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Jon G. Heintz

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## NOTES

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### SUSTAINED DISSENT AND THE EXTENDED DELIBERATIVE PROCESS

*Jon G. Heintz\**

#### INTRODUCTION

In the summer of 2012, in *American Tradition Partnership, Inc. v. Bullock*,<sup>1</sup> the Supreme Court of the United States summarily reversed a decision of the Montana Supreme Court, which had upheld a state statute regulating independent political expenditures by corporations.<sup>2</sup> In a brief per curiam opinion, the Court reaffirmed its decision in *Citizens United v. FEC*<sup>3</sup>—a 2010 case which held that independent corporate political expenditures are a form of political speech protected by the First Amendment<sup>4</sup>—and declared that “[t]here can be no serious doubt” that “the holding of *Citizens United* applies to the Montana . . . law.”<sup>5</sup> This, itself, is hardly noteworthy; the Court found that petitioners failed to meaningfully distinguish the case from *Citizens United*,<sup>6</sup> and, adhering to precedent, disposed of the case without much discussion. What is noteworthy, however, is that, notwithstanding the per curiam reversal, Justices Breyer, Ginsburg, Sotomayor, and Kagan joined in a dissenting opinion that went out of

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\* J.D. Candidate, University of Notre Dame Law School, 2014; B.B.A., University of Notre Dame, 2009. I thank Professor Randy J. Kozel for his guidance, patience, and support throughout the entire process. I also thank my family and my fellow members of Volume 88 of the *Notre Dame Law Review* for their support. All errors are my own.

1 132 S. Ct. 2490 (2012) (per curiam).

2 *Id.* at 2491. The statute prohibited corporations from making expenditures “in connection with a candidate or a political committee that supports or opposes a candidate or a political party.” *Id.*

3 130 S. Ct. 876 (2010).

4 *See id.* at 899–900.

5 *Am. Tradition P’ship*, 132 S. Ct. at 2491.

6 *Id.*

its way to explicitly reject the holding of *Citizens United*,<sup>7</sup> despite the existence of a factual basis upon which the dissenting Justices could have merely distinguished the case.<sup>8</sup> Relying on Justice Stevens's initial dissent, Justice Breyer reiterated that there exists a substantial body of evidence that independent corporate political expenditures are likely to lead to fraud and corruption—a finding that directly contradicts the majority opinion in *Citizens United*.<sup>9</sup> Freely admitting that he did not have the votes to overturn the precedent, Justice Breyer nevertheless refused to adhere to *Citizens United* and advocated the Court's reconsideration of its validity.<sup>10</sup>

Given the doctrine of stare decisis<sup>11</sup> and the Court's practice of adhering to precedent,<sup>12</sup> the fact that four Justices refused to accept the law handed down just two years prior in *Citizens United* is cause for inquiry. It is important to note that this was not an initial dissent; those Justices with views hostile to the majority opinion in *Citizens*

7 *Id.* at 2491 (Breyer, J., dissenting) (“I disagree with the Court’s holding in [*Citizens United*] for the reasons expressed in Justice Stevens’ dissent in that case.”). Writing for all four dissenters, Justice Breyer explained that, while he would have voted to grant certiorari to reconsider *Citizens United*, he did not “see a significant possibility of reconsideration,” and therefore voted to deny cert. *Id.* at 2492. For further discussion of so-called “defensive denials,” see H.W. PERRY, JR., DECIDING TO DECIDE 198–207 (1991). “[When] a justice believes that if a case is reviewed, he will not like the outcome on the merits . . . he . . . will vote to deny” the petition for certiorari, “even if he believes the case is certworthy, and perhaps even believes that the ruling below is a horrible injustice . . . .” *Id.* at 199.

8 Justice Breyer noted that the Montana Supreme Court found that independent corporate political expenditures did, in fact, “lead to corruption and the appearance of corruption in Montana.” *Am. Tradition P’ship*, 132 S. Ct. at 2491–92.

9 In *Citizens United*, the Court concluded “that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” 130 S. Ct. at 909.

10 *Am. Tradition P’ship*, 132 S. Ct. at 2492.

11 Latin for “to stand by things decided,” the doctrine of stare decisis commands that “a court must follow earlier judicial decisions when the same points arise again in litigation.” BLACK’S LAW DICTIONARY 1537 (9th ed. 2009).

12 See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (plurality opinion) (“[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.” (citing Lewis F. Powell, *Stare Decisis and Judicial Restraint*, 1991 J. SUP. CT. HIST. 13, 16 (1991))); *Adkins v. Children’s Hosp. of D.C.*, 261 U.S. 525, 545 (1923) (“That the right to contract about one’s affairs is a part of the liberty of the individual protected by this clause, is settled by the decisions of this Court and is no longer open to question.”); *Smith v. Turner*, 48 U.S. 283, 323–24 (1849) (“It becomes necessary . . . to inquire what right a State has to impose taxes . . . . On this point I find the doctrines held by the court so precisely and clearly laid down, that I shall do little more than cite the language of the bench. In *McCulloch v. Maryland* . . . .”).

*United*, including Justice Breyer, had the opportunity to dissent in that case. And while the doctrine of stare decisis is not an absolute command,<sup>13</sup> the factors that traditionally justify departing from stare decisis were not present in *American Tradition Partnership*.<sup>14</sup> Indeed, Justice Breyer admitted that his dissent in the latter case was based entirely on the objections Justice Stevens raised in the prior case.<sup>15</sup> So, given that the question presented to the Court had already been “settled” by *Citizens United*, how can the dissenters justify their refusal to accept the rule of law that case decided?

It is possible that, in *American Tradition Partnership*, Justice Breyer was planting the seeds of “sustained dissent”—described as “the practice of continually repeating resistance to a decision even years after the decision has become law.”<sup>16</sup> If this is true, what does it mean for the precedential value of *Citizens United*? More importantly, what does it mean for the Court as a general matter? The practice of sustaining one’s dissent is controversial, and by no means rare,<sup>17</sup> and raises important questions about the nature of stare decisis and precedent, the proper role of dissent, and the institutional legitimacy of the Supreme Court.

Part I of this Note will describe the practice of sustained dissent, exploring why Justices engage in it, classifying the possible justifica-

13 See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–06 (1932) (Brandeis, J., dissenting) (“*Stare decisis* is not . . . [an] inexorable command. . . . Whether it shall be followed . . . is a question entirely within the discretion of the court . . . .” (quoting *Hertz v. Woodman*, 218 U.S. 205, 212 (1910))).

14 In *Casey*, the plurality stated that “a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.” 505 U.S. at 864. The Court further enumerated the “prudential and pragmatic considerations” designed to test whether overruling prior precedent is “consisten[t] . . . with the . . . rule of law,” including whether the precedent “def[ies] practical workability[,] whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling,” and “whether the facts have so changed . . . as to have robbed the old rule of significant application or justification.” *Id.* at 854–55 (citations omitted). There was no significant evidentiary showing in *American Tradition Partnership* that, from 2010 to 2012, the facts used in deciding *Citizens United* had “so changed” as to justify a dissent in that case.

15 See *supra* note 7.

16 Allison Orr Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447, 447 (2008) (citing Maurice Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227 (1985)). This practice is also referred to as “perpetual dissent,” see Larsen, *supra*, or “continued dissent,” see Charles Fried, Comment, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 185 (2002).

17 See Fried, *supra* note 16, at 178 (“What is not rare at all is actual persistence in dissent.”); see also Larsen, *supra* note 16, at 448–49 (“[P]erpetual dissent is more the norm these days, rather than the exception.”).

tions for the practice, and highlighting those factors that may affect a Justice's decision to sustain his or her dissent. Part II will present the skeptical view of sustained dissent—embodied in various scholarly articles which are critical of the practice—and consider the potential negative consequences those articles raise, including the potential to harm reliance interests on the Court's decisions and even the legitimacy of the Court as an institution. This Part will also identify the very limited circumstances in which those scholars would tolerate sustained dissent and will examine their preferred alternative to the practice. Part III will respond to the existing literature's criticism of the practice by suggesting that the negative consequences raised in Part II are unlikely to come to fruition, and that by taking an unnecessarily harsh view of sustained dissent, critics foreclose the realization of certain benefits that may result from the practice. This Part will also explore a potential benefit that has been heretofore unexplored—the benefit of the extended deliberative process. Conceding that sustained dissent has perhaps become too common on the modern Court, this Part will maintain that confining its use only to extraordinary circumstances is too extreme a solution. With this greater insight, Part III will conclude by assessing the appropriateness of sustained dissent and will mark outer limits on one's use of the practice to ensure that Justices are restrained and that the practice's costs do not outweigh its benefits. Finally, Part IV will assume that, given the unique dissent, *American Tradition Partnership* marks the beginning of a sustained dissent from *Citizens United*, and will examine the appropriateness of such a decision in light of the competing theories discussed in Parts II and III.

This Note does not directly address the general practice of overruling precedent or render a judgment about when that is appropriate. While the implications and consequences of overruling and engaging in sustained dissent overlap,<sup>18</sup> this Note focuses on the practice of rejecting the validity of precedent and refusing to comply with its commands when a Justice knows that such a decision will not effect any immediate change in the rule of law. This approach is taken to keep the scope of the Note appropriately limited.

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18 See Michael Mello, *Adhering to Our Views: Justices Brennan and Marshall and Their Relentless Dissent to Death as a Punishment*, 22 FLA. ST. U. L. REV. 591, 650 (1995) (“A sustained dissent raises jurisprudential issues inseparable from those raised by the overruling of precedent.”).

## I. SUSTAINED DISSENT

Much has been written about the value of dissent generally.<sup>19</sup> Similarly, countless scholarly works and court opinions alike have extolled the virtue of the doctrine of *stare decisis* and of the Court's adherence to precedent.<sup>20</sup> Typically, these values are not at odds with one another. As Charles Fried explains, collaborative dissent—a dissent where the Justice expresses disagreement but does not question the validity of the holding—“accords quite well with the values of stability and continuity that lie behind the doctrine of *stare decisis*.”<sup>21</sup> However, when dissent is sustained in future cases, and a Justice refuses to accept a prior decision even grudgingly, it becomes much more difficult to reconcile the virtue of dissent with the need to adhere to precedent. This inherent tension raises the question of whether there are other ways in which the practice of sustained dissent might be justified. Part I will describe the practice, establish a clear definition, examine and classify the justifications for engaging in

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19 See, e.g., William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 428, 438 (1986) (observing that “dissents are . . . critical to an understanding of the [law]” and that “[t]he right to dissent is one of the great and cherished freedoms that we enjoy by reason of the excellent accident of our American births”); CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 176–82 (2003) (arguing that dissenting lower court judges can serve as whistleblowers, “discouraging the other judges from making a decision that is inconsistent with the Supreme Court’s command”); Randall T. Shepard, *What Can Dissents Teach Us?*, 68 ALB. L. REV. 337, 339 (2005) (observing that dissents have “value . . . as a teaching tool for future readers” and “can . . . provide valuable lessons about the law”). But see LEARNED HAND, *THE BILL OF RIGHTS* 72 (1958) (expressing concern that a dissenting opinion “cancels the impact of . . . solidarity on which the authority of a bench of judges so largely depends”).

20 See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 920 (2010) (Roberts, C.J., concurring) (“Fidelity to precedent—the policy of *stare decisis*—is vital to the proper exercise of the judicial function.”); *Payne v. Tennessee*, 501 U.S. 808, 827 (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.”); Powell, *supra* note 12, at 15–16 (identifying as the “specific merits of *stare decisis*” that it lightens judicial workload, “enhances stability in the law,” and, “perhaps . . . most important[ly],” it impacts the “public legitimacy” of the Court); Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 412 (2010) (“The doctrine [of *stare decisis*] enjoys lofty status as the emblem of a stable judiciary.”). Even those perceived as having a less favorable view of the doctrine still recognize its undeniable importance to the law. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 138–39 (1997) (“Originalism . . . must accommodate the doctrine of *stare decisis*; it cannot remake the world anew.”).

21 Fried, *supra* note 16, at 181; see also Kelman, *supra* note 16, at 230–31 (accepting dissent as a “legitimate and basically wholesome facet of the judicial enterprise” within a system of precedent).

the practice, and identify those factors that might affect a Justice's decision whether to engage in it.

### A. *Defining Sustained Dissent*

Perhaps the most famous example of sustained dissent is the long-standing practice of Justices Brennan and Marshall to dissent in every death penalty case since its constitutionality was affirmed in 1976,<sup>22</sup> defiantly refusing to accept the legality of that form of punishment. The seminal, oft-repeated phrase was: "I adhere to my belief that the death penalty is in all circumstances cruel and unusual punishment."<sup>23</sup> Justices Brennan and Marshall repeated this dissent more than 2100 times<sup>24</sup> from 1976 to their retirements in 1990 and 1991, respectively. This is the essence of sustained, indeed perpetual, dissent.

An examination of the existing, albeit sparse,<sup>25</sup> academic research on this practice yields reasonably consistent definitions. Allison Larsen writes that "[t]he critical feature of a perpetual dissent" is a Justice's "refus[al] to accept the rule of a prior decision (one in which he originally dissented) as controlling authority."<sup>26</sup> Maurice Kelman defines "sustained dissent" as when a Justice, presented with a question decided by a prior case in which the Justice dissented, "cling[s] to his own doctrinal position" and renews his original dissent.<sup>27</sup> Fried defines an "oppositional dissent" as one that "will not accept the decision even grudgingly . . . and thus implies a refusal to allow the decision to shelter under *stare decisis*."<sup>28</sup> Justice Brennan defined the "special kind of dissent" as one "in which a [J]ustice refuses to yield to the views of the majority although persistently rebuffed by them."<sup>29</sup> While each of these definitions varies slightly from the others, each reflects the same basic practice.

<sup>22</sup> See Mello, *supra* note 18, at 593.

<sup>23</sup> *Blystone v. Pennsylvania*, 494 U.S. 299, 324 (1989) (Brennan, J., dissenting). Justice Marshall joined the dissent. *Id.* at 309.

<sup>24</sup> Mello, *supra* note 18, at 593. "The Justices dissented not only to the imposition of capital punishment in cases granted certiorari review, but also in almost every capital case where certiorari was denied." *Id.*

<sup>25</sup> Larsen observes that, since Kelman's 1985 essay, "very little has been said about the practice of perpetual dissents . . ." Larsen, *supra* note 16, at 447 n.6.

<sup>26</sup> *Id.* at 451.

<sup>27</sup> Kelman, *supra* note 16, at 230.

<sup>28</sup> Fried, *supra* note 16, at 182. Fried goes on to describe such a dissent as one where the dissenter "rejects the court's decision so thoroughly that . . . he will not collaborate in the work of developing, refining, and perhaps qualifying the Court's [future decisions]." *Id.* at 183.

<sup>29</sup> Brennan, *supra* note 19, at 436.

For purposes of this Note, analysis is not confined only to those cases where a Justice participated and dissented in the precedential case.<sup>30</sup> Instead, it is sufficient that a sitting Justice rejects the validity of, and thus refuses to apply, a precedent that is “on all fours.” Larsen’s nomenclature of “perpetual dissent” is similarly not adopted, as there is value in exploring the significance of those dissents that, while perhaps do not extend for the entirety of a Justice’s career on the Court (like Brennan’s and Marshall’s), nevertheless refuse to accept a settled rule of law for some substantial period of time. Thus, for purposes of this Note, “sustained dissent” is defined as a Justice’s practice of refusing to accept the precedential effect of a prior case and, for at least some substantial period of time, continuing to dissent from applying the rule of law that case decided.<sup>31</sup> Clarifying a definition, however, only does so much to improve one’s understanding of sustained dissent. To truly comprehend this practice, one must attempt to understand why Justices engage in it and what factors affect the decision.

### B. *Why Justices Engage in Sustained Dissent*

While it is true that in the last few decades the Court has overruled more settled decisions than earlier Courts had, claims of the “recent demise of the Supreme Court’s doctrine of precedent are greatly exaggerated.”<sup>32</sup> In fact, the doctrine of stare decisis “enjoys lofty status as the emblem of a stable judiciary” and has been lauded

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30 For instance, Justice Kagan’s joining the dissent in *American Tradition Partnership* falls within my definition of sustained dissent. Even though she was not yet a Justice for the *Citizens United* decision, she refused to acknowledge the rule of law clearly established in that case.

31 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 . . . .”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 966 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (“We have stated . . . our belief that the Constitution does not subject state abortion regulations to heightened scrutiny. Accordingly, we think that the correct analysis is that set forth . . . in *Webster*.”); *South Carolina v. Gathers*, 490 U.S. 805, 823–24 (1989) (Scalia, J., dissenting) (“I continue to believe that *Booth* was wrongly decided, and . . . I would overrule that case.”).

32 Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 649, 733 (1999). Lee attributes this increase, at least in part, to the “vast body of constitutional case law [which] presents an ever-expanding target of ‘settled decisions.’” *Id.* at 649; see also Kelman, *supra* note 16, at 248 (“[C]onstitutional cases represented a smaller part of the Court’s work in [the nineteenth century] . . .”).



by the Supreme Court as fundamental to the importance of the rule of law.<sup>33</sup> Even Justice Thomas—the one Justice who, it has been suggested, does not believe in the doctrine of stare decisis<sup>34</sup>—said at his confirmation hearing that “stare decisis . . . is a very important and critical concept” in the “process of [judicial] decision making.”<sup>35</sup> Given that the Court values the doctrine of stare decisis and does not take lightly the decision to disrespect precedent, why would a Justice engage in sustained dissent? One can safely assume that a Justice who continues to dissent from precedent believes the prior case was wrongly decided; but beyond that, what are the justifications for sustained dissent? An examination of the existing research on this practice suggests these reasons can be grouped into three categories: strategic reasons, institutional reasons, and personal reasons.

Of the three justifications, the strategic justification has received the most attention in academic literature. Under this theory, the sustained dissent is an extended effort to gain the necessary fifth vote to overturn the precedent.<sup>36</sup> Here, the dissenting Justice assumes that “the decision[ ] which he opposes will prove to be short lived,”<sup>37</sup> or recognizes that the “ruling is definitive only if the four dissenters . . . will[ ] accept the decision from which they dissented,” instead of “hold[ing] on until they can pick up a fifth vote.”<sup>38</sup> Therefore, the sustained dissent is an attempt to prevent the issue from settling, to encourage challenges to the precedent, and ultimately to effect a change in the doctrine or rule of law. An example of this is Chief Justice Rehnquist’s dissent in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>39</sup> which was so oppositional in dissent as to be almost dismissive of the majority. The Chief Justice said he did “not think it incum-

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33 Kozel, *supra* note 20, at 412–13.

34 See Lincoln Caplan, *Clarence Thomas’s Brand of Judicial Logic*, N.Y. TIMES, Oct. 22, 2011, at SR10, available at <http://www.nytimes.com/2011/10/23/opinion/sunday/clarence-thomass-brand-of-judicial-logic.html>; Douglas T. Kendall, *A Big Question About Clarence Thomas*, WASH. POST, Oct. 14, 2004, at A31, available at <http://www.washingtonpost.com/wp-dyn/articles/A31117-2004Oct13.html>.

35 Kendall, *supra* note 34. Indeed, “Justice Thomas embrace[s] statutory stare decisis.” Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 326 n.49 (2005) (citing *Fogerty v. Fantasy*, 510 U.S. 517, 538–39 (1994) (Thomas, J., concurring)).

36 See Larsen, *supra* note 16, at 460.

37 Kelman, *supra* note 16, at 257.

38 Fried, *supra* note 16, at 177.

39 469 U.S. 528 (1985) (holding that it is within Congress’s authority under the Commerce Clause to regulate state governments through generally applicable laws, without regard to whether the regulated behavior is a “traditional governmental function”).

bent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.”<sup>40</sup> The Chief Justice “promise[d] continued dissent with the hope . . . of eventually prevailing.”<sup>41</sup> This type of sustained dissent has been described as “the child of hope.”<sup>42</sup> It could be said that the Justice who engages in sustained dissent for strategic reasons is doing so with his eyes on a greater prize—conceding a loss in today’s battle, but continuing the fight with the hope of ultimately winning the war.

Part of the reason sustained dissent can be an effective strategic tool is because it prevents the prior decision from hardening into settled law. When a Justice continues to dissent, it signals an ongoing internal dispute within the Court.<sup>43</sup> Indeed, to the extent an initial dissent indicates a disagreement on the Court, a “pattern of resistance . . . indicates that a precedent is [far more] vulnerable . . . .”<sup>44</sup> The Court itself acknowledged this fact in *Payne v. Tennessee*.<sup>45</sup> For example, in the wake of *Zelman v. Simmons-Harris*,<sup>46</sup> where a bloc of four dissenting Justices promised persistent dissent, Fried observed that it is “hard to claim that this case has brought stability to the law or definitively moved the issue to the political arena.”<sup>47</sup> The law is settled only if “the four dissenters . . . accept the decision from which they dissented,”<sup>48</sup> or, in other words, refuse to sustain their dissent. Particularly when one considers that only four votes are required to grant a petition for certiorari, the sustained dissent can be an effective strategic tool for prompting change in the law.

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40 *Id.* at 580 (Rehnquist, J., dissenting).

41 Fried, *supra* note 16, at 178. While *Garcia* itself was never overturned, the Rehnquist Court would eventually go “much further in the direction of asserting the independent position of states” than simply overturning *Garcia* would have. *Id.* at 178 n.72.

42 Kelman, *supra* note 16, at 257.

43 *Id.* at 254 (“[T]he dissident may imagine that he is preventing the official position from settling into a . . . hardness that will defy future displacement. He may suppose that the continuing exhibition of his opposition shows the world that the issue remains in dispute . . .”).

44 Larsen, *supra* note 16, at 466.

45 501 U.S. 808 (1991) (overruling *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989)). As part of its justification for overruling precedent in that case, the majority noted that the prior decisions “ha[d] been questioned by Members of the Court in later decisions.” *Id.* at 829–30.

46 536 U.S. 639 (2002) (affirming the constitutionality of an Ohio school voucher plan which allowed religious schools to participate).

47 Fried, *supra* note 16, at 177; *see id.* at 192.

48 *Id.* at 177.

However, this is not a perfect explanation for why Justices engage in the practice, in that it is both over- and under-inclusive. Scholarly research suggests that, not only were five-to-four decisions no more likely to garner sustained dissent, there are numerous examples of solo sustained dissents.<sup>49</sup> The example given at the outset—that of Justices Brennan and Marshall—was “basically a two-man operation.”<sup>50</sup> Furthermore, there is a lack of empirical evidence suggesting that sustained dissent is effective as a strategic tool.<sup>51</sup> If anything, engaging in sustained dissent merely “advertises the dissenter’s inability to win over his colleagues.”<sup>52</sup> So, while the strategic justification seems to make intuitive sense, existing academic research suggests that it is not an entirely satisfying explanation for why Justices engage in sustained dissent.

The institutional justification—whereby a Justice sustains his dissent because he views his acceptance of erroneous precedents as an abdication of his institutional role—perhaps seems counterintuitive at first; after all, it is often out of concern for the institutional legitimacy of the Court that Justices abandon their dissent and surrender to the doctrine of *stare decisis*.<sup>53</sup>

However, depending on how one defines the Court’s institutional legitimacy—or how a Justice defines his own institutional duty—sustained dissent could be the preferred path. A Justice who views the Constitution as the ultimate precedent, and who considers correct interpretation of the Constitution to be his foremost institutional

49 Larsen, *supra* note 16, at 461; *see, e.g.*, *Am. Truck Ass’n v. Mich. Pub. Serv. Comm’n*, 545 U.S. 429, 439 (2005) (Thomas, J., concurring in the judgment) (“I would affirm the judgment of the [state court] because ‘[t]he negative Commerce Clause has no basis in the text of the Constitution . . .’” (quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U. S. 564, 610 (1997) (Thomas, J., dissenting))).

50 Larsen, *supra* note 16, at 461. “Similarly, another duo, Justice Thomas and Justice Scalia, have continually teamed up” to engage in sustained dissent. *Id.*

51 *See* Kelman, *supra* note 16, at 255 (“It is a nice question whether dissent, be it singular or sustained, actually does contribute to later doctrinal change in a causal sense. . . . [But] there is nothing in the cases to suggest that sustained dissent is more potent than dissent uttered once and then suspended.”).

52 *Id.* at 256.

53 *See id.* at 230. In “abandon[ing] past dissent under the pressure of *stare decisis*,” a Justice recognizes his “duty . . . to rejoin his colleagues . . . as if he had concurred (albeit reluctantly) in the first place.” *Id.* (footnote omitted). For example, in *Orozco v. Texas*, 394 U.S. 324 (1969), Justice Harlan wrote that, though “the passage of time ha[d] not made . . . *Miranda* . . . any more palatable to” him, “purely out of respect for *stare decisis*,” he felt “compelled to acquiesce” in the majority’s decision affirming *Miranda*. *Id.* at 327–38 (Harlan, J., concurring). This concept will be discussed in greater detail in Part II.B.

goal, is more likely to sustain his dissent.<sup>54</sup> This justification is not confined to originalists, however. For instance, Justice Brennan defended his sustained dissent in death penalty cases partly on institutional grounds.<sup>55</sup> Justices, he argued, are “bound . . . by a larger constitutional duty . . . to expose” those Constitutional interpretations that “have [significantly] departed . . . from its essential meaning.”<sup>56</sup> Chief Justice Rehnquist, while sustaining his dissent from *Roe v. Wade*,<sup>57</sup> argued that “[t]he Judicial Branch derives its legitimacy . . . from deciding by its best lights whether [laws] . . . comport with the Constitution.”<sup>58</sup> Therefore, he wrote, “[i]t is . . . our duty to reconsider constitutional interpretations that ‘depar[t] from a proper understanding’ of the Constitution.”<sup>59</sup> Similarly, in his essay on the doctrine of stare decisis, Justice Douglas wrote that, while “[a] judge . . . may have compulsions to revere past history and accept what was once written[,] . . . he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it.”<sup>60</sup>

While this institutional approach does not necessarily *require* a Justice to sustain his dissent in *all* future cases, a Justice is warranted in refusing to accept binding precedent—in continuing to sustain his dissent—if he believes a proper reading of the Constitution requires him to do so. This decision does not necessarily derive any motivation from a desire to effect a change in the law—it need not have a strategic component. Instead, the decision is motivated by a sense of judicial duty to fulfill one’s institutional role. Though this may be a valid descriptive analysis of the institutional justification, it is difficult to reconcile with the value the Court places in the doctrine of stare decisis.

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54 For a discussion of why one’s theory of precedent cannot be divorced from one’s preferred interpretive method, and an argument that adherence to stare decisis puts greater stress on originalists, see Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent* (Notre Dame Legal Studies, Working Paper No. 12-66, 2012). *But see* SCALIA, *supra* note 20, at 139 (“The whole function of the doctrine . . . is a compromise of all philosophies of interpretation . . .”); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289 (2005) (“Whatever one’s theory of constitutional interpretation, a theory of *stare decisis* . . . always corrupts the original theory.”).

55 See Brennan, *supra* note 19, at 437.

56 *Id.*

57 410 U.S. 113 (1973).

58 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 963 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

59 *Id.* at 955 (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985)).

60 William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

The various normative theories discussed in Part II will call into question the propriety of the institutional justification for sustained dissent.

Finally, a third possible justification for a Justice's sustained dissent is based on personal reasons—reasons unique to that Justice as an individual, unrelated to any views about the institutional role of a Justice. Larsen, for example, raises the possibility that “plain old strong conviction . . . is driving these perpetual dissents” and that “finding [out] . . . what pushes his or her individual buttons” is the best way to predict when a Justice will continue in dissent.<sup>61</sup> A comparable theory states that a Justice will engage in sustained dissent when he has a “deep conviction,” or a “belief not only in the soundness of his position but [also] in its righteousness.”<sup>62</sup> Justice Brennan shared a similar observation—the “kind of dissent in which a judge persists in articulating a minority view of the law in case after case . . . constitutes a statement by the judge as an individual: ‘Here I draw the line.’”<sup>63</sup> Under this theory, apart from any possible institutional justification for sustained dissent as discussed above, the Justice continues his dissent because he absolutely cannot, as a matter of personal principle, bring himself to agree with the majority view.

This justification, however, need not depend singularly on great personal conviction. Larsen observes that Justices often sustain dissent as a matter of “self stare decisis.”<sup>64</sup> Here, a Justice who dissented in a prior case and continues to dissent in subsequent cases “do[es] not want to appear intellectually inconsistent . . . so [he] write[s] separately,” renewing the rationale and arguments from prior cases.<sup>65</sup> A characteristic of this, Fried explains, is when a Justice relies on and refers to his own prior dissents as authority.<sup>66</sup> Whether motivated by a deep conviction or a desire not to appear intellectually inconsistent, it is difficult to justify a sustained dissent for personal reasons. The first two justifications—strategic and institutional—can plausibly be con-

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61 Larsen, *supra* note 16, at 463.

62 Kelman, *supra* note 16, at 257. “Deep conviction is the fuel that drives dissent past the limits of hope, beyond appeal to the intelligence of a future day, and into the realm of the quixotic. It is why a [J]ustice champions a lost cause.” *Id.*

63 Brennan, *supra* note 19, at 437. Brennan worried that such a justification would “sound like too individualistic a justification of the dissent.” *Id.* at 438.

64 Larsen, *supra* note 16, at 469. In this scenario, the dissenting Justice would have dissented in the prior case.

65 *Id.* Larsen condemns this practice as “emphasi[zing] . . . the ‘I’ over the ‘We’” and “present[ing] an example of political behavior.” *Id.* at 470–71. “At bottom, he is elevating his individual jurisprudence . . . and denigrating the need for consistency . . . in the Court’s doctrine.” *Id.* at 469.

66 Fried, *supra* note 16, at 189.

sidered part of the traditional judicial role. However, a Justice's stubborn rejection of precedent in order to vindicate his personal conviction, or even worse, to protect his jurisprudential self-confidence, is at best a cause for concern. Nevertheless, as Larsen observes, this may be the justification with the greatest predictive force.<sup>67</sup>

Justices rarely come right out and say what their justification is for continuing to dissent, making the task of categorizing such behavior difficult. Admittedly, the categories of justifications may overlap, or there may be more than one motivating a Justice's decision.<sup>68</sup> Whatever the justification—strategic, institutional, personal, or otherwise<sup>69</sup>—the practice of sustaining one's dissent and rejecting the validity of precedent raises significant questions about the importance of stare decisis and the proper role of Justices on the Court.

### C. *Factors that Affect the Decision to Engage in Sustained Dissent*

There are a number of factors that affect a Justice's decision to engage in sustained dissent—some were alluded to in the previous section. While this Note cannot identify an exhaustive list of relevant factors, it will attempt to identify those that appear to have a significant impact on the difficult decision to sustain one's dissent. Some factors apply more directly to one particular justification and perhaps not at all to another.

The first and most important factor is the nature of the case; specifically, whether the Justice is being asked to interpret the Constitution or a statute. "Most Justices seem to agree that dissents on issues of statutory construction deserve less repetition."<sup>70</sup> The Rehnquist Court frequently indicated that the respect given to an erroneous precedent depends on the statutory or constitutional nature of the decision.<sup>71</sup> Because the Constitution gives Congress sole responsibility to

67 See Larsen, *supra* note 16, at 463.

68 Justice Brennan invoked both an institutional and personal justification for his continued dissent in death penalty cases. See Brennan, *supra* note 19, at 437.

69 Larsen suggests, with good reason, that "[p]erhaps the question of when to dissent perpetually is idiosyncratic and cannot be explained collectively." Larsen, *supra* note 16, at 459.

70 *Id.*; see also Barrett, *supra* note 35, at 317 ("The Supreme Court has long given its cases interpreting statutes special protection from overruling."); Kelman, *supra* note 16, at 237 ("One place where a cessation of dissent occurs with some regularity is in cases of statutory interpretation.").

71 Lee, *supra* note 32, at 655. "Whereas the Court purports to give 'great weight to stare decisis in the area of statutory construction,' it has also claimed that the doctrine 'is at its weakest when [it] interpret[s] the Constitution.'" *Id.* (citations omitted). Indeed, "Justice Stevens, who has perpetually dissented on a host of topics, will even acquiesce on statutory issues." Larsen, *supra* note 16, at 460.

enact and amend statutory law,<sup>72</sup> the Court is typically unwilling to depart from a statute's initial construction in subsequent cases.<sup>73</sup> Justices Brennan and Marshall, interestingly enough, provide a classic illustration of abandoning dissent in the statutory context. Despite initially dissenting in *Buffalo Forge Co. v. Steelworkers*,<sup>74</sup> in a subsequent case<sup>75</sup> construing the same statute, the two Justices—"[f]or reasons essentially of stare decisis"—terminated their initial dissent and contributed the decisive votes for adherence to the construction given to the statute in *Buffalo Forge*.<sup>76</sup> While sustained dissent in the statutory context is not unheard of,<sup>77</sup> it is extraordinarily rare.<sup>78</sup> By contrast, in her research on the Rehnquist Court era, Larsen discovered that each Justice sustained dissent from at least one constitutional law decision.<sup>79</sup> The rationale for this was explained in the Chief Justice's dissent in *Casey*—" [e]rroneous decisions in . . . constitutional cases are uniquely durable, because correction through legislative action, save for constitutional amendment, is impossible."<sup>80</sup> Accordingly, in constitutional cases, no Supreme Court Justice sees precedent as completely binding.<sup>81</sup> The nature of the case affects decisions to sustain one's dissent across the board, regardless of justification; indeed, perhaps it is a necessary assumption in this endeavor.

A second important factor is the perceived strength of the precedent. Challenges to precedent are often inspired by a sign of weakness—either indications of "misgiving" on the part of the Justices who

72 Barrett, *supra* note 35, at 317.

73 Justice Scalia observed that to do so would "establish within our jurisprudence . . . the dangerous principle that judges can give the same statutory text different meanings in different cases." *Clark v. Martinez*, 543 U.S. 371, 386 (2005).

74 428 U.S. 397 (1976).

75 *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702 (1982).

76 Kelman, *supra* note 16, at 237.

77 Larsen identifies Justice Thomas as willing to sustain his dissent in statutory cases, such as "his recurring statements in dissent that the Federal Arbitration Act does not apply to proceedings in state court." Larsen, *supra* note 16, at 455–56 (citing *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 689 (1996) (Thomas, J., dissenting)).

78 See *Rasul v. Bush*, 542 U.S. 466, 506 (2004) (Scalia, J., dissenting) ("Departure from our rule of *stare decisis* in statutory cases is always extraordinary . . .").

79 Larsen, *supra* note 16, at 456–57. Kelman suggests that another reason constitutional cases garner more "[s]tubborn dissent" is "because [J]ustices form such strong and matured convictions about [constitutional] law that they find it exceedingly hard to make even the limited shift from dissent to . . . accommodation." Kelman, *supra* note 16, at 248.

80 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 954–55 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

81 Mello, *supra* note 18, at 656.

fashioned the doctrine in question or by the doctrine's "visible deterioration over the course of time."<sup>82</sup> Fried has identified instances of bloc-dissenting as particularly strong: Here, a bloc of four dissenters persists in dissent, often on a variety of issues.<sup>83</sup> In these scenarios, the persistence of the bloc-dissents necessarily diminishes the strength of the precedent—"the distance is but a single vote"<sup>84</sup>—thereby making the continued dissent of the bloc more effective and more likely to be sustained. In accord with this principle, Justice Jackson claimed that the "first essential of a lasting precedent is that the court . . . be fully committed to its principle" and that the decision is "not a mere acquiescence but a conviction of those who support it."<sup>85</sup> When that conviction is lacking, it is not as difficult to justify rejecting the validity of precedent.<sup>86</sup> This factor is particularly relevant to strategic sustained dissents. The "score," it seems, would not matter to a Justice dissenting for institutional or personal reasons.<sup>87</sup> For the bloc of Justices holding out for that "elusive fifth vote,"<sup>88</sup> however, the perceived strength of the precedent is especially relevant.

The age of the precedent in question is a factor that can affect the likelihood of sustained dissent in either of two ways.<sup>89</sup> For instance, it could be argued that the newly minted precedent should be shielded from dissent; respecting it as a "probationary precedent" that needs time to develop and a chance to "demonstrate its merits."<sup>90</sup> This approach, it could be argued, accords well with the desire to maintain public faith in the judiciary, because if the Court is quick to overturn its decisions, such reversals could severely tax the public's

82 Kelman, *supra* note 16, at 256.

83 Fried, *supra* note 16, at 193; see also 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, 2112 (2002) ("In cases involving the scope of Congress's Commerce Clause powers, a regular group of four Justices have dissented repeatedly. Justices Stevens, Souter, Breyer, and Ginsburg have all announced . . . their intention to undo the conservative majority's 'new federalism' jurisprudence as soon as they can muster the requisite five votes.").

84 *Casey*, 505 U.S. at 943 (Blackmun, J., concurring).

85 Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334, 335 (1944).

86 *Id.*

87 For example, there is no indication that Justices Brennan or Marshall actually believed their continued dissent in death penalty cases would lead the Court to reconsider its interpretation of the Eighth Amendment. See Mello, *supra* note 18, at 650. Nevertheless, they continued to register their dissent in every opportunity they were given.

88 Larsen, *supra* note 16, at 460.

89 *Id.* at 462.

90 Kelman, *supra* note 16, at 234.



faith in the Court's decisions.<sup>91</sup> Conversely, others argue that newer precedent should be more susceptible to sustained dissent; "stare decisis concerns are . . . weaker for a new decision as it has had less of a chance to accrue reliance interests."<sup>92</sup> Justice Scalia illustrated the latter view in *South Carolina v. Gathers*,<sup>93</sup> when he observed that "the respect accorded prior decisions increases, rather than decreases . . . as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity."<sup>94</sup> Given the competing viewpoints, it appears that neither account adequately explains how the age of precedent impacts a Justice's decision to engage in sustained dissent.<sup>95</sup> While this factor is often referred to by Justices in dissent, there are many examples of sustained dissent from old and new precedents alike.<sup>96</sup> Therefore, it seems that the age of precedent "can be . . . either a plus or a minus . . . in determining the [effect] of stare decisis."<sup>97</sup>

However, the apparent lack of clarity on this issue is perhaps less troubling as one applies the age factor to the different justifications. If a Justice engages in sustained dissent for institutional reasons, it could be argued that he is less likely to question a well-aged precedent. This is because of the competing institutional concern of preserving the legitimacy of the Court by not overturning long-settled decisions.<sup>98</sup> Recalling Justice Scalia's opinion from *Gathers*, he argued that, while it is his institutional duty to reconsider incorrect decisions, those "decisions that have become so embedded in our system of government that return is no longer possible" should be immune from continued dissent.<sup>99</sup> Conversely, if a Justice is engaging in sustained dissent for strategic purposes, it stands to reason that he would register objection to the precedent as quickly as possible, preventing the rule of the prior case from hardening into settled doctrine. Indeed,

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91 See *id.* at 235. "The clumsy flip-flop in the Legal Tender Cases a century ago is still remembered as one of the Supreme Court's most grievous 'self-inflicted wounds.'" *Id.* (citation omitted). "Traumatic memories of this sort" may explain why Justice Stevens, "one of the Court's most independent [J]ustices," assumes a "profound obligation to give recently decided cases the strongest presumption of validity." *Id.* at 235 & n.30.

92 Larsen, *supra* note 16, at 462.

93 490 U.S. 805 (1989).

94 *Id.* at 824 (Scalia, J., dissenting).

95 Larsen, *supra* note 16, at 463.

96 *Id.*

97 Kelman, *supra* note 16, at 234.

98 See *id.* at 236 (observing that, when the Court repudiates decisions of "landmark" stature, there is a substantial concern for the Court's public image).

99 *Gathers*, 490 U.S. at 825 (Scalia, J., dissenting).

there are many examples—including important doctrinal matters such as federalism and the scope of the Commerce Clause—of strategic sustained dissents commencing very quickly after the precedential case was decided.<sup>100</sup> So, while it may be true that—in the aggregate—age of precedent is not a strong indicator of the likelihood of sustained dissent,<sup>101</sup> when examined in the context of one’s justification for doing so, age of precedent may have greater predictive force.

Finally, the basis of the dissenting Justice’s disagreement with the precedential case—a factor that has not received much attention in the academic research on sustained dissent—will likely affect a Justice’s decision to reject that precedent and cling to a prior dissent. For instance, if a Justice fundamentally disagrees with a particular factual assertion upon which a prior Court rested part of its judgment, that Justice is more likely to reject the validity of the precedent.<sup>102</sup> In *Erie Railroad Co. v. Tompkins*,<sup>103</sup> the Court partly based its decision to overrule *Swift v. Tyson*<sup>104</sup> on its contention that *Swift* was based on a faulty historical account.<sup>105</sup> In other words, the Court in *Swift* rested its decision on a factual assertion that the *Erie* Court later disagreed with. There was no change in the facts, which *Casey* tells us can justify overruling; it was the *Erie* Court’s disagreement with the *Swift* Court’s historical observation that prompted the overruling.<sup>106</sup> This factor is

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100 See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (Souter, J., dissenting) (renewing dissent from the same group of four Justices who dissented from the Court’s decision *United States v. Lopez*, 514 U.S. 549 (1995)); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (Stevens, J., dissenting) (renewing dissent from the same group of four Justices who dissented from the Court’s decision in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996)). These four cases featured the same bloc of five Justices in the majority and the same bloc of four Justices in dissent.

101 See *supra* notes 89, 95–97, and accompanying text.

102 See Kozel, *supra* note 20, at 427–28 (“The extent of reliance [on precedent] . . . derives in part from the integrity of the decision’s factual assumptions. When those assumptions have changed significantly, there will be less reliance on the precedent by stakeholders, who will expect the Court to update . . . the decision in light of new circumstances.”).

103 304 U.S. 64 (1938).

104 41 U.S. 1 (1842).

105 *Erie*, 304 U.S. at 72 (“But it was the more recent research of a competent scholar, who examined the original document, which established that the construction given to it by the Court was erroneous . . .”).

106 A similar example is *Lawrence v. Texas*, 539 U.S. 558 (2003). In *Lawrence*, the Court based its decision to overrule *Bowers v. Hardwick*, 478 U.S. 186 (1986), in part on its contention that *Bowers* erred in its assessment of the history of laws regulating homosexual behavior. *Lawrence*, 539 U.S. at 571 (“In summary, the historical grounds relied upon in *Bowers* are more complex than the majority . . . and the concurring opinion [of Chief Justice Burger] . . . indicate. Their historical premises are not with-

present in the context of antitrust as well. In 2006, a majority of the Court, in deciding whether a patent conferred sufficient market power to constitute a violation of the antitrust laws, rejected an applicable precedent because it disagreed with the earlier Court's economic judgment on the question.<sup>107</sup> Thus, the cases suggest that when a Justice's discord with precedent is based on his disagreement with a prior Court's factual, non-legal assertion, the Justice will accord less respect to the case, and that such a disagreement could be a relevant factor in the Justice's decision to sustain his dissent. This factor, however, is just one of many that may affect a Justice's decision. Parts II and III will offer guidance on how a Justice should consider and weigh the various factors in formulating his decision whether to sustain his dissent.

Armed with the knowledge from Part I—what sustained dissent is, what Justices are seeking to accomplish by engaging in it, and what factors may affect the decision whether to do so—one can begin to tackle the more interesting question: is sustained dissent justified? Parts II and III will present competing views of the appropriateness of the practice, weighing the various costs and benefits associated with it, determining when it is and is not justified, and exploring how the practice, if properly restrained, may lead to better judicial decisions.

## II. THE CRITICAL VIEW OF SUSTAINED DISSENT

If Justices Brennan and Marshall provide the paradigmatic example of sustained dissent,<sup>108</sup> the second Justice Harlan is perhaps the modern Court's "leading accommodationist."<sup>109</sup> Described as a "con-

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out doubt and, at the very least, are overstated."). Again, both cases were assessing the "facts on the ground" as they were before *Bowers* was decided, so it is impossible that those facts had changed. Rather, the *Lawrence* Court's rejection of *Bowers* was based on its disagreement with *Bowers*'s "version," so to speak, of the facts.

107 See *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006). In contradicting the precedent, the Court observed that "the vast majority of academic literature recognizes that a patent does not necessarily confer market power." *Id.* at 44.

108 Justices Brennan and Marshall are not extraordinary in this regard. While their collective practice of dissenting in every death penalty case post-1976 is perhaps most illustrative of the practice generally, many contemporaries of Justices Brennan and Marshall joined them in engaging in sustained dissent. See Larsen, *supra* note 16, at 454 ("During Rehnquist's tenure as Chief Justice, Justices Brennan, Marshall, Stevens, Scalia, and Thomas were the most prolific authors of perpetual dissents.").

109 Kelman, *supra* note 16, at 274; see also *supra* note 53 (explaining Justice Harlan's opinion on *stare decisis* and that he felt "compelled to acquiesce" to the majority). The second Justice Harlan (1955–1971) is not to be confused with the first Justice Harlan (1877–1911), who Kelman describes as "no stranger to repeated dissent." Kelman, *supra* note 16, at 250.

stitutional conservative on an increasingly activist Court,” Justice Harlan often found himself in the minority.<sup>110</sup> However, instead of continuing to act as an oppositional force, Justice Harlan offered “interim allegiance,” and in many cases “extended full precedential respect,” to those cases with which he initially disagreed.<sup>111</sup> While Justice Harlan made sure to register his disagreement with the correctness of the precedent and often hoped his own position would one day prevail, he nevertheless accepted and applied the precedent faithfully.<sup>112</sup> This approach has been lauded, and indeed preferred, by the existing scholarship that addresses sustained dissent.<sup>113</sup> Indeed, for reasons ranging from the practice’s perceived weakening of reliance on the Court’s decisions to its implications for the institutional legitimacy of the Court, most academics have taken a critical view of sustained dissent.<sup>114</sup> This Part will explore the potential negative consequences of the practice, identify those limited situations where those who are critical of the practice may nevertheless tolerate it, and examine a proposed alternative.

#### A. *Potential Negative Consequences of Sustained Dissent*

Opponents or skeptics of sustained dissent do not question the practice merely for ideological reasons. Indeed, as this Note shows, Justices at each end of the Court’s ideological spectrum engage in the

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110 Kelman, *supra* note 16, at 274.

111 *Id.*; see also Fried, *supra* note 16, at 190–91 (“Justice Harlan[ ] . . . made it a practice to let go and rejoin the communal task of knitting the continuing fabric of the law.”); Larsen, *supra* note 16, at 452 (“A known critic of *Mapp v. Ohio* and *Miranda v. Arizona*, Justice Harlan routinely joined subsequent cases that required application of those precedents . . . .” (footnotes omitted)).

112 See Kelman, *supra* note 16, at 275; Larsen, *supra* note 16, at 452. Justice Harlan’s practice of applying the precedent but questioning its correctness is not the same as concurring with the judgment of the Court for different reasons. In the former, the Justice begrudgingly applies the precedent; in the latter, the Justice does not apply the precedent, but still arrives at the same outcome as those who do.

113 See Kelman, *supra* note 16, at 298 (“I admire the collegialism of Justice Harlan more than the soloism of Justice Black.”); Larsen, *supra* note 16, at 477 (“I therefore suggest that the Harlan approach is a healthy alternative to the perpetual dissenter.”).

114 See Fried, *supra* note 16, at 192; Larsen, *supra* note 16, at 475 (“By disregarding precedent simply because he lost the first time around, a perpetual dissenter . . . gives credence to the claim that the Court is just a building where nine viewpoints are periodically counted and tallied.”); see also Krotoszynski, *supra* note 83, at 2109 (“[A] policy of openly refusing to accept prior precedents of the Supreme Court [is] incredibly imprudent.”); Neil S. Siegel, *State Sovereign Immunity and Stare Decisis: Solving the Prisoners’ Dilemma Within the Court*, 89 CAL. L. REV. 1165 (2001) (criticizing the Court’s lack of respect for precedent in the context of Eleventh Amendment state sovereign immunity cases).

practice with some degree of frequency.<sup>115</sup> Nor are their objections based simply on theoretical or jurisprudential differences. Opponents of sustained dissent have raised concerns that widespread use of the practice will lead to significant practical challenges—challenges that could ultimately hinder the Court’s fundamental role. Therefore, an examination of these potential negative consequences is necessary before one can make a reasoned judgment on the appropriateness of the practice.

Opponents of sustained dissent contend that, by engaging in the practice, a Justice takes himself out of the collaborative decision-making process of the Court.<sup>116</sup> A Justice who continually dissents—not only from the initial decision, but also from the subsequent decisions that shape the body of law—is rejecting the opportunity to “collaborate in the work of developing, refining, and perhaps qualifying the Court’s work . . . .”<sup>117</sup> This decision deprives the internal debate of a differing—often moderating—voice.<sup>118</sup> Because there is value in having diverse viewpoints on the Court<sup>119</sup> and the decision-making process in the Supreme Court is a collaborative enterprise, a Justice’s refusal to engage in that enterprise with the majority means she cannot prevent one bad decision from proliferating into a line of many bad decisions, and cannot “bring the doctrine closer to where she believes it should be heading.”<sup>120</sup> Opponents argue that, to the extent a Justice is committed to continuing a prior dissent and refuses to work cohesively with the other Justices to reach a good—if not ideal—outcome, the substantive doctrine suffers from a lack of diverse viewpoints.

Aside from any implications for the substantive doctrine itself, another possible negative consequence of sustaining one’s dissent is that the practice may harm reliance interests in the Court’s decisions.<sup>121</sup> It is argued that, since sustained dissent “implies a refusal to

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115 See Krotoszynski, *supra* note 83, at 2111 (“[P]erpetual dissent . . . knows no ideological boundaries.”).

116 See Fried, *supra* note 16, at 183; see also Larsen, *supra* note 16, at 473 (“A third consequence [of] perpetual dissents is the deprivation of a voice at Conference . . .”).

117 Fried, *supra* note 16, at 183.

118 See Larsen, *supra* note 16, at 473.

119 See *id.*

120 Fried, *supra* note 16, at 181.

121 See Larsen, *supra* note 16, at 472. For further discussion of how disrespecting precedent harms reliance on the Court’s decisions, see *Payne v. Tennessee*, 501 U.S. 808 (1991). Such behavior “sends a clear signal that scores of established constitutional liberties are now ripe for reconsideration, thereby inviting the very type of open defiance of our precedents that the majority rewards in this case.” *Id.* at 845 (Marshall, J., dissenting). While *Payne* was an instance of overruling precedent, instead of

allow the decision to shelter under stare decisis,"<sup>122</sup> if "the public discovers the fragility of [the] precedent . . . the decision's ability to stimulate reliance decreases."<sup>123</sup> In this context, sustained dissent has negative implications for the stability of doctrine, particularly where the change of a single vote threatens to undo a generation's worth of precedent.<sup>124</sup> One is reminded of the headline from the joint opinion in *Casey*—"Liberty finds no refuge in a jurisprudence of doubt."<sup>125</sup> Since the ability to rely on the Court's decisions is of great importance for private legal ordering and stability within the law,<sup>126</sup> the consequences of sustaining one's dissent can stretch far beyond mere jurisprudential theory and into "real life."

This problem is particularly acute when one considers the modern stare decisis factors laid out in *Casey*.<sup>127</sup> When the Court contemplates whether to overturn an erroneous precedent, one of the factors it takes into consideration is whether the decision has garnered substantial reliance.<sup>128</sup> Thus, "a continued campaign to erode the public's faith in a precedent can . . . sabotage [it] from the start."<sup>129</sup> By continually questioning the validity and correctness of a precedent, a minority of Justices can affect a future Court's evaluation of the degree of reliance that precedent has received.<sup>130</sup> This creates a sort of self-fulfilling prophecy, whereby the sustained dissent of the minority makes a future overruling more likely—a phenomenon that raises serious questions about stability and reliance, among other things.<sup>131</sup> Reliance is inextricably linked to the doctrine of stare decisis; a Jus-

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merely continuing in dissent, the implications for reliance interests are quite similar. Mello, *supra* note 18, at 650.

122 Fried, *supra* note 16, at 182.

123 Larsen, *supra* note 16, at 472.

124 Fried, *supra* note 16, at 185, 193.

125 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (plurality opinion).

126 Lee, *supra* note 32, at 653 ("[A] doctrine of reliance on precedent furthers the goal of stability by enabling parties to settle their disputes without resorting to the courts.").

127 See *supra* note 14.

128 *Casey*, 505 U.S. at 854 (asking "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling"). The joint opinion in *Casey* ultimately concluded that "Americans had structured their lives in reliance on *Roe*," a finding that "cautioned against overruling the decision." Larsen, *supra* note 16, at 472.

129 Larsen, *supra* note 16, at 473.

130 See *supra* note 45.

131 As Larsen observes, "there is something mischievous about the fact that a non-majority of the Court can affect a test that is applied by a majority Court in the future." Larsen, *supra* note 16, at 473.

tice's rejection of precedent has practically unavoidable negative consequences for reliance interests.

Perhaps the most significant consequence of the practice of sustained dissent is that it may undermine the legitimacy of the Court as an institution.<sup>132</sup> Opponents argue that “[w]hen a Justice continues to dissent on an issue that is controlled by an earlier decision,” and thus rejects the validity of existing precedent, “he upsets the common perception that the Court is bound by neutral principles.”<sup>133</sup> Persistent, unapologetic dissent serves to validate the criticism that “the Court is . . . composed of unelected judges free to write their policy views into law.”<sup>134</sup> It gives credence to the claim that the Court is nothing more than a glorified voting booth<sup>135</sup> and inspires hope that a mere change in the Court's membership will lead to significant doctrinal changes.<sup>136</sup> In *Payne*, Justice Marshall indicated that such a dismissive view of stare decisis would “destroy the Court's very capacity to resolve authoritatively the abiding conflicts” of the day.<sup>137</sup> Indeed, in *Casey*, the plurality opinion devoted an entire section to explaining

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132 See *id.* at 473–75; see also Lee, *supra* note 32, at 653 (“Stare decisis is also thought to preserve the Court's legitimacy.”).

133 Larsen, *supra* note 16, at 474.

134 Powell, *supra* note 12, at 16; see also Fried, *supra* note 16, at 178–79 (arguing that the promise of persistence in dissent reduces the Court to a political entity); Larsen, *supra* note 16, at 473–74 (“[A] commitment to precedent is what insulates the Court from being perceived as a political institution.”).

135 See Larsen, *supra* note 16, at 475.

136 See Fried, *supra* note 16, at 195 (lamenting as “quite dispiriting” the fact that observers of the Court “speak of . . . the effect of changes in personnel” as relevant to the Court's jurisprudence); see also *Payne v. Tennessee*, 501 U.S. 808, 845 (1991) (Marshall, J., dissenting) (“Speaking for the Court *as then constituted* . . .” (emphasis added)); Larsen, *supra* note 16, at 474 (observing that sustained dissent gives the impression that the Court “chang[es] its mind when it changes its membership,” which creates the impression that it is “a mere political machine”). Indeed, these concerns are not without merit. Many articles have been written suggesting the Court's inhabitants are merely political actors. See, e.g., Lino A. Graglia, *The Myth of a Conservative Supreme Court: The October 2000 Term*, 26 HARV. J.L. & PUB. POL'Y 281, 287 (2003) (“Justices Stevens, Souter, Ginsburg, and Breyer . . . constitute a highly reliable and predictable liberal bloc, which illustrates how little law and how much ideology affects Supreme Court decision-making.”).

137 *Payne*, 501 U.S. at 853. Justice Marshall continued “[i]f this Court shows so little respect for its own precedents, it can hardly expect them to be treated more respectfully by the state actors whom these decisions are supposed to bind.” *Id.* This sentiment was echoed one year later in *Casey*, when the plurality opinion observed that “overruling *Roe's* central holding would . . . seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992) (plurality opinion).

why not adhering to *Roe* would lead to a substantial degradation of the Court's legitimacy.<sup>138</sup> If the opponents of sustained dissent are correct and the perception begins to take hold that the Court is nothing more than a venue for political actors to vindicate their policy views, rather than a principled body that exhibits judicial restraint and due respect for precedent, such a perception may be difficult—if not impossible—to shake.

Furthermore, such a development would be undeniably damaging to the Court. The Court's power is almost entirely dependent on its actual and perceived legitimacy.<sup>139</sup> Having control of neither the sword nor the purse, the Court must rely on its judgment.<sup>140</sup> Thus, the Court's authority "ultimately rests on sustained public confidence in its moral sanction."<sup>141</sup> Chief Justice Marshall recognized this reality at the Court's infancy, seeking at every opportunity to establish consensus among the Court and to project strength and unanimity as a means of securing the Court's power.<sup>142</sup> While that commitment has perhaps waned throughout the years, Chief Justice Roberts adheres to this view as well.<sup>143</sup> The Chief Justice believes that the appearance of disagreement within the Court "make[s] it harder for the public to respect the Court as an impartial institution that transcends partisan politics."<sup>144</sup> Consider the implications for the Court's decision in

138 See *Casey*, 505 U.S. at 864–69.

139 See *id.* at 865 ("The Court's power lies . . . in its legitimacy . . ."); see also Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1108–09 (1995) (arguing that "an opinion must *look principled* as well as *be principled* in order to legitimately and justifiably fulfill the judicial function"); Larsen, *supra* note 16, at 474 ("[T]he Supreme Court's power and general effectiveness depends on its public image . . .").

140 THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1982).

141 *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

142 Note, *From Consensus to Collegiality: The Origins of the "Respectful" Dissent*, 124 HARV. L. REV. 1305, 1306 (2011) ("Recognizing that an activist Court produced substantial institutional costs . . ."); see also Shepard, *supra* note 19, at 337 ("The Marshall court ushered in a new practice of issuing a single opinion for the whole bench rather than separate opinions for each of the [J]ustices.").

143 Jeffrey Rosen, *Roberts's Rules*, THE ATLANTIC, Jan./Feb. 2007, at 104, 105, *available at* <http://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/>.

144 *Id.* ("In Roberts's view, the most successful chief justices help their colleagues speak with one voice. Unanimous . . . decisions . . . contribute to the stability of the law and the continuity of the Court . . ."); see also RICHARD KLUGER, *SIMPLE JUSTICE* 711 (2004) ("A unanimous opinion of the Court inspires a measure of respect and obedience that even a single dissent bespatters. A single opinion says that the nine men have in union apprehended truth and now reveal it . . .").



*Brown v. Board of Education*<sup>145</sup> had it—and each subsequent decision applying *Brown*—been a deeply divisive five-to-four battle, rather than a unanimous decision.<sup>146</sup> Indeed, Justice Stanley Reed—a Southern Justice who was the last holdout from unanimity in *Brown*<sup>147</sup>—joined the unanimous opinion not because he thought it was correct, but because he recognized the importance of presenting a united front to the American people, especially those inclined to disagree with the Court’s holding.<sup>148</sup> In stark contrast to sustaining his dissent, Justice Reed sacrificed even the initial dissent in the interest of preserving what he viewed as the Court’s legitimacy.<sup>149</sup> While it is not clear whether widespread sustained dissent would, in fact, substantially tarnish the Court’s public image, it is clear that any diminution in the Court’s perceived legitimacy would be unfortunate. As the plurality in *Casey* warned:

If the Court’s legitimacy should be undermined, then, so would the country be [undermined] in its very ability to see itself through its constitutional ideals. The Court’s concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.<sup>150</sup>

### *B. The Preferred Alternative*

Despite taking a mostly critical view of the practice of sustained dissent for the reasons discussed above, the existing academic literature on this practice has not ruled out its usefulness completely. While scholars lament the “rampant” and “haphazard[ ]” use of the

145 347 U.S. 483 (1954).

146 See, e.g., STEPHEN GOTTLEB, *MORALITY IMPOSED* 196 (2000) (“[A]ll the members of the Court understood the importance of unanimity [in *Brown*].”); see also Stephen Ellmann, *The Rule of Law and the Achievement of Unanimity in Brown*, 49 N.Y.L. SCH. L. REV. 741 (2005) (chronicling the way in which the Court achieved unanimity by securing the vote of Justice Stanley Reed).

147 See KLUGER, *supra* note 144, at 711 (“It was Reed whose yielding at the end of the Court’s deliberative process had given the decision its extra, crucial dimension: the Justices had spoken as one.”).

148 See Ellmann, *supra* note 146, at 757 (“Reed might have set aside his own convictions . . . because he felt that a unanimous decision would be better for the country and the Court than the same outcome arrived at by an 8-1 vote. . . . [E]ven a lone dissent by him would give a lot of people a lot of [cover] for making trouble. For the good of the country, he put aside his own basis for dissent.” (internal quotation marks omitted)).

149 KLUGER, *supra* note 144, at 702 (“For the good of the country, he put aside his own basis for dissent.” (citation omitted)).

150 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 868 (1992) (plurality opinion).

practice over the last two decades, many nevertheless concede that it can be valuable if subject to some significant restraint.<sup>151</sup> Employed very rarely—as a means of judicial civil disobedience—Larsen argues that sustained dissent becomes a powerful tool for communicating with the public.<sup>152</sup> “If . . . perpetual dissents . . . are rare . . . 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.”<sup>153</sup> Furthermore, such an approach would minimize institutional costs, as the Court’s legitimacy “would be re-affirmed more often than it would be eroded.”<sup>154</sup> Kelman concedes that sustained dissent can improve the Court’s debate and achieve doctrinal results of greater clarity.<sup>155</sup> “In favor of the course of unremitting dissent . . . is its quality of directness. . . . There is no over-subtlety, no distortion by any other concerns than the intrinsic merits of the case.”<sup>156</sup> Yet, like Larsen, Kelman advocates substantial modesty in its employment, encouraging Justices to “ask themselves whether there are special reasons why they should persist in dissent. And ‘I still think I am right and my colleagues are wrong’ is not . . . a fully sufficient basis for repetition of dissent.”<sup>157</sup>

Absent significant restraint, scholars find the practice mostly troubling, describing it as “unsettling” and “quite dispiriting,”<sup>158</sup> and likening it to the fable of “the boy who cries wolf”<sup>159</sup>—it happens so much that observers are not sure when to believe that the issue is truly important. Meanwhile, critics bemoan the system’s accumulation of substantial institutional costs without realizing any significant benefits, other than perhaps a Justice’s personal doctrinal consistency. While scholars acknowledge some value in the practice, they argue that value is confined to very limited circumstances, and that it is not appropriate for a Justice to consider sustained dissent outside those circumstances.

What is a Justice to do then? If widespread sustained dissent may discourage reliance and harm the Court’s public reputation, is a Justice supposed to simply go along with his colleagues and swallow his disagreement? Not necessarily. Attributed to the second Justice

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151 See, e.g., Larsen, *supra* note 16, at 449, 475.

152 See *id.* at 477–78.

153 *Id.* at 475.

154 *Id.* at 476.

155 See Kelman, *supra* note 16, at 254.

156 *Id.*

157 *Id.* at 297.

158 Fried, *supra* note 16, at 192, 195.

159 Larsen, *supra* note 16, at 475.

Harlan, scholars encourage an alternative practice, whereby a Justice writes a separate opinion that indicates disagreement with precedent, but nevertheless accepts it as controlling and applies it faithfully.<sup>160</sup> Referred to, metaphorically, as “cold storage,” the Justice need not abandon his disagreement or his hope that an alternative view may one day prevail; but in the meantime—“until a countermajority can be marshaled for corrective action”<sup>161</sup>—the Justice should shelve his dissent, accept the precedent as valid, and avoid the temptation to call its legitimacy into question. By doing this, the Justice is able to register his disagreement with the Court and indicate that the precedent is perhaps vulnerable, without appearing to be oppositional or obstructionist. Such an approach, its proponents argue, has “pragmatic and institutional benefits,”<sup>162</sup> avoids the negative consequences of sustained dissent, and offers a healthy alternative to a Justice wishing to satisfy compelling, yet competing interests.

In sum, the existing academic literature takes a mostly negative view of the practice of sustained dissent.<sup>163</sup> Scholars have identified a broad range of negative consequences that they argue result from the practice, chiefly its capacity to permanently alter the public’s perception of the Court. In light of these consequences, they argue that Justices should reserve their sustained dissent for extraordinarily rare circumstances, and instead place their disagreement into “cold storage” until the appropriate opportunity to overrule the precedent presents itself. Such restraint, it is argued, minimizes institutional costs without requiring a Justice to abandon his judicial principles. Part III of this Note will address the criticisms raised in Part II and present a more favorable view of sustained dissent.

### III. A MORE FAVORABLE VIEW OF SUSTAINED DISSENT

The concerns discussed in Part II are not without merit. Apprehension over the potential for a delegitimized Supreme Court and judicial decisions unable to foster the necessary degree of reliance is understandable. Nevertheless, while sustained dissent does impose some institutional costs, the practice is not as perilous as the existing academic literature maintains. Properly focused, sustaining in one’s

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160 Larsen refers to this practice as “concurrence under duress.” *Id.* at 449–50. Kelman refers to it as “temporary cold storage,” “temporary acquiescence,” and “self-subordination.” Kelman, *supra* note 16, at 230–31 (internal quotation marks omitted).

161 Kelman, *supra* note 16, at 258–59.

162 *Id.* at 297.

163 *See supra* note 114.

dissent can improve the quality of judicial decisions and minimize concerns over decreased reliance, all without harming the public's perception of the Court. Acknowledging that the practice must undoubtedly be constrained by pragmatic and institutional concerns, Justices should not place excessive limits on their use of the practice, as the value of sustained dissent extends beyond its use as merely an act of judicial civil disobedience.

This Part will respond to the negative consequences raised in Part II—not by suggesting that the concerns implicated are insignificant, but by explaining that it is a tenuous argument, at best, that the Court's engagement in sustained dissent is likely to lead to the consequences feared. After mitigating those concerns, this Part will explore value in the practice that has not been sufficiently discussed by the existing academic literature—namely, that sustaining one's dissent can be an effective means of extending the deliberative process of the Court, leading to judicial decisions that are of higher quality and are better able to garner respect and reliance in the long run. This Part will acknowledge the need for meaningful restraint on the part of Justices, but will ultimately advocate a more substantial role for sustained dissent than the one many scholars deem appropriate. Only after adequately addressing the criticisms raised in Part II and examining the unexplored potential value of sustained dissent can one begin to make an informed judgment about the appropriateness of the practice.

#### A. *Responding to the Negative Consequences*

As stated above, the concerns raised in Part II are not without merit. The quality and coherence of the Court's decisions, its ability to foster reliance on them, and the Court's broader institutional legitimacy are all of vital importance, not only to our judiciary, but also to our government and the greater principle of the separation of powers. However, opponents of sustained dissent either overstate the negative impact the practice has on these vital interests or fail to adequately account for countervailing benefits the practice can confer.

Opponents of sustained dissent argue that, because the sustained dissenter removes his oppositional voice from the collaborative judicial process, the practice has a negative effect on the development of the substantive body of law.<sup>164</sup> However, engaging in sustained dissent can actually have a positive, clarifying effect on the doctrine at issue. Much has been written about the value of a good dissent and

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164 See *supra* Part II.A.

how it can provide an appropriate context for the majority's decision.<sup>165</sup> For example, a dissent can "demonstrate[ ] flaws the author perceives in the majority's legal analysis" and "emphasize[ ] the limits of a majority's decision . . . ."<sup>166</sup> And while a dissent will not always lead to some future correction in the law, that does not mean it is without value; a dissent still can serve as a clarifying, moderating lens through which the majority decision is viewed.<sup>167</sup> And there is no reason that a dissent must cease to have a clarifying, moderating effect after only one iteration. As the Court begins to apply and shape that body of law in future cases, a continued dissenting voice can still serve this valuable purpose. Consider the dissent in *United States v. Morrison*,<sup>168</sup> where Justices Souter, Stevens, Ginsburg, and Breyer sustained their dissent from *United States v. Lopez*.<sup>169</sup> In *Lopez*, the Court limited the reach of Congress's authority to act under the Commerce Clause by holding that simple possession of a firearm was noneconomic activity, and thus it could not, even in the aggregate, have a substantial effect on interstate commerce.<sup>170</sup> The *Morrison* Court relied on *Lopez* in determining that, since violence against women was noneconomic activity, it likewise could not satisfy the "substantial effects" test.<sup>171</sup> In dissent, the four Justices reiterated their dissent from *Lopez*, but applied it to a factual context that placed even greater strain on the Court's analysis in *Lopez*.<sup>172</sup> Indeed, the argument that noneconomic activity does not have a substantial effect on interstate commerce appeared weaker in the context of *Morrison* than it did in *Lopez*. And

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165 See *supra* note 19.

166 Brennan, *supra* note 19, at 430. "[T]he dissent . . . safeguards the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision. . . . [V]igorous debate improves the final product by forcing the prevailing side to deal with the hardest questions urged by the losing side." *Id.*

167 Shepard, *supra* note 19, at 338–39.

168 529 U.S. 598, 628 (2000) (Souter, J., dissenting).

169 514 U.S. 549, 602 (1995) (Stevens, J., dissenting); *id.* at 603 (Souter, J., dissenting); *id.* at 615 (Breyer, J., dissenting).

170 See *id.* at 567–68 (majority opinion).

171 *Morrison*, 529 U.S. at 617–18 (majority opinion) ("We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local." (citing *Lopez*, 514 U.S. at 568 (majority opinion))).

172 *Id.* at 628–31 (Souter, J., dissenting) ("One obvious difference from *United States v. Lopez* is the mountain of data assembled by Congress, here showing the effects of violence against women on interstate commerce. . . . [W]e have the benefit of specific factual findings in the eight separate Reports issued by Congress and its committees . . . ." (citations omitted)).

to the extent the four Justices' continuation of their prior dissent raised this issue in a different factual context, and further pressed the majority's reasoning, the renewed dissent had value. Sustaining one's dissent need not amount to a wholesale rejection of the doctrine of *stare decisis*; it need not shake the public's faith in the Court. Rather, it is an opportunity for the Justice to continue to point out the majority's flaws, to apply those criticisms to different factual scenarios, and to provide lower court judges with a richer background and context in which to interpret the majority opinion.

Furthermore, in terms of doctrinal clarity, sustained dissents are valuable for what they are not—distortions of precedent. To the extent a Justice who disagrees with a precedent nevertheless adopts it but applies it unfaithfully, or attempts to twist the precedent to accommodate the outcome he seeks, future holdings become unnecessarily narrow and confusing.<sup>173</sup> These opinions do not represent a true acceptance of the precedent, but rather a compromised approach that can become counterproductive in the long run by muddying the doctrinal waters. Sustained dissent, by contrast, maintains a truly adversarial voice throughout the opinion and promotes clarity in the doctrine. An example of this problem is found in *Central Virginia Community College v. Katz*,<sup>174</sup> a 2006 case where the Court confronted its prior holding in *Seminole Tribe of Florida v. Florida*.<sup>175</sup> In *Katz*, the majority, comprised of the four dissenting Justices from *Seminole Tribe* and Justice O'Connor, did not purport to overrule *Seminole Tribe*, but applied its holding very narrowly and in a way the dissenters thought was unfaithful to the precedent.<sup>176</sup> Justice Thomas concluded his dissent by criticizing the majority for, in a sense, overruling *Seminole Tribe* by subterfuge: "It would be one thing if the majority simply wanted to overrule *Seminole Tribe* altogether. That would be wrong, but at least the terms of our disagreement would be transparent. The majority's action today, by contrast, is difficult to comprehend."<sup>177</sup> Had the four

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173 Larsen, *supra* note 16, at 467 ("[A] perpetual dissent . . . prevents subtle tinkering with doctrine and the muddying of the rule of law."). Sustained dissent also prevents the majority from "bend[ing] over backwards to accommodate the dissenters," which would result in "narrow case-specific holdings with no clear rules to guide the future." *Id.*

174 546 U.S. 356 (2006).

175 517 U.S. 44 (1996).

176 *Katz*, 546 U.S. at 379–80 (Thomas, J., dissenting). "[T]oday's decision thus cannot be reconciled with our established sovereign immunity jurisprudence . . . ." *Id.* at 382.

177 *Id.* at 393; *see also* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 984–85 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (criticizing the plurality for claiming to be adhering to precedent, but, in his view, distorting

Justices sustained their initial dissent from *Seminole Tribe* instead of straining to reach their conclusion without squarely disrupting *Seminole Tribe*, the doctrine of state sovereign immunity might be more clearly understood and less vexing for lower court judges.<sup>178</sup> With these concerns of clarity in mind, Justice Scalia's partial dissent from *Casey* is apt—"Reason finds no refuge in this jurisprudence of confusion."<sup>179</sup> Sustained dissent, in contrast to what its detractors may argue, can have a positive effect on the clarity of judicial decisions and coherence of a body of law by maintaining clear terms of disagreement and by decreasing the likelihood that a Justice will accord faux respect to precedent with which he truly disagrees.

Opponents of sustained dissent further argue that, if Justices insist on engaging in sustained dissent and repeatedly rejecting the validity of the Court's precedent, such behavior will harm the ability of the Court to stimulate the necessary degree of reliance on its decisions.<sup>180</sup> This is an inherent jurisprudential conundrum, however, and is hardly specific to sustained dissent. By tilting the scales too far in the direction of reliance concerns, opponents of sustained dissent unnecessarily impinge on the fundamental role of the Court—arriving at correct interpretations of the Constitution.<sup>181</sup> Moreover, by paying too much respect to reliance interests, the Court dooms itself to "keep repeating and reaffirming[ ] mistakes forever," foreclosing

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it); *cf.* *Payne v. Tennessee*, 501 U.S. 808, 835 (1991) (Scalia, J., concurring) ("A decision of this Court which, while not overruling a prior holding, nonetheless announces a novel rule . . . should be approached with great caution."). For further discussion of "stealth overruling," see Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1 (2010).

178 For a discussion of *Katz's* contribution to the confusing status of the Court's state sovereign immunity jurisprudence, see Scott Fruehwald, *The Supreme Court's Confusing State Sovereign Immunity Jurisprudence*, 56 DRAKE L. REV. 253, 299–300 (2008) ("There is nothing in the text of the Constitution or the history of the Bankruptcy Clause that even suggests that Congress intended to create an exception to states' sovereign immunity in this clause. . . . [T]he majority's untethered decision in *Katz* is legal reasoning of the worst kind."); T. Haller Jackson IV, *Fee Shifting and Sovereign Immunity After Seminole Tribe*, 88 NEB. L. REV. 1, 42 (2009) ("*Katz* represents a . . . dramatic methodological break from *Seminole Tribe* . . ."); see also Friedman, *supra* note 177, at 46 ("The first evil of stealth overruling is that in some cases it makes it difficult if not impossible for the lower courts to know what they are being instructed to do.").

179 *Casey*, 505 U.S. at 993 (Scalia, J., concurring in the judgment in part and dissenting in part).

180 See *supra* Part II.A.

181 "Our task is, as always, to decide only whether the challenged provisions of a law comport with the United States Constitution." *Casey*, 505 U.S. at 979 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

the possibility that the Court could correct its own harmfully erroneous decisions, or that the political branches could do so.<sup>182</sup> Admittedly, reliance is an important judicial consideration. It is most relevant when issues of contract or property are concerned<sup>183</sup>—those areas of the law where, as Justice Brandeis said, it is better that the law be settled than right.<sup>184</sup> But concerns for reliance must not be made to dominate countervailing interests, such as the interest in arriving at a correct interpretation of the highest precedent—the Constitution.<sup>185</sup> Particularly where the precedent demonstrably conflicts with the Constitution, rendering reliance on it less reasonable, the role of reliance would be significantly diminished.<sup>186</sup>

Moreover, it is not a foregone conclusion that sustained dissent will, in fact, harm reliance interests; indeed, if properly focused, the practice could strengthen reliance. Assuming that sustained dissent

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182 Akhil Reed Amar & Vikram David Amar, *Precedent on the High Court: More on Bakke and Bowers: Part Two of a Three-Part Series on Stare Decisis*, FINDLAW (Dec. 27, 2002), <http://writ.news.findlaw.com/amar/20021227.html>. The Amars offer the intriguing theory that the Court can rely on the political branches to correct erroneous decisions, so long as the Court admits its mistake. For instance, though it might be inappropriate for the Court to announce a prospective, gradually phased-in correction, it would not be improper for the legislature to do so. Therefore, “it is crucial for judges to tell us if they have indeed erred in the past so that the other branches may properly ponder their constitutionally permissible options.” *Id.*

183 See *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . .”); see also Lee, *supra* note 32, at 652–53 (recognizing that overruling precedent that establishes rules for contract, property, or other commercial relationships would undermine economic growth and stability).

184 *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting); see also Kozel, *supra* note 54 (“This article provides a systematic analysis of the ways in which theories of precedent are—and are not—derivative of overarching methods of constitutional interpretation.”).

185 Amar and Amar wrote:

[T]he Constitution, not the Court’s case law, is what ‘We the People’ ratified in the 1780s . . . . It is the document that creates the judiciary, not vice versa. Indeed, the same Constitution . . . requires all judges to swear an oath of allegiance not to their past rulings, but to the document itself. . . . *Marbury v. Madison* . . . makes clear that the entire basis of judicial review is to ensure compliance with the Constitution itself, as opposed to the misinterpretations of the Constitution by any branch of government—whether Congress or the President, or the judiciary itself.

Akhil Reed Amar & Vikram David Amar, *How Should the Supreme Court Weigh Its Own Precedent?: This Term, the Court Confronts Stare Decisis*, FINDLAW (Dec. 13, 2002), <http://writ.lp.findlaw.com/amar/20021213.html>.

186 See Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1061–64 (2003).



would not be perpetual, but rather would be abandoned once the Justice realizes that the competing view has ultimately prevailed, the more difficult path taken to respected precedent would convey a greater finality to the judicial process, and thus foster greater reliance.<sup>187</sup> Under this theory, because the rule of law would have been tested in multiple factual contexts and subject to many iterations of debate and dissent, the final outcome would be battle tested and afforded greater respect.<sup>188</sup> This position, developed more fully in Part III.B, is contestable, but the point is that potential harm to reliance interests needs not be a deal breaker for those pondering the appropriateness of sustained dissent. Harm to reliance interests is not inevitable—indeed, there is no empirical proof that increased use of sustained dissent in the modern Court has significantly harmed reliance interests. And if properly focused, sustained dissent could improve reliance on the Court’s decisions. Even if reliance is marginally harmed, however, there are countervailing benefits which counsel against a *per se* rejection of sustained dissent.

Finally, opponents of sustained dissent argue that, if the practice becomes too widespread, it could permanently undermine the legitimacy of the Court as an institution, relegating it to nothing more than a third political branch.<sup>189</sup> It is difficult to contest the assertion that the current Supreme Court is dealing with a public image problem. In a June 2012 poll conducted by Gallup, only 15% of respondents said they had a “great deal” of confidence in the Court, whereas 20% said they had “very little” confidence.<sup>190</sup> The percentage of respondents who said they had either a “great deal” or “quite a lot” of confidence in the Court averaged 47.5% from 1973 to 2004, but has averaged only 37% from 2005 to 2012.<sup>191</sup> The numbers certainly suggest that something is afoot. However, this reality is symptomatic of a broader trend. Confidence in public institutions has been decreasing steadily over the last few decades, and the Court currently places well ahead of other vital institutions, such as big business and organized labor, the presidency, Congress, banks, public schools, and the

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187 See generally Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1205–06 (2006) (“Super precedents are the constitutional decisions whose correctness is no longer a viable issue for courts to decide . . .”).

188 *Id.* at 1206.

189 See *supra* Part II.A.

190 GALLUP, *Confidence in Institutions* (June 7–10, 2012), <http://www.gallup.com/poll/1597/confidence-institutions.aspx>.

191 See *id.*

media.<sup>192</sup> This does not mean the Court should not worry about its public image; as stated above, because of its unique nature, the Court relies more on the appearance of legitimacy than other institutions do.<sup>193</sup> It simply suggests that there are broader issues in play, and something as esoteric as a Justice's approach to sustained dissent is unlikely to be noticed by the public, let alone have a negative impact on the Court's perceived legitimacy. For instance, according to a 2010 survey conducted by C-SPAN, 67% of respondents could not name a single case ever heard by the Supreme Court,<sup>194</sup> and a similar survey indicates that 66% of Americans could not name a single Supreme Court Justice.<sup>195</sup> Simply put, the extent to which engaging in sustained dissent is likely to have a significant negative impact on the public's perception of the Court is unclear at best.

Rather, as noted Supreme Court commentator Jeffrey Rosen speculates, the public's opinion of the Court is likely driven by much more general matters, such as whether the public is pleased, in terms of policy outcomes, with the Court's decisions.<sup>196</sup> For example, Rosen argues that high-profile, politically contentious cases—such as *Bush v. Gore*,<sup>197</sup> *Kelo v. City of New London*,<sup>198</sup> *Boumediene v. Bush*,<sup>199</sup> and even *Citizens United*—caused public angst “by increasing the perception among half the public that the Court is out of step with its partisan preferences.”<sup>200</sup> Indeed, the Supreme Court often finds itself as the

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192 See *id.*; see also David Frum, *Don't Take it Personally Your Honors: They're Mad at Everybody*, THE DAILY BEAST (June 8, 2012, 11:58 AM), <http://www.thedailybeast.com/articles/2012/06/08/supreme-court.html> (explaining that confidence in many American institutions has decreased significantly).

193 See *supra* notes 139–141 and accompanying text.

194 C-SPAN, SUPREME COURT SURVEY (June 21, 2010), available at [http://www.c-span.org/pdf/2010SCOTUS\\_poll.pdf](http://www.c-span.org/pdf/2010SCOTUS_poll.pdf).

195 FindLaw Survey: Most Americans Can't Name Supreme Court Justices, FINDLAW (Aug. 23, 2012, 12:02 PM), [http://blogs.findlaw.com/official\\_findlaw\\_blog/2012/08/findlaw-survey-most-americans-cant-name-supreme-court-justices.html](http://blogs.findlaw.com/official_findlaw_blog/2012/08/findlaw-survey-most-americans-cant-name-supreme-court-justices.html).

Chief Justice Roberts was the most well-known, recognized by only 20% of respondents. *Id.*

196 Jeffrey Rosen, *The Supreme Court Has a Legitimacy Crisis, But Not for the Reason You Think*, THE NEW REPUBLIC (June 11, 2012), <http://www.tnr.com/article/politics/103987/the-supreme-court-has-legitimacy-crisis-not-the-reason-you-think#>. “Americans support the Court when they perceive themselves to be in partisan agreement with it, and they lose confidence when they perceive the [J]ustices to be moving in a different partisan direction than their own.” *Id.*

197 531 U.S. 98 (2000).

198 545 U.S. 469 (2005).

199 553 U.S. 723 (2008).

200 Rosen, *supra* note 196. Under this theory, were the Court to decide two cases on the same day, one extremely troubling to Democrats and the other extremely

final arbiter of this country's most divisive political disputes. This is all to say that, in terms of affecting the long-term institutional legitimacy of the Court, the public is much less likely to be influenced by obscure jurisprudential practices than it is by the Court's arriving at outcomes it perceives as correct.<sup>201</sup> This creates the obvious problem that the public, in large part, does not always agree about what the "correct" outcome of a case should be. So what can the Court do to preserve its legitimacy?

As Justice Scalia presaged in *Casey*, "[i]nstead of engaging in the hopeless task of predicting public perception . . . the Justices should do what is *legally* right . . ." <sup>202</sup> In the same case, Chief Justice Rehnquist asserted that the Court "derives its legitimacy, not from following public opinion, but from deciding by its best lights whether [laws] comport with the Constitution."<sup>203</sup> Sustained dissent can play a valuable role in the legitimacy enhancing endeavor by giving the Court the opportunity to more thoroughly consider the case, particularly as applied to different factual scenarios, and by decreasing the likelihood that the Court will simply be compelled to reaffirm a prior incorrect decision. This more thorough, prolonged analysis would improve the Court's decisions, and could render them more reliable and respected in the long run. Thus, if properly—but not excessively—restrained, sustained dissent can improve the Court's image. In *Casey*, the Chief Justice acknowledged this, stating that the Court can "enhance[ ] its stature by acknowledging and correcting its error."<sup>204</sup> Chief Justice Roberts echoed this sentiment in *Citizens United*.<sup>205</sup> Indeed, many scholars agree that one of the Court's most legitimate, respected, relied upon cases is *Brown v. Board of Education*, a case where the Court questioned and ultimately repudiated one of

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troubling to Republicans, both parties would be dismayed by the Court, despite the fact that Court's decisions would not, in the aggregate, favor one party over the other.

201 *Id.* ("[T]he most straightforward way for the Court to maintain its high approval ratings is to hand down decisions that majorities of the public agree with.")

202 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 999 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

203 *Id.* at 963 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

204 *Id.* at 959.

205 *Citizens United v. FEC*, 130 S. Ct. 876, 920–21 (2010) (Roberts, C.J., concurring). In his concurrence, Chief Justice Roberts recognized that the doctrine of stare decisis is not an end in itself, but rather is intended to serve the greater interests of institutional legitimacy and promotion of the rule of law. *Id.* In those situations where adhering to the doctrine will "do[ ] more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent." *Id.* at 921.

its prior holdings.<sup>206</sup> While *Brown* was not an instance of sustained dissent, a Justice who may have chosen to sustain in dissent from *Plessy v. Ferguson*<sup>207</sup> would certainly have been vindicated.

Moreover, sustained dissent can enhance public confidence by giving individuals the peace of mind that, despite their disappointment with a particular decision, they still have a voice on the Court representing their views, not yet ready to give up the fight.<sup>208</sup> Justices Brennan and Marshall undoubtedly inspired and gave hope to the anti-death penalty movement in the wake of *Gregg v. Georgia*.<sup>209</sup> Indeed, in 1994, the National Coalition to Abolish the Death Penalty launched the Justice William J. Brennan, Jr. Project, dedicated to informing the public about failures of the death penalty.<sup>210</sup>

While much of the “legitimacy enhancing” argument developed above is not unique to sustained dissent specifically, the practice falls within a broader jurisprudential approach that seeks to improve the public’s perception of the Court by recognizing that the doctrine of *stare decisis* is merely “an adjunct”<sup>211</sup> of a greater duty. Blind adherence to past mistakes, purely out of respect for the doctrine, is in many circumstances an abdication of the fundamental judicial responsibility to faithfully interpret the Constitution.<sup>212</sup> Therefore, while the

206 See, e.g., Amar & Amar, *supra* note 185; see also *Citizens United*, 130 S. Ct. at 920 (2010) (Roberts, C.J., concurring) (acknowledging that abandoning precedent has led to significant social goods, such as desegregation and the enactment of minimum wage laws).

207 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

208 See Lani Guinier, *Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 50 (2008) (“By illuminating an alternative view of the law, [a dissenter] can . . . inspire a sense of agency among the people themselves.”). This article discusses how, for instance, Justices Scalia and Ginsburg have used their dissents to give minority viewpoints “enduring traction” in such a way that gives the public “more confidence in the lawmaking institutions and in their own ability to influence those institutions, and thus a greater sense of agency.” *Id.* at 117–18.

209 428 U.S. 153 (1976).

210 See Susan Blaustein, *Justice Brennan Holds Court*, THE NEW YORKER, Dec. 12, 1994, at 48, available at [http://www.newyorker.com/archive/1994/12/12/1994\\_12\\_12\\_048\\_TNY\\_CARDS\\_000369167](http://www.newyorker.com/archive/1994/12/12/1994_12_12_048_TNY_CARDS_000369167); see also Linda Greenhouse, *Liberal Giants Inspire Three Centrist Justices*, N.Y. TIMES, Oct. 25, 1992, at 1, available at <http://www.nytimes.com/1992/10/25/us/liberal-giants-inspire-three-centrist-justices.html?pagewanted=all&src=pm>. “By the end of careers in the law spanning six decades, Justices William J. Brennan Jr. and Thurgood Marshall had inspired generations of lawyers with their view of the law as an instrument of social and political change.” *Id.*

211 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 963 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); see also *supra* note 205 and accompanying text.

212 See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–80 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. . . . This is

simple fact that a Justice may engage in the practice is unlikely to harm the Court's legitimacy, to the extent the practice can be used as a means to improve judicial decisions, it could result in improved public confidence in the Court.

In sum, it is a tenuous proposition that sustained dissent will lead to the negative consequences feared in Part II. Instead of harming the substantive doctrine at issue in a particular case, sustained dissent can actually improve and clarify doctrine by continuing to test the majority's reasoning and by refusing to muddy the doctrinal waters with opinions that purport to apply precedent, but fail to do so faithfully. Similarly, while reliance interests are important for the Court, sustained dissent should not be dismissed purely out of concern for reliance. As an initial matter, there is no empirical evidence that sustained dissent harms reliance interests; further, sustained dissent could actually improve reliance on the Court's decisions to the extent those decisions are seen as the product of a more thorough, well-contested debate. And finally, given the public's lack of close attention to the Court, it is unlikely that engaging in a practice as obscure as sustained dissent will lead to an erosion of the public's confidence. But, if properly focused, sustained dissent could lead to better, more reliable judicial decisions, and could signify an unwillingness to cling to prior erroneous precedent, perhaps enhancing the Court's legitimacy. Either way, there are important trade-offs at play here. While overindulgence in the practice could be harmful to the Court in the long-term, Justices should not place excessive limitations on their use of sustained dissent, and should not restrict its employment merely to occasions of judicial civil disobedience.

*B. The Hidden Value of Sustained Dissent –  
Extending the Deliberative Process*

The potential benefits discussed in Part III.A—clearer doctrine, greater reliance, and improved legitimacy—are not all that sustained dissent can offer. One potential benefit of sustained dissent that has not been explored by the existing literature is the potential for an “extended deliberative process,”<sup>213</sup> which can improve the quality of

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of the very essence of judicial duty. . . . It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned . . . . [C]ourts, as well as other departments, are bound by that instrument.”).

213 In a 2003 article discussing collegiality on the bench, D.C. Circuit Judge Harry Edwards described the “deliberative process” as when “judges go back and forth in their deliberations over disputed and difficult issues until agreement is reached. . . . [J]udges participate as equals in the deliberative process—each judicial voice carries

judicial decisions by exposing Justices to different factual contexts and mitigating cognitive biases and various other limitations. The benefits conferred by an extended deliberative process, however, are not absolute, and will not always outweigh the institutional costs that sustained dissent can impose. Therefore, the practice must be restrained so that its employment creates value for the legal community and does not endanger the doctrine of *stare decisis*.

By engaging in sustained dissent, a Justice extends the deliberative process; that is, he stretches his consideration of a complex legal issue over a series of cases, refusing to fall in line with the majority after the initial case. Instead of merely accepting as binding a precedent he or she believes to be erroneous, and limiting his or her consideration of the present case accordingly, a Justice (or group of Justices) who extends the deliberative process will continue to test the precedent against a new set of facts, and with the benefit of information on how lower courts have implemented it and academic commentary about the decision. In other words, a case would not become “settled precedent” immediately upon its decision, but rather would be subject to criticism and theory testing for an extended period of time. In theory, the extended deliberative process will lead to better, more well-informed judicial decisions.<sup>214</sup> Armed with better information and different facts, the Justices would be able to craft a rule that fits a wider array of cases or that addresses concerns that may not have appeared at first blush. Importantly, this is not just another way of explaining how the Court modifies and contours a rule over time, though that is an important part of the process. Rather, the extended deliberative process encourages a more fundamental reconsideration of the precedent. While not every instance of sustained dissent will embody this principle,<sup>215</sup> those focused on reconsidering and improv-

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weight, because each judge is willing to hear and respond to differing positions.” Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1646 (2003). This article will develop the concept of the “*extended* deliberative process,” whereby the process Judge Edwards describes is extended over a number of cases.

214 This concept is distinct from the concept discussed in Part III.A—that sustained dissent can lead to clearer, more coherent decisions. Instead, the extended deliberative process could theoretically lead to better, more “correct” decisions. In other words, greater clarity and coherence help one to discover precisely what the Court is saying, which has significant benefits. The extended deliberative process goes beyond this, however, by producing more well-informed, higher quality decisions, which lead to better outcomes.

215 Consider, for example, Justices Brennan’s and Marshall’s sustained dissent from affirming the constitutionality of the death penalty in the line of cases beginning with *Gregg v. Georgia*, 428 U.S. 153 (1976). There was typically no reconsideration of

ing legal rules can extend and enrich deliberation, leading to better judicial decisions.

The idea that an extended deliberative process can improve judicial decisions rests on the notion that the one-case method of adjudication has significant flaws. In a 2012 case before the Ninth Circuit, Chief Judge Alex Kozinski wrote: “Bad facts make bad law. No facts make worse law.”<sup>216</sup> This observation succinctly embodies two fundamental aspects of our system of adjudication: it recognizes that a legal dispute must be decided within the framework of a case, while at the same time acknowledging that a single case can be inherently an imperfect context within which to settle complex and difficult legal questions. Indeed, it is a “hallmark of the common law” that the resolution of concrete disputes is the preferred method by which to make law.<sup>217</sup> A first-year course in Constitutional Law similarly demonstrates that such an approach, while compelled by the Constitution,<sup>218</sup> also promotes the separation of powers and a restrained judiciary.<sup>219</sup>

Nevertheless, it must be conceded that there are inherent limitations with this approach: “cases may produce inferior law whenever the concrete case is nonrepresentative of the full array of events that the ensuing rule or principle will encompass.”<sup>220</sup> And it is not only the extraordinary or unique case that may bring about this distortion;

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the issues; simply an adherence to the views they had expressed in earlier dissents. *See generally* Ronald J. Tabak, *Justice Brennan and the Death Penalty*, 11 *PAGE L. REV.* 473 (1991) (discussing Justice Brennan’s death penalty jurisprudence, including his many dissents in post-*Gregg* cases).

216 *Emeldi v. Univ. of Or.*, 698 F.3d 715, 718 (9th Cir. 2012) (Kozinski, J., dissenting from the order denying the petition for rehearing en banc); *cf.* *N. Secs. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) (“Great cases like hard cases make bad law.”).

217 Frederick Schauer, *Do Cases Make Bad Law?*, 73 *U. CHI. L. REV.* 883, 883 (2006); *see also* Oliver Wendell Holmes, *Codes, and the Arrangement of the Law*, in 1 *THE COLLECTED WORKS OF JUSTICE HOLMES* 212 (Sheldon M. Novick ed., 1995) (“It is the merit of the common law that it decides the case first and determines the principle afterwards.”). Notice that, like Judge Kozinski, Justice Holmes recognized both the value in case-based lawmaking as well as its imperfections. *See* Schauer, *supra* at 884–85.

218 The Constitution “limits the jurisdiction of federal courts to ‘Cases’ and ‘Controversies’ . . . .” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992) (quoting U.S. CONST. art. III, § 1).

219 *See, e.g.*, William R. Casto, *The Early Supreme Court Justices’ Most Significant Opinion*, 29 *OHIO N.U. L. REV.* 173, 185–87 (2002) (describing how the early Court’s rejection of advisory opinions was motivated by a desire to respect the separation of powers). “In a letter addressed to the President, [the Justices] wrote that they were specifically concerned about maintaining the ‘[l]ines of separation drawn by the Constitution between the three Departments of Government . . . .’” *Id.* at 184–85.

220 Schauer, *supra* note 217, at 884.

an ordinary case may present certain facts or issues that unduly impact the way a judge considers and decides a legal question.<sup>221</sup>

For instance, social science research suggests that the one case approach to adjudication may have a distorting effect on the outcome of a legal rule or principle due to unrealized cognitive limitations.<sup>222</sup> When judges are “mesmerized by the case before them,” they will attach too much weight to the facts of that case in assessing the proper legal outcome, leading to suboptimal decisions.<sup>223</sup> This is called the “availability bias.”<sup>224</sup> An example of the availability bias, raised by Frederick Schauer, is the case of *Katzenbach v. McClung*.<sup>225</sup> In *McClung*, the issue was whether Congress had authority under the Commerce Clause to enact the portion of the Civil Rights Act of 1964 that outlawed racial discrimination by restaurants who served food that had moved in interstate commerce.<sup>226</sup> Despite acknowledging the “absence of evidence connecting discriminatory restaurant service with the flow of interstate food,” the Court upheld the Act as valid, stating that private discrimination by local actors was “a national commercial problem of the first magnitude.”<sup>227</sup> With its companion case, *Heart of Atlanta Motel v. United States*,<sup>228</sup> *McClung* marked a significant expansion of the Commerce Clause, giving Congress the power to use the clause to regulate social concerns as opposed to primarily economic ones.<sup>229</sup> According to Schauer, “the pressing nature of the desegregation concerns presented in the . . . case may well have

221 *Id.* at 885.

222 *Id.* at 918; see also Nicole E. Negowetti, *Judicial Decisionmaking and the Limits of Perception: Mitigating Implicit Bias with Judicial Empathy*, 22 B.U. PUB. INT. L.J. (forthcoming Spring 2013), available at <http://ssrn.com/abstract=2164325> (“Cognitive science has revealed that decisions that we believe to be based on careful, neutral, logical reasoning may actually be guided by implicit biases and unexamined frameworks of thinking.”).

223 Schauer, *supra* note 217, at 894.

224 *Id.* at 894–95 (“This phenomenon of being overinfluenced by proximate examples is commonly called, in the heuristics and biases literature, the ‘availability heuristic.’”).

225 379 U.S. 294 (1964).

226 See *id.* at 298–99.

227 *Id.* at 304–05.

228 379 U.S. 241 (1964).

229 See, e.g., Heather Hale, Note, *United States v. Lopez: Resisting Further Expansion of Congressional Authority Under the Commerce Power*, 1996 DET. C.L. MICH. ST. U. L. REV. 99, 108–09 (1996) (noting the effect of The Civil Rights Act cases on Commerce Clause jurisprudence); James M. Maloney, Note, *Shooting for an Omnipotent Congress: The Constitutionality of Federal Regulation of Intrastate Firearms Possession*, 62 FORDHAM L. REV. 1795, 1813 (1994) (discussing the impact of The Civil Rights Act cases).



helped produce doctrinal extensions . . . that very likely would not otherwise have come to pass.”<sup>230</sup>

Even worse, if the availability bias manifests itself early in a rule’s doctrinal development, such an error could send the doctrine down an errant road, never to return.<sup>231</sup> A possible example of this is *Osborn v. Bank of United States*.<sup>232</sup> *Osborn* was the first case to construe the breadth of Article III’s arising under jurisdiction and still stands for the proposition that such jurisdiction is quite broad.<sup>233</sup> However, the decision has been criticized as having been motivated less by legal reasoning and more by the facts of the particular case—that is, Chief Justice Marshall felt that federal court jurisdiction of cases involving the Bank of the United States was extremely important to the country’s progress, and thus his ability to reason impartially was so affected.<sup>234</sup> While such criticism may be unwarranted, and while it is unclear that the holding in *Osborn* would ultimately have been different had the case been decided in a different factual context, it must be acknowledged that the facts of a case, while not always perfectly representative, nevertheless have a significant impact on its outcome and the resulting rule.

Another mental bias, the effect of which is amplified by the one case method of adjudication and could be mitigated by sustained dissent, is the “anchoring effect.” When a Justice “anchors,” his assessment of the present case is largely determined according to his

230 Schauer, *supra* note 217, at 902. The Fourteenth Amendment’s guarantee of equal protection restricts only state action; these cases, however, extended Congress’s power under the Commerce Clause to prohibit *local* discrimination by *private* actors—a significant expansion. See GREGORY E. MAGGS & PETER J. SMITH, *CONSTITUTIONAL LAW* 163 (2d ed. 2011).

231 But see Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 905 (2005) (“[P]recedent exerts more path dependency in constitutional law than social scientists acknowledge, but less path dependency than legal scholars presume.”).

232 22 U.S. 738 (1824).

233 *Id.* at 823 (“[W]hen a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause . . .”).

234 See, e.g., *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 481 (1957) (“Marshall’s holding was undoubtedly influenced by his fear that the bank might suffer hostile treatment in the state courts . . .”); Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 812 (2004) (“Scholars and judges have explained the unbounded logic of *Osborn* . . . as part of a mere political decision that was necessary at the time to protect the federal bank from interference by the States.”). But see *id.* at 813 (“That a judicial result is politically expedient does not render the reasoning that led to it ‘political’ and therefore unworthy of serious consideration.”).

understanding of the prior case; the Justice attaches too much weight to the prior case, and indeed confines his assessment of the present case to the logical framework created by the prior case.<sup>235</sup> In other words, the prior case frames the issue in such a way that it becomes difficult for the Justice to consider the present case from a different perspective.<sup>236</sup> This, of course, leads to a suboptimal system of assigning constitutional importance to cases—“first in time, first in right.”<sup>237</sup> Regardless of the specific bias at issue, whether conscious or unconscious,<sup>238</sup> the salient point is that sustained dissent can mitigate these concerns by extending the deliberative process into different factual scenarios. If even a single Justice refuses to accept a precedent with which he disagrees, and continues to dissent in future cases, such behavior can extend the deliberative process in a way that mitigates the effect of bias or other cognitive limitations, introduces varied factual contexts, and ultimately leads to truer, more representative opinions.

In advocating for a more favorable view of sustained dissent, one’s argument need not be hostile to the system of precedent or in favor of discarding the doctrine of *stare decisis*. To the contrary, in recognizing the importance of the doctrine, advocates of sustained dissent seek to ensure that only those cases truly worthy of being accorded great precedential respect reach that stature. An extended deliberative process makes a case’s journey to “respected precedent” a much more difficult one to complete. Precedent that fails to run the extended gauntlet would benefit from reconsideration and further debate, and should emerge with a clearer, sturdier rule. Precedent that survives the extended debate will be battle tested and can display its durability. In either case, the resulting precedent should be clearer, able to stimulate greater reliance, and indicative of a legitimate Court, but also of higher quality and more likely to be substantively correct.

### C. *Striking the Appropriate Balance*

As acknowledged above, however, the benefits conferred by an extended deliberative process will not always outweigh the institu-

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235 Schauer, *supra* note 217, at 896–97.

236 *Id.* at 897–98.

237 This is not to suggest that we should not accord respect to prior cases; it is to suggest that we should not unnecessarily foreclose reconsideration of the doctrinal frameworks that prior cases have established simply because the prior cases came first.

238 There is evidence that these biases impact the decisionmaker even if he is aware of them. Such biases are resistant to “awareness-based debiasing techniques.” Schauer, *supra* note 217, at 897.

tional costs imposed by its employment. To provide an extreme illustration, were a modern Justice to dissent from any case that upholds the constitutionality of paper money,<sup>239</sup> such a dissent would provide very little benefit to the Court's constitutional law jurisprudence, and would serve only to raise questions about the practicality of the Court.<sup>240</sup> So how can a Justice determine when engaging in sustained dissent is a worthwhile endeavor? What are the necessary restraints that must be imposed to ensure that the costs of engaging in the practice do not outweigh the benefits?

For the most part, this calculation will involve balancing the factors discussed in Part I.C—the nature of the case, the age of the precedent, and the strength of the precedent. For instance, Justices should only sustain their dissent in constitutional cases. While one must admit that a gridlocked or otherwise ineffective Congress will not always, in fact, be able to correct what it perceives as the Court's misinterpretation of a statute, respect for Congress's institutional role counsels against sustained dissent in statutory cases. After all, the Constitution gives Congress primary authority to shape policy through statutory law.<sup>241</sup> Once the Court interprets a statute, a Justice should leave disagreement with and correction of an erroneous construction to Congress. In attempting to properly focus employment of the practice so as not to incur undue cost, confining sustained dissent to issues of constitutional interpretation is a wise first step.

In addition, Justices should confine their use of the practice to newly minted precedent. This is because, as Justice Scalia properly observed in his dissent in *Gathers*, “the respect accorded prior decisions increases, rather than decreases . . . as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity.”<sup>242</sup> Thus, subjecting long-standing, well-entrenched precedent to sustained dissent would most squarely implicate reliance

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239 The constitutionality of paper money was ultimately affirmed in 1884. See *Juilliard v. Greenman*, 110 U.S. 421 (1884).

240 See, e.g., Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J.L. & PUB. POL'Y 1017, 1019–20 (2009) (recognizing that even those legal scholars who argue that the holdings of the *Legal Tender Cases* were incorrect as an original matter nonetheless acknowledge the impracticality of overturning those cases). But see Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not To)*, 115 YALE L.J. 2037, 2061 n.46 (2006) (arguing that, were the Court to overturn the *Legal Tender Cases*, Congress would still be able to establish a paper money system as necessary and proper to its authority to coin money and regulate interstate commerce).

241 See Barrett, *supra* note 186.

242 *South Carolina v. Gathers*, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting).

concerns, and could impose significant institutional costs.<sup>243</sup> There is no particular length of time whereby a precedent magically becomes immune from sustained dissent; this will require a prudential consideration on the part of the Justice. Erring on the side of caution, however, is advisable. A seismic shift in the legal landscape should be left to the people's elected representatives.<sup>244</sup> Conversely, a quick self-correction does not pose the same degree of threat, either to reliance or legitimacy.<sup>245</sup> Where the Court is viewed as overturning a landmark case, or a case that has spawned the reliance of an entire generation, costs are substantially higher.<sup>246</sup> In a sense, it is ideal for a Justice to commence a sustained dissent at the first opportunity given, putting the precedent—and those who may seek to rely on it—on notice as soon as possible. By exempting long-standing precedents from the crosshairs of sustained dissent, and by commencing the practice as early as possible, a Justice can mitigate reliance and legitimacy concerns, and maximize the benefits of the extended deliberative process.

Similarly, Justices should refrain from employing the practice to challenge especially strong precedent. This is not determined by simply tallying the “score” of the precedential case; as stated above, sustained dissent can still have value in the context of an eight-to-one decision. This evaluation would certainly account for the number of Justices in the majority, but also the persistence of the majority, the age of the precedent, whether there is new personnel on the Court, and whether actions by the States are calling into question the legitimacy of the precedent, etc. For instance, it could be argued that Justice Thomas's continued dissent from the “substantial effects” test of *United States v. Darby*<sup>247</sup> and *Wickard v. Filburn*<sup>248</sup> is somewhat overzealous.<sup>249</sup> The test currently has the support of seven, perhaps eight, members of the Court,<sup>250</sup> with no indication by any other member of

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243 See Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 750 (1988) (“To permit or vindicate challenges to these traditions would ‘incite radical and even revolutionary attacks on the legal status quo.’”).

244 See Joel Alicea, Note, *Stare Decisis in an Originalist Congress*, 35 HARV. J.L. & PUB. POL'Y 797, 808 (2012).

245 See Kelman, *supra* note 16, at 236.

246 See *id.*

247 312 U.S. 100 (1941).

248 317 U.S. 111 (1942).

249 “I adhere to my view ‘the very notion of a “substantial effects” test under the Commerce Clause is inconsistent with the original understanding of Congress’ powers and with this Court’s early Commerce Clause cases.’” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2677 (2012) (Thomas, J., dissenting).

250 For an example of Justices Ginsburg, Breyer, Sotomayor, and Kagan applying the test, see *Sebelius*, 132 S. Ct. at 2616 (Ginsburg, J., concurring in part, concurring in

an intention to overrule it; indeed, it has stood as precedent since the early 1940s, and there has been no significant political push to nominate Justices who oppose the test.<sup>251</sup> In other words, it appears that the “substantial effects” test is beyond judicial correction<sup>252</sup> and that Justice Thomas’s insistence on opposing it offers little jurisprudential value but imposes institutional costs. By contrast, the recent pronouncement by five Justices in *National Federation of Independent Businesses v. Sebelius*<sup>253</sup> that Congress may only utilize its authority under the Commerce Clause to regulate existing economic activity<sup>254</sup> is a more vulnerable precedent; it has the support of a bare majority of the Court (who did not join the same opinion) and is a much more recent decision. Sustaining dissent from this rule should result in less institutional costs than dissenting from application of the “substantial effects” test. Ultimately, in the interest of picking battles wisely and not using sustained dissent in such a way that a Justice weakens a long-standing, sturdy precedent (one that neither the people nor their elected representatives have challenged in any meaningful way), a Justice should confine his sustained dissent to issues that are still “open for debate”—issues that will benefit from the extended deliberative process.

In sum, use of the practice should be restrained to newly minted constitutional cases that, by their very nature, do not connote finality, but rather beckon for further discovery and debate. Doing so will help to ensure that the benefits of the extended deliberative process and other advantages conferred by sustained dissent outweigh the institutional costs imposed by the practice. Importantly, if confined to

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the judgment in part, and dissenting in part). For an example of Justice Kennedy complying in the application of the test, see *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). For an example of Justice Scalia applying the test, in conjunction with the Necessary & Proper Clause, see *Raich*, 545 U.S. at 34 (2005) (Scalia, J., concurring). For an example of Chief Justice Roberts applying the test, see *Sebelius*, 132 S. Ct. at 2578 (2012). Indeed, no other Justice joined Justice Thomas’s solo dissent in *Sebelius* rejecting the validity of the “substantial effects” test.

251 See, e.g., *United States v. Lopez*, 514 U.S. 549, 555–56 (1995) (referring to *Darby*, which created the substantial effects test, and *Wickard*, which affirmed and built upon the test, as “modern-era precedents”).

252 Efforts at limiting or eliminating the test, well-reasoned and legitimate, are best directed at the political branches, either by communicating to Congress that it should no longer utilize such power, or by urging constitutional amendment. Congress is equipped to handle such a transition prospectively—a strategy typically not available to the judiciary—which would minimize the costs of disruption to reliance.

253 132 S. Ct. 2566 (2012).

254 *Id.* at 2591 (“The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to ‘regulate Commerce.’”).

such situations, sustained dissent is not necessarily inconsistent with a desire for judicial restraint. While judicial restraint can be defined, rather simply, as the practice of adhering to precedent and promoting predictability<sup>255</sup>—a definition unkind to sustained dissent—other important characteristics animate judicial restraint as well. Such characteristics include deference to the political branches, reducing the role of the courts in the governing process, and preventing a judge from writing his personal political views into his decisions—collectively referred to as “structural restraint” by Judge Richard Posner.<sup>256</sup> With these characteristics in mind, sustained dissent accords quite well with judicial restraint; there is no reason that engaging in the practice would require violating any of the principles stated above. In fact, a sustained dissent could promote restraint by continually warning the majority that its decision has usurped authority from one of the coordinate branches, or has unwisely amplified the role of the Court.<sup>257</sup> Likewise, it could promote predictability and stability in the long run by producing sturdier, more reliable precedents. Simply because sustained dissent involves a Justice’s refusal to adhere to precedent does not necessarily mean that engaging in the practice is inconsistent with a restrained judiciary; indeed, if confined in the manner described above, sustained dissent can serve to promote judicial restraint.

#### D. *Assessing the Various Justifications for Sustained Dissent*

Having responded to the potential negative consequences and highlighted the countervailing interests at play, and with the additional insight provided by a thorough examination of the extended deliberative process, what conclusions can be drawn about the appropriateness of sustained dissent? Which justifications are legitimate, in that they promote better judicial decisions, maximize the benefits of sustained dissent, and minimize institutional costs? Conversely, which

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255 See Thomas W. Merrill, *Originalism, Stare Decisis, and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 273–77 (2005) (“[A]dopting a strong theory of precedent . . . would promote judicial restraint. . . . In sum, judicial restraint means judicial predictability.”).

256 Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1, 11–12 (1983).

257 Cf. Barrett, *supra* note 186, at 1063 (“Even if, for the sake of reliance, we are willing to tolerate [erroneous interpretations of the Constitution], a broad incursion would intolerably shift the balance between the judicial power and its counterweights. A broad power to trump constitutional text with erroneous gloss would remove the line between judicial interpretation and constitutional amendment.”).

instances of sustained dissent can be dismissed as misguided and ultimately counterproductive?

The personal justification for sustaining dissent is unsatisfactory. Whether motivated by stern convictions—“Here, I draw the line”—or by a desire to keep one’s judicial decisions internally consistent—the so-called “self stare decisis”—the typical sustained dissent for personal reasons fails to generate benefits that outweigh its costs. The benefits are not significant because the dissent does not extend the deliberative process by bringing new facts or arguments to light; it merely restates a well-informed but fundamental disagreement, or represents an unyielding commitment to one’s own judicial philosophy. In addition, the costs are substantial, because a personally motivated sustained dissent knows no principled bounds—the type, age, or strength of the precedent is unlikely to limit or restrain a dissent whose motivations transcend such factors. The paradigmatic example of Justices Brennan and Marshall is a good example of this; their sustained dissent lasted their entire careers, but arguably failed to make a substantial impact. Acknowledging that morality is an essential aspect of the law,<sup>258</sup> that the Constitution has an inherent moral component,<sup>259</sup> and that a Justice’s sense of morality can properly inform an initial dissent, the Justice’s role—in all but the most extraordinary circumstances<sup>260</sup>—is not to perpetually attempt to give effect to his own morality, or to vindicate his own prior line of reasoning. Ultimately, deeply entrenched moral disagreements are unlikely to be resolved in the context of the Court’s operations, and to allow such disagreements to weigh down the Court would be to improperly utilize the sustained dissent. Thus, the sustained dissent for personal reasons generally does not accord well with the principles laid out in this Note.

The benefits associated with sustained dissent, including the extended deliberative process, are more consistent with the institutional and strategic justifications. The institutional justification provides initial support for the practice—that Justices of the Court are bound by a fundamental duty to faithfully interpret the Constitution and not the gloss that an earlier Court may have put on it.<sup>261</sup> The strategic justification restrains the use of the practice in a meaningful way, limiting the practice to only those recently decided, hotly con-

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258 See generally JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (2d ed. 2011).

259 See generally RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996).

260 See, e.g., *supra* notes 206–207.

261 See *supra* note 60 and accompanying text.

tested cases that have not yet reached protected status and would benefit from the extended deliberative process. And finally, a more nuanced approach to the institutional justification provides guidance on when a sustained dissent should be abandoned; in this sense, the Justice is not simply an institutional crusader, disregarding all practical concerns in the name of “getting it right,” but instead recognizes the countervailing institutional interests and understands that his fundamental institutional role cannot be served if the Court is, or is perceived to be, merely a third political branch.<sup>262</sup> Thus, while the sustained dissent for personal reasons will not typically produce a net benefit, a sustained dissent that incorporates both strategic and institutional concerns is more likely to produce better judicial decisions in the long run.

Before turning back to *Citizens United*, it is worth revisiting the “cold storage” alternative preferred by Larsen and Kelman to determine how it accords with the values and principles laid out in Part III. Those who advocate the “cold storage” option—whereby a Justice explains his disagreement with the precedent in a concurrence, but applies the precedent faithfully until he has assembled enough support to reconsider and perhaps overturn it—assert that it is the more restrained, proper alternative to sustained dissent; that, by “concurring under duress,” a Justice can avoid incurring substantial institutional costs.<sup>263</sup> However, this is not necessarily the case—“cold storage” is a practice to be avoided. Operating under the false sense of security that this alternative imposes little or no institutional costs, advocates of “cold storage” have not laid out any principled limits on its employment.<sup>264</sup> Indeed, excessive use of “cold storage” would impose many of the same costs that excessive use of sustained dissent imposes—a Justice’s continued disagreement with precedent, whether in a dissent or a concurrence, raises many of the same reliance and legitimacy concerns discussed above. Further, legitimacy concerns may be heightened if a Justice openly declares his disagreement with the precedent, but applies it nonetheless. And without any principled limits restraining its employment or counseling its demise, there is no telling what the ultimate cost of the “cold storage” approach will be. Indeed, what if the counter majority is never assembled and the opportunity to overturn the precedent never arises?

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262 See Hellman, *supra* note 139.

263 See *supra* notes 160–162 and accompanying text.

264 See Kelman, *supra* note 16, at 230–31, 258–74, 297–98. In these passages, Kelman discusses, and ultimately advocates, the “cold storage” alternative to sustained dissent, but offers no significant restraints on its use.



Instead, continued disagreement with precedent should be channeled into a robust, properly focused sustained dissent. This Note openly acknowledges that sustained dissent imposes some institutional costs. Such an acknowledgement requires a careful balancing of the costs and benefits, ensuring that the practice remains limited in its application. If a Justice adheres to the limitations discussed above, the sustained dissent will only be used in appropriate cases, will remain temporally limited, and will allow the Justice to register his continued disagreement in a productive manner. Thus, the “cold storage” option is inconsistent with the necessary limitations and restraints advocated in this Note; the robust, properly focused sustained dissent is the preferable option.

#### IV. IS SUSTAINED DISSENT FROM *CITIZENS UNITED* JUSTIFIED?

Justice Breyer’s dissent in *American Tradition Partnership* suggests that he and the other three Justices intend to sustain their dissent from *Citizens United*. Justice Breyer essentially revealed his strategic motivations in his dissent.<sup>265</sup> Indeed, all the factors associated with the strategic dissent are present: *Citizens United* was a divisive five-to-four decision in a constitutional case from only two years prior.<sup>266</sup> Further, the minority’s dissent is chiefly based on what it perceives to be a faulty factual assertion relied upon by the *Citizens United* majority—that independent corporate political expenditures do not lead to corruption or the appearance thereof.<sup>267</sup> In short, the Justices disagreed with the holding of *Citizens United* and explicitly rejected its validity in *American Tradition Partnership*. Whether, or for how long, such a dissent may continue is an interesting question. For purposes of this Note, however, it is sufficient simply to acknowledge that the seeds have been planted. The more important question is whether, in this context, Justice Breyer and those who joined him are justified in continuing to dissent from *Citizens United* and when any possible justification may subside.

The critical view presented in Part II would likely not support the Justices’ decision to sustain their dissent from *Citizens United*. Those scholars who take an exceptionally limited view of the practice—who reserve its application only as a form of judicial civil disobedience—would likely find any justification lacking. For instance, Kelman

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265 *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2492 (2012) (Breyer, J., dissenting) (“Were the matter up to me, I would vote to grant the petition for certiorari in order to reconsider *Citizens United* or, at least, its application in this case.”).

266 *See id.* at 2490–92.

267 *See id.* at 2491.

argues that the notion “I still think I am right and my colleagues are wrong” is an insufficient justification for engaging in the practice;<sup>268</sup> that is precisely what Justice Breyer did in this case.<sup>269</sup> Similarly, there does not appear to be anything “truly extraordinary”<sup>270</sup> about *Citizens United* that would convince Larsen that sustained dissent from that case is appropriate. Certainly the case has taken on a high profile since it was decided, but the Court hands down many five-to-four decisions on issues of great public import each term. It does not appear that the criteria offered for when sustained dissent is permitted as a means of judicial civil disobedience has been met. Instead, those with a critical view of sustained dissent would likely urge the four Justices to place their dissent in “cold storage,” advertising their disagreement with *Citizens United* in a concurring opinion, but accepting and applying it until they have garnered the necessary fifth vote to overturn it.

Considering the dissent in light of the more favorable view presented in Part III, sustained dissent from *Citizens United* may be justified; it fits neatly into the framework of when engaging in the practice is appropriate. Recall from Part III that use of the practice should be restrained to newly minted constitutional cases that, by their very nature, do not connote finality, but rather beckon for further discovery and debate. This is an apt description of *Citizens United*;<sup>271</sup> it is precisely the kind of case that could benefit from the extended deliberative process. Had the Court been forced to confront in a meaningful way the Montana Supreme Court’s finding that independent corporate political expenditures lead to corruption and the appearance of corruption in Montana, particularly given the unique and varied histories of the several states, perhaps the Court would have seen the issue differently, or perhaps qualified the holding somewhat. Additional data or argument could have helped the Court to reconsider or reframe the issue in *Citizens United*. While the central holding likely would have remained, and perhaps rightly so, further

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268 Kelman, *supra* note 16, at 297.

269 See *Am. Tradition P’ship*, 132 S. Ct. at 2491 (“I disagree with the Court’s holding in [*Citizens United*] . . .”).

270 Larsen, *supra* note 16, at 476.

271 In addition to the case having been decided by a five-to-four margin only two years prior, the decision has received substantial criticism from the public and twenty-two states joined Montana in asking the Supreme Court to uphold the state’s ban on independent corporate political expenditures. See *Unlimited Campaign Spending Gets Thumbs Down in Polls*, FIRST AMENDMENT CENTER (July 18, 2012), <http://www.firstamendmentcenter.org/unlimited-campaign-spending-gets-thumbs-down-in-poll>; Katrina vanden Heuvel, *Resolve to Overturn ‘Citizens United’ Spreads Through the States*, THE NATION (June 12, 2012), <http://www.thenation.com/blog/168346/resolve-overturn-citizens-united-spreads-through-states#>.

deliberation and debate may have prompted the majority to look more favorably on the state's interest in preventing corruption. As cautioned above in Part III, *perpetual* dissent would not be justified; at a certain point, the costs of the minority's persistence in dissent would come to outweigh any possible benefits. For instance, if *Citizens United* weathers the storm of sustained dissent unscathed, an entire generation comes to rely on its validity, and there is no serious change in the public's sensibilities suggesting the issue should be revisited, continually dissenting would likely impose costs that outweigh the minimal benefits in this situation. But a properly focused, temporally limited, robust sustained dissent could prove to be fruitful in the context at issue.

In fact, it could be argued that the four dissenting Justices should have voted to grant certiorari and used the strength of the factual record in *American Tradition Partnership* to advance its cause.<sup>272</sup> However, since the Justices voted to deny the petition for certiorari—thereby foreclosing the opportunity for further briefing, argument, and debate—and merely reiterated a prior dissent, this instance of sustained dissent did not in any meaningful way extend the deliberative process. The sustained dissent in *American Tradition Partnership* raised questions about the validity of *Citizens United* and its vulnerability to a change in personnel, and thus harmed reliance interests, but did not significantly contribute to the doctrinal debate or help to reframe the issue. Such a brief sustained dissent is not worthless; in many cases the minority may consist of fewer than four Justices, and dissent from denial of certiorari may be the best that can be accomplished. But in this context, where the four dissenting Justices could have forced a meaningful—if ultimately unsuccessful—reconsideration of the issue, and could have truly extended the deliberative process, there was an opportunity that the dissenting Justices did not seize. Even the more favorable view of the practice would suggest that the sustained dissent in *American Tradition Partnership* left much to be desired. Perhaps if the dissenting Justices were focused on the value created by the extended deliberative process, and not merely on trying to serve strategic ends, they may have dissented more robustly.

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<sup>272</sup> Perry describes this practice as an “aggressive grant.” PERRY, *supra* note 7, at 207. Here, a Justice “reach[es] out to take a case . . . because [he has] calculated that it has certain characteristics that would make it particularly good for developing doctrine in a certain way . . . .” *Id.* at 207–08.

## CONCLUSION

Though sustained dissent has become more widespread in recent decades, it still has not garnered significant attention in academic literature. It is perhaps better described as a concept than as a well-defined practice. Theories about the appropriateness of its employment are not as developed or as well-known as those discussing a Justice's general approach to *stare decisis*, for example. And while this Note does not definitively answer any questions surrounding the practice, it contributes to the existing scholarly debate by responding to those who maintain a critical view of the practice, presenting a more favorable view of the practice's benefits, and advancing the idea of the extended deliberative process.

There are costs to engaging in sustained dissent—chief among them are harm to reliance on the Court's decisions and the possibility that excessive use of the practice could undermine the Court's legitimacy. However, the skeptical view maintained by most scholars who have explored the practice overstates the negative consequences. Indeed, it is too extreme of a solution to limit the practice to only a means of judicial civil disobedience. A middle ground exists whereby vigorous sustained dissent can be focused in such a way that it generates benefits that outweigh its costs. Sustained dissent can mitigate concerns associated with the one-case method of adjudication and lead to better, clearer judicial decisions. Those decisions that survive the extended deliberative process will garner substantial and well-deserved reliance. And if properly restrained to only a certain class of cases, these gains can be achieved without sacrificing the Court's legitimacy. The practice also confers benefits that have not yet been sufficiently explored, and an excessively limited approach to the practice forecloses the realization of such benefits.

Importantly, the conclusion that sustained dissent from *Citizens United* could be fruitful reflects no judgment about the merits of the Court's First Amendment analysis in that case. One can agree with the reasoning and outcome of the case while still believing that its central holding would benefit from further discussion and debate, and that vigorous but restrained sustained dissent can play a valuable role in the development of the doctrine. Similarly, one can condemn the reasoning of *Citizens United* and recognize that sustained dissent is beneficial—at least for a while—to challenge and limit the majority opinion, even if in doing so the Justice is ensuring another "loss" for his side of the debate. Principled use of the practice can improve

“good” and “bad” decisions alike. Ultimately, the value of sustained dissent derives as much from the resulting doctrine’s journey as it does from its destination.