# EXPANDING STARE DECISIS: THE ROLE OF PRECEDENT IN THE UNFOLDING DIALECTIC OF *BRADY V. MARYLAND*

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*Does stare decisis constrain the expansion of constitutional doctrine? Does existing precedent preclude the Supreme Court from expanding a criminal defendant's right to exculpatory evidence? While commentators frequently clash on when stare decisis should prevent the Court from overruling its own precedents, the question of when fidelity to precedent should inhibit doctrinal expansion is surprisingly undertheorized. This Article begins to fill this gap through an in-depth case study of stare decisis and the expansion of criminal due process doctrine.*

*The Article analyzes the longstanding constitutional dialectic between procedural and substantive schools of criminal due process. Focus is on* Brady v. Maryland*—the Court's landmark 1963 decision that requires prosecutors to disclose favorable evidence to criminal defendants. Last Term, Justice Scalia argued in his* Connick v. Thompson *concurrence that* Brady*'s scope does not extend to prosecutorial disclosure of untested evidence that could prove innocence. Though coherent, Justice Scalia's argument depends on a particularly formal approach to stare decisis and a procedural view of due process. His argument against expanding* Brady *can be contested by what I term a "justificatory" approach to stare decisis and a competing substantive view of due process. This recent conflict between*

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*formal and justificatory stare decisis approaches and competing due process schools reflects a deeper metadoctrinal pattern.*

*Based on a close reading of over a century of caselaw, this Article demonstrates how successful justificatory stare decisis arguments have facilitated expansion of criminal due process while formal stare decisis arguments have constrained doctrinal growth. Building on prior work, I illustrate the* Brady *dialectic and its relationship to stare decisis through graphical "opinion maps" that chart rival lines of majority, concurring, and dissenting opinions. Mapping this key due process territory offers insight on the deeper conflict between substance and procedure in due process jurisprudence as well as a generalizable method for studying the impact of stare decisis on constitutional adjudication.*

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## I. INTRODUCTION

Despite his fervent assertions of innocence, John Thompson faced execution for murder.[1] One month before his appointed date to die, defense investigators uncovered a laboratory report withheld by prosecutors in Orleans Parish before Thompson's 1985 trial.[2] Based on the report, Thompson conducted forensic blood testing that first exonerated him of an armed robbery and then led to his acquittal of the capital murder charges.[3] Prosecutorial suppression of the laboratory report had nearly cost Thompson his life, so upon his release, he sued the Orleans Parish District Attorney for violating his constitutional rights.[4] A federal jury awarded him $14 million in damages.[5] After the Fifth Circuit upheld the verdict, the Supreme Court—by a 5–4 margin—took it away.[6] The apparent callousness of the majority's decision in *Connick v. Thompson*[7] grabbed headlines and provoked sharp dissent.[8]

Behind these compelling facts lies a rather technical legal issue. Thompson had filed suit under the federal civil rights statute, 42 U.S.C. § 1983. He argued that the District Attorney bore responsibility for the suppressed laboratory report because he had failed to properly train Orleans Parish prosecutors in the law of *Brady v. Maryland*—the Supreme Court's landmark 1963 decision that requires prosecutors to disclose favorable evidence before trial.[9] In an opinion by Justice Thomas, the majority held that the single

1. Connick v. Thompson, 131 S. Ct. 1350, 1356 (2011).

2. *Id.* The laboratory report revealed that prosecutors had ordered testing on pants splattered with the blood of the perpetrator of an armed robbery blamed on Thompson. The real perpetrator had type B blood. Prosecutors never disclosed the report nor existence of the pants to Thompson. Neither did they order forensic testing of Thompson's blood.

3. *Id.* at 1356–57. Thompson had type O blood, proving he was not the armed robber. With the robbery conviction vacated, Thompson was finally able to testify in his own defense to the murder charges and demonstrate to his jury's satisfaction that another man had committed the crime.

4. *Id.* at 1357.

5. *Id.*

6. *Id.* at 1358, 1366 (*rev'g* 578 F.3d 293 (5th Cir. 2009)).

7. 131 S. Ct. 1350 (2011).

8. *See* Dahlia Lithwick, *Cruel but Not Unusual*, SLATE (Apr. 1, 2011, 7:43 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/04/cruel_but_not_unusual.html (calling Justice Thomas's opinion "one of the meanest Supreme Court decisions ever").

9. *See Thompson*, 131 S. Ct. at 1355 (citing Brady v. Maryland, 373 U.S. 83, 83 (1963)).

*Brady* violation that occurred in Thompson's case—suppression of the lab report—did not provide an adequate basis for failure-to-train liability under § 1983.[10] In dissent, Justice Ginsburg vociferously disputed the single-*Brady*-violation characterization of the trial record and argued that the jury had concluded that "conceded, long-concealed prosecutorial transgressions were neither isolated nor atypical."[11]

While commentators have naturally focused on *Thompson*'s effect upon civil rights law, this focus overlooks a potentially more explosive consequence on criminal due process doctrine. In his separate concurrence, Justice Scalia mounted an attack that purported to transcend *Thompson*'s failure-to-train posture and address prosecutors' primary constitutional obligations under *Brady v. Maryland*. Here Justice Scalia zeroed in on the dissent's assertion—uncontested by the parties in the case—that *Brady* requires the State to disclose "physical evidence that, which if tested, could establish the innocence of the person who is charged."[12] Justice Scalia railed against this asserted *Brady* obligation "as a *sub silentio* expansion of the substantive law of *Brady*."[13] Justice Scalia then proclaimed, "If any of our cases establishes such an obligation, I have never read it, and the dissent does not cite it," and he concluded that any "right to untested evidence" lies at the "very frontier of our *Brady* jurisprudence."[14]

The implications of Justice Scalia's claim are deadly serious. Taken literally, his logic dictates that John Thompson never had a right to discover the evidence that saved him from the gallows.[15] This should trigger serious due process concerns. Though not as

10. *Id.* at 1356–66.

11. *Id.* at 1370 (Ginsburg, J., dissenting).

12. *Id.* at 1368–69 (Scalia, J., concurring) (citing *id.* at 1380, n.13 (Ginsburg, J., dissenting) (quoting Transcript of Oral Argument at 34, *Thompson*, 131 S. Ct. 1350 (2011) (No. 09-571))).

13. *Id.* at 1369 (Scalia, J., concurring).

14. *Id.*

15. Though Justice Scalia did not argue against Thompson's exoneration, he clearly did argue that *Brady* doctrine imposes no obligation upon prosecutors to disclose evidence—like the suppressed lab report in Thompson's case—"whose inculpatory or exculpatory character is unknown." *Thompson*, 131 S. Ct. at 1369 (Scalia, J., concurring). While Justice Scalia apparently conceded that Assistant District Attorney Gerry Deegan committed a *Brady* violation, *see id.*, the fact remains that Deegan only ever suppressed *potentially* exculpatory evidence. Justice Scalia's doctrinal analysis, thus, logically holds that Deegan did not violate *Brady*.

robust as commentators had hoped,[16] *Brady* remains the flagship *constitutional* doctrine for putting evidence of innocence into the hands of criminal defendants.[17] Excessively limiting *Brady* threatens to make the Constitution irrelevant to the ongoing "innocence revolution"[18]—a revolution heralded by the advent of forensic DNA testing of evidence.[19] The Court has already held that due process does not guarantee convicted defendants access to postconviction DNA testing.[20] If Justice Scalia is right about *Brady*, due process may not even afford criminal defendants the right to access potentially exculpatory DNA evidence before trial.

Yet Justice Scalia may not be right. Indeed, I suggest that his objection to recognizing a right to untested evidence rests upon an entirely contestable interpretation of due process doctrine backed by an entirely contestable theory of stare decisis. Doctrinally, Justice Scalia's assessment of *Brady*'s reach elevates a narrow procedural interpretation of due process above a viable, competing, and broader substantive due process alternative. Less obviously, Justice Scalia

16. Professor Sundby captured the widely held attitude of many commentators when he memorably called *Brady* a "fallen superhero." *See* Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643 (2002); *see also* Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1535–36 (2010) (arguing that *Brady* doctrine has failed to live up to the ideals of the original decision).

17. No other constitutional doctrine has forced the Court to deal with innocence issues as squarely as *Brady* has. While the Court has steadfastly declined to decide whether the Constitution protects freestanding claims of actual innocence, *see* House v. Bell, 547 U.S. 518, 554–55 (2006) (declining to resolve freestanding innocence question left open by *Herrera v. Collins*, 506 U.S. 390 (1993)), the Court's *Brady* cases have featured free-ranging discussions about innocence issues, including the ethical obligations of prosecutors to seek to protect the innocent. *See, e.g.*, Cone v. Bell, 556 U.S. 449, 470 n.15 (2009). Commentators have recognized the continuing importance of *Brady* to innocence. *See generally* Ellen Yaroshefsky, *Foreword—New Perspectives on* Brady *and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943, 1943–59 (2010) (introducing a symposium on *Brady* largely concerned with ways to protect innocence).

18. *See* Mark A. Godsey & Thomas Pulley, *The Innocence Revolution and "Our Evolving Standards of Decency" in Death Penalty Jurisprudence*, 29 U. DAYTON L. REV. 265 (2004); Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573 (2004); Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187 (2010).

19. Professor Brandon Garrett is the leading chronicler and analyst of DNA exonerations. *See generally* BRANDON L. GARRETT, CONVICTING THE INNOCENT (2011); Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629 (2008); Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1 (2009); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008); Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010).

20. *See* Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308 (2009).

backs his argument by assuming a particularly formalistic theory of stare decisis vis-à-vis the evolution of doctrine. He does this even though a less formal—what I shall call a justificatory—approach to stare decisis is also viable. The right to untested evidence illegitimately expands *Brady* doctrine only under Justice Scalia's procedural and formal account. Under an alternative substantive and justificatory account, the right already exists comfortably within *Brady*'s borders. In short, the coherence of Justice Scalia's claim, that the right to untested evidence lies "at the very frontier of our *Brady* jurisprudence," depends entirely on how you map the due process territory.

This Article thus undertakes a novel survey of *Brady*'s contested territory. Following the cartographic metaphor, due process doctrine is realized through a series of graphical "opinion maps" of *Brady*'s due process origins and progeny.[21] The concept and method animating these maps are both dialectic.[22] Conceptually, the maps in this Article show how due process doctrine evolves as an unfolding argument between competing schools of jurisprudential thought. Methodologically, the maps are created by plotting citations between competing majority, concurring, and dissenting opinions in *Brady* cases.[23] The result is a picture of precedent that visualizes the rival "lines of opinions" in the opposing procedural and substantive due process schools. Over the long history of this due process dialectic, majority control of the Court has shifted back and forth between these schools. By tracing these ancestral paths, I connect Justice

21. Here I build on previous work mapping different regions of constitutional doctrine. *See* Colin Starger, *Exile on Main Street: Competing Traditions and Due Process Dissent*, 95 MARQ. L. REV. 1253, 1260 (2012) (mapping "economic liberty" and "incorporation" strands of "substantive due process doctrine") [hereinafter Starger, *Exile on Main Street*]; Colin Starger, *Response: Meaning and Metaphor in Trawling for* Herring, 111 COLUM. L. REV. SIDEBAR 109 (2011) (mapping Fourth Amendment exclusionary rule doctrine).

22. In its long and storied history, "dialectics" has acquired many different senses. *See generally* NICHOLAS RESCHER, DIALECTICS: A CLASSICAL APPROACH TO INQUIRY 119–74 (2007) (tracing the multiple and evolving meanings of "dialectic" from early Greek to modern times). In this Article, I employ the concept of dialectic to describe the ontological mechanism by which Supreme Court doctrine evolves. My dialectical method charts the competing lines of majority, concurring, and dissenting opinions and derives from the formal disputational structure of Supreme Court argument.

23. While direct citation provides the primary means for connecting opinions, I sometimes place opinions in rival lines based on more nuanced hermeneutic connections. These connections are justified by explicit argument. *See infra* Part III.A (elaborating on the mapping method).

Scalia's argument in *Thompson* to the teachings of the now-dominant procedural school.

By charting the competing schools' shifting fortunes, this Article seeks to explain how key substantive or procedural arguments prevailed in the due process dialectic. This rhetorical inquiry requires attention to a surprisingly undertheorized problem surrounding the operation of stare decisis in constitutional adjudication.[24] The problem is directly raised by Justice Scalia's accusation from *Thompson* that recognizing a right to untested evidence would work a "*sub silentio* expansion" of *Brady* doctrine. Despite echoing the more familiar charge of *sub silentio* overruling, Justice Scalia's formulation inverts the usual direction of critique.[25] Rather than decrying covert attacks on constitutional precedent, Justice Scalia objects to surreptitiously giving *Brady*'s precedent *too much life*. This raises the metadoctrinal question of exactly how to differentiate legitimate from illegitimate expansions of constitutional rules. While the Court and legal commentators alike have long clashed over when stare decisis should prevent the Court from overruling controversial precedents, the question of how stare decisis should constrain doctrinal expansion has received no sustained attention.[26] This Article begins to fill this gap through its in-depth

24. "Stare decisis" literally means "to stand by things decided" and refers to the doctrine of following precedent. BLACK'S LAW DICTIONARY 1537 (9th ed. 2009). In this Article, I am concerned only with questions surrounding the Court's following of its own precedent, often called "horizontal stare decisis" in the literature. *See* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2024–25 (1993). By referring to the principle of stare decisis, I therefore do not invoke questions of "vertical precedent"—how precedent binds inferior courts in the judicial hierarchy. *Cf.* Michael Serota, *Stare Decisis and the* Brady *Doctrine*, 5 HARV. L. & POL'Y REV. 415, 415 n.1 (2011) (analyzing *Brady* and considerations of "vertical stare decisis" in pretrial motion-to-compel controversies).

25. For recent analyses of the Court's *sub silentio* overrulings, see Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1 (2010); Christopher J. Peters, *Under-the-Table Overruling*, 54 WAYNE L. REV. 1067 (2008).

26. The rich academic literature on constitutional stare decisis focuses almost exclusively on theoretical considerations informing the Court's choice between overruling versus affirming its own precedent. For a representative sampling of this literature, see MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 9–46 (2008); Richard Fallon, *Stare Decisis and the Constitution*, 76 N.Y.U. L. REV. 570, 570–73 (2001); Friedman, *supra* note 25, at 8–29; Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 748–55 (1988); Michael S. Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1537–43 (2000); Peters, *supra* note 25, at 1067–73; Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 186–201 (2006). The Court's own debates over stare decisis have also invariably occurred in the context of

case study of stare decisis and the expansion of criminal due process doctrine.

This Article's *Brady*-mapping project and stare decisis case study are inextricably intertwined. The two strands fuse because the doctrinal dialectic implicated by *Brady* has turned on debates over whether to expand or contract—as opposed to overrule—prior precedent. At the time of the ratification of the Fourteenth Amendment in 1868, protections for criminal defendants were profoundly weaker than they are today. The maps herein first tell the story of how a series of due process extensions eventually culminated in the Court's 1963 creation in *Brady* of a freestanding criminal discovery right.[27] These doctrinal innovations were often hotly contested, but formal stare decisis objections to expanding precedent were unable to command majority support. However, the due process territory changed between *Brady* and 1985's *United States v. Bagley*.[28] In *Bagley*, formal stare decisis arguments prevailed over justificatory counterarguments and effectively contracted *Brady*'s scope. Since 1985, *Bagley*'s materiality standard has become entrenched, and the Court's *Brady* debates have largely turned into disputes over how to apply facts in particular cases.[29] Nonetheless, key questions about *Brady*'s scope remain.[30]

decisions to overrule (or not) prior precedent. For the most recent salvo in this debate, compare *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 919–22 (2010) (Roberts, C.J., concurring) (supporting the Court's overruling of *Austin*), with *id.* at 938–42 (Stevens, J., dissenting) (stating that overturning precedent requires more than "a significant justification, beyond the preferences of five Justices"). Professor Farber has also noted a gap in the literature regarding what it means to *follow* (as opposed to overrule) precedent. *See* Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1198–99 (2006).

27. *See infra* Part III.

28. 473 U.S. 667 (1985). *See infra* Part IV.A (analyzing *Brady*-to-*Bagley* era).

29. *See infra* Part IV.B (analyzing era from *Bagley* until this Term's case in *Smith v. Cain*, 132 S. Ct. 627 (2012)).

30. In addition to the right-to-untested-evidence question raised by *Thompson*, the Court also has left open whether prosecutors have an obligation to disclose evidence of innocence to defendants during the pretrial plea negotiation stage. *See* United States v. Ruiz, 536 U.S. 622, 622–23, 631, 633 (2002) (upholding a "fast-track plea" bargain that contained waiver of *Brady* right to disclosure of impeachment material but where government agreed to disclose information "establishing factual innocence"). The courts are also divided on *Brady*'s pretrial scope and application. *Compare* United States v. Sudikoff, 36 F. Supp. 2d 1196, 1206 (C.D. Cal. 1999) (granting discovery under *Brady*), *with* United States v. Coppa, 267 F.3d 132, 146 (2d Cir. 2001) (holding that *Brady* did not compel "immediate disclosure of all exculpatory and impeachment material"). In a recent article, Michael Serota argues that cases following *Sudikoff* fall afoul of vertical stare decisis. *See* Serota, *supra* note 24, at 429. However, authority is divided precisely because the Court has not spoken clearly. *Cf.* United States v. Bagley, 473 U.S. 667, 700

Based on a close reading of over a century of caselaw, this Article thus demonstrates how successful justificatory stare decisis arguments have facilitated expansion of criminal due process while formal stare decisis arguments have constrained doctrinal growth. Beyond its *Brady* insight, this Article offers new perspective on the deeper conflicts between substance and procedure in due process jurisprudence as well as a generalizable method for studying the dialectics of stare decisis in constitutional adjudication.

Though its primary thrust is descriptive, this Article also has a normative take-away. I ultimately critique the currently dominant formal and procedural view that *Brady* is a mere means to achieve a fair trial. Drawing on an older tradition, I advocate instead a substantive conception of *Brady* as a constitutional bulwark for protecting the ends of justice and argue that the fundamental concern with innocence that drove the creation of *Brady*'s right should guide the doctrine in this era of DNA exonerations.

This Article's argument proceeds as follows:

Part II develops the stare decisis frame of the inquiry. After discussing conventional understandings of stare decisis as a constraint on overruling, I propose new categories to describe precedential constraint on doctrinal expansion. Here I explain the difference between formal and justificatory views of stare decisis. Applying these terms to *Thompson*, I show how Justice Scalia's attack on the due process legitimacy of a right to untested evidence rests upon a particularly formal view of *Brady* precedent.

Parts III and IV constitute the heart of the *Brady*-mapping project. This survey details the dialectic between the procedural and substantive due process schools. Part III's map covers the years from 1868 until *Brady* was decided in 1963. Part IV has two maps. The first charts the debate from *Brady* until 1985's seminal *Bagley* decision; the second surveys the dialectic from *Bagley* until the present.

The broad stare decisis narrative of Part III begins after the passage of the Fourteenth Amendment. Early Court majorities generally rejected due process challenges to state criminal

(Marshall, J., dissenting) (explaining that *Bagley*'s interpretation of *Brady*'s materiality requirement "imposes on prosecutors the burden to identify and disclose evidence pursuant to a pretrial standard that virtually defies definition").

convictions so long as state procedures appeared to provide procedural fairness. However, a dissenting school advocated using due process to conduct substantive inquiries into whether miscarriages of justice had occurred. After considering a series of racially and politically charged controversies, the substantive school wrestled majority control of the Court and expanded the due process territory. This expansion culminated in Justice William Douglas's 1963 opinion for the Court in *Brady* and was made possible by a justificatory approach to prior precedent.

Part IV begins with the debates from *Brady* to *Bagley*. As I show, Justice Harry Blackmun's opinion in *Bagley* secured a major victory for the school advocating a procedural understanding of *Brady* based on a formal view of stare decisis. Justice Thurgood Marshall's *Bagley* dissent remains the classic articulation of a substantive alternative based on a justificatory attitude toward precedent. In the post-*Bagley* years, stare decisis concerns took a backseat in the mainline dialectic as battles over *Brady*'s legal meaning largely gave way to disputes over the application of facts. However, unsettled legal questions over *Brady*'s scope remain.

Part V considers these unsettled legal questions and makes my normative case for the best path forward. Although *Brady* itself is practically immune from overruling and deserves recognition as a "super-precedent,"[31] formal interpretations of *Brady* unnecessarily limit its reach in the DNA era. Taking inspiration from Justice Thurgood Marshall, I call for a return to the "majestic conception" of *Brady* doctrine animated by a substantive due process protection-of-innocence principle.[32]

31. *See* GERHARDT, *supra* note 26, at 177 (defining super-precedents as "practically immune to overturning"). Since John Roberts's 2005 confirmation proceedings, there has been a renewed interest in "super-precedents." *See id.* at 177–78; Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1750–52 (2007); Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1205–06 (2006); Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN L. REV. 37, 40 n.13 (2008). However, no scholar to date has identified *Brady* as a super-precedent; Michael Sinclair, *Precedent, Super-Precedent*, 14 GEO. MASON L. REV. 363, 365 (2007).

32. Justice Marshall elucidated *Brady*'s substantive due process principles in a series of brilliant but underappreciated dissents. *See infra* Part V. I borrow the "majestic conception" phrase from Justices Ginsburg and Stevens. *See* Herring v. United States, 555 U.S. 135, 151 (2009) (Ginsburg, J., dissenting) (quoting Arizona v. Evans, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting)) (calling for return to the majestic conception of the Fourth Amendment).

In my conclusion, I briefly reflect on the implications of this case study for future doctrinal and metadoctrinal scholarship on expanding stare decisis.

## II. STARE DECISIS, *BRADY*, AND THE RIGHT TO UNTESTED EVIDENCE

Philip Bobbitt has famously identified "doctrinal argument" as an archetypical modality of constitutional argument.[33] A "modality of argument" is essentially a coherent discursive way of addressing constitutional disputes.[34] Argument modalities proceed under their own self-contained logics and come with their own set of adjudicative principles.[35] In the case of doctrinal argument, the relevant modal logic concerns how to "apply[] the rules generated by precedent."[36] A preeminent adjudicative principle in doctrinal argument is stare decisis.[37]

Consider how rules generated *by* precedent—the substantive holdings in cases—differ from the stare decisis adjudicative principle *about* precedent. Rules generated by precedent define the specific boundaries of a given doctrine; they are first-order doctrinal rules. The principle of stare decisis applies across doctrinal boundaries; it is a second-order metadoctrinal principle. Critically, constitutional disputes can involve arguments over doctrinal rules and metadoctrinal principles. Opponents can contest both what relevant

33. *See* Philip C. Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233, 1255–61 (1989) [hereinafter Bobbitt, *Is Law Politics*]. Bobbitt identifies five other argumentative modalities—historical, textual, structural, ethical, and prudential. *Id*. at 1234; *see also* PHILIP C. BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 39–58 (1982) (describing doctrinal argument).

34. *See* Bobbitt, *Is Law Politics*, *supra* note 33, at 1255 (describing argumentative modalities as "how assertions are determined to be correct").

35. The idea of a modality's "self-contained logic" might be more fruitfully conceived as its essential *logos*. *See* Colin Starger, *The DNA of an Argument: A Case Study in Legal Logos*, 99 J. CRIM. L. & CRIMINOLOGY 1045, 1054–55 (2009) (describing *logos* as "a mode of proof"). Because argument modalities have separate and distinct *logoi*, conflicts between modalities are essentially "incommensurable." *See id*. at 1080–81 (applying Thomas Kuhn's theory of incommensurability to conflicting argument *logoi*); *see also* Bobbitt, *Is Law Politics*, *supra* note 33, at 1244 (criticizing Mark Tushnet for failing to come to terms with "the modal perspective" that makes a single theory of the Constitution impossible).

36. Bobbitt, *Is Law Politics*, *supra* note 33, at 1234.

37. Stare decisis is a relatively recent doctrine. For an older but still excellent historical account of its emergence, see E.M. Wise, *The Doctrine of Stare Decisis*, 21 WAYNE L. REV. 1043 (1974).

precedent is and how it should be applied on a given record, *and/or* they can argue over whether stare decisis requires that a particular precedent be followed, overruled, expanded, or contracted.

By definition, Supreme Court doctrinal arguments involve first-order disputes over doctrinal rules generated by prior Court opinions. Though the Court decides some doctrinal arguments unanimously, other times majority, concurrence, and dissent split.[38] When splits occur, competing Court opinions may invoke different prior majority, concurring, or dissenting opinions to support their perspective on doctrinal rules. Those prior opinions, in turn, may have invoked the authority of even earlier competing opinions. For certain highly contentious constitutional concepts—such as "due process" or "equal protection" or the power to "regulate commerce"—this argument over doctrine may persist for generations. When this occurs, competing lines of opinions effectively cohere into distinctive intellectual traditions. Rival traditions may be regarded as competing doctrinal schools.[39]

When doctrinal schools clash, first-order fights over doctrinal rules often involve a second-order dialectic over stare decisis. The metadoctrinal debate may be explicit or implicit, but the application of stare decisis is itself often contested. Scholarly debate on stare decisis has traditionally focused on whether and when it is permissible for the Court to overrule its own prior interpretations of the Constitution.[40] A related yet distinct controversy arises when all members of the Court accept a constitutional precedent's validity but disagree over whether the accepted precedent's scope should be expanded. This far less mooted stare decisis question is directly

38. In the October 2010 Term, 48 percent of the Court's merits opinions were unanimous. *See Stat Pack-October Term 2010*, SCOTUSBLOG (June 28, 2011), http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB_votesplit_OT10_final.pdf. By comparison, 20 percent of merits opinions had 5–4 splits. *Id.* Over the previous five terms, the average was 41 percent unanimous and 22 percent 5–4. *Id.*

39. The connection between doctrine and schools of thought is inherent. As Professor Goodrich reminds us, the English word "doctrine" literally derives from the Latin *doctrina*, meaning "teaching" and corresponding to the word *disciplina*, meaning "learning." PETER GOODRICH, READING THE LAW 136 (1986) ("Doctrine consists of the truths handed down by educators—by priests, judges, politicians, scholars and so on—all of whom are experts in the classics, custodians of ancient truths which are preserved for and presented to their contemporary audiences.").

40. *See supra* note 26 and accompanying text.

raised by Justice Scalia's accusation of *sub silentio* expansion in *Thompson*.

In this Part, I develop a vocabulary for describing the rhetorical positions that may be taken in debates over stare decisis and then apply it to the *Brady* debate in *Thompson*. Part II.A first discusses the difference between strict and lax conceptions of stare decisis in the overruling context and then proposes a distinction between formal and justificatory approaches to expanding precedential scope. Part II.B applies this frame to *Thompson* and shows how Justice Scalia's charge that any right to untested evidence exists at the frontier of the Court's *Brady* jurisprudence exemplifies a particularly formal view of stare decisis.

### *A. A Taxonomy of Stare Decisis*

American jurists have long recognized that the Supreme Court has the power to overrule its own prior decisions.[41] Yet just how bound the Court should be by its own prior interpretations of the Constitution remains controversial. A strict view of stare decisis generally advocates for adherence to precedent and against overruling. By contrast, a lax view accepts overruling more easily and deemphasizes strict adherence to precedent. These competing positions represent poles on a spectrum concerning the constraining force of precedent. In other words, for any given constitutional doctrine, one may adopt a stricter or more lax view of the force of stare decisis's command. These competing positions have also been described as strong and weak views of precedent.[42]

The canonical articulation of the lax view of constitutional stare decisis originates in Justice Louis Brandeis's dissent in *Coronado Oil*[43]:

41. *See* Solum, *supra* note 26, at 156 n.3.

42. *See* GERHARDT, *supra* note 26, at 47–68. Professor Solum has described essentially the same split as between formalist/neoformalist views (taking strict or strong positions on stare decisis) and Realist/instrumentalist views (adopting lax or weak positions). *See* Solum, *supra* note 26, at 186–88.

43. *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–13 (1932) (Brandeis, J., dissenting). As Professor Lee has observed, Justice Brandeis's *Coronado Oil* dissent is likely the Court's single most cited opinion concerning stare decisis. *See* Emery G. Lee III, *Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581, 592 & n.71 (2001). In a forthcoming work, I trace the singular influence of Justice Brandeis's dissent on stare decisis doctrine. *See* Colin Starger, *The Dialectic of Stare Decisis*

> Stare decisis is not, like the rule of res judicata, a universal inexorable command . . . . 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.[44]

Under Justice Brandeis's view, the Court should abandon its constitutional precedent when doing so comports with "the lessons of experience and the force of better reasoning."[45] As an empirical matter, Justice Brandeis was undoubtedly correct that the Court has many times overruled its constitutional precedents.[46] Indeed, the Court has discarded its own precedents more than 200 times in its history.[47]

While the empirical reality of overruling is undeniable, opinions about the practice's wisdom differ. Some jurists and scholars promote a strict view of constitutional stare decisis.[48] The best-known articulation of this perspective comes in the joint opinion in *Planned Parenthood v. Casey*,[49] the case that famously declined to overrule *Roe v. Wade*.[50] The *Casey* plurality saw overruling as appropriate only in narrow circumstances such as when a constitutional rule

*Doctrine*, *in* PRECEDENT ON THE UNITED STATES SUPREME COURT (C.J. Peters ed.) (forthcoming 2014).

44. *Coronado Oil*, 285 U.S. at 405–07 (Brandeis, J., dissenting) (internal citations omitted).

45. *Id.* at 407–08.

46. Justice Brandeis provided extensive proof of this proposition in his dense and scholarly footnotes. *See id.* at 406–10 nn.1–5.

47. In an exceptionally valuable study, Professor Gerhardt has documented all of the Court's overrulings from 1789 through 2004 and found that the Court has expressly overruled 208 precedents and *sub silentio* overruled 24 precedents. *See* GERHARDT, *supra* note 26, at 9, 35.

48. As of the early 2000s, it seemed as if the Court as a whole had embraced the stricter view of stare decisis. *See generally* Lee, *supra* note 43, at 581–88 (noting that the Court has changed its "overruling rhetoric" and increased the weight given to considerations of stare decisis). However, *Citizens United* suggests that this strong view no longer clearly commands majority support. *Compare* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 919–22 (2010) (Roberts, C.J., concurring), *with id.* at 938–42 (Stevens, J., dissenting).

49. 505 U.S. 833 (1992).

50. *Id.* at 855 (*aff'g* Roe v. Wade, 410 U.S. 113 (1973)).

> has proven to be intolerable simply in defying practical workability . . . [or when] related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine[,] or [when] facts have so changed . . . as to have robbed the old rule of significant application or justification.[51]

Absent special justification, the strict view of constitutional stare decisis thus directs the Court to follow its own precedent even if it believes that precedent was wrongly decided based on weak or flawed reasoning.[52]

Lax and strict approaches to overruling thus essentially differ on the relevance granted to a constitutional case's underlying reasoning. Whereas a lax view counts poor reasoning as justification for abandoning precedent, a strict view places little stock in the *ab initio* force of a case's reasoning and focuses instead on reliance on the rule of law handed down by precedent. In a more basic sense, a lax view of stare decisis authorizes change in doctrine through overruling while a strict view promotes stability in doctrine through affirming.

Although coherent arguments can be marshaled in favor of both lax and strict views as a general rule-of-law matter, I do not wish to rehearse those arguments here.[53] Rather, I want to stress the rhetorical connection between general stare decisis arguments about overruling and the particular doctrinal debates in which these arguments arise. Despite its metadoctrinal status, Supreme Court Justices do not invoke stare decisis with perfect consistency across doctrinal contexts.[54] This is no cynical observation about hypocrisy

51. *See id.* at 854–55 (citations omitted).

52. In *Casey*, the Court upheld *Roe* despite expressing doubts about its original validity. *See id*. at 855. The Court also surprised many by taking a similarly strict approach in *Dickerson*. *See* Dickerson v. United States, 530 U.S. 428, 443 (2000) (*aff'g* Miranda v. Arizona, 384 U.S. 436 (1986)).

53. The fine exchange between Professors Fallon and Paulsen well captures the general points in favor of strict or lax approaches. *Compare* Fallon, *supra* note 26 (stating that "stare decisis is not a constitutional requirement, but rather a judicial policy judgment"), *with* Paulsen, *supra* note 26 (arguing that stare decisis does not lack constitutional stature).

54. The Court's split over abortion and same-sex intercourse provides an obvious example. In *Casey*, socially liberal justices urged a strong view of stare decisis to affirm *Roe v. Wade*, while conservatives urged overruling. *Compare Casey*, 505 U.S. at 854–55 (joint opinion of Justices O'Connor, Kennedy, Souter), *with id.* at 999 (Scalia, J., dissenting). In *Lawrence v. Texas*, 539 U.S. 558, 577 (2003), the script flipped as liberal justices adopted a weak stare decisis

on the Court. Indeed, it would be unfair and absurd to expect any jurist to universally commit to always supporting doctrinal change or to always supporting doctrinal stability. Context matters immensely. Within the continuum between strict and lax general attitudes toward precedent, there is legitimate room for persuasion about the wisdom of overruling any given doctrine. Stare decisis provides a useful rhetorical framework for expressing these particular doctrinal arguments.

The stare decisis rhetorical framework changes when the debate shifts from the context of doctrinal overruling to that of doctrinal expansion. This is because the stare decisis question itself changes from challenging a precedent's basic legitimacy to broadening its scope of application. Does stare decisis require that the Court follow the literal "law" laid down in a previous case, or does it permit the Court to follow the "spirit" of that law and extend its reach? General jurisprudential attitudes toward this interpretative question also vary along a spectrum that leaves room for argument in particular cases. Instead of strict to lax, I classify the spectrum of arguments concerning expanding the scope of precedent as moving from formal to justificatory.

The key distinction underlying formal versus justificatory arguments is that between the "rule of law" announced in a case and its supporting "justification." In the literature, the conceptual categories of "rule of law" and "justification" assume many synonyms. Thus, a "rule of law" may be variously referred to as a rule, law, standard, test, or proposition. Though they have different shades of meaning,[55] all of these words express the kind of abstract generalization associated with the major premise of arguments—

position and conservatives urged fidelity to *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had upheld the prohibition on homosexual sodomy. *Compare Lawrence*, 539 U.S. at 577 (2003) (Kennedy, J., for the Court), *with id.* at 586–87 (Scalia, J., dissenting).

55. There is, of course, a long-standing debate over whether rules or standards make better laws. *See* Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (classic account of this debate). The dispute's intensity should not obscure the fact that rules and standards both state abstract "laws." Though standards tend to be more open and underdetermined than rules, standards and rules both play the "major premise" role in argument. I thus respectfully disagree with Professor Farber's characterization of debates over applying precedent as essentially tracking the debate between rules and standards. *See* Farber, *supra* note 26, at 1199. Instead, I see the split as between rules and *justifications*.

what philosopher Stephen Toulmin has called the "inference warrant" or "warrant" for an argument.[56] Next, the "justification" for a rule tracks Toulmin's concept of the "backing" for a warrant.[57] Other commonly used words expressing the concept of justification include rationale, grounds, purpose, goal, spirit, or policy.[58] The justification for a rule is essentially what "stands behind" that rule and compels its acceptance.

Although the distinction between rule and justification is philosophically sound, the concepts are frequently conflated in practice. When lawyers and jurists refer to a case's *holding* or its *ratio decidendi*, it is often unclear whether they are referring to the precedent's rule of law alone or to its rule and justification together. Conceptual sloppiness is partially to blame as inference warrants are easily confused with the backings for those warrants.[59] However, controversy also stems from a fundamental disagreement on whether holding *ought* to include a precedent's rule alone or its rule and justification together. Attitudes toward holding can also vary along the continuum between formal and justificatory. This explains why stare decisis arguments over expanding a precedent's scope also play out as arguments over what actually constitutes a precedent's holding. I call the competing poles in the approaches to stare decisis formal and justificatory.

Under a formal approach to stare decisis, it is a case's rule of law alone that binds subsequent courts. On this view, therefore, the rule alone constitutes a case's holding and *ratio decidendi*. I call this approach "formal" because it refuses to look behind the formal command of the rule. The formal view consequently regards a law's

56. *See* STEPHEN E. TOULMIN, THE USES OF ARGUMENT 91 (rev. ed. 2003) (distinguishing data from warrants and describing warrants as "rules, principles, inference-licenses or what you will").

57. *See id.* at 96. Backing provides "assurances, without which . . . warrants themselves would possess neither authority nor currency." *Id.*

58. Once again, the different shades of meaning in these words should not obscure their essentially similar rhetorical function in argument. Thus, even though "spirit" appears to look back and "goal" appears to look forward, both words signify argumentative reasons to *presently* interpret a rule one way or another.

59. The same sloppiness plagued philosophers as far back to Aristotle. Indeed, Stephen Toulmin's work was groundbreaking for its specific articulation of how Aristotle's syllogism conflated in its concept of a major premise the categories of warrant and backing. *See* TOULMIN, *supra* note 56, at 100–05. The conceptual clarity offered by Toulmin's argumentative scheme is underappreciated in the legal academy.

spirit or purpose as nonbinding dictum.[60] This reflects what Professor Schauer calls an "entrenched" view of rules.[61] If a new situation arises in which application of a rule potentially conflicts with the rule's underlying justification, the entrenched view requires that the rule should be followed rather than its justification.[62] A formal view of stare decisis similarly places a premium on literal rules in case holdings and places less value on the putative rationale behind such holdings.

By contrast, then, a justificatory approach to interpreting stare decisis views the command of a case's rule primarily through the lens of its underlying rationale. The justificatory perspective regards a precedent's holding as encompassing both the literal law set down and the purpose animating that law. It is not formal in that it accepts that a spirit stands behind a formal rule. In situations of conflict between literal rule and underlying justification, this view takes the opposite tack to the entrenched response and favors animating policy over the formal rule. Form thus follows purpose. Under this justificatory scheme, the generalization represented by the rule is not so firmly entrenched as to require strict adherence.

Once again, coherent arguments can be marshaled in favor of both formal and justificatory views as a general rule-of-law matter. But once again, I do not wish to rehearse those arguments so much as stress the rhetorical connection between general stare decisis arguments about doctrinal expansion and the particular doctrinal debates in which they arise. Within the continuum between formal and justificatory attitudes, there is legitimate room for persuasion about what stare decisis requires in a particular case. Formal arguments stress rules while justificatory arguments stress the backing for rules. The basic hypothesis vis-à-vis doctrinal expansion is that justificatory approaches will generally provide stronger

60. In his defense of "neoformalism," Professor Solum explicitly argues that a formal view of stare decisis can consider the purpose of a rule. *See* Solum, *supra* note 26, at 172. However, Solum implicitly concedes that formalists are less inclined to look at purpose than what he calls instrumentalists or realists. *Id.* In terms of a spectrum of positions then, it remains the case even under Solum's framework that the more formal one's approach to rules, the less likely purpose will come into play.

61. *See generally* FREDERICK SCHAUER, PLAYING BY THE RULES 42–52 (Tony Honore et al. eds., 1991) (arguing that under an entrenchment model of rules, generalizations control decisions even in those cases in which the generalization failed to serve its underlying justification).

62. *See id.* at 51.

arguments for expanding a rule's scope while formal arguments will better support constraining expansion.

The salience of these admittedly abstract distinctions and the tenability of my hypothesis will become clear when applied to *Brady* and due process jurisprudence. However, before turning to our case study, I must address a potential objection. The objection is that my distinction between formal and justificatory interpretations of precedent improperly assumes that it is possible to discern the semantic content of the "rule of law" in any given case. This is fair enough. Given how justices write opinions, identifying the precise rules announced in Supreme Court cases often presents difficulties that simply do not arise when identifying the rules stated in acts of Congress.[63]

Although I concede the general difficulty in precisely articulating the rules of cases, it is not always impossible. Indeed, some cases are written in a way that makes identifying the "canonical formulation" of their rules rather easy.[64] As it happens, this is precisely the case with *Brady v. Maryland*. For reasons explored below, identifying the relevant rule from *Brady* is uncontroversial—it has an easily identified canonical formulation. Indeed, I call this formulation "the *Brady* Rule." Precisely because *Brady* does not suffer from the interpretative difficulties sometimes associated with identifying precedent rules, it is perfectly suited to frame a case study into the dynamics of formal versus justificatory arguments for expanding precedent.

63. Professor Sinclair has adjudged this difficulty as fatally undermining any rule-based conception of precedent. *See* Sinclair, *supra* note 31, at 385–86. However, I see *Brady* as providing a compelling enough counterexample to make plausible the project of looking for rules in at least some cases.

64. *See* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 27 (1989) (arguing that while not all cases have discernable rules, some do). On the canonical formulation of rules, see generally SCHAUER, *supra* note 61, at 68–72 (discussing the distinction between canonically formulated rules and rules without canonically inscribed formulations); Alexander, *supra*, at 17–19 (listing canonical formulation as one condition that the rule model must meet). If a rule has a canonical formulation, there is by definition no interpretative dispute over its semantic content.

### *B. The* Brady *Rule and the Right to Untested Evidence*

Among practicing criminal lawyers and judges, *Brady* signifies more than just a single Supreme Court case. It stands for the entire realm of criminal procedure doctrine that deals with the prosecutorial obligation to disclose exculpatory evidence. As a textual matter, the original *Brady* case and its progeny all interpret the Due Process Clause of the Fourteenth Amendment. Justice William Douglas's 1963 opinion for the Court announced its core holding in bold and decisive language:

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.[65]

This is the exact formulation of what I call the *Brady* Rule.[66] The *Brady* Rule states a constitutional operative proposition about due process.[67] In essence, the *Brady* Rule created a right to discovery in criminal cases. Doctrinal expansion controversies in *Brady* concern just how broadly or narrowly the discovery right should apply.

Recall from the introduction that Justice Scalia protested in *Thompson* against recognizing a right to untested evidence on the grounds that it would impermissibly expand the substantive law of *Brady*.[68] I maintain that Justice Scalia's accusation rests upon a particularly formal approach to constitutional stare decisis. Though Justice Scalia did not state it this way, his formal logic for limiting the scope of the *Brady* Rule unfolds like this: *Taken literally, the* Brady *Rule applies only to "evidence favorable to an accused." Untested forensic evidence cannot be classified as "favorable to an accused" as its exculpatory value is unknown. Indeed, testing could show the evidence to be inculpatory and thus it is also potentially*

65. Brady v. Maryland, 373 U.S. 83, 87 (1963).

66. Throughout this Article, I also refer to the *Brady* Rule simply as "the Rule."

67. The "constitutional operative proposition" vocabulary originates from Professor Mitch Berman. *See* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 50–51 (2004). Drawing on Berman's work, Professor Jennifer Laurin has previously identified the *Brady* Rule as a constitutional operative proposition. *See* Jennifer E. Laurin, *Rights Translation and Remedial Disequilibration in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1018 (2010).

68. Connick v. Thompson, 131 S. Ct. 1350, 1369 (2011) (Scalia, J., concurring).

*unfavorable. Reading favorability out of the Rule to cover evidence that is only potentially exculpatory would expand* Brady *past recognizable borders.* Under this formal view, the analysis would not continue to consider *Brady*'s underlying due process justification.

This formal perspective thus reads the *Brady* Rule almost as a textualist would read a statute. As mentioned, Justice Scalia did not actually articulate this precise perspective in *Thompson*. However, before rehearsing Justice Scalia's actual (and still very formal) argument, I want to explore the formal idea that the *Brady* Rule represents the "canonical formulation" of the operative due process proposition.

As written, the *Brady* Rule is indeed particularly amenable to literal interpretation. Consider first the Rule's prefatory "[w]e now hold" phrase. This wording obviously aims to remove any doubt as to whether the announced rule constitutes holding or dictum. Next, consider the level of abstraction. The Rule is self-consciously general as it does not mention the particular litigants, facts, or outcome of the controversy before it. Yet the Rule is also usefully specific in naming the relevant actors (prosecution, accused) and prohibited action (suppression of favorable evidence). In sum, the purely linguistic formulation of the *Brady* Rule has canonical qualities.

Opinion language alone cannot suffice to make *Brady*'s operative due process proposition canonical. What really matters to canonicity is on-the-ground interpretative practice. By this measure, the Court has certainly behaved as if the *Brady* Rule were canonical. Practically every significant *Brady* decision directly quotes all or part of Justice Douglas's original *Brady* Rule in its analysis.[69] This practice of invoking Justice Douglas's precise formulation spans decades and continues even in cases not directly in the *Brady* line.[70]

69. *See* Smith v. Cain, 132 S. Ct. 627, 630 (2012) (paraphrasing *Brady* Rule); Cone v. Bell, 556 U.S. 449, 469 (2009) (same); Banks v. Dretke, 540 U.S. 668, 682 n.5 (2004) (direct quotation of entire rule); United States v. Ruiz, 536 U.S. 622, 628 (2002) (partial quotation of *Brady* Rule); Strickler v. Greene, 527 U.S. 263, 280 (1999) (direct quotation of entire rule); Kyles v. Whitley, 514 U.S. 419, 432 (1995) (same); United States v. Bagley, 473 U.S. 667, 669 (1985) (same); United States v. Agurs, 427 U.S. 97, 110 n.17 (1976) (same); Moore v. Illinois, 408 U.S. 786, 794 (1972) (same); Giglio v. United States, 405 U.S. 150, 153–54 (1972) (partial quotation of *Brady* Rule).

70. I consider as indirect *Brady* decisions those cases that conduct analysis of access-to-evidence issues under the Sixth Amendment as well as under the Due Process Clause. *See, e.g.*,

Moreover, quoting the Rule is often a vital step in the Court's analysis. Major *Brady*-line cases effectively interrogate this single sentence and create doctrine by elaborating upon the meaning of its component phrases.

Three quick examples demonstrate this formal notion of *Brady* doctrine as a systematic elaboration upon the *Brady* Rule's component phrases. First, in *Giglio v. United States*,[71] the Court essentially read the Rule's phrase "evidence favorable to an accused" to include impeachment material.[72] Second, in *United States v. Bagley*, the Court explicitly interpreted the Rule's key phrase "material to guilt or punishment" and found that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[73] And finally, in *Kyles v. Whitley*,[74] the Court held that individual prosecutors have "a duty to learn of any favorable evidence known to the others acting on the government's behalf . . . ."[75] This holding clarified that the Rule's injunction against "suppression . . . by the prosecution" effectively prohibited the police from suppressing exculpatory evidence.[76]

Though the Court has never claimed to read the *Brady* Rule "like a statute," the relationship between the Rule's specific text and the holdings in these cases certainly *resembles* the relationship between congressional law and Court precedent interpreting statutes. On a formal view, *Giglio*, *Bagley*, and *Kyles* do no more than implement the *Brady* Rule's operative language.[77] Interpretation must—first and foremost—be consistent with the Rule's plain

Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987) (paraphrasing *Brady* rule); United States v. Valenzuela-Bernal, 458 U.S. 858, 868 (1982) (direct quotation of entire *Brady* rule).

71. 405 U.S. 150 (1972).

72. *See id.* at 150, 155 (finding prosecutors violated due process when they failed to disclose that a government witness had secured a cooperation agreement in exchange for his testimony).

73. *Bagley*, 473 U.S. at 682.

74. 514 U.S. 419 (1995).

75. *Id.* at 437.

76. *Id.*; *see also* Youngblood v. West Virginia, 547 U.S. 867, 869–70 (2006) (citing *Kyles* for the proposition that "*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor'") (internal citations omitted).

77. Under Berman's framework, *Giglio*, *Bagley*, and *Kyles* would thus be examples of "decision rules" implementing *Brady*'s constitutional operative proposition. *See* Berman, *supra* note 67, at 50–51; *cf.* Laurin, *supra* note 67, at 1019 (describing *Brady*'s materiality requirement as "a classic decision rule inquiry").

meaning. Since the *Brady* Rule only applies to "evidence favorable to an accused," Justice Scalia's argument in *Thompson* thus makes formal sense.[78] Untested evidence is not actually favorable—only potentially so. Testing evidence could theoretically prove that it is inculpatory, in which case it would actually become "unfavorable to the accused." If the *Brady* Rule's plain language alone controlled, Justice Scalia's formal tack would seem strong.

Yet despite its surface appeal, the realities of interpretative practice undermine a highly formal explanation of the *Brady* line. First, reconsider *Kyles*, which read the Rule's phrase "suppression . . . by the prosecution" to also proscribe suppression by the police.[79] Since the police and prosecution are not the same, this reading is at least contestable. Nevertheless, a formal account of *Kyles* remains plausible given the direct relationship between prosecution and police.[80] However, no similarly plausible formal reading explains *United States v. Agurs*.[81] In *Agurs*, the Court held that, even in absence of any defense request for *Brady* material, prosecutors have an affirmative duty to disclose evidence that is "clearly supportive of a claim of innocence."[82] This strains against the plain text of the Rule, which only prohibits "suppression . . . upon request" of the defense.[83] The *Agurs* Court thus read the "upon request" condition right out of the *Brady* Rule.[84]

Though formally problematic, *Agurs*'s removal of the "upon request" condition from the Rule makes perfect sense under a justificatory view of precedent. On a justificatory account, purpose trumps form. *Agurs*'s argument logic proceeds like this: *Since one purpose of the* Brady *Rule is to protect innocence, the Rule should not be read to defeat this purpose. Suppressing evidence "clearly supportive of an innocence claim" only because the defense failed to request it goes against the spirit of the Rule. Therefore, the*

78. Connick v. Thompson, 131 S. Ct. 1350, 1368–70 (2011) (Scalia, J., concurring).

79. *Kyles*, 514 U.S. at 437.

80. Both institutions are arguably species of the same "state prosecution" genus.

81. 427 U.S. 97 (1976).

82. *See id.* at 107, 110.

83. The government advanced this precise argument in its *Agurs* briefing. *See infra* note 260 and accompanying text.

84. Justice Stevens, author of the *Agurs* opinion, later admitted as much. *See infra* note 299.

*prohibition of "suppression . . . upon request" will be read to also prohibit suppression without a request.*

*Agurs*'s justificatory logic could apply to the right-to-untested-evidence debate. Though the *Brady* Rule formally applies to evidence "favorable to the accused," enlarging its scope to cover untested evidence would arguably further the Rule's purpose of protecting innocence. After all, once untested evidence was tested, it led to John Thompson's exoneration. This raises a question for Justice Scalia—If *Agurs* could read "upon request" out of the Rule, why not similarly read away the formal requirement that evidence be "favorable"? In response, Justice Scalia might fairly assert that though the Court *could* read away the *Brady* Rule's favorability requirement, the germane fact is that Court *has not so held* until this point. This imagined answer closely echoes Justice Scalia's actual observation in *Thompson* that "[i]f any of our cases establishes such an obligation [to disclose untested evidence], I have never read it, and the dissent does not cite it."[85]

As I have stressed, Justice Scalia did not make a quasi-textualist argument about the *Brady* Rule in *Thompson*. His logic is formal but does not actually rest on textual exegesis of the *Brady* Rule. Nonetheless, the textual account of *Brady* doctrine helps contextualize the still-formal nature of Justice Scalia's actual charge of *sub silentio* expansion in *Thompson*. A formal reading demonstrates how Justice Scalia effectively anchored his argument in the literal favorability requirement of the *Brady* Rule. A formal account also helps elucidate Justice Scalia's otherwise confusing appeal to precedent in his actual *Thompson* argument.

After observing that no case affirmatively established a right to untested evidence, Justice Scalia argued that one case—*Arizona v. Youngblood*[86]—"appears to say just the opposite."[87] As Justice Scalia correctly noted, *Youngblood* held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve *potentially useful evidence* does not constitute a denial of due process

85. Connick v. Thompson, 131 S. Ct. 1350, 1369 (2011) (Scalia, J., concurring).
86. 488 U.S. 51 (1988).
87. *Thompson*, 131 S. Ct. at 1369 (Scalia, J., concurring).

of law."[88] Justice Scalia then quoted the *Youngblood* Court's observation that

> [*Brady*] makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence . . . [but] the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.[89]

Justice Scalia then concluded that "[p]erhaps one day we will recognize a distinction between good-faith failures to preserve [potentially exculpatory evidence] and good-faith failures to turn such evidence over to the defense. But until we do so, a failure to train prosecutors to observe that distinction cannot constitute deliberate indifference."[90]

The logic of Justice Scalia's substantive claim about *Brady* appears to be this—since *Youngblood* prohibits only *bad faith* destruction of potentially exculpatory evidence, *Brady*'s "irrespective of the good or bad faith" language means that the Rule cannot also apply to potentially exculpatory evidence. This reasoning is somewhat muddled but seems to rest on formal distinctions regarding potentially exculpatory evidence that were made in *Youngblood* but not in *Brady*.[91]

Justice Scalia's invocation of *Youngblood* is potentially shocking since the case denied relief to a man later proved innocent by DNA testing.[92] Citing *Youngblood* in an opinion suggesting that prosecutors have no obligation to disclose potentially exculpatory forensic evidence seems callous in the extreme. Moreover, Justice Scalia's citation to the case is puzzling as a doctrinal matter since it ignores seemingly key language in Chief Justice Rehnquist's majority opinion. The context for the Chief Justice's analysis was

88. *Id.* (quoting *Youngblood*, 488 U.S. at 58) (emphasis added).

89. *Id.* (quoting *Youngblood*, 488 U.S. at 57).

90. *Id.*

91. Justice Scalia's argument drifts here. He initially invokes *Youngblood* for the proposition that no substantive right to untested evidence exists under *Brady*, but he then phrases his conclusion in terms of civil liability for failure-to-train.

92. *See* Norman C. Bay, *Old Blood, Bad Blood, and* Youngblood*: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 WASH. U. L. REV. 241, 275–78 (2008).

Larry Youngblood's claim that police had failed to properly preserve semen evidence that could have proved him innocent of child molestation.[93] Chief Justice Rehnquist began by quoting *Agurs* and the *Brady* Rule. He then wrote:

> There is no question but that the State complied with *Brady* and *Agurs* here. The State disclosed relevant police reports to respondent . . . . The State provided respondent's expert with the laboratory reports and notes prepared by the police criminologist, and respondent's expert had access to the swab and to the clothing . . . .
>
> If respondent is to prevail on federal constitutional grounds, then, it must be because of some constitutional duty over and above that imposed by cases such as *Brady* and *Agurs*.[94]

In this passage, Chief Justice Rehnquist plainly characterizes the State's disclosure of the laboratory reports and granting of access to untested evidence as "compl[ying] with *Brady*."[95] This arguably supports the proposition that prosecutors do have a *Brady* obligation to disclose the existence of material untested evidence.

If *Youngblood* at least implies that *Brady* requires disclosure of untested evidence, why in his *Thompson* concurrence did Justice Scalia cite the case for the precise opposite proposition? I suggest this move is best understood as evincing a formal approach to constitutional precedent. A formal reading of *Youngblood* essentially dismisses Chief Justice Rehnquist's discussion of compliance with *Brady* as irrelevant dicta. Justice Scalia finds *Youngblood*'s holding in the two sentences he quotes and ignores everything else. The *ratio decidendi* reduces to this text and does not include underlying justification. In this way, Justice Scalia approaches the *Youngblood* Rule in much the same way as he approaches the *Brady* Rule—as an entrenched generalization that requires little inquiry beyond its plain language.[96]

93. *See Youngblood*, 488 U.S. at 52–55.

94. *Id.* at 55–56.

95. *Id.*

96. Of course, an alternative explanation of Justice Scalia's reading of *Youngblood* is possible. This explanation would characterize Justice Scalia's reading as essentially dishonest rather than formal/textualist. Ultimately, Justice Scalia's subjective intent in making his argument does not matter for my analysis. I am interested in understanding and answering the best

Of course, Justice Scalia's formal argument is entirely contestable. Unfortunately, the *Thompson* dissenters did not tender a justificatory response about the purpose or spirit of *Brady* being the protection of innocence.[97] In Part V below, I advance the response the dissent might have made. However, I must concede up front that the purpose of *Brady* is itself contested. Only the substantive due process school credits *Brady* with a strong innocence-protecting purpose. Followers of the competing procedural school see the purpose of *Brady* as limited to ensuring fairness at trial. It remains subject to debate whether recognition of a right to untested evidence is necessary to effectuate the purpose of the *Brady* Rule.

A complete understanding of the right-to-untested-evidence controversy—or of other contested expansions of *Brady*'s scope—thus requires more than the observation that Justice Scalia's argument is formal. It also requires an analysis of the deeper doctrinal dialectic between procedural and substantive schools. Parts III and IV below undertake this analysis by mapping *Brady*'s origins and progeny. Part III's analysis of *Brady*'s origins reveals that followers of the early substantive school continually expanded due process precedent via justificatory arguments. Part IV's analysis of *Brady*'s progeny shows how the procedural school eventually seized control of the doctrine while deploying formal stare decisis arguments. While I have stressed that the persuasive strength of stare decisis arguments depends on doctrinal context, these following Parts demonstrate how metadoctrinal stare decisis argumentation itself helps constitute context.

Before turning to Part III, a lurking criticism needs to be confronted. This criticism suggests that Justice Scalia's substantive *Brady* argument in *Thompson* has minimal relevance or importance to *Brady* doctrine. After all, Justice Scalia's argument came in a concurring rather than majority opinion, and *Thompson* was a civil rather than criminal case. One might therefore conclude that Justice

argument against recognizing a right to untested evidence in *Brady* doctrine. In my view, the best argument for this position is a highly formal one like the one Justice Scalia adopts in *Thompson*.

97. Rather, as Justice Scalia sarcastically observed, the dissenters relied on the concession by Connick's counsel that a *Brady* violation had occurred. Connick v. Thompson, 131 S. Ct. 1350, 1369 n.5 (2011) (Scalia, J., concurring) ("Given the effort the dissent has expended persuading us that Connick's understanding of *Brady* is profoundly misguided, its newfound trust in his expertise on the subject is, to say the least, surprising.").

Scalia's opinion does not state "the law" and thus should not cause concern. Despite its superficial appeal, I argue that this criticism misunderstands the real dynamics of doctrinal evolution.

First, the fact that Justice Scalia advanced his argument in a concurrence hardly means it could not influence *Brady*'s future development. As shown below, concurring opinions—including Justice White's concurrence in *Brady* itself—have already affected the course of *Brady* doctrine just as they have influenced other areas of jurisprudence.[98] Moreover, dissenting opinions—which have even less claim to "the law"—have also impacted the development of *Brady* and other due process doctrines.[99] Majority, concurring, and dissenting opinions all play a role in the dialectic and cannot be lightly ignored.

Second, the fact that *Thompson* is a civil case also does not preclude its influence over *Brady* criminal doctrine. As Professor Laurin has demonstrated, the course of constitutional criminal doctrine can shift because of "borrowing" from civil law.[100] And indeed, I show below how *Brady* doctrine has already been dramatically affected by borrowing from disparate areas of criminal law.[101] Once again, Justice Scalia's substantive *Brady* analysis cannot be dismissed simply because *Thompson* more directly concerned failure-to-train liability.

As shown in the next two Parts, the evolution of due process doctrine is complex and can be influenced by what appear to be unlikely sources. To fully understand the potential significance of

98. Justice White's *Brady* concurrence called for a limit on constitutionalizing discovery and inspired the modern procedural school. *See infra* Part IV and Figure 2. Justice Fortas's concurrence in *Giles v. Maryland*, 386 U.S. 66 (1967), similarly inspired the substantive school. *See infra* Part IV and Figure 2. Outside of *Brady*, the canonical example of an influential concurrence over constitutional law is Justice Jackson's opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring). *See* Epstein & Jacobi, *supra* note 31, at 60 n.85.

99. Justice Holmes's dissent in *Frank v. Magnum*, 237 U.S. 309 (1915), is an important root in *Brady*'s family tree. *See infra* Part III and Figure 1. Justice Harlan's dissent in *Giles* is a key ancestor of *Bagley*. *See infra* Part IV and Figure 2. For an analysis of dissenting opinions' influence over economic liberty and incorporation due process doctrine, see Starger, *Exile on Main Street*, *supra* note 21.

100. *See* Jennifer E. Laurin, *Trawling for* Herring: *Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670 (2011).

101. *See infra* note 289 and accompanying text (describing role of borrowing in justifying *Bagley*).

Justice Scalia's *Thompson* concurrence, we must therefore turn to the central task of mapping the competing lines in the *Brady* dialectic.

## III. DUE PROCESS ROOTS: COMPETING *BRADY* ANCESTRIES 1868–1963

Is the *Brady* Rule a creature of procedural or substantive due process? For good or ill, there is no simple or uncontroversial answer to this question. On the one hand, as Professor Israel has noted, *Brady* announced a "free-standing due process right."[102] Israel's classification derives from the complete absence of any reference to criminal discovery in the Constitution or its amendments. Like rights to abortion or same-sex intercourse, *Brady*'s discovery right is unenumerated and thus a *substantive* creation of the Court. On the other hand, the *Brady* Rule imposes a disclosure obligation on prosecutors that is inextricably bound with criminal procedure. In this way, the *Brady* Rule provides a procedural guarantee that trials will not occur without allowing defendants access to exculpatory evidence. *Brady* arguably shares procedural and substantive due process qualities. Perhaps because of such difficulties, the Court itself has never directly spoken on *Brady*'s proper doctrinal classification.[103]

Regardless of classification, *Brady* is a Court creation. No serious jurist or scholar has ever claimed that the *Brady* Rule derives from an original public understanding of the meaning of "due process" in 1791 or 1868.[104] And yet, though clearly a product of Warren Court activism, *Brady* has also never faced any noteworthy

102. *See* Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretative Guidelines*, 45 ST. LOUIS U. L.J. 303, 390–91 & n.498 (2001).

103. In *United States v. Ruiz*, Justice Breyer did analyze a *Brady* question using a procedural due process balancing test. *See* Unites States v. Ruiz, 536 U.S. 622, 631 (2002) (citing Ake v. Oklahoma, 470 U.S. 68, 77 (1985)). This citation led Professor Avery to conclude that *Brady* was a *Mathews* procedural due process right. *See* Michael Avery, *Paying for Silence: The Liability of Police Officers Under Section 1983 for Suppressing Exculpatory Evidence*, 13 TEMP. POL. & CIV. RTS. L. REV. 1, 26–27 (2003) (explaining how the *Ake* test is identical to the classic procedural due process test under *Mathews v. Eldridge*, 424 U.S. 319 (1976)). However, *Mathews*'s applicability to *Brady* was rejected by a more recent opinion by Chief Justice Roberts. *See* Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2332, n.3 (2009) (Stevens, J., dissenting) (noting Chief Justice Roberts's rejection of the *Mathews* test). No Court opinion has formally declared *Brady* a procedural or substantive due process right.

104. These dates correspond to the ratification of the Fifth and Fourteenth Amendments, respectively.

originalist critique. This is because the right to criminal discovery derived from *Brady* fundamentally differs from the other Court-created rights typically targeted by originalist theorists. Unlike rights to abortion or same-sex intercourse, no moral tradition is offended by *Brady*'s substantive concern with innocence. And unlike more controversial procedural protections the Court has read into the Constitution—the exclusionary rule and *Miranda* warnings stand as obvious examples—*Brady* does not ever exclude evidence of guilt to frustrate truth-seeking in criminal trials.

Yet the absence of originalist critique should not obscure *Brady*'s contested origins and development. After all, ours is an adversarial system of criminal justice and the *Brady* Rule favors criminal defendants. In broad strokes, those who sympathize with the criminal-defense bar favor an expansive substantive conception of *Brady*, while those sympathetic to the prosecution understand *Brady* as a limited procedural mechanism. This Part maps the emergence of the competing procedural and substantive due process schools and analyzes the history culminating in *Brady*. Part III.A presents the opinion map for this Part and briefly explains the general schema. Part III.B breaks down the due process dialectic prior to *Brady*, while Part III.C analyzes *Brady* itself.

### *A. Explanation of Mapping Schema*

Figure 1 below charts *Brady*'s due process roots. Each triangle on the map represents a Court opinion; the case name appears above the opinion and its author's name appears below. The opinion's year is shown on the X-axis while the number of votes it received is on the Y-axis; all points above the dashed line are thus majority opinions. Opinion triangles point either up or down. In Figure 1, all the triangles pointing up are blue and represent opinions that found a due process right favoring criminal defendants (or, if written in dissent, that would have found a due process right). These opinions are the direct ancestors of *Brady*—what I call the substantive school. Red triangles pointing down represent opinions denying the existence of a due process right. This is thus the weak due process right line—later associated with the procedural school opposing *Brady*'s expansion. Figure 1 thus shows how the procedural school

went from controlling the majority in *Hurtado* and *Frank* to sounding in dissent in *Moore* and *Brady*.

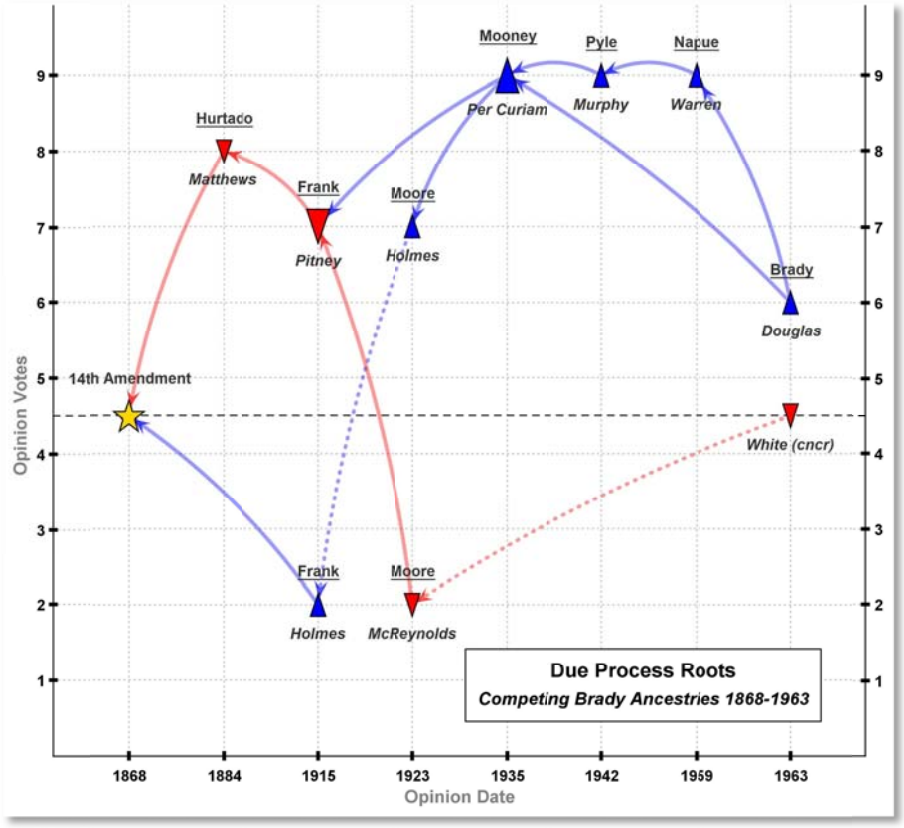


FIGURE 1

Arrows connect opinions and form lines of authority. Solid arrows mean the later opinion directly cited the earlier one to support the relevant due process proposition. For example, the arrow pointing from Justice Douglas's majority opinion in *Brady* back to the per curiam decision in *Mooney* is solid because *Brady* explicitly justified its ruling as "an extension of *Mooney v. Holohan*."[105] Dotted arrows indicate a more subtle hermeneutic connection that I argue exists between opinions, despite the absence of formal citation.

105. Brady v. Maryland, 373 U.S. 83, 86 (1963) (citing Mooney v. Holohan, 294 U.S. 103, 112 (1935) (per curiam)).

When dotted arrows join opinions, I provide argument to justify the link. Thus, the dotted arrow connecting Justice White's concurrence in *Brady* back to Justice McReynolds's dissent in *Moore* requires justification because Justice White did not explicitly cite *Moore* in his opinion.[106]

Taken as a whole, the map graphs the fortunes of competing doctrinal schools. The schools exist in familial lines of opinions. Subsequent opinions descend from earlier ones and share lineage and heritage. (To emphasize the importance of such familial connections, an opinion triangle grows in size as the number of citations to it increases.) The genealogical metaphor suggested by this depiction echoes the common practice of referring to "lines" of cases or to a leading case "and its progeny." However, this depiction refines the usual metaphor by mapping the relationships between *opinions* rather than between *cases*. Opinions have authors, which, unlike faceless attribution to "the Court," directly implies personal agency and the ideological commitments of individuals.[107]

Before specifically analyzing Figure 1, I want to emphasize that none of the opinion maps presented herein purport to chart every single relevant opinion from the period in question. The maps are not the territory. The point of the opinion maps is not to provide utterly exhaustive detail so much as to chart the main competing substantive and procedural due process lines. To deploy another analogy, Figures 1–3 are like maps of constellations. From a sparkling universe of opinions, I draw lines between what I see as the brightest stars. Like constellations, the real power in the connections drawn lies less in the raw images than in the stories it allows the observer to tell.

106. This argument is presented in Part III.C, *infra*.

107. Though ideological commitment forms a key part of the story, this does not mean that the history of *Brady* doctrine neatly reduces to a contest between "liberal" and "conservative" schools. Modern "liberal" and "conservative" categories did not coalesce until the middle of the twentieth century. *See, e.g.*, Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002) (examining attitudinalist scoring of liberal and conservative judicial leanings beginning in 1953). By contrast, "due process" is an ancient idea whose meaning has been contested since the Magna Carta. In particular, the personal ideological commitments of post–Civil War Justices do not neatly align with our modern conceptions of liberal or conservative.

### *B.* Brady*'s Ancestry: Rise of the Substantive School*

The basic story of *Brady*'s contested due process origins is set out in Figure 1. The earliest data point is the Fourteenth Amendment. Of course, the Amendment's "nor shall any state deprive any person of life [or] liberty . . . without due process of law" takes its due process language from the Fifth Amendment and applies it against the States.[108] Although this language provides a textual basis for the doctrine that follows, the text itself has played no meaningful role in the criminal due process dialectic. For the most part, the competing lines clash over proper interpretations of prior due process caselaw. The mode of constitutional argumentation is thus quintessentially doctrinal.

The competing opinion lines in Figure 1 thus reveal the import of this map. Opinions in the blue line are *Brady*'s direct predecessors. In chronological order, the opinions in this line are *Frank v. Magnum* (Justice Oliver Wendell Holmes dissenting, 1915);[109] *Moore v. Dempsey* (Justice Holmes for the Court, 1923);[110] *Mooney v. Holohan* (per curiam, 1935);[111] *Pyle v. Kansas* (Justice Frank Murphy for the Court, 1942);[112] *Napue v. Illinois* (Chief Justice Earl Warren for the Court, 1959);[113] and *Brady v. Maryland* (Justice William Douglas for the Court, 1963).[114] Opinions in the red

108. *See* U.S. CONST. amend V (declaring that in the context of criminal cases, no person "shall be deprived of life, liberty, or property, without due process of law" without referencing the "deprivor"). The Bill of Rights did not originally apply against the States. *See* Barron *ex rel.* Tiernan v. Mayor of Baltimore, 32 U.S. 243, 247 (1833). Since federal criminal law was very underdeveloped prior to the Civil War, the Court had effectively no criminal due process jurisprudence before it was called on to interpret the Fourteenth Amendment.

109. Frank v. Magnum, 237 U.S. 309 (1915). *Frank* was a 7–2 decision. Justice Mahlon Pitney delivered the opinion of the Court. *Id.* at 324. Justice Oliver Wendell Holmes, Jr. wrote a dissent joined by Justice Charles Evans Hughes. *Id.* at 345 (Holmes, J., dissenting).

110. Moore v. Dempsey, 261 U.S. 86 (1923). *Moore* was a 7–2 decision. Justice Holmes delivered the opinion of the Court. *Id.* at 87. Justice James McReynolds wrote a dissent in which Justice George Sutherland concurred. *Id.* at 92, 102 (McReynolds, J., dissenting).

111. Mooney v. Holohan, 294 U.S. 103 (1935). *Mooney* was a 9–0 decision delivered per curiam with no dissents. *Id.* at 109.

112. Pyle v. Kansas, 317 U.S. 213 (1942). *Pyle* was a 9–0 decision. Justice Frank Murphy delivered the opinion of the Court. *Id.* at 213.

113. Napue v. Illinois, 360 U.S. 264 (1959). *Napue* was a 9–0 decision. Chief Justice Earl Warren delivered the opinion of the Court. *Id.* at 265.

114. Brady v. Maryland, 373 U.S. 83 (1963). *Brady* was a 6–1–2 decision. Justice William Douglas wrote the opinion for the Court. *Id.* at 84. Justice Byron White wrote a separate opinion.

line represent the competing tradition that opposed the due process expansion leading to *Brady*. In order, these opinions are *Hurtado v. California* (Justice Stanley Matthews for the Court, 1884);[115] *Frank v. Magnum* (Justice Mahlon Pitney for the Court, 1915); *Moore v. Dempsey* (Justice James McReynolds dissenting, 1923); and *Brady v. Maryland* (Justice Byron White concurring, 1963).

The earliest opinion in this dialectic is Justice Matthews's 1884 opinion for the Court in *Hurtado*. This case represented the Court's first major ruling on what due process requires of the criminal process.[116] For present purposes, Justice Matthews's opinion is most significant for articulating the baseline rule that criminal due process requires that a defendant be given notice and the opportunity to be heard.[117] "Notice and opportunity to be heard" captures the essentially procedural conception of due process that initially held sway over the Court's jurisprudence. Under this conception, a state's criminal procedure comports with due process so long as it provides notice and opportunity—unless it otherwise falls afoul of "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[118] In *Hurtado*, Justice Matthews applied this rule and found that California's capital prosecution of Joseph Hurtado without grand jury indictment comported with due process.[119]

While *Hurtado* provides the procedural baseline, the competing substantive view does not really enter the dialectic until 1915's *Frank*.[120] *Frank* was the first in a series of racially and politically

*Id.* at 91 (White, J., concurring in judgment). Justice John Marshall Harlan II dissented and was joined by Justice Hugo Black. *Id.* at 92 (Harlan, J., dissenting).

115. Hurtado v. California, 110 U.S. 516 (1884). *Hurtado* was an 8–1 decision. Justice Stanley Matthews wrote the opinion for the Court. *Id.* at 519. Justice John Marshall Harlan wrote a solo dissent. *Id.* at 538 (Harlan, J., dissenting).

116. Israel, *supra* note 102, at 306.

117. Justice Matthews relied on earlier noncriminal precedent for the notice-and-opportunity-to-be-heard proposition. *See Hurtado*, 110 U.S. at 533 (quoting Kennard v. Louisiana *ex rel*, 92 U.S. 480 (1875)).

118. *See Hurtado*, 110 U.S. at 535.

119. *Id.* at 538. This result is notable because the Fifth Amendment clearly mandates grand jury indictments in federal prosecutions.

120. *See generally id.* at 538–58 (Harlan, J., dissenting) (declining to question whether the Court needed to look behind the forms of procedure and inquire into whether a miscarriage of justice had occurred). As important as Justice Harlan's dissent is to the Court's "incorporation" dialectic, it plays no significant role in *Brady*'s history. *See* Starger, *Exile on Main Street*, *supra* note 21, at 1290 (analyzing influence of Justice Harlan's dissent over incorporation doctrine).

charged cases reviewed by the Court—*Moore* and *Mooney* followed. In all these cases, the State provided the defendant notice and opportunity to be heard, but the question was whether a miscarriage of justice occurred despite formal procedural protections. The emerging substantive school advocated looking behind procedural form to the substance of justice.

The question of substantive justice loomed large when Leo Frank asked the Court to issue writ of habeas corpus. To many, Frank was a victim of great injustice.[121] He stood convicted of the capital rape-murder of Mary Phagan, a thirteen-year-old employee of his at the National Pencil Factory in Atlanta, Georgia.[122] Critically, Frank was a Jew and Phagan a Christian.[123] Frank's case caused tumult in the South as sensational newspaper coverage fanned anti-Semitic flames.[124] Before the Court, Frank argued that his trial had been conducted under a threat of mob violence and that mob domination had denied him due process of law.[125]

The Court ruled against Frank. Writing for a seven-Justice majority, Justice Pitney invoked *Hurtado* for the proposition that

> a criminal prosecution in the courts of a State . . . conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is "due process" in the constitutional sense.[126]

121. The Anti-Defamation League was actually founded in 1913 as a direct response to the *Frank* trial. *See Georgia Pardons Lynching Victim, ADL's First Case*, L.A. TIMES, Mar. 12, 1986, at A11.

122. *See* Eric M. Freedman, *Milestones in Habeas Corpus: Part II Leo Frank Lives: Untangling the Historical Roots of Meaningful Federal Habeas Corpus Review of State Convictions*, 51 ALA. L. REV. 1467, 1474 (2000).

123. Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557, 558 (1994).

124. *Id.*

125. Frank v. Magnum, 237 U.S. 309, 324–25 (1915).

126. *Id.* at 326 (citing Hurtado v. California, 110 U.S. 516, 535 (1884)). Justice Pitney cited other cases for this proposition here as well. It deserves mention that Frank's case involved important questions of federal habeas jurisdiction. Most of the cases Justice Pitney cites in his opinion serve as authority justifying his habeas ruling. *Hurtado* is the most important due process case he cites. For a discussion focused on the technical habeas aspects of *Frank*, see generally Freedman, *supra* note 122.

Under the "notice and opportunity to be heard" rule, Frank had received due process. This is because Frank's claim about mob domination had been heard and rejected by the appellate and supreme courts of Georgia.[127] These subsequent courts conducted their review "under circumstances wholly apart from the atmosphere of the trial, and free from any suggestion of mob domination."[128] Justice Pitney flinched at extending due process to "impair the power of the States to repress and punish crime."[129]

Justice Holmes dissented and gave first voice to the substantive perspective that due process inquiries cannot end with notice and opportunity. Relying on his own considerable authority, rather than any prior caselaw, Justice Holmes wrote:

> Whatever disagreement there may be as to the scope of the phrase "due process of law," there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard. Mob law does not become due process of law by securing the assent of a terrorized jury. We are not speaking of mere disorder, or mere irregularities in procedure, but a case where the processes of justice are actually subverted.[130]

Justice Holmes quickly dismissed Justice Pitney's worries that exercising federal habeas jurisdiction would violate the principle of comity and impair the State's authority to punish the guilty. Instead, Justice Holmes appealed to "the supremacy of the law and of the Federal Constitution."[131] Closing in strong moral language, Justice Holmes declared it "our duty . . . to declare lynch law as little valid when practiced by a regularly drawn jury as when administered by one elected by a mob intent on death."[132]

*Frank* thus presents side by side the nascent doctrinal philosophies of competing due process schools. Justice Pitney looked to the established forms of procedure and judged the whole state

127. *Frank*, 237 U.S. at 312–16 (reviewing procedural history).
128. *Id.* at 333.
129. *Id.* at 337.
130. *Id.* at 347 (Holmes, J., dissenting).
131. *Id.* at 349.
132. *Id.* at 350.

apparatus as formally sound.[133] Justice Holmes advocated piercing the form and independently assessing whether substantive justice was done.[134] To be sure, the dispute did not involve a wholly categorical disagreement on what due process required. Justice Holmes did not argue that the federal courts were free to second-guess state-court judgments that met formal procedural requirements. He stressed instead the particular gravity of the allegations in Frank's case.[135] For his part, Justice Pitney agreed that "if a trial is in fact dominated by a mob . . . so that there is an actual interference with the course of justice, there is . . . a departure from due process of law in the proper sense of that term."[136] However, he emphasized that Georgia had a sound corrective process, which had in fact previously granted new trials when mob violence rendered trials unfair.[137]

While only Justice Pitney's majority opinion formally assumed stare decisis status, Justice Holmes's dissent turned out to be more influential in the doctrine. To understand why, it is first important to realize that Justice Holmes correctly apprehended the vicious reality of mob violence in Frank's case. After losing in the Supreme Court, Frank's lawyers managed to persuade Georgia's governor to commute Frank's death sentence to life.[138] Outraged anti-Semitic mobs subsequently exploded into violence around the state.[139] A month later, a party led by eminent citizens abducted Frank from jail and then lynched him in Mary Phagan's hometown.[140] The horror of this injustice is compounded by the fact that Frank was almost certainly innocent.[141] This factual context informed the legal redemption of Justice Holmes's *Frank* dissent in *Moore*.

133. *Id.* at 345 (majority opinion) ("In all of these proceedings the State, through its courts, has retained jurisdiction over him, has accorded to him the fullest right and opportunity to be heard according to the established modes of procedure . . . .").

134. *Id.* at 346 (Holmes, J., dissenting) ("[H]abeas corpus cuts through all form and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.").

135. *Id.* at 349 (majority opinion).

136. *Id.* at 335. Depending on how draft opinions were circulated, this concession may have been made in direct response to Justice Holmes's sharp dissent.

137. *Id.* (citing Collier v. State, 42 S.E. 226 (1902); Myers v. State, 25 S.E. 252 (1895)).

138. Freedman, *supra* note 122, at 1495–96.

139. *Id.*

140. *Id.* at 1497.

141. The only uncertainty derives from the fact that there is no one hundred percent conclusive evidence of innocence such as a DNA test. In 1983, the Georgia Board of Pardons and

Decided in 1923, *Moore* was another Court encounter with mob justice.[142] This time the violence arose out of a massive race riot that occurred in 1919 in Phillips County, Arkansas.[143] The riot lasted days, and rampaging whites killed between 200 and 250 African Americans.[144] Four whites were also killed in the violence before federal troops restored order.[145] In the aftermath, a series of grand jury indictments and hasty trials resulted in seventy-nine convictions of black men for the murder of whites.[146] Twelve men received death sentences.[147] After a complicated path through Arkansas and federal courts, seven defendants who were all convicted of murdering the same man—Clinton Lee—ended up in a consolidated case before the Court in *Moore*.[148]

Now writing for a seven-Justice majority, Justice Holmes found that the defendants' allegations of mob violence and intimidation stated a valid due process claim. Justice Holmes agreed with the appellants that "although [the original proceedings were] a trial in form, [they] were only a form, and . . . the appellants were hurried to a conviction under the pressure of a mob."[149] For the proposition that this empty form violated due process, Justice Holmes cited no cases at all except for *Frank*.[150] Here Justice Holmes seized upon Justice Pitney's begrudging dictum from *Frank* that a trial dominated by a mob would violate due process if it caused an "actual interference with the course of justice."[151] In dissent, Justice McReynolds strongly objected to Justice Holmes's reading. He accused the *Moore* majority of putting the real *Frank* doctrine aside and adopting "the views expressed by the minority of the Court in that cause."[152] To

Paroles ruled that the evidence did not prove Frank was innocent. *See Georgia Pardons Victim 70 Years After Lynching*, N.Y. TIMES, Mar. 12, 1986, at A16. However, in 1986, the Board reversed itself and granted a posthumous pardon, stating that "such a standard of proof, especially for a 70-year-old case, is almost impossible to satisfy." *Id.*

142. Moore v. Dempsey, 261 U.S. 86 (1923).

143. Freedman, *supra* note 122, at 1502.

144. *See generally id.* at 1502–04 (analyzing different historical accounts of the violence).

145. *Id.* at 1504.

146. *Id.*

147. *Id.*

148. *Id.* at 1505–21 (detailing procedural history of cases involving the two sets of defendants (*Ware v. State*, 252 S.W. 934 (1923), and *Moore*)).

149. Moore v. Dempsey, 261 U.S. 86, 87 (1923).

150. *Id.* at 90–91 (citing Frank v. Magnum, 237 U.S. 309, 335 (1915)).

151. *Id.* (citing *Frank*, 237 U.S. at 335).

152. *Id.* at 93 (McReynolds, J., dissenting).

back up his claim, Justice McReynolds quoted seven complete paragraphs from *Frank* that put Justice Pitney's mob-domination quote in its original context.[153]

Though Justice Holmes technically quoted the *Frank* majority, his reasoning in *Moore* directly resonated with his prior dissent. In *Moore*, Justice Holmes once again viewed due process as demanding an inquiry into the ends of justice rather than a polite review of the means:

> [I]f the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights.[154]

On the other hand, Justice McReynolds's dissent echoed the central themes of the *Frank* majority—the importance of deferring to state criminal processes, confidence in the integrity of state-court review, and suspicion of defendants' claims.

These relationships between arguments explain why Figure 1 shows a dotted arrow pointing back from Holmes's majority opinion in *Moore* to his dissent in *Frank*.[155] Though not explicitly linked by textual citation (Justice Holmes did not cite his *Frank* dissent in *Moore*), the opinions share a deeper hermeneutic connection. Beyond a common author, they also advance the same tradition—advocating a strong substantive role for due process. *Moore* marks the first case in which freestanding due process found majority approval.[156] It also marks the beginning of the substantive due process school's rise.

This doctrinal changing of the guard necessarily involved a lax approach to stare decisis. In truth, McReynolds accurately captured Justice Holmes's disregard for *Frank*, and it is fair to say that *Moore* effectively overruled *Frank sub silentio*. Of course, Justice Holmes's

153. *Id.* at 94–96 (quoting *Frank* en bloc).

154. *Id*. at 86, 91 (majority opinion).

155. Since Justice McReynolds did directly cite the *Moore* majority, Figure 1's arrow connecting Justice McReynolds's opinion back to Justice Pitney's *Moore* opinion is solid.

156. *Cf.* Israel, *supra* note 102, at 374 (arguing *Moore* was the first case in which the Court found a due process violation that did not involve a parallel violation of a specific guarantee).

lax approach made sense given the *Frank* debacle and the contemporary realities of endemic racism and unchecked lynching. It also comes as no surprise that Justice Holmes delivered the stare decisis blow. After all, he is the author of that most famous aphorism critiquing slavish adherence to precedent—"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[157]

After *Moore*, the doctrinal question became how far the new substantive due process rule would reach. *Moore* showed that mob domination defeated due process even if notice and opportunity to be heard were formally present. The effective scope of the rule was subsequently extended in a string of unanimous cases—*Mooney*, *Pyle*, and *Napue*—that ultimately led to *Brady* and the creation of a due process right to discovery in criminal cases. During this period of expansion, the procedural school fell out of favor. This process began in *Mooney*.

The Supreme Court's 1935 per curiam opinion in *Mooney* is the most prominent single ancestor of *Brady*. Though its significance to due process is great, the opinion played a minor role in Tom Mooney's long odyssey to prove his innocence. A militant-left labor radical, Mooney was arrested in 1916 on a mass-murder charge arising out of the bombing of a pro-war rally in San Francisco that killed nine people.[158] Mooney's subsequent conviction likely rested upon false and perjured testimony.[159] At the time, Mooney's case became an international cause *célèbre* for the radical left. Strictly speaking, Mooney did not win relief in the Supreme Court.[160] However, after decades of mass demonstrations and protracted court battles, Governor Cuthbert Olson finally granted Mooney a full pardon on innocence grounds in 1939.[161]

157. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

158. *See* Rebecca Roiphe, *Lawyering at the Extremes: The Representation of Tom Mooney, 1916–1939*, 77 FORDHAM L. REV. 1731, 1731 (2009). Mooney had previously been acquitted of transporting explosives for the purpose of destroying the electrical transmission lines. Because of his radical politics and penchant for explosives, Mooney became the primary suspect for the San Francisco bombing despite the absence of any real evidence indicating guilt. *Id.* at 1738.

159. *Id.* at 1740–44 (discussing evidence).

160. The per curiam opinion denied Mooney leave to file a habeas petition and Mooney was forced to return to California courts for ultimately unsuccessful litigation. *See* Mooney v. Holohan, 294 U.S. 103, 115 (1935); Roiphe, *supra* note 158, at 1753 n.110, 1754–56.

161. Roiphe, *supra* note 158, at 1759.

*Mooney* is significant for our stare decisis study because it expanded due process doctrine to prohibit state subornation of perjury. In so doing, the Court publically rejected the intensely procedural arguments of the California Attorney General (AG). In his brief to the Court, the AG argued that Mooney's "assertions relate not to the process of law followed in the petitioner's case but relate to the credibility of the evidence produced against petitioner and to the good faith of the prosecuting attorney." [162] Relying on *Frank* and *Hurtado*, the AG asserted that due process merely required that the defendant be given "notice, and a hearing, or an opportunity to be heard."[163] He then protested that

> petitioner would persuade this court to change the accepted meaning of the word "process" and to so broaden it as to include that which has never been regarded as process by any court in the history of our country. He would have the meaning of the due process clause expanded into a guarantee against the presentation of false evidence.[164]

Notably, the AG's protest against *expansion* of the scope of due process is grounded in a formal stare decisis argument. Since Mooney undeniably had notice and opportunity in state courts, the AG characterized his quest for due process relief as unsupported by precedent.[165]

Of course, the AG's formal reading of due process doctrine was contestable. After summarizing the AG's due process arguments, the Supreme Court's per curiam opinion bluntly rejected them: "We are unable to approve this *narrow view* of the requirement of due process."[166] The requirement of due process, the Court wrote,

> cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court

162. Return to the Order to Show Cause Why Leave to File Petition for Writ of Habeas Corpus Should Not Be Granted at 2, Mooney v. Holohan, 294 U.S. 103 [hereinafter *Mooney* AG's Brief].

163. *Id.* at 4 (quoting Frank v. Magnum, 237 U.S. 309 (1915) (citing Hurtado v. California, 110 U.S. 516, 535 (1884))).

164. *Id.* at 17.

165. *Id.* at 6–7, 16–17.

166. *Mooney*, 294 U.S. at 112 (emphasis added).

> and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.[167]

As authority for its substantive conception of due process, the Court cited *Frank* and *Moore*.[168] However, the *Mooney* Court did not quote any formal rule from *Frank* or *Moore* and apply it to the case before it. Rather, it analogized to mob intimidation and invoked the "rudimentary demands of justice."[169] This was an essentially justificatory reading of stare decisis.

*Mooney*'s due process principle effectively authorized federal review of the good faith of prosecuting attorneys. When prosecutors acted in bad faith by suborning perjury, they reduced procedural protections to an empty form. Notice and hearing alone cannot protect against bad faith deception and perjured testimony. To protect the ends rather than the means of justice, *Mooney* read a substantive due process principle into the doctrine. *Mooney*'s principle was easily applied in the final two cases before *Brady* itself—*Pyle* and *Napue*.

In *Pyle*, the Court reviewed a pro se habeas petition on a state murder charge.[170] On behalf of a unanimous Court, Justice Murphy noted that allegations of perjury as well as the "deliberate suppression . . . of evidence favorable to [defendant]" stated a viable due process claim.[171] For this proposition, Justice Murphy cited *Mooney* alone.[172] Even though *Mooney* itself had no language about "deliberate suppression of evidence," the *Pyle* Court apparently found deliberate suppression inconsistent with *Mooney*'s spirit. In

167. *Id.*

168. *Id.* at 113 (citing Moore v. Dempsey, 261 U.S. 89, 90–91 (1923); *Frank*, 237 U.S. at 335).

169. *Id.* at 112.

170. Pyle v. Kansas, 317 U.S. 213, 214 (1942). Pyle's pro se petition named three witnesses who he claimed were forced either to lie or not testify by the prosecution. Pyle also claimed that evidence at a later trial held after his direct appeal contained evidence that exonerated him. *Id.*

171. *Id.* at 215–16. The Court found that Pyle's claims, if proved, would state a violation of constitutional rights. Ultimately, the Court remanded the case back to the Kansas Supreme Court. *Id.*

172. *Id.* at 216 (citing *Mooney*, 294 U.S. 103).

short, the Court once again adopted a justificatory view of stare decisis.

This pattern continued with the Court's 1959 opinion in *Napue*.[173] In this murder prosecution, the State's principal eyewitness falsely testified that he had received no deals in exchange for his testimony.[174] Writing for another unanimous Court, Chief Justice Warren found that this use of false testimony violated due process.[175] To back his argument, Chief Justice Warren first cited *Mooney* and *Pyle* for the "established" principle that due process prohibits "conviction[s] obtained through use of false evidence, known to be such by representatives of the State."[176] However, Chief Justice Warren had to argue further since the false testimony in *Mooney* and *Pyle* went directly to guilt or innocence, whereas the *Napue* false testimony only impeached witness credibility. Chief Justice Warren simply observed that the *Mooney-Pyle* principle "does not cease to apply merely because the false testimony goes only to the credibility of the witness."[177] Here, Chief Justice Warren flatly rejected a formal interpretation of prior precedent and effectively expanded the due process rule.

This brings us to *Brady*'s brink. Since 1923, the Court had steadily expanded the scope of due process to prohibit mob-dominated trials, subornation of perjury, and deliberate suppression of favorable evidence. These opinions all expressed substantive due process concern with the ends of justice and rejected a purely "notice and opportunity to be heard" procedural view. This expansion was backed by lax (in the case of *Moore*'s effective overruling of *Frank*) and then justificatory interpretations of stare decisis. However, all of the opinions in this line essentially dealt with situations in which state actors had proceeded in bad faith. Such bad-faith actions rendered formal procedural protections substantively impotent and led to injustice. Whether due process offered substantive protection for criminal defendants when bad faith was not implicated was not a question considered by the Court until *Brady*.

173. *See* Napue v. Illinois, 360 U.S. 264, 264 (1959).
174. *Id.* at 266–67. The witness had in fact received a plea deal for his cooperation. *Id.*
175. *Id.* at 272.
176. *Id.* at 269 (citing, *inter alia*, *Mooney* and *Pyle*).
177. *Id.*

### *C.* Brady*: Contested Birth of a Discovery Right*

Though the Court did not do so, John Brady's story could be read to reveal bad faith on the part of state authorities. Brady and his codefendant Donald Boblit faced charges for the robbery and murder by strangulation of William Brooks.[178] Brady and Boblit each confessed participating in the crime to police but blamed the other for actually killing Brooks.[179] The State tried the men separately and sought the death penalty for each. Prior to Brady's trial, his counsel requested to view the records of Boblit's confessions.[180] Prosecutors withheld one confession in which Boblit admitted to strangling Brooks.[181] At trial, Brady admitted his participation in the robbery but insisted that Boblit alone killed Brooks.[182] On this basis, Brady's counsel argued that his client should be spared capital punishment.[183] Without corroboration of Brady's story, the jury returned a death sentence. When the State subsequently tried Boblit, Boblit attempted to pin the murder on Brady.[184] At this point, prosecutors sought to impeach Boblit by brazenly introducing the very same confession they had previously withheld from Brady.[185] The jury in Boblit's trial found him guilty and sentenced him to die.[186]

Years later, Brady learned of Boblit's suppressed confession and filed a postconviction appeal.[187] After the trial court denied relief, the Maryland Court of Appeals reversed and ordered a new punishment-phase trial for Brady.[188] In its opinion, the court found that the State "knew in advance" of Brady's trial strategy and that "there was a duty on the State to produce the confession of Boblit that he did the actual strangling or at least to inform counsel for the accused of its

178. *See* Brady v. State, 160 A.2d 912, 913–14 (Md. 1960).

179. *See* Brady v. State, 154 A.2d 434, 434–35 (Md. 1959).

180. Stephanos Bibas, Brady v. Maryland*: From Adversarial Gamesmanship Toward the Search for Innocence?*, *in* CRIMINAL PROCEDURE STORIES 129, 134 (Carol S. Steiker ed., 2006) (citing Brady v. Maryland, 373 U.S. 83, 84 (1963)).

181. Brady v. State, 174 A.2d 167, 169 (Md. 1961).

182. Brady v. Maryland, 373 U.S. 83, 84 (1963).

183. *Id.*

184. *Brady*, 154 A.2d at 435.

185. *Brady*, 174 A.2d at 169. However, since this confession was not signed by Boblit, the presiding judge did not admit it into evidence. *Id.*

186. *Brady*, 154 A.2d at 434.

187. *See* Bibas, *supra* note 180, at 134.

188. *See Brady*, 174 A.2d at 172.

existence."[189] In language closely anticipating the eventual *Brady* Rule, the court then stated: "the suppression or withholding by the State, of material evidence exculpatory to an accused is a violation of due process . . . . It is none the less a denial of due process if the withholding of material evidence is without guile."[190]

The Maryland court's suggestion that prosecutors suppressed evidence "without guile" is puzzling. Consider the following proposition: *Boblit strangled Brooks*. At Brady's trial, the prosecution did not want the jury to believe this proposition and so withheld evidence supporting it. At Boblit's trial, the prosecution now wanted the jury to believe the exact same proposition and so sought to prove it using the evidence it had previously withheld. Through suppression and incompatible positions about the identity of the true killer, the prosecution sent two men to the gallows. One might well ask—how is this not bad faith? In the end, the Court never confronted this question since the parties did not dispute it.[191] Brady made no bad-faith accusations and prosecutors certainly did not advance a good-faith defense.[192] This lack of debate helps initially explain how the Court's arguably radical extension of *Mooney*'s bad-faith principle to good-faith situations escaped direct comment.

In any event, the Supreme Court affirmed the Court of Appeals.[193] In his majority opinion, Justice Douglas wrote for six members of the Court and proclaimed that the court below had "state[d] the correct constitutional rule."[194] Justice Douglas then frankly stated: "This ruling is an *extension* of *Mooney*."[195] Next,

189. *Id.* at 169.

190. *Id.*

191. Two potential good-faith explanations are possible—though weak. First, admissibility issues surrounding Boblit's confession possibly led prosecutors to believe disclosure to the defense was pointless. *See Brady*, 174 A.2d at 170. Alternatively, prosecutors may have believed that both Boblit and Brady shared complete culpability for the murder and so employed cynical tactics to reach a result they thought just—the death penalty for both.

192. *See generally* Brief for Petitioner, Brady v. Maryland, 373 U.S. 83 (1963) (No. 490), 1962 WL 115267 [hereinafter *Brady* Petitioner's Brief] (stating no bad-faith accusations against prosecutors). And for its part, the State did not try to defend its actions as undertaken in good faith. *See generally* Brief for Respondent, Brady v. Maryland, 373 U.S. 83 (1963) (No. 490), 1963 WL 105617 [hereinafter *Brady* Respondent's Brief] (offering no defense on the part of the State that actions were taken in good faith).

193. *Brady*, 373 U.S. at 91.

194. *Id.* at 86.

195. *Id.* (emphasis added).

Justice Douglas recounted developments since *Mooney*, noting both how courts had interpreted *Pyle* to forbid "'suppression of evidence favorable' to the accused"[196] and how *Napue* itself had "*extended* the test formulated in *Mooney*" to prohibit the state from allowing false evidence to go uncorrected.[197] With this pattern of extending precedent established, Justice Douglas formally announced the now-familiar *Brady* Rule. To recall it once more, this Rule held that suppression of favorable evidence by the prosecution when requested by the defense violated due process, "irrespective of the good faith or bad faith of the prosecution."[198]

The highly justificatory thrust of Justice Douglas's approach to stare decisis is apparent. Certainly, his assertion that the *Brady* Rule was a simple "extension of *Mooney*" is vulnerable to formal charges of impermissibly expanding then-existing due process jurisprudence. After all, it is quite a leap to infer an affirmative duty to disclose exculpatory evidence from cases that imposed a negative prohibition on suborning perjury or allowing lies to stand uncorrected. It similarly stretches analogy to find a constitutional basis for regulating discovery in cases that erected due process protections against mob justice. In short, it is a radical move to find precedent for the irrespective-of-good-or-bad-faith command of *Brady* in the tied-to-bad-faith history of its ancestral cases.

Although Justice Douglas's radical move was indeed contested, this specific stare decisis critique was not raised. On the key due process issue, Justice Byron White's separate concurring opinion functioned as the dissent.[199] Justice White railed against the central innovation of *Brady*—"cast[ing] in constitutional form a broad rule of criminal discovery."[200] He advocated leaving the task of creating discovery rules "to the rule-making or legislative process after full consideration by legislators, bench, and bar."[201] As noted, Justice White did not back his argument by accusing the Court of

196. *Id.* at 87 (quoting United States *ex rel.* Almeida v. Baldi, 195 F.2d 815, 820 (3d Cir. 1952)).

197. *Id.* (emphasis added) (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)).

198. *Id.*

199. Justice White concurred in the judgment on the only live controversy—whether John Brady deserved a new innocence-phase trial. He agreed that Brady did not. *Id.* at 92 (White, J., concurring).

200. *Id.*

201. *Id.*

improperly stretching prior precedent. However, he did attempt to stifle *Brady*'s doctrinal influence through a different kind of formal stare decisis argument. Specifically, Justice White boldly argued that the *Brady* Rule was nonbinding dictum.[202]

Justice White's formal reasoning proceeded from the observation that the Maryland Court of Appeals opinion—which was affirmed by the Court in *Brady*—had invoked due process without explicitly citing either the Maryland or federal constitutions.[203] Since both constitutions had due process clauses, Justice White noted that it was impossible to know whether the lower court's due process language stated a proposition of state or federal law, which rendered "the [federal] due process discussion by the Court . . . wholly advisory."[204] On this formal reading, the now-famous *Brady* Rule had no precedential value.[205] Though it seems quixotic in light of actual doctrinal developments, it is worth noting that Justice White's argument was formally reasonable. Indeed, Justice Douglas's due process discussion was not logically necessary to affirm the lower court, and, under a formal view of precedent, only those statements that are logically necessary to a court's decision constitute its holding.[206]

Of course, one reason that Justice White's formal stare decisis reasoning did not prevail is that it patently ignored Justice Douglas's unequivocal "[w]e now hold" prefatory language. Another reason is that his formal critique had little persuasive traction at that stage of the doctrinal discourse. In the forty years prior to *Brady*, the Court had steadily expanded due process and rejected formal readings of precedent.[207] *Brady* unquestionably represented an even more radical leap forward, but it had momentum behind it. As with Justice Holmes's aggressive expansion of due process in *Moore*, it is unsurprising that Justice Douglas paid little heed to formal stare

202. *Id.*

203. *Id.* at 91.

204. *Id.* at 92.

205. In his separate dissent, Justice Harlan agreed with Justice White that there was "no necessity for deciding in this case the broad due process questions with which the Court deals." *Id.* at 92 n.1 (Harlan, J., dissenting).

206. *See* Dorf, *supra* note 24, at 2041 (quoting Rupert Cross & J.W. Harris, PRECEDENT IN ENGLISH LAW 72 (4th ed. 1991) ("The *ratio decidendi* of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion . . . .").

207. *See supra* Part III.A–B.

decisis in *Brady*. After all, Justice Douglas had written a law review article fourteen years earlier in which he proclaimed that stare decisis had only a "tenuous" place in constitutional law.[208] "So far as constitutional law is concerned," wrote the future author of *Brady*, "stare decisis must give way before the dynamic component of history."[209]

Ultimately, this "dynamic component of history" is what justified Justice Douglas's radical doctrinal move in *Brady* and shielded it from any frontal attack on its precedential legitimacy. As I see it, the explanation for the comparatively muted critique of *Brady*, despite the opinion's tenuous link to prior precedent, lies in shifting historical paradigms of criminal prosecution and in the fundamentally intuitive appeal of the *Brady* Rule.

From the time of the Founding through the mid-twentieth century, criminal trials were deeply adversarial affairs.[210] In theory, juries found truth by weighing the competing cases advanced by the prosecution and defense. Each side sought victory in a sporting contest whose fairness was guaranteed by judges enforcing neutral rules. This early paradigm is known as the sporting theory of justice. By the time of *Mooney*, support for the sporting paradigm was waning but still had its adherents. In his *Mooney* brief, the California Attorney General unabashedly stated that the "function of the prosecuting attorney is to prosecute, to act as an accuser, to be a partisan, to present the evidence *on one side of the case*."[211] Due process, he reasoned, only demanded an "impartial [court] between the accuser and the accused" and could never be violated by a conviction obtained through perjury unless "the trial judge or trial jurors were parties to the alleged fraud."[212] Under the sporting paradigm, this was a credible argument. Yet the *Mooney* Court implicitly rejected this "narrow view of the requirement of due

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

209. *Id.* at 737.

210. *See* Bibas, *supra* note 180, at 131 (citing John H. Langbein, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (2003)).

211. *See Mooney* AG's Brief, *supra* note 162, at 20.

212. *Id.* at 21.

process."[213] In *Brady*, Justice Douglas finally and explicitly rejected the "sporting theory of justice."[214]

Under the new paradigm, the prosecution's ethical obligation became seeking justice rather than victory. With a new paradigm came new intuitions. By 1963, mandating the disclosure of exculpatory evidence gained an intuitive appeal that it lacked at the time of the Founding and passage of the Fourteenth Amendment. In *Brady* itself, everyone on all sides accepted that Boblit's confession should not have been withheld.[215] The new intuition signaled that what it meant to "play by the rules" in American criminal prosecutions had forever changed. The fundamental proposition that the prosecution had *some* duty to disclose evidence of innocence made sense. Because of this, limiting due process to the formal rules already in place made less sense. Advancing the reasoning of *Mooney* mattered more than fidelity to its formal rule.

However, the emergence of a new paradigm did not spell the end of the dialectic between substantive and procedural due process schools. In many ways, Justice Douglas's *Brady* opinion represents the apogee of the substantive school's influence over freestanding criminal due process doctrine. While no dissenting opinions questioned the doctrinal expansions in *Mooney*, *Pyle*, and *Napue*, Justice White did argue against constitutionalizing discovery in *Brady*. In his opinion, Justice White rested his objection on pragmatic grounds rather than previous doctrine. However, I suggest that his argument effectively picked up procedural due process themes previously championed by Justices Matthews in *Hurtado*, Pitney in *Frank*, and McReynolds in *Moore*. For this reason, Figure 1 connects Justice White's opinion to those earlier procedural opinions with a dotted arrow. Justice White's basic stance in *Brady* expressed both a confidence in the integrity of state-court criminal processes and misgivings at federal-court intervention in those processes. This stance resonates with the earlier procedural due process tradition.

213. Mooney v. Holohan, 294 U.S. 103, 112 (1935).

214. *See* Brady v. Maryland, 373 U.S. 83, 90–91 (1963); *see also* United States v. Agurs, 427 U.S. 97, 108 n.15 (1976) (quoting *Brady's* rejection of the "sporting theory of justice").

215. This benefited John Brady. After the Supreme Court handed down its decision, prosecutors never sought another death sentence for Brady and he was quietly paroled from prison eighteen years later. *See* Bibas, *supra* note 180, at 137.

The next Part explores how the substance/procedure dialectic unfolded after *Brady*. Even though Justice White's particular stare decisis objections to *Brady* failed, his procedural critique gained traction as objections mounted to recognizing too broad a constitutional right to discovery. As the desire to halt expansion spread, we see the re-emergence of more formal stare decisis argumentation in due process doctrine.

## IV. DEFINING THE FRONTIER: *BRADY* BATTLES 1963–2012

Does *Brady* guarantee fair process or substantive justice? Justice Douglas's original *Brady* opinion cited both concerns when explaining the principle behind the new Rule:

> The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts."[216]

This passage suggests twin justifications for the *Brady* Rule. The first justification is fairness. This is a procedural justification, grounding the *Brady* Rule in a constitutional commitment to fair administration of justice irrespective of an accused's guilt or innocence. The second justification is justice. This concern transcends procedural fairness and finds backing for the Rule in substantively just results. Under this second justification, *Brady* stands for a constitutional commitment to protecting innocence and apprehending the guilty.

This Part surveys the post-*Brady* battles over the scope and application of the *Brady* Rule. These battles contested which of *Brady*'s twin justifications should dominate understanding of the due process doctrine. While the substantive school pushed for a broad discovery right, the procedural school sought to limit the

216. *Brady*, 373 U.S. at 87.

prosecutorial duty to disclose. Unsurprisingly, the substantive school backed its doctrinal arguments by appealing to *Brady*'s substantive justification as a guarantee of justice. Likewise, the procedural school backed its arguments by characterizing *Brady* as a limited procedural mechanism for ensuring fairness at trial.

The nearly five decades of debate since *Brady* divide into two basic eras. Part IV.A explores the first era, which extends from 1963 until the Court handed down *United States v. Bagley* in 1985. During this era, the primary focus was on the reach of *Brady*'s central materiality requirement. As shown, *Bagley* represented a major victory for the procedural school, one that was enacted through a highly formal stare decisis argumentation.

In the post-*Bagley* years, stare decisis concerns took a backseat in the mainline dialectic as battles over *Brady*'s legal meaning largely gave way to disputes over the application of facts. Part IV.B explores the period after *Bagley* until the present day. Although the procedural view of *Brady* is now dominant, this subpart shows how *Brady* has become so entrenched in due process doctrine that it may rightly be called "super-precedent."

### *A. Debating Materiality:* Brady *to* Bagley *1963–1985*

After *Brady*, the competing schools primarily debated the scope of due process discovery and whether prosecutorial suppression could ever be deemed constitutionally harmless. These debates largely turned on interpretations of *Brady*'s materiality requirement. The subpart shows how the procedural tradition eventually consolidated its hold over the doctrine in *Bagley*.

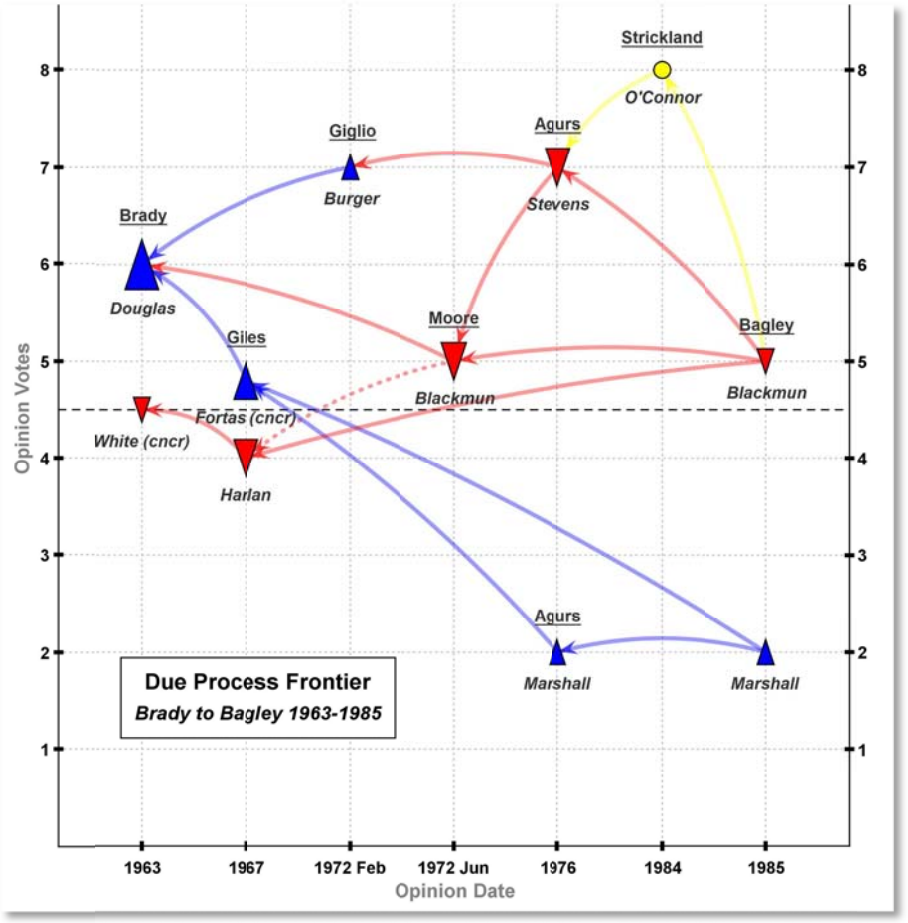


FIGURE 2

Figure 2 maps the competing schools from *Brady* until *Bagley*. As before, the blue line represents the substantive *Brady* school. These opinions all affirmed the due process right and afforded relief to the defendant (or, if written in dissent, would have affirmed the due process right and afforded relief). In chronological order, the opinions in this line are *Brady* (Justice Douglas for the Court, 1963);[217] *Giles v. Maryland* (Justice Abe Fortas concurring, 1967);[218]

217. *Id.* at 84.

218. Giles v. Maryland, 386 U.S. 66, 96 (1967) (Fortas, J., concurring). *Giles* was a 3–2–4 decision. Justice William Brennan, Jr. announced the judgment of the Court in an opinion joined

*Giglio v. United States* (Chief Justice Warren Burger for the Court, 1972);[219] *United States v. Agurs* (Justice Thurgood Marshall dissenting, 1976);[220] and *United States v. Bagley* (Justice Marshall dissenting, 1985).[221]

Once again, the red line represents the competing procedural school. The opinions all denied due process relief to the defendant (or, if written in dissent, would not have afforded due process relief). In chronological order, the opinions in this line are *Brady* (Justice White concurring, 1963); *Giles* (Justice John Marshall Harlan II dissenting, 1967); *Moore v. Illinois* (Justice Harry Blackmun for the Court, 1972);[222] *Agurs* (Justice John Paul Stevens for the Court, 1976); and *Bagley* (Justice Blackmun for the Court, 1985).[223]

Since it is technically not part of the *Brady* line, *Strickland v. Washington* (Justice Sandra Day O'Connor for the Court, 1984)[224] is

by Chief Justice Earl Warren and Justice Douglas. *Id.* at 67. Justice White concurred in judgment and wrote an opinion. *Id.* at 82 (White, J., concurring). Justice Abe Fortas did the same. *Id.* at 96 (Fortas, J., concurring). Justice John Marshall Harlan II dissented in an opinion joined by Justices Hugo Black, Tom Clark, and Potter Stewart. *Id.* at 102 (Harlan, J., dissenting).

219. Giglio v. United States, 405 U.S. 150 (1972). *Giglio* was a 7–0 decision. Chief Justice Warren Burger delivered the opinion of the Court. *Id.* Justices Lewis Powell and William Rehnquist took no part in the consideration or the decision of the case. *Id*. at 155.

220. United States v. Agurs, 427 U.S. 97, 114 (1976) (Marshall, J., dissenting). *Agurs* was a 7–2 decision. Justice John Paul Stevens delivered the opinion of the Court. *Id.* at 98. Justice Thurgood Marshall dissented in an opinion joined by Justice Brennan. *Id.* at 114 (Marshall, J., dissenting).

221. United States v. Bagley, 473 U.S. 667, 685 (1985) (Marshall, J., dissenting). *Bagley* was a 5–3 decision. Justice Blackmun announced the judgment of the Court and delivered the opinion of the Court except for Part III. *Id.* at 669. Justice O'Connor joined Justice Blackmun in Part III. *Id.* at 668. Justice White joined by Chief Justice Burger and Justice Rehnquist concurred except for Part III. *Id.* at 685 (White, J., concurring in part and concurring in judgment). Justice Marshall dissented in an opinion joined by Justice Brennan. *Id.* at 685 (Marshall, J., dissenting). Justice John Paul Stevens filed a solo dissenting opinion. *Id.* at 709. (Stevens, J., dissenting). Justice Lewis Powell took no part in the decision of the case. *Id.* at 684.

222. Moore v. Illinois, 408 U.S. 786 (1972). *Moore* was a 5–4 decision. Justice Harry Blackmun delivered the opinion of the Court. *Id.* at 787. Justice Marshall concurred in part and dissented in part and was joined by Justices Douglas, Stewart, and Powell. *Id.* at 800 (Marshall, J., dissenting).

223. *Bagley*, 473 U.S. at 668 (opinion of Blackmun, J.). Since Justice Blackmun advanced the critical due process proposition regarding materiality under *Brady* in Part III of his opinion, technically this triangle should be represented as only getting two votes. However, this would be misleading, since three other justices explicitly endorsed his materiality test. *See id.* at 685 (White, J., concurring in part and concurring in judgment).

224. Strickland v. Washington, 466 U.S. 668 (1984). *Strickland* was an 8–1 decision. Justice Sandra Day O'Connor delivered the opinion of the Court. *Id.* at 671. Justice William J. Brennan joined the Court's opinion but dissented in judgment based on his view that the death penalty is

represented as an orange circle. As explained below, *Strickland* did play an important "borrowing role" in restricting the meaning of *Brady* materiality.[225]

The post-*Brady* dialectic began with *Giles*. It provides an apt starting point since the exchange between Justice Fortas and Justice Harlan provides a blueprint for a debate that has continued for decades. Decided in 1967, the case concerned the rape convictions of brothers James and John Giles.[226] At trial, the Giles brothers offered a consent defense and argued that the victim had fabricated her rape allegations.[227] Prosecutors suppressed information affecting the victim's credibility before trial.[228] After their conviction, the brothers sought *Brady* relief.[229] The Court ultimately sent the case back to state court to consider new evidence disclosed for the first time during the Supreme Court litigation.[230] Justice Brennan wrote the plurality opinion in which he declined to examine potential issues about the scope of the prosecution's constitutional duty to disclose.[231]

Where Justice Brennan ducked the question, Justices Harlan and Fortas pointedly sparred over *Brady*. Justice Fortas initiated the argument in his concurring opinion. Confronting the objection that the suppressed revelations about the victim may not have been admissible at the Giles' trial, Justice Fortas wrote:

> I do not agree that the State may be excused from its duty to disclose material facts known to it prior to trial solely because of a conclusion that they would not be admissible at trial. The State's obligation is not to convict, but to see that, so far as possible, truth emerges. This is also

cruel and unusual punishment. *Id.* at 701 (Brennan, J., concurring in part and dissenting in part). Justice Marshall filed a solo dissenting opinion. *Id.* at 706 (Marshall, J., dissenting).

225. *See infra* notes 287–291 and accompanying text.

226. Giles v. Maryland, 386 U.S. 66, 67 (1967) (plurality opinion).

227. *Id.* at 69–70.

228. Specifically, prosecutors suppressed information showing that after the alleged rape occurred, but before the Giles' trial, the same victim had suffered from emotional disturbance, attempted suicide, and accused two other men of rape and then dropped the charges. *Id.* at 72–73.

229. The brothers prevailed in state trial court but lost on state appeal. *See id.* at 68; State v. Giles, 212 A. 2d 101, 111 (Md. Ct. App. 1965).

230. *See Giles*, 386 U.S. at 74 ("We now have evidence before us, which neither Judge Moorman nor the Court of Appeals considered, which in our view justifies a remand to the Court of Appeals for its consideration . . . .").

231. *Id.* at 73–74.

> the ultimate statement of its responsibility to provide a fair trial under the Due Process Clause . . . . No respectable interest of the State is served by its concealment of information which is material, generously conceived, to the case, including all possible defenses.[232]

By positing the search for truth as "the ultimate statement" of the due process obligation, Justice Fortas grounded the *Brady* Rule in a commitment to substantive justice.[233] By calling for a generous conception of materiality, he also advocated a justificatory approach to interpreting *Brady*'s precedent.[234]

In dissent, Justice Harlan mounted a rear-guard attack on *Brady*. Justice Harlan first characterized Justice Fortas's "generously conceived" materiality standard as a marked departure from the formal due process tradition of *Mooney* and *Napue*.[235] Since Justice Fortas's materiality standard implicitly invoked *Brady*, Justice Harlan explicitly dismissed the *Brady* Rule as "dicta" and cited Justice White's *Brady* concurrence as authority for this proposition.[236] Going further, Justice Harlan then proposed the *Mooney-Napue* rules against suborning perjury or permitting false testimony to go uncorrected as the outer limit of prosecutorial due process obligations.[237] Justice Harlan warned that Justice Fortas's reading of *Brady* would result "in the imposition upon the States through the Constitution of broad discovery rules," and that "[t]hose rules would entirely alter the character and balance of our present systems of criminal justice."[238] Under Justice Harlan's view, discovery regulation was simply beyond the scope of legitimate due process precedent. His argument thus adopted a formal stare decisis stance.

232. *Id.* at 98 (Fortas, J., concurring).

233. *Id*.

234. *Id*. at 96–102.

235. *Id.* at 116 (Harlan, J., dissenting) ("This standard would demand markedly broader disclosures than this Court has ever held the Fourteenth Amendment to require.").

236. *Id.* at 116–17 n.9 (Harlan, J., dissenting) ("I cannot agree that this Court in *Brady* extended *Mooney* in any fashion." (quoting Brady v. Maryland 373 U.S. 83, 92 (1963) (White, J., concurring))).

237. *Id.* at 117 ("Nor, in my view, does the Constitution demand more" (discussing *Mooney* and *Napue*)).

238. *Id.*

As it turns out, Justice Harlan's dissent in *Giles* was the last Supreme Court opinion that ever characterized the *Brady* Rule as dictum. Yet in subsequent battles over the Rule's scope, Justice Harlan's *Giles* opinion continued to exert influence over the procedural school. As shown in Figure 2, Justice Blackmun's *Bagley* opinion cited back to Justice Harlan's *Giles* dissent—just as Justice Harlan had cited back to Justice White's *Brady* concurrence.[239] Even though *Brady* became accepted as legitimate precedent, Justice Harlan's warning that broad discovery rules would undermine prosecutors' adversarial role inspired the procedural school to limit *Brady*. What's more, adherents to the procedural school followed Justice Harlan in using formal appeals to stare decisis.[240]

After *Giles*, though, the substantive school arguably still commanded the doctrine. However, 1972's *Giglio* represents the last unequivocal victory for that school. John Giglio's conviction stemmed from federal forgery charges.[241] At trial, an informant testified against Giglio and denied under vigorous cross-examination that he had an immunity deal.[242] The prosecution knew his testimony was false.[243] This was classic uncorrected perjury, and the Court unanimously held for Giglio.[244] Chief Justice Burger's opinion made clear that nondisclosure of evidence affecting credibility fell under the *Brady* Rule.[245] Since the informant's credibility was potentially "determinative of [Giglio's] guilt or innocence," reversal of the conviction was necessary to comport with the "rudimentary demands of justice."[246] In granting relief for the defendant, *Giglio* thus emphasized substantive justice and a systemic commitment to truth.

Where *Giglio* lacked controversy, *Moore* provoked it. Coincidentally, the 1972 *Moore* case saw the procedural school notch its first significant victory since the substantive school

239. Justice Blackmun's majority opinion in *Moore* also implicitly adopted Justice Harlan's procedural reasoning. *See infra* note 293 and accompanying text.

240. *See infra* note 250 and accompanying text.

241. Giglio v. United States, 405 U.S. 150, 150 (1972).

242. *Id.* at 151–52.

243. *Id.* at 152–53.

244. Although there were no dissenters, two Justices did not participate in the case. *See supra* note 219. Thus, Figure 2 shows Justice Burger's opinion as getting seven votes.

245. *Giglio*, 405 U.S. at 153–54 (discussing *Brady* and finding that *Brady*'s materiality requirement applied in the case).

246. *Id.* at 153 (quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935)).

assumed majority control in the 1923 *Moore* case. The facts were simple enough. Lyman Moore stood convicted of a barroom-shooting murder, and evidence emerged posttrial that cast doubt on an eyewitness who pegged Moore as the shooter.[247] Writing for a five-Justice majority, Justice Blackmun concluded that the suppressed evidence was not "material" under *Brady*.[248] Though Justice Blackmun professed to "adhere to the principles of *Brady*," he also emphasized that there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case."[249] Here, Justice Blackmun implicitly followed the position Justice Harlan urged in his *Giles* dissent—emphasizing constitutional limits on prosecutors' discovery obligations and denying *Brady* relief.[250]

Just as Justice Blackmun made his debut for the procedural school, *Moore* saw Justice Thurgood Marshall enter the *Brady* fray for the first time in the dissent.[251] Although the two Justices would later clash mightily with their interpretations of *Brady*'s precedent in *Bagley*, their *Moore* debate requires little attention since both opinions focused on facts rather than law. The opinions reached opposite conclusions about the materiality of the suppressed evidence in *Moore*, but neither jurist articulated a clear standard for this vital term.[252] The real significance of their exchange is that it made clear that *Brady* battles could turn on the meaning of

247. Moore v. Illinois, 408 U.S. 786, 788–793 (1972).

248. *Id.* at 797–98. Moore won some relief since his case was decided on the same day as *Furman v. Georgia*, 408 U.S. 238 (1972), which famously held the death penalty unconstitutional. *Id.* Since Moore had been sentenced to death, the Court also ruled that his death sentence could not be imposed. *See Moore*, 408 U.S. at 800.

249. *Moore*, 408 U.S. at 798, 795.

250. Because the connection is implicit, the arrow connecting the opinions in Figure 2 is dotted. Of course, I recognize that Justice Blackmun in *Moore* departed from Justice Harlan's strict position that the *Brady* Rule was dictum. At the same time, the deeper hermeneutic connection between the two jurists is evident from Justice Blackmun's subsequent citation in *Bagley* to Justice Harlan's *Giles* dissent for the proposition that *Brady* represents a limited procedural departure from an otherwise adversarial system. *See infra* notes 293–294.

251. *See Moore*, 408 U.S. at 800–08 (Marshall, J., dissenting). It is on account of its relative poverty as a source for legal analysis that I do not include Justice Marshall's *Moore* dissent in Figure 2.

252. *Compare Moore*, 408 U.S. at 797 ("We conclude, in light of all the evidence, that Sanders' misidentification of Moore as Slick was not material to the issue of guilt."), *with id.* at 806 n.4 (Marshall, J., dissenting) ("The materiality of the undisclosed evidence in this case cannot be seriously doubted.").

"materiality." How to define materiality would in turn depend on competing understandings of *Brady*'s justification and the proper approach to stare decisis. The fight over materiality ultimately played out over two key cases—*Agurs* in 1976 and *Bagley* in 1985.

Justice Stevens's majority opinion in *Agurs* uncomfortably occupies a liminal space between substantive and procedural due process conceptions of *Brady*. This is because the opinion simultaneously expanded and contracted the *Brady* Rule's scope.[253] The story behind this doctrinal ambiguity begins with a tryst in a cheap motel.[254] After hearing screams, motel employees barged into the room of erstwhile lovers James Sewell and Linda Agurs who were struggling over a bowie knife. After Sewell died from stab wounds, Agurs faced murder charges.[255] At trial, Agurs asserted self-defense to no avail.[256] Months after her conviction, Agurs's counsel discovered that Sewell had twice pleaded guilty to assault with a deadly weapon—a knife.[257] Agurs sought *Brady* relief, and the case found its way to the Court, which granted certiorari to decide "whether the prosecutor ha[d] any constitutional duty to volunteer exculpatory matter to the defense, and if so, what standard of materiality gives rise to that duty."[258]

The government pointed out to the Court that Agurs had never requested Sewell's criminal record and argued that, therefore, no *Brady* duty to disclose had existed.[259] This was a formal argument based on the *Brady* Rule's "upon request" condition—language the government insisted should be read literally.[260] Writing for a seven-Justice majority, Justice Stevens rejected this formal argument without ever directly addressing it. Instead, Justice Stevens proclaimed that an affirmative duty to disclose existed in situations

253. Since the majority denied relief to the criminal defendant, its representative triangle in Figure 2 is red and points down. Conversely, Figure 2 represents Justice Marshall's dissent in *Agurs* with a blue upward-pointing triangle because Justice Marshall would have granted relied under his unambiguously substantive perspective.

254. United States v. Agurs, 427 U.S. 97, 98 (1976).

255. *Id.* at 99–100.

256. *Id.* at 100.

257. *Id.* at 100–01.

258. *Id.* at 107.

259. *Id.* at 101.

260. *See* Brief for the United States, United States v. Agurs, 427 U.S. 97 (1976) (No. 75-491), 1976 WL 181371 at *24–26. In its argument, the government identified additional phrases in *Brady* and *Moore* that indicated that the defense had to request evidence. *Id.*

in which the "evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request."[261] To back this proposition, Justice Stevens invoked classic substantive due process justifications for *Brady* including the sovereign's interest in protecting innocence and seeing that "justice shall be done."[262] In sum, Justice Stevens ostensibly expanded the scope of the *Brady* Rule using a justificatory approach to stare decisis grounded in a substantive conception of due process.

Yet the outcome in *Agurs* belies any conclusion that the case represents a victory for the substantive school. Justice Stevens denied relief to Linda Agurs based on a narrow new materiality test.[263] To be fair, Justice Stevens's opinion actually suggested that *Brady* had three different materiality tests. The first two tests covered *Mooney*-like situations where suppressed evidence reveals knowing use of perjured testimony and *Brady*-like situations where suppression occurred despite a specific defense request for evidence.[264] Only the third test covered no-request situations like the one presented by Agurs's case.[265] Here Justice Stevens said that suppressed evidence was material only "if the omitted evidence creates a reasonable doubt that did not otherwise exist" when "evaluated in the context of the entire record."[266] According to Justice Stevens, this test struck a delicate balance by being less demanding on defendants than traditional newly-discovered-evidence tests but more demanding than customary harmless-error review.[267]

Yet Justice Stevens's claims to balance were undermined by the test's stated goal of protecting prosecutors. Justice Stevens explicitly set the materiality bar high enough to insulate prosecutors from

261. *Agurs*, 427 U.S. at 110.
262. *Id.* at 110–11 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).
263. *See id.* at 112–14.
264. *Id.* at 103–04.
265. *Id.* at 106–07.
266. *Id.* at 112.
267. The stricter newly-discovered-evidence standard required defendants to show that "the newly discovered evidence probably would have resulted in acquittal." *Id.* at 111 & n.19. By contrast, under harmless-error review, once constitutional error is found, the reviewing judge must set aside the verdict unless his "conviction is sure that the error did not influence the jury, or had but very slight effect." *Id.* at 112 (quoting Kotteakos v. United States, 328 U.S. 750, 764 (1946) (internal quotation marks omitted)).

having to deliver their entire files to defense counsel.[268] This shows the influence of the procedural due process school. Indeed, Justice Stevens tellingly cited Justice Blackmun's *Moore* opinion and call to limit procedural obligations when he justified this new materiality test.[269] And of course, the result in *Agurs* seemed to show that the new test tipped the scales in favor of prosecutors. Under the test, Justice Stevens found that nondisclosure of Sewell's previous knife assault charges did not create a reasonable doubt that did not otherwise exist. Despite the clear relevance of the knife charges to Agurs's self-defense theory, Justice Stevens's opinion forgave the nondisclosure and thus hinted that the obligation to disclose may never have existed.[270]

Justice Marshall dissented and sharply criticized the Court's attempted balancing act. Though it properly recognized an affirmative duty to disclose, Justice Marshall argued, "the Court so narrowly defines the category of 'material' evidence embraced by the duty as to deprive it of all meaningful content."[271] Justice Marshall insisted that the majority's new rule undermined *Brady*'s substantive commitments. The rule was "completely at odds with the overriding interest in assuring that evidence tending to show innocence is brought to the jury's attention."[272] This was because

> [t]he rule creates little, if any, incentive for the prosecutor conscientiously to determine whether his files contain evidence helpful to the defense. Indeed, the rule reinforces the natural tendency of the prosecutor to overlook evidence favorable to the defense, and creates an incentive for the prosecutor to resolve close questions of disclosure in favor of concealment.[273]

Rather than accepting the Court's "harsh standard," Justice Marshall advocated a test that required *vacatur* "[i]f there is a significant chance that the withheld evidence, developed by skilled counsel, would have induced a reasonable doubt in the minds of

268. *Id.* at 111.
269. *Id.* at 109 (quoting Moore v. Illinois, 408 U.S. 786, 795 (1972)).
270. *See id.* at 114.
271. *Id.* at 114 (Marshall, J., dissenting).
272. *Id.* at 117.
273. *Id.*

enough jurors to avoid a conviction."[274] This alternate test, Justice Marshall reasoned, would properly permit "close" cases to go to a jury—the rightful finders of fact in criminal cases.[275] To back his argument in favor of an expansive *Brady* right, Justice Marshall cited Justice Fortas's *Giles* concurrence, the inspiration for the substantive due process school.[276]

In retrospect, Justice Stevens likely regretted his failure to hear Justice Marshall's critique in *Agurs*. Though Justice Stevens apparently intended it, his *Agurs* opinion did not plainly announce itself as an expansion of *Brady* in the upfront manner that *Brady* had announced itself as an extension of *Mooney*.[277] Instead, Justice Stevens's opinion waivered in emphasis between substantive and procedural conceptions of *Brady* and expressed a general concern with constitutionalizing discovery. This left a rhetorical flank open, which the procedural *Brady* school successfully attacked in 1985's *United States v. Bagley*. After decades of expansion driven by concern for substantive justice, *Bagley* saw the school that interpreted *Brady* as a purely procedural guarantee firmly seize control of the doctrine and start to contract the due process territory.[278]

Justice Blackmun authored the procedural school's winning *Bagley* opinion and relied upon a peculiarly formal approach to stare decisis. To understand his opinion, it is important to realize that Hugh Bagley's case involved a specific request for *Brady* material that went ignored by the prosecution.[279] In particular, Bagley had requested records of government deals with informants who testified

274. *Id.* at 119. Justice Marshall took this standard from "the prevailing view in the federal courts." *Id.* at 118–19 & n.5. In particular, Justice Marshall seemed taken by Judge Friendly's analysis about the correct standard. *See id.* at 119 n.6.

275. *See id.* at 118–19.

276. *See id*. at 120 (discussing Giles v. Maryland, 386 U.S. 66, 100 (1967) (Fortas, J., concurring)).

277. Justice Stevens expressed his intent in his *Bagley* dissent. *See infra* note 296 and accompanying text.

278. Though they have not employed my terms, scholars agree that *Bagley* heralded a turning point. *See, e.g.*, Eugene Cerruti, *Through the Looking-Glass at the* Brady *Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process*, 94 KY. L.J. 211, 239 (2005); David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1224 & n.288 (2005).

279. United States v. Bagley, 473 U.S. 667, 669–70 (1985).

against him in a federal "drugs and guns" prosecution.[280] Pretrial, the government claimed no deals existed, but postconviction investigations revealed that the informants had been paid.[281] The key legal question before the Court was how to interpret *Brady*'s materiality requirement.[282] In *Bagley*, six justices endorsed the now governing materiality test—"evidence is material only if there is a probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"—and reversed Bagley's victory below.[283]

Adopting a single test for materiality in *Brady* necessarily meant jettisoning *Agurs*'s three-tiered materiality framework. In his opinion for the Court, Justice Blackmun acknowledged *Agurs*'s three-tiered analysis but concluded that *Agurs*'s no-request standard was "sufficiently flexible to cover the 'no request,' 'general request,' and 'specific request' cases" of prosecutorial suppression.[284] Justice Blackmun thus summarily collapsed *Agurs*'s differentiated materiality tests into a single test.[285] Crucially, Justice Blackmun offered no independent stare decisis analysis for this move. He did not criticize the *Agurs*'s framework as incorrect, illogical, or unworkable. Instead, Justice Blackmun reasoned from a simple premise concerning recent Court precedent that cited *Agurs*:

> [T]he Court has relied on and reformulated the *Agurs* standard for the materiality of undisclosed evidence in two subsequent cases arising outside the *Brady* context. In neither case did the Court's discussion of the *Agurs*

280. *Id.*

281. *Id.* at 671–72.

282. The Ninth Circuit had actually granted relief to Bagley on a combined *Brady*/Confrontation Clause theory. *See* Bagley v. Lumpkin, 719 F.2d 1462, 1464 (9th Cir. 1983). However, the Court quickly rejected the relevance of the confrontation argument and this aspect of the Court's decision provoked no dissent. *See Bagley*, 473 U.S at 676–77.

283. *See Bagley*, 473 U.S. at 682, 684 (White, J., concurring in part). Since the Ninth Circuit had decided the case on inapposite grounds, *see supra* note 282, the Court remanded Bagley's case back to the Ninth Circuit to determine "whether there is a reasonable probability that, had the inducement offered by the Government to O'Connor and Mitchell been disclosed to the defense, the result of the trial would have been different." *Bagley*, 473 U.S. at 684.

284. *Id.* at 682 (opinion of Blackmun, J.); *see also id.* at 685 (White, J., concurring in part) (agreeing that the standard is "sufficiently flexible").

285. More precisely, *Bagley* collapsed the "no request" and "specific request" materiality standards and left the standard for the first *Agurs* situation (regarding perjury) untouched. *See* Kyles v. Whitley, 514 U.S. 419, 433 (1995) (noting that *Bagley* "abandoned the distinction between the second and third *Agurs* circumstances . . . .").

standard distinguish among the three situations described in *Agurs*.[286]

After briefly quoting the two cases (*United States v. Valenzuela-Bernal*[287] and *Strickland v. Washington*), Justice Blackmun concluded that "the *Strickland* formulation of the *Agurs* test for materiality [is] sufficiently flexible [enough] to cover [all *Brady* situations]."[288] Based solely on these two cites, Justice Blackmun abandoned the *Agurs* framework.

In citing *Strickland* to justify reinterpreting *Agurs*, Justice Blackmun effectively "borrowed" from disparate areas of constitutional law in order to justify subjecting all *Brady* claims to a strict harmless-error requirement.[289] (Figure 2 thus represents this borrowing move by showing *Strickland* as a yellow circle distinct from the red or blue triangles in the main *Brady* lines.) This borrowing move ironically paired lax and formal approaches to stare decisis. On the one hand, Justice Blackmun's borrowing facilitated a lax overruling of *Agurs*'s framework. On the other, this overruling was accomplished through a highly formal reading of constitutional precedent.

The formal logic of Justice Blackmun's borrowing move was this: *given that the Court did not differentiate between the three situations when it cited* Agurs *outside the* Brady *context, therefore the* Agurs *differentiation no longer has a place inside the* Brady *context.* This argument literally removes text from context and then rejects context as irrelevant.[290] Thus, while *Strickland* did indeed characterize *Agurs* as mandating a single test for materiality of suppressed evidence, the context was Sixth Amendment ineffective-assistance-of-counsel claims.[291] In this context of failure by defense

286. *Bagley*, 473 U.S. at 681 (discussing United States v. Valenzuela-Bernal, 458 U.S. 858 (1982); Strickland v. Washington, 466 U.S. 668 (1984)).

287. 458 U.S. 858 (1982).

288. *Id.* at 682 (citing *Strickland*, 466 U.S. at 694).

289. On borrowing generally, see Laurin, *supra* note 100; Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 463 (2010) (defining the interpretive practice of constitutional borrowing). For the proposition that the *Bagley* test represents an "internalized harmless error requirement," see Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 71 (2005).

290. *Cf. Bagley*, 473 U.S. at 712 (Stevens, J., dissenting) (noting that *Valenzuela-Bernal* and *Strickland* fell outside *Brady* context).

291. *See Strickland*, 466 U.S. at 694 (discussing United States v. Agurs, 427 U.S. 97, 104 (1976)).

counsel—not suppression by the prosecution—the *Strickland* Court had no reason to discuss the finer points of *Agurs*'s framework.[292] Yet Justice Blackmun noted the formal description of *Agurs* and used that form to effectively overrule *Agurs* without any justification.

Justice Blackmun's stare decisis reasoning was entirely contestable at the time. Yet the *Agurs* dissenters (Justices Stevens and Marshall) failed to object loudly on stare decisis grounds. Before exploring the reasons and consequences of the dissenters' rhetorical strategy, a final observation about Justice Blackmun's opinion is in order. As authority for the proposition that *Brady* represented a "limited departure from the pure adversary system," Justice Blackmun cited his own *Moore* opinion as well as Justice Harlan's *Giles* dissent.[293] The citation to Justice Harlan's dissent reveals Justice Blackmun's fundamental allegiance to the older procedural due process school that always objected to broad discovery obligations. Per Justice Blackmun, *Brady* did not "displace the adversary system as the primary means by which truth is uncovered, but [exists] to ensure that a miscarriage of justice does not occur."[294] True to his school, Justice Blackmun suggested that *Brady* did not embrace a direct commitment to finding truth so much as provide a limited procedural mechanism to prevent systemic failure.

Despite *Bagley*'s frontal attack on *Agurs*'s constitutional authority, Justice Stevens in his dissent did not make any overt appeals to stare decisis. This omission is explained by Justice Stevens's surprising rereading of his old *Agurs* opinion. According to Justice Stevens, the "question in *Agurs* was whether the *Brady* rule should be *extended* to cover a case in which there had been neither perjury nor a specific request."[295] Justice Stevens then contended that *Agurs* had actually held that the *Brady* Rule did not apply in the no-

292. *Valenzuela-Bernal* also concerned Sixth Amendment issues (confrontation). While this case at least implicated *government* culpability (it concerned deportation of witnesses potentially helpful to the defense), Chief Justice Rehnquist used *Agurs* as only one example of the many areas of constitutional law where *some showing* of materiality or prejudice is required. *See Valenzuela-Bernal*, 458 U.S. at 867–71. In this context, the Court still had no need to discuss the finer points of the *Agurs* framework.

293. *See Bagley*, 473 U.S. at 675 & nn.6–7 (citing, *inter alia*, Moore v. Illinois, 408 U.S. 786, 795 (1972); Giles v. Maryland, 386 U.S. 66, 117 (1967) (Harlan, J., dissenting)).

294. *Id.* at 675.

295. *Id.* at 711 (Stevens, J., dissenting) (emphasis in original).

request situation and so created a brand-new constitutional rule.[296] Justice Stevens finally faulted *Bagley* for applying the *Agurs* no-request rule to a pure *Brady* Rule situation in which the government "failed to disclose favorable evidence . . . clearly responsive to the defendant's specific request."[297] Note how this interpretation of *Agurs* concedes that the government's textualist argument in *Agurs* had merit.[298] Though unanswered in *Agurs*, Justice Stevens replied in *Bagley* to the old textualist objection by asserting that *Agurs* had *deliberately* expanded the frontiers of *Brady* jurisprudence.

Justice Stevens's revisionist interpretation of *Agurs* is disputable.[299] Yet the hermeneutic merits of his interpretation matter less than its implications for our stare decisis case study. *Bagley* may have abandoned *Agurs*'s framework, but Justice Stevens now admitted that *Agurs* departed from the *Brady* Rule. Justice Stevens, therefore, could not mount a strong formal critique of Justice Blackmun's fidelity to constitutional precedent. Neither could Justice Stevens persuasively argue that Justice Blackmun failed to adhere to *Agurs*'s underlying reasoning. On the one hand, *Agurs* had justified its voluntary-disclosure obligation based on *Brady*'s substantive commitment to truth. On the other, *Agurs* justified ratcheting up harmless-error inquires in *Brady* cases based on a procedural due process commitment to limiting discovery. The balance between these rationales was always precarious, and the result in *Agurs* suggested that Justice Stevens had actually tipped the scales in favor of the procedural school. The end result in *Bagley*—denying relief to the convict—thus followed *Agurs*.

As he had done in *Agurs*, Justice Marshall also dissented in *Bagley*. However, Justice Marshall saw no stare decisis problem

296. *Id.* at 709 ("Our holding in *Agurs* was that the *Brady* rule applies in two of the situations, but not in the third [no request].").

297. *Id.* at 712–13.

298. *Compare supra* note 260 (describing the government's argument in *Agurs*), *with Bagley*, 474 U.S. at 710 n.1 (Stevens, J., dissenting) ("As written, the *Brady* rule states that the Due Process Clause is violated when favorable evidence is not turned over 'upon request.'").

299. In *Agurs*, Justice Stevens stated that "the rule of *Brady* . . . arguably applies in three quite different situations." United States v. Agurs, 427 U.S. 97, 103 (1976). The no-request situation was the third situation "in which the *Brady* rule arguably applies." *Id.* at 107. Justice Stevens never explicitly rejected this "arguable application," nor did he explicitly state that *Agurs* was an extension of *Brady*. Thus, the proposition that *Agurs* announced a brand-new rule rather than applied *Brady* is dubious. Justice Stevens may have subjective insight on authorial intent, but that counts for little in Supreme Court hermeneutics.

between *Agurs* and *Bagley* and indeed condemned the Court for "adhering to the view articulated in *Agurs*."[300] Even though the materiality framework changed, Justice Marshall saw *Agurs* and *Bagley* as equivalent in spirit. His justificatory attitude thus inhibited any formal or strict critique of *Bagley*'s overruling move. Furthermore, the only doctrinal authority apparently recognized in his *Bagley* dissent was that of his prior dissent in *Agurs*.[301] Building on themes he introduced in *Agurs*, Justice Marshall advocated for the "return [of] the original theory and promise of *Brady*."[302]

The thrust of Justice Marshall's substantive due process argument proceeded from the "fundamental premise" that "the purpose of a trial is as much the acquittal of an innocent person as it is the conviction of a guilty one."[303] To support this foundational doctrinal premise, Justice Marshall inevitably cited Justice Fortas's concurrence in *Giles*.[304] Justice Marshall then offered a panoply of prudential arguments as to why the new *Bagley* test "legitimiz[ed] the non-disclosure of clearly favorable evidence" and tempted prosecutors "to play the odds" and withhold favorable evidence on the "chance that [the] evidence will later turn out not to have been potentially dispositive" in the eyes of reviewing courts.[305] He rested this judgment on an empirical observation:

> Almost a decade of lower court practice with *Agurs* convinces me that courts and prosecutors have come to pay "too much deference to the federal common law policy of discouraging discovery in criminal cases, and too little regard to due process of law for defendants."[306]

Justice Marshall's reference to a "federal common law policy of discouraging discovery" suggests that *Agurs* had already persuaded members of the federal judiciary to join the ranks of the procedural *Brady* school. Justice Marshall wanted to buck this trend, and his

300. *Bagley*, 473 U.S. at 700 (Marshall, J., dissenting).

301. *See id.* at 704, 706 (citing *Agurs*, 427 U.S. at 119–20 (Marshall, J., dissenting) (arguing that normal constitutional-error test should apply to *Brady* violations)). Justice Marshall cited his *Agurs* dissent five separate times in *Bagley*.

302. *Id.* at 702.

303. *Id.* at 692 (quoting *In re* Kapatos, 208 F. Supp. 883, 888 (S.D.N.Y. 1962) (internal citations omitted)).

304. *Id.* (citing Giles v. Maryland, 386 U.S. 66, 98 (1967) (Fortas, J., concurring)).

305. *Id.* at 701.

306. *Id.* at 702 (quoting United States v. Oxman, 740 F. 2d 1298, 1310–11 (3d Cir. 1984)).

*Bagley* dissent set out a manifesto for his substantive view of the doctrine.

Unfortunately for the strong *Brady* tradition, no Supreme Court jurist since Justice Marshall has defended the substantive school with similar passion or learning. The next subpart tells the story of how *Bagley*'s narrow materiality standard became entrenched in the doctrine through repeated citations in *Brady* cases—by both majority and dissenting opinions—from 1985 until the present. While reviewing that narrative, it is important to bear in mind how Justice Stevens's betwixt-and-between *Agurs* opinion helped facilitate Justice Blackmun's *Bagley* triumph. Justice Stevens did not commit to a substantive conception of *Brady* in *Agurs* and did not forthrightly present *Agurs* as an extension of *Brady* based on a justificatory approach to stare decisis. This opened up a rhetorical space in the doctrinal discourse for Blackmun to urge a strongly procedural *Brady* view backed by a formal borrowing move from a disparate area of constitutional doctrine. In sum, the lack of a clear and committed doctrinal or metadoctrinal basis for *Agurs* undermined its persuasive impact over the dialectic.

### *B. Fact Controversies:* Bagley *to* Cain *1985–2012*

Despite Justices Marshall and Stevens's objections, *Bagley* settled the materiality question. For better or for worse, Justice Blackmun's reasonable-probability-of-a-different-outcome test stuck. Since 1985, the competing sides in *Brady* debates have accepted the *Bagley* test and fought instead over how the test applies on given sets of facts. Though Justices have still disagreed mightily on just outcomes for particular defendants, disagreements have mostly turned on questions of fact rather than law. This subpart briefly surveys these fact-intensive conflicts from *Bagley* until this Term's hot-off-the-presses *Smith v. Cain*[307] case.

As this survey shows, the factual nature of most contemporary *Brady* disputes signals two interrelated shifts in the debate. First, acceptance of *Bagley* by both majority and dissenting opinions in this era reveals how deeply entrenched the *Brady* Rule has become in due

307. 132 S. Ct. 627 (2012).

process doctrine. Though disputed in 1963, *Brady*'s constitutional authority is now beyond cavil—it is super-precedent. At the same time, the price of *Bagley*'s acceptance has been a weakening of the substantive conception of *Brady*. Inheritors of the substantive school have not championed the tradition of Justices Marshall, Fortas, and Douglas. Instead they have generally acquiesced in understanding *Brady* as a limited procedural means to ensure a fair trial. As a consequence, formal readings of the *Brady* Rule are more viable today than in earlier stages of the dialectic.

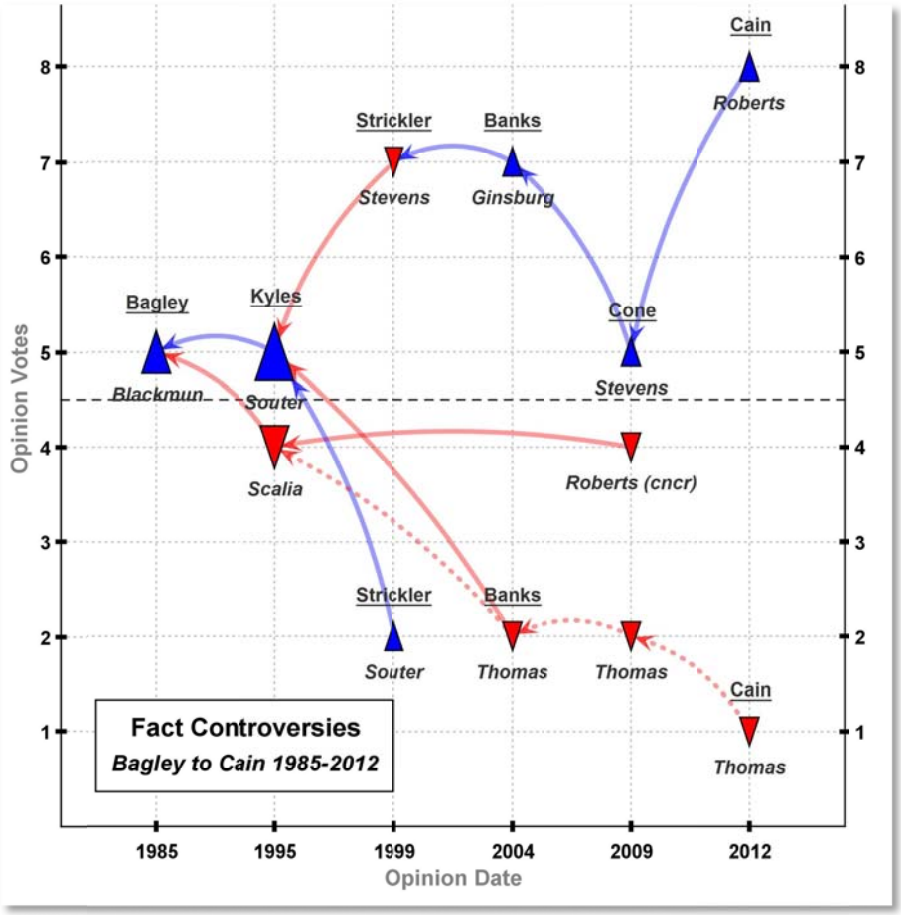


FIGURE 3

Figure 3 completes the map of *Brady*'s territory. As previously, blue upward-facing triangles represent opinions that granted relief on *Brady* grounds (or, if written in dissent, that would have granted due process relief). These are the inheritors of the substantive *Brady* tradition. In chronological order, the opinions in this line are *Kyles v. Whitley* (Justice David Souter for the Court, 1995);[308] *Strickler v. Greene* (Justice Souter concurring in part and dissenting in part, 1999);[309] *Banks v. Dretke* (Justice Ruth Bader Ginsburg for the Court, 2004);[310] *Cone v. Bell* (Justice Stevens for the Court, 2009)[311] and *Smith v. Cain* (Chief Justice Roberts for the Court, 2012).[312] The red triangles facing down represent opinions that denied relief on *Brady* grounds (or, if written in dissent, that would have denied due process relief). These opinions carried on the weak, procedural *Brady* tradition. In chronological order, the opinions in this line are *Bagley* (Justice Blackmun for the Court, 1985); *Kyles* (Justice Scalia dissenting, 1995); *Strickler* (Justice Stevens for the Court, 1999); *Banks* (Justice Clarence dissenting, 2004); *Cone* (Chief Justice Roberts concurring; Justice Thomas dissenting, 2009); and *Cain* (Justice Thomas dissenting, 2012).

308. Kyles v. Whitley, 514 U.S. 419 (1995). *Kyles* was a 5–4 decision. Justice David Souter delivered the opinion of the Court. *Id.* at 421. Justice John Paul Stevens filed a concurring opinion in which Justices Ruth Bader Ginsburg and Stephen Breyer joined. *Id.* at 454 (Stevens, J., concurring). Justice Antonin Scalia dissented in an opinion joined by Chief Justice William Rehnquist and Justices Anthony Kennedy and Clarence Thomas. *Id.* at 456 (Scalia, J., dissenting).

309. Strickler v. Greene, 527 U.S. 263, 296 (1999) (Souter, J., concurring in part and dissenting in part). *Strickler* was a 7–2 decision. Justice Stevens delivered the opinion of the Court. *Id.* at 265. Justice Thomas joined Parts I and IV of this opinion. *Id.* Justice Kennedy joined Part II of Justice Souter's dissent. *Id.*

310. Banks v. Dretke, 540 U.S. 668 (2004). *Banks* was a 7–2 decision. Justice Ginsburg delivered the opinion of the Court. *Id.* at 674. Justice Thomas filed an opinion joined by Justice Scalia concurring in part and dissenting in part. *Id.* at 706 (Thomas, J., concurring in part and dissenting in part). The part to which Justice Thomas dissented specifically concerned *Brady*. *See id.*

311. Cone v. Bell, 556 U.S. 449 (2009). *Cone* was a 5–2–2 decision. Justice Stevens delivered the opinion of the Court. *Id.* at 450. Chief Justice Roberts filed an opinion concurring in judgment. *Id.* at 476 (Roberts, C.J., concurring). Justice Alito filed an opinion concurring in part and dissenting in part. *Id.* at 478 (Alito, J., concurring in part and dissenting in part). Justice Thomas filed a dissenting opinion and was joined by Justice Scalia. *Id.* at 486 (Thomas, J., dissenting).

312. Smith v. Cain, 132 S. Ct. 627 (2012). *Cain* was an 8–1 decision. Chief Justice Roberts delivered the opinion of the Court. *Id.* at 629. Justice Thomas dissented. *Id.* at 631 (Thomas, J., dissenting).

*Kyles* is the first mainline *Brady* case decided after *Bagley*, and it exemplifies the fact-bound nature of debates in this modern period. A trial court sentenced Curtis Lee Kyles to death in 1984 for a robbery–murder in New Orleans.[313] The *Brady* issue concerned undisclosed evidence that cast doubt on the credibility of a key informant.[314] Writing for a five-Justice majority, Justice Souter held that Kyles deserved a new trial.[315] Though this relief counts as a victory for the strong *Brady* school, Justice Souter's opinion marks a shift in the substantive tradition. In his opinion, Justice Souter identified three "prominent case[s] on the way to current *Brady* law"—*Brady* itself, *Agurs*, and *Bagley*.[316] He referred only to the majority opinions in those cases and did not cite to the Marshall or Stevens dissents. Nor did Justice Souter invoke Justice Fortas's concurrence in *Giles*. In short, Justice Souter did not champion the old substantive school. Rather, by embracing *Bagley*, he articulated a new-school vision of *Brady* that legitimized a more procedural perspective.

In dissent, Justice Scalia did not object to Justice Souter's legal analysis.[317] Instead, he objected to the propriety of the Court's factual review and to its particular conclusions.[318] Justice Scalia's

313. *Kyles*, 514 U.S. at 422–23.

314. *See id.* at 424–28 (describing the investigation). The informant's nickname was "Beanie." His real name was Joseph Wallace, though he gave police other names. *See id.* at 424. At trial, Kyles argued that Beanie had actually killed the victim and was now framing him for the murder. *Id.* at 429. During collateral review, counsel discovered the police had not disclosed multiple items of evidence that casted doubt on Beanie's credibility and motives. *See id.* at 431. The Court listed seven categories of allegedly undisclosed evidence. *Id*. at 428–29.

315. *Id.* at 421–22.

316. *Id.* at 432–34.

317. This might initially seem surprising since *Kyles* did involve one important legal question—whether *Brady*'s scope extended to "evidence known only to police investigators and not to the prosecutor." *Id.* at 438. During litigation below, the State had taken the formal position that *Brady* did not apply to the police. However, at oral argument, counsel for the State apparently conceded that the police did have a duty to disclose. *Id.* at 438 n.11. Justice Souter thus did not contradict the State's ultimate position when he extended *Brady* to require disclosure of exculpatory evidence possessed by the police. Though Justice Scalia dissented, he took no issue with this legal point. Even though no previous *Brady*-line case had recognized a police duty to disclose, Justice Scalia apparently agreed that existing precedent justified recognition of this duty. This shows that even Justice Scalia's formalism has limits—the analogy between police and prosecutors seemed fundamentally sound.

318. However, Justices Souter and Scalia battled over the law governing habeas review of capital cases. *Compare id.* at 422 & n.1, *with id.* at 456–57 (Scalia, J., dissenting) (illustrating disagreement over the scope of deference to be given to the lower court's evidentiary review decisions in capital cases).

opening line perfectly captures his procedural approach to due process:

> In a sensible system of criminal justice, wrongful conviction is avoided by establishing, at the trial level, lines of procedural legality that leave ample margins of safety (for example, the requirement that guilt be proved beyond a reasonable doubt)—not by providing recurrent and repetitive appellate review of whether the facts in the record show those lines to have been narrowly crossed.[319]

From this premise, Justice Scalia decried the *Kyles* majority's very consideration of "a fact-bound claim of error rejected by every court, state and federal, that previously heard it."[320] Court review was inappropriate in "an intensely fact-specific case in which the court below unquestionably applied the correct rule of law."[321] Moreover, Justice Scalia continued, "the Court . . . get[s] the facts wrong."[322] The remainder of Justice Scalia's dissent countered Justice Souter's lengthy analysis of evidence supporting Kyles's innocence with his own lengthy analysis indicating Kyles's guilt.[323]

The primacy of facts in the debate between Justices Souter and Scalia in *Kyles* stands in stark contrast to the primacy of law in *Bagley*'s contest between Justices Blackmun, Marshall, and Stevens. Factual primacy signals a settling of the legal doctrine. Figure 3 illustrates this settling process, as both Justice Souter's and Justice Scalia's opinions point back to Justice Blackmun's *Bagley* opinion. This congruence shows how they agree on prior tradition. It also shows the strength of the procedural view over the modern doctrine.

The doctrinal settling process continued in *Strickler v. Greene*. This case concerned Tommy Strickler's capital conviction for kidnapping and murder.[324] The suppressed *Brady* material at issue impeached the testimony of a prosecution witness.[325] Writing for a

319. *Id.* at 456 (Scalia, J., dissenting).
320. *Id.*
321. *Id.* at 460.
322. *Id.*
323. *Compare id*. at 441–54 (majority opinion), *with id.* at 464–75 (Scalia, J., dissenting).
324. Strickler v. Greene, 527 U.S. 263, 266 (1999).
325. *Id.* The witness testified to seeing the abduction. At trial, she described it as a horrifying event implicating Strickler as a ringleader. The undisclosed materials made the event seem far less dramatic.

seven-Justice majority, Justice Stevens anchored his legal analysis in *Kyles* but, based on the facts, held that the suppressed evidence was not "material" under *Brady*.[326] Justice Stevens thus denied relief to Strickler—a weak *Brady* outcome—but affirmed the authority of Justice Souter's new-school *Brady* opinion in *Kyles*. As it happens, Justice Souter dissented in *Strickler*—yet he explicitly noted that "I look at this case much as the Court does" and agreed with the majority's characterization of the *Brady* Rule.[327] Indeed, Justice Souter recognized that he applied "the same standard to the same record" and cited back to his *Kyles* opinion for that standard.[328] For the second case in a row, majority and dissent agreed on the law.

This agreement heralds an important synthesis in the *Brady* dialectic. After years of competing theses and antitheses about the *Brady* Rule's materiality requirement, the *Bagley-Kyles-Strickler* interpretation of the *Brady* Rule became entrenched in constitutional discourse. Since these cases all interpret the *Brady* Rule's statement of due process (as opposed to directly interpreting the Due Process Clause), the entrenchment of *Bagley-Kyles-Strickler* represents a second-order entrenchment of the *Brady* Rule itself. I suggest that such second-order entrenchment signals that *Brady* has become "super-precedent." When antagonistic doctrinal schools agree not only on the rule stated by a constitutional precedent but also on second-order rules for implementing the precedent, overruling has become unthinkable. In the decades after 1963, disputes over the proper application of the *Brady* Rule increasingly assumed the prior legitimacy of the Rule. With *Bagley-Kyles-Strickler*, the prior legitimacy of the Rule settled a layer deeper into the very tissue of constitutional discourse.

326. *See id.* at 280–82 (citing Kyles v. Whitley, 514 U.S. 419 (1995)). Justice Stevens specifically noted that his opinion "[did] not modify *Brady*" and rejected any suggestion that he announced a "new rule." *Id.* at 289 n.35. While no justice on the Court disagreed with Justice Stevens, it should be noted that the Fourth Circuit had apparently misunderstood the *Brady* Rule. *See id.* at 290 (noting that the "standard used by that court was incorrect"). In other words, though the Court saw the doctrine as settled, lower courts were not yet all on the same page.

327. *Id.* at 296 (Souter, J., concurring in part and dissenting in part). Justice Souter supplemented the majority's legal analysis with a fascinating scholarly exposition of the "circuitous path by which the Court came to adopt 'reasonable probability' of a different result as the rule of *Brady* materiality." *See id.* at 300.

328. *Id.* at 302.

Yet the *Brady* dialectic did not end just because *Brady* became super-precedent. Rather, the locus of controversy shifted from the formulation of legal rules to the application of legal rules. Debates came to turn on facts rather than law. The factual-dispute pattern seen in *Kyles* and *Strickler* continued in our final three mainline cases—*Banks*, *Cone*, and *Cain*. In all three cases, the majority and dissent agreed on the proper legal test for materiality. In all three cases, the convict won some *Brady* relief with Justice Thomas dissenting on interpretation of the facts in the record.[329] While these outcomes might seem to indicate that the substantive *Brady* school now controls the Court, the reality is not so simple. The fact-bound majority opinions did not advance a strong substantive conception of *Brady* doctrine but rather advanced a more procedural understanding of the Rule that is consistent with *Bagley*.

In 2004's *Banks v. Dretke*, Justice Ginsburg gestured at the older substantive school perspective. The case involved suppressed impeachment evidence, and once again majority and dissent agreed on the materiality test.[330] Writing for a seven-Justice majority, Justice Ginsburg found the suppression undermined confidence in the verdict, and she stressed the prosecutorial obligation to seek truth and "refrain from [using] improper methods to secure a conviction."[331] In dissent, Justice Thomas responded, "Although I find it to be a very close question, I cannot conclude that nondisclosure of [the prosecution witnesses'] informant status was prejudicial under *Kyles*."[332] Sparks did not fly in *Banks*—the two sides just interpreted the record differently.

329. Justice Scalia joined Justice Thomas's dissents in *Banks* and *Cone*, but not in *Cain*. Although dotted arrows mostly connect Justice Thomas's opinions to each other, I suggest they are linked as part of the same tradition. *See infra* note 348.

330. Compare Banks v. Dretke, 540 U.S. 668, 698–99 (2003), with *id.* at 706 (Thomas, J., concurring in part and dissenting in part).

331. *Id.* at 696 (majority opinion) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)) (internal quotation marks omitted). *See id.* at 702–03. Justice Ginsburg's emphasis on truth-seeking came in response to the State's rather misguided argument that, under *Brady*, "the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence." *Id.* at 696 (quoting Transcript of Oral Arg. at 35, *Banks*, 540 U.S. 668 (No. 02-8286)) (internal quotation marks omitted).

332. *Id.* at 706 (Thomas, J., concurring in part and dissenting in part). With the question of prosecutorial intensions indirectly raised by Justice Ginsburg's opinion, Justice Thomas stressed in his dissent that prosecutors had not "*knowingly* failed to turn over evidence . . . *in violation of Brady*." *Id.* at 709–10 (emphasis in original).

2009's *Cone v. Bell* featured a more revealing exchange between the competing schools in their post-*Bagley* form. Gary Cone's *Brady* claim involved suppressed evidence of his serious drug addiction that could have mitigated juror assessment of his culpability for a double murder.[333] In the five-Justice majority opinion, Justice Stevens closely reviewed the trial record and concluded that Cone had a viable *Brady* claim under the *Bagley-Kyles-Strickler-Banks* materiality standard.[334] In dissent, Justice Thomas basically agreed with the materiality test but disagreed wholeheartedly on inferences of the record.[335] While this follows the essential factual-dispute pattern, *Cone* did break new ground in a long-simmering debate over the constitutional relevance of prosecutorial ethics. In a footnote to his opinion, Justice Stevens stated: "Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations."[336]

For this proposition, Justice Stevens cited to *Kyles* and ABA rules and standards.[337] He then continued, observing that "the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure."[338] For this latter proposition, Justice Stevens invoked his long-since-forgotten *Bagley* dissent.

333. Cone v. Bell, 556 U.S. 449, 451 (2009).

334. *See id*. at 469–70 (citing *Banks*, 540 U.S. 668, 698–99; Strickler v. Greene, 527 U.S. 263, 290 (1999); Kyles v. Whitley, 514 U.S. 419, 435 (1995)); *see also id.* at 475 (concluding after record review that the suppressed evidence "may well have been material to the jury's assessment of the proper punishment").

335. Justice Thomas actually accused the majority of misstating the *Kyles* standard. *See id.* at 490–91 (Thomas, J., dissenting). However, the quibble with Justice Stevens's phrasing is unpersuasive—especially in light of Chief Justice Roberts's concurrence. *See id*. at 477 (Roberts, C.J., concurring). *Cf. Strickler*, 527 U.S. at 298–300 (Souter, J., concurring in part and dissenting in part) (analyzing potential sources of confusion in phrasing of materiality standard). Once again, the real dispute in *Cone* concerned the record. *See Cone*, 556 U.S. at 498–500 (Thomas, J., dissenting) (concluding that "record as a whole" does not indicate that *Brady* material would have changed sentence).

336. *Cone*, 556 U.S. at 470 n.15.

337. *Id.* (citing *Kyles*, 514 U.S. at 437; STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3–3.11(a) (1993); MODEL RULES OF PROF'L CONDUCT R 3.8(d) (2008)).

338. *Id.* (citing United States v. Bagley, 473 U.S. 667, 667, 711 n.4 (1985) (Stevens, J., dissenting)).

The significance of Justice Stevens's footnote was not lost on Chief Justice Roberts. The Chief Justice concurred in judgment but did not join Justice Stevens's opinion.[339] In the main, Chief Justice Roberts saw "no reason to quarrel with the Court's ruling on the *Brady* claim" since it ordered the court below to conduct "a fact-specific determination . . . under the established legal standard."[340] However, Chief Justice Roberts wrote separately to make

> clear that the lower courts should analyze the issue under the *constitutional* standards we have set forth, not under whatever standards the American Bar Association may have established. The ABA standards are wholly irrelevant to the disposition of this case, and the majority's passing citation of them should not be taken to suggest otherwise.[341]

Here, Chief Justice Roberts adeptly fired a preemptive shot against any *sub silentio* expansion of *Brady*. Chief Justice Roberts objected to any bootstrapping of ethical obligations into *Brady*'s constitutional jurisprudence. In answer to Justice Stevens's citation to his *Bagley* dissent, Chief Justice Roberts gamely cited to Justice Scalia's dissent in *Kyles*.[342] Though he voted with the new "strong" school majority, Chief Justice Roberts made clear in his concurrence that he will carry on the traditions of the competing procedural due process school.

Indeed, the Court's 2011 Term decision in *Smith v. Cain* proves this point. The case involved Juan Smith's conviction for killing five people during an armed robbery.[343] Police suppressed pretrial statements by the crime's only eyewitness that would have cast doubt on his identification of Smith at trial.[344] Writing for an eight-Justice majority, Chief Justice Roberts held that the undisclosed evidence undermined confidence in Smith's conviction.[345] Although Chief Justice Roberts cited to the rules of *Cone*, *Kyles*, and *Brady*, he failed to quote any of the language from these opinions concerning

339. *See id.* at 477 (Roberts, C.J., concurring).
340. *Id.*
341. *Id.* at 477–78.
342. *See id.* at 477 (citing Kyles v. Whitley, 514 U.S. 419 (1995) (Scalia, J., dissenting)).
343. Smith v. Cain, 132 S. Ct. 627, 629 (2012).
344. The witness had repeatedly told police he could not identify who had done the killing. At trial, he was equally vehement in his identification of Smith. *See id.* at 630.
345. *Id.*

innocence, truth, or seeking justice.[346] On the other hand, he did invoke language from *Agurs* limiting the application of the *Brady* Rule in eyewitness impeachment cases when "the State's other evidence is strong enough."[347] In sum, Chief Justice Roberts's terse opinion offered a formal account of *Brady* untethered to any substantive concern for justice and emphasized limits on this rule. Though technically a *Brady* victory, his opinion advances a procedural perspective.

In contrast to Chief Justice Roberts's bloodless opinion, Justice Thomas issued a long and passionate dissent. Citing to Justice Scalia's dissent in *Kyles*, Justice Thomas wrote, "When, as in this case, the Court departs from its usual practice of declining to review alleged misapplications of settled law to particular facts . . . the Court should at least consider all of the facts."[348] As in *Banks* and *Cone*, Justice Thomas agreed on the materiality test but concluded that the majority got its facts all wrong. Justice Thomas's citation to Justice Scalia's *Kyles* dissent is revealing in that Chief Justice Roberts also cited to that opinion in his *Cone* concurrence.[349] Justice Scalia's *Kyles* dissent now stands as a classic articulation of the proceduralist view of *Brady*.

While the inheritors of the substantive and procedural *Brady* traditions now agree on the materiality test, the reasonable-probability-of-a-different outcome inquiry inherently turns on fact-bound questions. The competing assessments of the facts in *Kyles*, *Strickler*, *Banks*, *Cone*, and *Cain* may be attributable to ideological differences among Supreme Court Justices. As Professor Dan Kahan has shown in his path-breaking work, modern psychological research suggests that judicial fact-finding is deeply susceptible to the

346. *Id.* (citing Cone v. Bell, 556 U.S. 449, 469–70 (2009); *Kyles*, 514 U.S. at 434; and Brady v. Maryland, 373 U.S. 83, 87 (1963)).

347. *Id.* (citing United States v. Agurs, 427 U.S. 97, 112–13 n.21 (1976)).

348. *Id.* at 640 (Thomas, J., dissenting) (citation omitted) (citing *Kyles*, 514 U.S. at 456 (Scalia, J., dissenting). Justice Thomas's citation here ultimately justifies my decision in Figure 3 to link his dissents in *Cain*, *Cone*, and *Banks* to each other and back to Justice Scalia's *Kyles* dissent. Not only do Justice Thomas's opinions share the same author, they are thematically identical in their focus on facts and reading of them as upholding state prosecution.

349. *Cone*, 556 U.S. at 477 (Roberts, J., concurring in judgment) (citing *Kyles*, 514 U.S. at 458).

phenomena of motivated reasoning and cultural cognition.[350] A Justice's ideological worldview can easily affect how she sees the record before her. Although most—but not all—Justices agreed on the results in *Strickler*, *Banks*, and *Cain*, the readings of the facts were very hotly contested along ideological lines in *Kyles* and *Cone*. I suggest this will be the dominant pattern for *Brady* cases going forward—unless the debate shifts back to one about the scope of law rather than application of facts.

With the procedural school's ascendancy after *Bagley*, the *Brady* Rule has generally been strictly interpreted, and its scope has not been seriously expanded. The more time has passed, the more *Brady*'s due process boundaries have seemed fixed. Thus, in *Connick v. Thompson*, Justice Scalia was able to claim with some authority that the right to untested evidence existed at the frontier of *Brady* jurisprudence. His formal reading of the *Brady* Rule's "favorability" requirement resonates with the procedural approach to *Brady* that has been dominant since *Bagley*. Of course, the foregoing analysis has also shown that Justice Scalia's view of *Brady*'s borders—and the formal approach to stare decisis on which it depends—is not the only way of reading the history of due process jurisprudence. In the following Part, I present a normative argument against Justice Scalia's formal approach.

## V. THE MAJESTIC CONCEPTION OF *BRADY*

Eighteen years after Justice Marshall's retirement in 1991, the Supreme Court decided *District Attorney's Office v. Osborne*.[351] The case concerned William Osborne's quest to access forensic DNA evidence that he maintained would prove his innocence of rape.[352] Prosecutors possessed semen and hair evidence but refused to allow Osborne to test it.[353] Osborne sued under federal civil rights law and prevailed in lower courts on the theory that *Brady* authorized

350. *See generally* Dan M. Kahan, *Foreword: Neutral Principles and Motivated Reasoning*, 125 HARV. L. REV. 1 (2011); Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115 (2007) (questioning theories of constitutional neutrality in light of cognitive studies that reveal individuals are predisposed to mold their perceptions of policy-relevant facts to their own group commitments).

351. Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2312 (2009). Like John Thompson, Osborne litigated under the Federal Civil Rights Act, 42 U.S.C. § 1983.

352. *Osborne*, 129 S. Ct. at 2314.

353. *Id.*

postconviction access to evidence.[354] Before the Court, prosecutors conceded that DNA testing could prove Osborne's innocence but disputed that Osborne had a *constitutional* right to access evidence.[355]

Writing for a five-Justice majority, Chief Justice Roberts agreed with the prosecutors and denied Osborne relief.[356] Chief Justice Roberts's *Brady* analysis was decidedly brief. In his view, *Brady* was a "trial right," plain and simple.[357] Given that Osborne had been convicted, he was no longer cloaked in the presumption of innocence and no longer had the same due process liberty interests.[358] Since "nothing in our precedents" suggested that *Brady* applied postconviction, Chief Justice Roberts concluded that "*Brady* [was] the wrong framework."[359] Q.E.D.[360]

Like Justice Scalia's claim about untested evidence in *Thompson*, Chief Justice Roberts's procedural due process perspective of *Brady* precedents was entirely contestable and dependent upon a formal approach to stare decisis. Yet as in *Thompson*, no justice sitting in 2009 offered a full-throated defense of the old substantive school backed by a justificatory approach to stare decisis.[361] In my view, the failure is regrettable.[362]

This Part presents a doctrinal *Brady* argument in favor of recognizing a right to access to untested forensic evidence—whether

354. Dist. Attorney's Office v. Osborne, 521 F. 3d 1118, 1128 (2008) (citing Thomas v. Goldsmith, 979 F.2d 746, 749–50 (9th Cir. 1992) (authorizing postconviction DNA testing under *Brady* in a habeas case)).

355. *See Osborne*, 129 S. Ct. at 2336–38 (Stevens, J., dissenting) (noting the State's concession that testing would provide conclusive confirmation of Osborne's guilt or revelation of his innocence).

356. *See id.* at 2320–22 (majority opinion) (denying existence of freestanding substantive right to postconviction DNA testing).

357. *Id.* at 2319–20.

358. *Id.* at 2320.

359. *Id.* at 2319–20.

360. Entirely confident in this proof, Chief Justice Roberts said nothing more about *Brady*.

361. In his dissent, Justice Stevens did suggest that "the concerns with fundamental fairness that motivated our decision in [*Brady*] are equally present when convicted persons such as Osborne seek access to dispositive DNA evidence." *Id.* at 2335 (Stevens, J., dissenting). However, Justice Stevens also conceded that "*Brady* does not directly provide for a postconviction right to such evidence." *Id.* While lamentable, this concession is not surprising given Justice Stevens's opinions in *Agurs* and *Strickler*. *See* Strickler v. Greene, 527 U.S. 263 (1999); United States v. Agurs, 427 U.S. 97 (1976).

362. In the interests of full disclosure, I was part of the Innocence Project team representing Osborne in his DNA-access litigation.

in the pretrial context at issue in *Thompson* or in the postconviction setting from *Osborne*. This argument is rooted in the old substantive due process tradition of *Brady* and a justificatory attitude toward stare decisis. Here, I take particular inspiration from the insightful dissents by Justice Marshall that set out a majestic conception of *Brady*. Ultimately, I argue that even though the procedural school now dominates the doctrine, remembering Justice Marshall's majestic conception and reintroducing it into the constitutional conversation can positively influence the future dialectic.

The argument here begins with concession. A formal interpretation of the *Brady* Rule does not support a right to untested evidence. Untested evidence is not "favorable" under the Rule since testing could ultimately inculpate defendants and confirm guilt. Moreover, since the Rule only prohibits suppression of evidence favorable "to an accused," it also does not formally apply after trial when defendants have become "convicted" rather than "accused." It is thus granted that recognizing a *Brady* right to untested evidence would formally expand due process precedent. Finally, I concede that the formal stare decisis interpretation is coherent and leads to a result consistent with a procedural understanding of *Brady* as a limited procedural means to ensure a fair trial.

While conceding the coherence of the formal and procedural take, I respond that an equally coherent justificatory and substantive understanding of *Brady* precedent is possible—and normatively preferable at this dynamic moment in history. As this Article's survey has shown, the substantive school has long recognized that due process also stands for a constitutional commitment to seek truth and protect innocence. Sometimes recognition of these deep commitments requires looking beyond current forms of procedure directly to the ends of justice. When the time is right, a justificatory stare decisis approach is necessary.

Thus, Justice Holmes showed a willingness to expand due process precedent beyond "notice and opportunity to be heard" forms in order to confront mob intimidation in the *Frank* and *Moore* cases. The *Mooney* Court expanded the mob-domination principle to prohibit prosecutorial subornation of perjury. In *Brady* itself, Justice Douglas expanded the due process principle prohibiting bad-faith prosecutorial actions to also cover good-faith nondisclosure of

favorable evidence. Since *Brady*, *Agurs* expanded the Rule's scope to require disclosure in absence of a specific defense request, and *Kyles* extended the prohibition on prosecutorial suppression to police. None of these expansions perfectly fit with formal readings of prior precedent. All required a justificatory attitude toward stare decisis.

Only empty allegiance to form prevents recognition of the right to untested evidence under *Brady*. Prosecutors in *Osborne* admitted that postconviction DNA testing could potentially prove William Osborne's innocence but denied him access to testing anyway. This reeks of bad faith, and Chief Justice Roberts's refusal to recognize a *Brady* right in this context comes off as arid formalism. Similarly, Justice Scalia's invocation of *Youngblood* in his *Thompson* concurrence blithely ignores that the Court denied relief to a man later proved innocent by DNA testing.[363] If ever a case's subsequent history called for questioning whether procedural means adequately protected substantive ends, *Youngblood* is it. *Youngblood* demonstrates the need for due process expansion rather than the wisdom of formally limiting it.

Now, procedural due process proponents could respond to this by granting the wisdom of finding a *pretrial* right to access untested evidence but standing firm against applying *Brady postconviction*.[364] After all, pretrial DNA access potentially implicates procedural concerns for trial fairness whereas postconviction access does not. Though it does require a bigger expansion to recognize *Brady*'s postconviction applicability, I suggest doctrinal authority exists for this move. Specifically, the authority is Justice Marshall.

As already seen in his *Agurs* and *Bagley* dissents, Justice Marshall embraced a strong substantive conception of *Brady* as a bulwark protection of innocence. Though neither of those opinions confronted the postconviction question, Justice Marshall did analyze

363. One of *Youngblood*'s doctrinal ironies is that it saw Justice Blackmun—normally a stalwart of the procedural *Brady* school—dissent. In that prescient dissent, Justice Blackmun recognized that there was "a distinct possibility . . . that a proper test would have exonerated" Youngblood. Arizona v. Youngblood, 488 U.S. 51, 68 (1988) (Blackmun, J., dissenting). Justice Blackmun was right and Justice Scalia should have recognized this.

364. Of course, recognizing this would contradict Justice Scalia's *Thompson* argument. Yet I suspect that many ardent procedural due process adherents would accept this. The formalism of Justice Scalia's opinion is extreme.

the issue in a pair of overlooked dissents.[365] Both opinions concerned Ronald Monroe, who maintained his innocence of capital murder. Six months after his conviction, police discovered information implicating another man in the murder yet never disclosed this exculpatory evidence to Monroe.[366] Luckily, Monroe's own investigators later uncovered the evidence and Monroe won an execution stay.[367] Despite finding Monroe's "due process rights under *Brady* had been violated," the federal habeas court remanded Monroe's case to state court to determine the suppressed evidence's materiality.[368] Monroe unsuccessfully sought Supreme Court review of this order.[369] Dissenting from the denial of certiorari, Justice Marshall urged review to clarify "the scope of a defendant's rights under *Brady* . . . during the period following his conviction."[370]

In his dissent, Justice Marshall made the case for *Brady*'s postconviction applicability. He began by explaining the backing for *Brady*'s warrant: "The message of *Brady* and its progeny is that a trial is not a mere 'sporting event'; it is a quest for truth."[371] This quest for truth "may not terminate with a defendant's conviction."[372] Justice Marshall then pointed to newly discovered evidence statutes, which demonstrate that "the sovereign has decided that justice will be best served by qualifying the finality of a conviction."[373] Permitting the State to avoid newly-discovered-evidence proceedings by "suppressing the very evidence that would enable a defendant to trigger such proceedings" defeated justice.[374] In the end, Justice Marshall argued that the court below had "trivialize[d] the constitutional right recognized in *Brady* and its progeny[,]" and castigated the Court for standing by "in the face of the dilution of the due process rights of an individual who may not even be guilty."[375]

365. *See* Monroe v. Butler, 485 U.S. 1024, 1026–28 (1988) (Marshall, J., dissenting in the denial of certiorari) ("*Monroe II*"); Monroe v. Blackburn, 476 U.S. 1145, 1145 (1986) (Marshall, J., dissenting in denial of certiorari) ("*Monroe I*").

366. *Monroe I*, 476 U.S. at 1146.

367. *Id.* at 1146–47

368. *Id.* at 1147–48 (discussing the district court's ruling).

369. *Id.* at 1151.

370. *Id.* at 1145.

371. *Id.* at 1148.

372. *Id.*

373. *Id.* The statutes were Louisiana state statutes.

374. *Id.* at 1149.

375. *Id.* at 1150–51.

Justice Marshall's analysis perfectly encapsulates the justificatory logic of the substantive *Brady* school. Ronald Monroe's personal story may have faded from memory, but Justice Marshall's teachings should not be forgotten.[376] It matters little that Justice Marshall wrote in dissent. Dissents by Justice Holmes in *Frank* and Justice Harlan in *Giles* inspired the substantive and procedural schools respectively and eventually influenced the course of the due process doctrine. Justice Scalia's *Kyles* dissent currently guides the procedural school. What matters more is that Justice Marshall's majestic conception—stressing the primacy of truth and substantive justice—once again be heard in the constitutional conversation.

As this Article has shown, *Brady* doctrine has evolved through a dialectic between substantive and procedural due process perspectives. Though the procedural view now dominates, the doctrine is not forever lost. It was once inconceivable that criminal defendants would have any right to discovery—it is now deep constitutional intuition and super-precedent. In this current era of high-profile DNA exonerations, constitutional intuitions could again change. Prosecutorial withholding of potentially exculpatory untested evidence could become a relic of an unenlightened past. If this is to happen, however, the substantive argument needs to be pressed and responded to. The formal command of stare decisis needs to be challenged as unfaithful to the spirit of *Brady*'s due process context.

## VI. CONCLUSION

In this Article, I have mapped the unfolding dialectic of *Brady* doctrine. The dialectic has pitted two lines of opinions against each other. The line embracing procedural understanding of due process has adopted a formal attitude toward stare decisis. The competing line, committed to a more substantive view of due process, has relied upon a justificatory understanding of precedent. The maps have illustrated the rise and decline of the substantive school and

376. On remand, the Louisiana state courts denied Monroe relief on the very ground that Brady did not apply postconviction. *See Monroe II*, 485 U.S. 1024, 1026–27 (1988) (Marshall, J., dissenting in the denial of certiorari). The Court again failed to grant certiorari and Justice Marshall dissented. *See id.* However, lingering concerns over Monroe's innocence inspired a gubernatorial commutation of his death sentence. *See* Peter Applebome, *Governor of Louisiana to Spare Inmate's Life*, N.Y. TIMES, Aug. 17, 1989, at A16.

explained how the procedural view came to dominate current doctrine. Doctrinal movement has occurred through arguments about stare decisis. While expansion of due process precedent was a past norm, the doctrine settled after *Bagley* and formal boundaries appeared more fixed. *Brady* debates since *Bagley* have largely turned into disputes over facts rather than law. Yet some debates over scope remain. In the last Part, I considered the question of a *Brady* right to untested evidence. Invoking the majestic substantive tradition, I argued for doctrinal expansion to recognize the right in order to keep up with evolving norms of justice.

While the *Brady* dialectic illuminates the tension between procedural means and substantive ends in criminal prosecutions, the metadoctrinal implications of this case study extend beyond due process. I suggest that competing formal and justificatory conceptions of stare decisis can affect the expansion of constitutional doctrine more generally. Just as due process today looks a far cry from what it did in 1868, so too have other areas of constitutional doctrine changed radically since the Republic's founding and subsequent civil war. While overrulings undoubtedly account for many of the changes, doctrinal expansion has also played a vital role in transforming the constitutional landscape. For example, both Eighth Amendment[377]and First Amendment[378] jurisprudence have recently experienced significant doctrinal expansion that necessarily strained formal readings of prior precedent. Scholarly attention to the competing formal or justificatory attitudes toward prior precedent might help illuminate the dialectics by which these and other hotly contested doctrines assumed their current boundaries.

In the end, I hope to have demonstrated the methodological utility of mapping contested Supreme Court doctrine. By carefully

377. In last Term's *Miller v. Alabama* decision, a 5–4 majority extended the Eighth Amendment to prohibit mandatory life without parole sentences for juveniles convicted of murder. *See* Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012). This ruling was in turn built upon prior extensions of Eighth Amendment jurisprudence. *See id.* at 2463 (citing Graham v. Florida, 130 S. Ct. 2011, 2021 (2010) (striking down juvenile life without parole for nonhomicide offenses); Roper v. Simmons, 543 U.S. 551, 560 (2005) (striking down juvenile death penalty)).

378. In the 2010 Term's *Citizens United* decision, the majority controversially extended a line of opinions granting corporations First Amendment rights. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 899–900 (2010) (noting recognition of corporate First Amendment rights and extension to political speech in *First Nat'l Bank of Boston v. Bellotti*, 475 U.S. 765 (1978)).

tracing back competing lines of citation advocated in majority, dissenting, and concurring opinions, it becomes possible to identify the most prominent teachers and texts of competing doctrinal schools. These schools represent continuous jurisprudential traditions. Though the vocabularies and assumptions of these conflicting traditions change over time, charting their genealogies demonstrates a deeper continuity connecting today's doctrinal dialectics to great debates of the past. For scholars and teachers, this method can enrich our picture of how argument shapes doctrine. For advocates and participants in the debate, this kind of close study reveals what it really means to stay true to your school.

## APPENDIX: *BRADY* DIALECTIC 1868–2012