2017

The Judicial Legacy of Louis Brandeis and the Nature of American Constitutionalism

Edward A. Purcell Jr.
New York Law School, edward.purcell@nyls.edu

Recommended Citation
Touro Law Review, Vol. 33, Issue 1 (2017), pp. 5-50

THE JUDICIAL LEGACY OF LOUIS BRANDEIS AND THE NATURE OF AMERICAN CONSTITUTIONALISM

Edward A. Purcell, Jr. *

I. INTRODUCTION

Famous as a lawyer, political activist, democratic theorist, advisor to presidents, and Justice of the United States Supreme Court, Louis Dembitz Brandeis is unquestionably a major figure in American history.[1] The greatest part of his fame, of course, arises from his service on the Supreme Court and the reputation that he earned there as one of the Court's truly great Justices.[2] Even his severest critics—and he has a number of them—concede to that greatness.[3] One gauge

---

* Joseph Solomon Distinguished Professor, New York Law School. The author wishes to thank Jethro K. Lieberman and colleagues at the New York Law School faculty colloquium for their helpful comments, and New York Law School students Dana Cimera and Jordan Moss for their assistance in preparing this essay.

[1] For a sampling of the many books on Brandeis that are not otherwise cited below, *see generally* GERALD BERK, LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900-1932 (2009); ROBERT A. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND (1988); SUZANNE FREEDMAN, LOUIS BRANDEIS: THE PEOPLE'S JUSTICE (1996); ALLON GAL, BRANDEIS OF BOSTON (1980); DAVID C. GROSS, A JUSTICE FOR ALL THE PEOPLE: LOUIS D. BRANDEIS (1987); ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE (1946).

[2] Louis L. Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986, 987 (1967) ("[B]y common consent Brandeis is among the greatest of Supreme Court judges."); Clyde Spillenger, *Reading the Judicial Canon: Alexander Bickel and the Book of Brandeis*, 79 J. AM. HIST. 125, 125 (1992) ("No one holds a more secure place in this judicial pantheon than Louis D. Brandeis."). Brandeis has commonly been ranked as a great justice. *See, e.g.*, William G. Ross, *The Ratings Game: Factors That Influence Judicial Reputation*, 79 MARQ. L. REV. 401, 403, 445-49 (1996); Bernard Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 31 TULSA L.J. 93, 93, 122-26 (1995).

[3] *E.g.*, THOMAS K. MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN 135 (1984) (criticizing Brandeis' flawed contributions to regulatory theory and practice but conceding his greatness as a judge). For a qualification of McCraw's critique, see Nelson L. Dawson, *Brandeis and the New Deal*, *in* BRANDEIS AND AMERICA 38, 38-64 (Nelson L. Dawson ed., 1989). For criticisms of Brandeis as a lawyer, see, e.g., Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445 (1996), and as a judge, see, e.g., G. EDWARD WHITE, THE

of his high standing is the fact that judicial opinions have continued long after his death to invoke his name, a kind of recognition that he shares with only a handful of the Court's hundred-plus Justices who have passed from the scene.[4] Perhaps even more impressive, is the fact that it is his individual opinions—concurrences and dissents, not majority opinions—that judges and scholars most commonly cite.[5] Brandeis' "judicial mind," Alexander Bickel concluded, was "one, surely, of the half-dozen most influential ones in our history . . ."[6] In this symposium, however, I attempt neither an evaluation of Brandeis' achievements nor an assessment of his continuing influence.[7] In-

---

AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 126, 143, 145, 146, 150 (3d ed. 2007) [hereinafter WHITE, THE AMERICAN JUDICIAL TRADITION].

[4] *See, e.g.*, Bond v. United States, 134 S. Ct. 2077, 2087 (2014) (citing Brandeis' concurrence in Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936)); Hodgson v. Minnesota, 497 U.S. 417, 446 (1990) (citing Brandeis' dissent in Gilbert v. Minnesota, 254 U.S. 325, 335-36 (1920)); Bowen v. Michigan Acad. of Family Physicians, 476 U.S. 667, 681 n.12 (1986) (citing Brandeis' concurrence in St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936)); Fullilove v. Klutznick, 448 U.S. 448, 491 (1980) (citing Brandeis' dissent in New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932)); Buckley v. Valeo, 424 U.S. 1, 53 (1976) (citing Brandeis' concurrence in Whitney v. California, 274 U.S. 357, 375 (1927)); Flast v. Cohen, 392 U.S. 83, 97 (1968) (citing Brandeis' concurrence in *Ashwander*, 297 U.S. at 345-48); Miranda v. Arizona, 384 U.S. 436, 479-80 (1966) (citing Brandeis' dissent in Olmstead v. United States, 277 U.S. 438, 485 (1928)); New York Times v. Sullivan, 376 U.S. 254, 270 (1964) (citing Brandeis' concurrence in *Whitney*, 274 U.S. at 375-76). Individual Justices also frequently cite Brandeis by name in their separate opinions, see, e.g., Herring v. United States, 555 U.S. 135, 152 (2009) (Ginsburg, J., dissenting) (citing Brandeis' dissent in *Olmstead*, 277 U.S. at 477-79, 483-85); W. Lynn Creamery v. Healy, 512 U.S. 186, 216 (1994) (Rehnquist, J., dissenting) (citing Brandeis' dissent in *New State Ice Co.*, 285 U.S. at 311); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1051 (1992) (Blackmun, J., dissenting) (citing Brandeis' dissent in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 418 (1922)); I.N.S. v. Chadha, 462 U.S. 919, 1000-01 (1983) (White, J., dissenting) (citing Brandeis' dissent in Myers v. United States, 272 U.S. 52, 247 (1926)); United States v. Raddatz, 447 U.S. 667, 709-10 (1980) (Marshall, J., dissenting) (citing Brandeis' dissent in Crowell v. Benson, 285 U.S. 22, 87 (1932) and Brandeis' concurrence in *St. Joseph Stock Yards Co.*, 298 U.S. at 77); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 708 (1978) (Powell, J., concurring) (citing Brandeis' dissent in Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932)).

[5] MELVIN I. UROFSKY, DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT'S HISTORY AND THE NATION'S CONSTITUTIONAL DIALOGUE 187 (2015). "Brandeis's dissents would lay the foundation for the future and are the great examples of how one can engage in and affect not just the constitutional dialogue but the larger question of what rights we value as a free society." *Id.* at 151.

[6] ALEXANDER M. BICKEL, *Preface* to THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK, at vi (1957).

[7] For an insightful consideration of Brandeis' continuing relevance, see Jeffrey Rosen, *Why Brandeis Matters*, THE NEW REPUBLIC (June 29, 2010), https://newrepublic.com/article/75902/why-brandeis-matters. For an earlier assessment by Brandeis' successor on the Court, see Hon. William O. Douglas, *The Lasting Influence of Mr. Justice Brandeis*, 19 TEM. L.Q. 361 (1945).

stead, more broadly, I want to consider what his career on the Court—his judicial legacy—can teach us about the nature of American constitutionalism.

II. BRANDEIS'S JUDICIAL LEGACY

Quite strikingly, Brandeis' judicial legacy began even before he went on the high bench in 1916. His famous article on privacy, published in 1890, resonated with later generations and became a source repeatedly invoked on the long path that led to the establishment of a constitutional right to privacy.[8] Equally well known, his brief in *Muller v. Oregon*[9] in 1908, the famous "Brandeis brief," helped reorient constitutional argumentation by highlighting the importance of the factual context in which rules of law are applied.[10] Once on the bench, he pressed both of those ideas, insisting that privacy was a fundamental right[11] and that a detailed understanding of the relevant facts was a prerequisite for wise judging.[12] The "logic of words," he famously declared, "should yield to the logic of reali-

---

[8] *See, e.g.*, Poe v. Ullman, 367 U.S. 497, 521 n.12 (1961) (Douglas, J., dissenting) (citing to Warren & Brandeis, *Right to Privacy*, 4 HARV. L. REV. 192 (1890)). Douglas, in turn, wrote for the Court in Griswold v. Connecticut, expanding the right of privacy to include fundamental rights involving privacy and the use of contraceptives. 381 U.S. 479, 480-86 (1961). In *Griswold*, Douglas did not cite Brandeis, but Justice Arthur Goldberg, joined by Chief Justice Earl Warren and Justice William Brennan, concurred and cited Brandeis' dissenting opinion in *Olmstead*, which maintained that privacy rights are fundamental. *Id.* at 494 (Goldberg, J., concurring). *See* UROFSKY, DISSENT AND THE SUPREME COURT, *supra* note 5, at 204 ("[T]he Court and the country have accepted Brandeis's notion that the Constitution embodies a right to be let alone."). It should be noted, however, that Brandeis' idea of a right to privacy stemmed from far different concerns and values than did the constitutional right to privacy that subsequently developed. *See, e.g.*, Richard Chused, *Appropriate(d) Moments*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 103, 109-27 (2015).

[9] Muller v. Oregon, 208 U.S. 412 (1908).

[10] On the Brandeis Brief, see PHILLIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 114-31 (1984) [hereinafter STRUM, JUSTICE FOR THE PEOPLE]; MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 213-27 (2009). For an argument minimizing the importance of the Brandeis brief, see David E. Bernstein, *Brandeis Brief Myths*, 15 GREEN BAG 2D 9 (2011).

[11] *E.g.*, Gilbert v. Minnesota, 254 U.S. 325, 335 (1920) (Brandeis, J., dissenting); *Whitney*, 274 U.S. 357, 372-73 (1927) (Brandeis, J., concurring).

[12] Philippa Strum, *Brandeis and the Living Constitution*, *in* BRANDEIS AND AMERICA 120, 122 (Nelson L. Dawson ed., 1989) ("The most important contribution of Brandeis to constitutional interpretation and to keeping the Constitution a living one was his emphasis on facts."); UROFSKY, LOUIS D. BRANDEIS, *supra* note 10, at 130 ("One thread that runs through all his endeavors is the need to know the facts."). For Brandeis' judicial use of facts, see, e.g., Adams v. Tanner, 244 U.S. 590, 597-616 (1917) (Brandeis, J., dissenting).

ties."[13]

Brandeis's judicial legacy, of course, boasts a great many other contributions as well. He had a significant impact on a wide range of doctrinal areas from antitrust and commercial law to administrative law and utilities regulation,[14] and he sometimes exerted an unacknowledged influence over the Court's decisions when his internal advocacy among the Justices led them to alter their final opinions and judgments.[15] He was a leader in establishing legislative history as an important source of judicial reasoning,[16] and he was the first Justice to cite law review articles in his opinions, a practice that initially drew objection but subsequently became widely accepted.[17] His famous metaphor of the states as laboratories[18]—a novel and classic product of his early twentieth-century Progressivism—created an enduring image of the federal system, an image that his successors have repeatedly deployed and that has become widely accepted as a fundamental principle of federalism.[19]

---

[13] Di Santo v. Pennsylvania, 273 U.S. 34, 43 (1927) (Brandeis, J. dissenting). "Unless we know the facts on which the legislators may have acted, we cannot properly decide whether they were (or whether their measures are) unreasonable, arbitrary or capricious." Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 520 (1924) (Brandeis, J., dissenting).

[14] UROFSKY, LOUIS D. BRANDEIS, *supra* note 10, at 610.

[15] BICKEL, *supra* note 6, at 67-68, 74, 96-99, 101, 202, 212; STRUM, JUSTICE FOR THE PEOPLE, *supra* note 10, at 369-70. As one student of the Court concluded from studying several pairs of Justices, "the more influential and effective justice was the one more willing to moderate the application of his principles in the name of the broader good of the Court and the country." JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 21 (2006).

[16] BICKEL, *supra* note 6, at 59 ("Brandeis' method of ascertaining legislative purpose, for which he gained no acceptance in [a particular] case, has made much headway. It is as normal today as it was unusual then for the Court to look to legislative materials for indications of basic purpose and then to apply broadly or poorly worded statutes in conformity with that purpose."). For a discussion of the uses of legislative history, see William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT. L. REV. 365, 366 n.5 (1990) (suggesting that Brandeis also had doubts about legislative history); David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653 (2010) (examining use and significance of legislative history on Court from 1953 to 2006).

[17] UROFSKY, LOUIS D. BRANDEIS, *supra* note 10, at 82, 474.

[18] *E.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[19] *E.g.*, United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("[T]he theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."). Brandeis developed the "states as laboratories" idea long before he went on the Court. EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 165-69 (2007) [hereinafter PURCELL,

Above all, it was in the Court's constitutional jurisprudence where Brandeis had his greatest impact.[20] His opinions, addressing such issues as the nature of executive power, the scope of the Commerce Clause, the contours of preemption, and the reach of the police power helped shape contemporary constitutional law. To cite one important if relatively technical example, he was a major force in transforming the Court's choice-of-law jurisprudence under both the Due Process and Full Faith and Credit Clauses.[21]

Perhaps most centrally, Brandeis authored enduring opinions that have shaped our understanding of the nature, role, and limits of federal judicial power. In one direction, he was a paramount force in developing ideas of judicial restraint and in forging a variety of doctrines to support the broad principle that federal courts are rigorously limited in their powers.[22] He urged the federal courts to exercise their authority sparingly, defer in most instances to the actions of the other levels and branches of government, and invoke the Constitution only when absolutely necessary.[23] In a series of opinions he spelled out the reasons for giving legislatures broad discretion in enacting regulatory measures,[24] allowing ample leeway for administrative agencies

---

ORIGINALISM]. Reformers "ought to get the full benefit of experiments in individual states" before proposing federal actions, he argued in 1912. "There is great advantage in the opportunity we have of working out our social problems in the detached laboratories of the different states." 2 LETTERS OF LOUIS D. BRANDEIS 640 (Melvin I. Urofsky & David W. Levy eds., 1972).

[20] UROFSKY, LOUIS D. BRANDEIS, *supra* note 10, at 640 ("[N]o justice of the twentieth century had a greater impact on American constitutional jurisprudence.").

[21] EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA, 182-85 (2000); Clyde Spillenger, *Risk Regulation, Extraterritoriality, and Domicile: The Constitutionalization of American Choice of Law, 1850-1940*, 62 UCLA L. REV. 1240, 1302-19 (2015).

[22] *E.g.*, Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); Pennsylvania v. West Virginia, 262 U.S. 553, 605-23 (1923) (Brandeis, J., dissenting); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 479-88 (1921) (Brandeis, J., dissenting); Int'l News Serv. v. Associated Press, 248 U.S. 215, 248-67 (1918) (Brandeis, J., dissenting).

[23] *See* EVAN TSEN LEE, JUDICIAL RESTRAINT IN AMERICA: HOW THE AGELESS WISDOM OF THE FEDERAL COURTS WAS INVENTED 68 (2011) (explaining Brandeis was "the first Supreme Court Justice to expound fully" on what later became known as "the countermajoritarian difficulty," the idea that judicial review conflicted with democratic government and should therefore be exercised only as a last resort).

[24] STEPHEN W. BASKERVILLE, OF LAWS AND LIMITATIONS: AN INTELLECTUAL PORTRAIT OF LOUIS DEMBITZ BRANDEIS 307 (1994) ("The particularities of a case were always of great importance to Brandeis, but as we have seen this rarely prevented him from seeking the widest possible powers of discretion for state legislatures.").

to use their expertise,[25] and adhering strictly to the jurisdictional limits that confined the reach of the federal courts.[26] "[T]he most important thing we do," he famously told Felix Frankfurter, "is not doing."[27]

Brandeis not only urged that both policy and discretion frequently counseled restraint, but he also stressed that Article III mandated constitutional limits as well.[28] The Court had long held that judicial relief was not available to a claimant who had not suffered an injury, but since John Marshall's day it had considered that requirement rooted in the common law principle that judicial relief was available only when a party had suffered injury from the invasion of a legal right.[29] In an opinion in 1922, however, Brandeis transformed that injury requirement into an explicitly constitutional limitation on the federal judicial power.[30] "Plaintiff's alleged interest in the question," he declared in *Fairchild v. Hughes*,[31] was only a generalized public concern and not a claim of specific injury particular to the plaintiff himself.[32] Thus, it did not present "a case within the mean-

---

[25] *E.g.*, Pac. States Box & Basket Co. v. White, 296 U.S. 176, 185-86 (1935) (rebutting the presumption of facts sufficient to support exercise of police power same for administrative agencies as for legislatures); Great N. Ry. v. Merchs. Elevator Co., 259 U.S. 285, 291 (1922) (identifying the basis of primary jurisdiction of administrative agencies in the ability of "a body of experts" to effectively resolve complex fact issues); Fed. Trade Comm'n v. Gratz, 253 U.S. 421, 429-42 (1920) (Brandeis, J., dissenting); N. Pac. Ry. Co. v Solum, 247 U.S. 477, 484 (1918) (expanding the doctrine of primary jurisdiction of administrative agencies). The doctrine of primary jurisdiction originated in Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 448 (1907); *see also* UROFSKY, DISSENT AND THE SUPREME COURT, *supra* note 5, at 189-91; Louis L. Jaffe, *Primary Jurisdiction,* 77 HARV. L. REV. 1037, 1042 (1964); G. Edward White, *Allocating Power Between Agencies and Courts: The Legacy of Justice Brandeis*, 1974 DUKE L.J. 195, 207-08 (1974).

[26] PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION, *supra* note 21, at 120-24; Paul A. Freund, *Introduction* to BICKEL, *supra* note 6, at ch. 1; *Preface* to BICKEL, *supra* note 6, at xv-xxi.

[27] Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 313 (1985) (emphasis omitted).

[28] Fairchild v. Hughes, 258 U.S. 126, 129-30 (1922).

[29] *E.g.*, Marbury v. Madison, 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."). As late as 1938, for example, Justice George Sutherland continued to assume that standing was a requirement based not on Article III but on the common law. LEE, *supra* note 23, at 77.

[30] *Fairchild*, 258 U.S. at 129.

[31] *Id.*

[32] *Id.*

ing of [S]ection 2 of [A]rticle [III] of the Constitution."[33] As Evan Tsen Lee noted in his study of the standing doctrine, "[n]o previous decision had attributed a plaintiff's ineligibility to go forward to Article III."[34] Subsequently the idea took hold, and the Court has come to hold consistently that injury is a core constitutional component of the standing required to bring an action in the federal courts.[35]

Brandeis advanced his ideas of judicial restraint in many opinions[36] and ultimately enshrined them most famously in his concurrence in *Ashwander v. Tennessee Valley Authority*.[37] There, he pulled together a wide range of disparate cases to advance the sweeping proposition that, as a matter of both principle and practice, the "[t]he Court . . . has avoided passing upon a large part of all the constitutional questions pressed upon it for decision."[38] In doing so, he framed seven avoidance rules that would bar the federal judiciary from reaching many constitutional issues in cases.[39] Subsequently, his ideas of judicial restraint and constitutional avoidance became common currency,[40] and Justices have repeatedly cited his *Ashwander* principles in urging the Court to refuse to decide constitutional issues.[41]

---

[33] *Id.*

[34] LEE, *supra* note 23, at 40. Earlier decisions had referred to the Article III case or controversy limits on the federal judicial power, but they had focused on elements other than injury to the plaintiff. *See, e.g.*, Muskrat v. United States, 219 U.S. 346, 357 (1911) (explaining the term case in Article III "implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication"); Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892); United States v. Ferreira, 54 U.S. 40, 46-48 (1851) (noting federal judicial power does not extend to claims subject to final review by executive official).

[35] Allen v. Wright, 468 U.S. 737, 750-51 (1984).

[36] *See, e.g.*, King Mfg. Co. v. City Council of Augusta, 277 U.S. 100, 115-16 (1928) (Brandeis, J., dissenting); Lipke v. Lederer, 259 U.S. 557, 565 (1922) (Brandeis, J., dissenting); Hill v. Wallace, 259 U.S. 44, 72, 74-75 (1922) (Brandeis, J., concurring).

[37] Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 341-49, 351, 354-55 (1936) (Brandeis, J., concurring); Jaffe, *supra* note 2, at 988 ("[T]he *Ashwander* case is a *locus classicus* of judicial abstention.").

[38] *Ashwander*, 297 U.S. at 346 (Brandeis, J., concurring).

[39] *Id.* at 346-48 (Brandeis, J., concurring).

[40] For invocations of his avoidance principles, see, e.g., Singleton v. Wulff, 428 U.S. 106, 122-24 (1976) (Powell, J., concurring) (urging the importance of constitutional avoidance); United States v. Lovett, 328 U.S. 303, 318-20 (1946) (Frankfurter, J., concurring). For a formal avoidance doctrine inspired by Brandeis' views, see R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941). For an analysis of the avoidance doctrines, see generally Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994).

[41] Due to divisions on the merits, Justices often cite Brandeis' *Ashwander* concurrence while disagreeing on the applicability of its avoidance doctrines. *E.g.*, United States v.

While Brandeis advocated numerous doctrines of judicial restraint, he also pressed the Court in another and quite opposite direction, one that ultimately helped establish a far different and more assertive judicial power. World War I and the issue of free speech proved the catalysts.[42] Although Brandeis joined a unanimous bench in upholding government prosecutions under the Sedition and Espionage Acts in early 1919,[43] he quickly began to rethink his position and by the end of the year broke sharply from the majority.[44] First, he joined Holmes's ringing dissent in *Abrams v. United States*[45] that attempted to transform the Court's recently announced, but flaccidly applied, "clear and imminent danger" test into a significant limitation on governmental power.[46] Then, the very next year he struck out on his own, writing three bold dissents that rejected repressive government actions, two by the federal government under the Espionage Act and one under a state statute that prohibited interference with military

---

Windsor, 133 S. Ct. 2675, 2697-99 (2013) (Scalia, J., dissenting) (disagreeing with majority's refusal of avoidance and urging the use of the doctrine); Camreta v. Greene, 131 S. Ct. 2020, 2044 (2011) (Kennedy, J., dissenting) (disagreeing with majority's refusal of avoidance and urging the use of the doctrine); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 14-18 (1993) (Blackmun, J., dissenting) (urging the use of the avoidance doctrine and insisting that the majority reaching the constitutional decision was unnecessary); Webster v. Reprod. Health Servs., 492 U.S. 490, 532-33, 535-37 (1989) (Scalia, J., concurring) (rejecting Justice O'Connor's concurring opinion and reasoning on avoidance while urging the Court to reach the issue presented in Roe v. Wade, 410 U.S. 413 (1973)); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 158-59, 163-67 (1984) (Stevens, J., dissenting) (disagreeing with majority's refusal of avoidance and urging the use of the doctrine); Poe v. Ullman, 367 U.S. 497, 555 (1961) (Harlan, J., dissenting) (urging a constitutional decision on the merits).

[42] Philippa Strum, *Brandeis: The Public Activist and Freedom of Speech*, 45 BRANDEIS L.J. 659, 660 (2007) (suggesting that Brandeis' commitment to free speech grew in part out of his early reform experiences where open debates on controversial issues proved "crucial to his success").

[43] *See generally* Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. U.S., 249 U.S. 204 (1919); Schenk v. United States, 249 U.S. 47 (1919).

[44] Abrams v. United States, 250 U.S. 616, 631 (1919) (Holmes, J., dissenting, noting Brandeis' concurrence with the dissent).

[45] 250 U.S. 616.

[46] *Id.* at 627-28 (Holmes, J., dissenting). In a unanimous opinion written by Holmes, the Court articulated its "clear and present danger" test in the first of its World War I First Amendment cases. Schenk, 249 U.S. at 52. For a discussion of the role Holmes and Brandeis played in developing doctrines that gave greater protection to speech, see generally DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 342-80 (1997). For the ways in which Brandeis moved beyond Holmes and toward a broader theory of First Amendment protections, see generally Bradley C. Bobertz, *The Brandeis Gambit: The Making of America's "First Freedom," 1909-1931*, 40 WM. & MARY L. REV. 557 (1999); Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J. L. & POL. 451 (1988).

recruiting.[47] In each he sought to strengthen the "clear and present danger" test as a limit on governmental power and insisted on the paramount social and political importance of free speech.[48] That right was invaluable, he maintained in *Gilbert v. Minnesota*,[49] sounding his most fundamental Progressive values, because it protected freedom of thought, "the privacy and freedom of the home," and the "right of free men" to employ reason and public discussion "to strive for better conditions through new legislation and new institutions."[50] Of even greater long-range importance, his dissent suggested that at least some parts of the Bill of Rights should be incorporated into the concept of liberty in the Due Process Clause and thereby made binding on the states.[51] He urged that proposition more forcefully as the years went by,[52] and decades later that proposition became a funda-

---

[47] Schaefer v. United States, 251 U.S. 466, 482-84 (1920) (Brandeis, J., dissenting); Pierce v. United States, 252 U.S. 239, 270-73 (1920) (Brandeis, J., dissenting); Gilbert, 254 U.S. at 334-38 (Brandeis, J., dissenting); *see also* Urofsky, *Brandeis-Frankfurter*, *supra* note 27, at 323-24 (explaining that in the early 1920s Brandeis confided to Frankfurter that he had "never been quite happy" about agreeing with the Court's first free speech decisions, when he had "thought at the subject, not through it. Not until [he] came to write the Pierce [&] Schaefer cases did [he] understand it.").

[48] *Schaefer*, 251 U.S. at 482-84 (Brandeis, J., dissenting); *Pierce*, 252 U.S. at 270-73 (Brandeis, J., dissenting); *Gilbert*, 254 U.S. at 334-38 (Brandeis, J., dissenting).

[49] *Gilbert*, 254 U.S. at 334-38 (Brandeis, J., dissenting).

[50] *Pierce*, 252 U.S. at 273 (Brandeis, J., dissenting); *Gilbert*, 254 U.S. at 335 (Brandeis, J., dissenting); PHILIPPA STRUM, BRANDEIS: BEYOND PROGRESSIVISM 124 (1993) ("The *Gilbert* dissent nonetheless laid the foundation for a major alteration of American law and for a reassessment of political values."); *accord* UROFSKY, DISSENT AND THE SUPREME COURT, *supra* note 5, at 177-78. Recognizing the extent to which he was breaking new ground, Brandeis wrote Frankfurter asking that he and Zechariah Chafee, another Harvard Law Professor, review his *Gilbert* dissent to see if there was "any flaw in the reasoning in the dissent." Letter from Louis D. Brandeis to Felix Frankfurter (Dec. 16, 1920), *in* "HALF BROTHER, HALF SON": THE LETTERS OF LOUIS D. BRANDEIS TO FELIX FRANKFURTER 53 (Melvin I. Urofsky & David W. Levy, eds., 1991) [hereinafter HALF BROTHER]. Earlier in the year, Chafee had published a book entitled *Freedom of Speech* that was highly critical of the government's suppression of speech during the war. Lynne Wilson, *Book Review: Zechariah Chafee, Jr., Defender of Liberty and Law by Donald L. Smith*, 11 U. OF PUGET SOUND L. REV. 387 (1988).

[51] *Gilbert*, 254 U.S. at 336 (Brandeis, J., dissenting). Brandeis seemed to pull back from this contention when he wrote later in his *Gilbert* dissent that his views were based on the idea of the privileges and immunities of citizens. *Id.* at 337-38 (Brandeis, J., dissenting). The case presented "no occasion to consider whether [the Minnesota statute] violates also the Fourteenth Amendment." *Id.* at 343 (Brandeis, J., dissenting). He nonetheless seemed to make it clear that, if the issue were presented, he would hold that the statute also violated the Fourteenth Amendment. *Id.* (Brandeis, J., dissenting).

[52] Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) ("[A]ll fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the states.").

mental constitutional principle that would underlie sweeping changes, transform the law of civil liberties, and substantially broaden the constitutional rights of all Americans.[53]

By the early 1920s Brandeis began to suggest more pointedly that the protections of due process should extend beyond property rights to include all "things that are fundamental."[54] In 1923, breaking with Holmes and many Progressives, he joined the Court's opinion in *Meyer v. Nebraska*[55] and accepted the proposition that due process included a substantive component that protected family autonomy rights.[56] Two years later, this time with Holmes coming along, he joined the Court in reaffirming *Meyer* and holding that Fourteenth Amendment liberty included the rights of parents and guardians "to direct the upbringing and education of children under their control."[57] The same year he joined Holmes dissent in *Gitlow v. New York*[58] and declared that "the general principle of free speech" was "included in the Fourteenth Amendment."[59] Six years later, after repeatedly urging greater protections for free press,[60] he joined Chief Justice Charles Evans Hughes' opinion for a bare five-Justice majority in *Near v. Minnesota*[61] and held that freedom of the press was also

---

[53] MELVIN I. UROFSKY, *The Brandeis Agenda*, *in* BRANDEIS AND AMERICA, *supra* note 12, at 135 ("For it was Brandeis who pointed the way in the most important jurisprudential development of this century, the application of the Bill of Rights to the states by incorporating its provisions through the Fourteenth Amendment."); *accord* UROFSKY, DISSENT AND THE SUPREME COURT, *supra* note 5, at 179.

[54] Urofsky, *Brandeis-Frankfurter*, *supra* note 27, at 320; *see also Gilbert*, 254 U.S. at 343 (Brandeis, J., dissenting) ("I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property."); *Whitney*, 274 U.S. at 373 ("Thus all fundamental rights comprised within the term liberty are protected by the [F]ederal Constitution from invasion by the States. The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights.").

[55] Meyer v. Nebraska, 262 U.S. 390, 396 (1923).

[56] The Court voided a state law that prohibited the teaching of a foreign language in primary schools by stretching the liberty that due process protected to include educational and parental rights that were "essential to the orderly pursuit of happiness by free men." *Id.* at 399. For the opposition of Progressives, including Frankfurter, to *Meyer*, see GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 377-78 (1994).

[57] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (striking down a *de facto* anti-Catholic state statute).

[58] Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting, joined by Brandeis, J.).

[59] *Id.* (Holmes, J., dissenting).

[60] Schaefer v. United States, 251 U.S. 466, 482, 494-95 (Brandeis, J., dissenting); United States *ex rel.* Milwaukee Soc. Democratic Pub. Co. v. Burleson, 255 U.S. 407, 417 (1921) (Brandeis, J., dissenting).

[61] Near v. Minnesota, 283 U.S. 697 (1931).

protected by the Fourteenth Amendment.[62] Three years after that he joined Justice Benjamin N. Cardozo's concurrence in *Hamilton v. Regents of the University of California*[63] assuming that First Amendment "religious liberty" was also protected by the Fourteenth Amendment, a proposition that a unanimous Court accepted only six years later.[64]

As Brandeis expanded his idea of incorporating fundamental rights, he also moved to develop a more rigorously protective standard for determining the scope of First Amendment speech rights, an evolution that culminated in 1927 with his powerful concurrence in *Whitney v. California*.[65] There, he reiterated many of the First Amendment themes he had developed since 1920 and issued perhaps the most compelling defense of free speech in the Court's history.[66] First, he based his defense of free speech on a sweeping principle.[67] The "rights of free speech and assembly are fundamental," and "all fundamental rights comprised within the term liberty are protected by the [F]ederal Constitution."[68] Second, he rooted that constitutional principle in the values of free and open democratic government.[69]

> 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 incidence of the evil apprehended is so

---

[62] *Id,* at 722-23. In 1936, Brandeis joined the Court in affirming the right of freedom of the press under the Fourteenth Amendment. Grosjean v. Am. Press Co., 297 U.S. 233, 243-44 (1936); *see also* Stromberg v. California, 283 U.S. 359, 368-370 (1931) (affirming the right of free speech against the strictures of a state criminal syndicalism statute).

[63] Hamilton v. Regents of the Univ. of California, 293 U.S. 245 (1934).

[64] *Id.* at 265 (Cardozo, J., concurring, joined by Brandeis and Stone, JJ.); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). Brandeis had left the Court the year before *Cantwell* was decided.

[65] Whitney v. California, 274 U.S. 357 (1927). The case involved a conviction under the California Criminal Syndicalism Act statute, which made it a crime to help organize or join any group that taught or advocated the use of "unlawful acts of force and violence" as a means of promoting "political change." *Id.* at 359-60. Brandeis concurred in the judgment affirming the conviction on the ground that the Court lacked jurisdiction to hear the appeal. *Id.* at 380; *see* PHILIPPA STRUM, SPEAKING FREELY: *WHITNEY V. CALIFORNIA* AND AMERICAN FREE SPEECH 113-14 (2015).

[66] *See, e.g.*, Vincent Blasi, *The First Amendment and the Ideal of Civil Courage: The Brandeis Opinion in Whitney v. California*, WM. & MARY L. REV. 653, 681 (1988).

[67] *Whitney*, 274 U.S. at 373 (Brandeis, J., concurring).

[68] *Id.*

[69] *Id.* at 377-78 (Brandeis, J., concurring).

> imminent that it may befall before there is opportunity for full discussion.[70]

Third, he advocated an extremely demanding version of the "clear and present danger" test.[71] "The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression," he declared.[72] "There must be the probability of serious injury to the State."[73] In testament to his teaching, the Court in 1969 adopted a similarly stringent test protecting free speech and explicitly overruled the majority opinion in *Whitney* that Brandeis had so forcefully challenged.[74]

On a parallel course, he also inspired an expansion of Fourth Amendment protections.[75] As he had reacted against governmental repression of free speech and political dissent during and after World War I, so he grew increasingly disturbed during the 1920s by gov-

---

[70] *Id.* at 377 (Brandeis, J., concurring). He continued:

> 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. Such must be the rule if authority is to be reconciled with freedom.

Id. (Brandeis, J., concurring).

[71] *Whitney*, 274 U.S. at 374.

[72] *Id.* at 378 (Brandeis, J., concurring).

[73] *Id.* (Brandeis, J., concurring). Brandeis continued:

> Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger, whether the danger, if any, was imminent, and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the Legislature. The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the State, creates merely a rebuttable presumption that these conditions have been satisfied.

Id. at 378-379 (Brandeis, J., concurring). He rephrased the standard at several points, each stressing the narrow and demanding conditions that must be met before the government could restrict First Amendment rights. *Id.* at 373-74, 376-79 (Brandeis, J., concurring).

[74] Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969). Brandeis' "lasting contribution to democracy itself is the towering opinion he wrote in *Whitney*" which has "informed all discussions of free speech since." UROFSKY, LOUIS D. BRANDEIS, *supra* note 10, at 641. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254, 270 (quoting Brandeis' *Whitney* concurrence in arguing for the central importance of free speech to democratic government); *see* Blasi, *supra* note 66, at 682-84.

[75] UROFSKY, LOUIS D. BRANDEIS, *supra* note 10, at 618. Had Brandeis written nothing but *Olmstead* and *Whitney*, "his impact on American constitutional law would still have been great." *Id.*

ernment abuses in enforcing Prohibition.[76] Although he supported vigorous police efforts that he recognized as reasonable and necessary,[77] as the decade lengthened he became ever more determined to stop what he regarded as enforcement excesses. He sought to have the Attorney General curb the Federal Bureau of Investigation's offensive and sometimes unlawful tactics[78] and protested the government's use of undercover spies.[79] Privately deploring "the horrors of official inquisitorial methods,"[80] he believed that the nation's police and prosecutorial practices "carry us back to the age of torture."[81] Dissenting from the bench, he criticized government officers for entrapping defendants and chastised judges for showing an excessive "zeal to punish."[82] Sometimes, too, his views prevailed. In 1924, he wrote for a unanimous Court holding that brutal and protracted interrogation methods rendered a confession inadmissible,[83] and three

---

[76] *E.g.*, Ziang Sung Wan v. United States, 266 U.S. 1, 14-17 (1924); *see also* Letter from Louis D. Brandeis to Felix Frankfurter (Feb. 15, 1926), *in* HALF BROTHER, *supra* note 50, at 231-32; Letter from Louis D. Brandeis to Felix Frankfurter (Feb. 23, 1926), *in* HALF BROTHER, *supra* note 50, at 232; Letter from Louis D. Brandeis to Felix Frankfurter (June 23, 1926), *in* HALF BROTHER, *supra* note 50, at 242-43; Letter from Louis D. Brandeis to Felix Frankfurter (Feb. 4, 1927), *in* HALF BROTHER, *supra* note 50, at 272; Letter from Louis D. Brandeis to Felix Frankfurter (Nov. 4, 1928), *in* HALF BROTHER, *supra* note 50, at 350; UROFSKY, LOUIS D. BRANDEIS, *supra* note 10, at 627.

[77] Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative States: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 10 (2006) [hereinafter Post, *Federalism*]. Brandeis joined the Court in several decisions strengthening law-enforcement efforts. *E.g.*, United States v. Lanza, 260 U.S. 377 (1922) (holding that state and federal governments were separate sovereignties, and hence that Double Jeopardy Clause did not bar separate and subsequent prosecution); Carroll v. United States, 267 U.S. 132 (1925) (holding that automobile search did not require a warrant if officers met a relatively undemanding probable cause standard).

[78] UROFSKY, LOUIS D. BRANDEIS, *supra* note 10, at 627.

[79] Letter from Louis D. Brandeis to Felix Frankfurter (Feb. 4, 1927), *in* HALF BROTHER, *supra* note 50, at 272 (calling for "the needed investigation of the government prostitutes—sometimes called spies, and euphemistically known as detectives, inspectors, special agents & intelligence officers"). *See* Letter from Louis D. Brandeis to Felix Frankfurter (Feb. 15, 1926), *in* HALF BROTHER, *supra* note 50, at 231-32; Letter from Louis D. Brandeis to Felix Frankfurter (Feb. 23, 1926), *in* HALF BROTHER, *supra* note 50, at 232-33; Letter from Louis D. Brandeis to Felix Frankfurter (June 23, 1926), *in* HALF BROTHER, *supra* note 50, at 242-43.

[80] Letter from Louis D. Brandeis to Felix Frankfurter (Sept. 28, 1927), *in* HALF BROTHER, *supra* note 50, at 308-09; *see* LEWIS J. PAPER, BRANDEIS: AN INTIMATE BIOGRAPHY OF ONE OF AMERICA'S TRULY GREAT SUPREME COURT JUSTICES, 309-10 (1983).

[81] Letter from Louis D. Brandeis to Felix Frankfurter (Nov. 4, 1928), *in* HALF BROTHER, *supra* note 50, at 350-51.

[82] Casey v. United States, 276 U.S. 413, 421-25 (1928) (Brandeis, J., dissenting).

[83] Ziang Sung Wan v. United States, 266 U.S. 1, 13-17 (1924).

years later in *Gambino v. United States*[84] he wrote for the Court in broadening the Fourth Amendment exclusionary rule.[85]

Most famously, in 1928 Brandeis issued his ringing dissent in *Olmstead v. United States*,[86] denouncing the federal government's use of wire-tapping as a violation of the Fourth and Fifth Amendments.[87] In conducting their investigation, federal officers had violated a state's anti-wiretapping law, and their crime became the government's crime when the United States Department of Justice "sought . . . to avail itself of the fruits of these acts in order to accomplish its own ends."[88] In that case the government "assumed moral responsibility for the officers' crimes" and itself became "a lawbreaker."[89] Could the Court, Brandeis asked, "sanction such conduct on the part of the executive?"[90] He flatly rejected the possibility. "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen."[91] Here, too, Brandeis' separate opinion had a far-reaching impact, as the Court soon began moving toward his position and eventually limited and then effectively overruled the majority's opinion in *Olmstead*.[92]

Finally, Brandeis pointed the way toward what initially became the idea of "preferred freedoms" and then the more enduring idea that the judiciary had a special duty to protect both fundamental rights and "discrete and insular minorities."[93] In the spring of 1936

---

[84] Gambino v. United States, 275 U.S. 310 (1927).

[85] *Id.* at 312, 314, 317.

[86] Olmstead v. United States, 277 U.S. 438 (1928).

[87] *Id.* at 478-79 (Brandeis, J., dissenting).

[88] *Id.* at 483 (Brandeis, J., dissenting).

[89] *Id.* at 483 (Brandeis, J., dissenting).

[90] *Id.* at 483 (Brandeis, J., dissenting).

[91] *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting). Privately, Brandeis saw *Olmstead* as another example of the Court's social biases. Letter from Louis D. Brandeis to Felix Frankfurter (June 15, 1928), *in* HALF BROTHER, *supra* note 50, at 333 ("I suppose some reviewer of the wire-tapping decision will discern that in favor of property the Constitution is liberally construed—in favor of liberty, strictly.").

[92] Nardone v. United States, 302 U.S. 379, 384 (1937) (interpreting federal statute broadly to hold evidence resulting from illegal wiretaps inadmissible in federal prosecutions); Nardone v. United States, 308 U.S. 338, 340-41 (1939); *see also* Berger v. New York, 388 U.S. 41, 64 (1967) (Douglas, J., concurring) (concurring on the ground that the majority opinion overrules *Olmstead* sub silentio); Katz v. United States, 389 U.S. 347, 353 (1967) (explaining that the *Olmstead* trespass analysis is no longer controlling).

[93] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

he concurred alone in *St. Joseph Stock Yard Co. v. United States*[94] and proclaimed the existence of a pivotal distinction. The Constitution not only protected all fundamental liberty rights, he declared, but it also afforded some of those individual liberty rights greater protection than it accorded others.[95] The Court, he declared boldly, "has weighed the relative values of constitutional rights" and placed some of them—including First Amendment rights—above the rights of property.[96] Two years later he joined Justice Harlan F. Stone's famous opinion in *United States v. Carolene Products Co.*[97] and created another bare majority for the far-reaching proposition that Brandeis had suggested as early as 1920, that issues impinging on free speech, fundamental rights, and the proper functioning of democratic processes should be subject to heightened judicial scrutiny.[98]

Were I attempting to evaluate Brandeis's judicial legacy, I would of course have to consider what his many critics have identified as the flaws and failures in his jurisprudence. Brandeis has been charged with holding deeply misguided economic ideas, for example, and he has been repeatedly attacked as being too political, too activist, and too result-oriented.[99] Indeed, what some people regard as his

---

[94] St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 73 (1936) (Brandeis, J., concurring).

[95] *Id.* at 77-79 (Brandeis, J., concurring).

[96] *Id.* at 73, 77, 81 (Brandeis, J., concurring). Two years earlier Brandeis had joined Roberts's dissent, with Sutherland and Butler, in a 5-4 decision in Snyder v. Massachusetts, 291 U.S. 97, 123 (1934), arguing that due process included the right of a criminal defendant to be present at all phases of a trial, including a view. *Id.* at 127-29. There, Roberts distinguished between due process protection of property, which covered only "actual injury," and of fair "procedure in the courts," which guaranteed not merely "a just result" but also "that the result, whatever, it be, shall be reached in a fair way." *Id.* at 137 ((Roberts, J., dissenting).

[97] United States v. Carolene Products Co., 304 U.S. 144 (1938).

[98] *Id.* at 152 n.4. Stone cited Brandeis' concurrence in *Whitney* in support of the proposition that free speech was critical to the democratic political process. *Id.* For Brandeis' early opinions suggesting such heightened scrutiny, see Pierce v. United States, 252 U.S. 239, 253, 273 (1920) (Brandeis, J., dissenting); Gilbert v. Minnesota, 254 U.S. 325, 334, 337-38 (1920) (Brandeis, J., dissenting). For the short-lived "preferred" freedom idea, see, e.g., Thomas v. Collins, 323 U.S. 516, 529-30 (1945) (proclaiming the "preferred place" of First Amendment rights and citing *Carolene Products Co.* in support).

[99] *E.g.*, WHITE, THE AMERICAN JUDICIAL TRADITION, *supra* note 3, at 145-46 "When the insights generated by an inquiry into facts harmonized with his own predilections, conclusions became irresistible. Once he had drawn conclusions, he was not particularly tolerant of opposing views, nor terribly anxious, as a judge, to allow them much weight." WHITE, THE AMERICAN JUDICIAL TRADITION, *supra* note 3, 171. "Brandeis was the crusader. No less than McReynolds, on the far side of the fence, did Brandeis seek to write his own economic ideas into law." FRED RODELL, NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT OF THE UNITED STATES FROM 1790 TO 1955 227 (1955). *See* PURCELL, BRANDEIS AND THE

"most famous opinion,"[100] *Erie Railroad v. Tompkins*,[101] has been subject to extensive and severe criticism, some of it surely warranted.[102] One prominent scholar has even argued that *Erie* was not merely "wrong" but "pernicious" and that it stands out in the Court's long history as "the Worst Decision of all Time."[103] This is perhaps hyperbole.

In any event my purpose is neither to evaluate Brandeis' judicial legacy nor to assess the arguments of his critics and defenders. It is, rather, to consider what his career teaches about the nature of American constitutionalism. With that in mind, I turn not to what his critics have said but to the other side of his legacy coin, to the issues and areas where Brandeis' ideas have been ignored, discarded, or flatly rejected—in other words to the cast-offs from his judicial legacy.[104]

III. BRANDEIS'S JUDICIAL LEGACY: THE CAST-OFFS

Most arresting is Brandeis' private belief in the early 1920s that the Fourteenth Amendment should be repealed.[105] Today, of course, that amendment stands unchallenged as a central pillar of modern American constitutional law. While his belief was understandable in the context of his time and his political views, this particular Brandeisian idea now seems wholly wrong-headed, potentially catastrophic, and surely dead and buried.

Equally dead and buried are the assumptions that supported

PROGRESSIVE CONSTITUTION, *supra* note 21, at 124-32.

[100] RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 65 (1990).

[101] Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[102] The decision was "terribly misguided." Craig Green, *Can Erie Survive as Federal Common Law?*, 54 WM. & MARY L. REV. 813, 833 (2013). For criticisms, see, e.g., MICHAEL S. GREVE, THE UPSIDE DOWN CONSTITUTION ch. 10 (2012); PURCELL, ORIGINALISM, *supra* note 19, at 155-64.

[103] Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time*, 39 PEPP. L. REV. 129 (2011).

[104] All the great figures in American constitutional history have suffered their cast-offs. Alexander Hamilton, for example, argued that Congress could make federal questions exclusive to the federal courts, a rule that holds today, but he also maintained that the federal courts could review state court decisions, a position that was quickly rejected. Similarly, Chief Justice John Marshall held in *Marbury* that Congress cannot increase the Supreme Court's original jurisdiction, which remains good law, but his contention in the same opinion that Congress could not alter the Court's original jurisdiction has been rejected in favor of allowing Congress to shift cases within that jurisdiction to the Court's appellate jurisdiction. 5 U.S. at 138, 174. On various issues, all the great Justices have suffered similar fates.

[105] Urofsky, *Brandeis-Frankfurter*, *supra* note 27, at 325.

Brandeis' faith in Prohibition.[106] His commitment to that disastrous "social experiment" was intense on both the personal[107] and the judicial[108] level. Today, such assumptions and such a commitment seem naive in the extreme and wholly out of accord with contemporary views and values.

Other typically Brandeisian ideas seem largely passé.[109] Brandeis' faith in science, expert administration, and government regulation seems, at a minimum, excessively optimistic. The frequency of agency capture, the "revolving door" between regulators and regulated, and much disappointing practical experience have combined to chasten hopes and expectations. Contemporary commentators, even if still hopeful, are commonly more skeptical, while many have become deeply hostile to administrative agencies.[110]

Along similar lines, Brandeis' determined opposition to "bigness" in all its forms, a repeated theme in his writings,[111] appears tangential if not irrelevant to the pervasively centralized structural conditions of modern life. So, too, his deep hostility to corporations, another major element in his thinking.[112] Although resentments

---

[106] UROFSKY, LOUIS D. BRANDEIS, *supra* note 10, at 626.

[107] Although Brandeis "liked his beer and an occasional whiskey," he and his wife Alice "came to believe that the abolition of strong drink could be in the national interest." UROFSKY, LOUIS D. BRANDEIS, *supra* note 10, at 621, 625. Accordingly, Brandeis' personal views and behavior changed during Prohibition. "As Brandeis grew older, the ascetic streak in him strengthened, and he and Alice had no problem eliminating beer, wine, and whiskey from their household." UROFSKY, LOUIS D. BRANDEIS, *supra* note 10, at 625.

[108] "Brandeis's commitment to upholding prohibition and federal enforcement authority" exhibited a "breathtaking intensity." Post, *Federalism*, *supra* note 77, at 137 n.451. *See generally* Lambert v. Yellowley, 272 U.S. 581 (1926); Ruppert v. Caffey, 251 U.S. 264 (1920); Nat'l Prohibition Cases, 253 U.S. 350 (1920); Hamilton v. Kentucky Distilleries Co., 251 U.S. 146 (1919); ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-1921 532-35 (1984).

[109] Many of Brandeis' ideas "seem in retrospect quaint." POSNER, CARDOZO, *supra* note 100, at 140. Given the breadth of Brandeis' jurisprudence and the values he appealed to—democracy, freedom, localism, etc.—many elements of his jurisprudence remain perennials and others are periodically revived. *See, e.g.*, Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163, 186-90 (1996).

[110] *E.g.*, STRUM, JUSTICE FOR THE PEOPLE, *supra* note 10, at 335 (referring to "Brandeis's belief that unlimited human advancement can be furthered by legislation."). Brandeis' faith was, however, hardly naive. In 1922, for example, he warned a friend not to "pin too much faith in legislation" for a quite modern reason. "Remedial institutions are apt to fall under the control of the enemy and to become instruments of oppression." Letter from Louis D. Brandeis to Robert Walter Bruere (Feb. 25, 1922), *in* V LETTERS OF LOUIS D. BRANDEIS 45 (Melvin I. Urofsky & David W. Levy eds., 1978).

[111] *E.g.*, Liggett v. Lee, 288 U.S. 517, 565 (1933) (Brandeis, J., dissenting).

[112] *E.g.*, Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389, 404 (1928) (Brandeis, J., dissenting).

against both "bigness" and corporations remain alive, they have almost completely lost legal and constitutional salience. Even during Brandeis' lifetime, his attitudes on those subjects seemed unusual if not extreme,[113] and since his retirement national corporations have not only become ever more deeply embedded in American life but, more recently, ever more solicitously protected by the Supreme Court.[114]

Worse, some of Brandeis' judicial actions have been discarded and now seem flatly unacceptable. Few would defend his decision to join Holmes' opinion in *Buck v. Bell*[115] upholding a state law requiring sterilization of "feeble-minded" institutionalized persons.[116] Indeed, only three fleeting years after Brandeis retired a unanimous Court in effect rejected the opinion he had joined and held a similar state law unconstitutional under the Equal Protection Clause.[117] Equally striking, commentators have severely criticized and often condemned his extensive political involvements while he was on the bench. There seems to be a general agreement that those extrajudicial efforts were at a minimum disingenuous if not improper and that, even if not clearly wrong in his day, are most likely unethical under contemporary standards of judicial conduct.[118]

---

[113] LOUIS GALAMBOS & BARBARA BARROW SPENCE, THE PUBLIC IMAGE OF BIG BUSINESS IN AMERICA, 1880-1940: A QUANTITATIVE STUDY IN SOCIAL CHANGE 18 (1975) (arguing that even many Progressives had come to see large-scale corporate enterprise as consistent with their values).

[114] *See, e.g.*, Alan B. Morrison, *Saved by the Supreme Court: Rescuing Corporate America*, AM. CONST. SOC'Y FOR LAW AND POL'Y 1 (Oct. 2011), https://www.asclaw.org/sites/default/files/Morrison_-_Saved_by_the_Supreme_Court.pdf.; Lee Epstein, William M. Landis, & Richard A. Posner, *How Business Fares in the Supreme Court,* 97 MINN. L. REV. 1431, 1431-32 (2013); Edward A. Purcell, Jr., *From the Particular to the General: Three Federal Rules and the Jurisprudence of the Rehnquist and Roberts Courts*, 162 U. PA. L. REV. 1731, 1738-47 (2014).

[115] Buck v. Bell, 274 U.S. 200 (1927).

[116] *Id.* at 205.

[117] Skinner v. Oklahoma, 316 U.S. 535, 536 (1942). Indicative of the way that such outmoded decisions are frequently ignored, Melvin Urofsky's massive biography of Brandeis relegates *Buck* to a footnote describing the case in the briefest terms and noting only that it "is now considered" a "notorious opinion." UROFSKY, LOUIS D. BRANDEIS, *supra* note 10, at 874.

[118] Brandeis' most recent and highly sympathetic biographer concluded that Brandeis "maintained a level of extrajudicial activity that, by current standards of judicial ethics, would be either impermissible or at best questionable in judgment." UROFSKY, LOUIS D. BRANDEIS, *supra* note 10, at 460. For an indictment of Brandeis' behavior in this regard, see BRUCE ALLEN MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES (1982), and for a defense, see Robert Cover, *The Framing of Justice Brandeis*, THE NEW REPUBLIC 17 (May 5, 1982). For a review of

Even on First Amendment issues, constitutional law has moved well beyond Brandeis' emphasis on the instrumental and relatively narrow political grounds for upholding free speech. For Brandeis, the First Amendment served primarily to protect democratic government and the right of citizens to engage in serious public discourse.[119] By the late twentieth century, however, the Court was relying on the First Amendment to protect new and far wider categories of "self-expressive" speech and behavior, including nude dancing[120] and graphic sexual materials,[121] subjects that would surely have shocked Brandeis and struck him as far outside the First Amendment's scope and purpose.

Further, many of the Court's more recent decisions expanding the scope of corporate speech rights exceed drastically the limits Brandeis would have welcomed.[122] True, he joined the Court in using the First Amendment to protect newspaper corporations from special taxes directed against the press,[123] but that decision was limited to publishing companies that, in his view, served a special democratic purpose in educating the electorate.[124] The Court's more recent expansions of corporate speech rights would surely have struck Brandeis as serving that function poorly or not at all. "The sort of 'advocacy' of which Mr. Justice Brandeis spoke," then-Justice William Rehnquist noted while dissenting in a corporate speech case in 1980, "was not the advocacy on the part of a utility to use more of its

---

some of the literature on the issue, see G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576, 610-16 (1996).

[119] Pierce v. United States, 252 U.S. 239, 273 (1920) (Brandeis, J., dissenting); Gilbert v. Minnesota, 254 U.S. 325, 335 (1920) (Brandeis, J., dissenting); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[120] Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975).

[121] *E.g.*, Brockett v. Spokane Arcades, 472 U.S. 491 (1985); Jenkins v. Georgia, 418 U.S. 153 (1974). For a far broader view of that nature and function of free speech than Brandeis held, see, e.g., NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS (1995).

[122] *E.g.*, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978). Most likely, Brandeis would have joined the dissent by Justice White that was joined by Justices Brennan and Marshall. *Id.* at 802 (White, J., dissenting). For recent developments, see, e.g., Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights,* 56 WM. & MARY L. REV. 1673 (2015); Elizabeth M. Silvestri, *Free Speech, Free Press, Free Religion? The Clash Between the Affordable Care Act and the For-Profit Secular Corporation*, 48 SUFFOLK U. L. REV. 257 (2015).

[123] Grosjean v. Am. Press Co., 297 U.S. 233, 245, 248 (1936).

[124] *Id.* at 249-50.

product."[125]

First Amendment law has moved even farther from Brandeis' jurisprudence in other ways as well. The Court's recent decisions invalidating laws restricting campaign funding by corporations and, especially, its decision to adopt the narrowest possible definition of "corruption," contradict Brandeis' views on both the desirability of regulating campaign financing and the acute danger of political corruption.[126] Similarly, the Court's recent efforts to turn constitutional and statutory protections for religion into grounds for defeating both general social welfare measures and the legal rights of third persons are inconsistent with his views.[127] In spite of his support for incorporating the First Amendment religious clauses into the Fourteenth Amendment, Brandeis would have seen the rights they conferred as more limited and unable to restrict the general regulatory powers of the federal government in social and economic matters.[128]

Race is an even more obvious area where both popular attitudes and constitutional law have changed radically and consigned yet more parts of Brandeis' jurisprudence to the distant past. In

---

[125] Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 583, 595 (1980) (Rehnquist, J., dissenting).

[126] McCutcheon v. Fed. Elections Comm'n, 134 S. Ct. 1434, 1462 (2014); Citizens United v. Fed. Elections Comm'n, 558 U.S. 310, 314 (2010).

[127] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2762-64 (2014) (exempting on statutory grounds closely-held corporations from obligations under the Affordable Care Act). On the current Court's use of the First Amendment to defeat federal economic regulation and social programs, see Amanda Shanor, *The New Lochner*, 2016 WISC. L. REV. 133, 136 (2016). The interpretation of the religion clauses has generally changed as religious alignments and political coalitions have changed over the decades. *See, e.g.*, John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 281-82 (2001). For current efforts of right-wing Christian groups to use the First Amendment, especially the free speech clause to shape public education, see KATHERINE STEWART, THE GOOD NEWS CLUB: THE CHRISTIAN RIGHT'S STEALTH ASSAULT ON AMERICA'S CHILDREN 81, 83, 85 (2012).

[128] Brandeis joined Cardozo's concurrence in *Hamilton* which assumed that the religion clauses of the First Amendment were incorporated into the Fourteenth Amendment. 293 U.S. at 265. The opinion, however, stressed that the Free Exercise Clause did not exempt individuals from normal obligations of the law. "Never in our history has the notion been accepted, or even, it is believed, advanced, that acts thus indirectly related to [military] service . . . are so tied to the practice of religion as to be exempt, in law or in morals, from regulation by the state." *Id.* at 267. *See, e.g.*, Patrick J. McNulty & Adam D. Zenor, *Corporate Free Exercise of Religion and the Interpretation of Congressional Intent: Where Will It End?*, 39 S. ILL. U. L.J. 475, 477-78, 482-83 (2015); *see generally* Elizabeth Sepper, *Free-Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015). Similarly, Brandeis would likely have strongly opposed the Court's recent use of the First Amendment to trump the Establishment Clause. *See* Rosenberger v. Univ. of Virginia, 515 U.S. 819, 845-46 (1995); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 102 (2001).

Grovey v. Townsend,[129] for example, Brandeis joined the Court in upholding the right of the Texas Democratic Party to hold an "all white" primary, a decision that the Court overruled only five years after he left the bench.[130] More striking, in both *Gong Lum v. Rice*[131] and *South Covington & Cincinnati Street Railway Co. v. Kentucky*[132] Brandeis joined opinions reaffirming the "separate-but-equal" doctrine then enshrined in the now-scorned case of *Plessy v. Ferguson*.[133] In *Gong Lum*, where the Court upheld the right of Mississippi to classify a young Chinese girl as "colored" and require her to attend a segregated black school, Brandeis stood with the Court.[134] More telling, in *South Covington*, where a majority upheld a law requiring racial segregation on an interstate rail line,[135] three Justices did dissent, stressing the uncontested fact that the railway line in question crossed state lines.[136] Even given that interstate context and a dissenting cohort of three other Justices, Brandeis still chose to stay with *Plessy*.[137] In sharp contrast to the passionate dissents he issued in *Gilbert*, *Olmstead*, and so many other cases, he simply went along in race cases and remained silent.[138]

---

[129] Grovey v. Townsend, 295 U.S. 45, 47 (1935).

[130] *Id.* at 47; Smith v. Allwright, 321 U.S. 649, 666 (1944).

[131] Gong Lum v. Rice, 275 U.S. 78 (1927).

[132] S. Covington & Cincinnati St. Ry. Co. v. Kentucky, 252 U.S. 399 (1920).

[133] 163 U.S. 537 (1896); *see* STRUM, JUSTICE FOR THE PEOPLE, *supra* note 10, at 330-35.

[134] *Gong Lum*, 275 U.S. at 87.

[135] *S. Covington & Cincinnati St. Ry. Co.*, 252 U.S. at 404.

[136] "There is no conflict of testimony, and the record shows that the company was engaged in the operation of a street railway system whose principal business was interstate commerce, carrying passengers between Cincinnati and Kentucky cities across the Ohio River." *Id.* at 405 (Day, J., dissenting).

[137] In fairness, in a few cases Brandeis joined the Court in providing some protection for minorities. Those cases, however, not only had the support of a majority of the other Justices but they also involved either utterly indefensible abuses or laws that discriminated explicitly on the basis of race. *E.g.*, Moore v. Dempsey, 261 U.S. 86, 89 (1923) (writing for seven Justices, Holmes reversed convictions of blacks subject to outrageously unfair trials); Ng Fung Ho v. White, 259 U.S. 276, 285 (1922) (holding unanimously that two Chinese immigrants claiming U.S. citizenship could not be deported without a due process hearing on the fact of their alleged citizenship). By narrowing the focus and ignoring a great deal, Urofsky put the issue in the most positive light. "All told, in nearly all the major cases involving African-Americans in which he took part, Brandeis and a majority of the Court upheld the black petitioners." UROFSKY, LOUIS D. BRANDEIS, *supra* note 10, at 639. For an example of some of the complexities in the race cases Brandeis participated in, see, e.g., Spillenger, *Reading the Judicial Canon*, *supra* note 2, at 147-48.

[138] Christopher A. Bracey, *Louis Brandeis and the Race Question*, 52 ALA. L. REV. 859, 895 (2001) ("Brandeis' judicial record on racial issues pales in comparison with his demonstrated commitment to civil and economic liberties" and "evinces a conscious avoidance of

Born and raised in mid-nineteenth century Kentucky, Brandeis had seemingly absorbed the views of most white Southerners of the day, racial views that few Progressives subsequently wished to challenge.[139] Whatever the explanation for his racial jurisprudence, however,[140] it is clear that Brandeis failed to use his judicial position to press for significant changes and that he accepted and enforced *Plessy*'s "separate but equal" doctrine.[141] Thus, his jurisprudence in this area is far distant from contemporary views and contrary to the constitutional law that developed in the decades after *Brown v. Board of Education*.[142]

If a bit less obvious, Brandeis' views on gender equality seem equally outdated. Although he came to support women's suffrage and the opening of some new opportunities for women,[143] his views were far from those that became common in the later twentieth century. Assuming a dominant role in his marriage, he retained many tra-

---

the race question (whenever such avoidance was possible) and a certain complicity in the continued subjugation of American blacks.")). Brandeis' record was "disappointing with regard to the rights of black and Asian citizens and resident aliens." STRUM, JUSTICE FOR THE PEOPLE, *supra* note 10, at 330.

[139] UROFSKY, LOUIS D. BRANDEIS, *supra* note 10, at 20, 640. In one of his private letters Brandeis attributed a view he scorned, that scientific truth could be determined by a vote, to a "darky preacher." Letter from Louis D. Brandeis to Felix Frankfurter (Mar. 12, 1935), *in* HALF BROTHER, *supra* note 50, at 563-64. Whatever its impact, Brandeis' Kentucky upbringing was apparently relatively liberal compared with the upbringing of most white Southerners. BASKERVILLE, *supra* note 24, at 53-56.

[140] Baskerville suggests that Brandeis "remained silent" on matters of racial justice because "open advocacy of so unpopular a cause would prove to be the graveyard of his campaigning reputation." BASKERVILLE, *supra* note 24, at 286. Strum suggests more legalistically that Brandeis' race-related decisions may have been rooted in "[r]espect for state sovereignty and federalism." STRUM, JUSTICE FOR THE PEOPLE, *supra* note 10, at 334. For suggestions about other possible motives, see Bracey, *supra* note 138, at 905-09.

[141] "Neither the social contract [that Brandeis advocated] in the political sphere nor his proposed economic contract was addressed to the problem of status, equality, and the possibility of self-fulfillment in a society whose governmental and private institutions reflected an ideology of racism and sexism." STRUM, BRANDEIS: BEYOND PROGRESSIVISM, *supra* note 50, at 164. On the widespread racial bias in the United States and on the Supreme Court itself in the late nineteenth and early twentieth centuries, see Edward A. Purcell, Jr., *The Particularly Dubious Case of* Hans v. Louisiana*: An Essay on Law, Race, History, and "Federal Courts,"* 81 N.C. L. REV. 1927, 2001-38 (2003).

[142] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[143] *See, e.g.*, STRUM, BRANDEIS: BEYOND PROGRESSIVISM, *supra* note 50, at 163. Brandeis, for example, made a special personal appeal to President Franklin Roosevelt to appoint Frances Perkins to the cabinet. Melvin I. Urofsky, *Louis D. Brandeis and His Clerks*, 49 U. LOUISVILLE L. REV. 163, 181 (2010). When the president did so, Brandeis explained that Perkins was "the best" and that it was "a distinct advance to have selected a woman for the Cabinet." *Id.*

ditional and constrictive ideas about gender roles.[144] Unlike his focus on the facts of industrial society and the practical problems of workers, for example, he gave little heed to the social and economic facts that undergirded structures of gender inequality.[145] Again, unlike the attention he gave to implementing other reforms, he gave scant attention to the practical problems involved in actually achieving gender equality in practice.[146] "Brandeis seems to have assumed that suffrage would be a sufficient condition for true gender equality,"[147] Philippa Strum wrote, and he did not consider "how or whether one got into the workplace in the first instance."[148] Whether one sees his eponymous brief in *Muller v. Oregon*[149] as marking Brandeis as a sexist, a clever advocate, or simply a man of his times, constitutional law has since discarded the argument that women need special protective labor legislation because of their destined child-bearing roles in society.[150] More broadly, it has accepted the key principle that laws and practices involving alleged gender discrimination deserve a stricter form of judicial scrutiny.[151]

Finally, Brandeis' ideas of liberty and fundamental rights did not include claims for abortion, sexual freedom, or same-sex marriage.[152] One could suggest, of course, that his emphasis on protect-

---

[144] LEWIS J. PAPER, BRANDEIS 196 (1983); STRUM, BRANDEIS: BEYOND PROGRESSIVISM, *supra* note 50, at 163; STRUM, JUSTICE FOR THE PEOPLE, *supra* note 10, at 128-31; UROFSKY, LOUIS D. BRANDEIS, *supra* note 10, at 113, 124-26, 223-27, 365.

[145] STRUM, JUSTICE FOR THE PEOPLE, *supra* note 10, at 128-31; UROFSKY, LOUIS D. BRANDEIS, *supra* note 10, at 224, 594-95.

[146] UROFSKY, LOUIS D. BRANDEIS, *supra* note 10, at 223-24.

[147] STRUM, BRANDEIS: BEYOND PROGRESSIVISM, *supra* note 50, at 164.

[148] STRUM, BRANDEIS: BEYOND PROGRESSIVISM, *supra* note 50, at 164.

[149] Muller v. Oregon, 208 U.S. 412, 421-23 (1908).

[150] *Compare id.* at 421-23 (upholding special statutory protection for female workers), *with* United Auto Workers v. Johnson Controls, Inc., 499 U.S. 187, 197-200 (1991) (rejecting as discriminatory employer's policy providing special "protection" for female workers). On issues of gender equality, Brandeis has fairly been described as "a man of his time" and "a product of his times." STRUM, BRANDEIS: BEYOND PROGRESSIVISM, *supra* note 50, at 164; UROFSKY, LOUIS D. BRANDEIS, *supra* note 10, at 364.

[151] United States v. Virginia, 518 U.S. 515 (1996). For earlier decisions suggesting the need for greater protections against gender discriminations, see Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71 (1971).

[152] Stressing certain of Brandeis' statements and values, one could argue that his jurisprudence provides support for such recently recognized rights. *E.g.*, Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) (purpose of government "to make men free to develop their faculties."); Olmstead v. United States, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting) ("the right to be let alone" is "the most comprehensive of rights and the right most valued by civilized men."). Justices did on occasion use Brandeis to support expansions of the right to privacy. *See, e.g.*, Poe v. Ullman, 367 U.S. 497, 521 n.12, 543,

ing the "privacy and freedom of the home"[153] and his support for the Court's decisions in both *Meyer* and *Pierce v. Society of Sisters*[154] provided some support for the Court's eventual decisions in those areas. Even granted such a connection as a matter of abstract legal argument, however, it remains true that Brandeis' own views fell far short of including—or almost certainly even imagining—that such matters were among the fundamental rights that the Constitution protected.[155] His much different and far narrower view of fundamental rights is hardly surprising given the fact that during his lifetime the overwhelming majority of Americans were scandalized by ideas of sexual freedom and would have scorned the idea of providing constitutional protection for either abortion or same-sex marriage. In the past half-century, of course, all of those matters have come to receive constitutional protection.[156]

IV. CONTRIBUTIONS, CAST-OFFS, AND AMERICAN CONSTITUTIONALISM

Both Brandeis' judicial contributions and his judicial cast-offs highlight the same fundamental truth. The American Constitution is—as a matter of indisputable historical fact—a constitution of change.[157] Brandeis' enduring contributions to the nation's constitu-

548-59, 551-52 (1961) (Douglas, J., dissenting & Harlan, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 495 (1961) (Goldberg, J., concurring). Such uses were, however, expansions that Brandeis neither had in mind nor would most likely have accepted. *See, e.g.*, Blasi, *supra* note 66, at 672, 695-96; Farber, *supra* note 109, at 184-85.

[153] Gilbert v. Minnesota, 254 U.S. 325, 335 (1920) (Brandeis, J., dissenting).

[154] Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

[155] "It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." United States v. Windsor, 133 S. Ct. 2675, 2689 (2013).

[156] Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (right to same-sex marriage); Lawrence v. Texas, 539 U.S. 558 (2003) (anti-sodomy law invalid); Roe v. Wade, 410 U.S. 113 (1973) (due process right to abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (right of unmarried people to possess contraception on the same basis as married couples); *Griswold*, 381 U.S. 479 (1965) (right to privacy in sexual matters).

[157] Given the facts of constitutional history, "there's no realistic alternative to a living constitution." DAVID A. STRAUSS, THE LIVING CONSTITUTION 1 (2010). Indeed, even the Constitution's fundamental federal structure serves as an instrument of change. *See, e.g.*, PURCELL, ORIGINALISM, *supra* note 19, at ch.10; ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN (2011); Heather K. Gerken, *Windsor's Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587 (2015).

In moments of candor, the Court itself has acknowledged as much. Most famously, Chief Justice John Marshall explained why a constitution could not properly be filled with innu-

tional law are rooted in the fact that over the past century Americans have come to accept and honor many of his ideas and values, while his cast-offs spotlight the fact that over the same century Americans have passed over, discarded, or rejected many of his other ideas and values. Both the contributions and the cast-offs underscore the reality of constitutional change and illuminate its nature.

A. Brandeis and the Constitution of Change

At the highest authoritative level, members of the Supreme Court add—even if only by the votes they cast—their own distinctive inputs to the body of constitutional law and help shape, however faintly, the prevailing vectors of constitutional change.[158] We readily acknowledge, even if unintentionally, that fundamental truth when we speak of great Justices from Marshall and Story to the present. We regard Justices as great when they have left a distinct and enduring imprint on the law, narrowing or eliminating older interpretations and directions while adding new and different ones. We can and do

---

merable details but should only mark out its "great outlines" and designate its "important objects." McCulloch v. Maryland, 17 U.S. 316, 407 (1819). All else should be inferred from those basic guidelines, he reasoned, and those inferences should properly change as circumstances and needs changed. *Id.* at 415. The Constitution, Marshall explained, was "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs." *Id.* In declaring that poll taxes in state and local elections violated the Equal Protection Clause, the Court acknowledged that:

> [t]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.

Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669 (1966). "Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change." *Id.* Similarly, Chief Justice Rehnquist acknowledged the extent to which the Court has infused wholly new meanings into the Eleventh Amendment when he rejected legal arguments based on its text as a mere "straw man." Seminole Tribe of Florida v. Florida, 517 U.S. 44, 69 (1996). The Court has adopted change explicitly in its Eighth Amendment jurisprudence. *E.g.*, Atkins v. Virginia, 536 U.S. 304, 321 (2002) (amendment construed in light of nation's "evolving standards of decency.").

[158] KEN I. KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW 26 (2004) ("The Court, in short, is a flashpoint or a crucible. It sits at the center of the conjunctions, multiple orders, and intercurrences that characterize the American political order, and, aware of its perpetually tenuous claim to authority, a claim based precariously on its status as a law follower rather than a law creator, labors to reconcile them plausibly in light of concrete, often crosscutting goals (and often in the absence of them). Only a developmental approach to American constitutionalism can hope to capture these complicated dynamics.").

argue about the pedigree, propriety, quality, wisdom, and consequences of the changes each made, but we debate those qualities because each of the great Justices did change the law.

When was the last time you heard a debate about the jurisprudence of most of the Justices who sat with Marshall and Story? Thomas Todd and Gabriel Duvall, for example, or Smith Thompson and Robert Trimble? Or about some of the Justices who sat with Field, Miller, and Bradley after the Civil War? William Strong and Ward Hunt, or William B. Woods and George Shiras? Indeed, when was the last time you heard a debate about the contributions of many twentieth-century Justices? Joseph McKenna and Horace Lurton, or Joseph R. Lamar and Edward Sanford? James Byrnes and Harold Burton, or Sherman Minton and Charles Whitaker? Each of those largely overlooked, if not forgotten, Justices shared one characteristic: none left a noteworthy imprint on the Constitution.

One of the many imprints Brandeis left was, in fact, an explicit openness about the need for and legitimacy of constitutional change. "The prohibition contained in the Fifth Amendment refers to infamous crimes—a term obviously inviting interpretation in harmony with conditions and opinions prevailing from time to time," he wrote in *United States v. Moreland.*[159] And the confinement at issue was allowable, he continued, because it was certainly not infamous "to-day."[160] In *Olmstead* he emphasized that "this Court has repeatedly sustained the exercise of power by Congress, under various clauses of that instrument, over objects of which the [F]athers could not have dreamed."[161] Indeed, he praised the Fathers for their embrace of change. "Those who won our independence by revolution were not cowards," he proclaimed. "They did not fear political change."[162]

Quite explicitly, Brandeis's jurisprudence was a jurisprudence of change.[163] His characteristic insistence on the necessity of under-

---

[159] United States v. Moreland, 258 U.S. 433, 451 (1922) (Brandeis, J., dissenting).

[160] *Id.* at 450-51 (Brandeis, J., dissenting).

[161] Olmstead v. United States, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting) (citing Pensacola Tel. Co. v. Western Union Tel. Co, 96 U.S. 1, 9 (1877); N. Pac. Ry. Co. v. North Dakota, 250 U.S. 135 (1919); Dakota Cent. Tel. Co. v. South Dakota, 250 U.S. 163 (1919); Brooks v. United States, 267 U.S. 432 (1925)).

[162] Whitney v. California, 274 U.S. 357, 372, 377 (1927) (Brandeis, J., concurring); *see* BICKEL, *supra* note 6, at 151-54.

[163] It is worth noting, too, that one of the ironies of Brandeis' legacy is that it highlights the fact that Brandeis himself changed while on the bench. Strum, *Brandeis: The Public Ac-*

standing the facts was designed for that very purpose.

> But the cases which have most engaged the attention of the Court since the adoption of the Fourteenth Amendment and the great development of interstate commerce present no dispute as to the meaning of words or clauses. They deal with the application of admitted constitutional limitations to the varying and illusive facts of life. Life implies growth. Only change is abiding. In order to reach sound conclusion in such cases, we must strive ceaselessly to bring our opinions into agreement with the facts ascertained.[164]

The other characteristic elements of his jurisprudence served the same goal. His justification for free speech, his emphasis on the promise of science and expertise, his insistence on the importance of experimentation, and his image of the states as laboratories were all parts of the same coherent vision. Thus, for example, he not only urged courts to follow James Bradley Thayer's highly deferential "rule of the clear mistake" in order to open more space for legislative innovations, but in doing so he also expanded the scope of Thayer's rule by applying it to the review of state as well as to federal legislation, thus throwing even more doors open for such innovation.[165] There "must be power in [both] the states and the nation" he declared in his powerful dissent in *New State Ice Co. v. Liebmann*,[166] "to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs."[167]

On a parallel path, Brandeis sought to encourage the Court it-

---

tivist and Freedom of Speech, supra note 42, at 661-63, 708-09 and *passim*. His view of national authority, the First Amendment, judicial restraint, executive power, and the scope of the Fourteenth Amendment all changed during his tenure on the Court.

[164] BICKEL, *supra* note 6, at 151 (quoting an unpublished draft opinion in Stratton v. St. Louis Sw. Ry. Co. (1930)).

[165] PURCELL, ORIGINALISM, *supra* note 19, at 154-55. On Thayer's theory and its reformulation by Brandeis and other Progressive jurists, see Edward A. Purcell, Jr., *Learned Hand: The Jurisprudential Trajectory of an Old Progressive*, 43 BUFF. L. REV. 873, 884-96 (1995).

[166] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[167] *Id.* at 311 (Brandeis, J., dissenting). Shortly before he became a Justice with the Court in 1916 Brandeis had forecast those views. The "recent dissatisfaction with our law," he then declared, was rooted in "the fact that it had not kept pace with the rapid development of our political, economic and social ideals." Louis D. Brandeis, *The Living Law*, *in* BUSINESS – A PROFESSION 344, 347 (1933). As a result, he continued, it was essential for lawyers and judges to study the social and economic world so they could properly and effectively address "the problems of today." *Id.* at 362.

self to make constitutional changes by loosening the grip of *stare decisis* and thereby encouraging judicial innovation.[168] Dissenting in *Burnet v. Coronado Oil & Gas Co.*,[169] he maintained that *stare decisis* was not "a universal inexorable command" but, instead, merely a matter of "wise policy."[170] The decision to follow or overrule a precedent was "entirely within the discretion of the court."[171] While it was generally better to follow precedent or wait for legislative action, he maintained, "in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions."[172] The Court "bows to the lessons of experience and the force of better reasoning . . . ."[173] Not surprisingly, he buttressed his claim with a characteristic assertion: "the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."[174] Subsequently the Court has often invoked that principle, frequently citing yet another of his opinions that appeared in dissent.[175]

B. Understanding the American Constitution of Change

As a matter of history, the reality of constitutional change is undeniable, and one might think that everyone understands and accepts that fact.[176] Many, however, bemoan such changes or deny their legitimacy, and in truth there are serious reasons for that reac-

---

[168] *See* BICKEL, *supra* note 6, at 150-52.

[169] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting) (joined by Stone and Roberts, JJ.).

[170] *Id.* at 405-06 (Brandeis, J., dissenting). *See* UROFSKY, DISSENT AND THE SUPREME COURT, *supra* note 5, at 192 (stating that "Brandeis was the first justice to suggest that the Court not feel completely bound by precedent."). *See also* LEE, *supra* note 23, at 39-40; Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking* [sic] *in the Taft Court*, 85 MINN. L. REV. 1267, 1351-52 (2001).

[171] *Burnet*, 285 U.S. at 406 (Brandeis, J., dissenting).

[172] *Id.* at 406-07 (Brandeis, J., dissenting).

[173] *Id.* at 407-08 (Brandeis, J., dissenting).

[174] *Id.* at 408 (Brandeis, J., dissenting).

[175] *E.g.*, Seminole Tribe of Florida v. Florida, 517 U.S. 44, 63 (1996); Planned Parenthood v. Casey, 505 U.S. 833, 843, 854-55 (1992) (opinion of Justices O'Connor, Kennedy, and Souter announcing the judgment of the Court); Payne v. Tennessee, 501 U.S. 808, 828 (1991).

[176] *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 367 (2009); MARK TUSHNET, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: A CONTEXTUAL ANALYSIS 39 (2d ed. 2015).

tion.[177] If the Constitution changes in meaning and application, they argue, there is little or no point in having a written constitution.[178] If the Constitution's meaning and application change, they continue, there is no guarantee against erratic, subjective, and potentially radical and destructive changes.[179] And those protesters surely have one undeniable truth in their corner: change does not necessarily mean change for the better, and it does not necessarily mean "progress," however defined. It just means change, and possibly change for the worse.

Brandeis' justly celebrated concurrence in *Olmstead*, which heralded the open nature of many constitutional provisions and the necessity of adapting them to changing times, illustrates the danger.[180] The Fifth and Fourteenth Amendments, Brandeis declared, "do not forbid the United States or the states from meeting modern conditions," and those governments could properly meet those "modern conditions" by enacting laws so innovative that a mere half century earlier they "probably would have been rejected as arbitrary and oppressive."[181] The striking point about that statement is that as authority to support it Brandeis cited *Buck v. Bell*,[182] the decision he had joined the prior year upholding the supposedly "modern" idea promoted by the then-prominent eugenics movement that the "feeble-minded" should be sterilized.[183] The Court repudiated that decision

---

[177] On the complexities of constitutional interpretation and some of the reasons for criticizing theories of change or denying the legitimacy of interpretative change, see generally Jeffrey Goldsworthy, *Conclusions*, *in* INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 321 (Jeffrey Goldsworthy ed., 2006).

[178] West Coast Hotel v. Parrish, 300 U.S. 379, 402-03 (1937) (Sutherland, J., dissenting) (stating that "the meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made up of living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written -- that is, that they do not apply to a situation now to which they would have applied then--is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise.").

[179] RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 24 (1985) (stating that "the idea that constitutions must evolve to meet changing circumstances is an invitation to destroy the rule of law.").

[180] Olmstead v. United States, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting).

[181] *Id.* at 472 (Brandeis, J., dissenting) (quoting Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926)).

[182] Buck v. Bell, 274 U.S. 200 (1927).

[183] *Id.* at 207-08. The decision had strong social support at the time, as the eugenics

shortly after Brandeis left the bench,[184] and it is now widely discredited. The fact that Brandeis cited such a now-rejected decision as positive support for the desirability of constitutional change and adaptation, however, stands as a stark reminder that the reasons advanced for change are not always sound, that calls for change are not always benevolent, and that change itself might well prove unwise and harmful.

Ultimately, then, there are no guarantees, and there are surely no guarantees in Brandeis' jurisprudence.[185] Those who seek guidance from his legacy are likely to come to different conclusions in different cases because his jurisprudence—like the Constitution itself—incorporates fundamental and irresolvable tensions.[186] Brandeis' jurisprudence prizes certain values, but it also acknowledges both that those values have limits and that they may sometimes conflict. Thus, it urges the courts to both exercise judicial restraint and practice judicial boldness, to both encourage legislative experimentation and protect fundamental rights, to both uphold the common good and safeguard individual liberties, to both defer to actions of other governmental institutions and review those actions with exacting scrutiny.[187] Brandeis' jurisprudence, in other words, highlights enduring

---

movement was prominent in the United States in the 1920s and claimed many followers, including prominent scientists and leading Progressives. *See, e.g.*, Susan Currell, *Eugenic Decline and Recovery in Self-Improvement Literature of the Thirties*, *in* POPULAR EUGENICS: NATIONAL EFFICIENCY AND AMERICAN MASS CULTURE IN THE 1930'S 44 (Susan Currell & Christina Cogdell eds., 2006); DANIEL J. KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY 97 (1998); THOMAS C. LEONARD, ILLIBERAL REFORMERS: RACE, EUGENICS AND AMERICAN ECONOMICS IN THE PROGRESSIVE ERA 111-12 (2016); PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* 174 (2008); DONALD PICKENS, EUGENICS AND THE PROGRESSIVES (1968); David A. Bernstein, *From Progressivism to Modern Liberalism: Louis D. Brandeis as a Transitional Figure in Constitutional Law*, 89 NOTRE DAME L. REV. 2029, 2036 (2014).

[184] Skinner v. Oklahoma, 316 U.S. 535, 542-43 (1942).

[185] Even a Brandeisian reliance on "the facts" provides no guarantees, as "facts" may not actually be relevant—or even "facts"—and "scientific" theories may be flawed, misapplied, or simply unfounded. "Brandeis briefs" were used in the early twentieth century, for example, to support various forms of racial segregation and discrimination by bringing before the courts "scientific" evidence of the racial inferiority of blacks and the dangers of race-mixing. HERBERT HOVENKAMP, THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870-1970 53-55, 66-68 (2015).

[186] Brandeis' opinions are understandably cited in support of many arguments in many cases, but quite commonly the Justices disagreed as to their relevance, weight, and application. *See, e.g.*, the cases cited, *supra* notes 4, 41, 176, 188.

[187] In *Boy Scouts of America v. Dale*, Chief Justice Rehnquist and Justice Stevens sparred over the significance of Brandeis' principles in *New State*, where Brandeis praised the states as laboratories, and his position in *Whitney*, where he defended free speech. 530 U.S. 640,

values, illuminates critical tensions, and illustrates methodical and fact-based reasoning, but it can settle few if any of the newly pressing controversies that divide Americans in the present and that will surely divide them in the future.

If there are no guarantees from Brandeis' jurisprudence, there are equally no guarantees from anyone else's. Indeed, there are none from the United States Constitution itself. Thus, we confront the ultimate truth: The American Constitution and the vital tradition it has inspired have combined to offer many guides that limit, channel, and point, but they ultimately require each generation of Americans to understand, evaluate, and apply those guides according to their own best lights in the context of altered conditions and novel challenges.

Most American constitutionalists have accepted the fact of constitutional change and seek to identify reasonable and authorita-

---

660-61 (2000). Justice Stevens dissented and invoked *New State Ice*, while Rehnquist, writing for the Court, rejected the applicability of *New State Ice* and invoked *Whitney* instead. *Id.* at 660-61, 664 (Stevens, J., dissenting). The same conflict between those counterpoised principles occurred in *Chandler v. Miller*, in which Justice Ginsburg cited Brandeis' dissent in *Olmstead* to support her majority opinion, while Chief Justice Rehnquist countered by citing Brandeis' dissent in *New State Ice*. 520 U.S. 305, 322, 324 (1997) (Rehnquist, C.J., dissenting). In *Arizona v. Evans*, Chief Justice Rehnquist wrote for the majority and cited Brandeis' dissent in *New State Ice*. 514 U.S. 1, 8 (1995). However, Justice Stevens and Justice Ginsburg dissented separately, with Stevens citing Brandeis' dissent in *Olmstead* and Ginsburg citing Brandeis' concurrence in *Ashwander*. *Id.* at 18, 33 (Stevens, J., dissenting) (Ginsburg, J., dissenting).

Poe v. Ullman illustrates the inherent tension between Brandeisian activism and Brandeisian restraint. 367 U.S. 497 (1961) Justice Felix Frankfurter, when considering whether the plaintiffs had a fundamental right to contraceptives under the Due Process Clause, wrote for the plurality of four Justices and dismissed the plaintiffs' claim for lacking "the immediacy which is an indispensable condition of constitutional adjudication." *Id.* at 508. Frankfurter also cited Brandeis' opinion in *Ashwander* and stressed the importance of judicial restraint, along with the need to avoid reaching constitutional issues "in advance of the strictest necessity." *Id.* at 503. In contrast, Justice John Marshall Harlan, the Court's other leading "conservative," dissented and explained that the Court's judgment "does violence to established concepts of 'justiciability.' " *Id.* at 522-23 (Harlan, J., dissenting). Harlan cited Brandeis by name in three different places and quoted from Brandeis' opinions in both *Gilbert* and *Olmstead*, terming the latter "the most comprehensive statement of the principle of liberty" that undergirded the Fourth and Fifth Amendments. *Id.* at 550 (Harlan, J., dissenting). Along with other precedents, Brandeis' opinions supported the proposition "that the Constitution protects the privacy of the home against all unreasonable intrusion of whatever character," and "the intrusion of the whole machinery of the criminal law into the very heart of marital privacy . . . . " *Poe*, 267 U.S. at 550, 553 (Harlan, J., dissenting). Thus, such intrusion "marks an abridgment of important fundamental liberties protected by the Fourteenth Amendment." *Id.* at 554 (Harlan, J., dissenting). There is substantial tension, for example, between Brandeis' famous commitment to privacy and his insistence on the need for extensive governmental investigatory power to enforce the law, especially against corporate interests. *See* KERSCH, *supra* note 158, at 56-60.

tive norms to determine when and why it is legitimate. Strict "legalists" adopt formalistic methods that strive to cabin and legitimate change by portraying it as, in some essential sense, not truly change, but instead only the result of implicit and logical exfoliations from unchanging constitutional principles.[188] Such approaches, employing varieties of flexible word play, thus accept change by giving it a different name and masking the awkward facts of history with the smothering blanket of blinkered legal formalism.[189]

Less formalistic and more realistic constitutionalists accept and often emphasize the fact of change, adding to the role of constitutional text, structure, and doctrine the shaping force of changing social conditions, cultural values, and political movements.[190] At the same time, however, they also seek to both justify and ultimately constrain such change by integrating it into some broader normative vision that offers a reasoned connection to the Constitution.[191] Some emphasize fundamental moral principles that they find embedded in the Constitution and justify change when it accords with those moral norms.[192] Others justify change by socializing and institutionalizing

---

[188] Brian Z. Tamanaha, *Balanced Realism on Judging*, 44 VAL. L. REV. 1243, 1264 (2010).

[189] Felix Frankfurter adopted a version of this approach when he defended the New Deal's broadened use of the commerce power. He argued that economic changes "bring into play the affirmative possibilities of the authority over commerce granted to Congress" while warning against questioning the supremacy of law's internal logic. Any attempt to interpret trends in American constitutional history outside the frame of professed doctrine, he declared, "calls for the utmost wariness." FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 8 (1937).

[190] TUSHNET, *supra* note 176, at 271-72 (stating "[w]hat [U.S.] constitutional history shows, though, is that understanding the Constitution as it is requires us to pay relatively little attention to the written Constitution, somewhat more attention to the way in which the courts interpret the written Constitution, and a great deal of attention to the organization of politics by political parties under presidential leadership and to the principles that dominant parties and their presidents articulate.").

[191] TUSHNET, *supra* note 176, at 271-72.

[192] Although not a historian, Ronald Dworkin has repeatedly insisted that constitutional issues and judgments must be grounded in sound judgments of moral philosophy. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 3 (1996). The leading constitutional scholar of an earlier generation, Edward Corwin, made essentially the same point: "[T]he Supreme Court is vested with substantially complete freedom of choice [in construing the constitution, but w]ith this freedom there goes inevitably an equally broad *moral* responsibility." EDWARD S. CORWIN, THE TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL THEORY 182 (1934) (emphasis in original). As a more recent scholar wrote, changes are justified when they make "substantive contributions to the noblest causes that human institutions can and therefore should be made to serve." Rogers M. Smith, *Legitimating Reconstruction: The Limits of Legalism*, 108 YALE L.J. 2039, 2075 (1999) [hereinafter Smith, *Legitimating Reconstruction*].

it within the governmental structures that the Constitution establishes, especially the Article III judiciary.[193] One version of the latter approach emphasizes the channeling power of established legal doctrines that work themselves out slowly through those constitutionally ordained institutions.[194] Another version stresses the dual restraining and adapting powers of a deeply ingrained tradition of careful and small-step common-law judging.[195] Both tend to downplay the direct impact of external political developments on constitutional interpretation and highlight what they consider as the tenaciously constraining and channeling force of the law's internal elements.[196]

Yet other constitutionalists place greater weight on external social and political forces[197] and justify constitutional change by rooting it not only in a reasoned connection with the Constitution but,

---

[193] Smith, *Legitimating Reconstruction*, *supra* note 192, at 2049.

[194] *E.g.*, BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 31 (2000).

[195] HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION 127 (1990) (stating that "the common-law method of constitutional adjudication . . . better explains the Supreme Court's role in American government" than originalism or other theories and "has the advantage of building change into law, change that takes into account contemporary substantive values as well as participation[ ] values."). *Accord* STRAUSS, *supra* note 157, at 3-4, 118; Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1815 (2015) [hereinafter Fallon, *Constitutional Adjudication*].

[196] Disputes about the relative importance of internal and external forces on constitutional change and on the Supreme Court's decision making are unanswerable as a general matter and can only be resolved in terms of specific times, places, issues, judges, and decisions, and then only to the extent that there is adequate evidence in the historical record. *See, e.g.*, Edward A. Purcell, Jr., *National League of Cities: Judicial Decision-Making and the Nature of Constitutional Federalism*, 91 DENVER U.L. REV. 179, 179-80 (2014).

[197] In explaining constitutional change, for example, some versions stress the role of mass social movements. *E.g.*, William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2064 (2002); William E. Forbath, *Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771, 1772 (1994); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1326-27 (2006) [hereinafter Siegel, *Constitutional Culture*]. Other versions highlight the driving role of "transformative" presidencies. *E.g.*, BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 265 (2005) (explaining that the election of popular presidents with new political mandates created "a recurring institutional dynamic" that repeatedly led the Court to take on "the arduous task of creating a living constitutional law . . . . "); STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON, at xiv (1997) (explaining that "[m]y case for the presidency is that it has been a singularly persistent source of change, a transformative element engrained in the Constitution itself.").

more directly, in the Constitution's underlying principle of popular sovereignty.[198] One variation argues that over time the Court finds legalistic ways to adapt constitutional law to the prevailing views and values of the American people and that constitutional change is justified by popular approval from below.[199] A second variation focuses more narrowly on the rise of new political coalitions that come to dominate the institutions of government through popular elections, thereby establishing new "regimes" with distinctive constitutional values that are buoyed by widespread popular support.[200] A third variation incorporates "originalist" elements and argues that the Constitution establishes a structural "framework" for democratic politics, but leaves most substantive policy issues open for determination by democratic political developments in the future.[201] A fourth and somewhat more formally normative variation confers on certain major changes an express constitutional legitimacy, identifying special "moments" when particularly powerful and sustained popular move-

---

[198] Of course, virtually all American constitutionalists base their theories in one way or another on the Constitution's principle of popular sovereignty, but the key question always remains how exactly they explain the connection. "Originalist" theories, for example, commonly argue that the text of the Constitution as understood by the founders and ratifiers is the only proper basis for constitutional interpretation because it is only the text itself that has been approved by the people. For one statement of this idea, see KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 128-29 (1999).

[199] *See* FRIEDMAN, *supra* note 176, at 365-68. *See also* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 247-48 (2004). As Edward S. Corwin wrote in challenging the idea that the Supreme Court was the Constitution's sole authoritative voice, "judicial review is a process of popular government." EDWARD S. CORWIN, COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT 176 (Peter Smith 1957) (1938).

[200] LUCAS A. POWE, JR., THE SUPREME COURT AND THE AMERICAN ELITE, 1789-2008, at ix (2009) (explaining that the Supreme Court is best understood "as part of a ruling regime doing its bit to implement the regime's policies. Some of its most historically controversial decisions seem far less controversial when set within the politics of the time. Justices are, after all, subject to the same economic, social, and intellectual currents as other upper-middle-class professional elites."). The classic statement of "regime" theory appears in Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker,* 6 J. PUB. L. 279, 279-80 (1957). *See* Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 L. & SOC. INQUIRY 511, 519 (2007).

[201] Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 646 (2013) [hereinafter Balkin, *The New Originalism*] (stating that such "framework originalism is both originalist and compatible with a living Constitution."). *See also* JACK M. BALKIN, LIVING ORIGINALISM 10, 12 (2011) [hereinafter BALKIN, LIVING ORIGINALISM]; Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456-58 (2013); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 449 (2007).

ments lead the nation's political institutions to accept *de facto* changes as validly adopted constitutional amendments.[202]

In spite of their sometimes substantial differences, all those theories accept the fact of constitutional change, and they understand that change—with varying emphases—as a culturally-rooted, institutionally channeled, professionally disciplined, morally guided, and politically molded reality. Thus, in their light, it is entirely understandable why, as a general matter, Brandeis' jurisprudence would almost necessarily produce both contributions and cast-offs and why, as a particular matter, only specific historical analysis—not the words, text, or principles of the Constitution—can truly explain the origin and fate of each of those contributions and each of those cast-offs.

C. Denying the Legitimacy of Constitutional Change: Originalism

Some other commentators, however, acknowledge the fact of constitutional change but vigorously condemn it.[203] The view "that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes," Justice Hugo L. Black declared, was profoundly wrong.[204] Justice Black stated that "[f]or myself, I must with all due deference reject that philosophy."[205] The founding fathers "knew the need for change," he explained, and they provided in Article V's formal amendment process the only proper method for making such changes.[206]

---

[202] 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 92-93 (1991); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 312 (1998); 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 3 (2014).

[203] EPSTEIN, *supra* note 179, at 281 (stating that "[t]he New Deal *is* inconsistent with the principles of limited government and with the constitutional provisions designed to secure that end.") (emphasis in original); MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION 9 (2012) (explaining that a "dynamic began to unfold in the 1870s and accelerated thereafter," and in the New Deal the "Supreme Court abandoned the [earlier] competitive rules and instead embraced a constitutional order that facilitates the formation of state cartels . . . . "). *See also* RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, at x-xi (2006) (discussing that "standard interferences with employment contracts, such as minimum wage laws, antidiscrimination laws (in competitive markets only), collective bargaining laws, and Social Security requirements [are] unconstitutional . . . . ").

[204] Griswold v. Connecticut, 381 U.S. 479, 522 (1961) (Black, J., dissenting).

[205] *Id.* (Black, J., dissenting).

[206] *Id.* (Black, J., dissenting) (explaining "[t]hat method of change was good for our Fathers, and being somewhat [old-fashioned] I must add it is good enough for me."). For a fur-

Black's position was hardly new. Such originalist claims seem intrinsic to a legal system based on a written constitution, and from the Republic's earliest years commentators have advanced them in one form or another to support a spectrum of claims.[207] Such originalists assume that the Constitution today means what it meant to the founding generation and—their decisive claim—that its original meaning can be identified and deployed to decide specific contemporary issues correctly.[208]

The essence of the matter, however, is that such specifically directive originalism is wholly inadequate to justify its pretensions.[209]

---

ther in-depth examination on Black and his jurisprudence, *see generally* GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION (1977); ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY (2d ed. 1994). Justice Scalia took a position similar to Black's in addressing the Eighth Amendment:

> Bound down, indeed. What a mockery today's opinion makes of Hamilton's expectation, announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years--not, mind you, that this Court's decision 15 years ago was *wrong*, but that the Constitution *has changed*. The Court reaches this implausible result by purporting to advert, not to the original meaning of the Eighth Amendment, but to "the evolving standards of decency," of our national society . . . . Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.

Roper v. Simmons, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting) (emphasis in original) (citation omitted).

[207] *See, e.g.*, R.B. BERNSTEIN, *Legacies: What History Has Made of the Founding Fathers*, *in* THE FOUNDING FATHERS RECONSIDERED 115, 115-67 (2009); JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 1, 2 (2005). One relatively recent form, related to the revival of libertarian and classical economic theory, involves the claim that the Constitution is linked to classical "liberal," market, social contract thinking. RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 4, 6 (2014); TIMOTHY SANDEFUR, THE CONSCIENCE OF THE CONSTITUTION: THE DECLARATION OF INDEPENDENCE AND THE RIGHT TO LIBERTY 5 (2014).

[208] Boumediene v. Bush, 553 U.S. 723, 843 (2008) (Scalia, J., dissenting) (citing Crawford v. Washington, 541 U.S. 36, 54 (2004)) (explaining that "[t]he proper course of constitutional interpretation is to give the text the meaning it was understood to have at the time of its adoption by the people."). Most originalists, however, also dilute their methodological claims in various ways, acknowledging although seldom specifying the limits of the dilution. *See* BRUCE ALLEN MURPHY, SCALIA: A COURT OF ONE 130 (2014) (discussing that Justice Scalia declared in his confirmation hearing, "I think that there are some provisions of the Constitution that may have a certain amount of evolutionary content within them . . . . "). Some hybrid forms of "originalism," especially those advanced since the 1980s, are far more modest and embrace the practice of adaptive and changing "interpretations" of the Constitution. *See, e.g.*, BALKIN, LIVING ORIGINALISM, *supra* note 201, at 10, 12; Balkin, *The New Originalism*, *supra* note 201, at 641.

[209] The literature identifying the inadequacies of originalism is vast. The briefest sam-

The issues that the Constitution clearly settles have long been settled, while those that it does not clearly settle have become the stuff of new or recurring constitutional debates, shifting constitutional understandings, and often changing constitutional law.[210] Most, if not all, of the controversial and disputed issues that arise in the modern world fall into the latter category.

Specifically directive "original" meanings either cannot be discovered at all or the shards of relevant evidence in the historical record prove too vague, obscure, diverse, oblique, limited, ambiguous, or contradictory to provide clear and specific direction.[211] Further, the nation and the world have changed so drastically since the founding that many "original" meanings, even if they could be accurately and clearly identified, would not have the practical significance in the twenty-first century that they were understood to have in the eighteenth.[212] Revealingly, and as a result, originalists have produced no settled, consistent, and coherent methodology and have, instead, advanced a seemingly infinite variety of flawed—and usually elusively qualified—theories, methods, and assumptions that have led to wide ranges of conflicting conclusions.[213] Indeed, there seem nearly

---

pling includes the following: RICHARD H. FALLON, JR., THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW (2004); DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS (2002); KENT GREENAWALT, INTERPRETING THE CONSTITUTION (2015); H. JEFFERSON POWELL, A COMMUNITY BASED ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS (2002); Henry Paul Monaghan, *Doing Originalism*, 104 COLUM. L. REV. 32 (2004); Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL'Y 311 (1996).

[210] Originalist arguments are, in fact, seldom decisive, and they are commonly paired with other types of arguments that range from the lofty philosophical to the bluntly practical. *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 9-12 (1921); Fallon, *Constitutional Adjudication*, *supra* note 195, at 1760-63, 1770.

[211] JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 133 (1996) (stating that "the very extent and diversity of the records of ratification give intellectual license to a host of interpretative strategies . . . [f]rom such a body of writings, many an interpretation can be plausibly sustained, few conclusively verified or falsified."). The Court sometimes acknowledges as much. Justice Powell once wrote that "[a]t most, then, the historical materials show that--to the extent this question was debated--the intentions of the Framers and Ratifiers [of the Eleventh Amendment] were ambiguous."). Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 483-84.

[212] The Supremacy Clause was "originally" intended to ensure that properly ratified treaties trumped inconsistent state laws, but its meaning was altered over time and then changed radically in the twentieth century to accommodate profound changes in both the foreign relation needs of the United States and the domestic demands of American politics. *See* DAVID L. SLOSS, THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE 27 (2016).

[213] Some originalists acknowledge many of the differences that divide them. For a de-

as many originalisms as there are originalists, and deciding between any two versions of specifically directive originalism is like deciding which of Huck Finn's raft mates, the Duke or the Dauphin, was of nobler birth.

Equally to the point, and contrary to its advocates' claims,[214] originalism does little or nothing to confine judicial discretion and limit subjective constitutional interpretation.[215] Originalist arguments are commonly invoked by all sides in constitutional controversies, and they are readily adapted to support a wide range of conflicting positions.[216] The sweeping spectacle of contemporary originalisms does little but confirm that originalist methodologies determine precious little, while the practical goals and ideological premises of their varying proponents determine almost all.[217]

---

tailed discussion of different originalist theories, see Ilya Somin, *Originalism and Political Ignorance*, 97 MINN. L. REV. 625 (2012). *Compare, e.g.*, the disagreements between two self-proclaimed originalists: RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004) *with* Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081 (2005). *See generally* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239 (2009); William N. Eskridge, Jr., *The Marriage Equality Cases and Constitutional Theory*, 2015 CATO SUP. CT. REV. 111 (2015); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47 (2006).

[214] *E.g.*, WHITTINGTON, *supra* note 198, at 47-61; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863-64 (1989).

[215] The outcomes of cases are "based on ideology" rather than originalist sources and show "that originalism is no more constraining than alterative theories of interpretation." FRANK B. CROSS, THE FAILED PROMISE OF ORIGINALISM 193 (2013). *See, e.g.*, Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 163-64 (1997); Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 160 n.202 (1992). For an analogous argument about the inevitable need for value judgments in statutory interpretation, see Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation--And the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685 (2014).

[216] Such divergent originalisms are hardly new. Chief Justice John Marshall relied on originalist sources in defending the Second Bank of the United States, for example, while Spencer Roane, one of his principal adversaries, equally invoked originalist arguments to prove Marshall wrong. PURCELL, ORIGINALISM, *supra* note 19, at 186. The Chief Justice wound up charging that Roane's view of the Constitution's original meaning stemmed from "deep-rooted and vindictive hate," while Roane retorted that Marshall's interpretation proved him "a deplorable idiot." PURCELL, ORIGINALISM, *supra* note 19, at 186. For other classic examples of conflicting originalist arguments, see Dred Scott v. Sandford, 60 U.S. 393, 405, 426-27 (1857), and Myers v. United States, 272 U.S. 52 (1926) (majority opinion).

[217] CROSS, *supra* note 215, at 190-91 (stating that "[t]he study of the results of cases decided using the most prominent originalist sources suggests that the theory is not a meaningful one in the sense of determining case outcomes. The justices all appear to fit those originalist sources to the support of their preferred resolution of the case. Originalism is commonly manipulated."). In *Boumediene*, Justice Kennedy appealed to originalist sources in opposing

In fact, originalist methodologies and the historical materials that they cite are easily, commonly, and often purposely manipulated.[218] Justice Black's rejection of change by judicial interpretation, for example, was an act of high irony, for he was one of the Justices who radically changed the meaning and application of the Bill of Rights and the Fourteenth Amendment.[219] Similarly, the Court's recent decision in *District of Columbia v. Heller*,[220] commonly cited as a paradigmatic example of originalist reasoning, demonstrates the same point.[221] There, the Justices divided sharply over the interpretation of scattered, diverse, conflicting, and inconclusive historical materials, with the two opposed sides interpreting their self-selected

---

the conclusions of the dissenting Justice Scalia. *Boumediene*, 553 U.S. at 742-43, 745-46, 752. Similarly, in *Citizens United*, Justice Stevens dissented using an originalist argument, while Justice Scalia concurred and advanced an originalist counterargument supporting the Court's decision. 558 U.S. 310, 385, 393 (2010) (Stevens, J., concurring in part and dissenting in part) (Scalia, J., concurring). *Compare, e.g.*, AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005) (proposing originalist interpretation), *with* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012) (modifying, and arguably departing from, originalist interpretation), *and with* Robert J. Delahunty & John Yoo, *Saving Originalism*, 113 MICH. L. REV. 1081, 1084, 1086 (2015) (explaining that "[c]orrecting originalism's perceived shortcomings forces Amar to turn ever more intricate interpretative somersaults" and leaves him with "no limiting principle.").

[218] Condemning the views of John Marshall and Daniel Webster, for example, John Taylor of Caroline and John C. Calhoun, had no trouble proving that their extreme states' rights doctrines represented the authentic original command of the Constitution. JOHN TAYLOR, TYRANNY UNMASKED 100 (F. Thornton Miller ed., 1992) (1822) (stating that broad construction of national powers renders the "true intention of the constitution inefficacious and nugatory."). *See* JOHN C. CALHOUN, *A Discourse on the Constitution and Government of the United States*, *in* UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN 64, 65 (Ross M. Lence ed. 1992) (explaining that to show that the Constitution did not establish a national government, "it will be necessary to trace the expression to its origin."). For a more recent example, see Kristin A. Collins, *"A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249, 337-43 (2010) (describing Justice Frankfurter's inconsistent and inaccurate use of appeals to the intent of the Framers).

[219] *See, e.g.*, Adamson v. California, 332 U.S. 46, 89, 91-92 (1947) (Black, J., dissenting) (stating that "I would follow what I believe was the original purpose of the Fourteenth Amendment -- to extend to all the people of the nation the complete protection of the Bill of Rights."). In *Rochin v. California*, Black reached his favored result by "torturing the Fifth Amendment." 342 U.S. 165, 174-77 (1952) (Black, J., concurring); POWE, *supra* note 201, at 227. *See* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 120-21 (1965).

[220] Dist. of Columbia v. Heller, 54 U.S. 570 (2008).

[221] *Id.* at 576-77. *See, e.g.*, JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 345-49 (2009); Delahunty & Yoo, *supra* note 218, at 1088, 1093.

shards through their opposed ideological lenses.[222] Thus, specifically directive originalism only produces ever more fully weaponized—but radically conflicting—versions of the nation's history and constitutional law.

To label *Heller* and similar decisions originalist reminds of the story about Lincoln asking his cabinet how many legs a dog would "have if you call[ed] its tail a leg." "Four," Lincoln famously answered, for calling the tail a leg does not "make it a leg." Similarly, calling an opinion originalist does not make it an opinion determined by originalist sources. *Heller*, in fact, is inconceivable as a product of constitutional change absent the modern gun-rights movement, its avid embrace by the Republican Party, and its joint success in placing on the Supreme Court many ideological compatriots.[223]

Most important for understanding American constitutionalism, as *Heller* and other purportedly "originalist" decisions illustrate, is the fact that originalism is itself a doctrine of constitutional change.[224] In essence, originalism is a rhetorical trope for those who seek to overturn prevailing meanings and understandings in the name of allegedly older ones.[225] The fact is, however, that those allegedly

---

[222] STRAUSS, *supra* note 157, at 20 (stating that *Heller* was as a paradigmatic example of "[w]hen historical materials are vague or confused, as they routinely will be, there is an overwhelming temptation for a judge to see in them what the judge wants to see in them."). For the arbitrary rhetorical move that anchored the Court's reasoning, see Steven L. Winter, *Frame Semantics and the 'Internal Point of View,' in* 15 LAW AND LANGUAGE: CURRENT LEGAL ISSUES 2011 115, 119-20 (Michael Freeman & Fiona Smith eds., 2013).

[223] *See, e.g.*, Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 191-95 (2008). Not surprisingly, *Heller*'s result is fully consistent with the insistent personal values of the opinion's author. BISKUPIC, *supra* note 222, at 345-46, 363. Indicative of the manipulability of originalist reasoning and the pressing force of judicial ideology, consider the position of *Heller*'s author on substantive due process, where he argued that such rights should be limited to their "most specific level" of meaning. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989). Applying that principle, an originalist could readily conclude that the right recognized in *Heller* should be limited to the keeping of muzzle-loading, ball-firing, single-shot firearms.

[224] BALKIN, LIVING ORIGINALISM, *supra* note 202, at 11 (stating that "[m]ost successful political and social movements in America's history have claimed authority for change in just this way: either as a call to return to the enduring principles of the Constitution or as a call for fulfillment of those principles.").

[225] Modern, specifically directive "originalism" flourished within the Republican Party as a political jurisprudence designed to undermine post-New Deal liberalism and the decisions of the Warren Court. By claiming that eighteenth- and nineteenth- century attitudes determined constitutional meaning, conservatives believed they could strengthen their legal and historical arguments against the things they opposed: gay rights, abortion, gun control, affirmative action, social welfare programs, restrictions on the death penalty, expansive tort

older "original" meanings and understandings are either too vague and indeterminate to carry the weight claimed for them, or they have been specifically and selectively retrofitted to advance the particular contemporary goals and purposes of their current advocates.

It is no surprise, then, that when the New Deal Court changed the law, it sometimes did so in the name of "restoring" the Constitution's original meaning.[226] Nor that when the Warren Court changed the law, it too sometimes used originalist rhetoric to help justify those changes.[227] Nor, most recently, that when the Rehnquist and Roberts Courts changed the law, they also sometimes claimed originalist justifications.[228] All show that originalism is simply another method of legal argument, employed when serviceable, sometimes invoked and sometimes ignored, and functioning to sustain, while seeking to mask and deny, the reality of American constitutionalism.[229] Thus, there is no realistic question about choosing between a "living" and an "originalist" constitutionalism, only the question of choosing what kind of changing constitutionalism Americans wish to acknowledge and accept.[230]

---

liability, rigid separation of church and state, institutional reform litigation, and broad federal anti-discrimination laws. Edward A. Purcell, Jr., *The Courts, Federalism, and the Federal Constitution, 1920-2000*, *in* 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE TWENTIETH CENTURY AND AFTER (1920--), 127, 161-62 (Michael Grossberg & Christopher Tomlins eds., 2008). *See generally* CROSS, *supra* note 216.

226 Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality without Fundamentalism,* 107 HARV. L. REV. 30, 56-57 (1993). Felix Frankfurter presented a classic example of New Deal "restorationism:" "After a brave effort to confine the New Deal," he wrote, "the old Court surrendered in the spring of 1937--and returned to the Marshall-Taney-Waite view of national power." Allen R. Kamp, *Constitutional Interpretation and Technological Change,* 49 NEW ENG. L. REV. 201, 219 n.150 (2015) (citing FRANKFURTER, *supra* note 190, at 116).

227 The Warren Court "used originalist sources quite frequently, more so than did previous Courts," though its "apparent reliance on originalism in some cases may simply have been as a rhetorical tool in service to an outcome-oriented agenda." CROSS, *supra* note 216, at 96. *See, e.g.*, Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PENN. L. REV. 1, 22-23 (1998); Kelly, *supra* note 220, at 125.

228 CROSS, *supra* note 216, at 98; Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 29 n.74 (2009); Jamal Greene, *Selling Originalism,* 97 GEO. L.J. 657, 691, 713 (2009).

229 *Accord* Balkin, *The New Originalism*, *supra* note 202, at 649-50; Colby & Smith, *supra* note 214, at 307 (stating that originalism "is in fact a loose collection of a staggering array of often inconsistent approaches to constitutional interpretation. And the approaches themselves continue to change and evolve, sometimes too fast for anyone to keep up. Originalists might despise the notion of a 'living constitution,' but they have gone a long way toward creating a living constitutionalism of their own--the very existence of which undermines much of their own rhetorical and normative claims to superiority.").

230 Balkin, *The New Originalism*, *supra* note 202, at 718-19. Of course the Constitution is not "living," and it is not an "organism," as common metaphorical usages might seem to

Specifically directive originalism thus purports to make the Constitution something that it is not and cannot be, a predetermined mandate for future times and the foundation of an unchanging constitutional law. Its ultimate flaw, then, is that in proposing to address modern controversies it counsels us most unwisely, urging us to turn from grappling with the pressing challenges of the present to confecting subjectively imagined mandates from the past.

V. HISTORICAL UNDERSTANDING AND THE TRUE ORIGINALISM OF AMERICAN CONSTITUTIONALISM

While the Constitution fails to settle most new and controversial issues, it is helpful to remember that it also failed to settle a great many other issues and that only subsequent social and political developments were able to settle some, but not all, of those.[231] The Constitution did not settle the principle that Congress had the power to create the First and Second Banks of the United States.[232] The evolution of the party system, the disastrous war of 1812, the growth of the nation's economy, the conversion of James Madison, and the presence of Marshall and Story on the Supreme Court had far more to do with settling that issue than anything in the Constitution itself.[233]

---

suggest. The Constitution instead is the written foundation of American constitutionalism, a tenacious and evolving practice that seeks to maintain fidelity to its text, principles, structures and values while interpreting, shaping, and applying them in adaptive, effective, and desirable ways.

[231] Examples could be endlessly multiplied. For example, despite its explicit textual mandate, the Constitution did not even settle the principle that treaties were the "supreme Law of the Land." U.S. CONST., art. VI, cl. 2. To the contrary, the emergence of the United States as a world power, the complexities of international relations, and intense political opposition to the emergence of movements for international human rights and domestic civil rights settled the quite different principle--manifestly contrary to the facial command of the constitutional text--that treaties are supreme law only under certain special and highly circumscribed political conditions. Martin S. Flaherty, *Global Power in an Age of Rights: Historical Commentary, 1946-2000*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE, 416, 420, 422-23, 426 (David L. Sloss, Michael D. Ramsey, & William S. Dodge eds., 2011) [hereinafter INTERNATIONAL LAW].

[232] McCulloch v. Maryland, 17 U.S. 316, 324 (1819).

[233] Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791), *in* 19 THE PAPERS OF THOMAS JEFFERSON: 24 JANUARY TO 31 MARCH 1791 275, 276 (Julian P. Boyd ed., 1974). *See, e.g.*, Gerald Gunther, *Introduction* to JOHN MARSHALL, JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 1, 3-8 (Gerald Gunther ed., 1969) (showing the exchange between John Marshall and Spencer Roane over the constitutionality of the Second Bank of the United States.). Opponents of both banks developed elaborate constitutional and originalist arguments against their constitutionality. *See, e.g.*, Mr. James Madison, Remarks from Debate in the House of Representatives (Feb.

The Constitution did not settle the principle that the Union was permanent and that states could not secede.[234] The slavery controversy, the election of Abraham Lincoln, and Northern victory in the Civil War settled that principle.[235] The Constitution did not settle the principle that presidents could conclude binding agreements with foreign nations without the Senate's approval.[236] Economic expansion, the demands of international commerce, practicalities of conducting foreign policy, and the emergence of an increasingly powerful executive branch settled that principle.[237] Indeed, the three Civil War Amendments did not settle the principle that governments are required to accord full equality to all Americans or that racial discrimination and disenfranchisement are unconstitutional.[238] Only massive social changes, the Second World War, the emergence of a vigorous Civil Rights Movement, and profound shifts in American politics and culture settled—albeit still quite imperfectly—those principles.[239]

What, in fact, the Constitution itself did originally—and still does—is essentially five things, none of which is to provide specific direction in resolving most, if any, seriously controverted modern issues. The Constitution establishes the nation's complex structure of

---

2, 1791), *in* A SECOND FEDERALIST: CONGRESS CREATES A GOVERNMENT 126 (Charles S. Hyneman & George W. Carey eds., 1967).

234 Texas v. White, 74 U.S. 700, 700-01 (1868).

235 *Id.* at 727-28.

236 Craig Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345, 347 (1955).

237 Michael P. Van Alstine, *Treaties in the Supreme Court, 1901-1945*, *in* INTERNATIONAL LAW, *supra* note 232, at 217-18, 220-22. Similarly, the Constitution did not settle the principle that the executive can terminate treaties, but that principle has gradually become established. Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 773 (2014).

238 Baldly ignoring history in an effort to reconcile originalism with the principle of racial equality, Justice Scalia argued that the Thirteenth and Fourteenth Amendments "leave no room for doubt that laws treating people differently because of their race are invalid." Rutan v. Republican Party of Ill., 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting). As a matter of historical fact, those amendments were understood for some seventy-five years to allow pervasive racial discrimination and abuse in the United States. As late as 1959, after *Brown v. Board of Education*, for example, William F. Buckley argued in lofty philosophical terms that the South had the right to disenfranchise blacks notwithstanding the language of the Constitution. WILLIAM F. BUCKLEY, JR., UP FROM LIBERALISM 126-27, 129-30 (1959). Invoking such an abstract and ahistorical fiat illustrates the plasticity and manipulability of originalist arguments. *See* Ronald Turner, *A Critique of Justice Antonin Scalia's Originalist Defense of Brown v. Board of Education*, 62 U.C.L.A. L. REV. DISCOURSE 170, 183-84 (2014).

239 *E.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 3-6 (2004).

checking governmental institutions; it prescribes certain basic political and institutional principles such as representative government; it affirms the inspiring ideal of reasoned and limited constitutional government; it mandates certain republican political and moral values; and it stands as a paramount and compelling symbol of national unity and human community.[240] Its brilliance—and ultimately its inherent risk—lies precisely in the fact that it constrains and channels, but does not direct. Thus, it not only allows change but embraces it, while at the same time mandating as well as words can that such change come through the structures it establishes, comports with the principles it enshrines, and ultimately meets the approval of the people it governs.

Thus, while originalism as a specifically directive method of constitutional interpretation is a chimera, originalism in a far different and more realistic sense is vital. American constitutionalism is based on a shared communal faith that the Constitution is binding and authoritative and that the understandings of its framers and ratifiers may prove important guides in understanding its meaning, applying its principles, and honoring its values.[241] At a deeply embedded social and cultural level, such a communal belief is a core component of American life, law, and government and a profound source of the national unity. Indeed, this seems the Constitution's most commonly recognized virtue, one that scholars on all sides embrace.[242] That

---

[240] PURCELL, ORIGINALISM, *supra* note 19, at 196-200.

[241] Justice Benjamin N. Cardozo, for example, certainly no originalist, nonetheless followed traditional constitutional argumentation when he invoked " 'the free exercise' of religion as the phrase was understood by the founders of the nation." Hamilton v. Regents of the Univ. of California, 293 U.S. 245, 265-66 (1934) (Cardozo, J., concurring).

[242] Not surprisingly, James Madison understood the point. The Constitution, he declared in his first inaugural address in 1809, was "the cement of the Union." James Madison, Inaugural Address (Mar. 4, 1809), *in* 8 THE WRITINGS OF JAMES MADISON 47, 49 (Gaillard Hunt ed. 1908); STRAUSS, *supra* note 157, at 101 (explaining that "[t]he written Constitution is valuable because it provides a common ground among the American people, and in that way makes it possible for us to settle disputes that might otherwise be intractable and destructive."). More recently, James Boyd White made the point from the perspective of language and rhetoric. See JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY 246 (1984) (discussing that the Constitution "establishes a new conversation on a permanent basis" and thus "constitutes a rhetorical community."). For contemporary views, see Delahunty & Yoo, *supra* note 218, at 1113 (explaining that "[b]y encouraging fidelity to the original bargain that created and renewed the Union, originalism can help to keep that Union alive and well."); Siegel, *Constitutional Culture*, *supra* note 198, at 1419 (stating that "[w]hen citizens who passionately disagree about the terms of collective life can advance their contending visions as the outworking of the nation's founding commitments, they belong to a common community,

communal faith underwrites a sustaining conviction that Americans share fundamental premises even though, in ever-recurring constitutional disputes, they proceed by drawing from those premises narrower, more particular, and more immediately serviceable principles that allow them to justify sharply conflicting conclusions.[243] That true communal originalism is not a method of finding specific direction on controverted issues, but part of the social and institutional glue that helps hold the American people together and induces them to debate rather than fight.

Thus, the reality of this communal originalism is a fundamental element of the answer to the question that many of those who deny the legitimacy of constitutional change seem to regard—quite wrongly—as unanswerable: To repeat their question: What is the point of a written constitution if its meanings and interpretations change?[244] The answer—entirely accurate as a matter of the nation's history and crucial to an understanding of its constitutionism—is that, together with its other establishing contributions, the written Constitution helps knit Americans together in their common effort to maintain a free, open, tolerant, and democratic society. It undergirds a collective national enterprise in democratic self-government anchored in efforts to interpret its text, structure, and principles in ways that allow the American people to share a bonding sense of common values while vigorously and sometimes bitterly disputing the policies necessary to confront the challenges of an ever-changing world.[245]

To understand American constitutionalism in this manner helps develop a deeper understanding not just of Americans in the past, but of ourselves in the present. It is a method that urges us to try to understand how we come to embrace the values we hold and, consequently, why we adopt the constitutional views we espouse. It is especially important for Justices on the United States Supreme Court, for if they would be truly wise and properly restrained, they

---

despite deep disagreement about its ideal form.").

[243] RICHARD A. POSNER, HOW JUDGES THINK 302 (2008) (stating that "in most constitutional disputes, the disputants are not arguing from common premises.").

[244] As Justice Black stated the point, the idea that the Constitution's meaning changes over the years is "an attack" on the very "concept of a written constitution." GARY L. MCDOWELL, EQUITY AND THE CONSTITUTION: THE SUPREME COURT, EQUITABLE RELIEF, AND PUBLIC POLICY 129 (1982).

[245] Constitutional change sometimes occurs through the formal amendment process, but this is relatively rare and frequently of lesser importance, as amendments often function in large part to ratify social and attitudinal changes that have already occurred or are substantially underway. *See, e.g.*, STRAUSS, *supra* note 157, at 115-18.

must first understand not just the law, but themselves.[246] They must strive to understand why exactly they hold certain personal views and values, how many of those views and values were shaped by sources outside the Constitution, and how some of those views and values have in turn helped shape their understanding of the Constitution itself. Above all, they must strive to understand how those views and values may—consciously or unconsciously, properly or improperly—press them to shape the law in their service. Surely, no candid and self-conscious judge could possibly consider him or herself as merely a non-discretionary "umpire" calling balls and strikes in accord with some pre-existing and objective standard.[247]

VI. CONCLUSION

Louis Brandeis understood both the underlying communal function of the Constitution and the institutional tensions it structured in channeling conflict and enabling reasoned and ordered change. His jurisprudence embraced that communal function while seeking to utilize those institutional tensions to the nation's best advantage. One can fairly criticize many aspects of his career and jurisprudence, including the methods he used, the values he cherished, the goals he sought, the reasons he advanced, and the judgments he reached. One cannot fairly criticize him, however, for attempting—within the limited confines of his judicial role—to articulate reasoned constitutional arguments supported by empirical evidence and practical insight to adapt the law to meet what he considered the most pressing needs of the nation, its people, and its democratic government.

To one degree or another, all Justices have done that, even if they were largely or wholly unaware of the way their personal views and values were shaping their constitutional thinking. All the truly "great" Justices have also done that, too, but they—like Brandeis—have done so by and large consciously and purposely. That truth stands—for good as well as possible ill—as an intrinsic, dynamic, and fundamental element of American constitutionalism.

---

[246] Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 418-19 (2004).

[247] POWE, *supra* note 200, at 342 (testifying before Congress at the hearing on his nomination to the Court, now Chief Justice John Roberts "absurdly analogized a justice to an umpire.").