).

⁷⁹ See, e.g., *United States v. Morrison*, 529 U.S. 598, 663 (2000) (Breyer, J., dissenting).

⁸⁰ See, e.g., *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 326 (2003) (Kennedy, J., concurring in part and dissenting in part) ("I dissented in *Austin* and continue to believe that the case represents an indefensible departure from our tradition of free and robust debate." (citation omitted)); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 410 (2000) (Kennedy, J., dissenting).

⁸¹ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 431 (2003) (Ginsburg, J., dissenting).

⁸² *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 455 (2004) (Souter, J., dissenting).

they have each done it at least once. Justice Powell continued to insist that his dissenting opinion in *Patterson* contained the proper test for when a state may shift the burden of proof in criminal cases.⁸³ Justice Blackmun, though a late-comer to the crusade to dissent on every death penalty case, added his name to the effort,⁸⁴ and also perpetually dissented on whether commercial speech deserves full First Amendment protection,⁸⁵ and on whether laws that discriminate against the mentally retarded should be subjected to heightened review.⁸⁶ And Justice White's perpetual opposition to *Buckley* in the campaign finance arena was actually invoked many years later in Justice Stevens's dissent in *Randall v. Sorrell*⁸⁷ where he explained: "Justice White refused to abandon his opposition to *Buckley* Over the course of his steadfast campaign, he converted at least one other *Buckley* participant to this position and his reasoning has since persuaded me . . . as well."⁸⁸

II. WHEN DO THE JUSTICES PERPETUALLY DISSENT? IS THERE A PATTERN?

Knowing, as we now do, that perpetual dissents are common in recent history, it is natural to consider what factors go into determining when they are unleashed. Or, in other words, as this next part of this Essay will describe: When does a Justice perpetually dissent? No Justice continues to dissent every time he thinks the Court has gone astray in a certain area. Sometimes they acquiesce, bowing to stare decisis despite continued disagreement with the Court's legal rule.

Compare, for example, Justice Kennedy's behavior in two recent "hot button" areas of constitutional law. Although Kennedy was a vocal dissenter in the Sixth Amendment case of *Apprendi v. New Jersey*,⁸⁹ he nonetheless concurred in the subsequent case *Ring v. Arizona*,⁹⁰ explaining that "[t]hough it is still my view that *Apprendi v. New Jersey* was wrongly decided, *Apprendi* is now the law, and its holding must be implemented in a principled way."⁹¹ This attitude presents an interesting contrast to the one Justice Kennedy expressed in *Federal Election Commission v. Beaumont*,⁹² a campaign finance case. Though ultimately concurring in the judgment for

⁸³ See, e.g., *Martin v. Ohio*, 480 U.S. 228, 242 (1987) (Powell, J., dissenting).

⁸⁴ See, e.g., *Tuilaepa v. California*, 512 U.S. 967, 984 (1994) (Blackmun, J., dissenting).

⁸⁵ See, e.g., *Edenfield v. Fane*, 507 U.S. 761, 777-78 (1993) (Blackmun, J., dissenting).

⁸⁶ See, e.g., *Heller v. Doe*, 509 U.S. 312, 334 (1993) (Blackmun, J., dissenting).

⁸⁷ 126 S. Ct. 2479 (2006).

⁸⁸ *Id.* at 2508 (Stevens, J., dissenting) (citations omitted).

⁸⁹ 530 U.S. 466 (2000).

⁹⁰ 536 U.S. 584 (2002).

⁹¹ *Id.* at 613 (Kennedy, J., concurring) (citation omitted).

⁹² 539 U.S. 146 (2003).

other reasons, Justice Kennedy boldly asserted that “[m]y position, expressed in dissenting opinions in previous cases, has been that the Court erred in sustaining certain [campaign finance laws] . . . I adhere to that view, and so can give no weight to those authorities [*Nixon v. Shrink*, for example] in the instant case.”⁹³ Presumably, Justice Kennedy’s views on *stare decisis* did not change between the two cases. What would make Justice Kennedy acknowledge the precedential value of *Apprendi* but not of *Nixon v. Shrink* when he dissented from both cases quite vigorously?

Perhaps the question of when to dissent perpetually is idiosyncratic and cannot be explained collectively. Justices are, after all, individuals who have evolving working relationships with colleagues and, for some, a sense of the law’s fluidity. As part of the descriptive goal of this Essay, however, I attempted to distill some pattern that would explain the use of perpetual dissents across the board. I speculated that the decision to dissent again might be connected to an intensity of conviction, or perhaps with the freshness of the precedent, or maybe with how close they feel they are to achieving that fifth vote necessary to turn the dissenting view into the majority. None of the theories proposed as an explanation for perpetual dissents, however, provides a completely satisfactory explanation. The absence of a pattern, however, is itself an interesting observation and has significance for the justification and proper use of perpetual dissents, as will be explored in Parts III and IV below.

First, a word on the pattern I did discover. Most Justices seem to agree that dissents on issues of statutory construction deserve less repetition. Justice Stevens, for example, eventually gave in to the majority’s interpretation of Title VII in employment discrimination cases involving post-Act seniority systems, despite his prior dissent on the subject.⁹⁴ Chief Justice Rehnquist acknowledged that his view did not prevail in *Armco Inc. v. Hardesty*,⁹⁵ and hence did not continue to dissent in tax cases applying the substantial equivalence test.⁹⁶ Justice O’Connor, who (like Justice Thomas) once perpetually dissented on the question whether the Federal Arbitration Act should apply to state court proceedings, later gave up the effort, signing

⁹³ *Id.* at 163-64 (Kennedy, J., concurring) (citations omitted).

⁹⁴ *See, e.g.,* *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 913 (1989) (Stevens, J., concurring) (“Although I remain convinced that the Court misconstrued Title VII in *American Tobacco Co. v. Patterson*, the Court has correctly applied those decisions to the case at hand. And it is the Court’s construction of the statute—rather than the views of an individual Justice—that becomes a part of the law.” (citations omitted)).

⁹⁵ 467 U.S. 638 (1984).

⁹⁶ *See, e.g.,* *Fulton Corp v. Faulkner*, 516 U.S. 325, 348 (1996) (Rehnquist, J., concurring) (“I have expressed in dissent my belief that the ‘substantial equivalence’ test deviates from the principle articulated in earlier cases . . . However, my view has not prevailed, and *Darnell* simply cannot be reconciled with the compensatory-tax decisions cited in the Court’s opinion. I therefore join the opinion of the Court.” (citations omitted)).

on without comment to cases applying the counter holding in *Southland*.⁹⁷ Justice Scalia also stopped fighting the *Southland* decision, though not without announcing that he would “stand ready to join four other Justices in overruling it.”⁹⁸

Fewer perpetual dissents in statutory cases aligns with the conventional wisdom that stare decisis concerns are at their strongest in this area.⁹⁹ A Justice need not suffer sleepless nights over what he or she considers an erroneous statutory decision for “the obvious reason that Congress can correct a construction it did not intend or does not presently approve, a move ordinarily not open to it in the constitutional context.”¹⁰⁰ Thus, Justice Stevens, who has perpetually dissented on a host of topics, will even acquiesce on statutory issues, saying “it is the Court’s construction of the statute—rather than the views of an individual Justice—that becomes a part of the law.”¹⁰¹

Sustained dissents in constitutional law, perhaps due to the weaker force of stare decisis at work and because the Constitution, as Justice Peter Daniel once put it, “is above all precedents,” are far more common.¹⁰² Every Justice on the Rehnquist Court had at least one constitutional law decision he could not bring himself to follow, and many found themselves repeating a past dissent on a multitude of issues.¹⁰³ After looking through all of these dissents, however, I simply could not find a pattern or satisfactory explanation for when the Justices feel justified to dissent perpetually on constitutional issues and when they do not. I unsuccessfully tried out three propositions.

One theory was that the Justices perpetually dissent for strategic reasons—as an attempt to gain that elusive fifth vote one day. Under this theory, the dissenters are motivated because the original decision was so deeply divided, they feel corrective action must be inevitable. Some of the perpetual dissents do occur when the Court is split five to four. This is true of the four Justices who refuse to recognize the legitimacy of *Seminole Tribe*, and the same four Justices who adhere to their dissent in *Lopez* on the proper scope of the Commerce Clause.¹⁰⁴ It is also true for the four Jus-

⁹⁷ Compare *Perry v. Thomas*, 482 U.S. 483, 494 (1986) (O’Connor, J., dissenting) (reasserting that the Court’s decision in *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), which held that a California arbitration law was preempted by the Federal Arbitration Act, was unfaithful to congressional intent), with *Doctor’s Assocs. v. Casarotto*, 517 U.S. 681, 689 (1996) (holding that a Montana arbitration law was preempted by the Federal Arbitration Act under the Court’s decision in *Southland*).

⁹⁸ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285 (1994) (Scalia, J., dissenting).

⁹⁹ See Lee, *supra* note 5, at 703-04.

¹⁰⁰ John Hart Ely, *The Supreme Court, 1977 Term-Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 10 n.33 (1978).

¹⁰¹ *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 913 (1989) (Stevens, J., concurring).

¹⁰² *Rundle v. Del. & Raritan Canal Co.*, 55 U.S. (14 How.) 80, 99 (1852) (Daniels, J., dissenting).

¹⁰³ See *supra* Part I.B.

¹⁰⁴ See, e.g., *United States v. Morrison*, 529 U.S. 598, 663 (2000) (Breyer, J., dissenting).

tices (Scalia, White, O'Connor, and the Chief Justice) who perpetually dissented on the question of the admissibility of victim impact evidence (those dissenters were later appeased when *Booth v. Maryland*¹⁰⁵ was overruled after a change in the Court's membership).¹⁰⁶

In practice, however, five to four decisions were not more likely to spawn perpetual dissents on the Rehnquist Court. Many perpetual dissents continue, as one scholar described it, "past the limits of hope, beyond the appeal to the intelligence of a future day, and into the realm of the quixotic."¹⁰⁷ Indeed, perhaps the most famous "campaign" of perpetual dissents, the one by Justices Brennan and Marshall to find the death penalty unconstitutional, was basically a two-man operation (although Justice Blackmun eventually joined the fight) without any hope of foreseeable vindication. Similarly, another duo, Justice Thomas and Justice Scalia, have continually teamed up to reassert their view that the Eighth Amendment is not violated when a jury's discretion to consider mitigating evidence is limited.¹⁰⁸

Further, there are many examples of solo perpetual dissents. At least since 1991, Justice Stevens has dissented alone in every opinion that denied in forma pauperis status to petitioners who have filed too many frivolous cert petitions.¹⁰⁹ Similarly, Justice Thomas is not hesitant to repeat his lone views—like, for example, his claim that there is no such thing as a dormant Commerce Clause—even if his arguments are not likely to attract a majority any time soon.¹¹⁰ Not just the "big perpetual dissenters" go it alone. In *Lebron v. National Railroad Passenger Corp.*,¹¹¹ Justice O'Connor, alone, repeated her view—voiced originally in a dissent in *Edmonson*—that the conduct of a private actor is not subject to constitutional challenges if the

¹⁰⁵ 482 U.S. 496 (1987), overruled by *Payne v. Tennessee*, 501 U.S. 808 (1991).

¹⁰⁶ For an example of a perpetual dissent on *Booth*, see *South Carolina v. Gathers*, 490 U.S. 805, 823 (Scalia, J., dissenting), overruled by *Payne*, 501 U.S. 808.

¹⁰⁷ Kelman, *supra* note 6, at 257.

¹⁰⁸ See, e.g., *Brown v. Payton*, 544 U.S. 133, 147-48 (2005) (Scalia, J., concurring); *Smith v. Texas*, 543 U.S. 37, 49 (2004) (Scalia, J., dissenting); *Buchanan v. Angelone*, 522 U.S. 269, 279 (1988) (Scalia, J., concurring).

¹⁰⁹ See, e.g., *Zatko v. California*, 502 U.S. 16, 18 (1991) (Stevens, J., dissenting); *In re Bauer*, 528 U.S. 16, 17 (1999) (Stevens, J., dissenting); *In re Kennedy*, 525 U.S. 153, 154 (1999) (Stevens, J., dissenting); *Glendora v. Porzio*, 523 U.S. 206, 207 (1998) (Stevens, J., dissenting); *Brown v. Williams*, 522 U.S. 1, 1 (1997) (Stevens, J., dissenting).

¹¹⁰ See, e.g., *Am. Trucking v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 439 (2005) (Thomas, J., concurring). Though once accompanied by Justice Scalia in this view, Justice Thomas now goes at it alone. Justice Scalia has noted his "continuing adherence to the view that the so-called 'negative' Commerce Clause is an unjustified judicial invention," but he has concluded, "on *stare decisis* grounds" that he will enforce a negative Commerce Clause challenge in two situations only (laws that facially discriminate against interstate commerce and laws that are indistinguishable from ones previously held unconstitutional by the Court). *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 312 (1997) (Scalia, J., concurring).

¹¹¹ 513 U.S. 374 (1995).

conduct was private in nature.¹¹² And Chief Justice Rehnquist (a rare perpetual dissenter) dissented by himself in *Hobbie v. Unemployment Appeals Commission of Florida*,¹¹³ simply to adhere to a lone dissent he wrote in *Thomas v. Review Board of the Indiana Employment Security Division*¹¹⁴ on whether the denial of unemployment compensation to an employee who quit for religious reasons violates the Free Exercise Clause.¹¹⁵

To add to the confusion, some Justices will give up their perpetual dissent, even in the face of a new five to four decision to affirm the majority view. If the Justices were using strategy to determine when a perpetual dissent was proper, one would not expect to see such acquiescence in a closely-divided decision. Yet several Justices have displayed just this sort of behavior. Justices O'Connor and Souter were among the dissenters in *Veronia School District 47J v. Acton*,¹¹⁶ a case that upheld state-compelled urine testing in schools under the Fourth Amendment. Yet seven years later, in *Board of Education of Independent School District 92 v. Earls*,¹¹⁷ a five to four decision, they wrote separately to acknowledge that despite continued disagreement with *Veronia*, they believed it was the proper precedent to apply.¹¹⁸ Likewise, in a more familiar example, Chief Justice Rehnquist reiterated his *Roe* dissent in *Planned Parenthood v. Casey*,¹¹⁹ but years later acknowledged *Casey*'s legitimacy in his separate opinion in *Stenberg v. Carhart*,¹²⁰ another contentious five to four opinion. These examples of acquiescence are hard to explain if strategy is really the dominating factor in deciding when to unleash a perpetual dissent.

A second discredited hypothesis to describe when Justices perpetually dissent considers the age of the original decision, and this theory could work in one of two ways. On the one hand, "there is a sense in which the newly minted precedent deserves a special immunity from overruling."¹²¹ Thus one might expect perpetual dissents on new decisions to be rare as the Justices adopt a "probationary precedent" allowing time for the decision "to demonstrate its merits and to dispel the doubts raised by the dissent."¹²² On the other hand, however, *stare decisis* concerns are arguably weaker for a new decision as it has had less of a chance to accrue reliance interests; so perhaps one could expect more perpetual dissents right away and fewer dissents as a decision ages.

¹¹² *Id.* at 409 (O'Connor, J., dissenting).

¹¹³ 480 U.S. 136 (1987).

¹¹⁴ 450 U.S. 707 (1981).

¹¹⁵ *Hobbie*, 480 U.S. at 148 (Rehnquist, J., dissenting).

¹¹⁶ 515 U.S. 646 (1995).

¹¹⁷ 536 U.S. 822 (2002).

¹¹⁸ *Id.* at 842 (O'Connor, J., dissenting).

¹¹⁹ 505 U.S. 833, 944 (1992) (Rehnquist, C.J., dissenting).

¹²⁰ 530 U.S. 914, 952 (2000) (Rehnquist, C.J., dissenting).

¹²¹ Kelman, *supra* note 6, at 234.

¹²² *Id.*

Unfortunately, neither account adequately explains the perpetual dissents on the Rehnquist Court because there are many examples of reiterated hostility towards old and new precedents alike. *Buckley* continues to stimulate repeated dissent thirty years after it was decided in 1976,¹²³ as does *Penry*'s 1989 holding about the constitutional limits of a capital sentencing jury's discretion.¹²⁴ Indeed, *Miranda*, a 1966 decision that might have seemed old and stable by the turn of the century, was declared illegitimate in 2000 by Justices Scalia and Thomas who announced in dissent that they could not adhere to an erroneous decision even if it was a "celebrated one."¹²⁵ By contrast, *Ashcroft v. ACLU*,¹²⁶ a case from 2002 about the First Amendment implications of child protective internet legislation, spawned a perpetual dissent within two years.¹²⁷ And *Seminole Tribe* was on the books only for three years before Justice Stevens declared he would continue to register his disagreement with it,¹²⁸ and Justice Breyer explained he was "not yet ready to adhere to" it.¹²⁹ Since practice shows neither old nor new precedents are safe from perpetual dissents, the age of a precedent does not adequately explain when a Justice feels sustained dissents are proper.

My third and final hypothesis about when justices perpetually dissent also proved ultimately unsatisfactory as a perfect predictor, but could provide the most logical explanation. A Justice may continue to renew a dissenting opinion simply because he or she really cares about the issue. Might not plain old strong conviction be what is driving these perpetual dissents? Justice Brennan seemed to think so. While lecturing on dissents generally he explained that a repeated dissent, what he called a "special kind" of dissent, is the Justice's way of saying "Here I draw the line."¹³⁰ Perhaps, figuring out why a Justice perpetually dissents is as simple as finding, frankly, what pushes his or her individual buttons. This theory would certainly explain some of the perpetual dissents on the Rehnquist Court. Thus, for example, due to the heightened emotions that surround the death penalty, one can easily understand why Justices Brennan and Marshall would feel a continued need to "draw the line" on the constitutionality of capital punishment.

¹²³ See, e.g., *Randall v. Sorrell*, 126 S. Ct 2479, 2506 (2006) (Stevens, J., dissenting).

¹²⁴ See, e.g., *Tennard v. Dretke*, 542 U.S. 274, 293 (2004) (Scalia, J., dissenting).

¹²⁵ *Dickerson v. United States*, 530 U.S. 428, 465 (2000) (Scalia, J., dissenting).

¹²⁶ 535 U.S. 564 (2002).

¹²⁷ *Ashcroft v. ACLU*, 542 U.S. 656, 674 (2004) (Stevens, J., concurring) ("I continue to believe that the Government may not penalize speakers for making available to the general World Wide Web audience that which the least tolerant communities in America deem unfit for their children's consumption . . ." (citation omitted)).

¹²⁸ *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691-92 (1999) (Stevens, J., dissenting).

¹²⁹ *Id.* at 699 (Breyer, J., dissenting).

¹³⁰ Brennan, *supra* note 4, at 437.

The inverse of this theory would allow us to deduce from a Justice's limited use of perpetual dissents where his strong convictions must lie. Justice Souter, for example, only reiterates dissent to note a continued disapproval of *Seminole Tribe*, so it might be safe to assume that he "draws the line" at the Court's sovereign immunity doctrine.¹³¹ Justice Scalia has actually told us what pushes his buttons, noting that "when . . . a constitutional doctrine adopted by the Court is not only mistaken but also unsusceptible of principled application, I do not feel bound to give it *stare decisis* effect—indeed I do not feel justified in doing so."¹³² He adds, "I think it appropriate, in other words—indeed, I think it necessary—for a judge whose view of the law causes him to dissent from an overruling to persist in that position (at least where his vote is necessary to the disposition of the case) with respect to action taken before the overruling occurred."¹³³

Connecting perpetual dissents to strength of conviction has intuitive appeal, and it comports with the idea (explored below) that a perpetual dissent really functions as an act of judicial civil disobedience—a way for a Justice to send a message to the country alerting them to a critical mis-step in the Court's doctrine.¹³⁴ But this description presents two problems. The first is overuse. If perpetual dissents are used only when a Justice feels very strongly about a particular issue, it is hard to explain the extremely wide variety of topics on which repeated dissents have been written. And, if perpetual dissents are used frequently and on a wide variety of topics, they quickly lose their justification as an extreme sign of protest.¹³⁵ When over-used, these judicial acts of civil disobedience begin to look like simple stubbornness, and it becomes hard to believe that deep conviction is really what is doing the work.

The second problem with this theory is the inconsistency of acquiescence. To the extent the Justices feel justified in perpetually dissenting because of a deep moral conviction, or (like Justice Scalia) because they feel *stare decisis* effect is unwarranted for one reason or another, then what explains the times when they eventually acquiescence on these tough issues? In 2000, Justice Scalia declared that he would henceforth apply the voluntariness test of 18 U.S.C. §3501 instead of the protections afforded by *Miranda*.¹³⁶ He made this announcement with great gusto, insisting that "we cannot allow to remain on the books even a celebrated decision—*especially* a celebrated decision—that has come to stand for the proposition that the

¹³¹ See, e.g., *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 455 (2004) (Souter, J., concurring).

¹³² *BMW of N. Am., Inc. v. Gore*, 517 US 559, 599 (1996) (Scalia, J., dissenting).

¹³³ *Am. Trucking Ass'ns v. Smith*, 496 U.S. 167, 202 (1990) (Scalia, J., concurring in the judgment).

¹³⁴ See *infra* Part IV.

¹³⁵ See *infra* Part IV.

¹³⁶ *Dickerson v. United States*, 530 U.S. 428, 465 (2000) (Scalia, J., dissenting).

Supreme Court has power to impose extraconstitutional constraints upon Congress and the States.”¹³⁷ Six years later, however, this threat is left empty as Justice Scalia never again referenced his *Dickerson* dissent and has even joined a number of decisions since 2000 that apply *Miranda*.¹³⁸ Similarly, Justice Thomas has lessened his resistance to the Court’s holding that conditions of confinement are punishment with respect to the Eighth Amendment.¹³⁹ And, Justice Breyer, who had repeatedly called for the demise of preemptory strikes to jurors, now joins opinions that apply the Court’s present legal framework for addressing these challenges.¹⁴⁰

Perhaps the deep conviction that fuels perpetual dissents has a shelf life, lasting only until the Justice assumes he has bigger fish to fry or realizes he is fighting a losing battle. If that is so, that behavior somewhat undercuts the conviction theory for describing the perpetual dissent landscape, as circumstances external to the Justices’ individual fervor on an issue play a part in the decision on when to dissent perpetually and when to refrain.

III. THE SIGNIFICANCE OF THE PERPETUAL DISSENT: CAN IT BE JUSTIFIED?

The practice of reiterating a dissenting view in a subsequent case may be widespread and varied, but a big question remains—why does it matter? Some students of the Court are likely to find a robust practice of perpetual dissents not troubling at all: the Court overrules itself all the time, they might say, and there is nothing illegitimate about a Justice calling for change when he thinks the Court has gone astray. But it is important to remember that justifying a perpetual dissent is a different task from justifying a decision to overrule a precedent. To understand the distinction, consider the following hypothetical: two Justices, Alito and Stevens, confront a case that squarely presents the option to apply or to overrule *Martin*, the Court’s decision denying *in forma pauperis* status to indigent litigants who have “abused the writ of cert” by filing too many petitions. Their decisions should be based on: (1) whether they think *Martin* was wrongly decided (for whatever reason); and (2) if so, whether their views on stare decisis justify adhering to the Court’s original decision. Scholars have debated for years over the nature of these two factors and how they interplay, but this Essay presents a different debate: Should the answer to this question differ

¹³⁷ *Id.*

¹³⁸ See, e.g., *United States v. Patane*, 542 U.S. 630 (2004); *Missouri v. Seibert* 542 U.S. 600 (2004) (Scalia, J., joining O’Connor, J., dissenting on other grounds); *Yarborough v. Alvarado*, 541 U.S. 652 (2004); *Chavez v. Martinez* 538 U.S. 760 (2003).

¹³⁹ See *Hope v. Pelzer*, 536 U.S. 730, 759 n.12 (Thomas, J., dissenting on other grounds).

¹⁴⁰ See, e.g., *Johnson v. California*, 545 U.S. 162, 173 (2005) (Breyer, J., dissenting) (“I join the Court’s opinion while maintaining the views I set forth in my concurring opinion in *Miller-El v. Dretke*.” (citation omitted)).

for the two Justices because only one of them was on the Court at the time of the original decision? To isolate the variable, assume that Justices Stevens and Alito both think *Martin* was wrongly decided and both share the same view on stare decisis and agree that none of the “special circumstances” ordinarily proffered as reasons to depart from stare decisis justify abandoning the precedent. Under those circumstances, should Justice Stevens be freer to dissent because he was part of the original Court that decided the question and lodged his disagreement from the beginning? Is there any reason, in other words, why the mere fact of a prior dissent should influence a subsequent decision to apply the precedent?

My answer to that question is no, in almost all circumstances. And, conversely, I do not think it should matter to a new justice that he was not a member of the Court when a precedent was decided. The only two questions, I believe, that should play into a Justice’s decision about when to apply a controlling case are: Does he think the rule stated by the precedent is wrong, and is there a reason to depart from stare decisis? To me, the moment a Justice asks a third question and takes into account the consistency of his individual jurisprudential legacy at the expense of applying a settled rule of law, he has fundamentally altered his judicial role in an unacceptable way. Reasonable minds can disagree on this conclusion, however, and to form your own view on perpetual dissents, it is worth theorizing what function a perpetual dissent serves and what adverse consequences it could create.

A. *Potential Justifications for Perpetual Dissents*

Perhaps perpetual dissents can be justified as a method to signal to legislators, lawyers, and prospective litigants that the time has come for a precedent to be overruled, or that a legal principle has been stretched to its limit and will not be extended or cannot survive much longer. In a statutory case, for example, a perpetual dissent can easily communicate to the legislature involved that a corrective amendment is necessary. The signaling value of a perpetual dissent applies to constitutional cases as well. In the words of Justice Scalia, regular dissents are beneficial because they “inform the public in general, and the Bar in particular, about the state of the Court’s collective mind.”¹⁴¹ To the extent this is a benefit of a regular dissent, it is amplified in the context of a repeated one. A pattern of resistance, far more than a strongly-worded single dissent, indicates that a precedent is vulnerable and can perhaps prompt action from eager challengers.

To take a concrete and recent example, many people believe that the proponents of “Act 64”—the Vermont campaign finance legislation that was at issue in the 2006 case *Randall v. Sorell*—were well aware that their

¹⁴¹ Scalia, *supra* note 22, at 38.

legislation pushed the limits of *Buckley*.¹⁴² Some people believe, in fact, that the legislature actually designed the bill as a vehicle for the Court to overturn its 1976 decision (an invitation, of course, that the Court declined to accept).¹⁴³ *Buckley* is a decision that has engendered repeated criticism from several members of the Court throughout the years.¹⁴⁴ It is possible, at least, that these perpetual dissents encouraged Vermonters to push the envelope and challenge *Buckley* through legislation; the dissents might have conveyed to those eager to hear that the time was ripe for a change.

To the extent we think experimentation in local legislation is a road to progress (particularly in an area as dicey as that of campaign finance reform), then perpetual dissents can be useful. Such experiments are more likely to occur if the public realizes that the “collective mind of the Court” is open to change. Without the dicta from various Justices expressing a desire to overrule *Buckley*, then perhaps the creators of Act 64 would not have wasted their time. The point is not to trumpet the virtues of Act 64, but to forecast the possibility of an Act 65—potential useful legislation that might remain un-enacted if the fragility of *Buckley* was kept secret.

Perpetual dissents can serve as a useful signal in another way as well—when a change in the Court’s membership is on the horizon. Repeated criticisms of a controversial constitutional decision by members of the Court, particularly a four-justice perpetual dissent, will likely signal to the President and the Senate (and interested lobbying groups) the need to screen potential new appointment candidates for their views on the controversial question. Some may find this consequence objectionable because, “[i]t produces, or at least facilitates, a sort of vote-counting approach to significant rules of law.”¹⁴⁵ Others, however, will see virtue in the fact that the importance of an issue is highlighted when a perpetual dissent exposes the vulnerability of a precedent. According to this view, Americans have a right to know if a constitutional holding that will affect their daily lives is in danger (or shows promise) of changing, and the perpetual dissent serves as a welcome window into the inner workings of the Court at a time when the political branches are preparing for a change in the Court’s membership.

A third potential justification for a perpetual dissent is that it prevents subtle tinkering with doctrine and the muddying of the rule of law. If the votes of perpetual dissenters were not pre-ordained and off the table, authors of majority opinions might bend over backwards to accommodate the dissenters, resulting in very narrow case-specific holdings with no clear rules to guide the future. Similarly, the perpetual dissent may offer an outlet to a frustrated Justice who is fueled by an intense conviction, and who may

¹⁴² See *Landell v. Sorrell*, 382 F.3d 91, 152 (2d Cir. 2004) (winters, J., dissenting), *rev'd sub nom.* *Randall v. Sorrell*, 126 S. Ct. 2479 (2006).

¹⁴³ *Id.*

¹⁴⁴ See *supra* notes 80, 87-88 and accompanying text.

¹⁴⁵ Scalia, *supra* note 22, at 39.

otherwise find himself mis-applying precedents (either consciously or sub-consciously) in order to avoid the result he thinks is intolerable. A world with perpetual dissents, some may say, is better than a world where confusing alternative applications mar the Court's doctrines.¹⁴⁶

A final possible justification for perpetual dissents is that they "ke[ep] the Court in the forefront of the intellectual development of the law."¹⁴⁷ By virtue of the vast amount of dissenting and concurring opinions on today's Court, "the Court itself is not just the central organ of legal *judgment*; it is the center stage for significant legal *debate*."¹⁴⁸ And when a public institution is the center of a country's legal dialogue, the debate can reach a wider audience. Newspapers often report synopses of majority and dissenting Supreme Court opinions (particularly on the most controversial rulings of the day). This means that, at least in theory, a rich discussion on legal issues can take place by everyone's water cooler and not just by the cooler in law school faculty lounges.

Perpetual dissents do their part to extend this outreach. True, when a Justice merely cross-references an earlier dissent, he does not add much to the depth of legal debate. But to the extent the average newspaper reader in 1992 had not encountered then-Justice Rehnquist's dissent in *Roe*, she could wrestle with it when the New York Times reported on the Chief's dissenting opinion in *Casey*. Due to their prominence in our society, Supreme Court Justices are able to showcase their intellect to a national audience; this can enrich the debate not just in our classrooms, but our living rooms as well.

Perhaps the perpetual dissenter—a constant voice in the legal debate—helps evolve arguments and keep them current and in the forefront of public thought throughout the years. In this way, a perpetual dissenter may enrich and energize discussion on an issue by adapting his original view to modern times. A perpetual dissenter on the death penalty, for example, could strengthen his argument with the revelation of modern innocence cases and the advent of DNA evidence. If perpetual dissents can significantly extend and enrich important constitutional conversations, then perhaps they are worth their cost.

B. *The Flip Side: A Condemnation of Perpetual Dissents*

I do not, however, find the above justifications for perpetual dissent particularly persuasive. None of those functions—signaling to legislatures, providing an outlet for frustration, or stimulating discussion—fits the traditional conception of proper judicial responsibilities. Imagine that a circuit

¹⁴⁶ *See id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* (emphasis added).

court judge perpetually dissented in every death penalty case, reiterating his view that the death penalty is unconstitutional. Few would argue that this dissent was a valuable signal to the general populace and the legislative branches; such an act (although probably not unprecedented) would be considered by most to be obstructive. Although the analogy is not perfect—unlike the lower court judge, a Justice is not bound by decisions from a higher court—perhaps the fact that the Supreme Court Justice is the only member of the judiciary who has the luxury of perpetually dissenting should teach us that when she does so she is performing a unique function. The extent to which one buys these potential values of a perpetual dissent depends on one's comfort level with viewing the Justices as quasi-political figures.

When a Justice writes an initial dissent, he is identifying where he thinks the majority misapplied the law. That is a classic judicial function. When a Justice votes to overturn a precedent, he is identifying where he thinks the prior Court misapplied the law *and* he is identifying a “special circumstance” justifying the need to abandon precedent. That, too, is a classic judicial function. When, however, a Justice rejects a controlling precedent merely because he dissented from the original decision—an action that is distinct from his theory on *stare decisis*¹⁴⁹—he is abandoning the job of jurist in favor of becoming a theorist. He has diminished his obligation to apply controlling law simply because he was not part of the Court that made it so. At bottom, he is elevating his individual jurisprudence (and perhaps individual legacy?) and denigrating the need for consistency or at least coherence in the Court's doctrine. To me this is an unacceptable swap.

The risk is that perpetual dissents are used not to benefit the law or the Court as an institution, but rather to promote consistency for the Justices as individuals. On this theory, the Justices do not want to appear intellectually inconsistent (nor do they want their colleagues to point out these inconsistencies as signs of weakness),¹⁵⁰ so they write separately and engage in a sort of “self *stare decisis*.” They cite their own past dissents as authority,¹⁵¹ and they feel the need to justify why their dissent in one case is consistent with their vote in another.¹⁵² It is worth asking, however, whether an alle-

¹⁴⁹ See sources cited *supra* note 5; see also *supra* Part III.

¹⁵⁰ See, e.g., *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 326 (2003) (Kennedy, J., concurring in part and dissenting in part) (“I dissented in *Austin* and continue to believe that the case represents an indefensible departure from our tradition of free and robust debate. Two of my colleagues joined the dissent, including a Member of today's majority.” (citation omitted)).

¹⁵¹ See, e.g., *Am. Trucking Ass'n v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 439 (2005) (Thomas, J., dissenting) (“The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application” (quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting))).

¹⁵² See, e.g., *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 479 (2003) (Ginsburg, J., concurring) (“I join the Court's opinion, satisfied that it is not inconsistent with the opinion I wrote for the Court in *United States v. Navajo Nation*.” (citation omitted)); *James B. Beam Distilling Co. v.*

giance to “self stare decisis” is legitimate. Should concern with the consistency of one’s own voice be part of a judge’s calculus when he decides a case?

Recall that when five Justices of the Supreme Court make a decision, they do not simply announce “the majority opinion”; rather, they announce an “Opinion for the Court.”¹⁵³ And, when the modern Justices hearken back to the words of Chief Justice John Marshall, they use the word “we” to describe the earlier holdings. Relatedly, when a Justice speaks in his capacity as a Circuit Justice (say, in deciding whether to stay a lower court decision pending action on a cert petition) all Justices agree that the chambers decision must be based on the Court’s precedents, and not on the views of the individual Justice.¹⁵⁴ Even if a Justice agrees fully with the petitioner’s argument, he cannot use his power as an individual Justice to stay an action simply because the cert petition appeals to his prior dissenting views; rather, he must vote based “on a clear-eyed estimate of the chances that four votes will be cast to grant review.”¹⁵⁵ It is the Court’s voice, in other words—and not the Justice’s—that must carry the day.

These linguistic distinctions reinforce the idea that the Court (capital C) represents a voice that transcends time and the differences of opinion among its various members.¹⁵⁶ A regular dissent has a role in forming that one voice—majority opinions are often shaped and sharpened by responding to dissenting points of views. But a perpetual dissent—the act of writing separately solely because you did not join the first decision and want to remain consistent—is an emphasis of the “I” over the “We.”

To be clear, it is certainly legitimate for a Justice to vote to overrule a past precedent. Depending on one’s view of stare decisis, this can happen frequently or infrequently. The point here is only that there is no reason for that decision to factor in one’s individual track record on an issue. And when a Justice sticks to his guns on some issues when he has acquiesced to

Georgia, 501 U.S. 529, 545 (1991) (White, J., concurring) (“Nothing in the above, however, is meant to suggest that I retreat from those opinions filed in this Court which I wrote or joined holding or recognizing that in proper cases a new rule announced by the Court will not be applied retroactively even to the parties before the Court.”); Michigan v. Lucas, 500 U.S. 145, 153-54 (1991) (Blackmun, J., concurring) (“I concur in the judgment. I write separately because I was among those who dissented in *Taylor v. Illinois*, where the Court’s majority rejected the argument that the Sixth Amendment prohibits the preclusion of otherwise admissible evidence as a sanction for the violation of a reciprocal-discovery rule.” (citation omitted)).

¹⁵³ In this regard, it is interesting to note that Justice Scalia has observed that when the Court talks skeptically about an opinion, it refers to the judgment as one of “the majority” rather than the judgment of the Court. *Martinez v. Court of Appeals for Cal.*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring).

¹⁵⁴ *Kelman*, *supra* note 6, at 271.

¹⁵⁵ *Id.* (citing *Bd. of Educ. v. Superior Court.*, 448 U.S. 1343 (1980) (chambers opinion)).

¹⁵⁶ For a similar observation, see *Stack*, *supra* note 8, at 2240 (“The presence of a dissenting Justice demonstrates that behind the word ‘Court’ in the ‘opinion of the Court’ sit individual Justices, with only the fact that they constitute a majority of the Court’s membership separating them from their predecessors who filed seriatim opinions.”).

stare decisis in the past, this indicates that he is disregarding precedent, at least in part, because he lost the fight the first time around. In my opinion, this presents an example of political behavior. No longer is a Justice applying and interpreting the law by looking to precedent, original intent, text, or public policy. Instead he has traded in that job for the chance to remain on record and constant as to what he thinks the law should be. That choice may be valuable, but it is also not traditionally judicial.

The opposite, of course, is also true. Few would agree that a new Justice may ignore all precedent up to his first day on the job simply because he was not involved the first time the issue was decided. Theories on stare decisis should not alter depending on whether one voted in the case the first time. To the extent they do, this is non-judicial behavior; for what legal principle does a Justice apply when he refuses to apply a precedent (either in a perpetual dissent or as a new justice) not because it is out-dated or demonstrably wrong, but simply because he was not part of the original majority who decided it? The “that was not me so I am not bound by it” mentality has no place, in my opinion, on the Federal Bench.

* * *

Even if I am right, however, in my condemnation of perpetual dissents, there still exists a question of significance. If one takes as a given that perpetual dissents are political acts, why should it matter? To answer this question—and before rendering a verdict on the practice—it is worth considering the adverse consequences that flow from the perpetual dissent.

First, perpetual dissents pose a problem even for the cynics who believe that the Justices are just political actors primarily interested in imposing their own normative views and beliefs on the rest of society. To the extent you believe this is true, several scholars have invoked game theory to suggest that the Justices are more likely to accomplish their goals if they adhere to stare decisis in the face of decisions they do not like.¹⁵⁷

Under this theory, when the Justices’ normative views differ and one side refuses to adhere to a majority of the Court’s adoption of the other side, they become trapped in a prisoner’s dilemma. The most vivid example in recent history, as Neil Siegl has pointed out, is in the context of the sovereign immunity cases.¹⁵⁸ Justices Stevens, Souter, Ginsburg, and Breyer refuse to join an opinion that applies *Seminole Tribe*. They justify themselves by complaining that the *Seminole Tribe* majority itself belittled the importance of stare decisis by abandoning the precedent of *Union Gas*.¹⁵⁹ Of course, if the *Seminole Tribe* case is ever overruled, then the new dis-

¹⁵⁷ Erin O’Hara, *Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis*, 24 SETON HALL L. REV. 736, 748-49 (1993); see also Siegel, *supra* note 6, at 1182.

¹⁵⁸ See Siegel, *supra* note 6, at 1182.

¹⁵⁹ See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 97-99 (2000) (Stevens, J., dissenting).

senters could refuse to adhere to that new decision because of its disrespectful treatment of *Seminole Tribe*.

Over time, this practice will start to look like a dog chasing its tail. Professor Erin O'Hara theorizes that if Justices continue to replace one another's preferences like this, the net result will be that no one is any better at imposing their normative view on society.¹⁶⁰ She argues that this "non-productive competition" will only flood the dockets with excess litigation from parties who have an incentive to be in the majority for the time being.¹⁶¹ Both Siegel and O'Hara conclude that the ultimate way out of this cycle is for the Justices to commit to *stare decisis* and to resist the temptation to "punish" the other side by refusing to adhere to its precedents. The idea is that "the 'losing' Justice's embrace of the majority's decision [will be] reciprocated in situations in which the precedential shoe is on the other foot."¹⁶² On this theory, perpetual dissents, particularly ones that are joined by a block of four justices, simply add to a growing collective action problem.

Second, the practice of perpetually dissenting can actually influence how the doctrine of *stare decisis* is applied. This is so because the Court's test when deciding whether to overrule a precedent is one that can be influenced by the existence of perpetual dissents. As explained in *Casey*, which most scholars agree sets forth the modern *stare decisis* factors,¹⁶³ when the Court questions whether to overrule a past decision, it asks whether the rule has prompted "a kind of reliance that would lend a special hardship to the consequences of overruling."¹⁶⁴ In *Casey*, the majority concluded that Americans had structured their lives in reliance on *Roe*, and this reliance cautioned against overruling the decision. Indeed, even before *Casey*, scholars and judges commented that it is "the reliance element that is one of the chief inhibitors of judicial overruling."¹⁶⁵ To the extent one believes that the Court's decisions enter the public consciousness and affect the decision-making of the average American, then a perpetual dissent becomes relevant to the *Casey* reliance question at least with respect to closely divided decisions. Once the public discovers the fragility of a precedent, (which would presumably happen if every time it was applied several Justices repeated their view that it was illegitimate), then the decision's ability to stimulate reliance decreases.

¹⁶⁰ O'Hara, *supra* note 157, at 744-45.

¹⁶¹ *Id.* at 743-45.

¹⁶² Kelman, *supra* note 6, at 239.

¹⁶³ Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1551-67 (2000); see also Drew C. Ensign, *The Impact of Liberty on Stare Decisis: The Rehnquist Court from Casey to Lawrence*, 81 N.Y.U. L. REV. 1137, 1141-42 (2006).

¹⁶⁴ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854-55 (1992).

¹⁶⁵ Kelman, *supra* note 6, at 236.

This decreased certainty in the law is perhaps a vice of the perpetual dissent in and of itself, but the problem to which I am referring actually occurs farther down the road when a future Court evaluates the precedent. By decreasing the reliance interests on a precedent, a perpetually dissenting Justice can actually change the stare decisis calculus that the Court applies on that decision in the future. When the future Court evaluates whether Americans have come to rely on a precedent, it might consider the precedent's durability as always in doubt. In this way a continued campaign to erode the public's faith in a precedent can almost sabotage the precedent from the start. Granted, there is nothing wrong with a short-lived precedent per se—some think a decision can be so demonstrably wrong it deserves little stare decisis effect anyway.¹⁶⁶ But there is something mischievous about the fact that a non-majority of the Court can affect a test that is applied by a majority of the Court in the future.

A third consequence to perpetual dissents is the deprivation of a voice at Conference, or in the Justices' internal debate. Differing views on the Court—and dissents in general—have a well-recognized value: they improve the majority opinion by testing its reasoning, pushing its logic, and spotting objections.¹⁶⁷ As Justice Scalia has explained, “the first draft of a dissent often causes the majority to refine its opinion, eliminating the more vulnerable assertions and narrowing the announced legal rule.”¹⁶⁸ When a Justice continues to reject a controlling precedent by simply noting his disagreement without further elaboration, he has withdrawn from the game and deprived his colleagues of his participation. This move diminishes the internal conversation among the Justices. The perpetually dissenting Justice removes himself from the discussion of other secondary issues that might arise, and weakens the fine-tuning of the Court's doctrine that inevitably comes incrementally.

The largest consequence of the perpetual dissent, however, is its effect on the Court's perceived legitimacy. Putting aside what each Justice thinks individually about when he is or is not bound to follow precedent, it is hard to deny that the Court as an institution is subjected to an external pressure to stay consistent over time.¹⁶⁹ Indeed, when critics of the Court speak of “judicial activism” they are, at least in part, concerned about Justices departing from precedent and imposing their own will as the new law of the land. It is common, in other words, to assume that a commitment to prece-

¹⁶⁶ See Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 2-3 (2001).

¹⁶⁷ See Scalia, *supra* note 22, at 41 (“The most important internal effect of a system permitting dissents and concurrences is to improve the majority opinion.”).

¹⁶⁸ *Id.*

¹⁶⁹ See Hellman, *supra* note 5, at 1120.

dent is what insulates the Court from being perceived as a political institution.¹⁷⁰

As the Court has explained (most famously in *Casey* but also elsewhere),¹⁷¹ the Supreme Court's power and general effectiveness depends on its public image, and that public image is tarnished if the general populace believes the Court to be a mere political machine, changing its mind when it changes its membership.¹⁷² As Justice Frankfurter once argued, "the Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction."¹⁷³ And, as Justice Scalia has warned, the Court should not give ammunition to "those cynics who claim that changes in this Court's jurisprudence are attributable to changes in the Court's membership . . . and application of the ancient maxim 'that was then, this is now.'"¹⁷⁴

When a Justice continues to dissent on an issue that is controlled by an earlier decision, he upsets the common perception that the Court is bound by neutral principles. Maybe some law professors no longer believe in this story,¹⁷⁵ but the Court seems to think that the average American does, and it has expressed a keen interest in validating that belief. Indeed, as an example of this phenomenon, Emery Lee has pointed out that in the 1980s and early 1990s when Presidents Reagan and Bush appointed five new Justices to the Court, the general public feared that many old precedents (among them *Roe v. Wade*) would be overturned and that "the Court would be perceived as political in overruling precedents under these circumstances."¹⁷⁶ According to Professor Lee, the Court adapted by requiring a "special justification" to

¹⁷⁰ See Emery G. Lee III, *Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581, 586-87 (2001).

¹⁷¹ Though *Casey* represents the most famous example of the Court's awareness that adhering to stare decisis is important to keep it a legitimate institution in the public eye, it is by no means the only instance of this sort of discussion. In *Payne v. Tennessee*, 501 U.S. 808 (1991), for example, Chief Justice Rehnquist explained for the Court that "*stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* at 827. See also *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986) (stating that stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.").

¹⁷² Hellman, *supra* note 5, at 1109-11; see also Ensign, *supra* note 163, at 1160-61.

¹⁷³ *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting). Justice Harlan has echoed these sentiments, arguing that strongly supporting the need to adhere to precedent is "the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970).

¹⁷⁴ *County of Sacramento v. Lewis*, 523 U.S. 833, 861 (1998) (Scalia, J., concurring in the judgment).

¹⁷⁵ See, e.g., EPSTEIN & KNIGHT, *supra* note 15.

¹⁷⁶ Lee, *supra* note 170, at 587.

overrule constitutional precedents, thereby protecting itself from the accusation that it was acting “politically.”¹⁷⁷

By disregarding precedent simply because he lost the first time around, a perpetual dissenter reveals the man behind the curtain; he gives credence to the claim that the Court is just a building where nine viewpoints are periodically counted and tallied. This revelation and resulting public cynicism, if you believe the Court, chips away at the source of the power for our third branch of government, and could be cause for alarm.

IV. WHEN SHOULD THEY DO IT? A THEORY FOR PERPETUAL DISSENTS

Renewed statements of disagreement may have their place (as a signaling device or discussion stimulant), and it is possible to reject my view that perpetual dissents are difficult to reconcile with the traditional judicial role. Putting that aside, however, it still seems that if the perpetual dissent is ever justified, it must be subject to some restraint; for it is most difficult to take advantage of the perpetual dissenter’s benefits if it is used, as it seems it is today, almost haphazardly. Thus, the final section of this Essay humbly offers my thoughts on when perpetual dissents could conceivably be proper and when they are most certainly not.

My theory is reminiscent of the fable, the “boy who cried wolf,” which cautions us that important messages fall on deaf ears when they are over-used. This wisdom applies to the question of when to write a perpetual dissent. As we have seen, reiterated dissents can signal a need for change to political actors and appeal to a wider audience to increase debate on important legal issues. Regardless of whether a judge should pursue these goals, at the very least their accomplishment requires a willing audience; and reaching an audience is much more difficult if the perpetual dissenter is a “boy who cries wolf.” If perpetual dissents are so common that the readers of Supreme Court opinions just expect them to appear in all cases, then the opinions will not have much impact. If, however, perpetual dissents on the Court are rare, then their effect on the audience changes: a signal is sent indicating the importance of an issue or the need for continued debate or impending change.

Justice Brennan once offered a window into the intense frustration a perpetual dissenter might feel. He explained, “when a justice perceives an interpretation of the [constitutional] text to have departed so far from its essential meaning, that Justice is bound, by a larger constitutional duty to the community, to expose the departure and point toward a different path.”¹⁷⁸ Under these circumstances, a perpetual dissent does not simply offer an alternative analysis (for that could be accomplished without repeti-

¹⁷⁷ *Id.* at 587-88.

¹⁷⁸ Brennan, *supra* note 4, at 437.

tion); the opinion is actually more like an act of civil disobedience. As Justice Brennan explains, “this type of dissent constitutes a statement by the judge as an individual: ‘Here I draw the line.’”¹⁷⁹ A Justice’s attempt to say “Here I draw the line,” however, will start to sound disingenuous if he draws the line in every case.

In this way, the analogy to civil disobedience is helpful. The average protester (resisting the rule of law in a nonviolent way to encourage change) will only be taken seriously and can only be effective if he carefully selects his causes and picks his battles. Lkening perpetual dissents to a sort of judicial civil disobedience, the same condition must apply. If Justice Stevens, for example, was known to bow to *stare decisis* even in the face of decision he despised, imagine the effect of his statement that “despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent.” Readers would know that his conviction was very deep, and the Court’s sovereign immunity doctrine is particularly troubling. Now, however, we know that Justice Stevens will not abandon his dissent and accept controlling precedent on a whole host of issues. The same could be said about Justice Scalia. He does not just draw the line at “devising an abortion code;” he also rejects precedents and perpetually dissents in the context of punitive damages, the use of victim impact evidence, Eighth Amendment restrictions on capital sentencing, First Amendment protection for pornography, campaign finance, and questions involving the statute of limitations to use when a federal statute is silent.¹⁸⁰ Like the boy who cries wolf, a perpetual dissenter waters down the impact of his message when he “continues to adhere to his dissents” on a regular basis and on a wide variety of subjects.

Imagine a world, by contrast, where a perpetual dissent is truly extraordinary. When it did occur, such a statement would indeed signal to potential litigants that the Court’s precedent is fragile and that experimentation on the margins would be welcome; it would really raise the awareness of Presidents and Senators and the public that the Court could change course on this topic at any time (otherwise the actors might assume the threat is empty like Justices Scalia and Thomas in the context of *Miranda*); and, it could potentially trigger significant debate because, since rare, the perpetual dissent itself would become news-worthy. When used that way, a perpetual dissent suddenly becomes a powerful communication tool. The benefits of a perpetual dissent would be captured, but, at the same time, the institutional concerns that accompany them would be minimized: the possibility of nine separate bodies of law seems remote, reliance on the precedents themselves would seem more secure, and the Court’s legitimacy would be re-affirmed more often than it would be eroded.

¹⁷⁹ *Id.*

¹⁸⁰ See *supra* notes 62-70 and accompanying text.

If perpetual dissents were only used in extraordinary circumstances, the Justice who disagrees with a direction taken by the majority has another open avenue. He can, as Professor Kelman suggested twenty years ago, “table” the dissenting view until the Court agrees to revisit the question; in effect, placing his dissent in “temporary cold storage,”¹⁸¹ and even noting that he is “concurring under compulsion, abiding the time when he may win over the majority.”¹⁸²

Indeed, Kelman’s “cold storage” option looks a lot like the typical practice of the second Justice Harlan. Remember that Harlan would generally subordinate his views to the will of the majority, even in the face of decisions he thought were clearly wrong and had dissented from originally. Justice Harlan never felt he had to adhere to a constitutional philosophy or methodology he did not like, and he never felt compelled to extend a decision he thought was erroneous (though once it was extended, even over his dissent, he would faithfully apply the extension).¹⁸³ Thus in no way did he subordinate his views to the point that he felt he betrayed the duties of his conscience or a broader duty to the public to call a spade a spade.

I therefore suggest that the Harlan approach is a healthy alternative to the perpetual dissenter. If the reiterated dissent is ever justified, in my opinion, a Justice should save it for very special occasions and use it only when he thinks the issue is so exceedingly important, that the country will benefit from a continuing discussion on it, and/or that some political actors need a glimpse into the collective mind of the Court to see the fragility of the precedent. A Justice should, in other words, reserve it for the extraordinary times when he feels the need to act as a political figure.

CONCLUSION

It is not important that the justices agree on what issues do or do not justify a perpetual dissent. Nor is it realistic to think that all justices would agree on one theory of stare decisis. What is important, I submit, is that the Justices begin to realize the significance of the perpetual dissent independent from their views on stare decisis. When a Justice repeats a dissenting view in a subsequent case just because he lost the first time around, he is—at least arguably—acting politically. Given the potential costs to this strategy, it should not become commonplace. It is, instead, better reserved for special proclamation—“Here I draw the line, pay attention to this”—and this proclamation will be heard only if perpetual dissents are not overused. This self restraint can be accomplished only if the perpetual dissent is

¹⁸¹ Kelman, *supra* note 6, at 230-31.

¹⁸² *Id.* at 231 (citing Roger Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 219 (1957)).

¹⁸³ *Id.* at 274-75.

thought of as a powerful communication tool and not as a method to maintain a consistent individual jurisprudence.

In any event, the perpetual dissent should at least be something we talk about. As it stands now, the practice has become so common that it is at risk of becoming legitimized by default. There may be a time and a place for a perpetual dissent, but it is certainly a topic worth discussing.