

**Beyond Metaphorical Legitimacy:
A Theory of Perpetual Dissent on the U.S. Supreme Court**

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“The conditions of deliberation are, then, an agent not heedless of the future, not knowing for certain what that future will be as a consequence of his action, but counting upon there being a relation between his action and the response it is likely to receive such that whatever he chooses to do is not equally likely to be frustrated of its wished-for outcome.”

--Michael Oakeshott¹

There are few definite answers in constitutional adjudication. For a United States Supreme Court Justice interpreting an ambiguous constitutional clause, there is a *choice* to be made about its meaning in this case. The choice will be a response to its context and to the numerous agents expected to respond to it. A Justice who chooses to vote with the majority may be responding to the constitutional claims of citizens, or perhaps reciprocating a concession by fellow members of the Court. A Justice who chooses to file a dissenting opinion may hope to vindicate the Court’s public image, or perhaps to prompt a Congressional dialogue. A Justice who dissents repeatedly may respond *both* to political actors who expect continuity from Supreme Court rulings and to other expectations that he believes the majority has repeatedly undervalued – but to deem the former dispensable.

Nor is any of this controversial. It merely describes the practice of adjudication as it is already recognized and understood by its participants and observers. What separates this paper’s theoretical approach from those generally in use is that it draws on

¹ Oakeshott, Michael. *On Human Conduct*, New York: Oxford University Press, 2003, p. 44.

the efforts of a few political philosophers to articulate the presuppositions of the practice. I borrow H.L.A. Hart's account of institutional norms.² To explain the normative force of these norms, I adapt Jeremy Waldron's concept of the circumstances of disagreement. Yet what this theoretical account lacks in novelty it attempts to regain in the degree of articulateness it offers for normatively evaluating the choices of those engaged in adjudication. Its standard of evaluation is responsiveness. A conclusion about responsiveness invites us to confront the fine-grained landscape of reasons from which a judicial decision emerges. It thereby avoids the temptation to speak of legitimacy in aloof, metaphorical terms that obscure the characters of the men and women who decide our constitutional law. It also stops us short of the pitfall of characterizing those reasons as "right" or "wrong" and makes it possible for us to discuss its legitimacy whether or not we agree with it.

When a Supreme Court Justice dissents continuously against the same past decision, all the pitfalls of evaluation stand open. The decision can be reproached for violating the institutional norm against overturning precedent. But this reproach ignores that the norm is flexible in practice. Or the decision can be reproached as wrongly reasoned, but this obscures the violation of the norm altogether and shuts out those who believe it rightly reasoned. The standard of responsiveness answers these objections. The bulk of this paper examines what it means to think of the practice of "perpetual dissent,"³ as I call it, in terms of responsiveness.

² Hart, H.L.A., *The Concept of Law*, New York: Oxford University Press, 1997, p. 138.

³ Although it is not widely used, this convenient name comes from its use by Supreme Court Justice John Paul Stevens in the case *Davis v. Federal Election Commission*, 554 U.S. ___ (2008). (Stevens, J., concurring.) For its use in an academic context, see also Allison Orr Larsen, "Perpetual Dissent," *George Mason Law Review*, 2008.

III. How the Court Talks About Stare Decisis

Latin for “to stand by things decided,” *stare decisis* is the doctrine that present judges ought to uphold past cases as law, if asked to reconsider them. In the United States, the doctrine is a strict dictate for lower federal courts with respect to previous Supreme Court decisions. Supreme Court Justices also defer to *stare decisis* most of the time. But they frequently stretch and break it. The Court has overruled itself 155 times since 1950, and dissenters have called for overrule in many more cases.⁴

Nonetheless, Supreme Court opinions still disregard *stare decisis* self-consciously. Every opinion calling for an overturn defends itself for violating the doctrine. The Court’s official *stare decisis* doctrine has not changed much over the last fifty years: Supreme Court opinions still quote lines in favor and against upholding precedent from cases written as early as the 1920s.⁵ From opinions in perpetual dissent cases, two formulations of the *stare decisis* doctrine appear: with a presumption in its favor and without a presumption in its favor. Despite their crudeness, each formulation implies a different ideal authority relation between the individual Justice and the Court, *qua* institution. The more deference to *stare decisis*, the less the Justice’s authority vis-à-vis the Court.

A. The Presumption View of *Stare Decisis*

The most cited formulation of *stare decisis* is that precedent ought to have a rebuttable presumption in favor of reaffirming it. The majority of Justices claim to hold

⁴ See Epstein, Lee. *The Supreme Court Compendium: Data, Decisions, and Development*, ed. 4, CQ Press, 2007, pp. 197-206.

⁵ See, e.g., *Knickerbocker Ice v. Stewart*, 253 US 149 (1920) and *Industrial Accid. Comm'n v. James Rolph Co.*, 264 U.S. 219 (1924). (Louis Brandeis, J., opinion for the Court.)

this view, and its basic philosophy is reiterated in countless opinions.⁶ It was first refined in 1984⁷ as the requirement of a “special justification” for overruling precedent and was elaborated into a four-pronged test for doing so in *Planned Parenthood of Southeastern Pa. v. Casey* in 1992.⁸

When justifying its use of the presumption formulation, a Court opinion usually cites the value of institutional consistency.⁹ Two advantages are repeatedly claimed for consistency: stable expectations and the appearance of judicial competence and impartiality.¹⁰ The former, which I will address later in this section, can be evaluated case by case.

But the appearance of the Court is a tricky advantage to capture. Perceptions of it would be impossible to track, and the identity of the audience is ambiguous. In most cases, the general public are not even watching.¹¹ Yet the Court’s image must be sustained in regularities over its entire case body. Thus consistency effectively gains *inherent* value in each case. For the individual Justice, this means each of his own decisions is pulled by normative centrifugal pressures to compromise and to conform to longstanding institutional principles, like *stare decisis*. Every judicial decision must give

⁶ See, e.g., *Burnet v. Coronado Oil & Gas*, 285 U.S. 393 (1932). See also Stevens, John Paul, “The Life Span of Judge-Made Law,” *NYU Law Review*, 1983 (“The doctrine of *stare decisis* requires a separate examination”).

⁷ *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

⁸ 505 U.S. 833.

⁹ Hand, Learned. *Bill of Rights*, Harvard University Press, 1958, p. 72. (“...a dissenting opinion cancels the impact of monolithic solidarity on which the authority of the bench of judges so largely depends.”)

¹⁰ The three elements of *stare decisis* that show up in Court opinions are nicely summarized in this statement by Justice John Paul Stevens soon after he arrived on the Court: “The doctrine of *stare decisis* requires a separate examination. Among the questions to be considered are the possible significance of intervening events, the possible impact on settled expectations, and the risk of undermining public confidence in the stability of our basic rules of law.”

¹¹ See Marshall, Thomas R. *Public Opinion and the Supreme Court*, Boston: Unwin Hyman, 1989.

additional weight – a rebuttable presumption – to the factor of consistency, even without particular reasons for doing so in the case at hand.

The view that the Court’s legitimacy depends on its consistency ascribes a “thick” version of institutional image or personality to the Court. Opinions often go so far as to personify the Court, describing its rulings as its “speech” or “voice.” Although it is only metaphorical, this bears a strong analogy to the individual: a trustworthy, principled, and reasonable individual is consistent in his decisions.¹² If we would trust such an individual to rule us, then we will probably trust institutions that produce laws in the manner that principled individuals produce decisions. The classical majority opinion in *Planned Parenthood of Southeastern Pa. v. Casey*¹³ uses this method:

“The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle [in context, *stare decisis*], not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.”

As in this excerpt, Justices writing from the presumption view often fear the Court will appear either incompetent or “political” when its nine members fracture or its rulings vacillate over time. Their assumption seems to be that people outside the Court believe

¹² For further development of this idea: Dworkin, Ronald. *Law’s Empire*, Cambridge: Harvard University Press, 1986.

¹³ 505 U.S. 833 (1992). (O’Connor, J., Opinion of the Court.)

there are “right” answers in law.¹⁴ If the Justices are sufficiently impartial, they are likely to reach the same, right decision in any case. If the vote is divided or reverses a past decision, the Justices must be injecting personal or political preferences into their legal reasoning – or at least *some* of them must be. Justifying his vote for a precedent despite his distaste for it, Justice John Paul Stevens cited “potential damage to the legal system that may be caused by frequent or sudden reversals of direction that may appear to have been occasioned by nothing more significant than a change in the identity of this Court's personnel.”¹⁵ A ruling that overturns a precedent after a Justice is replaced – the aim of perpetual dissent – sounds an alarm of politicization.

The *Casey* formulation of *stare decisis* ratchets up the presumption in favor of precedent as the Court faces a *more* skeptical population. Thus the appearance of unity balances the impressions of illegitimacy that might circulate around a questionable or controversial ruling. This was also the thinking in *Brown v. Board of Education*, in which a unanimous Court faced the nation. But this contravenes another conception of *stare decisis* that sees more controversial rulings, especially those decided on 5-4 votes, as *more* susceptible to overrule because they are less clearly “right.”

At the root of the presumption view of *stare decisis* is distrust of the individual Justice vis-à-vis the Court. The individual Justice may be either unjustified, in light of

¹⁴ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). (O'Connor, J., Opinion of the Court.) (“Despite the variety of reasons that may inform and justify a decision to overrule, we cannot forget that such a decision is usually perceived (and perceived correctly) as, at the least, a statement that a prior decision was wrong. There is a limit to the amount of error that can plausibly be imputed to prior courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term.”)

¹⁵ *Florida Department of Health v. Florida Nursing Home Association*, 450 U.S. 147 (1981). (Stevens, J., concurring.)

disagreement, to settle controversial and important questions; or incompetent, in light of human fallibility, to do so. *Stare decisis* provides a convenient default against the hubris of an individual judge who believes he has all the answers. Justice Curtis' dissent in the infamous *Dred Scott* case is often quoted to this effect:

"[W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean."¹⁶

A Justice can demand moral humility from his colleagues while arguing that *he* is right without any cognitive dissonance. He may simply believe that a small number of judges are not in a place to decide national questions over which public opinion is deeply divided; his view may simply show more individual restraint. For example, O'Connor often argues that questions of moral value require special deference to institutional rules, as she did in *Casey*: "Our obligation is to define the liberty of all, not to mandate our own moral code." None of us want Justices joining the Court with their own idealistic vision of what the law ought to be and attempting to enact it. Justices must be willing to accept the institution and the case law as they find it, and to give up when their view doesn't prevail by the usual channels.

¹⁶ *Dred Scott v. Sandford*, 19 How. 393, 621 (1857). (Curtis, J., dissenting.)

United States Supreme Court Justices are also subject to all the limits of human reasoning. One such limit is uncertainty of the future. It is difficult to overestimate the abstract and uncertain world in which Justices operate. Years after a decision, Justices often cite their uncertainty about its legal outcomes.¹⁷ The whole of their knowledge about how their ruling will be received and implemented in the nation sometimes comes only from common sense and two or three (albeit dense) legal briefs. They decide questions about campaign finance without ever having run campaigns, about criminal procedure without ever having served on a trial court. But predicting exactly how other actors will interpret and react to a broad constitutional ruling is a nearly inhuman feat. Justice Stevens expressed this common sense view in a law review article revealingly entitled “The Life Span of Judge-Made Law”: “A proponent of change confronts a strong presumption against stirring up sleeping animals, for the consequences of change are never completely predictable.”¹⁸ In other words, in the face of uncertainty, the status quo is the best default – because at least it *certainly* avoids upsetting existing plans and policies.

The preservation of “settled expectations” is the most concrete, and perhaps most compelling, virtue of regularly adhering to *stare decisis*. The mantra for this view is former Justice Louis Brandeis’ quote: “In most matters it is more important that the applicable rule of law be settled than that it be settled right.”¹⁹ The test for overruling precedent that the Supreme Court adopted in *Casey* puts great emphasis on settled expectations. Drawing together conditions laid out in other cases, O’Connor for the first

¹⁷ See, e.g., *Federal Maritime Comm’n v. South Carolina Ports Authority*, 535 U.S. 743 (2002). (Breyer, J., dissenting.)

¹⁸ Stevens, John Paul. “The Life Span of Judge-Made Law,” *New York University Law Review*, 1983.

¹⁹ *Burnet v. Coronado Oil & Gas*, 285 U.S. 393 (1932).

time delimits four standards that must be met for *stare decisis* to be disregarded; all have been accepted in the language of subsequent opinions. The two conditions that put great emphasis on settled expectations require, first, that the overrule will not upset any great “reliance interests” that have come to rely on the ruling for rights or other expectations and, second, that the precedent has become “unworkable” for application in the courts.

Unsurprisingly, the presumption view of *stare decisis* frowns on perpetual dissents, which, happening as they often do just a few years apart, rarely offer convincingly *new* reasons for why a precedent should be overruled. Perpetual dissenters usually reiterate all their old reasons in full, or even just cite their former dissenting opinions. Thus perpetual dissent breaks the solidarity of the Court and disrespects its authority. Some have even gone so far as to liken the practice to civil disobedience,²⁰ insofar as the Justice disregards the law (the case law, at least) to cling to his own philosophy about how cases ought to be decided. Perhaps inevitably, some perpetual dissenters even try to sway Justices in the majority to their side over time.

But this account of *stare decisis* offers us no resources for criticizing individual Justices who perpetually dissent, because it is based on *general* conformity to the doctrine. The puzzle, on this view, is how the individual Justice could ever decide to trump the Court. If Justices cannot be trusted beyond tight limits on values issues, then why would they be justified in trumping the Court at all? Why would they have less humility about their beliefs about which issues are important enough to perpetually dissent on than they do about deciding the issues? The very issues Justices care most about are likely to be the ones that others care most about. Thus there is a collective

²⁰ Larsen, Allison Orr. “Perpetual Dissents,” *George Mason Law Review*, vol. 15, issue 2, 2008.

action problem if they are all perpetually dissenting, which becomes institutionally unworkable.

B. The Practical Considerations View of Stare Decisis

Scalia is at war with the notion of institutional legitimacy, or “the good of the institution” as he calls it. Scalia’s contrary conception of legitimacy is of “individual and thoughtful minds” judging what the Constitution originally authorized.²¹ The only source of a Justice’s authority is his appointment, and the only thing obligating his votes beyond that is the Constitution itself that he swore an oath to protect. On this view, it is the duty of the Justice, who represents the correct view, *not* to bow to *mere* institutional pressures. The crux of this view is the Justice’s unshakeable view that his opinion is right, all things considered. To vote any other way is to endorse what he believes is *wrong*. Compromise loses its virtue when what is at stake is not personal interest, which can be sacrificed at will, but impersonal *Justice*. Even if a Justice is willing to compromise on some practical considerations, he cannot compromise what he believes to be the right interpretation of a text, which will be indelibly written into case law.

Former Justice William Brennan, who perpetually dissented on cases involving the death penalty, obscenity, and states’ rights, articulated a similar standard for dissent. Brennan felt obligated not by the original meaning of the Constitution but by its “essential meaning.”²² For Brennan, it was the right and even duty of the Justice to speak

²¹ Scalia, Antonin. “The Dissenting Opinion,” *Journal of Supreme Court History*, 1994.

²² See Brennan, William J. “In Defense of Dissents,” *Hastings Law Journal*, Vol. 37, 1986, at p. 671. (“Of course the judge should seek out the community’s interpretation of the constitutional text. Yet, in my judgment, when a justice perceives an interpretation of the 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.”)

out when he believed the Court was wrong about that essential meaning. Thus this view employs its own normative language: it is not just that the judge is not bound by institutional norms – he is bound by a contrary obligation of Right Reason.

Following this philosophy, a precedent may be overruled for no other reason than that it was wrongly decided. Scalia often appeals to the intuition that a majority vote is merely a stroke of power rather than a *reason*: “What would enshrine power as the governing principle of this Court is the notion that an important constitutional decision with plainly inadequate rational support must be left in place for the sole reason that it once attracted five votes.” The prior majority vote is *only* a signal to outsiders who must obey and not to Justices who must justify.

Scalia in fact acts on this philosophy, frequently overruling precedent and perpetually dissenting.²³ He spearheaded two cases since the 1990s in which a block of four perpetual dissenters finally overturned their targeted precedent.²⁴ Although he often gives additional reasons for his votes to overturn precedent, he sometimes appeals only to the fallaciousness of the decision’s reasoning and its departure from the “right” Constitutional interpretation.

This view of legitimacy may seem obviously unappealing, something few Justices would actually adhere to or anyone would consider legitimate. Yet this view is powerful for two reasons. First, it seems to hold the potential for correcting vast injustices. The

²³ This is not to say that Scalia’s philosophy is consistent. Rather, he has articulated several different standards for when to overrule precedent, from precedent status plus the impossibility of principled application to simple wrongness. But all fall short of the commonly accepted *Casey* standard. See, e.g., *BMW of North America v. Gore*, 517 U.S. 559. (“When, however, 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.”)

²⁴ See *Grady v. Corbin* (1993) on the double jeopardy clause and *Payne v. Tennessee* (1991) on the use of victim impact statements at the sentencing phase of capital trials.

hero of this view is Justice Harlan, and Scalia loves to quote him at length, both in his opinions and in his other written works.²⁵ If the Court is grossly mistaken at any point, then the protest of the individual may save the Court as more reasonable Justices are appointed. This is especially true, according to Scalia, when the issue itself is deeply divisive and was decided merely on a 5-4 vote. Scalia's reply in dissent to the *Casey* majority opinion is, whether or not one agrees with that particular case, compelling:

'But whether it would "subvert the Court's legitimacy" or not, the notion that we would decide a case differently from the way we otherwise would have in order to show that we can stand firm against public disapproval is frightening.'²⁶

Second, mere continuity and institutional image do seem like small concerns when what is at stake is a constitutional interpretation. Each Supreme Court interpretation of the Constitution can vastly and *permanently* expand or contract the range of meanings that a particular legal text will tolerate. The mere vote of a majority of nine men in this case seems inadequate to settle the question. Several legal scholars have argued that the Court should in fact give little deference to *stare decisis*, unless it is plainly embedded in the precedent.

Scalia's and Brennan's view seems even more tenable when we consider the contingency of institutional norms based on an equilibrium of practice. For example, the institutional norm of unanimity has lost significant normative pull on the Supreme Court since the 1940s. Even the presumption for *stare decisis* has been lowered over time.

²⁵ See, e.g., *supra* note 21.

²⁶ *Supra* note 12. (Scalia, J., dissenting.)

Given these changes, it seems hard to argue that contingent institutional norms have any *intrinsic* value to compete against justice interests in any decision.

So where is the catch? It seems the simple statement of the no-presumption view of *stare decisis* is that Justices ought to perpetually dissent when they think a grave injustice has been done, while taking into account the need for institutional continuity. But the problem is that we disagree, drastically, about when a grave injustice has been done. Presumably *any* time a Justice loses on a high-stakes case he believes that a grave injustice has been done and would choose to perpetually dissent.

The key case where this view clashes with the consistency view is when the majority changes soon after a ruling and a question is reconsidered. This in fact happened in 1993 when the Court overruled a 1990 case on the double jeopardy clause. When Justice David Souter joined the Court, he joined the former minority to overturn the previous precedent.²⁷ Those who favor a presumption in favor of *stare decisis* will say that the Court's image must be preserved as unwavering, while the individualist will say that the Court should strive to get the law *right*.

II. A Model of Institutional Norms

Which ideal a Justice espouses loosely correlates with his actual rate of perpetual dissent. Naturally, Justices who claim not to give a favorable presumption to *stare decisis* tend to continue dissenting more often. But here the correlation ends.

It is important to be clear in all that follows that I assume at least some Supreme Court Justices are not merely “political.” Widely respected models of judicial behavior assume that judges are motivated to act only on their policy preferences. One such study

²⁷ *Grady v. Corbin*, 495 U.S. 508 (1990). (Souter, J.J., concurring.)

concludes that, "...overwhelmingly, Supreme Court Justices are not influenced by landmark cases with which they disagree."²⁸ On this view, the doctrines I just explained are no more than the Justices' justifications for their decisions, without being the actual reasoning by which they arrived at their conclusions. But it has been established thoroughly in political science literature that this model is too simplistic. It hastily draws conclusions about the underlying *reasoning* of judicial decisions only from the high correlation between judges' votes and their policy preferences. It also fails to explain why all Justices *do* vote counter to their policy preferences in some cases.

H.L.A. Hart's theory of judicial decision-making is more realistic. For Hart, Justices are always operating amongst institutional norms that condition their reasoning and votes. Long before the recent "attitudinal" studies, Hart wrote against the misperception that judicial decisions are entirely discretionary: "At any given moment, judges, even those of a supreme court, are parts of a system the rules of which are determinate enough at the centre to supply standards of correct judicial decision. These are regarded by the courts as something which they are not free to disregard in the exercise of authority to make those decisions which cannot be challenged within the system."²⁹

For Hart, some institutional rules – the "determinate" centre – are preconditions for authority in every act. A judge's statements will fail to attain the status and authority of judicial decisions if they flout these preconditions of his office. The key seems to be that other political actors will respond to judicial decrees only if they are issued with the

²⁸ See Segal, Jeffrey and Harold Spaeth. *The Supreme Court and the Attitudinal Model Revisited*, Cambridge University Press, 2002.

²⁹ *Supra* note 2, at 147. See also "The courts regard legal rules not as predictions, but as standards to be followed in decision, determinate enough, in spite of their open texture, to *limit, though not to exclude, their discretion*" (my emphasis) at 147.

proper preconditions of authority. If five Supreme Court Justices were to start shouting that the death penalty violated the Eighth Amendment from the steps of the Supreme Court building, the Texas state legislature would not thereby move to clear out its death row. Hence, authority is closely tied to the plausibility of enforcement.³⁰ By analogy, a police officer out of uniform and off duty simply cannot arrest a fellow citizen – he lacks the authority because he has not donned the regalia of his office and other legal actors will not appropriately respond to him. But such preconditions of Supreme Court authority are meager: once a Justice is appointed, he need only adopt the basic responsibilities of his office and express his votes in legal language and published opinions for them to be authoritative.³¹

Yet some institutional norms are not preconditions and therefore can be broken without endangering enforcement. Scalia has often plainly written that violating institutional norms has little impact on the perception of the Court’s authority, and public opinion data seems to substantiate his belief.³² Indeed, *Brown v. Board of Education*, *Roe v. Wade*, and *Bush v. Gore* are all striking demonstrations of how resilient the enforceability of the Court’s word can be. Public opinion polls, despite being at an all-time low after *Bush v. Gore*, have rebounded to roughly 80% approval. More tellingly, each of those controversial decisions was enforced, albeit hesitatingly by some. According to Hart, “A supreme Tribunal has the last word in saying what the law is and,

³⁰ Yet this does not mean that authority and enforcement are coterminous.

³¹ See the United States Constitution, Article III, section i: “The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.”

³² “I doubt that overruling *Booth* will so shake the citizenry's faith in the Court. Overrulings of precedent rarely occur without a change in the Court's personnel.” *Payne v. Tennessee*, 501 U.S. 808. (Scalia, J., Opinion of the Court.)

when it has said it, the statement that the court was ‘wrong’ has no consequences within the system: no one’s rights or duties are thereby altered.”³³

If this were true, it seems that perpetual dissent would never happen. Fortunately, Hart distinguishes different levels of “the system.” What is right or wrong depends on who is asking the question, and what level of the system they occupy. What is right for the Supreme Court Justice may not be what is right for the plaintiffs of the case, or for the legal scholar hashing out the legislative intent. Similarly, what is law will be different for the Supreme Court Justice, voting with at least four other Justices, than what is law for a citizen. While was ineffective for a citizen in Alabama in early 1953 to argue that *Plessy v. Ferguson* was wrong, it was quite forceful for the Supreme Court in 1954 to say the same. Fundamental institutional rules like the finality of the Court’s majority vote are the marks by which those called to enforce and obey the Supreme Court’s rulings recognize them as law – and cannot call them wrong. Court Justices have an entirely different set of institutional norms by which they recognize law as permanent or not – and therefore may criticize past rulings as wrong.

Yet, if Supreme Court Justices have this prerogative, the exercise of which does not endanger enforcement in any given case, it is unclear what restrains it. Certainly, one may object, Justices would not abandon *stare decisis* wholesale because *this* would finally endanger the enforcement of the Court. But it seems safe to expect that Justices would always adopt the standard “as little as I can get away with” in following institutional norms and everything else would be discretionary. This seems in line with Brennan’s claim that it is the Justice’s right to write whatever he believes is correct in his

³³ *Supra* note 2, at 138.

opinion. Yet, within the Court, many of these institutional norms flourish, as we have seen with *stare decisis*. There is a broad gap between the limit at which the Court's enforcement power will break down and what institutional norms claim to allow in a given case. And actual practice clearly falls inside this gap. Obeying *stare decisis* consistently is by no means a precondition of judicial authority, but there is no doubt that it often *is* obeyed even when it is unnecessary for authority and enforcement. In a system of equilibrium of voluntary rules, this may be at a point far afield from the point at which the Court's authority would break down.

But the threshold is still undefined. The most detail Hart seems to offer is that obedience to the rules reaches equilibrium through criticism. Hart explains that voluntary institutional norms, or those that are not preconditions for authority, are standards that Justices use to evaluate their and other Justices' conduct. He describes the members of a rule-constituted institution as those who "...accept and voluntarily co-operate in maintaining the rules, and so see their own and other persons' behavior in terms of the rules..."³⁴ Thus members of this practice may know that they can only push so hard on flexible rules before the character of the institution will change in some way – presumably a way unfavorable for their attempts to accomplish what they want. It does seem that thresholds of judicial discretion exist that Supreme Court Justices believe they can rightfully criticize one another for approaching. Accusations of overstepping the Court's authority often come from the ranks of dissent. They also come from the majority itself, so there is a sense in which the dissenters, who do not even control the law, can be held accountable for the illegitimacy of their *opinions*, or for the

³⁴ *Id.* at 91.

position they are advocating. Certainly, there is often mud slinging on both sides about errors of reasoning and even irrationality.³⁵ But the individual Justice can also be rightfully criticized for holding an opinion that is not just wrongly reasoned, but fails to adhere to the institutional standards of the Court. When the accuser invokes the legitimacy of the Court, it is almost always with reference to some institutional rule that he perceives (or claims to perceive) the Justice or opinion as having broken.

This threshold, contentious as it appears to be on each issue, is of course difficult to pinpoint. We have seen already that the Court expresses certain standards of criticism that it does not actually adhere to, such as the presumption and consideration-only views of *stare decisis*. And it may surprise no one that Justices hold each other to different institutional standards than they hold themselves. More perplexingly, it is unclear that Justices themselves know of such a threshold, though they appear to *use* some kind(s) in their own reasoning.³⁶ Perpetual dissenters seldom give any comparative reasons why *stare decisis* is not decisive in the case they want to overturn. Occasionally they note some practical consideration, such as confusion in the lower courts, that might be inferred to mitigate the benefits of stability; in other words, the current state is not itself stable. Perhaps because the presumption view of *stare decisis* is implicit in so many opinions, however, they never attempt to weigh these harms against the benefits of stability in *this* case.

³⁵ See, e.g., Scalia dissent in *Casey*. Admittedly, Justices predictably hold their opponents to higher standards than their own conduct. We need look no further than Scalia's repeated accusations of overturning "settled law" and "traditional methods of interpretation" to see this.³⁵

³⁶ Hart gives a compelling account of how Justices can be thought to be subconsciously abiding by rules that they see in the practice because they are already disposed to do so. See *supra* note 1, at p. 141.

Yet, the forgoing is not altogether satisfying because Hart does not explain the normative force of institutional norms. Hart explains how Court rules are *in fact* abided by most of the time, but he says nothing about why a Justice *ought* to feel bound to follow these norms in a given case. In other words, though his theory describes the possibility of the internal and external perspectives, it is itself explained from the external perspective. His theory therefore cannot capture how, from the internal perspective, Justices act when they give up their perpetual dissents. Nor can he say that a Justice ought to dissent, or that he is blameworthy or praiseworthy for doing so.

III. Responsiveness

I have already suggested that we can evaluate the legitimacy of a judicial decision by the standard of responsiveness. Responsiveness is a quality of the generation of a decision, and so involves the Justice and can show up in the shape of the decision itself. When a Justice is responsive to something (or someone), he takes it into consideration, gives it a fair weight in his reasoning vis-à-vis all other considerations, and changes his decision to accommodate it when possible. Justices can be responsive to the entire, complex context of a decision and its foreseeable impacts: its authority, the institutional norms conditioning it, the actors expected to respond to it, the actions it will prompt, etc. But because a Justice may be responsive to varying degrees, this standard gives us a more articulate range of evaluation than the binary of obedience or disobedience to rules and procedures.

Responding demands more than acknowledgement. But nor is it merely reacting. To respond to something, a judge need not drastically change the substance of his decision. An interest may be considered and even accommodated without being fulfilled.

The judge still *chooses* to act in one way rather than another – and therefore *necessarily* excludes some interests from being fulfilled. To appeal to common sense, an overall responsive decision’s author has taken all the relevant interests seriously, and not undervalued or even turned a blind eye to any because it is contrary to his position.

Many of the things to which a Justice responds are themselves expected responses. In a way that judges would no doubt recognize, Michael Oakeshott generally describes how all social actions and expressions intend to prompt responses from other actors:

“The speaker, we may suppose, has deliberated the situation to be responded to and has convinced himself of the merits of the action he wishes to evoke from his audience. But since what he is seeking is the performance of this action by another, or the agreement of many to thus act in concert, and not the acceptance by others of the reasons which have convinced him of the merits of the action he is recommending, he must offer them what they will recognize as cogent reasons for doing what he recommends them to do.”³⁷

A Supreme Court Justice’s vote and opinion are no different as an example of social action. Ultimately, all a judge’s considerations bottom out in expected responses from other actors in the legal system – the people expected to comply with them, the people expected to enforce them, and the people expected to use them to plan and predict their and others’ futures. When voting, Justices are seeking *particular* responses, not least from the political actors who must enforce their decisions. But they also seek responses,

³⁷ *Supra* note 1, pp.48-9.

more generally, from law-abiding citizens, lawyers, Congressmen, and other judges. The response they are looking for is not simply enforcement and obedience, but also acquiescence. One way that a Justice can fail to be responsive is to ignore the lack of acquiescence that will result from his decision.

By no means is this acquiescence the same as agreement. The Supreme Court operates in an environment of steadfast disagreement, both on the Court and among actors expected to respond to it. Court rulings on controversial issues often self-consciously acknowledge that “reasonable people disagree” over it. Disagreement also occurs between Justices on the level of jurisprudential philosophy.³⁸ Scalia insists that textualism is the correct way to interpret the Constitution, while Breyer insists that facilitating “active liberty” is the best interpretive means. How could and ought a Justice respond to such competing interests? Surely both cannot be accommodated. Political philosopher Jeremy Waldron’s thoughts on political disagreement help to explain why this question matters, and offer a tentative answer to it. According to Waldron, the “circumstances of politics” involve two realities³⁹: irresolvable

³⁸ See Dworkin’s dismissal of the circumstances of disagreement, *supra* note 11, at 264.

³⁹ The theory is not a perfect fit, because Waldron is discussing legislation, not judicial decision making. One method is to respect the decision mechanisms that society constructs in the face of disagreement – such as majority voting. The theory does not perfectly match the concerns judges might face, because it is designed to explain how we can consider legislation, decided by mere majority vote, to be legitimate. A legislator is not free to disregard a past majority vote, as a judge is. The important difference between a legislator and a judge is that the legislator need not be responsive to every interest. The legislator is elected to represent very particular interests – the interests of his constituents, however he interprets them. There is no expectation that he will speak in terms of existing laws. The core of institutional norms that are preconditions for his authority are nil, and he is expected to pursue his interests by nearly whatever means the legislature affords. In other words, we often think it is appropriate for Senators, within the bounds of ethics, to adopt the stance toward institutional rules “as little as I can get away with.” Thus it is important that the institutional norms that bind him be much more rigid, in order to enforce the recognition and respect of disagreement. Yet there is an important similarity here, insofar as we do want our legislators to respect continuity. The incoming new Senate never completely wipes out the _____

disagreements about politics and the need to reach collective decisions anyway in order to act in concert. But if we are to act in concert, no one must feel wholly excluded or disrespected by the decision. Generally, everyone must acquiesce. *This* is why we would feel uncomfortable if a Justice joined the Supreme Court with his pet ideal theory and attempted to remake the law, or if a radical group of Congressmen abruptly began repealing all existing legislation. The individual in politics, no matter how convinced of his own correctness, cannot refuse to respond to the reality of disagreement and the presence or lack of acquiescence. Otherwise, his speech and actions will fail to achieve their desired response of action in concert.

The passage from Oakeshott helps us understand another important dimension of responsiveness: recognition of the potential for persuasion. Action in concert requires persuasion rather than just acquiescence in at least one context: inside the Court. It may be that an idea is so eccentric, or so idiosyncratic (e.g., with respect to a Justice's singular interpretive method) that it lacks the power to persuade other Justices. To persist in expressing such an unpersuasive idea in the face of resistance is to fail to respond to the context of the expression. Such an unresponsive action can be self-defeating not in the same that it will fail to achieve its *objective* aim but that it will fail to achieve the desired *responses* from others. This is, for example, the situation of a person who insists on telling a joke in an inappropriate setting. As much as he may have the right to speak out, it is clearly wrong for him to do so – not because the joke is exactly self-defeating, but because it makes the desired response – and point of the expression – impossible. And this is the case of perpetual dissent.

With Waldron's account of the importance of respecting disagreement, we are now in a position to open the black box of Supreme Court legitimacy. We have seen that the Court presents its legitimacy as an "appearance" that is cultivated through cumulative obedience to institutional norms. *Stare decisis* exerts normative force on Justices' decisions partly because it adds the right coat of paint to the Court's image. But such an abstract interest is hard to place within the context of a judicial decision. Instead, Waldron explains how a concession to an institutional norm can reflect responsiveness. Critically, this is true only insofar as institutional norms represent objective, shared interests. For example, *stare decisis* represents an interest that is universally recognized: the importance of predictability and settled expectations, and of avoiding transaction costs. Although some people may be displeased by the outcome of the Court ruling, they can at least be consoled by the fact that an objective interest was protected – as theirs may be in the future. Thus the praise to be given to the Justice is not simply *because she followed the rule*, but because she responded to the concrete interest underlying the rule.

This is necessarily a context-dependent rather than principled adherence, because the actors from whom we seek responses vary by case and have different expectations. But this also helps to explain how a Justice could think that the benefits of deciding an issue do *not* always outweigh the harms of keeping it open. Perpetual dissent may even be seen in some cases as a response to the fact that the Justice is deciding a constitutional issue that will be engrained in the constitution, free of the attempts of Congress to undo it.

Concessions to institutional norms also reveal how Justices calibrate their reasons. Even when a Justice does not always defer to institutional norms, his occasional deferral

gives evidence of his responsive character. At least one reason he does not always defer is because shared interests like stability are not always the overriding ones. The Justice demonstrates that he *does* respond to objective interests and therefore his actions on related topics can be calibrated against them. By finally deferring to *stare decisis*, a dissenter demonstrates that he is willing to compromise his own reasoned legal opinion, not necessarily to the Court majority, but for the sake of uncontroversial practical considerations in the instant case.

The paradigm of unresponsiveness is any judicial decision that seems stubbornly out of touch with the Court and the context of its decision. This includes judgments that are too idealistic, or lack the ability to be persuasive to other agents in the system. It is frankly inconceivable that a reasonable person would insist that his ideas are always so important that they are never outweighed by objective considerations. It is likewise inconceivable that a reasonable judge would believe his narrow idea is *so* obviously correct and *so* important that it cannot be compromised at all in this case – even when it is apparent that many people will suffer costs from its enactment. The responsive attitude is characteristically judicial. This is why we do not want politicians to adjudicate, but only to legislate.⁴⁰ They have given a special weight in their thinking toward their own interest and designs, and will act accordingly, even to the great detriment of other interests.

⁴⁰ Yet I do not mean that politicians are wholly unresponsive. Responsiveness is why, for example, a U.S. Senator might not vote to overturn a bill passed a month ago – because he recognizes that this would devalue *all* legislation passed by majority vote. Of course, it might be true that the Senator will respond only out of his own interest – because he recognizes that his concession now will lead others to be more amenable in the future. He is not less responsive for this motivation.

Thus the judge's view of "all things considered" is very different from the private individual's view of all things and the politician's view of all things and the activist's view of all things. But if the Justice fails to let institutional factors show up in his discussion and even in his vote, he cannot be seen to be responding to all the circumstances in each situation. He has engineered his own views to filter out certain facts that he considers irrelevant or pithy. Justice Scalia denies, plausibly, that the "good of the institution" is a real interest facing him. But he can only legitimately do so insofar as he fairly faces all interests that might claim to have a stake in the endurance of the institution – as there is some evidence that he does.

To bring this discussion back to perpetual dissent: a perpetual dissenter must tread carefully, because he risks being seen as unresponsive when he refuses even to accept the initial premise of a case in a perpetual dissent series. One fact about the context of a perpetual dissent calls for special response: the fact that it wedges open a judicial question. All perpetual dissents create trails of quotable opinions that their author(s) hope will inspire future law – whether of the Court or of Congress. Especially in Court decisions made by a 5-4 split vote, they often also inspire political activists and other actors to challenge the ruling in the courts, and to reraise the issue before the Supreme Court. This can create "trainwrecks" in the lower courts and other parts of the legal system.⁴¹ Despite this reality, a perpetual dissent can be responsive. To do so, it must explain its consideration of this fact, or offer to condition its dissent on practical consequences. In other words, a conditioned dissent gives outside observers some way to calibrate their concerns against their own and judge them as reasonable or not.

⁴¹ See Benjamin Wittes' commentary on the Court's Eighth Amendment Jurisprudence, "What is Cruel and Unusual?" *Policy Review*, no. 134, December 2005.

Nonetheless, evaluating responsiveness does not require special backstage access to the Supreme Court conference room or to the psychology of the Justices. The signs of responsiveness can be obvious, as I will detail in the next section, in the way Justices express themselves in the written Supreme Court opinions, the public record of the Court's reasoning. But it need not be. Responsiveness may be hidden in some cases: the Justice responds to an interest, but ultimately deems it too insignificant, relative to the other interests at stake, to allow it to shape his decision. For now, suffice it to say that the sign of a judge's responsiveness usually shows in his willingness to compromise the reasons he at first found personally compelling in order to accommodate others' claims in his final solution.

IV. The Responsiveness (And Unresponsiveness) of Perpetual Dissents

The standard of responsiveness can be used to describe contemporary adjudication because Justices may be responsive even unintentionally. All Justices – even Scalia and Brennan – frequently follow precedents with which they disagree even without giving them a favorable presumption.⁴² At the same time, Justices who give a high presumption to *stare decisis* frequently vote to overrule precedent anyway. It is this inconsistency that I describe in terms of responsiveness in this section.

A. Respecting baseline precedents

⁴² While this may be difficult to prove in the context of some cases, when the motive could be one of any number of justifications offered for it, it is clearer in series of perpetual dissent, when justices will actually give up their intention to dissent indefinitely. I'm interested in these motives only as they are *explicitly* expressed in law – because it is only there that later justices can refer to them later in their own justifications.

To make an obvious point, the vast majority of the Supreme Court’s body of precedent is secure. Justices generally refrain from overruling longstanding precedents that are the grounds for many subsequent rulings. No modern Justice is contemplating overturning *Marbury v. Madison*. Furthermore, Justices uniformly follow the principle that rulings of statutory interpretation warrant more *stare decisis* authority than constitutional rulings. Statutory interpretations are almost always better decided than right, since the benefits of any one interpretation seldom exceed the benefits of settled expectations. No judge is so dogmatic as to insist that his “correct” reading of a statute is important *enough* to justify leaving the legal question unsettled, or to uproot dozens of cases.

B. Respecting *stare decisis*

Nor need the precedent be as old as *Marbury v. Madison* to inspire deference. Justices follow *stare decisis* even when the precedent is recent and under perpetual dissent. In fact, the *norm* is for a Justice to give up when he has had his say on an issue once. No Justice dissents repeatedly to every case series, even on constitutional issues. Some Justices refrain from dissenting even when other original dissenters continue. Perplexingly, when Justices give up their dissents, they seldom offer a reasoned explanation. Following *stare decisis* seems to require no more explanation than a two-paragraph concurring opinion – exactly as though *stare decisis* enjoys a presumption in its favor. For example, Justice Souter, giving up his dissent to *Davis v. Federal Election*

Commission as soon as the Court reconsidered it, described his objection as “not the stuff of which perpetual dissents are made.”⁴³

Justice Byron White’s choice not to perpetually dissent on the constitutionality of “victim impact statements” aggravated Scalia.⁴⁴ Two years earlier, White had dissented in *Booth v. Maryland*, a case striking down the use of these statements in capital murder sentencing. White could hardly be thought skittish about unsettling *stare decisis*, as he voted with the Court in 77% of the cases that formally altered precedent while he was a member.⁴⁵ He also participated in two major perpetual dissent series.⁴⁶ Yet in 1989 he chose to abandon the four other Justices prepared to overrule *Booth* in order to uphold *stare decisis*. His two-line concurrence read: “Unless *Booth v. Maryland*...is to be overruled, the judgment below must be affirmed. Hence, I join Justice Brennan’s opinion for the Court.”

Similarly, Kennedy temporarily abandoned his dissent on jury sentencing discretion in *Apprendi* the first time it was raised again, just two years later in 2002. With a two-paragraph concurrence, he resigned himself to the rule of the majority: “Though 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.”⁴⁷ Kennedy abandoned the fight even though three other Justices continued to call for overruling *Apprendi*.⁴⁸

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⁴⁴ See *South Carolina v. Gathers*, 490 U.S. 805 (1989).

⁴⁵ Epstein, Lee, et al. *The Supreme Court Compendium: Data, Decisions, and Developments*, , p. 591. White was a justice from 1969-1993.

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⁴⁷ *Ring v. Arizona*, 536 U.S. 584 (2002) (Kennedy, J., concurring).

⁴⁸ *Apprendi v. New Jersey*, 530 U.S. 466 (2000). (Kennedy, J., dissenting.)

Yet in both cases, the defecting Justice returned to the majority shortly afterward to overturn the original precedent. Two years after *Gathers*, White joined the Court in overturning *Booth* 6-3, after O'Connor and Kennedy joined the Court and secured an independent majority for the move. The only indication of White's passion on the issue is his dissent in *Booth*, which was relatively short – but quite genuine. Similarly, Kennedy revived his campaign against *Apprendi* two years after his acquiescence, without explanation. Again, these compromisers-cum-perpetual-dissenters offer no explanations for their realignment.

Even Scalia the great dissenter has been known to compromise immediately. A year after his initial dissent, Scalia acceded to treating the Federal Minimum Sentencing Guidelines as advisory – even though Justices Thomas and Alito continued to dissent. Scalia justified his concession in a simple concurrence: “Although I continue to believe that substantive-reasonableness review is inherently flawed, I give *stare decisis* effect to the statutory holding of *Rita*.”⁴⁹ Given that Scalia gives little to no independent weight to *stare decisis*, the lack of detailed explanation for what exactly made the legislation worthy of its effect makes it seem like fiat. However, Scalia was evidently hoping to gain majority support for his own, related, pet perpetual dissent on jury sentencing discretion. He declared a victory for that view in his concurrence: “The door therefore remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury.”⁵⁰

⁴⁹ *United States v. Booker*, 543 U.S. 220 (2005). (Scalia, J., dissenting in part and concurring in the judgment.)

⁵⁰ *Gall v. United States*, 552 U.S. ____ (2007) (Scalia, J., concurring).

Perplexingly, Scalia also abandoned his dissent in a case series on federal arbitration even though Thomas continued to dissent solo. Scalia said straightforwardly in *Allied-Bruce Terminix Cos. v. Dobson* that he would no longer dissent on the arbitration precedent in question.⁵¹ However, he pledged to join four other Justices in overturning it in the future, but with the explicit caveat that this is only true because reliance interests are not an issue: “I will, however, stand ready to join four other Justices in overruling it, since Southland will not become more correct over time, the course of future lawmaking seems unlikely to be affected by its existence...and the accumulated private reliance will not likely increase beyond the level it has already achieved.”

This concession is responsive. We can extract from it that Scalia thinks his position is persuasive – enough so to persuade any Justices who are appointed to the Court in the next few years. But it also recognizes the limits of his persuasiveness in *this* current situation: the efficacy of persuasion depends in part on its audience, and five Justices on *this* Court cannot be swayed. Scalia recently stated to the media that he finds his colleagues on the Court utterly beyond persuasion.⁵² What is persuasive about an argument is not that it actually does persuade any particular person, but that it is a reasonable response to its context that anyone in the same position could give a reason for. But insofar as Scalia is willing to admit when his argument has no persuasive

⁵¹ 513 U.S. 265 (1995).

⁵² “That’s quite a sales pitch from a justice who has always taken the position that he bears no burden of persuasion. He [Scalia] likes to say that he gave up on swaying his colleagues, or the public, long ago...In response to a question from Stahl about his inability to charm his colleagues into embracing Originalism, he repeated that his brethren are unpersuadable: ‘I’m not going to change their basic philosophy. These people have been thinking about the law for years.’ He has also stated that he writes for law students and the case books; it’s “too late” for the rest of us....” See Dahlia Lithwick, *Slate*, May 10, 2008.

capacity, and does not persist in it for mere self-expression, he succeeds in responding to the real context of the Court itself.

I posit that Kennedy's and White's defections could also be responsive. As Oakeshott noted generally about judicial precedent, "...the focus of the adjudicator's attention is not upon these amplifications of meaning [i.e., precedent] in respect of their having been used to settle earlier disputes, but in respect of their having contracted or expanded the range of meanings the rule concerned will tolerate."⁵³ When a Justice later accepts as law a precedent he dissented against originally, the explanation may be responsiveness to new, unforeseen conditions. The Justice may initially estimate that his dissent has no practical persuasive force at first but, seeing the judicial dialogue continued by other Justices without adverse practical effects, return to advocate the "right" rather than "stable" position.

New Justices occasionally refuse to join existing blocks of perpetual dissenters, even when they agree with their constitutional reasoning. For example, O'Connor refused to address the *stare decisis* question of *Roe* in all the abortion cases she dissented against prior to *Casey*,⁵⁴ even though White and Burger were boldly calling for overturn. In each, she expressed uncommon deference toward precedent. (E.g., "The permissible scope of abortion regulation is not the only constitutional issue on which this Court is divided, but -- except when it comes to abortion -- the Court has generally refused to let

⁵³ *Supra* note 38, at 136.

⁵⁴ See *Akron v. Akron Center for Reproductive Health* (1983); *Thornburgh v. American College of Obstetricians and Gynecologists* (1986); *Webster v. Reproductive Services* (1989).

such disagreements, however longstanding or deeply felt, prevent it from evenhandedly applying uncontroversial legal doctrines to cases that come before it.”⁵⁵)

Respect for *stare decisis* is why the current liberal-leaning Justices accept the constitutionality of the death penalty. Breyer, Souter, Stevens, and Bader-Ginsburg repeatedly show personal and legal repugnance for the punishment. But, at least in their opinions, the Justices accept that the death penalty does not violate the Eighth Amendment and have continued to rule on new cases involving details of the death penalty without raising that question. The reason is almost certainly *stare decisis* concerns: over the course of decades, the Court has built on the assumption that the death penalty is constitutional, and so the perpetual dissent died with the departure of the ardent dissenters Marshall, Brennan, and Blackmun in the 1990s.

Highlighting the separation in his mind between constitutional considerations and *stare decisis* considerations, Justice Stevens last year declared that he believes the death penalty “cruel and unusual” according to the Eighth Amendment, but voted to uphold the death penalty, saying, “[My judgment about the unconstitutionality of the death penalty] does not, however, justify a refusal to respect precedents that remain a part of our law. This Court has held that the death penalty is constitutional, and has established a framework for evaluating the constitutionality of particular methods of execution.”⁵⁶ Yet this reveals nothing about a career philosophy of perpetual dissent, since he agreed in 1985 to join a perpetual dissent against the campaign expenditure limits case, *Buckley v.*

⁵⁵ *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

⁵⁶ *Baze v. Rees*, 217 S. W. 3d 207 (2008). (Stevens, J., concurring.)

Valeo,⁵⁷ after being persuaded by one of the precedent's original dissenters, Justice White.

C. Surrendering perpetual dissent

Just as Justices do not immediately repeat their dissents, perpetual dissent campaigns are sometimes surrendered after just a few years or cases. As time wears on, cases build on the original precedent, and the dissenting opinions get shorter and begin quoting at greater length from previous opinions. With few exceptions, perpetual dissents face significant developments after the decision of three to four cases – usually an overturn, a compromise, or the defection or retirement of one or more of the dissenters.

The examples I want to examine are Kennedy's defection on campaign finance, Rehnquist's defection on overruling *Roe* and *Casey*, and O'Connor's partial defection from the anti-states' rights block of dissenters following *Seminole Tribe of Florida v. Florida*. Unfortunately, none of these Justices – as usual – offer explanations for their defections, returning to the majorities with very succinct concurrences.

Kennedy now upholds an old campaign finance precedent, *Buckley v. Valeo*, despite repeatedly and vehemently calling for its overturn from 2000-2006. His concurrence in the 2006 case reads almost like a dissent, but he states that the Court has properly applied *Buckley*, and therefore he joins the majority.⁵⁸ The statement gives no explicit reason for accepting the precedent.

⁵⁷ 424 U.S. 1 (1976).

⁵⁸ *Randall v. Sorrell*, 382 F. 3d 91 (2006) (Kennedy, J., concurring).

Rehnquist's surrender on the abortion issue is more astonishing, given his longtime emotional commitment to overturning *Roe* and *Casey*. In the Court's 2000 ruling in *Stenberg v. Carhart* on partial-birth abortion, the Chief Justice noted separately that he was prepared to uphold the holding of *Casey*: "I did not join the joint opinion in *Planned Parenthood of Southeastern Pa. v. Casey*...and continue to believe that case is wrongly decided. Despite my disagreement with the opinion...I believe Justice Kennedy and Justice Thomas have correctly applied *Casey*'s principles and join their dissenting opinions." Yet he gives no explanation for his concession. One explanation that has been offered is that, during his final years on the Court, Rehnquist adopted a more cooperative stance on many issues, and attempted to join the opinion of the Court whenever possible.⁵⁹

The last case involves the moderate author of the *Casey* majority opinion, Justice O'Connor. At least until 2006, she had backed the interpretation of the Eleventh Amendment introduced in *Seminole Tribe* in 1996, under which states have constitutional sovereign immunity from suit by their citizens. This decision has been contested by a block of four liberal dissenters ever since. But in 2006, she joined the four to narrow the *Seminole Tribe* holding, arguing – somewhat tenuously – that the Constitution's Bankruptcy Clause is an exception to the sovereignty principle. Thomas' dissent was nearly an *ad hominem* attack on her, accusing her of contradicting her earlier view.⁶⁰ Despite the silence of these defections, I think we can read them as responsive. First, we can safely assume the defectors did not change their minds about the reasoning in the

⁵⁹ Tushnet, Mark. *Divided Court: The Rehnquist Court and the Future of Constitutional Law*, W.W. Norton & Co. Publishing, 2005.

⁶⁰ *Central Community College of Virginia v. Katz* (2005). (Thomas, J., dissenting.) ("...(O'Connor, J., concurring) ('I agree with Justice Scalia that Congress may not abrogate the States' Eleventh Amendment immunity by enacting a statute under the Bankruptcy Clause'.)")

original precedent: Kennedy and Rehnquist explicitly say they continue to disagree on the arguments; O'Connor was a stalwart, career-long supporter of states' rights, who wrote one of the key opinions bolstering the Eleventh Amendment interpretation narrowed in 2006.⁶¹ Second, we know that these Justices are not blindly bending to *stare decisis* or appearances because they chose to dissent again already. Something else must have changed.

I propose, I think without great extravagance, that Rehnquist recognized that confidence in the holding of *Roe* had settled too deeply to be uprooted without severe transaction costs. Many conservative judges today accept that *Roe* is a "super precedent" because of lifestyle and family choices that have been made on its foundation. Kennedy and O'Connor may have responded to the mounting dissatisfaction with the volatile state of case law about campaign finance law and federalism – mostly among the lower courts and law schools, rather than the public. O'Connor's case is a bit dimmer, because is not herself a perpetual dissenter, but ceding ground to the dissent. I suggest that, quite characteristically, she may have been making a conciliatory gesture toward the anti-states' rights block in order to reach a narrower, more stable equilibrium. Although this is a step away from the status quo, it is nonetheless responsive.

D. Responsiveness to practicalities

But while it seems that Supreme Court Justices are at least responding to the judicial dialogue in which they find themselves, I suggest that their opinions reflect a lack of responsiveness to the broader context of their perpetual dissent. The *Casey* majority opinion outlined a test for the "special justification" of overruling precedent that is now

⁶¹ *Alden v. Maine*, 527 U.S. 706 (1999). (O'Connor, J., Opinion of the Court.)

accepted by most members of the Court, including, at his leisure, Scalia, that includes an assertion that precedent is not subject to "...a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation." This reliance standard includes the practical consequences of uprooting settled expectations, including all transaction costs such as confusion in the inferior courts, thwarted implementation by political actors like Congress and trial courts, and the cancellation of rights expected by individuals.⁶²

These "reliance" issues are generally given little attention in perpetual dissent opinions. Occasionally they are mentioned half-heartedly, usually in an attempt to provide the "special justification" for overruling precedent. The interests that frequently show up in opinions are "workability" of a precedent and "confusion in the lower courts." Sometimes these fleeting references to reliance issues are unmistakably implausible. For example, Scalia writes in the victim impact perpetual dissents of a "perceptible harm" caused by the exclusion of testimony about the type of harm done to the victim that the Court is excluding. Vaguely but classically, Souter writes in *Payne v. Tennessee*, joining the perpetual dissent against victim impact statements to construct a new majority, "I must rely as well on my further view that *Booth* sets an unworkable standard of constitutional relevance that threatens, on its own terms, to produce ...arbitrary

⁶²See the completion of Brandeis' famous quote: "The doctrine of *stare decisis* should not deter us from overruling that case [Jensen] and those which follow it. The decisions are recent ones. They have not been acquiesced in. They have not created a rule of property around which vested interests have clustered. They affect solely matters of a transitory nature. On the other hand, they affect seriously the lives of men, women, and children, and the general welfare. *Stare decisis* is ordinarily a wise rule of action. But it is not a universal, inexorable command. The instances in which the court has disregarded its admonition are many." *Industrial Accid. Comm'n v. James Rolph Co.* (1924). (Louis Brandeis, J., opinion of the Court.)

consequences and uncertainty of application.”⁶³ In the same case, Scalia denies the existence of any reliance issues related to victim impact statements, given that no private decisions were based on the earlier ruling.⁶⁴ But few of these dialogues between majority opinions and perpetual dissenting opinions have centered on reliance issues.

There are exceptions. The perpetual dissent series on campaign finance and jury sentencing both involve significant reliance issues, and the Justices occasionally changed positions when they became convinced of the practical consequences one way or another. Launching a series of cases on campaign finance, the Supreme Court in *Buckley v. Valeo* in 1976 ruled almost unanimously that campaign expenditures were protected under the first amendment. Over two decades later, in the case *Nixon v. Shrink Missouri Government P.A.C.*,⁶⁵ four dissenters had joined a perpetual dissent going back to the 1980s that insisted the Court-created campaign finance system was dysfunctional. In fact, new dissenters joined after 2000 because they were upset by the consequences of earlier rulings (but the case was not overruled due to a defection by Scalia). Breyer even explicitly qualified his *majority opinion* in *Nixon* by practical considerations, saying he might be willing to overrule *Buckley* if Congress was unable to cap self-contributions by wealthy candidates.

Justices have also more explicitly conditioned their perpetual dissents based on practical considerations. Breyer repeatedly offers the foresight that practical considerations may outweigh the strength of his arguments. In the campaign finance

⁶³ 501 U.S. 808 (1991). (Souter, J., concurring.)

⁶⁴ *Payne v. Tennessee*, 501 U.S. at 828 (1991). (“...where reliance is truly at issue, as in the case of judicial decisions that have formed the basis for private decisions, “[c]onsiderations in favor of *stare decisis* are at their acme.”)

⁶⁵ 528 U. S. 377 (2000).

series of perpetual dissents, Breyer argues explicitly that he could be persuaded to overturn *Buckley* if it turns out that Congress cannot find a creative solution to cap the sums of their own wealth that rich candidates for public office may spend.⁶⁶ But he is willing to experiment for a bit longer without upsetting the entire system. Breyer also says he may surrender his perpetual dissent on the Eleventh Amendment if the practical costs grow prohibitively large: “Today’s decision reaffirms the need for continued dissent – unless the consequences of the Court’s approach prove anodyne, as I hope, rather than randomly destructive, as I fear.”⁶⁷

Similarly, Souter acknowledges the harm of the federalism line of cases in *Alden v. Maine*, thereby at least offering the promise that he is weighing this into his consideration and that it may in the end prevail: “The Court has swung back and forth with regrettable disruption on the enforceability of the FLSA against the States, but if the present majority had a defensible position one could at least accept its decision with an expectation of stability ahead. As it is, any such expectation would be naïve.”

V. What it would mean to be responsive

As I discussed at the beginning of this paper, none of what I have described in the foregoing can be thought of as controversial or even novel. I hope only to have raised several questions about how we could understand and discuss the legitimacy of the United States Supreme Court, as a function not of its appearance or of its adherence to institutional norms, but of the quality of its decisions and its decision makers. For I think that, in talking about the Court solely in terms of legal arguments and philosophical

⁶⁶ *Nixon v. Shrink Missouri Government Political Action Committee*, 528 U.S. 377 (2000).

⁶⁷ *Federal Maritime Commission v. South Carolina Ports Authority*, 535 U.S. 743 (2002).

metaphors, we have lost sight of what is at stake in the Supreme Court's legitimacy *in each case*.

Holding steady that question, the standard of responsiveness lets us look closer at the concrete reasons behind each Court opinion. But it also brings us back, full circle, to the Justice himself. I have written at length about the responses that Supreme Court Justices seek from other actors in the legal and political system. But ultimately the search for responsiveness circles back to the qualities of the Justices themselves: a Justice who is responsive will make responsive decisions and express them in a responsive way. The key is that the Justice must be willing to act in context, never idealistically. Not only must he acknowledge all the interests that his decision will touch – he must respect them. And therefore he must *work* to weigh them fairly against each other, especially given his own predispositions to see the facts in one light. As Justice Stevens wrote in a journal article not long after he assumed his seat on the Supreme Court: "...pre-argument predictions about how a judge or Justice is likely to vote are far less significant than the knowledge that he or she will analyze the cases with an open mind and with respect for the law as it exists at the time of the decision."⁶⁸

My account of responsiveness leaves room to accommodate existing practice, as I have argued in the last section. The fact that Justices already seem to defer to *stare decisis* not as a rule but as a label for practical considerations offers hope that they could describe their practice this way in their opinions. The fact that Justices *do* perpetually dissent, but not on principle, suggests that they are responsive to the unique,

⁶⁸ Stevens previously cites Rehnquist joining the majority in *O'Hare Truck Service v. City of Northlake* and Burger's joining in *Branti v. Finkel*. From Stevens, John Paul. "Learning on the Job," *Fordham Law Review*, Vol. 76, 2005-06.

unpredictable context of each decision. Even by writing “despite my respect for *stare decisis*,” a Justice communicates “I respect and consider your interests and have factored them into my decision but, all things considered, I disagree and cast my vote accordingly.” Even when the Justices do not clearly explain their reasoning, and do not address every interest in each case, we can get signs of their responsive character.

But from my discussion of perpetual dissent, I think there is already one concrete change that we could ask of a perpetual dissenter: respond to the accusation that you are keeping expectations unsettled. Countless journal articles criticize the volatility of perpetual dissents on federalism, abortion, campaign finance, and other areas of law. Surely a criticism from legal scholarship does not condemn a practice (or all decisions would stand condemned). But it does point to a significant omission in the way perpetual dissenters discuss their dissents: they always return to the arguments of the past case and the old quotes about *stare decisis*, but fail to openly weigh them against the harms of keeping a legal question open *now*. It may be that the Eleventh Amendment is better left undecided than decided wrong. But this is a question that should be discussed transparently, not ceded with a two-paragraph concurrence and a nod to institutional rules.

That we continue to speak the language of metaphorical legitimacy is, I venture, counterproductive. American citizens and political actors may be savvier than the Court Justices and its commentators suggest. They may be more willing to acquiesce in nearly every decision made by open-minded, responsive professionals, even when they disagree with, or are even immediately disadvantaged by, their results. But they cannot if these qualities are concealed in jargon like the “presumption in favor of *stare decisis*,” and in

sweeping generalizations about the Court's character as an institution. Nor can those who disagree with Scalia's opinions acquiesce in his opinions until they possess some other standard than rightness – the standard he offers – by which to understand their legitimacy. Responsiveness may offer us just the degree of articulateness we need to feel comfortable about the institution of the Supreme Court in every case.