

## Brandeis: The Legacy of a Justice

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# BRANDEIS: THE LEGACY OF A JUSTICE

JOEL K. GOLDSTEIN\* AND CHARLES A. MILLER\*\*

*One hundred years after his appointment, Justice Louis D. Brandeis remains a distinctive and unusually influential figure in the history of the Supreme Court. Unlike many other great justices, Brandeis is not remembered for his majority opinions. Rather, what is distinctive about him is the extent to which so many of his dissents and concurring opinions continue to influence justices more than 75 years after he retired and a century after he joined the Court. Whereas justices cite majority opinions for their value as legal precedents, they invoke the dissents and concurrences of a retired justice due to the power of his or her ideas or the credibility of his or her reputation. Significantly, Brandeis's successors continue to turn to his classic dissents and concurrences more often than to the discretionary opinions of other justices. Their continuing reliance on Brandeis confirms the insight of Paul Freund, one of the Justice's most distinguished law clerks that Brandeis remains "the most powerful moral teacher" to have served on the Court.*

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## I. INTRODUCTION

The centennial of Justice Louis D. Brandeis's appointment to the Supreme Court provides an appropriate occasion to consider his judicial legacy. Woodrow Wilson's nomination of Brandeis on January 28, 1916,<sup>1</sup> to fill the vacancy caused by the death of Justice Joseph Rucker Lamar provoked immediate controversy and led to a contentious confirmation battle.<sup>2</sup> Seven former presidents of the American Bar Association including William Howard Taft publicly declared Brandeis unfit for the Court.<sup>3</sup> The two Senate committees charged with considering the nomination approved it by a single vote in each instance before the Senate ultimately confirmed Brandeis, 47–22 on June 1, 1916.<sup>4</sup> Yet long before Brandeis retired from the Court on February 13, 1939, he was regarded as one of its seminal justices, a recognition that has endured for more than three-quarters of a century since then.<sup>5</sup>

Yet Brandeis's judicial legacy defies conventional measures. Unlike Chief Justices John Marshall, Charles Evans Hughes, and Earl Warren, he did not, through the force of his personality or an ability to forge consensus, shape the course of the Supreme Court by cobbling together majorities on constitutional issues. Nor did he make his mark through the number of canonical majority opinions he left behind.<sup>6</sup> There were few such opinions. His concurrences and dissents, which the Court later used to mold new and enduring doctrine, left a wider imprint. Yet, significant though some of these contributions were, even they do not properly reflect the legacy of Justice Brandeis's twenty-three years on the Court. Often the Court moved towards the result he

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1. ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN'S LIFE* 465 (1946).

2. HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II* 141–44 (5th ed. 2008).

3. MASON, *supra* note 1, at 489.

4. *See generally* A.L. TODD, *JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS* (1964).

5. *See, e.g.*, ABRAHAM, *supra* note 2, 373–76 (summarizing various efforts to rank Supreme Court justices which place Brandeis in the “great” category); LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH, AND THOMAS G. WALKER, *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS AND DEVELOPMENTS* 464, 465 (6th ed. 2015) (summarizing various efforts to rank justices virtually all of which place Brandeis in “great” category); Jeffrey Rosen, *Why Brandeis Matters*, *NEW REPUBLIC* (June 28, 2010), <https://newrepublic.com/article/75902/why-brandeis-matters> [<https://perma.cc/3LY9-NEGF>] (calling Brandeis “the greatest constitutional philosopher of the twentieth century”); Anthony Lewis, *A Hero of American Justice*, *NEW YORK REVIEW OF BOOKS* (Feb. 11, 2010), <http://www.nybooks.com/articles/2010/02/11/a-hero-of-american-justice/> [<https://perma.cc/RP9X-SHJF>] (calling Brandeis “perhaps the most brilliant of all Supreme Court justices”).

6. *See* Lee Epstein et al., *Rating the Justices: Lessons from Another Court*, in *Annual Meeting Midwest Political Sci. Assoc.* (Chicago, Illinois) (Apr. 18, 1992), <http://epstein.wustl.edu/research/conferencepapers.1992MPSA.pdf> [<https://perma.cc/63ZV-PG2D>] (reporting the top ten authors of significant majority opinions, which does not include Brandeis).

suggested without embracing his approach, and some of those victories have proved fleeting.

Rather, Justice Brandeis's judicial legacy was, as Paul A. Freund put it, as "the most powerful moral teacher ever to have sat on our highest court."<sup>7</sup> That assessment continues to describe Brandeis's impact half a century after Freund wrote that judgment. Brandeis used his judicial opinions to express fundamental constitutional values in a profound and memorable way. As Freund put it in 1978, "while Brandeis was without doubt essentially a moralist, he was a moralist with a difference . . . . He was, in short, a moralist-cum-lawyer, whose special genius it was to perceive moral issues in what others saw as vast impersonal, inevitable trends, and to devise institutional arrangements designed to salvage moral values in a modern technological age."<sup>8</sup>

When Justice Brandeis used concurring and dissenting opinions to illuminate moral issues, these discretionary writings provided the opportunity for him to identify and speak to recurring moral questions in an instructive way.<sup>9</sup> The enduring quality of these expositions is demonstrated, in part, by the frequency with which modern jurists and others continue to cite them for the light they shed on contemporary problems or the support they lend to their discussions.<sup>10</sup>

Yet the power of Brandeis's articulated moral teachings constitutes only part of his judicial legacy. Less tangible than those gems of his judicial prose, yet also important, Brandeis's work demonstrated how a conscientious judge can apply values in a principled fashion as they arise in cases before the Court. A century after his appointment to the Court, his moral insights continue to inform discussion of constitutional law, and his performance provides a model for judicial behavior.

This essay continues in Section II by placing Brandeis's discretionary opinions in the context of his judicial service. Section III discusses the impact of Brandeis's dissents and concurrences in shaping subsequent doctrine and in articulating foundational concepts for judicial and extra-judicial discussion. Section IV addresses Brandeis's judicial behavior. Section V provides con-

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7. Paul A. Freund, *An Appreciation of Justice Brandeis*, 11 ST. LOUIS. U. L.J. 4, 5 (1966); cf. Felix Frankfurter, *Mr. Justice Brandeis and the Constitution*, in MR. JUSTICE BRANDEIS 47, 124 (Felix Frankfurter ed., 1932) ("In truth, Mr. Justice Brandeis is a moral teacher . . .").

8. Paul A. Freund, *Justice Brandeis: A Law Clerk's Remembrance*, 68 AM. JEWISH HISTORY 7, 7 (1978); see also MICHAEL J. SANDEL, PUBLIC PHILOSOPHY: ESSAYS ON MORALITY IN POLITICS 250 (2005) (listing Brandeis along with Thomas Jefferson, James Madison, Alexander Hamilton, John C. Calhoun, Abraham Lincoln, Frederick Douglass, Jane Addams, and Oliver Wendell Holmes as having produced "most notable expressions of American political thought").

9. See discussion *infra* Section III.B.

10. See *infra* Sections III.C, III.D.

clusions.

## II. AN OVERVIEW OF JUSTICE BRANDEIS'S JUDICIAL WORK

The observer may be surprised at the paucity of monumental majority opinions Justice Brandeis wrote for the Court during his twenty-three years of service. The absence of more such opinions did not reflect a tendency by Brandeis to dissent. On the contrary, he usually joined in the Court's resolutions. The overwhelming number of his published judicial opinions—some 457 of his 531 or 86%—were majority opinions.<sup>11</sup>

Many of Brandeis's opinions resolved important issues of law. For instance, in *Jacob Rupert, Inc. v. Caffey*,<sup>12</sup> he spoke for a 6–3 majority in upholding the power of Congress to prohibit, as a war measure, the use of certain products in manufacturing liquor. In *O'Gorman & Young, Inc. v. Hartford Fire Insurance Co.*,<sup>13</sup> he wrote for a 5–4 majority in applying a presumption of constitutionality to uphold a New Jersey insurance regulation against attack under the Due Process Clause of the Fourteenth Amendment. As will be suggested below, Brandeis had frequently criticized the Court's use of the Due Process Clauses of the Fifth and Fourteenth Amendments to strike down regulatory measures early in his tenure on the Court, but it was only President Herbert Hoover's appointments of Charles Evans Hughes and Owen Roberts to the Court in 1930 that created the possibility that Brandeis could express his view on the due process clauses in a majority opinion.<sup>14</sup> His opinion in *O'Gorman* did not end the Court's aggressive use of substantive due process to strike down regulatory measures, a practice that continued for a few more years.<sup>15</sup> Yet the opinion helped erode the underpinnings of the liberty of contract doctrine that the Court had used during the first third of the twentieth century to strike down federal and state economic regulation.<sup>16</sup> In

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11. We have calculated Brandeis's number of opinions from information provided at the website of the Louis D. Brandeis Collection at the Louis D. Brandeis School of Law Library. *The Collected Supreme Court Opinions of Louis D. Brandeis*, LOUIS D. BRANDEIS SCHOOL OF LAW LIBRARY (last visited Nov. 15, 2016), <http://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/the-collected-supreme-court-opinions-of-louis-d.-brandeis> [https://perma.cc/5YU9-SE5U]. *But see* MASON, *supra* note 1, at 627–28 (reporting that Brandeis wrote 454 majority opinions and 528 opinions); Epstein et al., *supra* note 5, at 632 (reporting that Brandeis wrote 455 opinions for the Court, 10 concurrences, and 65 dissents for a total of 530 opinions).

12. 251 U.S. 264 (1920).

13. 282 U.S. 251 (1931).

14. *See* discussion *infra* Section III.A.

15. *See, e.g.*, *New State Ice v. Liebmann*, 285 U.S. 262 (1932) (using Fourteenth Amendment Due Process Clause to strike down Oklahoma law regulating sale of ice without license).

16. *See* BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 76–105 (1998) (describing role of *O'Gorman* in eroding substantive

*Lynch v. United States*<sup>17</sup> and *Louisville Bank v. Radford*,<sup>18</sup> Brandeis wrote for a unanimous Court in striking down New Deal legislation for taking private property for public use without just compensation in violation of the Fifth Amendment. In *Senn v. Tile Layers Protective Union, Local No. 5*,<sup>19</sup> he wrote for a 5–4 majority in upholding a Wisconsin statute that allowed peaceful picketing to publicize labor disputes against an attack that it violated the Fourteenth Amendment. Brandeis’s opinion provided part of the basis for subsequent Court decisions eroding the restrictions the Taft Court had imposed on union activity.<sup>20</sup>

Yet only one of Brandeis’s majority opinions, that in *Erie v. Tompkins*,<sup>21</sup> was truly historic. That decision overruled the ninety-six-year-old precedent, *Swift v. Tyson*,<sup>22</sup> and held that the invocation of the federal court’s diversity subject matter jurisdiction did not authorize the federal court to fashion a “federal general common law.” Instead, a federal court in a diversity case was bound to follow the law, whether statutory or decisional, which the highest state court in that state would apply.<sup>23</sup>

*Erie* was, to be sure, a singular decision that restored some rationality and consistency to law by eliminating the incentive to forum-shop, which *Swift* had inadvertently created.<sup>24</sup> *Erie* left its own problems to be solved but, at least the applicable law would not vary depending on whether a federal or state tribunal had decided the case.<sup>25</sup>

Brandeis’s dearth of path-blazing majority opinions sets him apart from other consequential justices. It was not simply the great chief justices like Marshall, Hughes, and Warren who wrote many enduring majority opinions. Other associate justices, such as Hugo Black, William J. Brennan, Jr., Lewis

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due process).

17. 292 U.S. 571 (1934).

18. 295 U.S. 555, 601–02 (1935).

19. 301 U.S. 468, 482–83 (1937).

20. See, e.g., *A.F.L. v. Swing*, 312 U.S. 321, 326 (1941) (citing *Senn*, 301 U.S. at 478, for First Amendment protection of picketing); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) (citing *Senn*, 301 U.S. at 478, and Brandeis regarding picketing as protected speech).

21. 304 U.S. 64 (1938).

22. 41 U.S. 1 (1842).

23. 304 U.S. at 78.

24. See, e.g., *id.* at 73–75.

25. See TONY FREYER, HARMONY & DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM 143–64 (1981) (discussing difficulties occasioned by *Erie* and criticizing Brandeis’s claim that the Court had been acting unconstitutionally since *Swift*). But see EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 114 (2000) (defending Brandeis’s opinion in *Erie*); Ernest A. Young, *A General Defense of Erie Railroad Co. v. Tompkins*, 10 J.L., ECON. & POL’Y 17 (2013) (providing general defense of Brandeis’s arguments in *Erie*).

F. Powell, Jr., Potter Stewart, and Byron White, wrote more important majority opinions than Brandeis.<sup>26</sup> Indeed, some of those with whom Brandeis served for extended periods, such as Oliver Wendell Holmes,<sup>27</sup> Harlan Fiske Stone,<sup>28</sup> Benjamin Cardozo,<sup>29</sup> and even George Sutherland<sup>30</sup> and Owen Roberts,<sup>31</sup> wrote more often for the Court on significant matters than did Brandeis.

Circumstance more than anything else limited the number of Brandeis's historic majority opinions. The Court on which he served decided fewer constitutional cases than has been true in more recent times. The Court's conservative composition for most of his tenure dictated that he would often be in the minority in the Court's controversial constitutional cases.<sup>32</sup> And even when Brandeis found himself in the majority on such matters, institutional reasons dictated that others generally wrote the most significant decisions, such as Holmes,<sup>33</sup> who was more senior; Hughes,<sup>34</sup> who, as Chief Justice, brought symbolic importance to opinions he wrote and who possessed opinion-assigning authority; or Roberts,<sup>35</sup> who often was the swing vote.

Although Brandeis is often portrayed as a great dissenter, he had a general aversion to dissenting, especially in cases that did not involve the Constitution.<sup>36</sup> He rarely wrote dissenting (or even concurring) opinions.<sup>37</sup> Brandeis

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26. Epstein, et al., *Rating the Justices*, *supra* note 6, at 18.

27. See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919); *Missouri v. Holland*, 252 U.S. 416 (1920); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Buck v. Bell*, 274 U.S. 200 (1927).

28. See, e.g., *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939); *United States v. Caroleone Prods. Co.*, 304 U.S. 144 (1938); *S.C. State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177 (1938); *United States v. Louisiana*, 290 U.S. 70 (1933).

29. See, e.g., *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937); *Palko v. Connecticut*, 302 U.S. 319 (1937); *Nixon v. Condon*, 286 U.S. 73 (1932).

30. See, e.g., *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Powell v. Alabama*, 287 U.S. 45 (1932); *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

31. See, e.g., *United States v. Butler*, 297 U.S. 1 (1936); *Grovey v. Townsend*, 295 U.S. 45 (1935); *Nebbia v. New York*, 291 U.S. 502 (1934).

32. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932); *Liggett Co. v. Lee*, 288 U.S. 517 (1933); *Myers Adm'x v. United States*, 272 U.S. 52 (1926).

33. See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919); *Nixon v. Herndon*, 273 U.S. 536 (1927).

34. See, e.g., *Nat'l Labor Rel. Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *West Coast Hotel v. Parrish*, 300 U.S. 397 (1937); *The Gold Clause Cases*, 294 U.S. 240 (1935); *Home Bldg. and Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); *Near v. Minnesota*, 283 U.S. 697 (1931); *Stromberg v. California*, 283 U.S. 359 (1931).

35. See, e.g., *Herndon v. Lowry*, 301 U.S. 242 (1937); *Nebbia v. New York*, 291 U.S. 502.

36. See generally Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 *Sup. Ct. Rev.* 299, 314-15 (Brandeis, arguing against dissents in non-constitutional cases); Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 *MINN. L. REV.* 1267, 1314, 1386 (2001) (showing that Brandeis joined about 93% of the opinions of the Taft Court); *id.* at 1387, 1388 (showing that Brandeis changed more than 50%

often withheld a separate expression of his views if the Court's opinion was modified to reflect his concerns, at least in part, and sometimes simply to be a good institutional citizen.<sup>38</sup> Only 12% of his opinions were dissents and less than 2% were concurrences.<sup>39</sup> He averaged fewer than three dissenting opinions per term.<sup>40</sup> In fact, most of his dissents came during the first two-thirds of his service, when Edward White and William Howard Taft were chief justices of rather conservative Courts.<sup>41</sup> He wrote seventeen dissents from opinions during his five terms on the White Court and forty-two dissents during his nine terms on the Taft Court, and only five while serving for eight terms with Chief Justice Charles Evans Hughes.<sup>42</sup>

Yet this small portion of Brandeis's judicial workload has had a disproportionate impact on his judicial reputation. For, as Justice Robert H. Jackson later observed, Brandeis was "distinguished . . . not for the frequency of his dissents, but for their strength—not for their number, but for their quality."<sup>43</sup>

Once Brandeis joined the Court, he limited his published writings about law to his judicial opinions. He did not write law review articles or give academic speeches or media interviews. Moreover, in writing dissents and concurrences, he was not constrained by the institutional responsibility of speaking for a majority and the consequent obligation to conform his ideas to the limits of consensus. In these discretionary opinions, he was free to share the insights that were the unique product of his mind and experience. As Walton H. Hamilton put it, "The dissent is his own utterance, unconfused by the need of voicing the opinions of others; it is not the law, but the law as he would

of his conference vote dissents during the Taft Court to join Court opinion).

37. See *supra* text accompanying note 11 and note 11.

38. PHILIPPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* 369–70 (1984); Urofsky, *Brandeis-Frankfurter Conversations*, *supra* note 36, at 309, 328 (Brandeis describing when he withholds a dissent); see also Post, *supra* note 36, at 1274 (identifying presumptive norm on Taft Court for justices to join Court opinions notwithstanding disagreement to foster Court's influence and prestige); *id.* at 1284 (citing Canon of Judicial Ethics in 1920s calling for judges on courts of last resort to "use effort and self-restraint" to promote consensus).

39. See *supra* note 11 and accompanying text.

40. See *id.*

41. See generally *The Collected Supreme Court Opinions of Louis D. Brandeis*, *supra* note 11.

42. See generally *id.* Brandeis also rarely wrote concurring opinions. His ten concurring opinions came at an average of less than one every other year and in fact were bunched in six Court terms with three each coming in the 1926 and 1935 terms.

43. Robert H. Jackson, *Assoc. Justice of the Supreme Ct. of the U.S., Tribute to Louis D. Brandeis, The Man*, at the 39th Annual Convention of Hadassah in Washington, D.C. (Oct. 26, 1953) (transcript available at <http://www.roberthjackson.org/wp-content/uploads/migrated-files/thecenter/files/bibliography/1950s/tribute-to-louis-d.-brandeis,-the-man.pdf> [<https://perma.cc/QP65-XNPC>]); see also MASON, *supra* note 1, at 628 (stating that Brandeis's "dissenting opinions are of quality, not quantity").



have it be.”<sup>44</sup> This observation applied equally to Brandeis’s concurrences. Brandeis produced his most powerful and enduring moral teachings in these discretionary opinions.

### III. THE IMPACT OF JUSTICE BRANDEIS’S DISCRETIONARY OPINIONS

#### A. *The Source of Future Doctrine*

Brandeis’s concurrences and dissents helped shape doctrine the Court later adopted, in some cases even while he was still on the Court.<sup>45</sup> For instance, once he joined the Court, Brandeis inherited Holmes’s role as the most consistent judicial voice criticizing the Court’s aggressive use of the Fourteenth Amendment to strike down state legislation regulating economic matters during the *Lochner* era.<sup>46</sup> He called instead for judicial deference to such legislative decisions.<sup>47</sup> Thus, in Brandeis’s second dissenting opinion, issued in *Adams v. Tanner*<sup>48</sup> during his first term on the Court, he argued that the Court must consider the “evil” the State of Washington sought to remedy, the remedy adopted, and the experience elsewhere, not to determine whether the remedy was wise, or even to establish the facts since such matters were within the province of the state legislature. “The sole purpose of the inquiries is to enable this Court to decide whether, in view of the facts, actual or possible, the action of the State of Washington was so clearly arbitrary or so unreasonable that it could not be taken” without violating fundamental rights.<sup>49</sup>

In *New State Ice Co. v. Liebmann*<sup>50</sup> he argued that the Court had no right to weigh the evidence or determine whether all statements of fact upon which Oklahoma’s legislature acted were well-founded but simply the far more modest task of determining the “reasonableness” of its belief in the existence of evils and the effectiveness of its remedy.<sup>51</sup> The Court must defer to the su-

44. Walton H. Hamilton, *The Jurist’s Art*, in MR. JUSTICE BRANDEIS 169, 187 (Felix Frankfurter ed., 1932).

45. Epstein and her colleagues also report that Brandeis dissented in sixteen cases that were later overruled. Epstein et al., *Rating the Justices*, *supra* note 6, at 22.

46. See, e.g., *Jay Burns Baking v. Bryan*, 264 U.S. 504, 534 (1924) (Brandeis, J., dissenting); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 488 (1921) (Brandeis, J., dissenting); *New State Ice v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

47. See, e.g., *Liggett Co. v. Lee*, 288 U.S. 517 (1933) (Brandeis, J., dissenting); *New State Ice*, 285 U.S. at 284–87, 302–03 (Brandeis, J., dissenting); *O’Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251 (1931); *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920); *Adams v. Tanner*, 244 U.S. 590, 600 (1917) (Brandeis, J., dissenting).

48. 244 U.S. 590 (Brandeis, J., dissenting).

49. *Id.* at 600.

50. 285 U.S. 262.

51. *Id.* at 286–87 (Brandeis, J., dissenting).

perior authority of the state legislature to know the relevant facts.<sup>52</sup> The following year in *Liggett v. Lee*<sup>53</sup> Brandeis argued that a Florida statute was presumptively constitutional absent any factual showing that it was unreasonable.<sup>54</sup> Ultimately, in the mid-1930s, the Court began to display greater deference to legislative decision-making in economic matters, in cases like *Nebbia v. New York*<sup>55</sup> and *West Coast Hotel v. Parrish*.<sup>56</sup>

Brandeis had frequently dissented from opinions of the White and Taft Courts constraining union activity, including in *Duplex Printing Press Co. v. Deering*,<sup>57</sup> and *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n*.<sup>58</sup> In *United States v. Hutcheson*, the Court held that Congress, in response to dissents by Brandeis, had clarified federal anti-trust law to exempt union activity, thereby bringing the law into harmony with his interpretation.<sup>59</sup>

Or take Brandeis's classic dissent in *Olmstead v. United States*<sup>60</sup> in which, in the context of the Fourth Amendment, he argued that the Constitution conferred as against the government a right to privacy or, as he put it, "the right to be let alone." In one of the most memorable passages in Supreme Court opinions, Brandeis wrote:

The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let

52. See STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 121, 128 (2010) (discussing Brandeis's belief in legislative superiority for fact-finding regarding societal problems).

53. 288 U.S. 517 (1933).

54. *Id.* at 543 (Brandeis, J., dissenting); see also *Quaker City Cab Co. v. Commonwealth of Pa.*, 277 U.S. 389, 411 (1928) (Brandeis, J., dissenting) ("The Court may think such views unsound. But, obviously, the requirement that a classification must be reasonable does not imply that the policy embodied in the classification made by the legislature of a State shall seem to this Court a wise one."); *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 533–34 (1924) (Brandeis, J., dissenting) (arguing that Court's role was not to weigh evidence but to determine whether legislative act "transcends the bounds of reason").

55. 291 U.S. 502 (1934).

56. 300 U.S. 379 (1937).

57. 254 U.S. 443, 479 (1920) (Brandeis, J., dissenting).

58. 274 U.S. 37, 56 (1927) (Brandeis, J., dissenting).

59. 312 U.S. 219, 229–31, 236 (1941).

60. 277 U.S. 438, 478 (1928).

alone—the most comprehensive of rights, and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.<sup>61</sup>

Brandeis and his law partner, Samuel D. Warren, had first developed that concept nearly forty years earlier in their classic *Harvard Law Review* article, “The Right to Privacy,” but they were writing about a common law right against unwanted publicity, not a constitutional right.<sup>62</sup> In his *Olmstead* dissent, Brandeis argued that the Fourth Amendment’s prohibition against unreasonable searches and seizures was not limited to situations where the government physically entered property, and looked for, and confiscated, objects as the Court, in a rather literal and formalistic opinion by Chief Justice Taft concluded.<sup>63</sup> Brandeis, however, reasoned that the Fourth and Fifth Amendments were produced in an age when force and violence were the means of compelling evidence, but by 1928 technology offered new instruments like wiretapping that allowed government surreptitiously to invade private spaces.<sup>64</sup> Constitutional interpretation, he said, must adapt to modern circumstance in order to vindicate the principle animating these texts in the Bill of Rights.<sup>65</sup> He argued that the Fourth Amendment enjoined “every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed.”<sup>66</sup>

In the end, it was Brandeis’s *Olmstead* dissent, not Taft’s majority opinion, that endured, including his classic encomium of the constitutional concept of privacy. Nearly forty years later, in *Katz v. United States*,<sup>67</sup> the Court explicitly overruled *Olmstead*. During the intervening years, other justices had found Brandeis’s dissent persuasive. Dissenting in 1942 in *Goldman v. United States*, Justice Murphy cited Warren and Brandeis’s article of 1890 and referred to Brandeis’s “memorable dissent” in *Olmstead* as a text to which “little can or need be added” regarding “the value of the right to privacy.”<sup>68</sup> He followed Brandeis in recognizing “a right of personal privacy” in the Four-

61. *Id.* at 478 (Brandeis, J., dissenting).

62. Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

63. *Olmstead*, 277 U.S. at 464. (“The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.”).

64. *Id.* at 473 (Brandeis, J., dissenting).

65. *Id.* at 472–74.

66. *Id.* at 478.

67. 389 U.S. 347, 353 (1967).

68. *Goldman v. United States*, 316 U.S. 129, 137 (1942) (Murphy, J., dissenting).

teenth Amendment which was “as dear as any to free men” and on which “the spiritual freedom of the individual depends in no small measure.”<sup>69</sup> Chief Justice Stone and Justice Frankfurter also announced they were prepared to overturn *Olmstead* for reasons stated in its dissenting opinions.<sup>70</sup> In 1947, dissenting in *Harris v. United States*, Frankfurter, though not yet the full Court, would have explicitly overruled the *Olmstead* majority.<sup>71</sup> In 1952, Justice Douglas, who had been in the majority in *Goldman*, was now convinced that he had been wrong and that Brandeis was right from the beginning.<sup>72</sup> “I cannot improve on [Brandeis’s dissent],” he wrote, and then proceeded to quote four paragraphs from it.<sup>73</sup>

The Court did not explicitly rely on Brandeis’s classic dissent when it gave *Olmstead* its overdue burial in *Katz*.<sup>74</sup> Justice Stewart, who wrote the majority opinion, had earlier expressed hostility to a constitutional right to privacy in a different context<sup>75</sup> and here specifically stated that “the Fourth Amendment cannot be translated into a general constitutional ‘right to privacy.’”<sup>76</sup> Yet Brandeis’s dissent had left its mark during the prior four decades and in some respects *Katz* followed the path it suggested. *Katz* recognized that the Fourth Amendment protected people, not places, and that its protection did not depend upon a physical intrusion.<sup>77</sup> The adoption of these principles allowed the Fourth Amendment to reach newer, potentially intrusive

69. *Id.*

70. *Id.* at 136.

71. *Harris v. United States*, 331 U.S. 145, 159 (1947) (Frankfurter, J., dissenting) (associating the Fourth Amendment with the right to be let alone).

72. *On Lee v. United States*, 343 U.S. 747, 762 (1952) (Douglas, J., dissenting).

73. *Id.* at 762–64. Justice Douglas referred to Brandeis’s dissent as the “historic statement” of the right to be let alone. In *On Lee*, Justice Frankfurter observed that since it was decided, “instead of going from strength to strength in combating crime, we have gone from inefficiency to inefficiency, from corruption to corruption. The moral insight of Mr. Justice Brandeis unerringly foresaw this inevitability.” *Id.* at 759; see also *Irvine v. California*, 347 U.S. 128, 146 (1954) (Frankfurter, J., dissenting) (describing Brandeis’s dissent as “prophetic” of situation presented).

74. *Katz v. United States*, 389 U.S. 347 (1967). But see Erwin Chemerinsky, *Rediscovering Brandeis’s Right to Privacy*, 45 BRANDEIS L.J. 643, 646 (2007) (claiming *Katz* adopted Brandeis’s approach); Carol S. Steiker, *Brandeis in Olmstead: “Our Government is the Potent, the Omnipresent Teacher,”* 79 MISS. L. REV. 149, 161 (2009) (calling *Katz* “a belated vindication” of Brandeis’s dissent). But cf. Paul A. Freund, *Privacy: One Concept or Many*, in PRIVACY 182, 197 n.20 (J. Roland Pennock & John W. Chapman eds., 1971) (stating tersely that in *Katz* “the dissenting position [in *Olmstead*] was adopted by the Court” if “the dissenting position” is read as meaning simply that the Fourth Amendment applied to warrantless electronic surveillance); Steiker, *supra*, at 158–63 (discussing differences between *Katz* and Brandeis dissent).

75. See *Griswold v. Connecticut*, 381 U.S. 479, 530 (1965) (Stewart, J., dissenting) (“I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.”).

76. *Katz*, 389 U.S. at 350.

77. *Id.* at 351.

technologies, which Brandeis had anticipated with alarm.<sup>78</sup> And it protected privacy of the telephone upon which the user justifiably relied.

Brandeis's *Olmstead* dissent had also provided a concept that influenced the shape of constitutional doctrine in other important ways beyond his anticipation. In 1965, two years before *Katz* overruled *Olmstead*, the Court used a newly-minted constitutional right to privacy to strike down a Connecticut law prohibiting the use of contraceptives in *Griswold v. Connecticut*.<sup>79</sup> The Court's opinion, written by Justice Douglas, maintained that although the Constitution does not mention privacy, marital or otherwise, "penumbras" or "emanations" from a collection of constitutional clauses are sufficient to create the right.<sup>80</sup> Since Brandeis never wrote, in the U.S. Reports or law reviews, about the application of a "right to be let alone" to sexual activity it is unclear how he would have regarded it. Yet quite clearly his formulation helped shape the doctrine that emerged from his argument in *Olmstead*.

Four years before *Griswold*, the Court had dodged deciding the contraceptive issue.<sup>81</sup> There, Justice Frankfurter's plurality opinion invoked Brandeis's "*Ashwander* Rules" to justify the Court's practice of avoiding constitutional questions whenever possible.<sup>82</sup> Justice Harlan, however, was not persuaded the Court should avoid the constitutional question.<sup>83</sup> Rather, he drew at length from Brandeis in *Olmstead*, which he described as "[p]erhaps the most comprehensive statement of the principle of liberty underlying these aspects of the Constitution" dealing with the privacy of the home,<sup>84</sup> as well as from Brandeis's dissent in *Gilbert v. Minnesota* celebrating "the privacy and freedom of the home."<sup>85</sup>

In the years leading up to *Griswold*, Brandeis's formulation had appeared without attribution;<sup>86</sup> the Court had associated the Fourth Amendment with a right of privacy;<sup>87</sup> and Brandeis's classic passage in *Olmstead* had permeated academic writing.<sup>88</sup> For instance, Erwin Griswold, Dean of Harvard Law

78. See Steiker, *supra* note 74, at 158.

79. 381 U.S. 479.

80. *Id.* at 484.

81. *Poe v. Ullman*, 367 U.S. 497, 503 (1961).

82. *Id.* at 502-03.

83. *Id.* at 524 (Harlan, J., dissenting).

84. *Id.* at 550.

85. *Id.* at 552 (quoting *Gilbert v. Minnesota*, 254 U.S. 325, 335-36 (1920)).

86. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 650-51, 654-56 (1961) (repeatedly referring to Fourth Amendment as standing for "right of privacy"); *Wilson v. Schnettler*, 365 U.S. 381 (1961) (Douglas, J., dissenting) ("Under the Fourth Amendment, the judiciary has a special duty of protecting the right of the people to be let alone, except as warrants issue on a showing of probable cause.").

87. See, e.g., *Mapp*, 367 U.S. at 650-52, 655-56 (1961).

88. See Erwin N. Griswold, *The Right to be Let Alone*, 55 NW. U. L. REV., 216, 216-17 (1960).

School, wrote that the right to be let alone, “the most familiar statement” of which appeared in Brandeis’s *Olmstead* dissent, was “implicit in many of the provisions of the Constitution and in the philosophic background out of which the Constitution was formulated.”<sup>89</sup> Princeton professor William Beaney included a lengthy discussion of Brandeis in *Olmstead* in an article of 1962.<sup>90</sup> Utah Law School Dean Daniel J. Dykstra discussed Brandeis’s formulation in “The Right Most Valued by Civilized Men.”<sup>91</sup>

Justice Black, dissenting in *Griswold*, recognized a Brandeisian background to Douglas’s opinion for the Court and, as it conflicted with his own constitutional formalism, did not like what he saw.<sup>92</sup> The Court, he complained, had converted the tort-based right that Warren and Brandeis had articulated into a constitutional concept.<sup>93</sup> Justice Goldberg in his concurrence which Chief Justice Warren and Justice Brennan joined, explicitly relied on Brandeis’s dissent, quoting from it since it “comprehensively summarized the principles underlying the Constitution’s guarantees of privacy.”<sup>94</sup>

When the issue of abortion came to the Supreme Court eight years later in *Roe v. Wade*, some justices again turned to Brandeis for guidance.<sup>95</sup> Justice Blackmun, who wrote the majority opinion for seven justices in the case, cited Brandeis’s *Olmstead* dissent as a source of the right to privacy.<sup>96</sup> Concurring, Justice Douglas anchored *Griswold*’s right to privacy in the right to be let alone, which Brandeis celebrated in *Olmstead*.<sup>97</sup> In dissent, Justice Rehnquist complained that the Court had abandoned its practice of not formulating a rule broader than the facts presented, and cited Brandeis’s *Ashwander* Rules in support.<sup>98</sup>

### B. *The Most Powerful Moral Teacher*

Yet just as Brandeis’s judicial legacy certainly does not depend on his majority opinions, neither does it turn primarily on the extent to which his dissents and concurring opinions later became law. Rather, his legacy rests on

89. *Id.* at 216.

90. William M. Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 Sup. Ct. Rev. 212, 218–28.

91. 6 UTAH L. REV. 305 (1959).

92. *Griswold v. Connecticut*, 381 U.S. 479, 510 n.1 (Black, J., dissenting).

93. *Id.*

94. *Id.* at 494 (Goldberg, J., concurring).

95. *Roe v. Wade*, 410 U.S. 113 (1973).

96. *Id.* at 152.

97. *Id.* at 213 (Douglas, J., concurring) (“This right of privacy was called by Mr. Justice Brandeis the right ‘to be let alone.’ *Olmstead v. United States*, 277 U.S. 438, 478 (dissenting opinion).”)

98. *Roe v. Wade*, 410 U.S. at 172 (Rehnquist, J., dissenting).

the instructive way in which he expressed foundational constitutional ideals. The vocabulary in those formulations have provided future generations. As Paul Freund wrote about the Justice: “The mission that he pursued indomitably was no less than to rediscover the prophetic ideals that became historic American values, and to devise ways to translate these into the structure of our modern industrial society.”<sup>99</sup> Not surprisingly, Brandeis expressed these ideals most powerfully in his concurring opinions and dissents.

Although categorizing Brandeis’s thoughts risks oversimplification, his ideas might be usefully placed in five groups. First, he was an eloquent proponent of individual rights. Justice Frankfurter did not overstate the case when he referred to Brandeis as “co-architect of the great constitutional structure of civil liberties.”<sup>100</sup> The discussion above of *Olmstead* suggests how Brandeis’s “right to be let alone” has influenced the Court’s formulation of the constitutional concept (or concepts) of privacy.<sup>101</sup> Brandeis’s *Olmstead* dissent was one of the two great pillars of that structure.

His concurring opinion in *Whitney v. California*<sup>102</sup> was the other. This case arose from the conviction of Anna Whitney for violating California’s syndicalism statute through her participation in the Industrial Workers of the World (IWW).<sup>103</sup> Although Brandeis joined on procedural grounds<sup>104</sup> the Court’s unanimous opinion affirming Whitney’s conviction, his ringing concurrence reads like a dissent.<sup>105</sup> Perhaps more eloquently than any other Supreme Court opinion, Brandeis’s concurrence articulated an enduring rationale for a robust doctrine of free political speech. He wrote:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should

99. Paul A. Freund, *Brandeis, Louis Dembitz*, in *AMERICAN REFORMERS* 107, 112 (Alden Whitman ed., 1985).

100. *Pennekamp v. Florida*, 328 U.S. 331, 352 (1946) (Frankfurter, J., concurring).

101. See discussion *supra* Section III.A.

102. 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

103. *Id.* at 359, 364 (majority opinion).

104. *Id.* at 379 (Brandeis, J., concurring). Whitney had not argued that the California law was unconstitutional absent clear and unusual danger of serious evil and had not asked judge or jury to consider those questions. Moreover, there was evidence from which a reasonable factfinder could find that the IWW was part of a conspiracy to commit serious crimes.

105. Brandeis’s opinion grew largely out of a dissent he wrote in *Ruthenberg v. Michigan* during the Court’s 1926 term regarding the appeal of Charles E. Ruthenberg, executive secretary of the Communist Party of Michigan, for allegedly violating Michigan’s Criminal Syndicalism law. The case was mooted by Ruthenberg’s death in March 1927 before the Court could affirm his conviction and accordingly Brandeis had no occasion to issue a dissent in that case. Instead, he converted much of his work in that case for use in *Whitney*. See Ronald K.L. Collins & David Skover, *Curious Concurrence: Justice Brandeis’s Vote in Whitney v. California*, 2005 Sup. Ct. Rev. 333, 334.

prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.<sup>106</sup>

Brandeis proceeded to define the prevailing “clear and present danger” test by giving each adjective and noun a constrained reading.<sup>107</sup> Under Brandeis’s formulation, the evil anticipated must be serious, imminent and likely to result absent suppression of speech. An emergency must be so severe and imminent as to preclude further discussion and make action a necessary last resort.<sup>108</sup>

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106. *Id.* at 375–76. The phrase “they believed liberty to be the secret of happiness, and courage to be the secret of liberty” came from Pericles’ “Funeral Oration.” Presumably Brandeis expected his readers to recognize it, but few of today’s readers will. For a fuller discussion, see CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 98–99 (1969).

107. *Whitney*, 274 U.S. at 376.

108. *Id.* at 377 (“Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the in-



Alexander Bickel later called Brandeis's *Whitney* opinion "one of the most eloquent, as well as intellectually persuasive, passages in the extensive literature of free speech."<sup>109</sup> Brandeis's biographer, Melvin Urofsky, suggested that *Whitney* "[p]erhaps more than any other of his opinions . . . has shaped American constitutional law," citing its influence on the First Amendment jurisprudence of Justices Black, Douglas, Brennan, and John Marshall Harlan II.<sup>110</sup> He might have added Justice Stevens to his list, who later called Brandeis's *Whitney* concurrence "the most significant" opinion of the Taft Court.<sup>111</sup>

Urofsky was surely right when he wrote that if Brandeis "had never written anything other than the *Olmstead* and *Whitney* opinions his impact on American constitutional law would still have been great."<sup>112</sup> Yet Brandeis's often lonely commitment to individual rights was also evident in cases beyond *Olmstead* and *Whitney*. In fact, his *Whitney* opinion was the culmination of nearly a decade's thought and writing regarding free expression. In his 1920 opinion in *Schaefer v. United States*, he cautioned against prosecuting someone "for a disloyal heart" and worried that even in peacetime "an intolerant majority, swayed by passion or by fear, may be prone in the future, as it has often been in the past, to stamp as disloyal opinions with which it disagrees."<sup>113</sup> Later in 1920, Brandeis dissented from a case affirming a conviction for teaching pacifism in violation of a Minnesota law.<sup>114</sup> In his dissent, he argued that the law punished not acts but beliefs, particularly one section that he wrote made

it punishable to teach in any place a single person that a citizen should not aid in carrying on a war, no matter what the relation of the parties may be. Thus the statute invades the privacy and freedom of the home. Father and mother may not

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cidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.")

109. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 99 (1962).

110. MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE*, *supra* note 36, at 638.

111. JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 31 (2011); *see also* *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (Stevens, J., for six-justice majority, referring to "Justice Brandeis's classic opinion in *Whitney*"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (Brennan, J., for six-justice majority, referring to Brandeis's "classic formulation" in *Whitney*).

112. UROFSKY, *supra* note 36, at 618.

113. *Schaefer v. United States*, 251 U.S. 466, 493, 495 (1920) (Brandeis, J., concurring and dissenting); *see also* *Pierce v. United States*, 252 U.S. 239, 253 (1920) (Brandeis, J., dissenting).

114. *Gilbert v. Minnesota*, 254 U.S. 325, 334 (1920) (Brandeis, J., dissenting).

follow the promptings of religious belief, of conscience or of conviction, and teach son or daughter the doctrine of pacifism.<sup>115</sup>

In dissenting from a decision which allowed the postmaster general to deny a preferred mailing rate to a publication which he thought had included subversive materials, Brandeis wrote:

If, under the Constitution, administrative officers may, as a mere incident of the peace time administration of their departments, be vested with the power to issue such orders as this, there is little of substance in our Bill of Rights and in every extension of governmental functions lurks a new danger to civil liberty.<sup>116</sup>

A second aspect of Brandeis's thought was his belief that citizenship imposed upon the individual duties that could be more important than rights. "[A]bove all rights rises duty to the community," he declared in his dissent in *Duplex Printing Press Co. v. Deering*.<sup>117</sup> In a case of 1922 testing whether a state law could prevent coal mining that caused the subsidence of a house, a Court majority in an opinion by Justice Holmes held that it could not, while Brandeis in dissent spoke of the "paramount rights" of the public under the state law because the regulated party enjoyed "the advantage of living and doing business in a civilized community."<sup>118</sup>

Third, Brandeis worried about "bigness," both economic and governmental. Regarding the former, Brandeis had written about the "curse of bigness" during his years as a public-spirited citizen<sup>119</sup> and he did not abandon those convictions when he joined the Court. One week before he issued his dissent in *Olmstead*, he gave voice to some of these concerns in dissenting in *Quaker City Cab Co. v. Commonwealth of Pennsylvania*<sup>120</sup> that struck down a state measure taxing corporations more heavily than individuals. He wrote:

But there are still intelligent, informed, just-minded, and civilized persons who believe that the rapidly growing aggregation of capital through corporations constitutes an insidious menace to the liberty of the citizen; that it tends to increase the subjection of labor to capital; that, because of the guid-

115. *Id.* at 335–36.

116. *Milwaukee Soc. Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 436 (1921) (Brandeis, J., dissenting).

117. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 488 (1921) (Brandeis, J., dissenting).

118. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416, 422 (1922) (Brandeis, J., dissenting).

119. See, e.g., *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS* (Osmond K. Fraenkel ed., 1934).

120. 277 U.S. 389 (1928).

ance and control necessarily exercised by great corporations upon those engaged in business, individual initiative is being impaired and creative power will be lessened; that the absorption of capital by corporations, and their perpetual life, may bring evils similar to those which attended mortmain; that the evils incident to the accelerating absorption of business by corporations outweigh the benefits thereby secured, and that the process of absorption should be retarded.<sup>121</sup>

Five years later, amidst the Great Depression, *Louis K. Liggett Co. v. Lee*<sup>122</sup> furnished another opportunity for Brandeis to echo, and build upon, his earlier expression while dissenting from the Court's decision striking down a Florida statute that imposed heavier taxes on corporations operating chain stores than on others. He wrote:

There is a widespread belief that the existing unemployment is the result, in large part, of the gross inequality in the distribution of wealth and income which giant corporations have fostered; that, by the control which the few have exerted through giant corporations, individual initiative and effort are being paralyzed, creative power impaired, and human happiness lessened; that the true prosperity of our past came not from big business, but through the courage, the energy, and the resourcefulness of small men; that only by releasing from corporate control the faculties of the unknown many, only by reopening to them the opportunities for leadership, can confidence in our future be restored and the existing misery be overcome, and that only through participation by the many in the responsibilities and determinations of business can Americans secure the moral and intellectual development which is essential to the maintenance of liberty. If the citizens of Florida share that belief, I know of nothing in the Federal Constitution which precludes the State from endeavoring to give it effect and prevent domination in intrastate commerce by subjecting corporate chains to discriminatory license fees. To that extent, the citizens of each State are still masters of their destiny.<sup>123</sup>

Brandeis also warned against the inappropriate exercise of governmental

121. *Id.* at 410–11 (Brandeis, J., dissenting).

122. 288 U.S. 517 (1933).

123. *Id.* at 580 (Brandeis, J., dissenting); see also Freund, *Justice Brandeis: A Law Clerk's Remembrance*, *supra* note 8, at 13 (*Liggett* “became in his hands a vehicle for the expression of his profoundest convictions about the vices of bigness. He poured into his opinions the fruits of a lifetime of experience and study, with a freedom made possible by the fact that he was writing for himself alone.”).

power. That concern found consistent expression in cases involving separation of powers, federalism, and constitutional rights. Brandeis appreciated the Constitution's separation of powers as a strategy to restrain government. As he wrote in a dissent in 1926:

The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.<sup>124</sup>

Yet Brandeis did not rely simply on institutional arrangements to hold government to a high standard of behavior. In 1921, he dissented from a Court decision allowing the government to retain for use in criminal proceedings documents that private parties had stolen and then furnished.<sup>125</sup> Brandeis acknowledged as true the majority's argument that "no provision of the Constitution requires their surrender and that the papers could have been subpoenaed."<sup>126</sup> Yet he regarded that contention as irrelevant.

Still I cannot believe that action of a public official is necessarily lawful, because it does not violate constitutional prohibitions and because the same result might have been attained by other and proper means. At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen.<sup>127</sup>

Seven years later, Brandeis expressed similar inclinations in dissenting from a majority opinion by Justice Holmes upholding the conviction of a lawyer for violating federal narcotics laws that prohibited the purchase of morphine not in or from its original package.<sup>128</sup> Prison officials had conspired to entrap a lawyer suspected of providing morphine to prisoners and had succeeded in their scheme.<sup>129</sup> The evidence convinced Brandeis that officials had no prior basis to believe the defendant had violated the law.<sup>130</sup> Brandeis ar-

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124. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

125. *Burdeau v. McDowell*, 256 U.S. 465, 476 (1921); *see id.* for Brandeis's succinct and elegant statement of the facts and question presented ("Plaintiff's private papers were stolen. The thief, to further his own ends, delivered them to the law officer of the United States. He, knowing them to have been stolen, retains them for use against the plaintiff. Should the court permit him to do so?").

126. *Id.* at 477.

127. *Id.*

128. *Casey v. United States*, 276 U.S. 413, 421 (1928) (Brandeis, J., dissenting).

129. *Id.* at 421–22.

130. *Id.* at 424.

gued that the conviction should be vacated, not to vindicate any right the defendant possessed but rather “to protect the government. To protect it from illegal conduct of its officers. To preserve the purity of its courts.”<sup>131</sup>

Brandeis wrote his most enduring exposition of the perils of government misconduct two months later in his dissent in *Olmstead*.<sup>132</sup> There he cautioned that the danger of a violation of constitutional rights was greatest when government pursued popular ends:

Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.<sup>133</sup>

Brandeis argued that, independent of constitutional arguments relating to the Fourth and Fifth Amendments, the Court should reverse the conviction on equitable grounds. The wire-tapping when committed had represented simply the illegal acts of government officials, but “if this Court should permit the Government, by means of its officers’ crimes, to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification” and “the Government itself would become a lawbreaker.”<sup>134</sup> The Court should protect itself by invoking the defense of unclean hands against the government.<sup>135</sup>

Yet Brandeis’s concern went beyond his belief that the rule of law bound government officials as well as private citizens. Brandeis added to the concerns previously expressed when he wrote that because the government was the “omnipresent teacher,” it had additional reason to make certain its behavior conformed to a high standard. He wrote:

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for

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131. *Id.* at 425.

132. *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

133. *Id.* at 479. It may be noted that the last sentence in this passage is inscribed on the wall of a corridor in the House wing of the U.S. Capitol.

134. *Id.* at 483.

135. *Id.* at 485.

law; it invites every man to become a law unto himself; it invites anarchy. To declare that, in the administration of the criminal law, the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.<sup>136</sup>

Yet Brandeis knew that separated powers and checks and balances did not eliminate the need for governmental institutions, including the judiciary, to exercise self-restraint. He had resisted the use of the Due Process clauses to strike down economic regulations of legislative bodies, arguing that in a democracy courts should generally defer to those political judgments.<sup>137</sup> His dissent in *International News Service v. Associated Press*<sup>138</sup> written near the beginning of his tenure articulated his recognition of the limits of judicial capacity as an additional reason for deference. He agreed that Associated Press had some property right in the news its reporters collected during World War I and which INS had pirated and sold at a lower price.<sup>139</sup> The “injustice” of INS’s behavior was “obvious,” he said, but injustice in the setting of the case was not sufficient to support a decision for the Associated Press.<sup>140</sup> “Courts,” he wrote, “are ill-equipped to make the investigations which should precede a determination of the limitations which should be set upon any property right in news.”<sup>141</sup> Courts, he continued, “would be powerless to prescribe the [needed] detailed regulations . . .”<sup>142</sup> Rather, courts should not promulgate a new rule at all, but should leave to Congress the task of investigating and legislating with respect to the injustice the case brought to light.<sup>143</sup> Brandeis did not address whether it was realistic to expect Congress to undertake the assignment. But he presumably believed that in this instance leaving a wrong without a remedy was preferable to fashioning a judicial rule when prudential considerations dictated inviting legislative attention and waiting for Congress to act.<sup>144</sup>

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136. *Id.*

137. See, e.g., *O’Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257-258 (1931); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280, 283-285, 310 (1932) (Brandeis, J., dissenting).

138. 248 U.S. 215, 248 (1918) (Brandeis, J., dissenting).

139. *Id.* at 262.

140. *Id.*

141. *Id.* at 267.

142. *Id.*

143. *Id.*

144. For discussions of *International News Service v. Associated Press*, see UROFSKY, LOUIS D. BRANDEIS: A LIFE, *supra* note 36, at 551-52; Richard A. Epstein, *International News Service v.*

The most cited of Brandeis's opinions is his concurrence in *Ashwander v. Tennessee Valley Authority*.<sup>145</sup> The opinion, which brought together years of experience and thought about the role of the Supreme Court, provides guidelines for judicial action or inaction. He articulated the rules against deciding questions outside of an adversarial context;<sup>146</sup> anticipating constitutional questions;<sup>147</sup> formulating constitutional rules broader than the facts require;<sup>148</sup> deciding cases on a constitutional basis when an alternative ground is available;<sup>149</sup> adjudicating matters brought by those without standing;<sup>150</sup> adjudicating claims brought by those who have benefitted from the laws they are challenging;<sup>151</sup> considering a constitutional challenge to a statute where it can fairly be construed in a manner to sustain it;<sup>152</sup> and striking down a statute absent its clear unconstitutionality.<sup>153</sup>

Finally, notwithstanding his concern regarding the burdens on the people of governmental power, Brandeis also believed that government had an essential regulatory function. As he concluded in his dissent in *Duplex Printing Press v. Deering*:

All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to

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Associated Press: *Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85, 93 (1992).

145. 297 U.S. 288 (1936).

146. *Id.* at 346 ("The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions is 'legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals.'").

147. *Id.* at 346-47 ("The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'").

148. *Id.* at 347 ("The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'").

149. *Id.* ("The Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

150. *Id.* ("The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.").

151. *Id.* at 348 ("The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.").

152. *Id.* ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

153. *Id.* at 354-56 (referring to "the long established presumption in favor of the constitutionality of a statute" and citing statements against findings of unconstitutionality except in clear cases).

set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat.<sup>154</sup>

Thus, rights, even those Brandeis most cherished, must sometimes yield to government's proper regulatory function. As he wrote in his *Olmstead* dissent, the "right to be let alone—the most comprehensive of rights and the right most valued by civilized men," was not an absolute, because the Fourth Amendment did not prohibit every governmental intrusion into individual privacy but only "every unjustifiable intrusion."<sup>155</sup> So, too, the rights of free speech and assembly, which he recognized as basic to political society in his *Whitney* concurrence, must sometimes yield since they were "fundamental, [but] not in their nature absolute."<sup>156</sup> Instead, "[t]heir exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic, or moral."<sup>157</sup>

Brandeis accepted government regulation, not simply to avert harm, however, but out of a sense of optimism regarding the virtue of experimentation as an engine of progress. "There must be power in the States and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs," he wrote in his *New State Ice v. Liebmann* dissent in 1932.<sup>158</sup> And although his formulation imagined experimentation at both levels of a federal government, experimenting at the state level offered a special advantage: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>159</sup> Decades later Justice Harlan referred to Brandeis's "laboratory" metaphor as a "celebrated dictum."<sup>160</sup> Brandeis's commitment to

154. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 488 (1921) (Brandeis, J., dissenting).

155. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

156. *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

157. *Id.* See also *Senn v. Tile Layers Protective Union, Local No. 5*, 301 U.S. 468, 478 (1937) (balancing the constitutional right of union members to publicize "the facts of a labor dispute" and the state's police power to "regulate the methods and means of publicity as well as the use of public streets").

158. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

159. *Id.*

160. *Duncan v. State of Louisiana*, 391 U.S. 145, 193 (1968) (Harlan, J., dissenting); see also *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 752 (1964) (Stewart, J., dissenting) (stating that the point regarding "the unique values" of states in the federal union "was never better made" than by Brandeis in his "classic dissent" in *Liebmann*).



federalism, as a means of promoting experimentation and decentralizing governmental power, was also reflected in his *Erie* opinion which was decided at the time the Court was adopting a broader understanding of Congress's power under the Commerce Clause. As Bruce Ackerman observed, "just at the moment that the New Deal Court was destroying the old notion that Congress had limited powers over the economy, Brandeis was creating a new—if more modest—constitutional role for states' rights in the courts."<sup>161</sup>

Brandeis's dissent in *New State Ice* contains some of his most stirring writing, most notably his final sentence: "If we would guide by the light of reason, we must let our minds be bold."<sup>162</sup> But a reader is bound to juxtapose that uplifting message with a line earlier in the opinion: "Man is weak, and his judgment is, at best, fallible."<sup>163</sup> Yet the two views do not cancel one another out, and it is very possible to admire both Brandeises. Indeed, the different judgments reflected the complexity of Brandeis's judgments and his recognition that the law, like life, often had to accommodate seemingly inconsistent beliefs.

Brandeis's belief in experimentation also informed his understanding of *stare decisis*.<sup>164</sup> Courts should generally follow precedent in order to lend consistency and predictability to law.<sup>165</sup> But *stare decisis* was not an "inexorable command."<sup>166</sup> Courts must be willing to overturn constitutional decisions which otherwise resisted correction "to bring its opinions into agreement with experience and with facts newly ascertained."<sup>167</sup>

### C. Brandeis's Students: Later Justices

Brandeis's formulations have continued to percolate through the U.S. Reports in the seventy-seven years since he left the Court. It is a particularly ra-

161. See BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 372 (1998).

162. 285 U.S. at 311 (Brandeis, J., dissenting); see also *Jay Burns Baking v. Bryan*, 264 U.S. 504, 517, 520 (Brandeis, J., dissenting) ("Sometimes, if we would guide by the light of reason, we must let our minds be bold.").

163. *New State Ice*, 285 U.S. at 310.

164. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407–08 (1932) (Brandeis, J., dissenting) ("recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function").

165. *Id.* at 405–06.

166. *Id.* at 405.

167. *Id.* at 412; see also *Di Santo v. Pennsylvania*, 273 U.S. 34, 42 (1927) (Brandeis, J., dissenting) ("But the doctrine of *stare decisis* does not command that we err again when we have occasion to pass upon a different statute. In the search for truth through the slow process of inclusion and exclusion, involving trial and error, it behooves us to reject, as guides, the decisions upon such questions which prove to have been mistaken."); *Washington v. Dawson & Co.*, 264 U.S. 219, 238 (1924) (Brandeis, J., dissenting) ("*Stare decisis* is ordinarily a wise rule of action. But it is not a universal, inexorable command.").

re tribute that Brandeis's successors have continued to look to his concurrences and dissents. Justices cite majority opinions because they reflect prevailing law. Concurrences and dissents can claim no such authority. Their use signifies an appreciation of the ideas expressed and a perception that they are likely to be persuasive either because of the high regard in which Brandeis is held or because of the ideas themselves.

The frequency with which the Court or its justices have invoked Brandeis's concurrences or dissents since his retirement provides one telling measure of his continuing influence. Since his retirement in February, 1939 Supreme Court opinions have cited forty-seven Brandeis concurrences or dissents. Table 1 shows the ten most cited Brandeis discretionary opinions.

Table 1 Number of Opinions Citing a Brandeis Concurrence or Dissent Since 1939<sup>168</sup>

Ashwander v. Tennessee Valley Authority (1936)	183
Olmstead v. United States (1928)	98
Whitney v. California (1927)	97
Burnet v. Coronado Oil & Gas Co. (1932)	66
New State Ice Co. v. Liebmann (1932)	50
Duplex Printing Press Co. v. Deering (1921)	15
Myers v. United States (1926)	14
Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri (1923)	12
United States ex rel. Milwaukee Social Democrat Publishing Co. v. Burleson (1921)	12
Crowell v. Benson (1932)	11

*Ashwander* is cited nearly twice as many times as the next nearest case. This should hardly be a surprise. *Ashwander* provides guidelines or “rules” that Brandeis propounded for the federal judiciary.<sup>169</sup> The quality of the opinion and the authority of the author give it the aura of a *vade mecum*, waiting to be consulted by any conscientious justice.

The next two most cited opinions are the familiar pair of Brandeis's *Whitney* concurrence and *Olmstead* dissent. They are cited for their ringing rhetoric on behalf of freedom of expression and a right to be let

168. The data in this Table relies on research performed over several years by Stacey Osmond, Zachary Merkle, Alex Davis, and most recently Jordan Buchheit. The Table and related numbers on the following pages are updated to include cases decided through the end of the Supreme Court's October 2015 term. (unpublished excel sheets and summary charts) (on file with author).

169. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. at 346–48 (Brandeis, J., concurring).

alone.<sup>170</sup> The next case is *Burnet v. Coronado Oil & Gas Co.*, in which the Justice wrote a disquisition on *stare decisis*, a doctrine that in some cases in a legal system based as much on precedent as is the American, is inevitably controversial.<sup>171</sup> After these cases comes Brandeis's dissent in *New State Ice*, an opinion that combines the Justice's arguments on behalf of a state's right to experiment in its legislation affecting the economy and its fortunate position as a "laboratory," with its closing credo: "If we would guide by the light of reason we must let our minds be bold."<sup>172</sup> A wide discrepancy in number of citations separates *New State Ice* from the others.

These numbers become even more impressive when compared to citations of the prominent concurrences or dissents of other justices. Justice Harlan's famous dissent in *Plessy v. Ferguson* (1896), Justice Holmes's in *Lochner v. New York* (1905), and Justice Jackson's concurrence in *Youngstown v. Sawyer* (1952) have been cited 32, 43 and 44 times in opinions by other Supreme Court justices respectively, less often than the top five of Brandeis's concurrences or dissents. Only Justice Holmes's dissent in *Abrams v. United States* (1919) with 57 citations would crack Brandeis's first five.

The extent of Brandeis's continuing influence on the Court is further suggested by the number of justices who have looked to his opinions for guidance. During the last seventy-seven years, 34 of the 42 justices who have served on the Court since Brandeis retired have cited at least one of his concurrences or dissents. The ten justices who cited Brandeis most often were Justices Stevens (79), Frankfurter (65), Brennan (62), Rehnquist (42), Marshall (39), Douglas (37), Breyer (32), Harlan (24), O'Connor (23), and Powell (23), a list that includes jurists of varying ideologies and dispositions. Half of the justices (21) have cited Brandeis's discretionary opinions at least ten times. There is no indication that Justice Brandeis's influence is waning. Since 2000, 12 of the 13 justices have cited thirteen Brandeis concurrences or dissents ninety-seven times.<sup>173</sup> During that period, ten justices<sup>174</sup> have cited Brandeis's *Ashwander* opinion more than thirty times.

Testimonials by many of Brandeis's successors provide further evidence of his influence. Justice Stevens, who held the Brandeis seat for nearly thirty-five years, referred to Brandeis as a "hero" and "one of America's greatest

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170. *Olmstead v. United States*, 277 U.S. 438, 478–79 (1928) (Brandeis, J., dissenting); *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring); see MILLER, *supra* note 106, at 97–99.

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

172. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

173. (Unpublished excel sheets and summary chart) (on file with authors).

174. Chief Justice Roberts (4) and Justices Stevens (6), Scalia (4), Kennedy (3), Souter (1), Thomas (3), Ginsburg (1), Breyer (10), Alito (1), and Kagan (1).

judges.”<sup>175</sup> Justice Breyer called Brandeis a “legal seer” and praised his “impartiality, wisdom, and judicial depth.”<sup>176</sup>

What is striking is not simply how often Brandeis’s concurring and dissenting opinions are cited, but that they are invoked in many of the most seminal constitutional law decisions since his time. For instance, in *Dennis v. United States*<sup>177</sup> four opinions representing the views of seven justices cited Brandeis’s concurrence in *Whitney*<sup>178</sup> as well as several other of his discretionary opinions.<sup>179</sup> In *Youngstown Sheet & Tube Co., v. Sawyer*,<sup>180</sup> a leading case on presidential power growing out of President Truman’s order to seize America’s steel mills, Justices Frankfurter and Douglas in their concurrences cited Brandeis’s dissent in *Myers*<sup>181</sup> and Frankfurter invoked Brandeis’s *Ashwander* opinion.<sup>182</sup> In *Mapp v. Ohio*<sup>183</sup> and *Miranda v. Arizona*<sup>184</sup> the Court quoted Brandeis’s warning in *Olmstead* about the cost of government law-breaking in justifying the exclusion of evidence under the Fourth Amendment<sup>185</sup> and the Fifth Amendment,<sup>186</sup> respectively. In *New York Times v. Sullivan*<sup>187</sup> Justice Brennan, in his majority opinion, cited Brandeis’s “clas-

175. STEVENS, FIVE CHIEFS, *supra* note 111, at 5. Justice Brandeis’s influence on Justice Stevens was reinforced by the fact that the latter’s revered constitutional law professor, Nathaniel Nathanson, had clerked for Justice Brandeis. *Id.*

176. Stephen Breyer, Assoc. J. U.S., Speech at Brandeis School of Law, Louisville, Ky.: Justice Brandeis as Legal Seer (Feb. 16, 2004) (available at [http://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp\\_02-16-04](http://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_02-16-04) [<https://perma.cc/Z8N9-BWK5>]).

177. 341 U.S. 494 (1951).

178. *Id.* at 506–07 (Vinson, C.J., plurality opinion for himself, Reed, Burton, and Minton, J.); *id.* at 537 (Frankfurter, J., concurring); *id.* at 568 n.12 (Jackson, J., concurring); *id.* at 585 (Douglas, J., dissenting).

179. *Id.* at 526 (Frankfurter, J., concurring) (citing *Jay Burns Baking v. Bryan*, 264 U.S. 504, 517); *id.* at 535 (Frankfurter, J., concurring) (citing *Schaefer* and *Pierce* and Holmes’s dissent in *Abrams v. United States*, which Brandeis joined); *id.* at 567–68, 571 (Jackson, J., concurring) (citing *Whitney* and *Schaefer*). *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring); *Schaefer v. United States*, 251 U.S. 466, 493, 495 (1920); *Pierce v. United States*, 252 U.S. 239, 253 (1920) (Brandeis, J., dissenting).

180. 343 U.S. 579 (1952).

181. *Id.* at 613–14 (Frankfurter, J., concurring); *id.* at 629 (Douglas, J., concurring); *cf. also Youngstown*, 343 U.S. at 702 (Vinson, C.J., dissenting (citing Brandeis’s *Myers* dissent simply to record, not to rely on, Brandeis’s opinion). *Myers Adm’x v. United States*, 272 U.S. 52 (1926)).

182. *Id.* at 595; *see also id.* at 632 n.2 (Douglas, J., concurring) (citing Brandeis’s majority opinion in *United States v. North American Transportation & Trading Co.*, 253 U.S. 330, 333 (1920)).

183. 367 U.S. 643 (1961).

184. 384 U.S. 436 (1966).

185. *Mapp*, 367 U.S. at 659.

186. *Miranda*, 384 U.S. at 479–80.

187. 376 U.S. 254 (1964).

sic formulation” regarding free expression.<sup>188</sup> In *Stanley v. Georgia*<sup>189</sup> the Court drew from Brandeis’s *Olmstead* and *Whitney* opinions in striking down a Georgia statute that outlawed possession of obscenity.<sup>190</sup> When, in 2001, the Court considered whether the First Amendment precluded prosecution for broadcasting a phone conversation that had been improperly intercepted, the Court looked to Brandeis for guidance regarding the constitutional principles regarding public discussion and privacy that were at stake.<sup>191</sup> Justice Stevens’s majority opinion cited the 1890 Warren and Brandeis article as well as the “classic opinion” in *Whitney*.<sup>192</sup> Justice Breyer’s concurrence cited Brandeis’s *Olmstead* dissent for the “right to be let alone” as well as the earlier law review article<sup>193</sup> that Chief Justice Rehnquist’s dissent also invoked.<sup>194</sup> More recently, multiple Brandeis discretionary opinions were cited in *Citizens United v. Federal Election Commission*,<sup>195</sup> the controversial campaign finance decision, and in *McDonald v. Chicago*,<sup>196</sup> the case holding that the Second Amendment right to bear arms applied as against the states. These cases illustrate a not infrequent phenomenon in which justices on opposing sides of a case each seek to associate the result they have reached with Brandeis’s teachings.<sup>197</sup>

#### D. Brandeis’s Students: Presidents of the United States

Yet even the Court’s continued reliance on the rich corpus of ideas Justice Brandeis left behind understates his judicial legacy. The ideas he articulated

188. *Id.* at 270; *see also id.* at 301 (Goldberg, J., concurring) (citing Brandeis’s *Whitney* concurrence for the proposition that repression causes hatred).

189. 394 U.S. 557 (1969).

190. *Id.* at 564, 566–67.

191. *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001).

192. *Id.* at 534–35 (2001).

193. *Id.* at 536–38, 540 (Breyer, J., concurring).

194. *Id.* at 553 (Rehnquist, C.J., dissenting).

195. 558 U.S. 310, 395, 427, 466 (2010) (Chief Justice Roberts, concurring, citing Brandeis’s *Ashwander* concurrence while Justice Stevens, in the principal dissent, cited Brandeis’s opinions in *Ashwander* at 395, *Liggett* at 427, and *Whitney* at 466).

196. 561 U.S. 742, 863, 865, 869, 921, 926 (2010) (Justices Stevens and Breyer each citing Brandeis’s opinions in *Whitney* and *Liebmann* in their dissents).

197. *See also Hill v. Colorado*, 530 U.S. 703, 716–17, 751, 788 (2000) (the majority, associating the right of an unwilling listener to be free from unwanted communications to the right to be let alone, whereas Justice Scalia dissented, arguing that the right to be let alone applied to government, not private speech and Justice Kennedy, arguing that *Whitney*, not *Olmstead*, provided the principle that was relevant to speech); *Boy Scouts of America v. Dale*, 530 U.S. 640, 660–61 (majority opinion); *Boy Scouts* at 664, 700 (2000) (Stevens, J., dissenting) (Justice Stevens, in dissent, writing for himself and three other justices, invoked Brandeis’s “laboratory” of democracy metaphor while the majority invoked Brandeis’s concurrence about free speech in *Whitney* and argued that his dissent in *Liebmann* applied to economic matters.).

on the bench have resonated in public discourse. Presidents from both parties have frequently borrowed from Justice Brandeis's prose to advance their own proposals.

In his 1967 State of the Union Address, President Lyndon B. Johnson invoked "what Justice Brandeis called the 'right most valued by civilized men'—the right to privacy" in calling for an end to wiretapping except in cases of national security.<sup>198</sup> President Richard M. Nixon, who described Brandeis as one of his "heroes"<sup>199</sup> and called him a great jurist on multiple occasions,<sup>200</sup> also closed a national radio address on the American right of privacy by stating that "in the first half of this century, Mr. Justice Brandeis called privacy the 'right most valued by civilized men.' In the last half of this century, we must also make it the right that is most protected."<sup>201</sup> President Gerald Ford called Brandeis "one of the wisest" justices in American history.<sup>202</sup> President Carter began a statement announcing new measures to protect privacy by quoting Brandeis's *Olmstead* dissent.<sup>203</sup> President Reagan, who referred to Brandeis as one of the "great [American] jurists"<sup>204</sup> drew from him in warning against the dangers of centralized government. He told the American Bar Association in 1983: "I think Justice Brandeis was right when he said, 'Experience teaches us to be most on our guard in protecting liberty when Government's purposes are beneficent.'"<sup>205</sup> President George H. W. Bush in-

198. Annual Message to the Congress on the State of the Union, 1 PUB. PAPERS 2, 6 (Jan. 10, 1967); see also Special Message to the Congress on Crime in America, 1 PUB. PAPERS 134, 144 (Feb. 6, 1967) (same); Remarks at the Swearing In of Ramsey Clark as Attorney General, 1 PUB. PAPERS 312, 313 (Mar. 10, 1967) (same).

199. Remarks at a Question-and-Answer Session With a 10-Member Panel of the Economic Club of Detroit. PUB. PAPERS 965, 976 (Sept. 23, 1971).

200. *Id.*; Remarks at an Informal Meeting With Members of the White House Press Corps on Judge Haynsworth's Nomination to the Supreme Court PUB. PAPERS 814, 819 (Oct. 20, 1969); Conversation with Newsmen on the Nomination of the Chief Justice of the United States, PUB. PAPERS 389, 397 (May 22, 1969).

201. Radio Address About the American Right of Privacy, PUB. PAPERS 195, 198–99 (Feb. 23, 1974).

202. Remarks at the Boy Scouts Annual Awards Dinner, PUB. PAPERS 691, 692 (Dec. 2, 1974).

203. National Privacy Policy Message to the Congress on Proposals To Protect the Privacy of Individuals. PUB. PAPERS 581 (Apr. 2, 1979).

204. Statement on the American Bar Association's Rating of Supreme Court Nominee Robert H. Bork, 2 PUB. PAPERS 1008 (Sept. 9, 1987); see also Remarks at a White House Briefing on the Nomination of Robert H. Bork to be an Associate Justice of the Supreme Court of the United States, PUB. PAPERS 1103, 1104 (Sept. 30, 1987) (describing Brandeis as "great" and "legendary").

205. Remarks at the Annual Meeting of the American Bar Association in Atlanta, Georgia, 1 PUB. PAPERS 1110, 1114 (Aug. 1, 1983); see also Remarks at the Annual Meeting of the National Association of Towns and Townships, 2 PUB. PAPERS 1252, 1253–54 (Sept. 12, 1983) ("The idealistic goals of those who centralized American government didn't change the nature of what we confronted. Supreme Court Justice Louis Brandeis once said that 'Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in

voked “[t]he great Supreme Court Justice Louis D. Brandeis” who “foresaw a time when a single courageous State may serve as a laboratory and try novel social and economic experiments without risk to the rest of the country.”<sup>206</sup> At a state dinner for the President of Chile, the first President Bush recalled that Brandeis “observed that the final end of the state was to make men free to develop their faculties. And he added that ‘Those who love freedom know liberty to be the secret of happiness and courage to be the secret of liberty.’”<sup>207</sup> Like Jimmy Carter, President Clinton invoked Brandeis on privacy from the *Olmstead* dissent.<sup>208</sup> In vetoing a measure that would make unauthorized disclosures of classified information a felony, Clinton relied on *Whitney*:

Justice Brandeis reminded us that “those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government.” His words caution that we must always tread carefully when considering measures that may limit public discussion—even when those measures are intended to achieve laudable, indeed necessary, goals.<sup>209</sup>

Within the first ten days of his presidency, Barack Obama twice cited Brandeis in advocating governmental transparency.<sup>210</sup> On other occasions, Obama invoked Brandeis for the virtues of federalism<sup>211</sup> and the importance of citizenship.<sup>212</sup>

insidious encroachment by men of zeal, well-meaning but without understanding.”).

206. Remarks at the Republican Governors’ Association Annual Dinner, 2 PUB. PAPERS 1349, 1351 (Oct. 17, 1989); *see also* Remarks at a Republican Party Fundraising Dinner in Los Angeles, California, 1 PUB. PAPERS 168, 169 (Feb. 6, 1990) (invoking “laboratories of democracy” metaphor).

207. Remarks at the State Dinner for President Patricio Aylwin of Chile, 1 PUB. PAPERS 766 (May 13, 1992).

208. Remarks Announcing the Financial Privacy and Consumer Protection Initiative, 1 PUB. PAPERS 682, 683 (May 4, 1999); Remarks on the Issuance of Final Regulations on Protection of Medical Records Privacy, 3 PUB. PAPERS 2750, 2751 (Dec. 20, 2000).

209. Message on Returning Without Approval to the House of Representatives Intelligence Authorization Legislation for Fiscal Year 2001, 3 PUB. PAPERS 2466 (Nov. 4, 2000).

210. Memorandum on the Freedom of Information Act, PUB. PAPERS (Jan. 21, 2009) (quoting Brandeis that sunlight is one of the best disinfectants); Remarks Following a Meeting With Business Leaders, PUB. PAPERS (Jan. 28, 2009) (same); *see also* The President’s Weekly Address May 1, 2010, <https://obamawhitehouse.archives.gov/the-press-office/weekly-address-president-obama-calls-congress-enact-reforms-stop-a-potential-corpor> [<https://perma.cc/HYW5-4RF5>] (same).

211. *See also Memorandum on Preemption*, AMERICAN PRESIDENCY PROJECT (May 20, 2009), <http://www.presidency.ucsb.edu/ws/?pid=86191> [<https://perma.cc/9GU8-QRF9>] (quoting Brandeis that “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country”).

212. *Remarks at a Democratic National Committee Fundraiser in Portland, Oregon*, AMERICAN PRESIDENCY PROJECT (May 7, 2015), <http://www.presidency.ucsb.edu/ws/?pid=110154>

## IV. JUSTICE BRANDEIS'S MODEL OF JUDICIAL BEHAVIOR

Even the voluminous evidence presented above does not fully capture the legacy of Justice Brandeis's twenty-three years on the Court. Although much of what he left behind was compelling articulations of foundational ideals, his legacy was more than the sum of his expressed ideals. It also includes his model of principled judicial performance. While something should be said regarding his methodology of constitutional decision-making, his judicial behavior is better captured by reading his opinions than by trying to identify its components. Nevertheless, three interconnected features seem apparent.

First, Justice Brandeis's approach to deciding constitutional cases was deeply empirical. He eschewed absolutes and abstractions in a continuing effort to bring law into harmony with life. "Knowledge is essential to understanding, and understanding should precede judging," he wrote in a dissent.<sup>213</sup> He believed that courts could not determine whether legislatures acted in an unreasonable, arbitrary or capricious manner without having a complete understanding of the facts that might have informed their outputs. As Justice Frankfurter wrote on the fortieth anniversary of Brandeis's appointment to the Court: "At a time when our constitutional law was becoming dangerously unresponsive to important social changes, when decisions were rested on hollow formulas, themselves the product of limited experience, he insisted, as the great men of law have always insisted, that law must be sensitive to life."<sup>214</sup>

Frankfurter continued, using Brandeis's language that judgments regarding whether legislative behavior was arbitrary and unreasonable "should be based upon a consideration of relevant facts, actual or possible—*Ex facto jus oritur* [The law arises from facts]. That ancient rule must prevail in order that we may have a system of living law."<sup>215</sup> In this respect, Brandeis stood apart not only from those committed to Lochnerian jurisprudence but to Justice Holmes, whose opinions often emphasized abstract principles untested against experience.

Moreover, Justice Brandeis viewed constitutional law as dynamic, not static, and as fundamentally about general purposes, not specific applica-

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[<https://perma.cc/XX8Z-NGQ8>]; *Remarks at a Democratic National Committee Fundraiser in New York City*, AMERICAN PRESIDENCY PROJECT (Nov. 2, 2015), <http://www.presidency.ucsb.edu/ws/?pid=111016> [<https://perma.cc/8JF9-TPJ9>]; *Remarks at a Democratic National Committee Fundraiser in Potomac, Maryland*, AMERICAN PRESIDENCY PROJECT (Nov. 4, 2015), <http://www.presidency.ucsb.edu/ws/?pid=111018> [<https://perma.cc/4RYU-8F6H>].

213. See *Jay Burns Baking v. Bryan*, 264 U.S. 504 (Brandeis, J., dissenting).

214. Felix Frankfurter, *The Moral Grandeur of Justice Brandeis*, N.Y. TIMES MAGAZINE, Nov. 11, 1956, reprinted in FELIX FRANKFURTER, OF LAWS AND LIFE & OTHER THINGS THAT MATTER: PAPERS AND ADDRESSES OF FELIX FRANKFURTER, 1956–1963, 58 (Philip B. Kurland ed., 1965).

215. *Adams v. Tanner*, 244 U.S. 590, 600 (1917) (Brandeis, J., dissenting).



tions.<sup>216</sup> The Constitution afforded protections beyond those the Founding generation imagined.<sup>217</sup> Interpreters should read the Fourth Amendment in light of its animating purposes rather than subject it to an “unduly literal construction.”<sup>218</sup> Nor should they limit the Fourth Amendment’s protection against unreasonable searches and seizures to the form the evil took in the Founders’ era: breaking and entering and taking. Technology had evolved to give the government “[s]ubtler and more far-reaching means of invading privacy.”<sup>219</sup> “Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world.”<sup>220</sup> Similarly, speech must be given wide protection because of its critical role in a democracy: to allow individuals to develop and society to improve.<sup>221</sup> The Fifth Amendment required a grand jury presentment or indictment as a prerequisite for a prosecution but “infamous crimes” invited reinterpretation to accommodate to changing conditions.<sup>222</sup>

Brandeis’s related beliefs in the value of experience and the dynamic nature of law contributed to his humility as a jurist. Judicial decisions were not carved in stone but were always subject to revision based on future developments. “It is a peculiar virtue of our system of law that the process of inclusion and exclusion, so often employed in developing a rule, is not allowed to end with its enunciation, and that an expression in an opinion yields later to the impact of facts unforeseen,” he wrote in a 1926 dissent.<sup>223</sup>

Justice Brandeis practiced judicial humility by his adherence to jurisdictional rules and principles that limited the Court’s role and his belief that courts should defer to legislative judgment regarding economic matters. Although some have associated his commitment to judicial restraint with his progressive agenda<sup>224</sup> or criticized his work as result-oriented, Brandeis’s practice of allowing procedural impediments to dictate his decisions suggests a principled appreciation of the limits imposed on courts.<sup>225</sup> His votes often did not

216. *Olmstead v. United States*, 277 U.S. 438, 472–74 (1928) (Brandeis, J., dissenting).

217. *Id.*

218. *Id.* at 476.

219. *Id.* at 473.

220. *Id.* at 472.

221. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

222. *United States v. Moreland*, 258 U.S. 433, 451 (1922) (Brandeis, J., dissenting); *see also* BICKEL, *supra* note 109, at 106–08 (discussing Brandeis’s belief in, but omission of, language regarding “living Constitution” in order to gain Chief Justice Taft’s joinder to his dissent).

223. *Jaybird Mining Co. v. Weir*, 271 U.S. 609, 615, 619 (1926) (Brandeis, J., dissenting).

224. *See, e.g., Purcell*, *supra* note 25, at 122 (associating Brandeis’s “commitment to judicial restraint” with its “tactical” use to “defend Progressive values threatened by a hostile judiciary”).

225. *See, e.g., Whitney*, 274 U.S. at 373 (Brandeis, J., concurring); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

reflect his views on the merits of a dispute because jurisdictional or procedural issues intervened. He voted to uphold Anna Whitney's conviction, for instance, because she had not raised at trial the issue of whether her conduct presented a "clear and present danger."<sup>226</sup> In *New State Ice*, he deferred to the judgment of the Oklahoma state legislature in passing a measure that restricted competition even though the statute's monopolistic character contradicted his deeply-held economic views.<sup>227</sup> He admonished his colleagues that "in the exercise of this high power [of judicial review] we must be ever on our guard, lest we erect our prejudices into legal principles."<sup>228</sup> Though sympathetic to the Court's resolution of the constitutional issues, Brandeis would not have reached the merits in *Ashwander*, because he thought the case not justiciable.<sup>229</sup>

Some regard Brandeis's majority opinion in *Erie* as hypocritical because it deviated from some of the rules he set forth two years earlier in *Ashwander*. The parties had not argued regarding whether *Swift* should be overruled and Brandeis, for the Court, rested the decision on constitutional, rather than statutory, grounds contrary to one of his prescriptions in *Ashwander*. Justice Reed's *Erie* concurrence suggested a statutory resolution that seemed more true to *Ashwander*.<sup>230</sup>

Yet Justice Brandeis's opinion also might be viewed as judicial recognition that the power of the federal judiciary was limited. It seems harsh to condemn Brandeis for overturning *Swift* if it and its progeny involved a usurpation of power by the federal judiciary in the first place. On the contrary, it would seem appropriate, indeed commendable, for the Court to recognize the error of a course it had endorsed which had aggrandized the power of the federal judiciary at the expense of the state courts. *Erie* thus can most properly be seen as a remarkable example of the federal judiciary recognizing a limit on its own power even when doing so involved confessing past error and relinquishing power it had long asserted. Brandeis may have thought a statutory ruling unavailable since Congress's failure to correct Justice Joseph Story's reading of the Rules of Decision Act for nearly a century implied acquiescence in it. Indeed, Brandeis had argued that the Court had more latitude to reexamine its constitutional holdings than its statutory interpretations.<sup>231</sup>

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226. See, e.g., *Whitney*, 274 U.S. at 379 (Brandeis, J., concurring).

227. 285 U.S. at 309–10 ("The objections to the proposal are obvious and grave. The remedy might bring evils worse than the present disease. The obstacles to success seem insuperable.")

228. *Id.* at 311.

229. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). For a fuller discussion of *Ashwander*, see *supra* pp. 360–361.

230. *Erie v. Tompkins*, 304 U.S. 64, 90–92 (1938) (Reed, J., concurring).

231. See, e.g., *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–08 (1932) (Brandeis, J.,

Whereas in *International News Service v. Associated Press* he dissented because he appreciated Congress's superior competence to provide a remedy, in *Erie* he decided on constitutional grounds because he respected Congress's implicit acquiescence in *Swift*'s statutory interpretation.

Brandeis's predicament in *Erie* reveals a further characteristic of his judicial behavior. Notwithstanding his ability to formulate foundational principles, he was ultimately a balancer. He recognized that ideals often came into conflict and that at some point accommodations needed to be made to manage the inevitable tension.<sup>232</sup> Thus, in *Whitney* he articulated a robust version of Free Speech but ruled against Anita Whitney on procedural grounds.<sup>233</sup> In *Ashwander*, he was not unsympathetic to the Court's ruling on the merits but thought principles of judicial behavior should prevent it from reaching those issues.<sup>234</sup> And in *Erie* he reached out to decide a constitutional question, seemingly at odds with one of *Ashwander*'s teachings, in order to reverse what he regarded as an unconstitutional assumption of power by the federal judiciary in *Swift v. Tyson*.<sup>235</sup> These results did not reflect inconsistency. They were rather the product of a conscientious effort to manage principles in conflict.

## V. JUSTICE BRANDEIS

Brandeis believed that the Supreme Court was "a teacher to the nation of both scholarly and moral truths."<sup>236</sup> That understanding of the institution shaped his conception of his duty as a justice. He sought to make his opinions instructive, not simply convincing, and he continued to rework them so they would teach, not simply persuade.<sup>237</sup>

One need only open a newspaper or a computer to be reminded that the dangers he warned of remain, in some respects in even more insidious forms today than when he wrote. That Brandeis's moral teachings have not prevailed in the world in which we live does not mark him as a failure or render his principles irrelevant. They did not always prevail in his day either. "If the lessons you have taught do not seem to have been learned very well yet, that is not for any lack on your part," Elizabeth Brandeis Raushenbush wrote her

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dissenting).

232. See, e.g., Max Lerner, *The Social Thought of Mr. Justice Brandeis*, in MR. JUSTICE BRANDEIS 7, 30 (Felix Frankfurter ed., 1932) ("At the basis of Mr. Justice Brandeis's attitude toward the problem of regulation is his conviction that no rights are absolute.").

233. *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring).

234. *Ashwander*, 297 U.S. at 341 (Brandeis, J., concurring).

235. *Erie*, 304 U.S. at 69; *Ashwander*, 297 U.S. at 346-48.

236. MILLER, *supra* note 106, at 194.

237. *Id.*

father the day after he retired from the Court.<sup>238</sup> Rather, a century after he joined the Court, Brandeis's discretionary opinions provide a reservoir of moral concepts to help in considering many complicated constitutional challenges that face us still. As Paul Freund observed in concluding a 1978 remembrance of Justice Brandeis, "The generation now coming of age would find a remarkably sympathetic guide to the perplexed in the life and works of Brandeis, if only they were made aware of this resource of wisdom."<sup>239</sup>

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238. Letter, February 14, 1939, quoted in MASON, *supra* note 1, at 634.

239. Freund, *A Law Clerk's Remembrance*, *supra* note 8, at 18 (alluding to Moses Maimonides's *Guide for the Perplexed*, which attempted to reconcile Aristotle's theories with Jewish theology).