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The Highest Court: A Dialogue between Justice Louis Brandeis and Justice Antonin Scalia on Stare Decisis

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THE HIGHEST COURT: A DIALOGUE BETWEEN JUSTICE LOUIS BRANDEIS AND JUSTICE ANTONIN SCALIA ON STARE DECISIS

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> "I love judges, and I love courts. They are my ideals, that typify on earth what we shall meet hereafter in heaven under a just God."[1]
>
> —*Chief Justice William Howard Taft*

The scene is the main reading room in the Supreme Court library. It is 12:01 AM on a Thursday night, and a hapless law clerk[2] *named Madison Nomos*[3] *is working on a draft of a dissenting opinion for his Justice. Specifically, Nomos is researching whether an earlier Supreme Court case—one with which his Justice vehemently disagrees—should play a significant role in the Court's analysis of an issue that has gripped the nation. Nomos's Justice was recently confirmed, and this will be her first oppor-*

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1. Mason, *William Howard Taft*, *in* 3 THE JUSTICES OF THE SUPREME COURT 1789–1978, at 2105 (Leon Friedman & Fred L. Israel eds., 1980).

2. *See* John Duffy, *Tribute: Justice Scalia's Hapless Law Clerk*, SCOTUSBLOG (Mar. 6, 2016, 11:31 AM), http://www.scotusblog.com/2016/03/tribute-justice-scalias-hapless-law-clerk/ (describing a time when Justice Scalia, "ever the teacher," refused to allow a "false 'lesson'" go unchallenged and, therefore, assigned a "hapless law clerk"—Professor Duffy—the task of reviewing the lengthy legislative history of an Act to prove its lack of worth in construing legal text).

3. The name is a combination of James Madison, the primary architect of the United States Constitution, and Nomos, the ancient Greek daemon of laws, statutes, and ordinances.

tunity to firmly state her views on stare decisis[4] *in the Supreme Court. She has tasked the clerk with providing support for her argument that the Court should abandon its prior ruling. Nomos has been working on the opinion for hours and is no closer to reaching a conclusion than when he started. Though the courthouse is empty, the clerk hears a noise as the doors at the end of the room fling open. Justice Antonin Scalia and Justice Louis Brandeis enter the room, engaged in a heated argument over Webster's New International Dictionary: Second Edition (1934).*

MADISON NOMOS [*startled*]: Who's there? Do you have clearance to be in the building after hours?

JUSTICE SCALIA: We don't need clearance!

JUSTICE BRANDEIS: The real question is, what are *you* doing here so late? Normally we have the place to ourselves. No matter, let me introduce myself; I am Justice Louis Brandeis.

JUSTICE SCALIA [*placing the Dictionary on a nearby reading table*]: And "I'm Scalia."[5]

MADISON NOMOS [*standing*]: Well of course I know who you are. I just . . . well, never mind. Forgive me for not greeting you properly. I am Madison Nomos. I have been working alone in here for hours and thought that everyone had left.

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4. *See generally* THE LAW OF JUDICIAL PRECEDENT (Bryan A. Garner et al. eds., 2016). Stare decisis comes from the Latin phrase, "*stare decisis et non quieta movere*," which means "[t]o stand by things decided, and not to disturb settled points." *Stare decisis*, BLACK'S LAW DICTIONARY (10th ed. 2014). Hence, "stare decisis" is defined as "[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." *Id.* There are two types of stare decisis frequently referred to by commentators: "vertical" and "horizontal." Vertical stare decisis refers to the requirement that lower courts must follow higher courts. For example, according to vertical stare decisis, the Fourth Circuit Court of Appeals must follow all decisions made by the Supreme Court in the same way that the Eastern District of Virginia must follow all decisions made by the Fourth Circuit Court of Appeals. *See* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final."). Horizontal stare decisis is usually defined as the requirement that a court must follow its own precedents. *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (noting that adherence to horizontal precedent 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"). This dialogue is chiefly concerned with horizontal stare decisis in the Supreme Court of the United States.

5. *Bush v. Gore*, OYEZ, https://www.oyez.org/cases/2000/00-949 (last visited Apr. 5, 2017) (said as a preemptive strike to assist a lawyer who had already called two Justices by the wrong name earlier in his argument).

JUSTICE SCALIA [*pulling up a chair*]: Does your Justice have you slaving away reviewing the long-forgotten legislative history of some statute from the 1890s?

MADISON NOMOS [*sitting down and laughing*]: No, Justice Scalia. The Court is preparing to release its opinion in a highly contested and publicized case, and my Justice is writing a dissent. The majority is basing its conclusion on a case that was decided several years ago that my Justice believes was decided incorrectly—neither of you wrote the opinion. She has asked me to research the Supreme Court's historical treatment of stare decisis to further support her opinion. This is her first term on the Court, and it will likely be her first decision of many where she faces the issue, so she wants this opinion to be as well supported as possible for future reference. And unfortunately, my research is turning into a Sisyphean effort: the closer I get to a conclusion, the more I feel as though the true answer is slipping away.

JUSTICE SCALIA: That seems like a daunting task for a law clerk: summarize the last two-hundred years of stare decisis jurisprudence. "What happened to the Eighth Amendment['s]" proscription of cruel and unusual punishment?[6]

JUSTICE BRANDEIS [*pulling up a chair, intrigued*]: Well, does the case turn on statutory or constitutional interpretation?

MADISON NOMOS: On constitutional interpretation, Justice Brandeis. It centers on the Due Process Clause of the Fourteenth Amendment. Thirty years ago, the Court found that the Constitution afforded a right that did not have its basis in either its text or the history or tradition of the United States. Nevertheless, everybody—from the lower courts to the populace at large—seems to have accepted it as the law of the land. Now the Court wants to expand that right to include something that would have never been considered in 1868. The majority rests its decision on the past case, but my Justice believes that case should be overruled and the Court should return to first principles.

JUSTICE BRANDEIS: Well, I believe that I answered your Justice's question concerning the Court's historical treatment of constitutional precedent back in 1932. The Court is not *bound* to follow past precedent just because it has become accepted by the judici-

6. *National Federation of Independent Business v. Sebelius*, OYEZ, https://www.oyez.org/cases/2011/11-393 (last visited Apr. 5, 2017).

ary and society. While, of course "[s]*tare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right," it "is not, like the rule of *res judicata*, a universal, inexorable command."[7] In matters of statutory interpretation, for instance, the Court should be deferential to stare decisis because correction can be had, rather easily, by legislation.[8] "But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions."[9] After all, the Court should bow "to the lessons of ex-

7. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–06 (1932) (Brandeis, J., dissenting).

8. *Id.* at 406. Still, Justice Brandeis cited a string of cases where the Court *had* overruled precedent based on statutory interpretation because of the importance of the issue. Though this analysis does not figure prominently into the dialogue, it does add some insight into the discussion regarding Justice Brandeis's motives for asserting his dichotomy. Therefore, for the convenience of the reader, the text of footnote 1 is included below:

> This Court has, *in matters deemed important*, occasionally overruled its earlier decisions although correction might have been secured by legislation. See Chicago & Eastern Illinois R. Co. v. Industrial Commission, 284 U.S. 296, overruling Erie R. Co. v. Collins, 253 U.S. 77, and Erie R. Co. v. Szary, 253 U.S. 86; Gleason v. Seaboard Air Line Ry. Co., 278 U.S. 349, 357, in part overruling Friedlander v. Texas & Pacific Ry. Co., 130 U.S. 416; Lee v. Chesapeake & Ohio Ry. Co., 260 U.S. 653, 659, overruling Ex parte Wisner, 203 U.S. 449, and qualifying In re Moore, 209 U.S. 490; Boston Store v. American Graphophone Co., 246 U.S. 8, 25, and Motion Picture Co. v. Universal Film Co., 243 U.S. 502, 518, overruling Henry v. A. B. Dick Co., 224 U.S. 1; Rosen v. United States, 245 U.S. 467, 470, overruling United States v. Reid, 12 How. 361 (compare Greer v. United States, 245 U.S. 559, 561; Jin Fuey Moy v. United States, 254 U.S. 189, 195; Olmstead v. United States, 277 U.S. 438, 466); Roberts v. Lewis, 153 U.S. 367, 377, overruling Giles v. Little, 104 U.S. 291; Kountze v. Omaha Hotel Co., 107 U.S. 378, 387, overruling Stafford v. Union Bank of Louisiana, 16 How. 135; United States v. Phelps, 107 U.S. 320, 323, overruling Shelton v. The Collector, 5 Wall. 113, 118; Hornbuckle v. Toombs, 18 Wall. 648, 652, 653, overruling Orchard v. Hughes, 1 Wall. 77, Noonan v. Lee, 2 Black 499, and Dunphy v. Kleinsmith, 11 Wall. 610; Mason v. Eldred, 6 Wall. 231, 238, in effect overruling Sheehy v. Mandeville, 6 Cranch 253; Gazzam v. Phillips' Lessee, 20 How. 372, 377, 378, overruling Brown's Lessee v. Clements, 3 How. 650; Vidal v. Girard's Executors, 2 How. 127, qualifying Baptist Assn. v. Hart's Executor, 4 Wheat. 1; Gordon v. Ogden, 3 Pet. 33, 34, overruling Wilson v. Daniel, 3 Dall. 401; compare Brenham v. German American Bank, 144 U.S. 173, 187, overruling Rogers v. Burlington, 3 Wall. 654 and Mitchell v. Burlingham, 4 Wall. 270; Hudson v. Guestier, 6 Cranch 281, 285, overruling Himely v. Rose, 4 Cranch 241, 284. See also Fairfield v. County of Gallatin, 100 U.S. 47, 54, 55, and cases cited.

Id. at 406–07 n.1 (emphasis added).

9. *Id.* at 406–07. This has come to be known as the "Brandeis Dichotomy," which contends that this two-tiered standard was the historical practice of the Court. This paper only addresses a limited aspect of horizontal stare decisis on the Supreme Court and, of course, is not meant to be a treatise on the topic. For a comprehensive overview on the subject, see THE LAW OF JUDICIAL PRECEDENT, *supra* note 4.

perience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."[10] Even Justice Scalia would agree with that.

JUSTICE SCALIA: I agree with part of what you said, but certainly not everything. On the whole, though, yes, "the doctrine of *stare decisis* is less rigid in its application to constitutional precedents," and that is "especially true of a constitutional precedent that is both recent and in apparent tension with other decisions."[11]

MADISON NOMOS: Yes, Justice Brandeis, I am familiar with your influential dissent in *Burnet v. Coronado Oil & Gas Co.* But, with all due respect, I worry about the historical roots of your two-tiered standard in the Court's practice. And, therefore, I have concerns about suggesting that my Justice rely on it.

JUSTICE BRANDEIS: What do you mean that you "worry about the historical roots"? I cited twenty-nine cases in that dissent that either overruled or qualified over thirty other cases concerning constitutional interpretation.[12] Those cases clearly demonstrate that

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10. *Coronado Oil*, 285 U.S. at 407–08.

11. Harmelin v. Michigan, 501 U.S. 957, 965 (1991).

12. For the convenience of the reader and because of its importance to the forthcoming conversation, the text of Justice Brandeis's footnotes is included below:

> Besides cases in note 4, see East Ohio Gas Co. v. Tax Commission, 283 U.S. 465, 472, overruling Pennsylvania Gas Co. v. Public Service Commission, 252 U.S. 23; Terral v. Burke Construction Gas Co. 257 U.S. 529, 533, overruling Doyle v. Continental Insurance Co., 94 U.S. 535, and Security Mutual Life Insurance Co. v. Prewitt, 202 U.S. 246; Pennsylvania R. Co. v. Towers, 245 U.S. 6, 17, in part overruling Lake Shore & Michigan Southern Ry. Co. v. Smith, 173 U.S. 684; United States v. Nice, 241 U.S. 591, 601, overruling Matter of Heff, 197 U.S. 488; Garland v. Washington, 232 U.S. 642, 646, 647, overruling Crain v. United States, 162 U.S. 625; Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, in effect overruling Hylton v. United States, 3 Dall. 171; Leisy v. Hardin, 135 U.S. 100, 118, overruling Peirce v. New Hampshire, 5 How. 504; Leloup v. Port of Mobile, 127 U.S. 640, 647, overruling Osborne v. Mobile, 16 Wall. 479; Morgan v. United States, 113 U.S. 476, 496, overruling Texas v. White, 7 Wall. 700; Legal Tender Cases, 12 Wall. 457, 553, overruling Hepburn v. Griswold, 8 Wall. 603; The Belfast, 7 Wall. 624, 641, overruling in part Allen v. Newberry, 21 How. 544; The Genesee Chief, 12 How. 443, 456, overruling The Thomas Jefferson, 10 Wheat. 428, and The Orleans v. Phoebus, 11 Pet. 175; Louisville, Cincinnati & Charleston R. Co. v. Letson, 2 How. 497, 554–556, overruling Commercial & Rail Road Bank v. Slocomb, 14 Pet. 60, and other cases, and qualifying Bank of the United States v. Deveaux, 5 Cranch 61; compare Marshall v. Baltimore & Ohio R. Co., 16 How. 314, 325, 326, in turn qualifying the Letson case, supra. Compare Helson v. Kentucky, 279 U.S. 245, 251, qualifying Crandall v. Nevada, 6 Wall. 35; Sonneborn Bros. v. Cureton, 262 U.S. 506, qualifying Texas Co. v. Brown, 258 U.S. 466; Browman v. Continental Oil Co., 256 U.S. 642, and Standard Oil

this two-tiered approach *was* the historical practice of the Court. Moreover, the Court—including both its progressive and conservative members—has *accepted* this approach for nearly a century. Chief Justice Rehnquist repeated the two-tiered standard verbatim when he wrote that "'[*s*]*tare decisis* is not . . . a universal, inexorable command,' especially in cases involving the interpretation of the Federal Constitution."[13] He continued by noting that "[e]rroneous decisions in such constitutional cases are uniquely durable, because correction through legislative action,

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Co. v. Graves, 249 U.S. 389; Union Tank Line Co. v. Wright, 249 U.S. 275, 283, 284, qualifying Pullman Palace Car Co. v. Pennsylvania, 141 U.S. 18; Wheeler v. Sohmer, 233 U.S. 434, 440, qualifying Buck v. Beach, 206 U.S. 392 (compare Baldwin v. Missouri, 281 U.S. 586); Home Telephone & Telegraph Co. v. Los Angeles, 227 U.S. 278, 294, qualifying Barney v. New York, 193 U.S. 430; Galveston, H. & S. A. Ry. Co. v. Texas, 210 U.S. 217, 226, qualifying Maine v. Grand Trunk Ry. Co., 142 U.S. 217; In re Chapman, 166 U.S. 661, 670, qualifying Runkle v. United States, 122 U.S. 543, 555; New Orleans City & Lake R. Co. v. New Orleans, 143 U.S. 192, 195, qualifying Gordon v. Tax Appeal Court, 3 How. 133; Philadelphia S. S. Co. v. Pennsylvania, 122 U.S. 326, 342, qualifying State Tax on Railway Gross Receipts, 15 Wall. 284; Wabash, St. Louis & Pacific Ry. Co. v. Illinois, 118 U.S. 557, 568, 569, qualifying Peik v. Chicago & Northwestern Ry. Co., 94 U.S. 164; Kilbourn v. Thompson, 103 U.S. 168, 196–200, qualifying Anderson v. Dunn, 6 Wheat. 204. See also discussion of New York v. Miln, 11 Pet. 102, in Passenger Cases, 7 How. 283; that of Fickeln v. Shelby County Taxing District, 145 U.S. 1, in Crew Levick Co. v. Pennsylvania, 245 U.S. 292, 296, and in Texas Transport & Terminal Co. v. New Orleans, 264 U.S. 150, 153, 154; that of Gulf, Colorado & Santa Fe Ry. Co. v. Texas, 204 U.S. 403, in Baltimore & Ohio Southwestern R. Co. v. Settle, 260 U.S. 166, 173.

Movement in constitutional interpretation and application—often involving no less striking departures from doctrines previously established-takes place also without specific overruling or qualification of the earlier cases. Compare, for example, Allgeyer v. Louisiana, 165 U.S. 578, with The Slaughter House Cases, 16 Wall. 36; Tyson v. Banton, 273 U.S. 418, with Munn v. Illinois, 94 U.S. 113; Muller v. Oregon, 208 U.S. 412, and Bunting v. Oregon, 243 U.S. 426, with Lochner v. New York, 178 U.S. 45.

Coronado Oil, 285 U.S. at 407–08 n.2.

See Alpha Cement Co. v. Massachusetts, 268 U.S. 203, 218, overruling Baltic Mining Co. v. Massachusetts, 231 U.S. 68; Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204, 209, overruling Blackstone v. Miller, 188 U.S. 189. See also Baldwin v. Missouri, 281 U.S. 586, 591; Beidler v. South Carolina Tax Commission, 282 U.S. 1, 8; First National Bank v. Maine, 284 U.S. 312. During the twenty-seven years preceding the decision of Farmers Loan & Trust Co. v. Minnesota, Blackstone v. Miller had been cited with approval in this Court fifteen times. Compare Educational Films Corp. v. Ward, 282 U.S. 379, 392°394, and Pacific Co. v. Johnson, decided today, post, p. 480, qualifying Macallen Co. v. Massachusetts, 279 U.S. 620.

Id. at 409 n.4.

13. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 954–55 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (citing *Coronado Oil*, 285 U.S. at 405 (Brandeis, J., dissenting)).

save for constitutional amendment, is impossible."[14] And Justice O'Connor agreed that stare decisis "reflects a policy judgment that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.' . . . That policy is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions."[15] Justice Breyer likewise found that the "Court applies *stare decisis* more 'rigidly' in statutory than in constitutional cases."[16] In fact, since 1944,[17] the Court has uncritically adhered to that standard because, after all, it has been its historical practice to do so. From Justice Stone,[18] to Justice Frankfurter,[19] to even Justice Thomas,[20] this two-tiered standard is, unwaveringly, how the Supreme Court approaches matters of stare decisis.

MADISON NOMOS: I am aware of your lengthy footnotes and the cases that you cited in support of your standard. And it is clear that the Court has accepted your two-tiered approach. But, it seems to me that your standard has had a dramatic effect on the Court—one that would not have occurred were it not for its acceptance. For example, as of 2004, the Supreme Court had overruled its prior decisions approximately 225 times since its creation.[21] In the first 143 years of the Court's existence—*before* your

14. *Id.* at 954–55.

15. Agostini v. Felton, 521 U.S. 203, 235 (1997) (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 63 (1996); *Coronado Oil*, 285 U.S. at 406 (Brandeis, J., dissenting)).

16. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 923 (2007) (Breyer, J., dissenting).

17. Smith v. Allwright, 321 U.S. 649 (1944).

18. St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 94 (Stone, J. and Cardozo, J., concurring) (citing *Coronado Oil*, 285 U.S. at 407, 408 (Brandeis, J., dissenting)) ("The doctrine of *stare decisis* . . . has only a limited application in the field of constitutional law.").

19. Graves v. New York, 306 U.S. 466, 491–92 (Frankfurter, J., concurring) (Although "[j]udicial exegesis is unavoidable with reference to an organic act like our Constitution, [nevertheless] the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.").

20. Clark v. Martinez, 543 U.S. 371, 401–02 (2005) (Thomas, J., dissenting) ("It is true that we give stronger *stare decisis* effect to our holdings in statutory cases than in constitutional cases.").

21. CONG. RESEARCH SERV., CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. DOC. NO. 108–19, at 63 (Supp. 2004); CONG. RESEARCH SERV., CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. DOC. NO. 108–17, at 2385–99 (2002). Much of Nomos's critique of the Brandeis Dichotomy, including the proceeding figures, is based on Lee J. Strang & Bryce G. Poole, *The Historical (In)Accuracy of the Brandeis Dichotomy: An Assessment of the Two-Tiered Standard of Stare Decisis for Supreme Court Precedents*, 86 N.C. L. REV. 969, 979–80

dissent in *Coronado Oil*—the Court only overruled its own precedents forty-one times, or roughly once every three-and-a-half years.[22] But in the seventy-four years since your articulation of the two-tiered standard, the Court overruled its own precedents 184 times, which, on average, is about two-and-a-half times per year.[23] Given such a large disparity, does it not follow that your approach changed the trajectory of the Court's approach to stare decisis instead of solidifying it?

JUSTICE SCALIA [*skeptically*]: I seriously doubt that Justice Brandeis's approach is the *sole* cause of the increase in overruling precedents on the Supreme Court. After all, "Supreme Court Justices do not create law in a vacuum."[24] There was simply less need to overrule precedent during the Court's first 143 years of existence because of the country's ability to more easily remedy incorrect decisions pertaining to the Constitution than it has now.[25] If the Court did not take an approach to stare decisis where it was more flexible in cases pertaining to constitutional interpretation, the populace would be bound to the will of five unelected judges with little hope to reverse them. That hardly sounds like a democratic republic to me . . . .

MADISON NOMOS: Well, Justice Scalia, I suppose that you are right. Certainly there were factors in addition to the acceptance of Justice Brandeis's dichotomy that played a role in the increased rate of reversals.[26] But what troubles me—and most likely my Justice—the most about the two-tiered standard is the unquestioned notion that its purported origin is in the Court's nineteenth century's practice.

(2008).

22. *See supra* note 21.

23. *See supra* note 21.

24. Strang & Poole, *supra* note 21, at 980.

25. *See, e.g.*, Pollock v. Farmers Loan and Trust Co., 157 U.S. 429 (1895) (overruled by the Sixteenth Amendment); Dred Scott v. Sanford, 60 U.S. 393 (1856) (overruled by the Fourteenth Amendment); Chisholm v. Georgia, 2 U.S. 419 (1793) (overruled by the ratification of the Eleventh Amendment in 1795); *see also Justice Antonin Scalia and Justice Ruth Bader Ginsburg*, THE KALB REPORT (Apr. 17, 2014), https://research.gwu.edu/sites/research.gwu.edu/files/downloads/45Words_Transcript.pdf ("[I]f there were a targeted amendment that were adopted by the states, I think the only provision I would amend is the Amendment Provision. I figured out, at one time, what percentage of the populace could prevent an Amendment to the Constitution. And, if you take a bare majority in the smallest states by population, I think something less than two percent of the people can prevent a Constitutional Amendment. It ought to be hard, but it shouldn't be that hard.").

26. Strang & Poole, *supra* note 21, at 980 n.44.

JUSTICE BRANDEIS: Were the cases not sufficient to support that assertion?

MADISON NOMOS: Justice Brandeis, the cases that you cited are of particular concern to me. As part of my research, I came across an article suggesting that, despite the fact that you cited numerous cases to support the claim that this two-tiered approach was the historic practice of the Court, *none* of them actually supported that position.[27] The paper argued that, at most, there were a handful of isolated arguments in those opinions by individual Justices where they "distinguished their approach to constitutional cases from cases involving other subject matters."[28] But even still, none of those sufficiently supported your dichotomy as the historical practice of the Court.[29]

JUSTICE BRANDEIS [*indignantly*]: Well, please tell me *why* exactly those cases are insufficient to support the historical record? And, while Law Review articles can certainly be of great assistance in reaching a judicial determination,[30] let's talk about the actual cases, if you don't mind.

MADISON NOMOS: Of course, Justice Brandeis. The first case of concern to me is Chief Justice Taney's dissenting opinion in the *Passenger Cases*,[31] which you cited in footnote 2 of your dissent in *Coronado Oil*.[32] As you are aware, the *Passenger Cases* pertained to whether state statutes that taxed aliens upon arrival to the states violated the Commerce Clause.[33] In that case, a splintered Court found that states did not have the right to impose a tax determined by the number of passengers of a designated category

27. *Id.* at 991.

28. *Id.*

29. *See generally id.* at 991–1014.

30. STEPHEN W. BASKERVILLE, OF LAWS AND LIMITATIONS: AN INTELLECTUAL PORTRAIT OF LOUIS DEMBITZ BRANDEIS 267–68 (1994) ("Beginning with his very first dissenting opinion in *Adams v. Tanner* (1917), the new justice had adopted the practice of supporting his juristic assaults on what he considered the narrow legalism of the Court's conservatives with copious references to law reviews, academic texts, and other nonjudicial sources. In fact, the technique used in these "Brandeis opinions" was similar to that developed in the celebrated "Brandeis briefs" that he had filed in *Muller v. Oregon* and a number of subsequent social-welfare cases.").

31. 48 U.S. (7 How.) 283, 494 (1849) (Taney, C.J., dissenting). This exchange concerning the *Passenger Cases* is based off of the analysis in Strang & Poole, *supra* note 21, at 994–98.

32. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407–08 n.2 (1932) (Brandeis, J., dissenting).

33. *Passenger Cases*, 48 U.S. (7 How.) at 283.

on board a ship and/or disembarking into the State.[34] In his dissent, Chief Justice Taney argued that the Court's "opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported."[35] I assume that this is what you cited in support of your assertion that it was the historic practice of the Court to give less precedential weight to matters of constitutional interpretation. But Chief Justice Taney's statement was preceded by his recognition of the *authority* of constitutional precedent: "After such opinions [in the *License Cases*], judicially delivered, I had supposed that question to be settled, so far as any question upon the construction of the Constitution ought to be regarded as closed by the decision of this court."[36] Further, Chief Justice Taney "conceded that Supreme Court precedent in constitutional matters would act as authority; they only could not *absolutely* foreclose reopening an issue."[37] Throughout the rest of his opinion, Chief Justice Taney cited, discussed, and treated as authoritative the Court's precedent in a number of cases involving constitutional precedent.[38] For example, Chief Justice Taney argued that *City of New York v. Miln*[39] and *Brown v. Maryland*[40] had already decided the questions presented in the *Passenger Cases*.[41] Subsequently, he summarized his argument: "With such authorities to support me, so clearly and explicitly stating the doctrine, it cannot be necessary to pursue the argument further."[42] Moreover, in a later opinion, Chief Justice Taney noted that "*stare decisis* is the safe and established rule of judicial policy, and should always be adhered to. For if the law, as pronounced by the court, ought not to stand, it is in the power of the legislature to amend it, without impairing rights acquired under it."[43] It does not follow to me that he would have recognized the

34. *See id.*

35. *Id.* at 470 (Taney, C.J., dissenting).

36. *Id.*

37. Strang & Poole, *supra* note 21, at 995 (emphasis added).

38. *Passenger Cases*, 48 U.S. (7 How.) at 471–94 (Taney, C.J., dissenting).

39. 36 U.S. (11 Pet.) 102 (1837).

40. 25 U.S. (12 Wheat.) 419 (1827).

41. *See Passenger Cases*, 48 U.S. (7 How.) at 477 (Taney, C.J., dissenting); *see also id.* at 479 ("I assent fully to the doctrine upon that subject laid down in the case of *Gibbons v. Ogden.*").

42. *Id.* at 480.

43. *The Genesee Chief*, 53 U.S. (12 How.) 443, 458 (1851).

importance of precedent in a later decision while arguing that stare decisis did not apply as strongly to constitutional precedent in an earlier opinion—especially if, as you argue, the earlier opinion represented the historical practice of the Court. And several years later, in *Marshall v. Baltimore & Ohio Railroad Co.*, the Court relied on the standard rule for stare decisis—not your dichotomy or on those elements of Chief Justice Taney's dissent that support it—in ruling that a corporation is a citizen, for the purposes of federal diversity jurisdiction, in the state of its incorporation.[44] Does this not, at a minimum, cut away at the historical record you presented in your *Coronado Oil* dissent?

JUSTICE BRANDEIS: Well, I think that you are mischaracterizing those opinions. Nevertheless, even if I conceded that you were correct with regards to the *Passenger Cases*, there are still more than two dozen other citations that support my position.

MADISON NOMOS: Yes, your honor. There was one majority opinion, in particular, that appeared to have a plausible bearing on your claim that constitutional decisions should be accorded less precedential weight than other precedents: the *Legal Tender Cases*,[45] which you also cited in footnote 2 of your dissent in *Coronado Oil*.[46] As you know, the central issues of the *Legal Tender Cases* were whether Congress had the authority to print paper money and whether paper money could be used to settle debts incurred before the Legal Tender Act was passed.[47] In 1870, the Court held in *Hepburn v. Griswold* that the Legal Tender Act was unconstitutional as applied retroactively to contracts entered into before its passage.[48] *Hepburn* was decided with less than a full bench, and that is why, in 1871, the Court heard two more cases reargue ing the constitutionality of the Act, after two vacancies had been filled.[49] And so, in the *Legal Tender Cases*, the Court, by a vote of five to four, overruled *Hepburn* and held that the Legal Tender

44. *See* Marshall v. Balt. & Ohio R.R. Co., 57 U.S. (16 How.) 314 (1853).

45. 79 U.S. (12 Wall.) 457 (1871). The following discussion draws on Strang & Poole, *supra* note 21, at 997–99.

46. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407–08 n.2 (1932) (Brandeis, J., dissenting).

47. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 529.

48. 75 U.S. (8 Wall.) 603, 625 (1870).

49. *See* Gerald T. Dunne, *Legal Tender Cases*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 498, 498 (Kermit L. Hall ed., 1992).

Act was constitutional.[50] Writing for the majority, Justice Strong noted that,

> [*Hepburn*] was decided by a divided court, and by a court having less number of judges than the law then in existence provided this court shall have. These cases have been heard before a full court, and they have received our most careful consideration. The questions involved are constitutional questions of the most vital importance to the government and to the public at large. *We have been in the habit of treating cases involving a consideration of constitutional power differently from those which concern merely private right. We are not accustomed to hear them in the absence of a full court, if it can be avoided.*[51]

But even though the Court argued that constitutional decisions decided by less than a full bench have less precedential weight than those decided by a full bench,[52] Justice Strong's opinion does not seem to support your dichotomy for three reasons. First, Justice Strong's claim that *Hepburn* was deserving of less precedential weight because it was not decided by a full court was unprecedented—it moved beyond *Briscoe v. Commonwealth's Bank of Kentucky*, which held that it was a prudent "practice" to hear constitutional cases with a full court.[53] In contrast to *Briscoe*, Justice Strong's opinion argued that if two conditions are met—(1) a constitutional decision and (2) less than a full Court—the precedent carries less weight. Justice Strong's additional condition—if the case is a constitutional decision—and the Court's conclusion—that the previous case carries less precedential weight—went well beyond *Briscoe*.[54] Therefore, since Justice Strong's claim was unprecedented, it provides little support that your dichotomy was the *historical* practice of the Court. Second, it appears that Justice Strong was arguing that, to have less precedential weight, in addition to the precedent in question being one of constitutional interpretation, "it *must also* have been decided by less than a full Court."[55] By contrast, you did not couple your two-tiered standard

50. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 553.

51. *Id.* at 553–54 (emphasis added).

52. Strang and Poole note that the fact that "this was Justice Strong's argument can also be seen from the other opinions in the case. Justice Bradley, in his concurrence, focused on the fact that the 'decision is recent, and is only by a bare majority of the court.'" Strang & Poole, *supra* note 21, at 999 n.173 (quoting *Legal Tender Cases*, 79 U.S. (12 Wall.) at 570 (Bradley, J., concurring)).

53. 33 U.S. (8 Pet.) 118, 122 (1834).

54. Strang & Poole, *supra* note 21, at 999.

55. *Id.* (emphasis added).

with the *Briscoe* requirement.[56] Instead, it appears that you claimed that the only condition for application was that the precedent be a constitutional decision.[57] Therefore, Justice Strong's opinion does not seem to support your assertion on that front, either. And third, "the *Legal Tender Cases* were outliers because of the unique political circumstances under which the Court operated"—it "was under tremendous pressure from the public and from Congress to legitimate paper money."[58] Thus, the fact that it buckled to societal and political pressure by reversing *Hepburn* hardly qualifies it as strong support for your dichotomy.[59] And while I could continue arguing cases all night, it seems to me that the Court historically refused to alter its traditional approach to stare decisis until your dissent in *Coronado Oil*, which was the first time that anyone on the Court addressed the issue in a sustained manner.[60]

JUSTICE BRANDEIS: I do not know why you are so concerned with the historical foundation of this two-tiered standard. But if you are unconvinced by the record that I used to support my opinion in *Coronado Oil*, surely the policy reasons behind adopting such an approach alone are sufficient to persuade your Justice, are they not?

MADISON NOMOS: Please elaborate what you mean, Justice Brandeis. You know your own policy justifications the best, and I do not want to mischaracterize them.

JUSTICE BRANDEIS: I will gladly summarize why the Court should follow an approach that gives less precedential weight to constitutional precedent—which, by the way, seems to be what your Justice wants to do in this case, so I am not sure why you are so keen in fighting the veracity of my dissent. As I mentioned earlier in our conversation and in my *Coronado Oil* dissent, "[t]he Court bows to the lessons of experience and the force of better reasoning, recognizing that the process to trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."[61] Prior decisions "not only may . . . have been rendered upon

56. *Id.*

57. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting); Strang & Poole, *supra* note 21, at 999.

58. Strang & Poole, *supra* note 21, at 999.

59. *See id.*

60. *See id.* at 1000.

61. *Coronado Oil*, 285 U.S. at 407–08 (Brandeis, J., dissenting).

an inadequate presentation of then existing conditions, but the conditions may have changed meanwhile. Moreover, the judgment of the Court in the earlier decision may have been influenced by prevailing views as to economic or social policy which have since been abandoned."[62] "Our Constitution is not a straitjacket. It is a *living organism*. As such it is *capable of growth*. . . . Because [it] possesses the capacity of adaptation, it has endured as the fundamental law of an ever developing people."[63] It is precisely because of the Constitution's adaptability and the populace's relative inability to amend it that the Court must be able to reverse prior decisions on the basis of newly obtained knowledge or societal or scientific developments. The Court must "prefer[] innovation to the confines of precedent."[64]

MADISON NOMOS: So, Justice Brandeis, are you suggesting that stare decisis should be weakened in order to achieve political ends? Should the Court, in effect, operate as a "floating constitutional convention"?[65]

JUSTICE BRANDEIS: What I am suggesting is that stare decisis should be weakened so that the present is not bound by the dead hand of the past[66]—especially when we know more now than we did then. Before I took the bench, I championed Progressive causes. I was among "the first lawyers to combine the 'sociological jurisprudence' espoused by proto-legal realists in the Progressive movement—a jurisprudence that rejected the 'rigid formalism' of the nineteenth century and sought instead to view cases as concrete social phenomena—with effective advocacy."[67] In 1911, five years before I became a Supreme Court Justice, I remarked that "[i]n the past the courts have reached their conclusions largely deductively from preconceived notions and precedents. The method [that I] tried to employ in arguing cases before them has been

62. *Id.* at 412.

63. MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 580 (2009) (emphasis added).

64. Strang & Poole, *supra* note 21, at 984.

65. Compassion in Dying v. Washington, 49 F.3d 586, 591 (9th Cir. 1995), *vacated en banc*, 79 F.3d 790 (9th Cir. 1995), *rev'd and remanded sub nom.* Washington v. Glucksberg, 521 U.S. 702 (1997).

66. *C.f. Coronado Oil*, 285 U.S. at 405–06, 412; (Brandeis, J., dissenting); UROFSKY, *supra* note 63, at 320 ("The economic menace of past ages was the dead hand which gradually acquired a large part of all available lands.").

67. Strang & Poole, *supra* note 21, at 981.

inductive, reasoning from the facts."[68] And I did just that in my brief in *Muller v. Oregon*.[69] Before I took the bench,

> [L]egal science—the unwritten or judge-made laws as distinguished from legislation—was largely deaf and blind to [revolutionary changes]. Courts continued to ignore newly arisen social needs. They applied complacently eighteenth-century conceptions of the liberty of the individual and of the sacredness of private property. Early nineteenth-century scientific half-truths like "The survival of the fittest," which, translated into practice, meant "The devil take the hindmost," were erected by judicial sanction into a moral law. Where statutes giving expression to the new social spirit were clearly constitutional, judges, imbued with the relentless spirit of individualism, often construed them away. Where any doubt as to the constitutionality of such statutes could find lodgment, courts all too frequently declared the acts void.[70]

In matters of great importance that have the potential to affect the rights of the entire populace,[71] what just society would allow and encourage the present to be inexorably bound to such decisions of the past? And so, when I ultimately joined the Court in 1916, I "continued to be a stalwart advocate of Progressive policy goals."[72] Others have noted my "intense activity as [a] new Deal recruiting officer" and my "persistent, behind-the-scenes effort[s in the Court] . . . to implement the policies [I] believed essential to economic recovery and political reform."[73] For example, it is well known that I generally refrained from dissenting except when necessary while I was on the Court.[74] "There is a limit to the frequency with which you can [dissent], without exasperating men."[75] So, "I sometimes endorse[d] an opinion with which I d[id] not agree, 'I acquiesce[d]'; as Holmes put[] it 'I'[d] shut up.'"[76] But

68. PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 124–25 (1984).

69. 208 U.S. 412 (1908). "In a bold move, Brandeis included only two pages of legal argument in his brief, and then appended over 110 pages presenting social science data regarding the effects of long hours of labor on the 'health, safety, and morals and general welfare of women." Strang & Poole, *supra* note 21, at 981–82 (citing John W. Johnson, *Brandeis Brief*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 85, 85 (Kermit L. Hall ed., 1992)).

70. Louis D. Brandeis, *"The Living Law,"* *in* BRANDEIS ON DEMOCRACY 59, 60–62 (Philippa Strum ed., 1995).

71. *See supra* note 8.

72. Strang & Poole, *supra* note 21, at 982.

73. Nelson Lloyd Dawson, *Brandeis and the New Deal*, *in* BRANDEIS AND AMERICA 38, 40 (Nelson Lloyd Dawson ed., 1989) (citations omitted).

74. UROFSKY, *supra* note 63, at 579.

75. *Id.* (alteration in original).

76. *Id.*

in cases—such as *Coronado Oil*—where the idea of a "living Constitution" really mattered, I dissented from my "brother Justices" over and over again because their opinions relied too heavily on precedent at the expense of consequences or facts.[77]

JUSTICE SCALIA [*jovially*]: I dissent![78]

JUSTICE BRANDEIS [*laughing*]: I had a feeling that you might.

JUSTICE SCALIA: To start, the Constitution is "not a living document. It's dead, dead, dead."[79] Or, better put, it is "enduring."[80]

JUSTICE BRANDEIS: That seems a bit harsh . . . .

JUSTICE SCALIA [*joking*]: Justice Brandeis, if you are a revolutionary in your approach to the Constitution, I can only hope to be described as a "counterrevolutionary."[81] Listen, "I attack ideas. I don't attack people. And some very good people"—present company included—"have some very bad ideas."[82]

JUSTICE BRANDEIS [*laughing*]: Well, I suppose that I will accept the complement.

JUSTICE SCALIA: Back to the topic at hand. As I mentioned earlier, I agree with you, Justice Brandeis, that "the doctrine of *stare decisis* is less rigid in its application to constitutional precedents."[83] But I think that you [*looking at Madison Nomos*] are getting too caught up in whether he was correct in his assertion that it was the historical practice of the Court. Regardless of whether the "Brandeis dichotomy" found its roots in the nineteenth century, it has become an engrained practice of the Court. It is not re-

77. *See* Philippa Strum, *Brandeis and the Living Constitution*, *in* BRANDEIS AND AMERICA 118, 118–32 (Nelson Lloyd Dawson ed., 1989) (proposing that Brandeis's view of human nature, his view of law, and his closely allied view of constitutional interpretation shaped his perspective of the Constitution as a "living" document).

78. The lack of the traditional qualifier, "respectfully," is not meant to imply any lack of collegiality or respect that would exist between Justice Scalia and Justice Brandeis. *See* King v. Burwell, 135 S. Ct. 2480, 2507 (2015) (Scalia, J., dissenting) ("I dissent.").

79. Katie Glueck, *Scalia: The Constitution Is 'Dead,'* POLITICO (Jan. 29, 2013, 8:26 AM), http://www.politico.com/story/2013/01/scalia-the-constitution-is-dead-086853 (recounting Justice Scalia's statement while speaking at Southern Methodist University).

80. Lesley Stahl, *Justice Scalia on the Record*, CBS NEWS (Apr. 24, 2008), http://www.cbsnews.com/news/justice-scalia-on-the-record/.

81. *Id.*

82. *Id.* ("I can be charming and combative at the same time. . . . What's contradictory between the two? I love to argue. I've always loved to argue. And I love to point out the weaknesses of the opposing arguments. It may well be that I'm something of a shin kicker. It may well be that I'm something of a contrarian.").

83. Harmelin v. Michigan, 501 U.S. 957, 965 (1991).

lied upon for its "precedential value"—it is neither statutorily nor constitutionally mandated—rather, it is relied upon as a matter of convenience. Moreover, it is good practice for the Court to adopt such a policy, but not for the reasons stated by my colleague.

MADISON NOMOS: Well, Justice Scalia, why do you believe the Court should give less deference to constitutional precedent?

JUSTICE SCALIA: It all comes down to how one views the proper role of a Justice on the Supreme Court. As I see it, "[i]f you're going to be a good and faithful judge, you have to resign yourself to the fact that you're not always going to like the conclusions you reach. If you like them all the time, you're probably doing something wrong."[84]

> [T]he main danger in judicial interpretation of the Constitution . . . is that judges will mistake their own predilections for the law. Avoiding this error is the hardest part of being a conscientious judge. . . . Nonoriginalism, which under one or another formulation invokes 'fundamental values' as the touchstone of constitutionality, plays precisely to this weakness.[85]

In other words, "[t]he judge who always likes the results he reaches is a bad judge."[86] And so, if a collection of five unelected judges erred in a matter of constitutional interpretation, the Court should not be inescapably bound to continue the folly. "[Stare decisis], to the extent it rests upon anything more than administrative convenience, is merely the application to judicial precedents of a more general principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts."[87] In fact, "[e]very time the Supreme Court defines another right in the Constitution it reduces the scope of democratic debate."[88] And so, "[a] decision of this Court which, not overruling a prior holding, nonetheless announces a novel rule, contrary to long and unchallenged practice, and pronounces it to be the Law of the Land—such a decision, no less

84. *Antonin Scalia, Associate Justice of the U.S. Supreme Court*, ACE'S WEB WORLD, http://www.edu.aceswebworld.com/antonin_scalia.html (last visited Apr. 5, 2017) [hereinafter *Antonin Scalia, Associate Justice*].

85. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989).

86. Glueck, *supra* note 79.

87. Payne v. Tennessee, 501 U.S. 808, 834–35 (1991) (Scalia, J., concurring).

88. *Antonin Scalia, Associate Justice*, *supra* note 84.

than an explicit overruling, should be approached with great caution."[89]

MADISON NOMOS: So, then, Justice Scalia, would I be correct in stating that you only ignored the doctrine of stare decisis when the Court's previous holdings had no foundation in constitutional text or American legal or social traditions? In other words, you "sought to *deactivate* the Court's previous activism?"[90]

JUSTICE SCALIA: Sure.

JUSTICE BRANDEIS: You see, while I would move society forward by discounting constitutional precedent that no longer found its basis in reason, my colleague would "turn back the clock" on many basic civil rights, including the privacy protections and much of the Bill of Rights law that developed in the latter half of the 20th century.[91] As a fellow "Living Constitutionalist" argued: "[I]t should be clear that an extraordinarily radical purge of established constitutional doctrine would be required if we candidly and consistently applied" Justice Scalia's originalism.[92] "Surely that makes out at least a prima facie practical case against the model."[93]

MADISON NOMOS: Yes, Justice Scalia, would it not be judicial activism—which you claim to loathe—to reverse years of precedent and societal progress because *you* think that a case from thirty years ago was decided incorrectly? Moreover, would you not be bound by your own views to reject *all* nonoriginalist precedent? Of course, I know that you were not consistent in doing so during your tenure.

JUSTICE SCALIA [*sarcastically*]: And how exactly I was *in*consistent?

MADISON NOMOS: Well, Justice Scalia, it appears to me that the cases in which you confront the issue of whether to adhere to the doctrine of stare decisis can be placed into three separate categories. The first of these is when you have argued that the Court

89. *Payne*, 501 U.S. at 835 (Scalia, J., concurring).

90. SCALIA'S COURT: A LEGACY OF LANDMARK OPINIONS AND DISSENTS 15–16 (Kevin A. Ring ed., 2016).

91. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 411 (2012).

92. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, *in* STANFORD LEGAL ESSAYS 179, 189 (John Henry Merryman ed., 1975).

93. *Id.*

should disregard stare decisis in order to overrule *nonoriginalist* precedent. Though there are countless opinions from your years on the bench that fit in this category, I think that your dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[94] is, perhaps, the clearest example.[95] As you know, in *Casey*, the Court was asked to determine the constitutionality of five provisions of the Pennsylvania Abortion Control Act of 1982.[96] While upholding four of the five provisions, the plurality reaffirmed "the *essential* holding of *Roe v. Wade*" in large part due to its consideration of "principles of institutional integrity . . . and the rule of *stare decisis*."[97] Relying on the notion that "the 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,"[98] the plurality determined that the key questions it had to answer when ascertaining the applicability of the doctrine of stare decisis were whether "the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as

94. 505 U.S. 833, 979 (1992) (Scalia, J., dissenting).

95. *Id.*; *see also* Arizona v. Gant, 556 U.S. 332, 351, 354 (2009) (Scalia, J., concurring) (arguing that the Court should overrule *New York v. Belton*, 453 U.S. 454 (1981), and *Thornton v. United States*, 541 U.S. 615 (2004), because "the historical practices the Framers sought to preserve" by ratifying the Fourth Amendment do not justify the rule set forth in those cases, which "opens the field to what I think are plainly unconstitutional searches"); Thornton v. United States, 541 U.S. 615, 625, 628–29 (2004) (Scalia, J., concurring in the judgment) (urging the Court to overrule *New York v. Belton*, 453 U.S. 454 (1981), because "in our search for clarity, *we have now abandoned our constitutional moorings and floated* to a place where the law approves of purely exploratory searches of vehicles during which officers with no definite objective or reason for the search are allowed to rummage around in a car to see what they might find") (alteration in original) (emphasis added) (quoting United States v. McLaughlin, 170 F.3d 889, 894 (9th Cir. 1999) (Trott, J., concurring)); Crawford v. Washington, 541 U.S. 36, 42, 60 (2004) (tracing the common law roots of the Sixth Amendment's Confrontation Clause while arguing that *Ohio v. Roberts*, 448 U.S. 56 (1980), should be overruled because it "departs from the historical principles" of the "original meaning of the Confrontation Clause").

96. *Casey*, 505 U.S. at 844 (plurality opinion). The provisions at issue: (1) required a woman seeking an abortion to give her informed consent after having been provided with certain information at least twenty-four hours before the abortion was performed; (2) mandated the consent of one parent for a minor seeking an abortion (with a "judicial bypass option if the minor does not wish to or cannot obtain a parent's consent"); (3) required a married woman to obtain the written approval of her husband before seeking an abortion; (4) imposed certain reporting requirements on facilities that provide abortions; and (5) set forth a definition of "medical emergency" that would alleviate the need to comply with the other requirements. *Id.*

97. *Id.* at 845–46 (emphasis added).

98. *Id.* at 854.

to have left the old rule no more than a remnant of abandoned doctrine; or," citing your dissent in *Coronado Oil*, Justice Brandeis, "whether the facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[99] After an extensive analysis, the plurality concluded that "[w]ithin the bounds of normal *stare decisis* analysis . . . the stronger argument is for affirming *Roe*'s *central holding*."[100] Justice Scalia, in a somewhat caustic dissent, you challenged the plurality's reliance on what it perceived to be *Roe v. Wade*'s "central holding"—that "the power of a woman to abort her unborn child is a 'liberty' in the absolute sense" —because of that decision's nonoriginalist foundations.[101] Consequently, you took issue with the plurality's conclusion that it must be followed because of the importance of stare decisis.[102] Despite the plurality's "exhaustive discussion of all the factors that go into the determination of when *stare decisis* should be observed and when disregarded," you noted that "they never mention[ed]" the important question of "'how *wrong* was the [initial] decision on its face?'"[103] Thus, you asserted that "[t]he Court's reliance upon *stare decisis* can best be described as contrived. It insists upon the necessity of adhering not to all of *Roe*, but only to what it calls the 'central holding.'"[104] You argued that "*stare decisis* ought to be applied even to the doctrine of *stare decisis*," which did not include the "keep-what-you-want-and-throw-away-the-rest version" employed by the Court.[105] In conclusion, you argued that, instead of picking and choosing the parts of past decisions that they liked, "the Justices should do what is *legally* right by asking two questions: (1) Was *Roe* correctly decided? (2) Has *Roe* succeeded in producing a settled body of law? If the answer to both questions [was] no," as you concluded it was in this case, stare decisis should be disregarded and "*Roe* should undoubtedly be overruled."[106]

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99. *Id.* at 854–55.

100. *Id.* at 861 (emphasis added).

101. *Id.* at 980 (Scalia, J., dissenting).

102. *Id.* at 982–83.

103. *Id.* (emphasis added).

104. *Id.* at 993.

105. *Id.* ("I wonder whether, as applied to *Marbury v. Madison*, 1 Cranch 137 (1803), for example, the new version of *stare decisis* would be satisfied if we allowed courts to review the constitutionality of only those statutes that (like the one in *Marbury*) pertain to the jurisdiction of the courts.").

106. *Id.* at 999.

JUSTICE BRANDEIS [*laughing*]: And now it is my turn to dissent.[107] Nothing changed, factually, in the nineteen years between *Roe* and *Casey*. And, though the issue was divisive amongst the populace both then and now, this was certainly a situation in which it was "more important that the applicable rule of law be settled than that it be settled right,"[108] which it appears to have been in the first instance. And so, the plurality was right in its reliance upon *Roe*. My two-tiered analysis, after all, was not meant to give Justices carte blanche to overrule constitutional precedent on a whim.

JUSTICE SCALIA: Well, it was as clear then as it is now that "[t]he Imperial Judiciary lives."[109] Nonetheless [*turning to Madison Nomos*], it seems that I am batting 1.000[110] against your claims of inconsistency . . . .

MADISON NOMOS: Yes, Justice Scalia, the first category certainly stands in your favor. But please allow me to continue—and I will attempt to be brief to make my point. The second category consists of those cases in which you dissented because the Court failed to follow *originalist* precedent, with the best example being your dissenting opinion in *Lawrence v. Texas*.[111] As you are both aware, in *Lawrence*, the Court, relying in part on *Casey*, held that criminal statutes outlawing sodomy were unconstitutional because they violated individuals' fundamental "liberty" to engage in sexual acts within the privacy of their own homes.[112] In doing so, the majority appeared to take a page from your dissent in *Ca-*

107. *See supra* note 78.

108. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

109. *Casey*, 505 U.S. at 996 (Scalia, J., dissenting). In *Casey*, Justice Scalia further noted, "I cannot agree with, indeed I am appalled by, the Court's suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced—*against* overruling, no less—by the substantial and continuing public opposition the decision has generated." *Id.* at 998.

110. *See* Jonas Shaffer, *Justice Antonin Scalia Was a Camden Yards Regular, Often to Root on the Yankees*, BALT. SUN (Feb. 15, 2016, 5:45 PM), http://www.baltimoresun.com/sports/bal-justice-antonin-scalia-was-a-camden-yards-regular-often-to-root-on-the-yankees-20160215-story.html; *see also* Roger Rubin, *Supreme Court Justice Sonia Sotomayor Joins Yankee Stadium Bleacher Creatures During First-Inning Wednesday*, N.Y. DAILY NEWS (Aug. 1, 2012, 10:33 PM), http://www.nydailynews.com/sports/baseball/yankees/supreme-court-justice-sonia-sotomayor-joins-yankee-stadium-bleacher-creatures-first-inning-wednesday-article-1.1126783 ("Justice (Antonin) Scalia is fond of reminding me that he was the first Yankees fan on the Court and he is still a very loyal Yankees fan.").

111. 539 U.S. 558, 586–87 (2003) (Scalia, J., dissenting).

112. *Id.* at 578 (majority opinion).

sey when it overruled *Bowers v. Hardwick*[113] because of the Justices' belief that it "was not correct when it was decided" and it "ought not to remain binding precedent."[114] Because societal views of homosexuality had changed in the years since *Bowers* was decided, the Court found that the decision was no longer binding.[115] In your dissent, Justice Scalia, you began by sharply noting that you did "not [yourself] believe in rigid adherence to *stare decisis* in constitutional cases; but [you] do believe that [the Court] should be consistent rather than manipulative in invoking the doctrine."[116] You argued that the Court was flippant in its appeal to stare decisis by comparing *Roe* with *Bowers*[117] and by demonstrating that *Bowers* was decided based on an originalist interpretation of the Fourteenth Amendment.[118] The Court, in your opinion, had "largely signed on to the so-called homosexual agenda" and thus was willing to take advantage of Justice Brandeis's standard that constitutional precedents carry less precedential weight in order to eliminate "the moral opprobrium that has traditionally attached to homosexual conduct."[119]

JUSTICE BRANDEIS: I apologize for interrupting, but it appears from the cases you have cited thus far that my colleague has been remarkably *consistent* in his approach to stare decisis—misguided, though he may be. He argues for overruling cases that did not adhere to his jurisprudential views while affirming those that do. Obviously my "brother Justice" can defend himself, but what exactly is the point that you trying to make by breaking these decisions down into arbitrary categories?

MADISON NOMOS: I was attempting to draw attention to the first two categories of Justice Scalia's treatment of stare decisis in order to show their stark contrast with the third: those cases where you [*looking at Justice Scalia*] seem to accept precedent, even where it is *inconsistent* with the original meaning of the text. In your 1988 Taft Lecture, entitled *Originalism: The Lesser Evil*, you described yourself as a "faint-hearted originalist" who would af-

113. 478 U.S. 186, 196 (1986) (holding that the Constitution did not confer a fundamental right to engage in homosexual sodomy).

114. *Lawrence*, 539 U.S. at 578.

115. *Id.* at 571–77.

116. *Id.* at 587 (Scalia, J., dissenting).

117. *Id.* at 587–92.

118. *Id.* at 592–98. "The Court's description of 'the state of the law' at the time of *Bowers* only confirms that *Bowers* was right." *Id.* at 594 (citing *id.* at 518 (majority opinion)).

119. *Id.* at 602.

firm a strong role for nonoriginalist precedent[120] because the "results of doing otherwise seem . . . too objectionable to countenance."[121] Professor Randy Barnett has alleged that, in your approach, you are "willing to avoid objectionable outcomes that would result from originalism by invoking the precedents established by the dead hand of nonoriginalist justices."[122] A key example of this apparent inconsistency centers on your treatment of substantive due process.[123] For example, in your concurring opinion in *Albright v. Oliver*, you noted your acceptance of the Court's inclusions of "certain explicit substantive protections of the Bill of Rights" within the Fourteenth Amendment's Due Process Clause "because it is both long established and narrowly limited," despite that doctrine's blatant departure from the Clause's original meaning.[124] And in *McDonald v. City of Chicago*, you reaffirmed that position, "[d]espite [your] misgivings about substantive due process as an original matter,"[125] instead of joining Justice Thomas's concurring opinion where he argued for the rejection of substantive due process and the resurgence of the Fourteenth Amendment's Privileges or Immunities Clause.[126] So, more fully stated, my question is how can you [*looking at Justice Scalia*] argue for a weaker view of stare decisis in nonoriginalist constitutional interpretation in some cases, but not in others? For the sake of consistency, are you not bound as an adherent and proponent of originalism to purge established constitutional doctrine based on nonoriginalist interpretation? Is judicial engagement in this context not the truest form of judicial restraint?

JUSTICE SCALIA [*chuckling*]: "Get out of here!"[127] First and foremost, while I described myself as fainthearted in 1988, I repudi-

120. *See* Scalia, *supra* note 85, at 864.

121. Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 12 (2006). Much of this portion of the conversation borrows from Professor Barnett's critique.

122. *Id.* at 13.

123. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 550, 559–61 (1995) (joining Chief Justice Rehnquist's opinion of the Court, which attempted to reconcile its result with the Court's post-New Deal interpretation of the Commerce Clause, instead of joining Justice Thomas's concurring opinion, which included a stricter originalist analysis).

124. 510 U.S. 266, 275 (1994) (Scalia, J., concurring).

125. 561 U.S. 742, 791 (2010) (Scalia, J., concurring).

126. *See generally id.* at 805–06 (Thomas, J., concurring).

127. Christopher Landau, *Tribute: He Did What He Was Born to Do*, SCOTUSBLOG (Feb. 25, 2016, 3:32 PM), http://www.scotusblog.com/2016/02/tribute-he-did-what-he-was-born-to-do/ ("The expression . . . was perhaps the Justice's favorite way of dismissing an argument he deemed meritless.").

ated that sentiment a long time ago[128]—"I try to be an honest originalist!"[129] And second, none of the cases that you have cited support your assertion that I have been inconsistent in that view in my approach to the doctrine of stare decisis. Listen, while I admit to not believing "in rigid adherence to *stare decisis* in constitutional cases,"[130] "I'm an originalist and a textualist, not a nut."[131] Therefore, I "do not propose that all decisions made, and doctrines adopted, in the past half-century or so of unrestrained constitutional improvisation be set aside."[132] Rather, I have argued that "only those [cases] that fail to meet the criteria for stare decisis" should be overturned.[133] These criteria include consideration of (1) "whether harm will be caused to those who justifiably relied on the decision,"[134] (2) "how clear it is that the decision was textually and historically wrong,"[135] (3) "whether the

128. MARCIA COYLE, THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION 164–65 (2013).

129. Jennifer Senoir, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), http://nymag.com/news/features/antonin-scalia-2013-10/.

130. Lawrence v. Texas, 539 U.S. 558, 587 (2003) (Scalia, J., dissenting).

131. Nina Totenberg, *Justice Scalia, the Great Dissenter, Opens Up*, NPR (Apr. 28, 2008, 7:32 AM), http://www.npr.org/templates/story/story.php?storyId=89986017 (referring to Justice Thomas's hardline approach to nonoriginalist precedent).

132. SCALIA & GARNER, *supra* note 91, at 412.

133. *Id.* The proceeding discussion is adapted from SCALIA & GARNER, *supra* note 91, at 412.

134. *Id.* (citing Walton v. Arizona, 497 U.S. 639, 673 (1990) (Scalia, J., concurring in part and concurring in the judgment) (explaining that stare decisis has little applicability when the earlier caselaw has spawned uncertainty because the doctrine's purpose is that "of introducing certainty and stability into the law and protecting the expectations of individuals and institutions that have acted in reliance on existing rules"); South Carolina v. Gathers, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting) ("The freshness of error not only deprives [the earlier case] of the respect to which long-established practice is entitled, but also counsels that the opportunity of correction be seized at once, before state and federal laws and practices have been adjusted to embody it."); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 52 (1868) ("Before [disregarding stare decisis], . . . it will be well to consider whether the point involved is such as to have become a rule of property, so that titles have been acquired in reliance upon it, and vested rights will be disturbed by any change.")).

135. SCALIA & GARNER, *supra* note 91, at 412 (citing Payne v. Tennessee, 501 U.S. 808, 834 (1991) (Scalia, J., concurring) (supporting the overruling of *Booth v. Maryland*, 482 U.S. 496 (1987): "If there was ever a case that defied reason, it was *Booth* . . . , imposing a constitutional rule that had absolutely no basis in constitutional text, in historical practice, or in logic."); United States v. International Boxing Club of N.Y., Inc., 348 U.S. 236, 249 (1955) (Frankfurter, J., dissenting) ("That doctrine [of stare decisis] is not, to be sure, an imprisonment of reason.")). While, on the surface, Justice Scalia appears to be adopting an approach similar to that espoused by Caleb Nelson in *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001), it is notable that this is not his *only* criteria as what constitutes "demonstrably erroneous precedent" is in the eye of the beholder.

decision has been generally accepted by society,"[136] and (4) "whether the decision permanently places courts in the position of making policy calls appropriate for elected officials."[137] So, while I "believe that the Supreme Court should not give stare decisis effect to *Roe v. Wade*,"[138] I "would, on the other hand, accept as settled law the incorporation doctrine—whereby the Bill of Rights is made applicable to the states by interpreting the Fourteenth Amendment's Due Process Clause as encompassing it—even though it is based on an interpretation of the Due Process Clause (so-called substantive due process) that the words will not bear."[139] And so, in response to your specific challenge, I "would accept most, though not all, other prior applications of substantive due process, though [I] would not apply that atextual doctrine anew in the future."[140] Thus, stare decisis—a doctrine whose function "is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability"[141]—"is an exception to textualism (as it is to any theory of interpretation) born not of logic but of necessity."[142] So while you may be able to organize my opinions into seemingly clear, but nonetheless arbitrary, categories regarding their treatment of nonoriginalist precedent, you have missed the forest for the trees; they are consistent based on the Court's past treatment of stare decisis.

JUSTICE BRANDEIS: Well, Justice Scalia, it appears that we are more alike in our views of the subject than I originally thought. Are our approaches to stare decisis not the same, albeit under a

136. SCALIA & GARNER, *supra* note 91, at 412 (citing John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 31 HARV. J.L. & PUB. POL'Y 917, 922 (2008) (noting that the Constitution containing entrenched norms with substantial consensus, "creates legitimacy, allegiance, and even affection as citizens come to regard the entrenched norms as part of their common bond")).

137. SCALIA & GARNER, *supra* note 91, at 412 (citing Tennessee v. Lane, 541 U.S. 509, 556 (2004) (Scalia, J., dissenting) (declining to give stare decisis effect to "congruence and proportionality" tests for § 5 of the Fourteenth Amendment)); Ewing v. California, 538 U.S. 11, 31–32 (2003) (Scalia, J., concurring) (declining to give stare decisis effect to a "proportionality" test for violation of the Eighth Amendment)); Stenberg v. Carhart, 530 U.S. 914, 954–56 (2000) (Scalia, J., dissenting) (declining to give stare decisis effect to the "undue burden" standard of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (plurality opinion)).

138. SCALIA & GARNER, *supra* note 91, at 413.

139. *Id.*

140. *Id.*

141. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 138–40 (1997).

142. SCALIA & GARNER, *supra* note 91, at 414.

different name? After all, we have both adopted a relatively weak view of constitutional precedent so that we may be free to urge the Court to later correct itself from the dead hand control of the past . . . .

JUSTICE SCALIA: Brother Louis,[143] though you are correct that we both argue for weak adherence to constitutional precedent, the purposes behind our approaches could not be more different. While you and those who agree with you seek to free the Court from its past decisions so that it may *evolve* with what you perceive to be the current society's revised beliefs—based on advances in science or social milieus— I am arguing that Justices should reverse the decisions of Living Constitutionalists so that the democratic process and the rule of law may be respected and reign supreme, instead of the Court.

JUSTICE BRANDEIS: Justice Scalia, we can both agree that "[i]f we desire respect for the law, we must first make the law respectable."[144] It seems that we just disagree on how to effectuate that.

MADISON NOMOS [*looking at his watch*]: Well, Justice Brandeis and Justice Scalia, this conversation has been illuminating. I am now convinced that your [*looking at Justice Brandeis*] chief assertion that the doctrine of stare decisis bears less weight when it involves constitutional precedent is the historical practice of the Court, regardless of whether it was at the time of *Coronado Oil*. And so, when starting with that general precept, it seems that what is to be done from that point forward depends on my Justice's view of her proper function as a Supreme Court Justice interpreting the Constitution—whether she wants the Court to evolve or to devolve. You have given me much to consider.

JUSTICE BRANDEIS [*standing up*]: Thank you for the entertainment. We will leave you to finish your draft—best not to upset your Justice.

JUSTICE SCALIA [*standing up and retrieving the Dictionary from the reading table*]: Yes, we better be off. Don't make a regular habit of staying here all night.[145] Assuming you have kids, "[b]e

143. Justice Clarence Thomas, Eulogy at Justice Scalia's Memorial Service (Mar. 1, 2016), https://www.c-span.org/video/?405460-1/memorial-service-supreme-court-justice-antonin-scalia (referring to Justice Scalia's practice during oral argument to lean back in his chair and ask "Brother Clarence" for his thoughts).

144. A TREASURY OF JEWISH QUOTATIONS 269 (Joseph L. Baron ed., 1996).

145. *See* Mark Zimmermann, *Cardinal, Chaplain Praise Scalia as Man of Faith, Fami-*

home for dinner. Be home for dinner. That is when the little monsters are civilized. They do not grow up civilized. It is a process. And much of that process occurs at family dinner."[146]

JUSTICE BRANDEIS: Yes, "[w]hen a man feels that he cannot leave his work, it is a sure sign of an impending collapse."[147]

MADISON NOMOS: I do not anticipate making a regular habit of interrupting your nightly arguments. Given the significance of this decision to the American people and to my Justice, however, I feel compelled to stay here until I complete this draft. I am learning that there is more to judging than just calling balls and strikes.[148] While judges certainly should be umpires and not players, the strike zone provides a definitive guide for how they are to make the call. There is no grey line. That is rarely the case in the Supreme Court.

JUSTICE SCALIA [*laughing*]: Of course there is a strike zone on the Court: the Constitution. As my successor, Justice Gorsuch, so eloquently put it, "donning a black robe means something—and not just that I can hide the coffee stains on my shirts. We wear robes—honest, unadorned, black polyester robes that we (yes) are expected to buy for ourselves at the local uniform supply store—as a reminder of what's expected of us when we go about our business: what Burke called the 'cold neutrality of an impartial judge.'"[149] The "controversial" cases are much simpler than you think they are. "The death penalty? Give me a break. It's easy.

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ly and the Law, CATHOLIC NEWS SERV. (Feb. 18, 2016, 4:51 PM), http://www.catholicnews.com/services/englishnews/2016/cardinal-chaplain-praise-scalia-as-man-of-faith-family-and-the-law.cfm.

146. Justice Antonin Scalia, Address at Pepperdine University School of Law (Feb. 16, 2016), https://www.youtube.com/watch?v=zPNxqr_5_gY.

147. Letter from Louis D. Brandeis to Alfred Brandeis (Mar. 8, 1897), *in* 3 LETTERS OF LOUIS D. BRANDEIS, 1913–1915, 127 (Melvin I. Urofsky & David W. Levy eds., 1971).

148. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005) ("Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire. . . . If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench, and I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability, and I will remember that it's my job to call balls and strikes, and not to pitch or bat.").

149. Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 919–20 (2016) (quoting Edmund Burke, *Preface to the Address of M. Brissot to His Constituents*, *in* 8 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 381, 381 (London, F. & C. Rivington 1801)).

Abortion? Absolutely easy. Nobody ever thought the Constitution prevented restrictions on abortion. Homosexual sodomy? Come on. For 200 years, it was criminal in every state."[150]

JUSTICE BRANDEIS: No, that is not right. What was perceived as a constitutional practice in the past may no longer be so today. And similarly, what was never viewed as a constitutionally protected right in 1791 may become one as the country's moral compass changes. The Court's members must leave their old methodologies behind in favor of the new as they become a more informed body.

JUSTICE SCALIA: While the traditional, originalist view of judging may not always "yield a single right answer in all hard cases," that does not mean that courts should or must abandon it.[151] "Imagine two men walking in the woods who happen upon an angry bear. They start running for their lives. But the bear is quickly gaining on them. One man yells to the other, 'We'll never be able to outrun this bear!' The other replies calmly, 'I don't have to outrun the bear, I just have to outrun you.'"[152] I just don't think that you [*turning to Justice Brandeis*] are offering anything better with your proposed evolving-Constitution approach. In our democratic republic, the people have the ultimate power, not five unelected judges who are tasked with examining society's social thermometer. So, Brother Louis, I will leave you and your method to the bear.

MADISON NOMOS: I do not want to speak out of turn on a topic of which I know little, but perhaps I can try to meet in the middle. I agree that judges in a democratic society are not legislators and should not seek "to reshape the law as they think it should be in the future."[153] Instead, judges should "strive (if humanly and so imperfectly) to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be—not to decide cases based on their own moral convictions or the policy consequences they believe

150. *Scalia: Abortion, Death Penalty "Easy" Cases*, ASSOCIATED PRESS (Oct. 5, 2012, 4:14 AM), http://www.cbsnews.com/news/scalia-abortion-death-penalty-easy-cases/.

151. Gorsuch, *supra* note 149, at 918.

152. *Id.* (noting that Justice Scalia loved to tell this story).

153. *Id.* at 906.

might service society best."[154] Though the judiciary is bound by the laws passed by the people through legislation and ratified by the Executive, however, the Court must also be sure to give due consideration and respect to the specific facts involved in the underlying case. While we work in the law every day, for many people who come before this Court or any other, it is the only interaction with the justice system that they will ever have. "Everyone who comes to Court deserves respect. . . . A case isn't just a number or a name, but a life's story and a human being with equal dignity to [our] own."[155] I think that judges owe it to those people to approach the facts of each case as neutrally as possible, but perhaps not "cold[ly]."[156] And so, it appears to me that judging is much more akin to the infield fly rule[157] than it is to calling balls and strikes. There is an established rule for how to make the call, but ultimately it is the instinct of the judge that wins the day. This allows for a bit of subjectivity to creep in, no matter how hard the judge tries to suppress it. Regardless, it seems both of you agree that the Court should adopt a weak view of stare decisis, which answers my Justice's question. Thank you both again for your advice tonight. It has been an honor. You are both truly

154. *Id.*

155. *Confirmation Hearings on the Nomination of Neil Gorsuch to Be Associate Justice of the United States: Hearing Before the S. Comm. on the Judiciary,* 115th Cong. __ (2017).

156. Burke, *supra* note 149, at 155.

157. MAJOR LEAGUE BASEBALL, OFFICIAL BASEBALL RULES 145–46 (2016), http://mlb.mlb.com/mlb/downloads/y2016/official_baseball_rules.pdf ("An INFIELD FLY is a fair fly ball (not including a line drive nor an attempted bunt) which can be caught by an infielder with ordinary effort, when first and second, or first, second and third bases are occupied, before two are out. The pitcher, catcher and any outfielder who stations himself in the infield on the play shall be considered infielders for the purpose of this rule. When it seems apparent that a batted ball will be an Infield Fly, the umpire shall immediately declare 'Infield Fly' for the benefit of the runners. If the ball is near the baselines, the umpire shall declare 'Infield Fly, if Fair.' The ball is alive and runners may advance at the risk of the ball being caught, or retouch and advance after the ball is touched, the same as on any fly ball. If the hit becomes a foul ball, it is treated the same as any foul. If a declared Infield Fly is allowed to fall untouched to the ground, and bounces foul before passing first or third base, it is a foul ball. If a declared Infield Fly falls untouched to the ground outside the baseline, and bounces fair before passing first or third base, it is an Infield Fly."); *id.* at 146 ("On the infield fly rule the umpire is to rule whether the ball could ordinarily have been handled by an infielder-not by some arbitrary limitation such as the grass, or the base lines. The umpire must rule also that a ball is an infield fly, even if handled by an outfielder, if, in the umpire's judgment, the ball could have been as easily handled by an infielder. The infield fly is in no sense to be considered an appeal play. The umpire's judgment must govern, and the decision should be made immediately."); *id.* at 39–40 ("A batter is out when . . . [a]n Infield Fly is declared"). For an excellent discussion of the Infield Fly Rule, see *Aside: The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474 (1975).

lions of the law.[158]

JUSTICE SCALIA: At the end of the day just remember to make the decision and move on. And as for the American people, [*laughing*] they will "get over it."[159] Now, where were we, Justice Brandeis? Ah, yes [*muffled whispering*] . . . .

Justice Brandeis and Justice Scalia exit through the same door in which they entered, continuing their argument over Webster's New International Dictionary: Second Edition (1934). Meanwhile, Madison Nomos returns to his work with renewed fervor.

158. *See* Gorsuch, *supra* note 149, at 905 ("Justice Scalia. He really was a lion of the law: docile in private life but a ferocious fighter when at work, with a roar that could echo for miles.").

159. Stahl, *supra* note 80 (discussing the backlash in response to the Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000)).