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Historical (In)Accuracy of the Brandeis Dichotomy: An Assessment of the Two-Tiered Standard of Stare Decisis for Supreme Court Precedents

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THE HISTORICAL (IN)ACCURACY OF THE BRANDEIS DICHOTOMY: AN ASSESSMENT OF THE TWO-TIERED STANDARD OF STARE DECISIS FOR SUPREME COURT PRECEDENTS*

LEE J. STRANG** & BRYCE G. POOLE***

*For over seventy years, the Supreme Court has applied a two-tiered standard of stare decisis under which precedents involving constitutional interpretation are given less weight than precedents involving statutory interpretation. This two-tiered standard was first articulated by Justice Brandeis in his dissenting opinion in the 1932 case *Burnet v. Coronado Oil & Gas Co.* In his dissent, Justice Brandeis argued that the two-tiered standard was the historical practice of the Court, and he cited to cases he claimed supported the dichotomy. In actuality, the two-tiered standard was an invention of the twentieth century, originating in Justice Brandeis's dissenting opinion, and rooted in his legal realist jurisprudence and Progressive and New Deal sympathies.*

In this Article, the authors dissect the evidence that Justice Brandeis used to support his claim and themselves evaluate the authentic historical practice of the Court. As a careful analysis of the Court's precedents reveals, the Court did not utilize the two-tiered standard—at least, not until Justice Brandeis and the New Deal Court embraced it. Instead, the authors show that the authentic historical practice of the Supreme Court was to treat precedents involving constitutional interpretation the same as other types of precedents. The Court would overrule precedents only when those precedents had been undermined by one or more of six discrete factors. In all other cases, if the Court could not articulate a justification for overruling, the prior decision

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would be treated as binding precedent for purposes of *stare decisis*.

The authors' conclusion undermines one of the few "articles of faith" of American constitutional legal practice. Brandeis's dichotomy, stripped of its historical pedigree, loses one of its most powerful supports. What remains after the loss of its historical support is the naked normative claim that the Supreme Court should give less precedential weight to constitutional precedents. This sole remaining claim is much less powerful, as Justice Brandeis himself recognized since he used, as his primary argument, the one based on the Court's historical practice. Without this historical support, Brandeis appears more like a politician seeking to advance his political goals.

Of course, it may be the case that the normative arguments for Brandeis's dichotomy sufficiently support it, and the authors do not contest those arguments here. However, the powerful hold of Brandeis's historical claim on American legal practice—despite the lack of evidence supporting it—suggests that the normative arguments alone are not sufficiently robust. And, without sufficient support, Brandeis's dichotomy—along with the dramatic number of Supreme Court reversals it has been used to justify—becomes suspect and open to rejection.

INTRODUCTION	971
I. RISE OF THE BRANDEIS MYTH	974
A. <i>Creation of the Myth</i>	974
B. <i>Acceptance of the Myth</i>	977
C. <i>Justice Brandeis's Agenda: Weakening Stare Decisis To Achieve Political Ends?</i>	980
II. DECONSTRUCTING THE MYTH.....	991
A. <i>Brandeis's Misunderstanding—Mischaracterization?—of the Historical Record</i>	991
B. <i>The Brandeis Myth's Unopposed Victory</i>	1000
C. <i>The Rise of the Brandeis Dichotomy</i>	1001
III. THE AUTHENTIC HISTORICAL PRACTICE OF THE SUPREME COURT	1014
A. <i>Our Methodology and Its Limits</i>	1014
B. <i>No Distinction Between Constitutional and Other Precedents</i>	1015
1. <i>Precedents Undermined by Subsequent Cases</i>	1017
2. <i>Precedents Undermined by Acts of Congress</i>	1021

3. Precedents Undermined by Executive Action.....	1022
4. Precedents Undermined by Developments in State Law.....	1023
5. Precedents Undermined by Significant Changes in Circumstances.....	1024
6. Patently Erroneous Precedents	1025
7. Summary.....	1025
C. <i>No Hint of the Brandeis Dichotomy</i>	1026
D. <i>Note on the Role of Property and Contract Interests</i>	1027
CONCLUSION	1027
APPENDIX	1028

INTRODUCTION

The Supreme Court of the United States—rhetorically, at least¹—utilizes two different standards for the respect it gives to its precedent. The Court gives less deference to precedents interpreting the Constitution than to precedents interpreting a statute or involving other, nonconstitutional legal norms.² This statutory-constitutional dichotomy spans the Court’s ideological makeup.

On the right, Chief Justice Rehnquist has explained that the Court’s traditional approach to *stare decisis*³ was two-tiered:

“*Stare decisis* is not . . . a universal, inexorable command,” especially in cases involving the interpretation of the Federal

1. Some scholars have argued that *stare decisis* does not have, or has not had, a significant impact on judges’, and especially Supreme Court Justices’, decisionmaking. See THOMAS G. HANSFORD & JAMES F. SPRIGGS, II, *THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT* 4 (2006) (describing the “attitudinal model” as the claim that “the justices’ votes are exclusively a result of their ideological leanings”).

2. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); see also, e.g., *Neal v. United States*, 516 U.S. 284, 295 (1996) (stating that the Court gives “great weight to *stare decisis* in the area of statutory construction” due to “concerns about the relationship of the Judiciary to Congress”).

3. From the Latin phrase, “*stare decisis et non quieta movere*,” meaning “[t]o stand by things decided, and not to disturb settled points.” BLACK’S LAW DICTIONARY 1443 (8th ed. 2004). *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.* Commentators frequently refer to two types of *stare decisis*: “vertical” and “horizontal.” Vertical *stare decisis* is usually defined as the requirement that lower courts must follow higher courts. Horizontal *stare decisis* is usually defined as the requirement that a court follow its own precedents. This Article is chiefly concerned with horizontal *stare decisis*. For a discussion of vertical *stare decisis*, see Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818 (1994) (describing vertical *stare decisis* in federal courts); see also Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2024–28 (1994) (explaining the difference between vertical and horizontal *stare decisis*).

Constitution. Erroneous decisions in such constitutional cases are uniquely durable, because correction through legislative action, save for constitutional amendment, is impossible. It is therefore our duty to reconsider constitutional interpretations that “depar[t] from a proper understanding” of the Constitution. . . . [The Court’s] constitutional watch does not cease merely because we have spoken before on an issue; when it becomes clear that a prior constitutional interpretation is unsound we are obliged to reexamine the question.⁴

Indeed, statements like those of Rehnquist, to the effect that constitutional decisions will be afforded less weight for purposes of *stare decisis* than decisions involving other legal issues, have appeared frequently in Supreme Court decisions. For example, in *Harmelin v. Michigan*,⁵ Justice Scalia stated that “the doctrine of *stare decisis* is less rigid in its application to constitutional precedents.”⁶

Justices elsewhere on the ideological spectrum, such as Justice O’Connor, have expressed similar sentiments:

As we have often noted, “[s]*tare decisis* is not an inexorable command,” but instead 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.⁷

On the left side of the Court’s ideological spectrum, Justice Breyer has likewise found that the “Court applies *stare decisis* more ‘rigidly’ in statutory than in constitutional cases.”⁸

4. *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) (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting)); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985); *Smith v. Allwright*, 321 U.S. 649, 665 (1944).

5. 501 U.S. 957 (1991).

6. *Id.* at 965; *see also* *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.”).

7. *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (citing *Payne*, 501 U.S. at 828; *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)); *see also* *Hohn v. United States*, 524 U.S. 236, 251 (1998) (Kennedy, J., majority) (making an argument similar to Justice O’Connor’s opinion in *Agostini*).

8. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. ___, 127 S. Ct. 2705, 2734 (2007) (Breyer, J., dissenting); *see also* *Shepard v. United States*, 544 U.S. 13, 23 (2005) (Souter, J., majority) (making an argument similar to Justice Breyer’s *Leegin Creative Leather Products* opinion); *Hubbard v. United States*, 514 U.S. 695, 711–12 (1995) (Stevens, J., majority) (same).

Nor are these claims recent inventions of the Rehnquist and Roberts Courts: more than forty years ago, Justice Harlan wrote that the Court has a “considered practice not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases.”⁹

Despite the appearance of unanimity and the veneer of an impressive pedigree, however, the two-tiered standard of *stare decisis* is of recent vintage, one that rests on a demonstrably false historical claim. The modern Court’s two-tiered *stare decisis* analysis has its origin in Justice Brandeis’s dissent in *Burnet v. Coronado Oil & Gas Co.*¹⁰ There, Justice Brandeis incorrectly claimed that this two-tiered approach was the historical practice of the Court. The modern Court uncritically accepted Brandeis’s claim that the two-tiered standard was the Court’s historical practice—the “traditional approach,” to use the words of Chief Justice Rehnquist,¹¹ of the Supreme Court.

We will call Brandeis’s claim that the Court’s historical practice was to utilize two tiers of respect for precedent the Brandeis Myth, and we will label the statutory-constitutional dichotomy for which Brandeis argued the Brandeis Dichotomy. We establish in this Article that the Brandeis Dichotomy is not the historical practice of the Supreme Court. We show that the two-tiered standard of *stare decisis* is an invention of the twentieth-century Court, beginning with Justice Brandeis’s dissent in *Burnet*.

We also show that the actual historical practice of the Court was to treat constitutional precedents in the same manner as precedents involving other legal areas. We do so by reviewing the cases utilized by Justice Brandeis in his dissenting opinion in *Burnet*.¹² Specifically, the Court’s historical practice was to accord varying respect to precedent based on six relatively discrete factors: (1) whether the precedent in question had been undermined by subsequent cases; (2) whether the precedent was undermined by subsequent congressional

9. *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962).

10. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–10 (1932) (Brandeis, J., dissenting).

11. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

12. *Burnet*, 285 U.S. at 407 n.2, 409 n.4 (Brandeis, J., dissenting). Specifically, we utilize the list compiled by the Congressional Research Service which in turn relied on Justice Brandeis’s list. CONG. RESEARCH SERV., CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. DOC. NO. 108-19, at 63 (Supp. 2004) [hereinafter CONSTITUTION OF THE UNITED STATES OF AMERICA 2004]; CONG. RESEARCH SERV., CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. DOC. NO. 108-17, at 2385–99 (2002) [hereinafter CONSTITUTION OF THE UNITED STATES OF AMERICA 2002]. This list is commonly used and relied upon by scholars. As we discuss below, however, it has limitations.

action; (3) whether the precedent was undermined by subsequent acts of the executive branch; (4) whether the precedent was undermined by subsequent developments in state law; (5) whether factual circumstances had so changed that adherence to the precedent would result in very harmful consequences; and (6) whether the Court's previous determination was seriously wrong.¹³

In Part I we will describe the creation of the Brandeis Myth. We will also discuss how the two-tiered system of *stare decisis* was adopted (and became the dominant theory) by the Supreme Court after *Burnet*. Then, in Parts II and III, we will establish that the historical practice of the Court was to treat constitutional precedents the same as precedents in other legal areas, and to rely on the six factors we listed above to accord more or less deference to precedent. After describing the rise of the Brandeis Dichotomy at the beginning of the twentieth century, we will also briefly offer some reasons why Brandeis may have created his Myth, especially in the face of evidence that was so clearly contrary to his claim.

I. RISE OF THE BRANDEIS MYTH

A. *Creation of the Myth*

"*Stare decisis*," Justice Brandeis argued in his famous dissent in *Burnet*,

is not, like the rule of *res judicata*, a universal, inexorable command. "The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided." . . . *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. *But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.* The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error,

13. As we discuss below in Part III, the sixth category fits what Caleb Nelson called "demonstrably erroneous" precedents. Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 1 (2001).

so fruitful in the physical sciences, is appropriate also in the judicial function.¹⁴

Justice Brandeis claimed that decisions involving issues of constitutional interpretation should be accorded less weight for purposes of *stare decisis* than decisions involving issues of statutory interpretation. Justice Brandeis used two arguments to support his Dichotomy: one based on policy, and the second based on a historical claim that the Dichotomy was the Court's traditional practice.

Justice Brandeis's policy argument was an attempt to differentiate precedents involving constitutional issues from precedents involving other issues by "isolating the principal policy weighing against *stare decisis*—that of correcting judicial error—and by emphasizing the comparative difficulty of extra-judicial error correction in the constitutional realm."¹⁵ Since our purpose is to challenge the Brandeis Myth, we will concentrate on Brandeis's historical argument.¹⁶

Justice Brandeis supported his assertion about the Court's historical practice with two lengthy footnotes where he listed twenty-nine cases that he maintained had overruled or qualified over thirty other cases.¹⁷ According to Brandeis, these cases demonstrated that

14. *Burnet*, 285 U.S. at 405–08 (Brandeis, J., dissenting) (emphasis added) (internal citation omitted).

15. Thomas R. Lee, *Stare Decisis in Historic Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 705 (1999).

16. Our decision to concentrate solely on Brandeis's historical argument is not meant to suggest that we accept his policy arguments for a two-tiered standard of *stare decisis*. Other scholars have put forward attractive normative arguments to justify according less weight for *stare decisis* purposes to decisions involving constitutional interpretation. See, e.g., Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 269 (2005) (arguing that the Supreme Court has the authority to overrule any precedent based on an incorrect interpretation of the Constitution).

17. *Burnet*, 285 U.S. at 407–08 n.2, 409 n.4 (Brandeis, J., dissenting). For the convenience of the reader, we have included the text of Brandeis's footnotes here:

n.2 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 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*

the Court had employed a more lenient standard for "cases involving

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; *Bowman v. Continental Oil Co.*, 256 U.S. 642, and *Standard Oil 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 *Ficklen 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.

Id. at 407–08 n.2.

n.4 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.

the Federal Constitution” than for cases where “correction can be had by legislation.”¹⁸

B. *Acceptance of the Myth*

According to one commentator, Justice Brandeis’s “memorable prose has since become a mandatory part of the burial rite for any constitutional precedent.”¹⁹ A review of the Supreme Court’s case law bears out this observation.²⁰ In this subsection, we will briefly describe the Brandeis Dichotomy’s rise to ascendancy.

Only four years after *Burnet*, Justice Stone relied on Justice Brandeis’s *Burnet* dissent in a concurrence. He argued that the Court should reject a line of cases because “the doctrine of *stare decisis* . . . has only a limited application in the field of constitutional law.”²¹

Justice Brandeis’s argument was next echoed seven years after *Burnet* by Justice Frankfurter, in his concurring opinion in *Graves v. New York*,²² a case that itself explicitly overruled four prior decisions.²³ Justice Frankfurter argued that although “[j]udicial exegisis 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.”²⁴ In reaching this conclusion, Justice Frankfurter cited *Burnet*²⁵ and also the dissenting opinion of Chief Justice Taney in the *Passenger Cases*,²⁶ relied on by Justice Brandeis.²⁷

18. *Id.* at 406–07.

19. Lee, *supra* note 15, at 704. Another scholar described Brandeis’s as the “most famous exposition of this position.” Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 467; see also Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 3 n.8 (1979) (noting that the argument that *stare decisis* has less effect in the context of constitutional law “is often accompanied by an excerpt from Justice Brandeis’s dissenting opinion in *Burnet*”).

20. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 235–36 (1997) (collecting cases that approve of the dichotomy); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (citing Brandeis’s dissent in *Burnet* for the proposition that “it is common wisdom that the rule of *stare decisis* is not an ‘inexorable command,’ and certainly it is not such in every constitutional case”).

21. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 94 (1936) (Stone, J. and Cardozo, J., concurring) (citing *Burnet*, 285 U.S. at 407, 408 (Brandeis, J., dissenting)).

22. 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring).

23. *Id.* at 481–86 (overruling *Dobbins v. Comm’rs of Erie County*, 41 U.S. (16 Pet.) 435 (1842); *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871); *New York ex rel. Rogers v. Graves*, 299 U.S. 401 (1937); and *Brush v. Comm’r of Internal Revenue*, 300 U.S. 352 (1937)).

24. *Graves*, 306 U.S. at 491–92.

25. *Id.* at 490 n.5.

26. *Id.* at 492 n.11 (citing *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849)).

Thus the stage was set, and only five years later (twelve years after *Burnet*) the Court itself accepted the relaxed standard of precedent proffered by Justice Brandeis. In *Smith v. Allwright*,²⁸ a majority of the Court embraced the Brandeis Myth and Dichotomy for the first time.²⁹ Justice Reed wrote the majority opinion in which the Court overruled the prior decision of *Grove v. Townsend*.³⁰ “In reaching [the] conclusion” to overrule *Grove*, Justice Reed wrote, “we are not unmindful of the desirability of continuity of decision in constitutional questions.”³¹ Despite this desire for stability, Justice Reed argued that

when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action *this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice*, and this practice has continued to this day.³²

Perhaps the most dismaying aspect of the fundamental doctrinal change that took place in *Smith* is that it was based on an uncritical acceptance of Justice Brandeis’s claim that the two-tiered standard had been the historical practice of the Court. Justice Reed stated that “[t]his has long been accepted practice,” and supported this assertion with one footnote that said, simply, “See cases collected in the dissenting opinion in *Burnet v. Coronado Oil & Gas Co.*”³³ The Court has never investigated the historical validity of the Brandeis Myth.³⁴

The Brandeis Myth similarly and quickly carried the scholarly field as well. Subsequent scholars who wrote on the subject of the Court’s practice regarding precedent uncritically accepted the Brandeis Myth. In a 1949 law review article, Justice Douglas enthusiastically endorsed the Brandeis Dichotomy, supporting it with

27. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 413 (1932) (Brandeis, J., dissenting).

28. 321 U.S. 649 (1944).

29. *Id.* at 665 n.9.

30. *Id.* at 666 (overruling *Grove v. Townsend*, 295 U.S. 45 (1935)).

31. *Id.* at 665.

32. *Id.* at 665–66 (emphasis added).

33. *Id.* at 665 n.9.

34. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) (“We have long recognized, of course, that the doctrine of *stare decisis* is less rigid in its application to constitutional precedents.”).

reference to the new circumstances that later Justices faced.³⁵ In their 1958 study of the Supreme Court's practice of overruling precedent, Albert P. Blaustein and Andrew H. Field reaffirmed the Brandeis Dichotomy with quotations from Brandeis's dissent and Douglas's article.³⁶

Today, Brandeis's two-tiered standard for precedent, and its purported origin in the nineteenth-century practice of the Court, is nearly unquestioned. As Lawrence Tribe has noted—citing Brandeis's *Burnet* dissent as support—"the standard learning has long been that constitutional determinations that the Supreme Court believes to be seriously mistaken ought to be much easier to overturn than would be the case with a mere statutory interpretation."³⁷ Tribe, like other scholars,³⁸ does not question Brandeis's historical claim, and instead relies on the policy claim in Brandeis's "influential dissent" regarding the respective difficulty of congressional "overruling" of an incorrect decision.³⁹ Earl Maltz, for instance, casually concluded that the Dichotomy has held sway "[a]t least since the days of Chief Justice Taney," in 1849.⁴⁰

The results of this change in course have been staggering: the Supreme Court has overruled its prior decisions approximately 225 times since its creation, but the rate of such overrulings increased dramatically after *Burnet*.⁴¹ In the 143 years of the Court's existence until Justice Brandeis's dissent in *Burnet*, the Court overruled its own precedents forty-one times,⁴² or about once every three-and-a-half

35. See William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949) ("He cannot do otherwise unless he lets men long dead and unaware of the problems of the age in which he lives do his thinking for him.").

36. Albert P. Blaustein & Andrew H. Field, "Overruling" *Opinions in the Supreme Court*, 57 MICH. L. REV. 151, 167 (1958).

37. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 84 (3d ed. 2000) (citing Brandeis's dissent in *Burnet*); see also *id.* at 1322 (citing Brandeis's dissent for the proposition that "[t]he Supreme Court has explicitly recognized that *stare decisis* . . . is at its lowest ebb in constitutional cases").

38. See, e.g., Maltz, *supra* note 19, at 468 ("The force of Justice Brandeis's argument depends in large measure on the perception that the political branches are unable to alter the effects of erroneous constitutional decisions."); Monaghan, *supra* note 19, at 3 n.8 (noting the origin of the dichotomy in Brandeis and questioning not its historical pedigree, but its policy justifications).

39. 1 TRIBE, *supra* note 37, at 247.

40. Maltz, *supra* note 19, at 467.

41. CONSTITUTION OF THE UNITED STATES OF AMERICA 2004, *supra* note 12, at 63; CONSTITUTION OF THE UNITED STATES OF AMERICA 2002, *supra* note 12, at 2385-99. These figures are as of 2004, the most recent year for which the Congressional Research Service has published collected information on Supreme Court cases overruling prior precedents.

42. See *supra* note 41 and accompanying text.

years. In the seventy-four years since *Burnet*, the Court overruled its own precedents 184 times,⁴³ or about two-and-a-half times per year.⁴⁴ The rate of overruling is nearly nine times greater after *Burnet*.

Of course, Justice Brandeis could not have achieved this dramatic victory on his own; Supreme Court Justices do not create law in a vacuum. Justice Brandeis's work took place against a backdrop of legal "reform" that had far-reaching consequences, including the creation from whole cloth of the new two-tiered doctrine of precedent. In Part I.C, we discuss possible reasons why Justice Brandeis may have sought to establish the Brandeis Dichotomy as the law of the Court. In Parts II.B and II.C, we will discuss the context in which Justice Brandeis's work can best be evaluated, and explore the reasons why legal scholars and the bench and the bar so eagerly embraced the Brandeis Dichotomy.

C. *Justice Brandeis's Agenda: Weakening Stare Decisis To Achieve Political Ends?*

Why did Justice Brandeis wish to establish the Brandeis Dichotomy as the law of the Court? Part of the answer is that a lower standard of respect for constitutional precedent fit with Brandeis's Progressivism, legal realism, and New Deal sympathies. Other scholars have likewise connected Progressivism, legal realism, and the New Deal; these three strands of thought were compatible and frequently intertwined.⁴⁵ All three strands were at home in Brandeis's thought.⁴⁶

Generations of historians have lionized Louis Brandeis as a hero of the Progressive movement.⁴⁷ Indeed, many of Brandeis's

43. See *supra* note 41 and accompanying text.

44. See Maltz, *supra* note 19, at 467 ("In the twelve-year period from 1937 to 1949 . . . the Court overruled earlier constitutional decisions in twenty-one cases—nearly as many as in the 140 years preceding *Coronado Oil & Gas*. By 1959, the number of instances in which the Court had reversals involving constitutional issues had grown to sixty; in the two decades which followed, the Court overruled constitutional cases on no less than forty-seven occasions."). Of course, factors in addition to the rise of the Brandeis Dichotomy likely played a role in the increased rate of reversals.

45. See generally MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* (1992) (describing relationship among Progressivism, legal realism, and the New Deal); N.E.H. HULL, *ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE* (1998) (same); JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995) (same).

46. Melvin I. Urofsky, *Louis Dembitz Brandeis*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 83, 83 (Kermit L. Hall ed., 1992).

47. See, e.g., EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* (2000); PHILIPPA STRUM, *BRANDEIS: BEYOND PROGRESSIVISM* (Wilson Carey McWilliams & Lance Banning eds., 1993); MELVIN I. UROFSKY, *LOUIS D.*

biographers have written works that can best be described as hagiographies.⁴⁸ Long before he became a Justice of the Supreme Court, Brandeis had earned a reputation as a champion of Progressive causes. What made Brandeis stand out in Progressive circles was the legal skill with which he advocated these causes. Brandeis was one of 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.⁴⁹

Among the many contributions Brandeis made to the Progressive movement, one that stands out in the minds of most historians was what has come to be called “the Brandeis Brief.” As counsel in *Muller v. Oregon*⁵⁰ in 1908, Brandeis, who had already made a name for himself as a skilled attorney and social activist, submitted a lengthy brief supporting the constitutionality of an Oregon statute limiting the hours per day that women could work in laundries and other industries.⁵¹ 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

BRANDEIS AND THE PROGRESSIVE TRADITION (Oscar Handlin ed., 1981) [hereinafter UROFSKY, BRANDEIS AND THE PROGRESSIVE TRADITION]; MELVIN I. UROFSKY, A MIND OF ONE PIECE: BRANDEIS AND AMERICAN REFORM (1971) [hereinafter UROFSKY, BRANDEIS AND AMERICAN REFORM].

48. See generally, e.g., ALLON GAL, BRANDEIS OF BOSTON (1980); DAVID C. GROSS, A JUSTICE FOR ALL THE PEOPLE: LOUIS D. BRANDEIS (1987); IRIS NOBLE, FIREBRAND FOR JUSTICE: A BIOGRAPHY OF LOUIS DEMBITZ BRANDEIS (1969); PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE (1984).

Thomas McGraw labeled many of the biographies and histories that take Brandeis as their subject as “hagiographical”; according to McGraw, “[T]he Brandeis literature began as hagiography, and it continued in that vein for a hundred years, until the 1980s.” THOMAS K. MCGRAW, PROPHETS OF REGULATION 83 (1984) (citing ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN’S LIFE (1946); ALPHEUS THOMAS MASON, BRANDEIS: LAWYER AND JUDGE IN THE MODERN STATE (1933); ALFRED LIEF, BRANDEIS: THE PERSONAL HISTORY OF AN AMERICAN IDEAL (1936); MR. JUSTICE BRANDEIS (Felix Frankfurter ed., 1932); SAMUEL J. KONEFSKY, THE LEGACY OF HOLMES AND BRANDEIS: A STUDY IN THE INFLUENCE OF IDEAS (1956); A.L. TODD, JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS (1963); UROFSKY, BRANDEIS AND AMERICAN REFORM, *supra* note 47; UROFSKY, BRANDEIS AND THE PROGRESSIVE TRADITION, *supra* note 47; NELSON LLOYD DAWSON, LOUIS D. BRANDEIS, FELIX FRANKFURTER AND THE NEW DEAL (1980); LEWIS J. PAPER, BRANDEIS (1983)).

49. Urofsky, *supra* note 46, at 83.

50. 208 U.S. 412 (1908).

51. *Id.* at 419 n.1.

of women.”⁵² The technique worked: the Court took “judicial cognizance” of Brandeis’s social science data and commended Brandeis by name for the “very copious collection of all these matters.”⁵³ As one commentator noted, “Brandeis had managed to create an entry to the Court for social facts, making an important impact on . . . [the] arena of American law.”⁵⁴

When Brandeis did ultimately join the Court, he continued to be a stalwart advocate of Progressive policy goals. Indeed, he, along with Justices Cardozo and Stone, became known as one of the “Three Musketeers,” the three Justices who consistently voted to support Roosevelt’s New Deal legislation.⁵⁵ The historian Nelson Dawson has documented Brandeis’s support for New Deal policy.⁵⁶ Brandeis went beyond merely supporting New Deal policies in his judicial opinions, however: he was noted for his “intense activity as a New Deal recruiting officer” and for his “persistent, behind-the-scenes effort . . . to implement the policies he believed essential to economic recovery and political reform.”⁵⁷ For example, “Brandeis urged

52. John W. Johnson, *Brandeis Brief*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 85, 85 (Kermit L. Hall ed., 1992).

53. *Muller*, 208 U.S. at 419–20.

54. STRUM, *supra* note 48, at 122. Morton Horwitz commented on the impact of the “Brandeis Brief” on the direction of American legal theory and its importance to the legal realist movement:

[T]he distinction between law in books and law in action also led directly to an alliance between Progressivism and reformist social science. For example, the “Brandeis brief” presented to the Supreme Court by Louis D. Brandeis in the case of *Muller v. Oregon* (1908) extensively cited social science research into working women’s lives to defend successfully a constitutional challenge to a maximum hours law for women. This focus on social facts, it needs to be emphasized, represented another important form of critique of that “heaven of legal concepts,” those otherworldly abstractions haunting Classical Legal Thought, that Felix Cohen portrayed as the reason for its being out of touch with reality. . . . By insisting that detailed knowledge of social fact represented a healthy antidote to highly apologetic forms of discourse and judgment, Progressives treated social science research as providing a necessary demystifying first step toward the goal of social reform. In short, social science was another way of undermining disembodied formalism.

HORWITZ, *supra* note 45, at 188–89.

55. ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 254 (1956) (“Together the Three Musketeers fought an unceasing battle against formalistic jurisprudence.”).

56. DAWSON, *supra* note 48, at 125–53; see also Nelson Lloyd Dawson, *Brandeis and the New Deal*, in *BRANDEIS AND AMERICA* 38, 38–65 (Nelson Lloyd Dawson ed., 1989) (documenting Brandeis’s support of New Deal policies).

57. Dawson, *supra* note 56, at 40 (citations omitted).

others to support the Wisconsin Plan [part of the New Deal], and he also lobbied vigorously for it behind the scenes.”⁵⁸

The Brandeis Dichotomy permitted the New Deal Court to more easily implement the Progressive, and later the New Deal, agenda. Brandeis supported the New Deal and, more generally, the ability of government to respond to perceived new social challenges. Brandeis consistently opposed constitutional restrictions on the ability of the national government to deal with economic issues and thus ended up in dissent in many of the cases that were later overruled using the Brandeis Dichotomy.⁵⁹ As Thomas McGraw noted,

The central themes of [Brandeis’s] court career accorded well with the chief interests of his earlier life: a preoccupation with actual social conditions, an insistence on individual rights and autonomy, and—most important for his decisions on economic issues—a powerful commitment to judicial restraint. Because of this emphasis on judicial restraint, it is difficult to separate law from economics in his judicial opinions.⁶⁰

It is not surprising, then, that Justice Brandeis often chafed at the older precedents that he felt were an impediment to Progressive and New Deal goals. Brandeis often spoke with disdain about these precedents, arguing that they led to poor decisions by hidebound

58. *Id.* at 48 (citations omitted). Indeed, Brandeis’s “behind-the-scenes” activities went well beyond what was (and what is today) considered appropriate for a sitting Justice:

Various aspects of Brandeis’s career have generated scholarly debate over the years, but it is the issue of judicial propriety that has most recently put him once again before the public eye. It is clear that Brandeis never manifested that Olympian detachment from political matters expected of Supreme Court justices. His activities, furthermore, intensified during the opportunity afforded by the New Deal. He certainly violated the recognized canons of judicial propriety. Indeed, it is arguable that the intensity and duration of his political activity while on the Court is unparalleled. Furthermore, Brandeis was aware of the impropriety because he was careful to conceal his activities and maintain the appearance of detachment.

Id. at 54 (citations omitted). In fact, Franklin Roosevelt sought Brandeis’s advice regarding the New Deal. PAUL JOHNSON, *A HISTORY OF THE AMERICAN PEOPLE* 766–67 (1997).

59. See Charlotte C. Bernhardt, *Supreme Court Reversals on Constitutional Issues*, 34 CORNELL L.Q. 55, 63 (1949) (finding that Brandeis’s dissents were often the precursors to later majority decisions adopting Brandeis’s reasoning); Blaustein & Field, *supra* note 36, at 162 (finding that Brandeis was the Justice who dissented most often from opinions that were later overruled); see also STEPHEN W. BASKERVILLE, *OF LAWS AND LIMITATIONS: AN INTELLECTUAL PORTRAIT OF LOUIS DEMBITZ BRANDEIS* 272 (1994) (referencing Brandeis’s focus on politics and economics).

60. MCGRAW, *supra* note 48, at 135–36 (citations omitted).

judges. For example, in 1911, five years before Brandeis first donned the robes of a Supreme Court Justice, he remarked that “[i]n the past the courts have reached their conclusions largely deductively from preconceived notions and precedents. The method I have tried to employ in arguing cases before them has been inductive, reasoning from the facts.”⁶¹ Similarly, in a talk before lawyers in 1916, Brandeis exhorted the assembled lawyers to embrace and advocate what he called “the living law.” He stated:

In periods of rapid transformation, challenge of existing law, instead of being sporadic, becomes general. . . . Has not the recent dissatisfaction with our law as administered been due, in large measure, to the fact that it had not kept pace with the rapid development of our political, economic, and social ideals? In other words, is not the challenge of legal justice due to its failure to conform to contemporary conceptions of social justice? . . . But legal science—the unwritten or judge-made laws as distinguished from legislation—was largely deaf and blind to [the 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.⁶²

Brandeis preferred innovation to the confines of precedent. He was the first Justice to extensively cite to and rely on law review articles in his opinions. Stephen Baskerville has argued that Brandeis’s tactics as a writer of judicial opinions were similar to those he had developed as an advocate:

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 non-

61. STRUM, *supra* note 48, at 124–25.

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

judicial 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.⁶³

Justice Brandeis’s policy goals fit well with his legal realism, which provided a legal philosophy that justified the mechanisms he used—including the Brandeis Dichotomy itself—to achieve his policy goals. Brandeis believed his was an age of constitutional abstraction, unconnected to the real world and its social and economic troubles.⁶⁴ Legal realism provided a vehicle for Brandeis to, in his view, reconnect law to reality.⁶⁵

A prominent example of Brandeis the legal realist can be found in *Erie Railroad v. Tompkins*⁶⁶ and the majority opinion authored by Brandeis where the Court overruled *Swift v. Tyson*.⁶⁷ As argued by Patrick Borchers, *Erie* was a result of the triumph of legal realism—the judge as lawmaker—and *Erie* represented an attempt by the Supreme Court to get federal judges out of the uncomfortable job of lawmaking.⁶⁸ *Erie* corresponded to Brandeis’s desire to minimize the obstacles federal judges presented to the New Deal by lessening their lawmaking authority. As Bruce Ackerman has argued, in *Erie* “the New Deal Court . . . moved decisively to destroy the foundations of *Lochnerian* jurisprudence by demystifying the common law.”⁶⁹ The Court did so by “expos[ing] the ‘common law’ as another name for the exercise of sheer political will.”⁷⁰

This view found expression in, perhaps most prominently, the Court’s Commerce Clause jurisprudence. If the Supreme Court, as Brandeis believed, was simply another political institution like

63. BASKERVILLE, *supra* note 59, at 267–68 (citations omitted).

64. See Felix Frankfurter, *Mr. Justice Brandeis and the Constitution*, in MR. JUSTICE BRANDEIS 49, 52 (Felix Frankfurter ed., 1932) (“At a time when our constitutional law was becoming dangerously unresponsive to drastic social changes, when sterile *cliches* instead of facts were deciding cases, he insisted . . . that law must be sensitive to life.”).

65. See *id.* (“Until his famous brief in *Muller v. Oregon*, societal legislation was supported before the courts and largely *in vacuo*—as an abstract dialectic between ‘liberty’ and ‘police power,’ unrelated to the world of trusts and unions.”); *id.* at 74–75 (discussing the need for “judges thoroughly awake to the problems of their day and open-minded to the facts which may justify legislation”).

66. 304 U.S. 64 (1938).

67. 41 U.S. (16 Pet.) 1 (1842).

68. Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 115–17 (1993).

69. 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 370–71 (1998).

70. *Id.* at 371.

Congress,⁷¹ and legal issues are best understood as policy judgments,⁷² then the Supreme Court should cease restricting Congress's attempts to govern the national economy under the Commerce Clause because Congress was the institution best suited to make these national policy judgments.⁷³ In this light, the Brandeis Dichotomy enabled the Court to limit its jurisdiction over national economic matters by repudiating its previous (misguided) restrictions on Congress's policy judgments while at the same time placing the New Deal on solid constitutional footing.⁷⁴ As one historian summarized, one of the "central themes of [Brandeis's] court career" was, in the area of "economic issues[,] a powerful commitment to judicial restraint."⁷⁵

Brandeis's and the Court's treatment of economic issues contrasted with their treatment of civil liberties.⁷⁶ In this area, Congress and the states, relative to the Court, were less well equipped.⁷⁷ For this reason, the Court retained a role policing legislative encroachment into civil liberties.⁷⁸

The relatedness of Brandeis's legal realism, his policy preferences, and the Brandeis Dichotomy were also displayed in his *Burnet* dissent itself. For instance, Brandeis repeatedly emphasized the realist themes of experience and the importance of facts to judicial determinations.⁷⁹ Brandeis also argued that the Court in the past "may have been influenced by prevailing views as to economic or social policy which has since been abandoned."⁸⁰

Brandeis's friends and ideological fellow-travelers likewise recognized the link between Brandeis's legal realism, his Progressivism, and his support for policies that later would form the core of the New Deal. In a book published in 1932—the same year Brandeis's *Burnet* dissent was issued—Felix Frankfurter, a long-time friend and ally of Brandeis, wrote an essay praising Brandeis's judicial

71. BASKERVILLE, *supra* note 59, at 278; *see also* Frankfurter, *supra* note 64, at 97 ("In view of our federalism and the Court's peculiar function, questions of jurisdiction in constitutional adjudications imply questions of political power.").

72. Frankfurter, *supra* note 64, at 52–53 (citations omitted).

73. *Id.* at 65, 74–75. Brandeis took a similar view of the states and their attempts to respond to social and economic challenges. *Id.* at 59, 65.

74. *Id.* at 96–97.

75. MCGRAW, *supra* note 48, at 135–36.

76. BASKERVILLE, *supra* note 59, at 272.

77. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (using the rationale of "discrete and insular minorities").

78. 2 ACKERMAN, *supra* note 69, at 372.

79. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407, 410, 412 (1932) (Brandeis, J., dissenting).

80. *Id.* at 412.

temperament and jurisprudential philosophy. Frankfurter lauded Brandeis for being “thoroughly awake to the problems of [the] day” and for being “open-minded to the facts which may justify legislation.”⁸¹ Frankfurter continued, “[Brandeis’s] wide experience, his appetite for fact, his instinct for the concrete and his distrust of generalities, equip Mr. Justice Brandeis with unique gifts for the discharge of the Court’s most difficult and delicate tasks.”⁸²

Frankfurter then included two lengthy quotations from Justice Brandeis’s dissents in *Washington v. W.C. Dawson & Co.* and *DiSanto v. Pennsylvania*. Significantly, these quotations contained a discussion by Brandeis regarding his reasons for considering stare decisis to be a weak constraint.⁸³ Thus, Frankfurter juxtaposed a discussion of the need for a “fact-based” jurisprudence (i.e., legal realism) to support Progressive (and, later, New Deal) policies with a quotation arguing for a lesser standard of stare decisis when the out-of-date precedents would stand in the way of those same political goals.

Brandeis brought this view of precedent to the bench: he frequently offered sharp criticisms of the judicial opinions of his “brother Justices” when he felt those opinions relied too heavily on precedent at the expense of what Brandeis perceived as logic. For example, in a dissenting opinion in *Washington v. W.C. Dawson & Co.*,⁸⁴ Justice Brandeis urged the Court to “frankly overrule[]” several “recent decisions” because “[t]he decisions are recent ones [that] have not been acquiesced in.”⁸⁵ He concluded his opinion by arguing against applying the doctrine of stare decisis: “*Stare decisis* is ordinarily a wise rule of action. But it is not a universal, inexorable command.”⁸⁶ Finally, Brandeis argued that “[t]he instances in which the Court has disregarded its admonition [the admonition of stare decisis] are many,”⁸⁷ and in a footnote he listed several cases he claimed overruled prior precedents⁸⁸—the same approach he would use in *Burnet* eight years later, and relying on many of the same cases.⁸⁹

81. Frankfurter, *supra* note 64, at 74–75.

82. *Id.* at 75.

83. *Id.* at 102–04.

84. 264 U.S. 219 (1924).

85. *Id.* at 236, 238 (Brandeis, J., dissenting).

86. *Id.* at 238.

87. *Id.*

88. *Id.* at 238 n.21.

89. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 n.2 (1932) (Brandeis, J., dissenting).

Similarly, in this dissenting opinion in *DiSanto v. Pennsylvania*,⁹⁰ Brandeis argued against application of stare decisis:

But the doctrine of *stare decisis* does not command that we err again when we have occasion to pass upon a different statute. In the search for truth through the slow process of inclusion and exclusion, involving trial and error, it behooves us to reject, as guides, the decisions upon such questions which prove to have been mistaken. This course seems to me imperative when, as here, the decision to be made involves the delicate adjustment of conflicting claims of the Federal Government and the States to regulate commerce. The many cases on the Commerce Clause in which this Court has overruled or explained away its earlier decisions show that the wisdom of this course has been heretofore recognized. In the case at bar, also, the logic of words should yield to the logic of realities.⁹¹

Following the pattern established in *Dawson* and later perfected in *Burnet*, Brandeis included in a footnote a list of cases which he claimed overruled prior precedents.⁹²

A review of Justice Brandeis's unpublished work, much of which he destroyed,⁹³ supports our contention that he formulated the Brandeis Dichotomy to advance his policy preferences without adequate support from the Court's historical practice. The evidence from Brandeis's unpublished work is not dispositive, but it is suggestive.

It appears that Justice Brandeis formulated the Brandeis Dichotomy prior to having sufficient—really any—historical evidence to support it. For example, the 1930 case of *Stratton v. St. Louis Southwestern Railway Co.*⁹⁴ presented the question of the ability of states to tax foreign corporations based on their out-of-state assets consistent with the dormant component of the Commerce Clause.⁹⁵ The Court's jurisprudence had in recent decades moved to a rule almost completely prohibiting such taxation.⁹⁶ Brandeis's policy position was that states should have great leeway to regulate

90. 273 U.S. 34 (1927).

91. *Id.* at 42–43 (Brandeis, J., dissenting).

92. *Id.* at 43 n.4.

93. 1 LETTERS OF LOUIS D. BRANDEIS, at xx (Melvin I. Urofsky & David W. Levy eds., 1971).

94. *Stratton v. St. Louis Sw. Ry. Co.*, 282 U.S. 10, 12–13 (1930).

95. *Id.* at 12–13.

96. See ALEXANDER M. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS 124–29 (1957) (describing the evolution of the Court's jurisprudence in this area).

economic activity to overcome the economic challenges they faced, and his legal position reflected it.⁹⁷ His unpublished dissent in *Stratton* mirrored his policy and legal positions.

Brandeis's unpublished *Stratton* dissent used language and arguments that were similar, and in some cases identical to, that which would later find their home in his *Burnet* dissent.⁹⁸ Brandeis argued, as he would in *Burnet*, that in cases of a constitutional "character," it was proper for the Court to overrule itself if "experience" had shown that the precedent was mistaken.⁹⁹ Similar to *Burnet*, Brandeis distinguished constitutional cases from other cases for purposes of *stare decisis*.¹⁰⁰ Further, Brandeis relied on, as he would in *Burnet*, the inability of Congress to overrule the Court's mistaken constitutional decisions to support the Brandeis Dichotomy.¹⁰¹

When he wrote his *Stratton* dissent arguing for the Brandeis Dichotomy, it does not appear that Brandeis had conducted sufficient research to support the Brandeis Myth. Instead, in *Stratton* he cited to his 1924 and 1927 dissents in *Dawson* and *DiSanto* and the cases they cited.¹⁰² *Dawson* and *DiSanto* did not, however, purport to announce or support the Brandeis Myth. Instead, they stood for the more uncontroversial proposition that the Supreme Court had on occasion overruled itself and hence that *stare decisis* was not an unvarying command,¹⁰³ although there are some hints that Brandeis was already thinking in terms of the Brandeis Dichotomy.¹⁰⁴

97. *Id.* at 119–23, 128.

98. Compare *id.* at 151 ("For, the position of this Court in cases involving the application of the Constitution, is wholly unlike that of the highest court of England, where the doctrine of *stare decisis* was formulated."), with *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 409–10 (1932) (Brandeis, J., dissenting) ("In cases involving the Federal Constitution the position of this Court is unlike that of the highest court of England, where the policy of *stare decisis* was formulated and is strictly applied to all classes of cases." (footnote omitted)).

99. BICKEL, *supra* note 96, at 150.

100. *Id.* at 151–52.

101. *Id.* at 151. Brandeis also cited to many of the same sources he would later cite in *Burnet*, *id.* at 151 nn.53–55, and used the argument that constitutional cases are simply concerned with the application of an agreed-upon meaning to differing factual situations, *id.* at 151.

102. *Id.* at 150–52, 152 n.56.

103. *DiSanto v. Pennsylvania*, 273 U.S. 34, 42–43 (1927); *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 238–39 (1924).

104. See *DiSanto*, 273 U.S. at 42 (noting that "it is ordinarily better to seek correction by legislation. Often this is true although the question is a constitutional one." (emphases added)); *Dawson*, 264 U.S. at 237 (noting that because the Court's decision was grounded in the Constitution only a constitutional amendment could overrule it). Of course, the fact

Brandeis's failure to find support for the Brandeis Myth prior to articulating the Brandeis Dichotomy in *Stratton* is also visible in the early drafts of his *Burnet* dissent.¹⁰⁵ Although it is often difficult to read Justice Brandeis's handwriting, it appears that his characterization of the Brandeis Dichotomy went through at least three iterations.

The first iteration stated that "the instances are many where this Court has disregarded the admonition of *stare decisis*. And in cases involving merely the application of the Federal Constitution the reason for doing so *may be* persuasive."¹⁰⁶ To support his claim, Justice Brandeis immediately contrasted the Supreme Court's comparative ability with that of the British Parliament.¹⁰⁷ This was the same tactic Justice Brandeis used in his unpublished *Stratton* dissent. In both instances, Brandeis advocated the Brandeis Dichotomy prior to having the research to confirm its historical veracity and, instead of using the historically oriented Brandeis Myth as he would in later iterations of his *Burnet* dissent, he used a policy argument, one based on comparative ability.

Justice Brandeis's second iteration stated that "this Court has, for at least eighty years, disregarded the admonition of *stare decisis* where it believed that the result of perpetuating the error would be serious, and correction through legislative action was practically impossible, as in cases involving the Federal Constitution."¹⁰⁸ At this point, Justice Brandeis began citation to Supreme Court cases and made comparison with the British Parliament a separate argument.¹⁰⁹

The last iteration was the one that found its way to the published dissent: "But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions."¹¹⁰ Brandeis added additional case citations and further textually distanced his policy argument based on the comparative abilities of the Supreme Court and Parliament.

that Justice Brandeis would cite *Dawson* and *DiSanto* in *Burnet* as supporting the Dichotomy also lends support to this proposition.

105. The drafts of Brandeis's *Burnet* dissent are found in The Louis Dembitz Brandeis Papers, 1856-1941, Reel 56, 401-60 (Univ. of Louisville, Univ. Archives & Historical Research Ctr.).

106. *Id.* at 577-78 (emphasis added).

107. *Id.* at 578.

108. *Id.* at 585.

109. *Id.* at 586-87.

110. *Id.* at 614-15.

The transformation of Brandeis's formulation of the Brandeis Dichotomy, and the arguments he used to support it, provides evidence that Justice Brandeis first advocated the Dichotomy and then researched the Court's historical practice to find support for his claim in the form of the Brandeis Myth. While not dispositive, this chronological relationship suggests that Justice Brandeis formulated his Dichotomy to advance his policy goals.

It is not an exaggeration to say that Brandeis had an agenda, and that he was willing to overturn precedents he perceived as an obstacle to that agenda. Thus, it is really no surprise that Brandeis—the lion of Progressivism, one of the Three Musketeers of the New Deal Court, and a legal realist judge—worked so hard to establish the Brandeis Dichotomy as the practice of the Court.

II. DECONSTRUCTING THE MYTH

A. *Brandeis's Misunderstanding—Mischaracterization?—of the Historical Record*

There were several flaws with Justice Brandeis's methodology. In the first instance, despite the fact that Justice Brandeis cited numerous cases to support his claim that the historical practice of the Court was to accord less weight to decisions involving constitutional issues, *none* of the cases he cited took that position.

Instead, the Court and its members, on only a handful of occasions prior to *Burnet*, distinguished their approach to constitutional cases from cases involving other subject matters.¹¹¹ Unfortunately for Brandeis, however, none sufficiently support the Brandeis Dichotomy.

The first such case was *Briscoe v. Commonwealth's Bank of Kentucky*,¹¹² decided in 1834. In *Briscoe*, the parties presented

111. The Court's practice prior to *Briscoe v. Commonwealth's Bank of Kentucky*, 33 U.S. (8 Pet.) 118 (1834), was firmly within traditional *stare decisis* norms. This is exemplified by the reaction of Justices Washington, Thompson, and Trimble in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827), to *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819). The three "considered themselves bound by the rule of *stare decisis* to follow the previous adjudication as against their own former and present opinions." Louis B. Boudin, *The Problem of Stare Decisis in Our Constitutional Theory*, 8 N.Y.U. L.Q. REV. 589, 607–08 (1931). For example, Justice Washington had not believed, when *Sturges* was handed down, that states had the authority to pass laws on bankruptcy. See *Ogden*, 25 U.S. (12 Wheat.) at 263–64 (making this point). But he went along with the *Ogden* majority anyway. *Id.*

112. 33 U.S. (8 Pet.) 118 (1834).

constitutional challenges to state action.¹¹³ The Court refused to decide the case.¹¹⁴ Chief Justice Marshall stated that the Court's practice was not to decide constitutional questions without "a majority of the whole court."¹¹⁵ Since such a majority was not present because two Justices were absent, the Court directed reargument.¹¹⁶

Briscoe does not support the Brandeis Myth. The Court did not hold that constitutional cases have lesser precedential weight. How could it when it did not reach a decision on the merits? The question was not one of the authority of an existing precedent. Instead, the Court was simply following a prudent "practice" of requiring a majority of all Justices to decide constitutional cases.¹¹⁷

The second occasion on which members of the Court singled out constitutional cases was the 1847 decision of the *License Cases*.¹¹⁸ The *License Cases* involved Commerce Clause challenges to state restrictions on the sale of alcoholic beverages.¹¹⁹ The Court fractured and the Justices issued a number of opinions, two of which—Chief Justice Taney's and Justice Daniel's opinions—addressed the constitutional status of the legal issues.¹²⁰

Chief Justice Taney argued that, "in cases depending upon the construction of the constitution," the Court should "state very much at large the principles and reasoning upon which the[] judgment was founded."¹²¹ Taney believed that this was the usual practice of the Court.¹²² Taney justified this treatment by reference to the "great public interests" involved in constitutional cases.¹²³

113. *Id.* at 119, 122.

114. *Id.* at 122.

115. *Id.* One scholar has argued that Marshall took this position in response to previous instances where state courts refused to abide by Supreme Court decisions invalidating state laws, which the state courts justified by pointing to the lack of a majority of the Court that invalidated the statutes. See SIMEON E. BALDWIN, *THE AMERICAN JUDICIARY* 118 (1905) (giving this explanation).

116. *Briscoe*, 33 U.S. (8 Pet.) at 122.

117. *Id.* This was also D.H. Chamberlain's view, see D.H. Chamberlain, *The Doctrine of Stare Decisis as Applied to Decisions of Constitutional Questions*, 3 HARV. L. REV. 125, 128 (1889) ("The rule of practice stated is, that a majority of a full court . . . ought to join in deciding constitutional questions."), and Thomas Cooley's, see THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* *161-*62 (5th ed. 1883).

118. 46 U.S. (5 How.) 504 (1847).

119. *Id.* at 504.

120. *Id.* at 573-86 (Taney, C.J., concurring); *id.* at 611-18 (Daniel, J., dissenting).

121. *Id.* at 585.

122. *Id.*

123. *Id.*

Taney's opinion does not support the Brandeis Dichotomy. As with *Briscoe*, Taney did not say that constitutional precedent is deserving of less weight than other precedents. Indeed, Taney was not even addressing the authority of precedent and was instead urging the Court, as a public institution, to explain itself as fully as it could.

Justice Daniel was well known as an opponent of national power, and his dissent exemplifies his opposition.¹²⁴ He argued that in constitutional cases he would "never . . . consent that the text of that instrument shall be overlaid and smothered by . . . the decisions of judges."¹²⁵ Daniel supported his view by reference to his oath to support the Constitution and deference to the sovereign (the People) which authorized the Constitution.¹²⁶ Daniel concluded that since *Brown v. Maryland*¹²⁷—the primary precedential support for the opposing view—was not a "correct induction" from the Constitution, it did not deserve his acquiescence.¹²⁸

For a number of reasons, Daniel's opinion is weak support for the Brandeis Dichotomy. Remarkably, it appears to be the first opinion to ever question the applicability of stare decisis to constitutional cases.¹²⁹ As Strang and others have demonstrated, stare decisis is part of the original meaning of federal judicial power, and early federal courts acted consistent with this understanding.¹³⁰ The outlying nature of Justice Daniel's views is supported by the lack of citation to his opinion and the absence of similar views in the *U.S. Reports*.

124. For a review of Justice Daniel's life, see JOHN P. FRANK, *JUSTICE DANIEL DISSENTING: A BIOGRAPHY OF PETER V. DANIEL, 1784–1860* (1964). See also Boudin, *supra* note 111, at 621 (characterizing Justice Daniel as "the most consistent and persistent dissenter from the rule of *stare decisis*").

125. *The License Cases*, 46 U.S. (5 How.) at 612; *id.* at 613 ("It cannot be correctly held, that a decision, merely because it be by the Supreme Court, is to override alike the constitution and the laws both of the States and of the United States."); see also *Marshall v. Balt. & Ohio R.R. Co.*, 57 U.S. (16 How.) 314, 343–44 (1853) (Daniel, J., dissenting) (arguing that stare decisis is inapplicable in the face of a clear constitutional command).

126. *The License Cases*, 46 U.S. (5 How.) at 612.

127. 25 U.S. (12 Wheat.) 419 (1827).

128. *The License Cases*, 46 U.S. (5 How.) at 612.

129. See Lee, *supra* note 15, at 714–15 (characterizing Daniel's claim as "groundbreaking").

130. See Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 82–83 (2000) (arguing that the original meaning of Article III included stare decisis); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 447–71 (2006).

Second, Daniel had strong reason to create a basis to reject *Brown*: his opposition to expansive federal power.¹³¹ Daniel needed a reason to reject *Brown* that his anti-precedent argument supplied. The ad hoc nature of his rejection of stare decisis in the constitutional context can be seen from his reliance on precedent in other constitutional cases. Amazingly, two years later, in the *Passenger Cases*, Daniel relied on the Court's decision in the *License Cases* as authority to reject a broad interpretation of federal power.¹³² In addition, none of the other Justices in the *License Cases* agreed with Daniel's view and instead employed traditional judicial techniques to address *Brown*.

Third, Justice Daniel argued for the *elimination* of stare decisis in constitutional cases, not that constitutional cases should receive some, though less deference, as advocated by Brandeis. Brandeis could not point to Daniel's position to support his own because Daniel's position is contrary to Brandeis's.

Fourth, Justice Daniel's rationale is equally applicable to statutory cases. Daniel argued that the Supreme Court's duty was to enforce the Constitution's true meaning because that is the will of the sovereign. This logic is applicable to statutes as well: statutory precedents should receive no deference because the Supreme Court's duty is to enforce the people's will as expressed in the true meaning of the statute. Daniel's logic turns the Brandeis Dichotomy on its head.

Another candidate to support the Brandeis Dichotomy was Chief Justice Taney's dissent in the *Passenger Cases*.¹³³ The *Passenger Cases* faced the question of whether state statutes that taxed aliens upon arrival to the states violated the Commerce Clause.¹³⁴ In his

131. In the *Passenger Cases*, decided a couple of years after the *License Cases*, Justice Daniel dissented from the majority's decision that state laws that had taxed alien passengers upon arrival violated the Commerce Clause. In his dissent, Daniel expressed his strong "disapproval":

Impressed as I am with the mischiefs with which that decision is believed to be fraught, trampling down, as to me it seems to do, some of the strongest defences of the safety and independence of the States of this confederacy, it would be worse than a fault in me could I contemplate the invasion in silence. I am unable to suppress my alarm at the approach of power claimed to be uncontrollable and unlimited.

48 U.S. (7 How.) 283, 494 (Daniel, J., dissenting).

132. *Id.* at 497. The remainder of Daniel's opinion is filled with citation to, and discussion of, precedent. *Id.* at 498-518.

133. 48 U.S. (7 How.) 283, 494 (1849) (Taney, C.J., dissenting).

134. *Id.* at 283.

dissenting opinion, Chief Justice Taney traded rhetorical places with Justice Daniel. Taney argued, like Daniel two years earlier,¹³⁵ 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."¹³⁶

Taney's opinion does not support the Brandeis Dichotomy and, even if it did, it would be frail support. 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."¹³⁷ Furthermore, Taney conceded that Supreme Court precedent in constitutional matters would act as authority; they only could not *absolutely* foreclose reopening an issue.

The remainder of Taney's opinion bore this out. Throughout the rest of his opinion, Taney cited, discussed, and treated as authoritative the Court's precedent.¹³⁸ For example, Taney argued that *City of New York v. Miln*¹³⁹ and *Brown v. Maryland*¹⁴⁰ had already decided the questions presented in the *Passenger Cases*.¹⁴¹ Later, Taney 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."¹⁴²

Second, Taney's opinion was, if read like Daniel's before it, novel. Taney himself gave evidence of this when he stated: "it be regarded *hereafter* as the law of this court."¹⁴³ One cannot read Taney as claiming that the Court's historic practice was to give constitutional precedents less respect because Taney was offering that the Court

135. Chief Justice Taney did so, however, without citation to Daniel, which supports our view that Taney was not rejecting application of *stare decisis* to constitutional cases as Daniel seemed to be.

136. *The Passenger Cases*, 48 U.S. (7 How.) at 470 (Taney, C.J., dissenting).

137. *Id.*

138. *Id.* at 471–94.

139. 36 U.S. (11 Pet.) 102 (1837).

140. 25 U.S. (12 Wheat.) 419 (1827).

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

142. *Id.* at 480.

143. *Id.* at 470 (emphases added).

should—prospectively—adopt such a practice, and Taney cited nothing to support such a conclusion.¹⁴⁴

Indeed, when Taney had the opportunity to apply a novel stare decisis standard two years later in the *Genesee Chief*,¹⁴⁵ he did not address the possibility and instead applied the traditional stare decisis standard that looked to whether overruling would upset settled property or contract expectations.¹⁴⁶ (Taney also did not join Daniel in dissent in *Marshall v. Baltimore & Ohio Railroad Co.*,¹⁴⁷ discussed below, where Daniel reiterated his view from the *License Cases*.¹⁴⁸)

The *Genesee Chief*, decided in 1851, involved an admiralty action arising out of a collision between vessels on Lake Ontario.¹⁴⁹ The question before the Court was whether federal court admiralty jurisdiction extended to inland lakes and waterways, bodies of water that did not ebb and flow with a tide¹⁵⁰ and hence did not fall under the description of admiralty jurisdiction given earlier by the Court in the *Thomas Jefferson*,¹⁵¹ decided in 1825.¹⁵² Chief Justice Taney, writing for the Court, declined to follow the *Thomas Jefferson* and rejected an appeal to stare decisis because “the *Thomas Jefferson* did not decide any question of property, or lay down any rule by which the right of property should be determined.”¹⁵³ “In such a case,” Taney continued:

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. But the decision referred to has no relation to rights of property. It was a question of jurisdiction only, and the judgment we now give can disturb no rights of property nor interfere with any contracts heretofore made. The rights of property and of parties will be the same by whatever court the law is administered. And as we are convinced that the former decision was founded in error, and that the error, if not corrected, must produce serious public as well as private

144. See Lee, *supra* note 15, at 716 (arguing that counsel in the case followed the traditional practice of stare decisis).

145. 53 U.S. (12 How.) 443 (1851).

146. *Id.* at 458–59.

147. 57 U.S. (16 How.) 314 (1853).

148. *Id.* at 343–44.

149. *The Genesee Chief*, 53 U.S. (12 How.) at 450.

150. *Id.* at 451–59.

151. 23 U.S. (10 Wheat.) 428 (1825).

152. *The Genesee Chief*, 53 U.S. (12 How.) at 451–59.

153. *Id.* at 458.

inconvenience and loss, it becomes our duty not to perpetuate it.¹⁵⁴

As Professor Thomas Lee noted, “Taney’s experiment with th[e] idea [of a modified stare decisis standard] apparently had ended.”¹⁵⁵

In *Marshall*, decided in 1853, the Court followed precedent¹⁵⁶—over strong dissents by Justice Daniel and others¹⁵⁷—and ruled that a corporation is a citizen, for purposes of federal diversity jurisdiction, in the state of its incorporation.¹⁵⁸ The majority opinion, written by Justice Grier, argued that the Court must follow its precedent on this point because many cases had been decided under it, the federal courts’ practice was conformed to it, many property and contract interests were premised on it, and, most importantly, the scope of federal court jurisdiction was defined by it.¹⁵⁹ Despite the majority’s concern with the precedent’s correctness,¹⁶⁰ to overrule it would cause “great and irreparable evil on the community.”¹⁶¹

Justice Daniel’s dissent argued that the Court should overrule the precedent upon which the Court relied.¹⁶² Again, he claimed that since the Constitution was the ultimate authority, the Court, as an agent, could not contradict the Constitution and any cases so doing were not deserving of precedential weight.¹⁶³

The *Marshall* Court did not rely on the Brandeis Dichotomy or on the opinion proffered by Taney in the *Passenger Cases* or by Justice Daniel in dissent in *Marshall* itself. Instead, the majority articulated the standard rule for stare decisis (the only alteration being the Court’s statement that federal court jurisdiction deserved special stare decisis protection).¹⁶⁴

Of the cases in which the Supreme Court addressed the subject matter of the case—that is, whether the case involved constitutional or other subject matters—only one majority opinion had any plausible bearing on Justice Brandeis’s claim that constitutional decisions should be accorded less precedential weight than other

154. *Id.* at 458–59.

155. Lee, *supra* note 15, at 718.

156. The precedent was *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*, 43 U.S. (2 How.) 497 (1844).

157. See *Marshall v. Balt. & Ohio R.R. Co.*, 57 U.S. (16 How.) 314, 337–54 (1853).

158. *Id.* at 325–29.

159. *Id.* at 325.

160. *Id.* at 326.

161. *Id.* at 325.

162. *Id.* at 343–45 (Daniel, J., dissenting).

163. See *id.* at 344 (“Wherever the Constitution commands, discretion terminates.”).

164. *Id.* at 325 (majority opinion).

precedents: the *Legal Tender Cases*.¹⁶⁵ 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.¹⁶⁶ In 1870, the Court held in *Hepburn v. Griswold*,¹⁶⁷ by a vote of four to three, that the Legal Tender Act was unconstitutional as applied retroactively to contracts entered into before its passage.¹⁶⁸ *Hepburn* was decided with less than a full bench, however, and the following year the Court heard two more cases rearguing the constitutionality of the Act, after two vacancies had been filled.¹⁶⁹

In the *Legal Tender Cases*, the Court, by a vote of five to four, overruled *Hepburn* and held that the Legal Tender Act was constitutional.¹⁷⁰ Justice Strong, in delivering the opinion of the Court, commented that

[*Hepburn*] was decided by a divided court, and by a court having a 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.*¹⁷¹

Justice Strong cited *Briscoe v. Commonwealth's Bank of Kentucky* to support his contention that the Court should not hear constitutional cases in the absence of a full court.¹⁷²

The majority of the Court in the *Legal Tender Cases* argued that constitutional decisions decided by less than a full bench have less

165. 79 U.S. (12 Wall.) 457 (1871).

166. *Id.* at 529.

167. 75 U.S. (8 Wall.) 603 (1870).

168. *Id.* at 615–25.

169. 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).

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

171. *Id.* at 553–54 (emphasis added).

172. *Id.* at 554 (citing *Briscoe v. Commonwealth's Bank of Ky.*, 33 U.S. (8 Pet.) 120 (1834)).

precedential weight than those decided by a full bench.¹⁷³ For at least three reasons, Justice Strong's opinion does not adequately support the Brandeis Dichotomy.

First, Justice Strong's claim that *Hepburn* was deserving of less precedential weight because it was not decided by a full court moves substantially beyond *Briscoe* and is therefore unprecedented. *Briscoe*, discussed above, stated only that it was a prudent "practice" to hear constitutional cases with a full court.¹⁷⁴ Strong, by contrast, argued that if two conditions are met—(1) a constitutional decision and (2) less than a full Court—then the precedent has less weight.

Strong's additional condition—a constitutional decision—and his conclusion—less precedential weight—went beyond *Briscoe*. That Strong too recognized this can be seen from his protest that overruling *Hepburn* was not "unprecedented."¹⁷⁵ Since Strong's claim is unprecedented, it provides little support for the Brandeis Myth.

Second, Justice Strong was not advocating the Brandeis Dichotomy. Instead, he argued that to have less precedential weight, in addition to the precedent in question being a constitutional decision, it must also have been decided by less than a full Court. Justice Brandeis, by contrast, did not couple the Brandeis Dichotomy with the *Briscoe* requirement. Instead, Brandeis claimed that the only condition for application of the Brandeis Dichotomy was that the precedent be a constitutional decision.

Third, the *Legal Tender Cases* were outliers because of the unique political circumstances under which the Court operated. The Court was under tremendous pressure from the public and from Congress to legitimate paper money. Its buckling to this pressure is a weak basis upon which to ground the Brandeis Dichotomy.

In sum, in no cases did the Supreme Court adopt the Brandeis Dichotomy. Instead—at most—there were a handful of isolated arguments by individual Justices and Justice Strong's *Legal Tender* opinion. However, as shown above, these too did not support the Brandeis Dichotomy. The Court did not apply the Brandeis Dichotomy when deciding to overrule constitutional decisions as compared to decisions involving other issues. Instead, as described in Part III, the Court applied the traditional stare decisis factors. There were, to be sure, isolated hints by Justices that distinguishing between

173. 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." *Id.* at 570 (Bradley, J., concurring).

174. *Briscoe v. Commonwealth's Bank of Ky*, 33 U.S. (8 Pet.) 118, 122 (1834).

175. *The Legal Tender Cases*, 79 U.S. (12 Wall.) at 554.

constitutional and statutory precedents was normatively attractive. However, the Court decidedly refused to alter its traditional approach to stare decisis.

B. The Brandeis Myth's Unopposed Victory

Why was the Brandeis Myth so persuasive? Part of the answer was because no one on the Court had ever before addressed the issue of stare decisis in as sustained a manner as Brandeis. The Court had simply assumed that constitutional decisions should be treated the same as decisions in other legal areas, and proceeded accordingly. And, after Justice Brandeis, no one ever bothered to correct his mistaken reading of the past.

Prior to *Burnet*, the Court very rarely engaged in discussions of the theory of precedent. To be sure, the Court, like all federal courts, relied on precedents from the very beginning,¹⁷⁶ but only rarely did the Court evaluate the underlying theory of precedent itself. Moreover, on those few occasions that the Court did discuss stare decisis, it was never a discussion as thorough as that in *Burnet*.¹⁷⁷ Even when the Supreme Court overruled one of its prior decisions for the first time, in the case of *Hudson & Smith v. Guestier*,¹⁷⁸ the Court did not discuss the theory of precedent.¹⁷⁹

Despite the fact that the Court did not address the theory of stare decisis in its early years, it nevertheless continued—almost blithely—to cite, discuss, interpret, distinguish, and apply precedents in all but the briefest opinions. Constitutional decisions were no exception. This practice is made emphatically clear in the first *Pollock v. Farmers' Loan & Trust Co.*,¹⁸⁰ one of the few cases in which the Supreme Court actually discussed, albeit—and characteristically—briefly,¹⁸¹ the theory of stare decisis in the context of constitutional decisions.¹⁸²

176. See Strang, *supra* note 130, at 467–71 (detailing the early federal court practice).

177. Which is not to say that Brandeis's discussion was sufficiently thorough to justify the change he proposed.

178. 10 U.S. (6 Cranch) 281 (1810), *overruling* *Rose v. Himely*, 8 U.S. (4 Cranch) 241 (1808).

179. *Id.* at 283–85.

180. 157 U.S. 429 (1895).

181. See *id.* at 575–76.

182. This case was conspicuously absent from Justice Brandeis's dissenting opinion in *Burnet*, although he included the second *Pollock* case in his list of overruling cases, which he claimed had overruled the case of *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796). See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 n.4 (1932) (Brandeis, J., dissenting).

Most legal commentators, following the lead of the courts, did not investigate the veracity of Brandeis's claim that the two-tiered standard for stare decisis was rooted in the Court's historical practice. For example, Justice Douglas, in his 1949 article, *Stare Decisis*, asserted that the "place of *stare decisis* in constitutional law is even more tenuous [than in statutory law]."¹⁸³ Douglas did not give any indication that the Dichotomy was an innovation or that it was controversial when introduced, unlike some other scholars.¹⁸⁴ Some writing on the topic of stare decisis around the time of *Burnet* commented that the Dichotomy was controversial and an innovation.¹⁸⁵ This sea change in Supreme Court jurisprudence was the result of several factors, which we explore in the next section.

C. *The Rise of the Brandeis Dichotomy*

The statutory-constitutional dichotomy made famous by Brandeis did not enter upon the horizon of the mainstream of legal thinkers until the early twentieth century. The possibility of a dichotomy was mentioned in passing in the late nineteenth century, but it was just that, a passing mention of a possible way for the courts to approach their precedents.

The mainstream view of stare decisis in the late eighteenth and early nineteenth centuries was the declaratory theory of precedent.¹⁸⁶ The declaratory theory held that "judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law."¹⁸⁷ According to the declaratory theory, subsequent courts are bound by the decisions of earlier courts, subject to narrow exceptions.¹⁸⁸

The declaratory theory of precedent also explained when precedents would have greater than normal precedential effect. This occurred primarily when the precedents involved property or

183. Douglas, *supra* note 35, at 736.

184. See Bernhardt, *supra* note 59, at 66–68 (recognizing that the Brandeis Dichotomy did mark a shift).

185. See, e.g., Albert Kocourek & Harold Koven, *Renovation of the Common Law Through Stare Decisis*, 29 ILL. L. REV. 971, 983–84 (1935) ("Others contend that *stare decisis* has no application in the field[] of constitutional law." (first emphasis added)).

186. See Strang, *supra* note 130, at 449–50, 456 (explaining the declaratory theory of precedent and its prominence).

187. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *69 (1885).

188. See *id.* at *70 ("[P]recedents and rules must be followed, unless flatly absurd or unjust.").

commercial interests.¹⁸⁹ As Polly Price found after reviewing the historical record, “the compulsion to follow precedent . . . depended to some extent upon the subject matter involved.”¹⁹⁰

Stare decisis became more constraining as the nineteenth century wore on.¹⁹¹ Scholars have found that a number of factors played a role in the “hardening” of stare decisis during the nineteenth century, including the rise of legal positivism, the codification movement, and the availability of reliable law reports.¹⁹² This background provides no support for a statutory-constitutional dichotomy. Instead, if anything, the hardening of stare decisis made such a dichotomy less likely. None of the reasons for the hardening of stare decisis distinguish between statutory and constitutional precedents.

A review of the historical sources in the late eighteenth and nineteenth centuries confirms that neither courts nor scholars practiced or advocated for the Brandeis Dichotomy. Instead, after a handful of scattered mentions in the nineteenth century,¹⁹³ the Brandeis Dichotomy was picked up by legal scholars in the early twentieth century.¹⁹⁴ These scholars, many of whom were

189. Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 69 (2001); Lee, *supra* note 15, at 688–89. Some also claimed that a precedent would also be subject to greater precedential weight if it was part of a “strong and . . . uniform . . . train of decisions.” See James Ram, *The Science of Legal Judgments*, in 9 LAW LIBRARY 76 (John Purdon ed., 1835).

190. Price, *supra* note 130, at 98; see also *id.* (“Courts noted with some frequency that, when the rule of a prior case involved something other than property, they were less constrained by the doctrine of precedent to follow it.”); Lee, *supra* note 15, at 702 (“By the Taney era, then, the Court had settled on a bifurcated stare decisis standard . . . ‘Considerations in favor of *stare decisis* [were] at their acme in cases involving property and contract rights.’” (internal citation omitted)).

191. See, e.g., Healy, *supra* note 189, at 87 (“The American commitment to stare decisis gradually strengthened during the nineteenth century.”); Price, *supra* note 130, at 84 (“[S]ome historians have located the beginning of a ‘strict’ doctrine of precedent only in the post-founding period.”).

192. Healy, *supra* note 189, at 87; see also Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 36 (1959) (summarizing the reasons for the rise of a stronger version of stare decisis); Nelson, *supra* note 13, at 37–48 (arguing that the rise of legal positivism and the codification movements caused the hardening of stare decisis).

193. See Lee, *supra* note 15, at 714 (“[E]xcept in a few isolated opinions of single Justices, the constitutional dimension of a precedent was not considered relevant to the stare decisis question in the Taney era.”). Indeed, the first such instance, as explained above, did not occur until 1847—and then in dissent—in Justice Daniel’s dissent in the *License Cases*. The *License Cases*, 46 U.S. (5 How.) 504, 611–18 (1847) (Daniel, J., dissenting).

194. See Bernhardt, *supra* note 59, at 66 (finding that stare decisis came to have less weight in the constitutional context over the late nineteenth and early twentieth centuries).

progressives and legal realists, saw in the Brandeis Dichotomy a means to advance their legal reform agendas.

Toward the end of the nineteenth century, in 1885, Daniel H. Chamberlain published the first scholarly work that focused on the doctrine of stare decisis in the American legal system.¹⁹⁵ Significantly, Chamberlain's treatise is devoid of any commentary regarding how stare decisis should be applied in the context of constitutional decisions.

After Chamberlain published his tract, Justice Matthews wrote to Chamberlain to "express[] regret that the essay had not considered the question of 'the applicability, or the extent of the application, of the doctrine to constitutional questions.'" ¹⁹⁶ Chamberlain responded with the first law review article published on the topic of stare decisis in constitutional decisions. He sought to directly answer Matthews' question.¹⁹⁷

Chamberlain first criticized the claims in the opinions in the *Legal Tender Cases* that sought to undermine the precedential authority of *Hepburn*.¹⁹⁸ For example, he challenged Justice Strong's claim that the Court in *Hepburn* did not have its full complement of authorized Justices.¹⁹⁹

Thereafter, Chamberlain turned directly to the question of whether a case, simply because it is a constitutional case, is subject to less precedential weight.²⁰⁰ He argued that the reason for stare decisis—"to promote certainty and steadiness in the declaration and application of the law"—is at least, and likely more, necessary in constitutional law.²⁰¹ Chamberlain continued:

A rule of constitutional construction can hardly be changed with less inconvenience or disadvantage to the public than one of private concern only. It must be conceded always that if a decision is wrong, clearly wrong in principle or on the facts (and this is to be determined on the conscience of the court called to examine it), it may be, or even ought to be, reversed. No less, an exception to *stare decisis* seems tenable or practicable. This

195. DANIEL H. CHAMBERLAIN, *THE DOCTRINE OF STARE DECISIS: ITS REASONS AND ITS EXTENT* (1885).

196. Chamberlain, *supra* note 117, at 127 (quoting a letter from Justice Stanley Matthews to D.H. Chamberlain). Chamberlain also noted that Justice Matthews had not given his own opinion on the matter. *Id.*

197. *Id.* at 125.

198. *Id.* at 126–30.

199. *Id.* at 128.

200. *Id.* at 130.

201. *Id.* at 130–31.

is as true, it seems in reason, of public cases as of private cases, of cases of constitutional law or power as of cases of private right, and no more so. Our inquiry now is, Is the rule less applicable in any respect to cases of the former class than to those of the latter? If the view here suggested is supported or opposed by any authorities or reasons, we do not know where. . . . *We know of no authorities which have discussed or answered our inquiry*; we do not even know that it is regarded in the forum of the profession or of jurists and judicious law-writers as an open question²⁰²

Chamberlain's view, expressed in 1890, represented the virtually undisputed orthodoxy.

A review of scholarly works from the late nineteenth century confirms this. Thomas Cooley published the fifth edition of his influential *Treatise on the Constitutional Limits* in 1883.²⁰³ In it, he addressed the precedential effect of constitutional precedents.²⁰⁴ Cooley did not identify a distinction between constitutional and statutory decisions.²⁰⁵ Instead, he reiterated the orthodox view that the precedential weight of a decision was contingent on, among other things, "whether the point involved is such as to have become a rule of property."²⁰⁶ The general rule, according to Cooley, was that constitutional decisions should be followed—that they have precedential weight—to avoid the "very grave" harm to the "rights and duties" of "citizen[s]."²⁰⁷

Despite a few hints in the *U.S. Reports*, discussed above in Part II.A, the Supreme Court's consistent practice and the legal profession's position was that constitutional cases possessed as much precedential weight as other types of cases, and for similar reasons.²⁰⁸ For instance, the much-cited *Interpretation of Statutes*, published in 1888, reiterated the orthodox position: "[T]he rule of *stare decisis*, applicable in similar cases to the interpretation of statutes, is recognized also in that of constitutions."²⁰⁹ Similarly, J.G.

202. *Id.* at 131 (emphasis added).

203. COOLEY, *supra* note 117.

204. *Id.* at *47-*57, *161-*63.

205. *Id.*

206. *Id.* at *52-*53. When a decision involved property, Cooley advised that any change to the rule embodied in the precedent be altered only by the legislature. *Id.*

207. *Id.* at *50.

208. *See, e.g.*, *County of Green v. Conness*, 109 U.S. 104, 104-05 (1883) (deciding a case on the basis of citation to previously decided cases).

209. G.A. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES § 529 (1888).

Sutherland's famous *Statutory Construction* stated that *stare decisis* "has been applied to decisions construing constitutions as well as other written laws."²¹⁰ This later changed dramatically in the legal literature: "When we turn to recent legal literature [in 1930] we find an even more radical spirit than is shown by the courts."²¹¹

For a period of time, advocates for and against the Brandeis Dichotomy coexisted.²¹² As early as 1904, proponents of the orthodox view recognized that their position was beginning to be challenged.²¹³ In a 1904 law review article, William Shroder defended the orthodox position.²¹⁴ He noted that, in place of the traditional rules regarding special protection for property rights, some had advocated for the Brandeis Dichotomy.²¹⁵ Shroder—correctly, as we have shown—criticized Brandeis Dichotomy advocates for contradicting the "weight of authority" that supported the orthodox view.²¹⁶ According to Shroder, Brandeis Dichotomy advocates were able to muster only limited support for their position, and then only from state case law.²¹⁷

Similarly, Henry Campbell Black (the author of *Black's Law Dictionary*) published his *Handbook on the Law of Judicial Precedents or the Science of Case Law* in 1912.²¹⁸ Black first reaffirmed the orthodox view that, "when the meaning of the constitution upon a doubtful question has been once carefully considered and judicially decided, every reason is in favor of a steady adherence to the authoritative interpretation."²¹⁹ This is especially

210. J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 317 (1891); see also William J. Shroder, *The Doctrine of Stare Decisis—Its Application to Decisions Involving Constitutional Interpretation*, 58 CENT. L.J. 23, 28–31 (1904) (arguing that the "weight of authority" is against a statutory-constitutional dichotomy).

211. Arthur L. Goodhart, *Case Law in England and America*, 15 CORNELL L.Q. 173, 181 (1930).

212. In his 1931 article, *The Problem of Stare Decisis in Our Constitutional Theory*, Louis Boudin identified this coexistence, Boudin, *supra* note 111, at 595–97, and argued that American legal practice did not have a coherent understanding of the relationship between *stare decisis* and constitutional decisions, *id.* at 597.

213. Earlier orthodox scholars had not even noted the pro-Brandeis Dichotomy position. See ENDLICH, *supra* note 209, § 529.

214. Shroder, *supra* note 210, at 31.

215. *Id.* at 29.

216. *Id.* at 30.

217. *Id.* at 29–30.

218. HENRY CAMPBELL BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS OR THE SCIENCE OF CASE LAW (1912).

219. *Id.* at 223.

true, found Black, where the cases dealt with contract or property interests.²²⁰

Black noted, however, that some decisions included statements by Supreme Court Justices which indicated that stare decisis had less effect in constitutional cases.²²¹ Black rejected this "occasional dicta" in favor of

the generally accepted rule that, when the constitutionality of an act of Congress . . . is fairly attacked and fully adjudicated by the court of last resort, a decision sustaining its validity is to be adhered to, on the principle of stare decisis, and the questions involved are no longer to be considered as open to controversy.²²²

A similar treatment of stare decisis in constitutional cases is found in the *Corpus Juris* of the period.²²³ In the section on courts, *Corpus Juris* stated the general rule of stare decisis and its rationale.²²⁴ The general rule was applicable to constitutional cases.²²⁵ Like Black, *Corpus Juris* indicated that there was some "authority for the view that the doctrine cannot control questions involving the construction and interpretation of the organic law, or at least does not apply with the same force to decisions on constitutional questions as to other decisions."²²⁶ However, this view was supported only by citation to state cases,²²⁷ and *Corpus Juris* specifically noted that the federal courts did not accept the Brandeis Dichotomy, instead applying stare decisis with full force to constitutional decisions.²²⁸ *Corpus Juris* also restated the orthodox position that stare decisis was especially strong when property and contract interests were at stake.²²⁹ Consequently, the authors of *Corpus Juris* recognized that, while the orthodox view was challenged, it remained the authoritative position.

220. *Id.* at 224-25; see also *id.* at 227 ("[T]his is true . . . especially . . . where a decision sustaining the validity of a statute has become the foundation of titles, the basis of private rights, or an essential element in various public or private contracts and business transactions.").

221. *Id.* at 226.

222. *Id.*

223. 15 C. J. *Courts* (1918).

224. *Id.* § 304.

225. *Id.* §§ 318, 341.

226. *Id.* § 341.

227. *Id.* § 341 nn.35, 36.

228. *Id.* § 341 n.35a.

229. *Id.* § 342.

Other commentators—a distinct minority—began, with the turn of the century, to articulate the Brandeis Dichotomy.²³⁰ For example, Charles Collins wrote in 1912 that “the doctrine of *stare decisis* is much weaker in the realm of constitutional law.”²³¹ Collins argued that the lesser level of precedential weight was necessary to permit the Constitution to “evolve” in response to changing social conditions.²³²

A 1924 article by Pennsylvania Supreme Court Justice Robert Von Moschzisker exemplifies this period of transition to ascendance of the Brandeis Dichotomy.²³³ Von Moschzisker first explained the bases for *stare decisis* and that it applied more rigorously to cases involving property and contract rights.²³⁴ When he turned to the question of application of *stare decisis* to constitutional cases, Von Moschzisker noted both the orthodox view and the Brandeis Dichotomy.²³⁵ According to Von Moschzisker, “[t]here is much to be said in favor of the view that, in constitutional cases, the doctrine of *stare decisis* should not apply with undue severity.”²³⁶ Von Moschzisker’s language, and his supporting citation to one state case and Willoughby’s treatise (discussed below), indicate that he recognized the novelty of that “view.”²³⁷ Other literature from the era is similar.²³⁸

By the time Brandeis wrote his dissent in 1932, the orthodox view was overturned. This inversion was clear when Westel Woodbury Willoughby wrote his treatise on constitutional law in

230. See Boudin, *supra* note 111, at 601 (recognizing that relatively few advocated the Brandeis Dichotomy); *id.* at 602 (“The majority of writers, however, are content to deduce the correct rule from the course of actual adjudications—as if the matter depended not on the Constitution and the logic of our constitutional system.”).

231. Charles Wallace Collins, *Stare Decisis and the Fourteenth Amendment*, 12 COLUM. L. REV. 604, 604 (1912).

232. *Id.* at 604, 606–07; see also George Edward Sullivan, *The Correct Doctrine of Stare Decisis*, 55 CENT. L.J. 362, 373–74 (1902) (“Constitutional questions are unaffected by the doctrines of *stare decisis*, even though property rights have been settled upon the faith of a prior erroneous interpretation of such constitutional provisions.”).

233. Robert Von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409 (1924).

234. *Id.* at 409–17.

235. *Id.* at 420–21.

236. *Id.* at 420.

237. *Id.* at 420 n.30; see also *id.* at 420–21 (finding that “it may well be urged” that reasons for the orthodox view are outweighed by contrary reasons).

238. See, e.g., Kocourek & Koven, *supra* note 185, at 983–84 (“*Others* contend that *stare decisis* has no application in the field[] of constitutional law.” (first emphasis added)).

1929.²³⁹ In the section on *stare decisis*, Willoughby cited and discussed only statements that supported his contention that “the doctrine of *stare decisis* should not be so rigidly applied to the constitutional as to the other laws.”²⁴⁰ He quoted, for example, Chief Justice Taney’s dissent from the *Passenger Cases*, and Justice Brandeis’s dissent in *Washington v. W.C. Dawson & Co.*²⁴¹ And he offered the same policy rationale for the Brandeis Dichotomy that Brandeis would himself adopt three years later.²⁴² Indeed, the language employed by Brandeis was very close to Willoughby’s.²⁴³ Willoughby gave no hint of the Brandeis Dichotomy’s novelty.

As described above,²⁴⁴ after Brandeis’s dissent in *Burnet*, the Brandeis Dichotomy took the judicial field, and just as quickly, occupied the scholarly field. By 1941, Roscoe Pound could bemoan the loss of *stare decisis*. Pound saw that judges and scholars “demand[ed] . . . today that courts be free to decide each case without reference either to past decisions or to other like cases.”²⁴⁵

We have presented the rise of the Brandeis Dichotomy and its eventual triumph over the orthodox view. The full story is, however, slightly more complex. Beginning with Justice Daniel, and then picking up again in the early twentieth century, there was an even more radical position: *stare decisis* is entirely inapplicable to

239. 1 WESTEL WOODBURY WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* (2d ed. 1929); see also Goodhart, *supra* note 211, at 173–74, 186, 188 (arguing that *stare decisis* was becoming less robust in the United States than it was previously, and this was due, in part, to the diminished weight of constitutional precedents).

240. WILLOUGHBY, *supra* note 239, at 74.

241. *Id.* at 74–75.

242. *Id.*

243. Compare *id.* at 74 (“An error in the construction of a statute may easily be corrected by a legislative act, but a Constitution and particularly the Federal Constitution, may be changed only with great difficulty.”), with *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting) (“This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions.”), and WILLOUGHBY, *supra* note 239, at 74 (stating that there are many instances where “the doctrines declared in prior cases have been in part evaded or modified without explicit repudiation”), with *Burnet*, 285 U.S. at 408 n.2 (Brandeis, J., dissenting) (“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.”).

244. See *supra* Part I.B.

245. Roscoe Pound, *What of Stare Decisis?*, 10 FORDHAM L. REV. 1, 1 (1941).

constitutional cases.²⁴⁶ Everett Abbot's 1913 book, *Justice and the Modern Law*, advocated the Daniel view.²⁴⁷ Abbot argued, like Daniel, that because the Constitution was the supreme law of the land, any Supreme Court decisions to the contrary were not binding.²⁴⁸ In fact, Abbot believed that one "has an absolute constitutional right to appear before the court and challenge its interpretations of the Constitution, no matter how often they have been promulgated."²⁴⁹

A later expression of the Daniel view was given by Louis Boudin in 1931.²⁵⁰ Boudin argued that "stare decisis cannot possibly have any place in the decision of constitutional questions."²⁵¹ Boudin followed Justice Daniel's reasoning: the Constitution is the ultimate legal norm in our society; any governmental act contrary to the Constitution is "null and void";²⁵² hence, an erroneous decision on the interpretation of the Constitution cannot bind later courts.²⁵³ Boudin does mention the orthodox view and the Brandeis Dichotomy, both of which he finds inadequate, the latter because it does not go far enough.²⁵⁴

The existence of this minority view espoused by Justice Daniel does not alter the strength of our claims. The Brandeis Dichotomy first appeared on the national stage in the early twentieth century and slowly gained ascendancy. It did not represent the Supreme Court's historic practice. In fact, the Daniel view's existence bolsters our position: proponents of the Daniel view explicitly recognized that theirs was not the Court's practice, and openly advocated a change in that practice.

What caused the replacement of the orthodox view with the Brandeis Dichotomy? We believe that at least four factors played a role: (1) the rise of the Progressive movement and, relatedly, the New Deal with its goal of expanding the ability of government to intervene in the nation's economic and social life; (2) the rise of legal

246. See Sullivan, *supra* note 232, at 373–74 ("Constitutional questions are unaffected by the doctrines of *stare decisis*, even though property rights have been settled upon the faith of a prior erroneous interpretation of such constitutional provisions.").

247. EVERETT V. ABBOT, *JUSTICE AND THE MODERN LAW* (1913).

248. *Id.* at 77.

249. *Id.* at 78.

250. Boudin, *supra* note 111.

251. *Id.* at 595.

252. *Id.* (emphasis omitted).

253. *Id.* Boudin's reasoning is nearly identical to the arguments put forward by a contemporary originalist. See Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 25–28 (1994).

254. Boudin, *supra* note 111, at 597.

realist thought; (3) the concern of the bench and bar with a common law system made unmanageable by an enormous number of reported decisions; and (4) a late nineteenth-century movement in state courts to give less precedential weight to constitutional decisions. Over a period of approximately thirty years, the orthodox view was challenged and then eclipsed.

The Progressive era is usually dated from 1900 to World War I,²⁵⁵ and one of its central tenets was reform of the law to better meet the challenges of a new, industrial society.²⁵⁶ In the legal literature of the time, one finds as a constant refrain that society has changed and that the law needs to change as well.²⁵⁷ Of course, one obstacle in American legal practice to large-scale or rapid change was *stare decisis*; accordingly, numerous commentators and judges sought to limit, and in some cases eliminate, the doctrine from American legal practice.²⁵⁸ As one scholar has noted: "More and more, the conviction spread that legal adjudication has to keep pace with social and economic changes. Especially in the field of constitutional law . . . the need for flexibility became obvious."²⁵⁹

One example of this literature is *Stare Decisis*, published in 1918.²⁶⁰ There, the author, Charles Blydenburgh, first noted that "changes in [social] conditions . . . require a departure from old rules and decisions."²⁶¹ Blydenburgh found that the common law could easily accommodate this needed change, so long as the courts employed a proper conception of *stare decisis*.²⁶² By cutting free the underlying principles of the common law from old precedents that applied the principles to no-longer-existing social circumstances, and freshly applying the principles to new social conditions, *stare decisis* is not an obstacle to the Progressive agenda.²⁶³ The problem was not *stare decisis* itself, Blydenburgh argued, but a mistaken—restrictive—conception of it.²⁶⁴ Others applied this reasoning to constitutional precedent.²⁶⁵ Scholars both sympathetic and unsympathetic to the

255. JOHNSON, *supra* note 58, at 607.

256. *Id.* at 607–08.

257. HORWITZ, *supra* note 45, at 33–63, 145–70.

258. *See, e.g.*, JOHN HENRY WIGMORE, PROBLEMS OF LAW: ITS PAST, PRESENT, AND FUTURE 79–80 (1920) (arguing that a too-rigid conception of *stare decisis* had produced "the government of the living by the dead").

259. Bernhardt, *supra* note 59, at 66.

260. Charles E. Blydenburgh, *Stare Decisis*, 86 CENT. L.J. 388 (1918).

261. *Id.* at 389.

262. *Id.* at 388–89.

263. *Id.* at 388–89, 392.

264. *Id.* at 391–92.

265. *See* Collins, *supra* note 231, at 604, 606–07.

change took note: “The number of recent books and articles which deal with the theory of precedent is strong evidence that the American jurist is attempting to create a new system which he believes will be more in consonance with the social welfare than has been that of the past.”²⁶⁶

Many of the Progressive movement’s goals came to fruition during Roosevelt’s New Deal, which dramatically expanded the scope of government.²⁶⁷ The Brandeis Dichotomy aided the concomitant “transformation”²⁶⁸ of constitutional law that sustained the New Deal.²⁶⁹ As other scholars have noted, the Brandeis Dichotomy permitted “the New Deal and Fair Deal Courts to re-examine the economic realities of the complex society which they served and to overrule decisions which had not stood the test of time.”²⁷⁰ Brandeis consistently opposed constitutional restrictions on the ability of the national government to deal with economic issues and thus ended up in dissent in many of the cases that were later overruled using the Brandeis Dichotomy.²⁷¹ The change in constitutional law was likely most dramatic in the Court’s Commerce Clause jurisprudence, a change that sustained much New Deal legislation.²⁷²

The rise of legal realism also played a role. One of the characteristics of legal realist thought is that law, including written legal norms, does not determine the outcome of cases.²⁷³ Instead, judges have discretion to mold the result of the case to advance the

266. Goodhart, *supra* note 211, at 181; *see also* Pound, *supra* note 245, at 9 (identifying as one motivation for the attack on *stare decisis* the changed social and economic makeup of American society, from rural to urban and industrial); Von Moschzisker, *supra* note 233, at 421 (arguing that *stare decisis* must be more flexible in the constitutional context to accommodate “new conditions [that] were not foreseen or considered”).

267. *See* JOHNSON, *supra* note 58, at 752–57, 764–66.

268. *See* 2 BRUCE ACKERMAN, *supra* note 69, at 255–382 (describing the New Deal Court as effecting a “transformation” of constitutional law).

269. *See* Emmet H. Wilson, *Stare Decisis, Quo Vadis? The Orphaned Doctrine in the Supreme Court*, 33 GEO. L.J. 251, 254, 278 (1945) (noting that “recent years have brought forth an abnormal number of reversals,” but finding the weakening value of *stare decisis* salutary by promoting the “spirit of progress”).

270. Blaustein & Field, *supra* note 36, at 175.

271. *See* Bernhardt, *supra* note 59, at 63 (finding that Brandeis’s dissents were often the precursors to later majority decisions adopting Brandeis’s reasoning); Blaustein & Field, *supra* note 36, at 151, 162 (finding that Brandeis was the Justice who dissented most often from opinions that were later overruled).

272. *See, e.g.*, *United States v. Se. Underwriters Ass’n*, 322 U.S. 533, 542–53 (1944) (overruling an 1869 decision and holding that insurance companies that issue insurance in many states were subject to the Commerce Clause); *Wickard v. Filburn*, 317 U.S. 111, 124–25 (1942) (upholding the constitutionality of the Agriculture Adjustment Act of 1938 using the substantial effects test).

273. HORWITZ, *supra* note 45, at 170, 189–93, 199.

best policy.²⁷⁴ Judges should, therefore, “play the game” of distinguishing and synthesizing precedents with the goal of reaching the preferred policy outcome.²⁷⁵

Judges are, to a significant extent and similar to legislators, policymakers. Later judges, therefore, should not be bound by earlier judges’ policy decisions. This was especially the case in light of changed social and economic circumstances which the realists of Brandeis’s era believed they were facing.

On the realist reading of judging and the law, there is good reason to distinguish between constitutional and statutory precedents. If judges can more easily change constitutional precedents, then they can more easily effectuate the good policies of, for example, the New Deal. Putting the New Deal on solid constitutional footing also had the benefit of respecting the comparative advantage of legislators over judges in economic and social areas.

A third factor that contributed to the rise of the Brandeis Dichotomy was the enormous expansion in the number of case reports. Beginning at the end of the nineteenth and growing through the beginning of the twentieth centuries, the bench and bar began to express concern with perceived excessive case reporting which was, they believed, distorting the practice of law. Repeatedly during this period, scholars expressed concern with a perceived flood of cases.²⁷⁶ This call was also heard from the bar²⁷⁷ and bench.²⁷⁸ The concern

274. *Id.*

275. As Pound noted,

If those are right who maintain that legal precepts are nothing more than formulations of the self-interest of a dominant social and economic class, and that single decisions are inevitably dictated by class interest or prejudice, or if those are right who assert that it is psychologically impossible for a bench of judges to act objectively and impartially, that in fact every case will be treated as unique and that legal reasoning and reference of decisions to traditional or to statutory precepts is a hollow pretence to cover up an arbitrary resort to prejudice, there is no need of debating about stare decisis.

Pound, *supra* note 245, at 2.

276. *See, e.g.*, Goodhart, *supra* note 211, at 179 (noting the disparity between the limited number of English reports and the deluge of American reports).

277. John W. Davis, *The Case for the Case Lawyer*, 3 MASS. L.Q. 99, 102–03, 108 (1917) (pleading with the bench and bar to reduce the number and length of opinions and the amount of citation in briefs).

278. *See, e.g.*, *State v. Rose*, 106 N.E. 50, 52 (Ohio 1914) (“Case law is fast becoming the great bane of the Bench and Bar.”); HARLAN F. STONE, *LAW AND ITS ADMINISTRATION* 214 (1915) (appealing to judges to reduce the length and number of reported cases).

was that the common law system could not function if there were too many cases for its human actors to use effectively.²⁷⁹

By creating the Brandeis Dichotomy, the Court could eliminate recourse to its earlier case law which was stiffly criticized as being built on too-fine distinctions. This could be done, for instance, by replacing the previous case law on Congress's Commerce Clause power with a simple rule that effectively permitted Congress to regulate all social activity.

Lastly, in the late nineteenth century, some state courts adopted the Brandeis Dichotomy for their interpretations of their own state constitutions.²⁸⁰ By 1898, the Supreme Court of Missouri could explain that the question of “[w]hether the doctrine [of stare decisis] applies to the construction of the constitution is a question that has been differently decided in different jurisdictions.”²⁸¹ The court also noted that one of the primary reasons for adopting the Brandeis Dichotomy is the relative ease with which legislatures can change statutes compared to the difficulty of altering a constitution after a misinterpretation by a court.²⁸²

Some states, such as Ohio, adopted the Brandeis Dichotomy. In *State v. Sinks*,²⁸³ the Supreme Court of Ohio ruled that stare decisis had less application to constitutional decisions because, to do otherwise, would “burden forever” the citizens of the state with an unconstitutional decision.²⁸⁴ By contrast, the California courts early on rejected the Brandeis Dichotomy. “In construing statutes and the Constitution, the rule is almost universal to adhere to the doctrine of *stare decisis*,” stated the Supreme Court of California in rejecting a request to overrule a previous decision.²⁸⁵ Many other states also rejected the Brandeis Dichotomy.²⁸⁶

This movement in state courts was picked up by scholars who then argued for broad adoption of the Brandeis Dichotomy by the

279. Davis, *supra* note 277, at 109.

280. See *Mountain Grove Bank v. Douglas County*, 47 S.W. 944, 946–47 (Mo. 1898) (discussing the adoption of the Dichotomy by some states and noting the policy reasons behind the Dichotomy).

281. *Id.* at 946.

282. *Id.* at 947.

283. 42 Ohio 345 (1884).

284. *Id.* at 357; see also *P.J. Willis & Bro. v. Owen*, 43 Tex. 41, 48 (1875) (adopting the Brandeis Dichotomy).

285. *Seale v. Mitchell*, 5 Cal. 401, 403 (1855).

286. See, e.g., *Evans v. Job*, 8 Nev. 322, 344 (1873) (“[I]t is an almost universal rule in construing statutes and constitutions to adhere to former decisions.”); see also Shroder, *supra* note 210, at 31 (arguing that most state courts that overruled previous constitutional decisions did so using the traditional stare decisis factors).

federal courts.²⁸⁷ For example, one scholar promoting the Brandeis Dichotomy stated that stare decisis is inapplicable to constitutional cases and cited to only one state court case to support his claim.²⁸⁸ In this way, progressive scholars would leverage the little legal authority available to support the Brandeis Dichotomy.

III. THE AUTHENTIC HISTORICAL PRACTICE OF THE SUPREME COURT

A. *Our Methodology and Its Limits*

As we noted in the Introduction, to evaluate the Brandeis Myth, we used the list of cases compiled by the Congressional Research Service (the “CRS List”) of where the Supreme Court overruled itself. The CRS List, in turn, relied on previous efforts, including those by Justice Brandeis.²⁸⁹ We reviewed each case to determine what reasons the Court gave to justify its departure from the norm of stare decisis.

The CRS List includes cases in which the Court explicitly overruled itself, and those where the Court did not, but was (and is) commonly taken to have overruled itself.²⁹⁰ As we briefly note below, there are reasons to believe that those characterizations were wrong in some instances. This possible error rate does not include the failure to include in the CRS List those numerous cases where it is not clear whether and, if so, when the Court implicitly overruled itself.

Some of the cases on the CRS List did not purport to overrule prior precedents as Justice Brandeis claimed. For example, the *Belfast*,²⁹¹ which Justice Brandeis claimed had overruled “in part” the case of *Allen v. Newberry*,²⁹² did not overrule *Allen* but instead questioned and distinguished it. Writing the opinion of the Court, Justice Clifford noted that although there was some language in *Allen* that seemed to contradict the Court’s decision in the *Belfast*, that

287. See Shroder, *supra* note 210, at 29–31 (criticizing reliance on this movement and arguing against the Dichotomy).

288. Sullivan, *supra* note 232, at 373–74.

289. CONSTITUTION OF THE UNITED STATES OF AMERICA 2004, *supra* note 12, at 63; CONSTITUTION OF THE UNITED STATES OF AMERICA 2002, *supra* note 12, at 2385–99.

290. *Id.*

291. 74 U.S. (7 Wall.) 624 (1869).

292. 62 U.S. (21 How.) 244 (1859).

language was “not necessary to that decision,” and so there was no reason to overrule *Allen*.²⁹³

Justice Brandeis similarly treated the case of *Pollock v. Farmers’ Loan & Trust Co.*,²⁹⁴ which he claimed overruled *Hylton v. United States*.²⁹⁵ Although Chief Justice Fuller, who wrote the opinion of the Court, criticized *Hylton* as “badly reported,”²⁹⁶ he nevertheless agreed with the reasoning presented therein and concluded that “there [was] nothing in the *Hylton* case in conflict with” the Court’s approach in *Pollock*.²⁹⁷

In addition, in some of the cases on the CRS List, where the Court explicitly stated that it was overruling itself, scholars have plausibly argued that the Court was wrong. For example, Thomas Lee argued that the Court in *Hudson & Smith v. Guestier*²⁹⁸ did not overrule *Rose v. Hiemly*,²⁹⁹ as it purported to do.³⁰⁰ Lee noted that *Rose* had not decided the issue decided by *Hudson*, and that what was reported as the majority opinion in *Rose* did not, in fact, garner a majority of the Court.³⁰¹

Despite these limitations, the CRS List is a good basis upon which to test the Brandeis Myth because of its wide acceptance and because of its own basis in Brandeis’s dissent.

B. No Distinction Between Constitutional and Other Precedents

In Part II, we evaluated the Brandeis Myth by reviewing those instances where the Court or its members distinguished constitutional from other cases. We found that Justice Brandeis’s claim did not accurately represent the authentic historical tradition of the Supreme Court. In this Part we sketch out what the historical practice actually was.

293. *The Belfast*, 74 U.S. (7 Wall.) at 641. Justice Clifford was making reference to the then-prominent distinction between obiter dicta and the holding of a case: only the holding was considered binding in determining the precedential value of the case, whether for purposes of stare decisis or res judicata. RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 25 (4th ed. 1991). Justice Clifford asserted that applying the dicta from *Allen* would have been “incorrect” in the context of the *Belfast*, because the two cases involved different statutory provisions. *The Belfast*, 74 U.S. (7 Wall.) at 641.

294. 158 U.S. 601 (1895).

295. 3 U.S. (3 Dall.) 171 (1796).

296. *Pollock*, 158 U.S. at 626.

297. *Id.*

298. 10 U.S. (6 Cranch) 281 (1810).

299. 8 U.S. (4 Cranch) 241 (1807).

300. Lee, *supra* note 15, at 676–78.

301. *Id.*

From 1789 to 1932, when Justice Brandeis issued his famous dissent in *Burnet*, the Supreme Court is taken to have overruled its own precedent forty-one times in forty-two cases.³⁰² A careful analysis of these forty-two cases reveals that not once did the Court justify a decision to overrule prior precedent based on the Brandeis Dichotomy. Instead, the Court relied on six discrete justifications for overruling prior decisions.

The first justification for overruling was that the precedent had been undermined or contradicted by subsequent cases; this was the justification relied upon most frequently, relied on by the Court in twenty³⁰³ of the forty-two cases.³⁰⁴ The second justification for overruling, invoked in five cases, involved precedents that had been undermined by subsequent acts of Congress.³⁰⁵ A third, and related justification for overruling, invoked in three cases, was that the precedent had been undermined by the practice of the executive branch.³⁰⁶ The fourth justification for overruling, invoked in six cases, involved precedents that had been undermined by developments in state law.³⁰⁷ The fifth justification, invoked in three cases, involved

302. In one instance, the court overruled itself using two cases, *Boston Store v. Am. Gramophone Co.*, 246 U.S. 8, 25 (1918); *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 518 (1917), to overrule one earlier case, *Henry v. A.B. Dick Co.*, 224 U.S. 1 (1912).

303. Twenty is the number of cases in which the Court appeared to rely on this rationale as the predominant justification for overruling a precedent. Often, as we explain below, the Court utilized more than one category to justify its overruling.

304. *Gordon v. Ogden*, 28 U.S. (3 Pet.) 33, 34–35 (1830); *Kilbourn v. Thompson*, 103 U.S. 168, 199–200 (1881); *Kountze v. Omaha Hotel Co.*, 107 U.S. 378, 387–90 (1883); *Morgan v. United States*, 113 U.S. 476, 496–97 (1885); *Wabash St. Louis & Pac. Ry. v. Illinois*, 118 U.S. 557, 570 (1886); *Phila. & S. S.S. Co. v. Pennsylvania*, 122 U.S. 326, 345 (1887); *In re Ayers*, 123 U.S. 443 (1887); *Leloup v. Port of Mobile*, 127 U.S. 640, 647 (1888); *Leisy v. Hardin*, 135 U.S. 100, 118 (1890); *Brenham v. German Am. Bank*, 144 U.S. 173, 187 (1892); *Penn. R.R. Co. v. Towers*, 245 U.S. 6, 17 (1917); *Rosen v. United States*, 245 U.S. 467, 470–72 (1918); *Boston Store of Chi. v. Am. Graphophone Co.*, 246 U.S. 8, 25 (1918); *Terral v. Burke Constr. Co.*, 257 U.S. 529, 532–33 (1922); *Lee v. Chesapeake & Ohio Ry. Co.*, 260 U.S. 653, 659–60 (1923); *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203, 218 (1925); *Gleason v. Seaboard Air Line Ry. Co.*, 278 U.S. 349, 357 (1929); *Farmers Loan & Trust Co. v. Minnesota*, 280 U.S. 204, 209 (1930); *E. Ohio Gas Co. v. Tax Comm'n of Ohio*, 283 U.S. 465, 471–72 (1931); *Chi. & E. Ill. Ry. Co. v. Indus. Comm'n of Ill.*, 284 U.S. 296, 299 (1932).

305. *Louisville, Cincinnati, and Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 554–56 (1844); *United States v. Nice*, 241 U.S. 591, 601 (1916); *Rosen v. United States*, 245 U.S. 467, 471–72 (1918); *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 517–18 (1917); *Gleason v. Seaboard Air Line Ry.*, 278 U.S. 349, 357–58 (1929).

306. *Gazzam v. Lessee of Phillips*, 61 U.S. (20 How.) 372, 377 (1858); *United States v. Phelps*, 107 U.S. 320, 323 (1883); *United States v. Nice*, 241 U.S. 591, 601 (1916).

307. *Green v. Lessee of Neal*, 31 U.S. (6 Pet.) 291, 295, 301 (1832); *Suydam v. Williamson*, 65 U.S. (24 How.) 427, 432–35 (1861); *Mason v. Eldred*, 73 U.S. (6 Wall.) 231,

precedents premised on factual assumptions that had changed so significantly that following the prior decision would lead to a potentially disastrous result.³⁰⁸ The final justification, invoked in eight cases, is what we label “seriously wrong”; when the Court determined that it had so patently erred in the overruled case that it must overrule it.³⁰⁹ Only a precedent that fit into one or more of these six categories was considered ripe for overruling.³¹⁰

Before proceeding to illustrate the six categories, we will offer a short note on outliers. Two of the cases in the Court’s 143-year history are difficult to explain on traditional legal bases and instead are likely the result of nonlegal influences. The *Legal Tender Cases*, discussed above, are a prominent example of this. Subject to tremendous pressure from the public—numerous transactions were premised on the legality of paper money—and the ascendant Republican Congress, the Court reversed itself.³¹¹

1. Precedents Undermined by Subsequent Cases

The first case explicitly to justify overruling a prior decision because it had been undermined by subsequent cases was *Gordon v. Ogden*,³¹² which overruled *Wilson v. Daniel*.³¹³ The issue in *Gordon* was how to interpret the requirement of the twenty-second section of the Judiciary Act of 1789, which established an amount in controversy requirement of \$2,000 for the Supreme Court to exercise jurisdiction over cases on a writ of error.³¹⁴ The Court in *Wilson* had said that the

238–41 (1868); *County of Cass v. Johnston*, 95 U.S. 360, 368–69 (1877); *Fairfield v. County of Gallatin*, 100 U.S. 47, 54–55 (1879); *Roberts v. Lewis*, 153 U.S. 367, 377 (1894).

308. *The Genesee Chief*, 53 U.S. (12 How.) 443, 455–59 (1852); *The Belfast*, 74 U.S. (7 Wall.) 624, 641 (1869); *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 553–54 (1871).

309. *Hudson & Smith v. Guestier*, 10 U.S. (6 Cranch) 281, 285 (1810); *Trebilcock v. Wilson*, 79 U.S. (12 Wall.) 687, 695–99 (1872); *Hornbuckle v. Toombs*, 85 U.S. (18 Wall.) 648, 650 (1874); *Union Pac. Ry. Co. v. McShane*, 89 U.S. (22 Wall.) 444, 461–62 (1875); *Tilghman v. Proctor*, 102 U.S. 707, 708 (1881); *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601, 626 (1895); *Garland v. Washington*, 232 U.S. 642, 646–47 (1914); *Chesapeake & Ohio Ry. Co. v. Leitch*, 276 U.S. 429, 430 (1928).

310. As we pointed out earlier, these categories were not hermetically sealed. Quite the opposite, in fact: cases that fit into more than one category would be even more vulnerable to overruling. For example, *Rosen v. United States*, 245 U.S. 467 (1918), and *Gleason v. Seaboard Railway*, 278 U.S. 349 (1929), fit into both the first and the second categories: the cases they overruled were undermined both by subsequent cases and by subsequent acts of Congress. Thus, they were prime candidates for overruling. As a result, the cases listed in the six categories add up to more than forty-two.

311. This likely also occurred in *Trebilcock v. Wilson*, 79 U.S. (12 Wall.) 687 (1871), another legal tender case.

312. 28 U.S. (3 Pet.) 33 (1830).

313. 3 U.S. (3 Dall.) 401 (1798).

314. *Gordon*, 28 U.S. (3 Pet.) at 34.

amount was determined by “recur[ring] to the foundation of the original controversy—to the matter in dispute when the action was instituted.”³¹⁵ In other words, if the original complaint was for more than \$2,000, it did not matter if the ultimate judgment was for less than that amount—the Supreme Court could still exercise jurisdiction over the case.

The Court in *Gordon* criticized this approach because the reason for having the \$2,000 limitation was to avoid the “expense of litigation” in the Supreme Court.³¹⁶ Nevertheless, the Court recognized that the precedent in *Wilson* weighed heavily against this conclusion, and the Court would have followed *Wilson*, except that *Wilson* had been undermined by subsequent cases.

Although that case was decided by a divided court, and although we think, that upon the true construction of the twenty-second section of the judicial act, the jurisdiction of the court depends upon the sum in dispute between the parties as the case stands upon the writ of error, we should be much inclined to adhere to the decision in *Wilson vs. Daniel*, had not a contrary practice since prevailed.³¹⁷

The Court cited two cases³¹⁸ in particular that had explicitly undermined *Wilson*, and then noted that the “silent practice of the court” in many other cases also undermined *Wilson*.³¹⁹ Ultimately the Court concluded that *Wilson* had been sufficiently weakened as a precedent that it need no longer be followed, and the Court formally adopted the rule that the amount in controversy must be based on the judgment below, not the initial complaint.³²⁰

The Court also relied on this justification to overrule a prior precedent in *Kountze v. Omaha Hotel Co.*,³²¹ which overruled *Stafford v. Union Bank of Louisiana*.³²² *Stafford* had stood for the proposition that in order for an appeal to stay execution of an award for damages, the appellant must post a supersedeas bond equal to the amount of damages awarded.³²³ In *Kountze*, the Court attacked the

315. *Wilson*, 3 U.S. (3 Dall.) at 405.

316. *Gordon*, 28 U.S. (3 Pet.) at 35.

317. *Id.* at 34.

318. *Wise & Lynn v. The Columbian Tpk. Co.*, 11 U.S. (7 Cranch) 276 (1812); *Cooke v. Woodrow*, 9 U.S. (5 Cranch) 13 (1809).

319. *Gordon*, 28 U.S. (3 Pet.) at 35.

320. *Id.* at 34–35.

321. 107 U.S. 378 (1883).

322. 58 U.S. (17 How.) 275 (1855).

323. *Id.* at 280.

reasoning of the rule in *Stafford*, noting that “the appeal bond is not intended as security for either the amount of the decree or the interest accruing pending the appeal, but for such damages as may arise from the delay incident to the appeal.”³²⁴ Despite this, the Court still would have followed the precedent except that the actual practice of judges differed from the rule in *Stafford*: in cases involving large judgments, a smaller amount in bond had been deemed sufficient to stay the execution of the judgment.³²⁵ In the end, the Court determined that “[s]ubsequent decisions have undoubtedly modified the rule followed in this case [*Stafford*], and, indeed, have overruled it.”³²⁶

The language embraced by the Court in *Kountze* to justify overruling *Stafford* became the most frequently invoked justification for overruling precedent. Indeed, the recitation that a precedent had been undermined by subsequent cases became almost talismanic. To cite just a few examples, in *Morgan v. United States*,³²⁷ the Court overruled its precedent in *Texas v. White*,³²⁸ which had held that states could retroactively limit the negotiability of state bonds, because “the original decision of the court . . . ha[d] been questioned and limited in important particulars in the subsequent cases involving the same questions.”³²⁹ Similarly, the Court in *Leloup v. Port of Mobile*³³⁰ overruled *Osborne v. Mobile*³³¹ because it had been undermined by “[a] great number and variety of cases involving the commercial power of Congress” evaluated by the Court over the preceding fifteen years.³³² In *Brenham v. German American Bank*,³³³ the Court stated that both *Rogers v. Burlington*³³⁴ and *Mitchell v. Burlington*³³⁵ “must [be] regard[ed] . . . as overruled . . . by later cases in this court.”³³⁶ In all of these overruling cases, the Court relied on a litany of cases that—according to the Court—questioned, limited, or distinguished the precedent it ultimately overruled.

324. *Kountze*, 107 U.S. at 390.

325. *Id.* at 387–88. One case had permitted a bond of \$1,000 to stay a judgment of \$25,000; another case had permitted a bond of \$225,000 to stay an award of \$600,000.

326. *Id.* at 387.

327. 113 U.S. 476 (1885).

328. 74 U.S. (7 Wall.) 700 (1869).

329. *Morgan*, 113 U.S. at 496.

330. 127 U.S. 640 (1888).

331. 83 U.S. (16 Wall.) 479 (1873).

332. *Leloup*, 127 U.S. at 648.

333. 144 U.S. 173 (1892).

334. 70 U.S. (3 Wall.) 654 (1866).

335. 71 U.S. (4 Wall.) 270 (1867).

336. *Brenham*, 144 U.S. at 187.

Usually the Court justified overruling a prior decision that had been undermined by subsequent cases only after it had been questioned on multiple occasions. This was not an ironclad rule, however, and on occasion the Court overruled a prior decision that conflicted with only a relatively small number of cases. For example, in *Rosen v. United States*,³³⁷ the Court overruled *United States v. Reid*³³⁸ because *Reid* conflicted with two other cases.³³⁹

Similarly, in the case of *East Ohio Gas Co. v. Tax Commission*,³⁴⁰ the Court overruled its prior decision in *Pennsylvania Gas Co. v. Public Service Commission*.³⁴¹ *East Ohio Gas Co.* involved the transportation of natural gas across state lines and focused specifically on the issue of where to draw the line between inter- and intrastate commerce. The rule expressed in *Pennsylvania Gas Co.* was that “the entire movement of the gas was interstate commerce, [and] in the absence of contrary regulation by the Congress, the state commission had jurisdiction to prescribe [the] rates”—in effect giving the New York Gas Commission the authority to set the rates charged to consumers in Pennsylvania.³⁴²

The rule in *Pennsylvania Gas Co.* conflicted with the rule developed in two other cases, however. In *Public Utilities Commission v. Landon*,³⁴³ a case that preceded *Pennsylvania Gas Co.*, the Court declared that “[i]nterstate movement ended when the gas passed into local mains.”³⁴⁴ Five years later, the Court expanded on this rule in *Missouri v. Kansas Gas Co.*,³⁴⁵ in which it declared that “[w]ith the delivery of the gas [transported from one state to another] to the distributing companies . . . the interstate movement ends.”³⁴⁶ When the Court heard *East Ohio Gas Co.*, it had to consider not one precedent but three, with one contradicting the other two. Thus, the decision to overrule *Pennsylvania Gas Co.* was not based on its status as a “constitutional” precedent, but rather on the fact that the rule it

337. 245 U.S. 467 (1918).

338. 53 U.S. (12 How.) 361 (1851).

339. The two cases were *Logan v. United States*, 144 U.S. 263 (1892), and *Benson v. United States*, 146 U.S. 325 (1892). But, as mentioned above, *Rosen* also relied on the fact that *Reid* had been undermined by subsequent congressional legislation.

340. 283 U.S. 465 (1931).

341. 252 U.S. 23 (1919).

342. *E. Ohio Gas Co.*, 283 U.S. at 471.

343. 249 U.S. 236 (1919).

344. *Id.* at 245.

345. 265 U.S. 298 (1924).

346. *Id.* at 308.

articulated was an outlier in the development of inter- and intrastate commerce decisions that had been undermined by other cases.

This pattern is repeated in several other cases relied on by Justice Brandeis. In *Terral v. Burke Construction Co.*,³⁴⁷ the Court overruled *Doyle v. Continental Insurance Co.*³⁴⁸ and *Security Mutual Life Insurance Co. v. Prewitt*,³⁴⁹ because those cases conflicted with the principle established by more recent decisions.³⁵⁰ The Court in *Pennsylvania Railroad Co. v. Towers*³⁵¹ overruled *Lake Shore & Michigan Southern Railway Co. v. Smith*³⁵² because the legal theory upon which *Lake Shore* was decided had been undermined by several other cases.³⁵³ The Court overruled *Texas v. White*³⁵⁴ because it had been “questioned and limited in important particulars in the subsequent cases involving the same questions.”³⁵⁵ Likewise, *Baltic Mining Co. v. Massachusetts*³⁵⁶ was overruled because it “conflict[ed] with conclusions reached in later opinions.”³⁵⁷ In case after case, the pattern that emerges is that the Court reevaluated its past decisions, not because those decisions involved constitutional issues, but simply because they had been undermined by subsequent cases.

2. Precedents Undermined by Acts of Congress

The second justification for overruling precedents was that those precedents had been undermined by legislation from Congress. The first time the Court relied on this justification was in *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*,³⁵⁸ where the Court overruled *Commercial & Rail Road Bank of Vicksburg v. Slocomb*³⁵⁹ because Congress had enacted new legislation that “was passed exclusively with an intent to rid the courts of the decision in [*Slocomb*.]”³⁶⁰

347. 257 U.S. 529 (1922).

348. 94 U.S. 535 (1877).

349. 202 U.S. 246 (1906).

350. *Terral*, 257 U.S. at 532–33.

351. 245 U.S. 6 (1917).

352. 173 U.S. 684 (1899).

353. *Towers*, 245 U.S. at 17.

354. 74 U.S. (7 Wall.) 700 (1869).

355. *Morgan v. United States*, 113 U.S. 476, 496 (1885).

356. 231 U.S. 68 (1913).

357. *Alpha Cement Co. v. Massachusetts*, 268 U.S. 203, 218 (1925).

358. 43 U.S. (2 How.) 497 (1844).

359. 39 U.S. (14 Pet.) 60 (1840).

360. *Letson*, 43 U.S. (2 How.) at 556.

The Court offered a similar justification in the case of *United States v. Nice*,³⁶¹ which overruled *In re Heff*.³⁶² *In re Heff* involved the interpretation of the General Allotment Act of 1887. Specifically, the Court ruled that section six of that Act conferred citizenship upon Native Americans who had received allotments of tribal reservation land.³⁶³ After reexamining this issue, the Court concluded that its construction of the statute had been effectively undermined by “many later enactments clearly reflecting what was intended by Congress.”³⁶⁴

3. Precedents Undermined by Executive Action

The third justification, similar to the second, involved precedents that had been undermined by the practice of the executive branch (of the federal government). In *United States v. Phelps*,³⁶⁵ for example, the Court overruled *Shelton v. Collector*³⁶⁶ because the practice of the Treasury Department cut against it. In *Phelps*, the Court evaluated the claim of a foreign plaintiff who sought to recover an abatement of duties for damaged goods. Under the rule in *Shelton*, an importer would have to apply for a damage allowance, and thus the damages would have to be ascertained before the goods were entered and the duties paid.³⁶⁷ However, it was difficult, if not impossible, to ascertain the degree of damage before the cargo could be unloaded and inspected—which could happen only after the goods were entered and the duties paid. Ultimately, the Court ruled that the correct order was entry, payment of duties, permit, and landing, and then an allowance for damage.³⁶⁸ The Court justified overruling *Shelton* because “[t]he practice of the [T]reasury [D]epartment and of the collector has evidently been contrary to [*Shelton*]. . . . This practice, it

361. 241 U.S. 591 (1916).

362. 197 U.S. 488 (1905).

363. *Id.* at 503.

364. *Nice*, 241 U.S. at 601.

365. 107 U.S. 320 (1883). The Supreme Court did not actually include its reasoning in its opinion in this case. Instead, the Court tersely stated, “The subject is so fully and carefully considered in the opinion of the court below, that we deem it unnecessary to do more than to refer to the report of the case” *Id.* at 323 (citing *United States v. Phelps*, 27 F. Cas. 523 (1879)). This case, then, can more accurately be characterized as an opinion by Judge Blatchfield, of the United States Circuit Court for the Southern District of New York, that offered persuasive reasons for why *Shelton* should be overruled, reasons that were eventually adopted by the Supreme Court without exposition. To avoid awkward grammatical constructions, however, we imputed the reasoning to the Court itself.

366. 72 U.S. (5 Wall.) 113, 118 (1867).

367. *United States v. Phelps*, 27 F. Cas. 523, 526 (1879).

368. *Id.* at 524–26.

is fair to assume, has obtained because the [T]reasury [D]epartment did not regard that decision as disposing of the question finally.”³⁶⁹

4. Precedents Undermined by Developments in State Law

The fourth justification for overruling involved precedents that had been undermined by developments in state law, which occurred when the Court had ruled on a matter involving interpretation of state law where the state supreme court later differently interpreted the state law or the state legislature modified the state law.³⁷⁰ As the Court stated in *Green v. Lessee of Neal*,³⁷¹ “in cases depending on the laws of a particular State, [federal courts will] adopt the construction which the courts of the State have given to those laws.”³⁷² A decision “by the highest judicial tribunal of a State” would be “considered as final” by the Supreme Court in interpreting that state’s laws.³⁷³ Thus, the Court in *Green* overruled its own precedent in *Patton’s Lessee v. Easton*,³⁷⁴ in which the Court had interpreted the statute of limitations of Tennessee,³⁷⁵ because the Tennessee Supreme Court had subsequently interpreted the statute of limitations differently.³⁷⁶

On other occasions, the Supreme Court overruled its precedents because they conflicted with both state legislative action and state supreme court cases. *Mason v. Eldred*,³⁷⁷ for example, overruled *Sheehy v. Mandeville*³⁷⁸ because *Sheehy* had been disapproved by several state supreme courts and several states had enacted statutes to circumvent it.³⁷⁹

369. *Id.* at 526.

370. See Blaustein & Field, *supra* note 36, at 169 (recognizing this rationale).

371. 31 U.S. (6 Pet.) 291 (1832).

372. *Id.* at 297 (quoting *Elmandorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 159 (1825)).

373. *Id.* at 298.

374. 14 U.S. (1 Wheat.) 476 (1816).

375. *Id.* at 478.

376. *Green*, 31 U.S. (6 Pet.) at 301. In one sense, in cases in which the Supreme Court ostensibly overrules its own precedent because that precedent does not comport with subsequent cases by a state supreme court, it may not be accurate to characterize these as overrulings at all. It may be more accurate to think of these as cases in which the Court merely applies the state law as it finds it. In this sense, cases where the Supreme Court interprets state law would have very little precedential value, as they would turn on whatever the current status of the state’s law was and not the Court’s own precedent. See Lee, *supra* note 15, at 678 (arguing that when the Supreme Court decides to overrule its precedents because they conflict with subsequently decided state supreme court cases, this decision should not be considered an overruling).

377. 73 U.S. (6 Wall.) 231 (1868).

378. 10 U.S. (6 Cr.) 253 (1810).

379. *Mason*, 73 U.S. (6 Wall.) at 236–39.

5. Precedents Undermined by Significant Changes in Circumstances

Fifth, the Court would occasionally overrule a precedent if that precedent was based on factual assumptions that had changed so significantly that following the prior decision would lead to a potentially disastrous result. This fifth justification, perhaps because it was somewhat less narrow than the other categories, was only rarely invoked. One example of this justification is the *Legal Tender Cases*, discussed in Part II.A.³⁸⁰

Another example is the case of the *Genessee Chief*,³⁸¹ which overruled both the *Thomas Jefferson*³⁸² and *The Orleans v. Phoebus*.³⁸³ The issue in all three cases was the extent to which navigable rivers fell within the jurisdiction of the federal courts in maritime cases. The old rule was that “the jurisdiction of the courts of admiralty of the United States [was] declared to be limited to the ebb and flow of the tide.”³⁸⁴ The practical effect of this rule was to exclude jurisdiction over cases involving “contracts for maritime services when made on land” and “torts and collisions on a tide-water river, if they took place in the body of a country.”³⁸⁵ This rule may have been acceptable when it was first promulgated in 1825, a time “when the commerce on the rivers of the west and on the lakes was in its infancy,” but, with the advent of steam technology, the waterways became much more heavily trafficked, and such a rule would prove detrimental to economic growth.³⁸⁶ The Court concluded:

It is evident that a definition that would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide. And certainly there can be no reason for admiralty power over a public tide-water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters; and we think are within the grant of

380. See Blaustein & Field, *supra* note 36, at 170 (finding that the *Legal Tender Cases* were overruled, in part, because of the great hardship caused by *Hepburn*).

381. 53 U.S. (12 How.) 443 (1851).

382. 23 U.S. (10 Wheat.) 428 (1825).

383. 36 U.S. (11 Pet.) 175 (1837); see also Blaustein & Field, *supra* note 36, at 172 (finding that the *Thomas Jefferson* was overruled, in part, because of the great hardship it caused).

384. *The Genessee Chief*, 53 U.S. (12 How.) at 455–56 (1851).

385. *Id.* at 456.

386. *Id.*

admiralty and maritime jurisdiction in the Constitution of the United States.³⁸⁷

6. Patently Erroneous Precedents

The sixth and last category includes those cases in which the Supreme Court overruled previous cases giving as its reason that the prior case was patently erroneous. Perhaps the best example of this is *Hornbuckle v. Toombs*,³⁸⁸ decided in 1874. There, the Court addressed the meaning of a statute establishing territorial courts and governing their proceedings.³⁸⁹ The Court ruled that the territorial legislatures were empowered by the statute to establish their courts' procedures.³⁹⁰ In doing so, the Court rejected two prior cases that had come to a different conclusion.³⁹¹ The Court canvassed the merits of the previous cases and engaged in an extended discussion about why those cases were incorrect.³⁹² The Court did not appeal to any justification other than the patently erroneous nature of the overruled cases.

Our findings confirm Caleb Nelson's own findings that the Supreme Court's presumption against overruling its own precedent is overcome when the precedent is "demonstrably erroneous."³⁹³ Nelson argued that today's "conventional wisdom" is that "a purported demonstration of error is not enough to justify overruling a past decision."³⁹⁴ However, according to Nelson, courts in the nineteenth century overruled cases that were demonstrably erroneous.³⁹⁵

7. Summary

In sum, the Supreme Court overruled its prior decisions in a number of circumstances, but it always offered reasons for doing so. It was never enough that the prior case was simply erroneous; instead, the Court justified the decision to overrule by showing that the precedent had been undermined in some way, or that it was patently erroneous. If the Court could not articulate a compelling justification

387. *Id.* at 457.

388. 85 U.S. (18 Wall.) 648 (1874).

389. *Id.* at 652.

390. *Id.* at 653.

391. *Id.* at 653–57.

392. *Id.*

393. Nelson, *supra* note 13, at 1.

394. *Id.* at 2.

395. *Id.* at 1 n.1, 8–48.

for overruling the prior decision, it would be followed as binding precedent. This standard was applied equally for all types of cases, whether they involved issues of constitutional interpretation or not.

C. *No Hint of the Brandeis Dichotomy*

Our review of the forty-two cases on the CRS List prior to Brandeis's dissent in *Burnet* reveals that no case explicitly relied on the Brandeis Dichotomy. Instead, the Court explicitly relied on the six factors discussed above. If the Brandeis Myth is correct, then why did the Court never employ the Brandeis Dichotomy? This absence is especially telling given the repeated—and explicit—invocation of the Brandeis Dichotomy post-*Burnet*, and by a few isolated Justices pre-*Burnet*.

While not dispositive,³⁹⁶ it is suggestive that more overruled cases involved federal statutory (or common law) issues than federal constitutional issues.³⁹⁷ Stated differently, contrary to Brandeis's claim that the Supreme Court more readily overruled constitutional cases than statutory cases, the Supreme Court had overruled statutory cases more frequently. Thus, both on the rhetorical surface of the Court's legal practice and the substance of its practice, the Brandeis Myth does not fit the historical practice of the Supreme Court.

The absence of the Brandeis Dichotomy in the Court's nineteenth-century practice also fits with the original meaning of Article III, which made no distinction between constitutional and statutory precedents.³⁹⁸ Instead, all federal court precedent was entitled to significant respect.

396. It is not dispositive because we do not have complete data on the relative number of statutory and constitutional cases decided by the Supreme Court during this period. However, the evidence that does exist suggests that, especially as the nineteenth century progressed, the Court heard a substantial number of constitutional challenges. See Keith E. Whittington, *Congress Before the Lochner Court*, 85 B.U. L. REV. 821, 831 (2005) (finding that the Court heard approximately 158 constitutional challenges to federal statutes between 1890 and 1919); Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 294–95 (1913) (finding that the Court heard 560 constitutional challenges under the Fourteenth Amendment between 1887 and 1911); Charles Warren, *A Bulwark to the State Police Power—the United States Supreme Court*, 13 COLUM. L. REV. 667, 695 (1913) (finding that the Court heard 302 constitutional cases under the Interstate Commerce and Contracts Clauses during a similar period).

397. The Court overruled prior cases involving federal statutes on eighteen occasions, two cases involving federal common law, and one involving international law, and on fifteen occasions the Court overruled cases involving federal constitutional issues. The remaining cases involved state law issues.

398. See Strang, *supra* note 130, at 467–71.

D. Note on the Role of Property and Contract Interests

While not one of the reasons given by the Court to justify overruling a precedent, the existence of reliance interests built up around a precedent—especially if those interests took the form of property and contract interests—provided a reason for the Court to follow or affirm a precedent. As many scholars have noted, the existence of property and contract reliance interests is one of the traditional factors that American courts have taken into account when assessing the authority of a precedent.³⁹⁹ Cases and commentators in the nineteenth century confirm this.⁴⁰⁰

The existence of this factor further undermines Brandeis's claims in *Burnet* in which he failed to even note the fact that the Court had often taken this factor into account in constitutional cases as in other non-constitutional cases.

CONCLUSION

In this Article, we argued that the Brandeis Dichotomy—that Supreme Court decisions involving issues of constitutional interpretation should be accorded less weight for purposes of stare decisis—was not the historical practice of the Court. The two-tiered theory of precedent is actually a creation of the twentieth century. We argued that the authentic historical practice of the Supreme Court was to treat precedents involving constitutional interpretation the same as other types of precedents. The Court would overrule precedents only when those precedents had been undermined by subsequent cases, subsequent congressional action, the practice of the executive branch of the federal government, an authoritative interpretation of state law, a radical change in the circumstances undergirding the prior case, or on the rare occasion that the Court had seriously erred in its previous construction of the law. In all other cases, if the Court could not articulate a justification for overruling, the prior decision would be treated as binding precedent for purposes of stare decisis.

Our conclusion undermines one of the few “articles of faith” of our constitutional legal practice. The Brandeis Dichotomy, stripped of its historical pedigree, loses one of its most powerful supports. What remains after the loss of the Brandeis Myth is the naked

399. Healy, *supra* note 189, at 69; Lee, *supra* note 15, at 688; Price, *supra* note 130, at 98.

400. *Marshall v. Balt. & Ohio R.R. Co.*, 57 U.S. (16 How.) 314, 325 (1853); *The Genesee Chief*, 53 U.S. (12 How.) 443, 458 (1851); COOLEY, *supra* note 117, at *52-*53.

normative claim that the Supreme Court should give less precedential weight to constitutional precedents. This sole remaining claim is much less powerful, as Justice Brandeis himself recognized since he used, as his first argument, the Brandeis Myth. Without the Brandeis Myth, Brandeis appears more like a politician seeking to benefit his political goals.

Of course, it may be the case that the normative arguments for the Brandeis Dichotomy sufficiently support it, and we do not contest those arguments here. However, the powerful hold of the Brandeis Myth on our legal practice—despite the lack of evidence supporting it—suggests that the normative arguments alone are not sufficiently robust. And, without sufficient support, the Brandeis Dichotomy—along with the dramatic number of Supreme Court reversals it has been used to justify—becomes suspect and open to rejection.

APPENDIX

Justice Brandeis may have been the first person to compile a list of cases in which the Supreme Court overruled its prior decisions, but he has been frequently imitated.⁴⁰¹ The following compilation is originally from the Congressional Research Service.⁴⁰² We present this list here for the convenience of the reader, but remind the reader of our reservations.⁴⁰³

	Overruling Case	Overruled Case(s)
1	Hudson v. Guestier, 10 U.S. (6 Cranch) 281, 285 (1810)	Rose v. Himely, 8 U.S. (4 Cranch) 241 (1808)
2	Gordon v. Ogden, 28 U.S. (3 Pet.) 33, 34 (1830)	Wilson v. Daniel, 3 U.S. (3 Dall.) 401 (1798)
3	Green v. Lessee of Neal, 31 U.S. (6 Pet.) 291 (1832)	Patton's Lessee v. Easton, 14 U.S. (1 Wheat.) 476 (1816)
4	Louisville, Cincinnati, and Charleston R.R. Co. v. Letson, 43 U.S. (2 How.) 497, 554–56 (1844)	Commercial & R.R. Bank of Vicksburg v. Slocomb, 39 U.S. (14 Pet.) 60 (1840); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806); and qualifying, Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61 (1809)

401. See, e.g., Blaustein & Field, *supra* note 36, at 184–94; Douglas, *supra* note 35, at 756–58; Maltz, *supra* note 19, at 494–96.

402. CONSTITUTION OF THE UNITED STATES OF AMERICA 2004, *supra* note 12, at 63; CONSTITUTION OF THE UNITED STATES OF AMERICA 2002, *supra* note 12, at 2385–99.

403. See *supra* Part III.

	Overruling Case	Overruled Case(s)
5	The Genessee Chief, 53 U.S. (12 How.) 443, 456 (1851)	The Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825); The Orleans v. Phoebus, 36 U.S. (11 Pet.) 175 (1837)
6	Gazzam v. Lessee of Phillips, 61 U.S. (20 How.) 372, 377-78 (1858)	Brown's Lessee v. Clements, 44 U.S. (3 How.) 650 (1845)
7	Suydam v. Williamson, 65 U.S. (24 How.) 427 (1861)	Williamson v. Berry, 49 U.S. (8 How.) 495 (1850); Williamson v. Irish Presbyterian Congregation, 49 U.S. (8 How.) 565 (1850); Williamson v. Ball, 49 U.S. (8 How.) 566 (1850)
8	Mason v. Eldred, 73 U.S. (6 Wall.) 231, 238 (1868)	Sheehy v. Mandeville, 10 U.S. (6 Cranch) 253 (1810)
9	The Belfast, 74 U.S. (7 Wall.) 624, 641 (1869)	Allen v. Newberry, 62 U.S. (21 How.) 244 (1858) (in part)
10	Knox v. Lee (The Legal Tender Cases), 79 U.S. (12 Wall.) 457, 553 (1871)	Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870)
11	Trebilcock v. Wilson, 79 U.S. (12 Wall.) 687 (1872)	Roosevelt v. Meyer, 68 U.S. (1 Wall.) 512 (1863)
12	Hornbuckle v. Toombs, 85 U.S. (18 Wall.) 648, 652-53 (1874)	Noonan v. Lee, 67 U.S. (2 Black) 499 (1863); Orchard v. Hughes, 68 U.S. (1 Wall.) 73, 77 (1864); Dunphy v. Kleinsmith, 78 U.S. (11 Wall.) 610 (1871)
13	Union Pac. Ry. Co. v. McShane, 89 U.S. (22 Wall.) 444, 462 (1874)	Kansas Pac. Ry. Co. v. Prescott, 83 U.S. (16 Wall.) 603 (1873) (in part)
14	County of Cass v. Johnston, 95 U.S. 360 (1877)	Harshman v. Bates County, 92 U.S. 569 (1875)
15	Fairfield v. County of Gallatin, 100 U.S. 47 (1879)	Town of Concord v. Portsmouth Savings Bank, 92 U.S. 625 (1875)
16	Tilghman v. Proctor, 102 U.S. 707 (1880)	Mitchell v. Tilghman, 86 U.S. (19 Wall.) 287 (1873)
17	Kilbourn v. Thompson, 103 U.S. 168, 192-200 (1881)	Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821)
18	United States v. Phelps, 107 U.S. 320, 323 (1883)	Shelton v. Collector, 72 U.S. (5 Wall.) 113 (1867)

	Overruling Case	Overruled Case(s)
19	Kountze v. Omaha Hotel Co., 107 U.S. 378, 387 (1883)	Stafford v. Union Bank of La., 57 U.S. (16 How.) 135 (1853)
20	Morgan v. United States, 113 U.S. 476, 496 (1885)	Texas v. White, 74 U.S. (7 Wall.) 700 (1869)
21	Wabash St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557 (1886)	Peik v. Chi. & Nw. Ry., 94 U.S. 164 (1877) ("substantially though not expressly overruled")
22	Philadelphia & S. Steamship Co. v. Pennsylvania, 122 U.S. 326 (1887)	State Tax on Ry. Gross Receipts, 82 U.S. (15 Wall.) 284 (1873) ("basic grounds of decision repudiated")
23	In re Ayers, 123 U.S. 443 (1887)	Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738 (1824)
24	Leloup v. Port of Mobile, 127 U.S. 640, 647 (1888)	Osborne v. Mobile, 83 U.S. (16 Wall.) 479 (1873)
25	Leisy v. Hardin, 135 U.S. 100, 118 (1890)	Peirce v. New Hampshire, 46 U.S. (5 How.) 504 (1847)
26	Brenham v. German American Bank, 144 U.S. 173, 187 (1892)	Rogers v. Burlington, 70 U.S. (3 Wall.) 654 (1866); Mitchell v. Burlington, 71 U.S. (4 Wall.) 270 (1867)
27	Roberts v. Lewis, 153 U.S. 367, 377 (1894)	Giles v. Little, 104 U.S. 291 (1881)
28	Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895)	Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796)
29	Garland v. Washington, 232 U.S. 642, 646-47 (1914)	Crain v. United States, 162 U.S. 625 (1896)
30	United States v. Nice, 241 U.S. 591, 601 (1916)	Matter of Heff, 197 U.S. 488 (1905)
31	Pennsylvania R.R. Co. v. Towers, 245 U.S. 6, 17 (1917)	Lake Shore & Mich. S. Ry. Co. v. Smith, 173 U.S. 684 (1899) (in part)
32	Rosen v. United States, 245 U.S. 467, 470 (1918)	United States v. Reid, 53 U.S. (12 How.) 361 (1851)
33	Boston Store v. Am. Graphophone Co., 246 U.S. 8, 25 (1918); Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 518 (1917)	Henry v. Dick Co., 224 U.S. 1 (1912)

	Overruling Case	Overruled Case(s)
34	Terrel v. Burke Constr. Co., 257 U.S. 529, 533 (1922)	Doyle v. Cont'l Ins. Co., 94 U.S. 535 (1877); Security Mut. Life Ins. Co. v. Prewitt, 202 U.S. 246 (1906)
35	Lee v. Chesapeake & Ohio Ry., 260 U.S. 653, 659 (1923)	Ex parte Wisner, 203 U.S. 449 (1906); qualifying In re Moore, 209 U.S. 490 (1908)
36	Alpha Cement Co. v. Massachusetts, 268 U.S. 203, 218 (1925)	Baltic Mining Co. v. Massachusetts, 231 U.S. 68 (1913)
37	Chesapeake & Ohio Ry. Co. v. Leitch, 276 U.S. 429 (1928) (reh'g)	Chesapeake & Ohio Ry. Co. v. Leitch, 275 U.S. 507 (1927)
38	Gleason v. Seaboard Air Line Ry. Co., 278 U.S. 349, 357 (1929)	Friedlander v. Texas & Pac. Ry. Co., 130 U.S. 416 (1889) (in part)
39	Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204, 209 (1930)	Blackstone v. Miller, 188 U.S. 189 (1903)
40	E. Ohio Gas Co. v. Tax Comm'n, 283 U.S. 465, 472 (1931)	Pennsylvania Gas Co. v. Public Serv. Comm'n, 252 U.S. 23 (1920)
41	Chicago & E. Ill. R.R. Co. v. Industrial Comm'n, 284 U.S. 296 (1932)	Erie R.R. v. Collins 253 U.S. 77 (1920); Erie R.R. v. Szary, 253 U.S. 86 (1920)