ESSAYS FROM
BRANDEIS UNIVERSITY’S
COMMEMORATION OF THE
100TH ANNIVERSARY
OF THE APPOINTMENT
OF LOUIS D. BRANDEIS
TO THE UNITED STATES
SUPREME COURT

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and David J. Weinstein
These essays were commissioned from participants in a 2016 celebration at Brandeis University commemorating the 100th anniversary of the nomination and confirmation of Louis D. Brandeis to the United States Supreme Court.

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Then

On January 28, 1916, President Woodrow Wilson announced that he was nominating Boston attorney Louis Dembitz Brandeis to fill a vacancy on the Supreme Court of the United States. The 58-year-old Brandeis had an inkling what he might be in for: “I am not exactly sure,” he wrote to his brother Alfred, “that I am to be congratulated, but I am glad the President wanted to make the appointment and I am convinced, all things considered, that I should accept.”

The public reaction to the president’s announcement was swift and explosive. Former President William Howard Taft, denouncing the nomination, called Brandeis “a muckraker, an emotionalist for his own purposes, a socialist, prompted by jealousy, a hypocrite … who is utterly unscrupulous…a man of infinite cunning…of great tenacity of purpose, and, in my judgment, of much power for evil.” Even the liberal New York Times was unhappy, complaining that Brandeis “is essentially a contender, a striver after change and reforms. The Supreme Court by its very nature is the conservator of our institutions.”

The qualities that concerned Taft and the Times are the very things that we at Brandeis University value so much in our institution’s namesake. As a young lawyer, he had taken on the inquisitive press and defined, for the first time in American life, a “right to privacy.” Later, when taking legal action to limit the number of hours that women were forced to work in certain industries, he invented a new form of argument – relying on data, not just legal theory – and the “Brandeis Brief” became a staple of American law. When the growing power of mammoth financial institutions threatened to overwhelm the interests of small investors, he argued eloquently for limits on the ways in which financiers could use “other people’s money.” And he spoke explicitly about his commitment to “social justice,” an idea that Brandeis and other prominent thinkers of the progressive era brought into the public lexicon – and which remains a cornerstone of the Brandeis University ethos.
The battle over the Brandeis nomination made headlines across the country for more than four months, and it is clear that some of the opposition to the nomination had its roots in anti-Semitism. The Senate Judiciary Committee held weeks of hearings, but according to the tradition of the time, the nominee himself was not invited to speak on his own behalf or answer their probing questions about his judicial philosophy. Instead, Brandeis helped to orchestrate a quiet but effective campaign from his home in Massachusetts to try to shore up political support for his confirmation.

On June 1, 1916, Wilson’s vice president Thomas Riley Marshall, in his role as president of the Senate, announced that Louis D. Brandeis had been confirmed as an associate justice of the Supreme Court by a vote of 47 to 22. Brandeis was on the train from his office in Boston to his summer home in Dedham, Massachusetts, when the Senate was voting. When he arrived, his wife Alice met him at the door with a new greeting: “Good evening, Mr. Justice Brandeis.”

Brandeis served as a justice of the Supreme Court for the next 23 years, creating a legacy of brilliant and innovative jurisprudence that makes him not only one of the great justices, but one of the primary shapers of the modern-day United States. His dissent in Olmstead v. the United States, which argued for limiting the government’s use of technology to spy on its own citizens, continues to influence legal doctrine in the age of Edward Snowden. And his famous concurring opinion in Whitney v. California made freedom of expression not just a constitutional principle but an active force in American life. Evil and destructive rhetoric, he insisted in Whitney, must be met with “more speech, not enforced silence.”

Those who feared his appointment were wrong about at least one thing: Brandeis was no activist lawyer determined to turn upside down the cherished traditions of the Supreme Court. He would prove, in fact, to be a proponent of judicial restraint. He believed deeply in American democratic institutions, which meant for him that Congress and the president ought to make the laws, and Supreme Court justices should avoid interpreting the law to suit their moral or political positions.

Above all, Louis Brandeis believed in creating space and freedom for the individual to live a meaningful life as an engaged citizen of a democracy. Much of his jurisprudence had as its ultimate end the goal of protecting the space where citizens could learn, and where ideas could be debated. For that reason, it is fitting that the founders of this university chose to honor him as its namesake. His greatest legacy is the meaning that he found in robust civic and intellectual engagement, a hallmark of Brandeis University from its founding to the present day.
Now

Over the course of the winter and spring of 2016, Brandeis University marked the centennial of the nomination and appointment of Louis D. Brandeis to the Supreme Court of the United States with a series of events, exhibitions and special occasions.

The celebration kicked off on January 28, 2016, with “Louis Brandeis, the Supreme Court and American Democracy,” featuring Justice Ruth Bader Ginsburg and an all-star cast of judicial, scholarly and journalistic commentators.

Five panel discussions followed during February, March and April, focused on different aspects of the varied and remarkable career of Louis D. Brandeis (“LDB”). The life and career of Brandeis served as the starting point for the kind of vigorous debate that for him characterized the best of American life.

The contributors to our LDB 100 panels brought to our conversations a variety of intellectual and professional perspectives. Scholars, journalists, judges and activists joined in the kind of robust multi-disciplinary discussion that the author of the original “Brandeis Brief” would have cherished.

This Collection

In this publication, 11 of the contributors to our LDB 100 series reflect on the extraordinary achievements of Louis Brandeis in light of contemporary developments in law, politics and society. They demonstrate that the legacy of Justice Brandeis is a dynamic and powerful current in 21st century American life.

Ruth Bader Ginsburg’s address from “Louis D. Brandeis, the Supreme Court and American Democracy,” the kickoff event for the LDB 100 series, focuses on the development of the “Brandeis Brief” for Brandeis’ argument in Muller v. Oregon, followed by Justice Ginsburg’s reflections on how the thinking of Louis Brandeis has had a direct influence on her own thinking and career.

The other 10 essays, commissioned as original contributions to the LDB 100 series, are grouped (as were our panel discussions) around key themes:
Citizenship and the Economy: Labor, Inequality and Bigness
Richard Adelstein and Alexis Goldstein examine Louis Brandeis’ concerns about the power and influence of large corporations, and consider the implications of his ideas in an era when the issue of income inequality has once again become part of the national discourse.

Privacy, Technology and the Modern Self
Anita Allen, Shane Harris, and Steven Mirmina return to LDB’s seminal essay on “The Right to Privacy” and his landmark dissent in Olmstead v. United States in light of the pervasive intrusions on private life that technology has made possible in our time.

Jewish Justices and the Expanding Diversity of the Supreme Court
David Dalin and Linda Greene review the extraordinary battle over the 1916 nomination process, and trace the history of the changing racial, ethnic and gender composition of the United States Supreme Court over the following century.

Speech and Participation in a Democracy: What are the Rights and Responsibilities of the Educated Citizen?
Leslie Kendrick, Jon Levy and Philippa Strum trace the Justice’s evolution on issues of freedom of speech and expression, culminating in his famous concurring opinion in Whitney v. California. Their essays focus particularly on Brandeis’ overriding conviction that the health of American democracy depends on active citizen participation in democratic debate and practice.

Together these contributions, and the conversations hosted at the University and archived on online, represent the continuing vitality of the thought and spirit of Louis D. Brandeis, a man who welcomed the challenges of profound social and political change, and whose responses to those challenges resonate to this day.

Daniel Terris
Chair, LDB 100 Organizing Committee

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PART I: LOUIS D. BRANDEIS, THE SUPREME COURT AND AMERICAN DEMOCRACY
Lessons Learned from Louis D. Brandeis

Ruth Bader Ginsburg* H'96

The Brandeis Brief

In these remarks, I will try to convey Brandeis’ impact on me in my years as a lawyer, and then as a judge. I will speak first, and longest, of the Brandeis Brief famously filed in *Muller v. Oregon*. The Supreme Court decided that case in 1908. The Court upheld, as constitutional, a 1903 Oregon law that prohibited employment of women in industrial jobs for more than ten hours per day. In briefs filed in the 1970s, I described the *Muller* decision as an obstacle to Supreme Court recognition of the equal citizenship stature of men and women as constitutional principle. While the *Muller* decision was a precedent I sought to undo, the method Brandeis used to prevail in that case is one I admired and copied. Let me explain why I applauded Brandeis’ method but not the decision he sought and gained.

In 1903, Oregon adopted a law setting ten hours as the maximum workday for women “employed in any mechanical establishment, factory, or laundry.” Promoters of Oregon’s law limiting hours for women workers included labor reformers who first proposed an eight-hour day for all workers. When that proposal failed to gain legislative support, the proponents settled on a measure limiting the hours blue-collar women could engage in
paid labor. Their hope was that a law protecting women would serve as an “opening wedge,” leading, in time, to protection of all workers.

Portland laundry owner Curt Muller insisted that laundress Emma Gotcher work more than ten hours on September 4, 1905. That date, it seems, was not fortuitous. It was the day the State had designated Labor Day to encourage employers to give their workers a holiday. The timing, and Emma Gotcher’s membership in the Laundry Workers Union, suggest that Muller and fellow members of the Laundry-Owners’ Association aimed to create a test case. As it turned out, they did. Oregon prosecuted Muller for violating the State’s law. After an unsuccessful defense in Oregon’s courts, Muller asked the U.S. Supreme Court to take the case and declare the State’s 1903 law unconstitutional.

Muller had cause to be hopeful. In 1905, the Supreme Court had ruled, 5–4, in *Lochner v. New York*, that New York had acted unconstitutionally when it enacted a law limiting the hours that bakers could work to ten per day, sixty per week. According to the Court, the hours limitation interfered with the right of bakery owners and bakery workers to contract freely, a liberty the Court lodged in the Fourteenth Amendment’s Due Process Clause, which reads: “[No] State shall deprive any person of life, liberty, or property, without due process of law.”

The National Consumers League, led by social reformer Florence Kelley, wanted to ensure that Oregon would have the best possible representation. Kelley’s first choice was Brandeis, but the League, while Kelley was out of town, had set up an appointment for her with a celebrated New York bar leader, Joseph H. Choate. To Kelley’s relief, Choate declined to take the case. He told Kelley he saw no reason why “a big husky Irishwoman should [not] work more than ten hours a day . . . if she and her employer so desired.” Kelley next went to Boston to enlist Brandeis. She was accompanied by Josephine Goldmark, who was Brandeis’ sister-in-law and Kelley’s associate in the Consumers League.

Brandeis, then age fifty-one, said yes to the League, on one condition. He wanted to be Oregon’s counsel, not relegated to a friend-of-the-Court role, and he wanted to argue the case orally on the State’s behalf. Kelley and Goldmark made that happen. Brandeis
then superintended preparation of a brief unlike any the Court had yet seen. It was to be loaded with facts and spare on formal legal argument.

Josephine Goldmark, aided by her sister Pauline and several volunteer researchers, scoured the Columbia University and New York Public Libraries in search of materials of the kind Brandeis wanted—facts and figures on dangers to women’s health, safety, and morals from working excessive hours, and on the societal benefits shortened hours could yield. Data was extracted from reports of factory inspectors, physicians, trade unions, economists, and social workers. Within a month, Goldmark’s team compiled information that filled 98 of the 113 pages in Brandeis’ brief.

To show that Oregon was no outlier, Brandeis first set out the statutes of the twenty States that had restricted women’s on-the-job hours. He also listed similar hours laws in force in Europe. His basic contention: The due process right to contract for another’s labor is subject to reasonable restraints to protect health, safety, morals, and the general welfare.

To convince the Court, Brandeis had to distinguish *Lochner v. New York*. Bakers, the Court had commented in *Lochner*—a job category overwhelmingly male—were “in no sense wards of the state.” Women, Brandeis urged, were more susceptible than men to the maladies of industrialization, and their unique vulnerabilities warranted the State’s sheltering arm. The brief’s pattern: After a line or two of introduction, Brandeis quoted long passages from the sources Goldmark and her associates had supplied.

Some of those sources would hardly pass go today. For example, Brandeis quoted a medical expert who reported: “[I]n the blood of women, so also in their muscles, there is more water than in those of men.” Less imaginary, Brandeis emphasized the effect of overworking women on the general welfare: “Infant mortality rises,” he told the Court, “while the children of married working-women, who survive, are injured by the inevitable neglect. The overwork of future mothers,” he added, “directly attacks the welfare of the nation.”

On the benefit side, Brandeis stressed that shorter hours allowed women to attend to their family and household responsibilities. According to a source he quoted: “[F]ree time
[for a woman] is not resting time, as it is for a man. . . . For the working-girl on her return from the factory, there is a variety of work waiting. She has her room to keep clean . . . her laundry work to do, clothes to repair and clean, and, besides this, she should be learning to keep house if her future household is not to be [a] disorderly . . . failure.” To allay the concern that shorter hours were bad for business, Brandeis excerpted studies of more contemporary resonance showing that maximum hours laws improved productivity.

The brief’s bottom line: Decades of well-documented experience at home and abroad showed that Oregon’s Legislature had good reason to believe that public health, safety, and welfare would be advanced by limiting women’s paid work to ten hours per day.

Counsel for laundry owner Muller scarcely anticipated the mountain of social and economic material the State, through Brandeis, would present. But Muller’s brief made a point equal rights advocates of my day embraced: Most of the disadvantages facing women in the labor market derive from society, not biology, Muller argued. “Social customs [not inferior ability],” he urged, “narrow the field of [their] endeavor.” “[O]stensibly,” the brief continued, Oregon’s law was “framed in [women’s] interest.” But was it intended, Muller asked, perhaps “to limit and restrict [their] employment,” in order to give a boost to “[women’s] competitor[s] [for blue-collar jobs] among men?”

The Supreme Court heard argument in the Muller case only five days after receiving the voluminous Brandeis Brief. (Such short time between briefing and argument would not occur today.) Less than six weeks post argument, the Supreme Court unanimously upheld Oregon’s law. Justice Brewer, who was a member of the 5–4 majority that invalidated New York’s maximum hours legislation in Lochner, authored the Court’s relatively short opinion. Brewer took the unusual step of acknowledging the “copious collection” of statutes and reports, domestic and foreign, in Brandeis’ brief.

Then, Brewer put his own spin on the materials Brandeis presented. The Justice found in those materials confirmation of eternal, decidedly unscientific, truths about men and women. According to Brewer, “history [shows] that woman has always been dependent upon man.” “[I]n the struggle for subsistence,” he wrote, “she is not an equal competitor with her brother.” “[S]he is so constituted that she will rest upon and look to him for
protection.” Brewer then switched images from man as protector to man as predator. Woman’s “physical structure and a proper discharge of her maternal functions,” he wrote, “justify legislation to protect her from the greed as well as the passion of man.”

Did the Justices rule in Oregon’s favor in *Muller* because they were impressed by the extraordinary quality of the Brandeis Brief? Or did they hold for Oregon because the Brandeis Brief shored up their own preconceptions about the relationship between the sexes, the physical superiority of men, women’s inherent vulnerability, and society’s interest in “the well-being of wom[e]n” as actual or potential mothers? Would Brandeis’ technique work when social and economic data was inconsistent with traditional views about “the way women are” and was used to challenge, not defend, sex-based classifications in the law?

As a law student in the late 1950s, I learned in my Constitutional Law class that *Muller* marked a first break from the Court’s refusal to uphold social and economic legislation attacked as invading the liberty to contract once thought to be secured by the Fifth and Fourteenth Amendments’ Due Process Clauses. *Muller* was a decision to applaud, New Deal oriented professors taught us.

Just over a decade later, briefing gender discrimination cases in or headed for the U.S. Supreme Court, I looked at *Muller* differently. The decision, I appreciated, was responsive to “turn of the twentieth-century conditions when women labored long into the night in sweat shop operations.” But, I observed in 1970s briefs, “[a]s the work day [for industrial workers, male and female] shortened from twelve hours to eight, and the work week from six days to five,” laws limiting only women’s work were in many instances “‘protecting’ [women] from better-paying jobs and opportunities for promotion.” However well intended, such laws could have a perverse effect—they could (and all too often did) operate to protect men’s jobs from women’s competition. (Recall that the same point was made by Curt Muller’s lawyer, but it carried less credibility in 1908, when unregulated work weeks, with no overtime pay, could run seventy-two hours or more.)
In briefs and commentary, I included *Muller* in a trilogy of cases that “b[ore] particularly close examination for the support they appear[ed] to give [to] . . . perpetuation of the treatment of women as less than full persons within the meaning of the Constitution.” The other decisions in the trilogy were *Goesaert v. Cleary*, which, in 1948, upheld a Michigan statute prohibiting women from working as bartenders, citing moral concerns; and *Hoyt v. Florida*, which, in 1961, upheld a state statute excluding women from the obligation to serve on juries because of their place at “the center of home and family life.”

While equal rights advocates attacked the substance of the *Muller* decision, they were hugely inspired by Brandeis’ method. The aim of the Brandeis Brief was to educate the Judiciary about the real world in which the laws under inspection operated. That same aim motivated brief writers in the turning-point gender discrimination cases, *Reed v. Reed*, decided in 1971, and *Frontiero v. Richardson*, decided in 1973. *Reed* was the first case ever in which the U.S. Supreme Court disapproved a classification based on gender. The Idaho statute involved in *Reed* was once typical; it provided: As between persons “equally entitled to administer [a decedent’s estate], males must be preferred to females.” Two federal statutes, also typical of the time, were involved in *Frontiero*. Both laws granted fringe benefits to married male military officers but withheld them from most married female officers.

The Brandeis Brief presented economic and social realities in justification of protective labor legislation challenged as unconstitutional. In *Reed, Frontiero*, and later 1970s gender discrimination cases, Brandeis-style briefs explained that, as the economy developed and society evolved, laws premised on women’s subordinate status violated the Constitution’s guarantee of “the equal protection of the laws” to all persons.

The social and economic facts urged in *Reed* and *Frontiero* aimed to open jurists’ eyes. Copying Brandeis’ method was useful to that end. Laws once thought to operate benignly in women’s favor—keeping them off juries and relegating them to “women’s work” in the military, for example—in time, came to be seen as measures impeding
women’s opportunity to participate in and contribute to society based on their individual talents and capacities.

Judicial Authority to Repair Unconstitutional Legislation

Another lesson learned from Brandeis. Much legislation into the 1970s was based on the premise that men were breadwinners; women, men’s dependents. So, for example, when Stephen Wiesenfeld’s wage-earning wife died in childbirth, he sought the social security benefits that would enable him to care personally for his infant son. They were called “child in care” benefits, available when a wage earner dies with a spouse and young child surviving. If the deceased wage earner was a man, there were monthly benefits for widow and child. But if the wage earner was a woman, as Paula Wiesenfeld was, there were no benefits for the widower.

On behalf of Stephen Wiesenfeld, I asked the Court essentially to write into the statute the fathers Congress had left out, to convert the “mother’s benefit” into a “parent’s benefit.” Can’t be done, some of my academic colleagues told me. The Court might nullify the mother’s benefit, leaving it to Congress to start over from scratch. But it would be out of bounds for the Court, lacking the power of the purse, to order payments to widowed fathers.

That is just what the Government initially argued. In the district court, the Government urged dismissal of Stephen Wiesenfeld’s complaint. “It is clear,” the Government maintained, that the “plaintiff does not complain about what Congress enacted [a mother’s benefit], he complains about what Congress [did] not enact [a father’s benefit]. [He] has therefore chosen the wrong forum [for] the relief he seeks. He should take his complaint to Congress.” That argument, had it been accepted, would have immunized from judicial review statutes that confer benefits unevenly—on women only or men only. The legislature would have power, unchecked by the judiciary, to diminish the equal protection principle.

Was my position radical? Precedent was slim, but what there was had heft. It started with Brandeis in a case decided in 1931 involving state taxation, Iowa-Des Moines
*National Bank v. Bennett.* Complainants were a national and a state bank. Their complaint, Iowa officials taxed them at a rate higher than the rate charged corporations in competition with them. Brandeis wrote for a unanimous Court that the banks were entitled to a “refund of the excess taxes exacted from them.” He explained:

The petitioners’ rights were violated . . . when taxes at the lower rate were collected from their competitors. It may be assumed that all ground for a claim for refund would have fallen if the State, promptly upon discovery of the discrimination, had removed it by collecting the additional taxes from the favored competitors. By such collection the petitioners’ grievances would have been redressed. . . . The right invoked is that to equal treatment; and such treatment will be attained if either their competitors’ taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. . . . Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative.

Typically clear expression from Brandeis’ pen.

In a 1970 decision, *Welsh v. United States,* Justice Harlan followed and expanded upon Justice Brandeis’ lead, explaining:

Where a statute is defective because of under inclusion, there exist two remedial alternatives: a court may either declare it a nullity . . . or it may extend the coverage of the statute to include those who are aggrieved by exclusion.

Thanks in part to the Brandeis and Harlan opinions, the Court saw the light. In *Frontiero,* it did not nullify benefits enjoyed by married male officers; instead, it extended those benefits to married female officers. And in *Wiesenfeld,* instead of nullifying benefits enjoyed by widowed mothers, it extended them to widowed fathers. In several later cases, the Court followed the same path.
Brandeis’ Legacy

In connection with a soon to be published book titled *Louis D. Brandeis, An American Prophet*, author and head of the Constitution Center in Philadelphia, Jeffrey Rosen, asked me about Brandeis’ influence on me. I spoke, of course, about the Brandeis Brief and the brief written in the turning point 1971 Reed v. Reed case. Self-consciously Brandeisian, the Reed brief attempted to document, through citation to economic, social, and historical sources, the artificial barriers imposed on women by law and custom, suppressing their aspirations and opportunities to achieve.

I also spoke of Brandeis as Justice, his craftsmanship, sense of collegiality, ability to combine a dedication to judicial restraint with a readiness to defend civil rights and liberties when the values our Constitution advances required it. “Brandeis worked hard on his opinions,” I responded to Jeff, “as evidenced by the number of drafts he composed. He cared not only about reaching the right bottom line judgment; he cared as much about writing opinions that would enlighten other people.”

I also admired Brandeis, I told Jeff, “for his determination to dissent or concur separately only when he felt the public really needed to hear his separate views.” Alexander Bickel published a book in 1957 compiling Brandeis’ unpublished opinions. “Not many jurists,” I observed, “would go through the hard labor of writing an opinion, then step back and ask, *Is this opinion really needed.*” His dissents were all the more influential because of his self-imposed restraint.

A further admirable quality, Brandeis’ views could change when information and experience showed his initial judgment was not right. In the 1880s he opposed extending suffrage to women. Men were doing well enough in conducting the nation’s political affairs, he thought, and they had obligations women escape. Military service, for example. He might have added jury duty.

By the 1910s, however, Brandeis had become a strong supporter of votes for women. Perhaps it was the influence of his wife and a daughter who took a year off between college and law school to campaign for women’s suffrage. Perhaps it was the able
women he encountered among social reformers: Jane Addams, Florence Kelly, his sister-in-law, Josephine Goldmark, and a number of others. Voting was a citizen’s right, he recognized, but it was also a citizen’s obligation. No class or section of the community is so wise or just, he came to see, that it can safely be trusted to govern without the participation of other classes or sections.

What of interpretive approach, Jeff asked. “[Brandeis’] purposive interpretation of statutes and our fundamental instrument of government place him high among jurists who interpret legal texts sensibly,” I answered. “He certainly was not an admirer of what was once called legal classicism, which seems to me similar to today’s originalism.” As an example, I mentioned the June 2015 health care decision. Brandeis, I have no doubt, would have agreed with the majority’s decision to salvage, not destroy, the Affordable Care Act. He would not say, as the dissenters did, that because the Act used the words “exchange established by the state,” the text must be interpreted in a way that would undermine the entire Act. One could not attribute to a responsible member of Congress an outcome so bizarre.

I ventured, too, that Brandeis would have deplored the Court’s 2010 decision in *Citizens’ United v. FEC*, which struck down restrictions on corporate campaign spending. Brandeis had pointed out in 1933, in his dissent in *Louis K. Liggett Co. v. Lee*, that legislatures throughout the nineteenth and early twentieth centuries had imposed a host of regulations designed to ensure that the corporate form would not threaten equality of opportunity and the autonomy of individuals.

When Brandeis retired in 1939 after 23 years of distinguished service on the Supreme Court bench, he had written 448 opinions of the Court, 10 concurring opinions, and 64 dissenting opinions. It is fitting to conclude these remarks with the appraisal of his work at the Court by his colleagues, expressed in their farewell letter:

> Your long practical experience and intimate knowledge of affairs, the wide range of your researches and your grasp of the most difficult problems, together with your power of analysis and your thoroughness in
exposition, have made your judicial career one of extraordinary distinction and far-reaching influence.

That influence, I can attest, continues to this day.

*Ruth Bader Ginsburg is an associate justice of the Supreme Court of the United States. President Clinton nominated her to the Supreme Court, and she took her seat on August 10, 1993.
PART II:
CITIZENSHIP AND THE ECONOMY:
LABOR, INEQUALITY AND BIGNESS
The Last Autonomist
Richard Adelstein*

I
Louis Brandeis was the greatest opponent of bigness, but he was not the first. After 1870, the American economy was transformed with astonishing speed by the introduction of new technologies of mass production, first in the railroads and soon in a broad range of industries from oil and steel to canned goods and cigarettes. Around these hugely productive and expensive new machines, manufacturing enterprises of unprecedented size and power emerged, seemingly overnight, to integrate them profitably into the rapidly expanding economy. Americans had never before seen anything like these privately controlled economic behemoths. They were perplexed and divided by the revolution in production and organization they were not just witnessing but themselves propelling with their eager consumption of inexpensive, mass-produced goods, and by the dilemma of development it posed, the question of what economic and political life in twentieth-century America was to become.

The rising industrial giants offered Americans not only a cornucopia of material wealth undreamed of even a generation before, but a deeply impressive model of human organization and collective power, solidly grounded in the modern virtues of rationality, efficiency, scientific administration and corporate organization. But at the same time,
they posed a lethal threat to political values and traditional ways of organizing work that Americans had long held dear. For all the material comforts the new order entailed, many were troubled by the seemingly irresistible drive toward greater wealth and industrial concentration and its devastating effects on small business and entrepreneurial opportunity. They watched with alarm as professional managers increasingly exercised detailed control over the daily activities of millions of workers in pursuit of corporate profit and made economic decisions of great consequence to all Americans largely without their participation. Others embraced the new order, and dismissed these concerns as nostalgic. For them, the dazzlingly efficient creation of wealth in the great firms had simply made values in production and ways of organizing work that did not enhance profits obsolete.

Was bigness a blessing, or a curse? Should autonomy and responsibility be sacrificed for material wealth and collective power? This was the question that galvanized American politics for thirty years before 1911, when Brandeis first joined the public debate. Would Americans trade their traditional economy of modest, more equally distributed production in small forms centered on individuals and favoring economic autonomy, personal responsibility and decentralized authority, for a new industrial order that vastly increased aggregate wealth but distributed it far more unequally, elevated the corporate interests of large firms above those of individuals and small firms in the name of efficiency, and made possible the scientific rationality, close discipline and managerial hierarchy the industrial giants required? Would they, as Brandeis put it in 1913, sell their birthright for a mess of pottage?

Industrial bigness came to the United States in two phases, through two distinct processes of growth, with the Sherman Act of 1890 unfortunately sandwiched between them. In the first, from 1870 to the early 1890s, manufacturers of all kinds created loose horizontal agreements to stabilize falling prices and allocate production in response to the excess capacity created by the wave of optimistic investment after 1865. Cartels and similar arrangements among competitors in labor-intensive industries typically failed quickly, but those in the emerging mass-production industries generally succeeded. By
1890, many had tightened into large, unitary trusts or holding companies whose small numbers in their industries gave them significant control over prices and outputs. These were the time-honored tactics of monopoly, against which Americans had long held a special animus, and about which there existed a well-developed body of common law. So it’s not surprising that the Sherman Act of 1890, the legal ground on which the battle over bigness would be fought over the next twenty years, was a law against monopoly that borrowed its language from the common law—every contract or combination “in restraint of trade” was declared illegal, and every act of “monopolizing” made a felony.

But the development of American industry did not stop in 1890, and in the century’s final decade, many of the most successful mass-production firms, already made very large by their price-stabilizing absorption of horizontal competitors, grew much larger still, in response to a different set of pressures. To ensure what Alfred Chandler (1977) called “throughput,” the steady flow of resources in and out of costly facilities needed to sustain profitable operation, the giants integrated vertically by acquiring previously independent suppliers and distributors. This brought whole domains of economic activity, involving many thousands of people once linked primarily by market exchange, within the ambit of consensual but tightly centralized production collectives. Small businesses were again annihilated in large numbers, and the commercial culture and widespread entrepreneurial opportunity they represented still more gravely threatened by the expanding corporate hierarchies and the new organizational values they nurtured and enforced. By 1904, after seven years of convulsive consolidation and incorporation in the wake of a deep depression, the economic and social landscape was dominated by the several dozen huge corporations that continued to frame American life for most of the twentieth century.

As all this was taking place, it became clearer to autonomists like Brandeis that the problem was not monopoly but bigness—the herding of millions of heretofore relatively independent farmers, tradesmen, laborers, and merchants into large corporate hierarchies, and the replacement of broadly dispersed entrepreneurial opportunity and personal responsibility in small enterprises with widespread employment and diffused
responsibility in big ones. In their view, low prices were not, as the proponents of efficiency maintained, a blessing of bigness, but a curse. It was precisely the ability to push prices far below what smaller firms could match that drove the growth of the new giants, and it was their size itself, and not any power over prices they might have or abuse, that was transforming the experience of work and responsibility for millions of people in ways that threatened the American experiment in free government itself.

But by the time the opponents of bigness could recognize their cause and mount a campaign against it, the federal statute intended to address the industrial problem, the anti-monopoly Sherman Act, was already in place. The struggle between efficiency and autonomy, between bigness and smallness as organizing principles for the new century’s political economy, would be fought on its conceptual battlefield, which was strongly tilted against the autonomists. The language of the Act, the common law of trade restraint and the conceptual vocabulary they generated were all logically indifferent to bigness. They were incapable of articulating, and thus permitting some explicit resolution of, the political and cultural problems caused not by insufficient or unfair competition among large corporations but by the economy of large corporations itself. As an object of common law doctrine or American industrial policy since the Sherman Act, bigness simply does not exist.

The idea of “contracts in restraint of trade” poses a paradox. Every contract restrains trade—the point of contracting is to move relations from the uncertainty of free exchange to the predictability of mutual obligation, to the advantage of all sides. How can the law encourage contracts but oppose restraints of trade at the same time? The common law’s answer was to preserve every person’s liberty to enter into whatever contractual relations they desired, but to guarantee a free and competitive contracting environment for all. Hence the rule of reason: contracts were lawful unless they “unreasonably” interfered with the freedom of others to contract or compete themselves. The common law was not hostile to monopoly itself, or even to contracts that fixed prices or limited outputs. Instead, it condemned monopolizing behavior, defined as “unfairly” excluding actual or potential competitors from the field rather than defeating them honestly within the rules.
of fair competition.

None of this has anything to do with bigness. Monopoly firms can be big or small, big firms may or may not be monopolies. Everyone who wants an original work of art or needs a dentist in the countryside is typically at the mercy of a small monopolist with more power over price than Andrew Carnegie ever had. Carnegie Steel grew as large as it did because that was the only efficient and profitable way to produce inexpensive steel with costly equipment, a trope repeated in dozens of other capital-intensive industries of the time. Some of the entrepreneurs who built these firms behaved very badly indeed—the original list of “unreasonable” restraints of trade attached by the Supreme Court to the Sherman Act was largely inspired by the monopolizing behavior of John D. Rockefeller. But Carnegie, and most of the others, did not. Nothing in the explosive growth of Carnegie Steel would have raised an issue at common law. In most of the mass-production industries, there was little monopolizing, and no monopoly, since even the most tightly organized industries still left room for small independents. The problem with big firms was not that they were monopolies, but that they were big. Anti-monopoly laws attack big and small monopolists alike, and anti-bigness laws attack big firms whether they monopolize or not. But anti-bigness laws don’t attack monopoly, and anti-monopoly laws don’t attack bigness.

Given the ideological chasm separating the visions of efficiency and autonomy, the intensity of the debate in the press and in Congress over “the trusts” in the months preceding the passage of the Sherman Act is easy to understand. What is surprising is the near unanimity, in the midst of this passionate controversy, of the Senate’s approval of the Act’s final language—52 for, 1 opposed, 29 absent. The legislative friends of efficiency, aware of the common law’s indifference to fairly won bigness, wanted simply to write the rule of reason into the Act. The law, they believed, should permit contracts that restrained trade or reduced the number of competitors, even where they led to very large firms or monopoly power, unless this restraint was “unreasonable,” achieved through unfair methods of competition, or by making it impossible (not merely unprofitable) for others to compete. The autonomists, aware of the same indifference,
saw the rule of reason as an obstacle to the direct assault on bigness they thought necessary. They wanted aggressive intervention in the market processes that produced efficient bigness, limiting the capitalization or operational scale of firms, or breaking up big ones to preserve or restore the existence of smaller competitors, even at the substantial cost of the material wealth that the foregone bigness would have produced. “In the determination of questions,” as William Jennings Bryan told a conference on trusts, “we should find out what will make our people great and good and strong rather than what will make them rich.”

In the end, the Sherman Act made every contract in restraint of trade illegal, omitting the crucial word “unreasonable” that would have imported the common law rule of reason into the statute, and reproduced the logical paradox that robbed the Act as passed of any meaning at all. This is why senators of every persuasion could support it. Those who welcomed bigness were confident that federal judges would interpret the Act in the only plausible way, by inserting the missing qualifier before the phrase “restraint of trade.” For the enemies of bigness, the absence of the crucial adjective created room to argue that the Act did not import the common law or its rule of reason at all, and that courts were free to exercise broad supervisory powers over large firms in pursuit of autonomist objectives different from the efficient production of wealth. In this way, and not for the last time, Congress threw the responsibility for interpreting a meaningless statute, and thus making detailed national policy on the question it was supposed to address, to unelected federal judges. Between 1890 and 1911, that is exactly what they did. Fully reflecting the people’s deep ambivalence over the dislocating, disorienting reconstitution of economic life occurring before their eyes, the judges nodded first to the antitrust of efficiency, then to autonomy, before making their peace with bigness at last.

In the earliest cases, the lower courts instinctively read the rule of reason into the Act, generally vindicating combinations and cartel agreements where there was no attempt to preclude entry by others and no injury to the public beyond the intended control of prices or outputs. Bigness as such was no offense, nor was the simple existence of monopoly power without clear evidence that it had been abused. But in 1897, the autonomists on the
Supreme Court seized the high ground, rallied by Justices John Harlan and Rufus Peckham, both best known for their roles in other, more famous judicial dramas. In *United States v. Trans-Missouri Freight Association*, the Court considered a cartel agreement among several small railroads to stabilize rates after a punishing rate war, and over a strong dissent for four efficiency-minded justices by Edward White, struck it down as an illegal restraint despite its being well within the common law’s range of reasonableness. For the Court, Peckham explicitly rejected the rule of reason and poured the autonomist creed into the empty Act in words Brandeis himself might have used, at the same time that they illustrated the futility of articulating the problem of bigness in the language of trade restraint:

> Trade or commerce . . . may nevertheless be badly or unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class, and the absorption of control over one commodity by an all-powerful combination of capital. . . . [This] is unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein. . . . [I]t is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others.

By 1904, Peckham had abandoned the cause of “small dealers and worthy men” to protect their oppressors’ right to contract free from any governmental interference of which the judges disapproved. For a time, Harlan held the autonomist fort, and in
Northern Securities Company v. United States gathered a plurality of four around the proposition that the Sherman Act made it illegal for firms to merge when this would reduce the number of active competitors in a given market, a reading that could clearly be used to block any merger at all, reasonable or unreasonable, in an effort to limit the size of firms. But the words of the Sherman Act themselves, the logical power of the common law of trade restraint and, most importantly, the people’s apparent unwillingness to dismantle a now fully rooted industrial order to restore an old, austere regime of smallness were too much for the dwindling forces of autonomy to overcome.

In 1911, White, now Chief Justice, was at last able to secure a majority for incorporating the common law rule of reason into the Sherman Act, and in Standard Oil Company v. United States and United States v. American Tobacco Company established that only contracts that unreasonably restrained trade were illegal under the Act and began to construct the open-ended list of monopolizing behaviors that would constitute unreasonable restraints. The result of the struggle was a judge-made policy that, without ever confronting the question of bigness directly, encouraged vertical integration wherever cost economies could be realized and, once firms had grown very large in this way, forbade them only from actively excluding competitors and colluding horizontally to fix prices or outputs. In United States v. United States Steel Corporation (1920), a case pursued by both Taft and Wilson against the successor to Carnegie Steel, the Court dismissed the complaint because the government could not show that the company had acted unreasonably or unlawfully, and interred any remaining hope of an antitrust of autonomy by explicitly declaring that “the law does not make mere size an offence.” Having assisted in the prosecution before coming to the Court in 1916, Justice Brandeis took no part in the decision.

II

Brandeis was largely silent on these issues until 1911, when in a series of popular essays and appearances before congressional committees he began to assert himself on bigness and become autonomy’s most thoughtful and resourceful champion. At the core of his
thinking were the ideas of decentralization and privacy, and a deeply felt commitment to the independence and personal development of the individual in all aspects of social life. “Remember,” he wrote informally in 1922, “that always and everywhere the intellectual, moral and spiritual development of those concerned will remain an essential—and the main factor—in real betterment.”

This development of the individual is, thus, both a necessary means and the end sought. For our objective is the making of men and women who shall be free—self-respecting members of a democracy—and who shall be worthy of respect. Improvement in material conditions of the worker and ease are the incidents of better conditions—valuable mainly as they may ever increase opportunities for development. The greater developer is responsibility. Hence, no remedy can be hopeful which does not devolve upon the workers participation in, responsibility for, the conduct of business; and their aim should be the eventual assumption of full responsibility—as in cooperative enterprises. This participation in and eventual control of industry is likewise an essential of obtaining justice in distributing the fruits of industry.

All of this militates for smallness, the continuous devolution of authority from the center to the periphery in both economics and government. Law must come, where possible, from the states and localities, not just to tame Leviathan but to encourage responsible experimentation in public policy as well. And government needed the power to address the imbalance and injustice that inevitably proceed from bigness. Bigness, he believed, was not just inefficient but immoral, stifling the spirit and entrepreneurial energy of common people, separating owners of firms from responsibility for their conduct, enabling financiers and managers to seize the levers of industry and democracy and reducing ordinary citizens to voting spectators rather than full participants in their own government.

Brandeis combined a conservative respect for evolved institutions and a deep skepticism about the efficacy of reform by legislation with a recognition of the cognitive
limitations of human actors (“Many men are all wool, but none is more than a yard wide”) and a reliance on decentralized, entrepreneurial experimentation as the surest route to progress in the face of inevitable human ignorance and fallibility. As his frequent allusions to progress and betterment intimate, his commitment to the individual was fundamentally moral and political. Like Jefferson, Brandeis believed that genuine democracy required a certain kind of independent, self-reliant citizen, a person accustomed to governing himself responsibly and thus capable of appreciating the subtleties of political questions and deliberating fairly with others to resolve them. And like Peckham and Bryan, he was prepared to trade material wealth for autonomy in the workplace and the opportunity for as many ordinary men and women as possible to assume personal responsibility for their own enterprises and livelihoods.

One might expect such a man to have joined the autonomists on the legal barricades as the battle over bigness was being waged in the Court, and to have supported the kind of legislation they knew was required to limit the size of firms, but he did neither. When Standard Oil was decided, Brandeis’ immediate response was to help his friend Robert La Follette draft a bill that accepted the rule of reason just as it had been articulated and applied by the Court and sought merely to specify more clearly in the statutes what behaviors would constitute unreasonable restraints or unfair practices under the Sherman Act. The bill failed, but its objective was achieved in 1914, after Wilson, tutored by Brandeis, had been elected with a mandate to continue the fight against the trusts. The battle over bigness was rejoined in Congress, with autonomists pleading for legislation that would overturn the rule of reason and reverse the victory of efficiency in the courts. But with Brandeis heavily involved in its construction, Congress instead passed the Clayton Act, which included the list La Follette had called for and nothing else that would disturb the regime of bigness.

For decades, friends of efficiency had argued that the question of how large firms should grow should be left to the market. Legislated limits on size presumed an answer it was impossible for legislators to know, and could only be artificial and arbitrary. The only way to determine how big was too big was, first, to police the market fairly to keep
the avenues of competition clear and open to all, and then submit as many entrepreneurial experiments in size and form as their originators believe will be profitable to the test of market competition. When firms believe expansion will increase profits, they will grow, and when they conclude that further expansion will be unprofitable, they will stop growing of their own volition. If the market proves them right, they will have discovered the most efficient scale for their particular operations; if not, their errors will be revealed by competition and the costs paid by those who made them. On this point too, Brandeis strongly endorsed the policy of efficiency. There is, he wrote in 1912,

in every line of business a unit of greatest efficiency. What the size of that unit is cannot be determined in advance by a general rule. It will vary in different lines of business and with different concerns in the same line [and] with the same concern at different times because of different conditions. What the most efficient size is can be learned definitively only by experience. The unit of greatest efficiency is reached when the disadvantages of size counterbalance the advantages [and] exceeded when the disadvantages of size outweigh the advantages. For a unit of business may be too large to be efficient as well as too small.

A substantial virtue of this approach is its commitment to consumer sovereignty—it lets the people (“consumers”) decide, through their choices of what to buy and where to work, just how much fairly earned bigness they want and allows the market to adjust the size of firms to those preferences. But if the question of optimal size is indeed best left to fair competition in markets, and firms have grown large because consumers in fact prefer the wealth that large scale makes possible to the political and moral virtues of smallness, then bigness can be eliminated only by legislation that overturns this outcome and, as the autonomists had to concede, deprives the people of what they want in favor of what others think is better for them.

At the climactic moment in the struggle, then, when autonomy’s last hope was to overturn the judicial decision for efficiency by popular legislation, the great autonomist threw his considerable intellectual and moral weight behind the keystone policies of
efficient bigness, the common law rule of reason, with its distinction between good and bad trusts and benign tolerance of the former, and committing the question of how large firms were to grow to a market cleansed of unethical practices, where consumer preference and corporate profit would be the final arbiters of size. Why?

The answer begins with Brandeis’ prescient emphasis before 1916 on the cognitive and informational impediments to optimizing behavior imposed by human frailty, what economists now call bounded rationality. “With the growth in size,” he wrote, “comes an increasing cost of organization and administration which is so much greater than the increase in the volume of business that the law of diminishing returns applies.”

Man’s work often outruns the capacity of the individual man; and no matter how good the organization, the capacity of an individual man usually determines the success or failure of a particular enterprise. . . . Organization can do much to make concerns more efficient [and] larger units possible and profitable. [But] organization can never supply the combined judgment, initiative, enterprise and authority which must come from the chief executive officer. Nature sets a limit to his possible achievement. As the Germans say: “Care is taken that the trees do not scrape the skies.”

This much may still be true, though modern theories of the firm suggest that effective organization can do much more to extend the limited capacities of individuals than Brandeis imagined. But bounded rationality led him to a crucial error. If human frailty ensures that the costs of organization and administration will outweigh the benefits of expansion before firms become “too big,” then the market can be relied upon to produce firms that are both efficiently sized, because they stop growing at just the point where the advantages of expansion are balanced by its costs, and modest in scale. If this is so, then enterprises that exceed the modest scale dictated by nature’s limits must be inefficiently large, and could only have achieved their size through unfair or unethical practices of the sort the rule of reason is meant to forbid. And if this is so, a detailed and aggressively enforced rule of reason was all that was needed—once the outlawed practices that
enabled the bloated giants to grow so large were effectively policed, they would simply collapse under the weight of their own inefficiency (Cullis, 1996). It seemed an autonomist’s dream come true—the virtues of smallness achieved without coercion in fairly policed markets with no loss of efficiency or wealth from the absence of bigness.

But it wasn’t, because the first of these propositions is simply false. The lesson historians and economists have taken from the experience of Carnegie Steel and thousands of firms since is that businesses can grow efficiently even to colossal scale, and then shrink efficiently back again, as conditions warrant. Capital-intensive firms grew very large before 1911 without unreasonably restraining trade, thrived and grew still further under the rule of reason in the “American” half-century that followed, and then contracted or perished as technology and competition changed after 1970. Brandeis was right that firms will grow until it’s unprofitable for them to grow larger, but for a variety of reasons, some having to do with the economics of mass-production, some with the ability of organization to overcome human frailty, and some with consumers’ desire for cheap goods at the expense of autonomy, the fairly won efficient scale of some firms will be far larger than Brandeis thought desirable, or even possible. Autonomy cannot be had without cost after all. Smallness, as everyone could see, demanded a kind of determined austerity, a self-imposed poverty, that only the most disciplined and stalwart autonomists could hope to sustain and that bigness could wash away in a flood of goods if only people would adjust their values and culture to its demands.

Slowly, Brandeis came to realize this, and why the battle had been lost. If fair competition produced efficient bigness, it must be because consumers, the ordinary men and women in whom he and Jefferson had placed their faith, preferred cheap goods to small scale. Had it been otherwise, they would have refused the mass-produced bounty pouring from the industrial corporations and paid the higher prices and accepted the material deprivation that production in small, collegial firms would inevitably demand. They didn’t, and accommodated themselves to the new order, just as Karl Marx and the vast majority of economists in our own day would predict—in a world of markets, they say, efficient production of wealth is an irresistible force. But to Brandeis, the people
who “hated monopoly and loved bigness” had done the unthinkable, abandoning the personal autonomy and responsibility that made them free for the addictive wealth and ease made possible by the industrial discipline of mass production, reducing themselves from active citizens to passive consumers, “servile, self-indulgent, indolent, ignorant.”

“It’s clear, I think,” he wrote Felix Frankfurter in 1925, “that the gentle enslavement of our people is proceeding apace . . . & that the only remedy is via the individual. To make him care to be a free man & willing to pay the price.” But he could not escape the devastating conclusion that the people had indeed made clear, through the complex interplay of their choices in markets, legislatures and courts over an entire generation, that they preferred the comforts of corporate hierarchy to the rigors of industrial liberty. A short time later, again to Frankfurter, he let his anger show.

Isn’t there among your economists some one who could make clear to the country that the greatest social-economic troubles arise from the fact [that] the consumer has failed absolutely to perform his function? He lies not only supine, but paralyzed & deserves to suffer like others who take their lickings “lying down.” He gets no worse than his just desert. But the trouble is that the parallelogram of social forces is disrupted thereby. It destroys absolutely the balance of power.

Brandeis’ own enduring commitment to the moral virtues of smallness was reflected in the material asceticism of his later life and his increasingly lonely struggle, epitomized in Liggett v. Lee (1933), to preserve the autonomy cherished in the America of his birth against the organizational demands of the industrial age. But in the compass of his own lifetime, and to his deep disappointment, the people made clear that they did not care to be free in the way he hoped they would, and were not willing to pay the price this kind of freedom required of them.

III

What would he say if he could see us now? Brandeis would surely be dismayed by much of what has become of the American economy and political culture in the seventy-five
years since his death, but not surprised. The advance of bigness has continued unabated, even as the industrial behemoths of the early twentieth century have been displaced by technology, media, and banking corporations of comparable size and even greater economic and political power. Capital still knows no borders, so just as burgeoning industrial firms moved from state to state in the nineteenth century to escape one’s regulatory reach or enjoy the fiscal largesse of another, their successors now choose among countries for the same reasons, or to seek ever cheaper labor. A hundred years ago, the federal government could, if it chose, impose effective regulatory constraints on the light-footed giants, but there is no such international authority today (for which Brandeis would certainly be grateful), so their behavior is increasingly unchecked by law as developing countries compete for their favor with lax regulation and the governments of developed ones worry about jobs and tax bases. States and nations, rich and poor, become beholden to the corporations for the work and wealth they can bring, politicians of every party who depend on them for campaign funding do their bidding once they’re elected, and voters find it very hard to effect meaningful change in the direction of their government no matter whom they elect.

At the same time, as the great majority of Americans continue to earn their livelihoods as employees, the labor unions that once provided what Brandeis saw as an essential, private counterweight to large firms in the interests of workers have declined to insignificance. The increasing power of finance, itself a product of the drive for ever greater efficiency and profit in production, impels firms to cut costs ruthlessly and destroys all vestiges of the mutual commitment of employer and employee and more equal distribution of power and income that characterized the nineteenth-century workshops and businesses that Tocqueville and Brandeis admired. So stock prices rise, wages fall, goods become cheaper, and as more and more of the economy’s wealth is funneled through smaller numbers of large corporations, with nothing to disturb the grip of their executives on it or the desire of their stockholders for it, less and less of it passes from employers to workers. Brandeis’ dream of cooperative, collegial workplaces and widespread entrepreneurial responsibility has largely gone unrealized, save for the
franchising of local outlets by huge corporations. He would sadly trace all of this, the increasing inequality of income and wealth it has produced, and the necessarily imperial ambitions of a centralized American state committed to “growth” and the material prosperity of an economy dominated by large corporations, to the apparently insatiable desire of those very workers, in their contemptible new identity as “consumers,” for ever more output at ever lower prices, come what may.

But he would, I think, see both hope and political opportunity in the environmental movement. Brandeis’ enduring faith in the facts as best they can be known, in science and the scientific method, and in the need for experimentation in the face of complex problems, would lead him first to accept the reality of climate change and the threat it poses and then, as “attorney for the situation,” to mediate among the many interests engaged in this universally urgent issue in search of a rational solution acceptable to as many as possible. What makes the message of the environmentalists so difficult for so many to accept is easy to see. Very few would argue with the goal of preserving a planet habitable for human beings, and only a minority of the most obstinate or interested are unwilling to entertain the possibility that climate change poses a serious threat to that goal. There is great uncertainty about what is and will be happening to the atmosphere and climate, when, and with what consequences, and how effective or costly various policies might be in addressing them. And there is dispute over whether climate change has been caused by the way the developed countries have organized production over the last century and a half, to maximize both the material wealth humans can extract from the earth and the stress this pursuit puts on its atmosphere and resources.

But no one doubts that any effective effort to slow or reverse the effects of climate change will require that we in the developed countries moderate our pursuit of material wealth and learn to live with less. What this means, and how life might change as a result, has been discussed far less than the stark facts of climate change and the technical aspects of addressing it. Preserving a habitable planet seems to many to be possible only at the price of a radical reduction in the quality of life for all, a frightening prospect to which contemporary political and economic discourse offers little alternative. What will the
world look like if climate change is effectively controlled? How will production and distribution be organized? What will we lose, and what might we gain? The urgency of the issue demands a revolution in the way we think about what we want to produce, and how, but we seem to lack a positive, hopeful perspective from which to make it, a way to see the necessary reduction in material wealth not as a recipe for universal misery but as an opportunity to build a better way of living for individual men and women. Brandeis’ mature philosophy of smallness, of continuous devolution of power and responsibility from the center to the periphery and unwavering devotion to the intellectual and moral development of the individual in every sphere of social life, offers precisely that. He lets us see what might be possible if we can free ourselves from the addiction to wealth and strive instead to spread active, responsible participation in the direction of industry and government as broadly as possible. He would have delighted at the chance to make his case, and Jefferson’s, for the twenty-first century.

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What a Little Sunlight Can Do: Learning from the Economic Legacy of Louis D. Brandeis

Alexis Goldstein*

Louis Brandeis knew well the power of the press. Whether it was performing for the newspapers in a fight he suspected he’d lose,¹ or amplifying Congressional findings and explaining them to the public, Brandeis harnessed publicity to defend democracy, fight corruption, and upend oligarchy. But a corollary to Brandeis’ phrase “electric light is the best policeman” is that thieves hide well in the dark.² One lesson we can glean from Brandeis’ legacy is that structural reforms happen in the public spotlight—often following crisis moments. But deregulation and corporate concentration happens slowly and in the shadows.

Brandeis’ documentation of the sins of what he called “our financial oligarchy” laid the groundwork for his long legacy of economic reforms—the Clayton Antitrust Act of 1914, the Federal Trade Commission, the Federal Reserve Act, and the Banking Act of 1933, better known as Glass-Steagall. But after nearly fifty years of financial stability, a period of quiet deregulation flourished, allowing financial oligarchy to return. Today, the titans of banking are once again exerting enormous control over American industry, as they did in the time of Brandeis. What Brandeis called the “curse of bigness” that gave
the money trusts the power to “dominate the state” is with us today in the form of banks that remain too big to fail—and largely unaccountable to regulators or law enforcement.³

Then, as now, the path to upending this control is in the sunlight of disclosure and a galvanized public. This combination can make the unfinished work of financial reform a reality, even in the face of tremendous opposition. It worked in Brandeis’ time, it worked in the wake of the 2008 financial crisis, and it can work again—hopefully, it won’t take another financial crisis to actualize it.

What a Little Sunlight Can Do

The Pujo Committee and Other People’s Money

After the panic of 1907, with the rise of the Progressive movement, the patriarch of the “House of Morgan” banking dynasty J. Pierpont Morgan reluctantly launched a public relations offensive on behalf of his embattled bank.⁴ The move came after Congress launched the “Pujo Committee,” which was created to investigate the so-called “money trust” of elite Wall Street interests that exerted undo power over American finance. Brandeis, the arch-nemesis of the House of Morgan, relentlessly publicized the Committee’s work in a series of articles in Harper’s magazine in 1913.

Brandeis documented how the role of investment bankers grew from advising people on how to invest, to growing into giant trusts that acquired control over parts of American industry like the nation’s railroads. As bankers entrusted with the deposits of savers, investment bankers used “other people’s money” to make these vast acquisitions. He discussed how the bankers would try and manipulate stock prices to their benefit, and how by sitting on multiple Boards of Directors, bankers like J. Pierpont Morgan (of JPMorgan) and George F. Baker (of First National of New York) exercised vast control over American companies (both sat on forty-eight separate corporate boards).⁵ In 1914, Brandeis’ articles were complied into a book called Other People’s Money and How the Bankers Use It. The exposure the book generated helped rally public opinion against the largest banks, and ultimately led to the passage of the Clayton Antitrust Act of 1914.
But the influence and legacy of Brandeis’ writings on Pujo didn’t end there. When another banking crisis in 1929 sent the country into a massive Depression, the 1933 re-issue of *Other People’s Money* helped inspire the passage of the Glass-Steagall Act, which split the more boring commercial banking from the riskier investment banking, and forced the break-up of the House of Morgan into JPMorgan and Morgan Stanley. In a letter to then-chairman Thomas Lamont, future JPMorgan chairman Russell Leffingwell wrote of Glass-Steagall, “I have little doubt that [Brandeis] inspired it, or even drafted it.”

The separation of commercial from investment banking, along with other reforms of the time like the creation of the Securities and Exchange Commission, whose mission is to protect investors and ensure that companies are providing accurate disclosures (a cause Brandeis championed), ushered in a half century of financial stability, with the lowest rate of bank failures in U.S. history.

*The Fight to Illuminate the Fed’s Shadowy Emergency Lending*

Another piece of Brandeis’ economic legacy is his role in shaping the Federal Reserve. In the wake of the Pujo Committee, President Woodrow Wilson was confronted with two plans for creating a centralized bank. At a meeting at the White House on June 11, 2013, Wilson asked Brandeis to help him decide which plan to take.

The first plan, proposed by Representative Carter Glass and his advising economist Henry Parker Willis, was a modified version of a 1912 plan that emerged out of the National Monetary Commission, headed by Senator Nelson Aldrich (R-RI), and was widely favored by the banks. The Glass-Willis plan proposed a decentralized reserve system that would be privately held by a maximum of twenty independent banks.

The second plan formed when Secretary of State William Jennings Bryan, Senator Robert L. Owen (D-OK), and Treasury Secretary William McAdoo heard about Glass-Willis and feared the repercussions of allowing private banks to directly issue currency. The Bryan plan sought a compromise between a completely government-run central bank (which McAdoo wanted, but was seen as politically impossible) and the more privatized
system offered by Glass-Willis. Private banks would participate in the system, issue Federal Reserve Notes that were government obligations, and the members of its governing body, the Federal Reserve Board, would be appointed by the President and confirmed by the Senate.

It was Brandeis who helped convince Wilson to move forward with the Bryan plan over Glass-Willis. Brandeis had hoped the proposed private/public blend for the Federal Reserve would deter both overt government control and overt private control. But Brandeis was quickly disappointed by the way Wilson implemented the new Federal Reserve Board. As Philippa Strum documents in her biography of Brandeis, Brandeis and other progressives were “horrified at Wilson’s appointment of bankers to the Federal Reserve Board, a move that delighted the business community.” One can imagine that Brandeis might have been similarly horrified by the actions the Fed took to fight the disclosure of the extent of its emergency lending during the financial crisis, but equally pleased with the muckrakers who fought tirelessly to expose it, bringing new and important reforms in the wake of their hard-fought disclosure.

From 2007 to 2010, the Fed provided billions and billions of dollars in emergency assistance each day to troubled institutions—with the amount of assistance they provided peaking on December 5, 2008 at a staggering $1.2 trillion. The assistance consisted of loans and other liquidity programs, and the Fed provided it not just to failing U.S. banks, but also to foreign-owned banks, and non-financial firms like Caterpillar and Toyota. These programs were completely separate from the $700 billion Troubled Asset Relief Program (TARP) bailout, and its beneficiaries were completely undisclosed to Congress at the time. We only know the full details of these programs because of the diligence and perseverance of the late Mark Pittman, and the rest of the Bloomberg News team.

Part of the very Federal Reserve Act that Brandeis helped to create allowed this extensive secret bailout to occur—although the relevant language was first added in 1932, many years after the initial passage that Brandeis had influenced, and evolved over time. Section 13(3) of the Federal Reserve Act allows the central bank in “unusual and exigent
circumstances” to provide emergency loans and other assistance to banks and, as of 1991, to non-banks as well.¹⁷

In Other People’s Money, Brandeis famously wrote, “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”¹⁸ Perhaps that is why the Fed fought so vociferously to keep secret just how unstable hundreds of firms were during the worst parts of the financial crisis—they feared the outcomes transparency would bring.

The Bloomberg team knew that the Fed was giving out loans—but they didn’t know who was actually getting the money, as the data was all compiled in aggregate. So Bloomberg News filed a Freedom of Information Act (FOIA) request to find out which firms the Fed was loaning money to through these programs. The Fed refused to disclose it, arguing that most relevant documents were at the New York Fed, who they alleged wasn’t subject to FOIA law.¹⁹ So on November 7, 2008 Bloomberg LP sued the Fed, and as Bob Ivry documents in his book The Seven Sins of Wall Street, a protracted legal battle began.

In April 2009, Judge Loretta Preska of the Southern District of New York ruled that the Fed should hand over the loan information. The Clearing House Association, a 156-year-old group of the biggest banks in the U.S., joined the Fed to appeal Preska’s decision.²⁰ In May 2010, the court of appeals ruled in favor of Bloomberg. At this point, the Fed finally gave in, and decided not to appeal. That left only the big U.S. banks in the form of the Clearing House Association to fight it, and they did, appealing the decision at all the way to the Supreme Court.

On March 21, 2011, the Supreme Court refused to take the case. The Fed was forced to send Bloomberg their data on the extent of emergency lending during the crisis—which they chose to do in 29,000 pages of PDFs.²¹ After painstakingly copying the data into a more usable and parse-able electronic format the Bloomberg team carefully compiled their findings in 2011, along with a stunning interactive website that allows visitors to search by company name and explore the extent of the loans and assistance the
Fed gave the firm. Unfortunately, Mark Pittman wasn’t able to see the fruits of his labor, as he passed away in November 2009.

But the efforts of Pittman have found its legacy in law. Reforms to the emergency lending he tirelessly fought to document making their way into the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 1101 of Dodd-Frank specifies that extensions of credit by the Federal Reserve be limited to programs with “broad-based eligibility.” In other words, the Fed can no longer shovel billions and billions in emergency assistance to a single institution. But some lawmakers sought even further reforms to strengthen the protections against bailing out failing firms, in part in reaction to what many view as the Fed’s insufficiently rigorous interpretation of Section 1101 in their proposed rules. Senators Elizabeth Warren (D-MA) and David Vitter (R-LA) drafted bipartisan legislation with still clearer restrictions: Their bill, the Bailout Prevention Act, only allows the Fed to provide assistance to solvent firms, and it requires that the lending happen at a penalty rate. The Fed incorporated some of the Senators’ suggestions in its final version of a rule implementing Section 1101, but problems remain: for example, it still allows borrowers in need of emergency loans to self-certify their own solvency.

Had Congress known at the time about the trillions of dollars in low-interest loans the Fed provided (separate and apart from the $700 billion in TARP aid), far more sweeping reforms might been achieved. After all, the Fed’s secrecy during the crisis greatly benefited the biggest banks, enabling them to lie about their financial condition. On November 26, 2008, Bank of America (BAC)’s CEO Ken Lewis wrote to shareholders that BAC was “one of the strongest and most stable major banks in the world,” but didn’t mention that his firm owed the Federal Reserve $86 billion dollars that very day.

Former Democratic Senator Ted Kaufman told Bloomberg that if Congress had known at the time the extent of the help the Fed was providing, “he would have been able to line up more support for breaking up the biggest banks.” Kaufman’s proposal—a joint effort championed by Senator Sherrod Brown (D-OH)—was a modern version of Brandeis’ break-up proposal.
Brandeis argued that size could be restricted through taxation, and that “every business unit above a certain size should be forced to pay a tax large enough to be a burden for an inefficient mammoth.”

Rather than creating a tax, the Brown-Kaufman amendment would have created absolute limits on bank size, including a prohibition on any bank holding company holding more than 10 percent of the total insured deposits in the U.S., and on any bank having liabilities greater than 2 percent of G.D.P.

It should not have taken intrepid journalism to bring some sunlight to the Fed. And the co-operation of the Fed with the nation’s largest banks to suppress the full truth of their emergency lending shows the Fed being far too close with the financial firms they are meant to supervise. This would not have surprised Brandeis, who as Jeffrey Rosen notes, “understood the likelihood that federal officials who are given broad discretion to regulate the financial industry will be successfully defanged by the lobbying power of our financial oligarchy.”

But the spotlight created by the doggedness of Mark Pittman forced a policy change after public outrage (and a segment on the Fed lending on The Daily Show)—and that is a victory Brandeis would surely appreciate.

**Providing Disclosures for Consumers and Fighting Conflicts in Investments**

The close partnership Brandeis had with President Wilson allowed them to create a stunning legacy of economic reform. Today, President Obama is taking a step to ensure his own legacy when it comes to protecting America’s retirement savers from conflicted investment advice.

In *Other People’s Money*, Brandeis wrote of investment bankers violating the trust of small investors: “Advice cannot be unbiased where the banker, as part of the corporation’s management, has participated in the creation of the securities which are the subject of sale to the investor.”

Such conflicted advice remains today—and many of American’s retirement savers are not even aware such a conflict exists. In the United States, not all retirement advisors are bound to make recommendations that secure your financial future. Instead, some are able to take kickbacks from their firms in exchange for pushing certain products on their clients—whether or not they are in their best interest.
The Council of Economic Advisers estimates that the bad advice these kickbacks incentivize cost Americans $17 billion a year.31

To address this problem, President Obama has backed a plan by the Department of Labor to reduce the harmful impact of conflicts-of-interest by closing loopholes in the fiduciary standard—in other words, by requiring all retirement advisers to act in their customers’ best interests. The White House’s involvement has brought significant new media attention to the issue. In February of 2015, the President teamed up with AARP, financial advocacy groups, and Senator Elizabeth Warren to host a press event lauding the importance of the rule.32 From publishing extensive information about the importance of the rule to the White House website,33 to directing the Council of Economic Advisors to measure the impact of conflicted retirement advice, the President has made this fight his own, which has helped to rally additional political support among his party.

The support will be needed; the modest proposal has unleashed a firestorm of industry lobbying against it. One of the proposal’s fiercest critics is Rep. Ann Wagner (R-MO). She has sponsored multiple bills that would effectively kill the Department of Labor’s proposal by delaying it indefinitely. She told a group of 800 insurance brokers and executives that she was “at war with the Department of Labor” and that she is willing to cut off funding for the Department if they don’t back off from the rule, saying to applause in the room full of brokers and executives, “If push comes to shove . . . by god, we’ll just defund them.”34

Brandeis was focused on disclosures because he believed in the importance of an informed citizenry. He also thought that such disclosures to investors, if they were truly accurate, could help break the power of the financial oligarchy, as investors would be able to hold banks to account: “To be effective, knowledge of the facts must be actually brought home to the investor, and this can best be done by requiring the facts to be stated in good, large type in every notice, circular, letter and advertisement inviting the investor to purchase. Compliance with this requirement should also be obligatory, and not something the investor could waive.”35
Although Brandeis was speaking about investors, not consumers, his comments seem prescient when reviewing the passage in 2009 of the Credit Card Accountability Responsibility and Disclosure (CARD) Act. The CARD Act was meant to curtail some of the worst practices in the credit card industry, such as imposing penalty APRs on consumers who were as little as one hour late, or changing the card’s APR and applying that new interest rate retroactively to balances incurred prior to the rate change. The CARD Act prohibited these practices, and also directed companies to standardize the way they presented the interest rate—in easy-to-understand language and in large type.

Brandeis’ consumer advocacy also led to his fighting for the creation of the Federal Trade Commission (FTC), which is particularly appropriate given that a little less than a century later, the Consumer Financial Protection Bureau (CFPB) would come into being as a new regulator created by Dodd-Frank to ensure consumer financial markets are fair, transparent, and competitive. The Bureau notes on its website that “an informed consumer is the first line of defense against abusive practices”—a very Brandeisian notion. Two ways they are pursuing that are through new disclosures on mortgage loans, and an online database, which allows customers to see what sorts of complaints have been filed with them against a given financial firm. But, the CFPB’s mission is broader than the disclosure-centered solutions Brandeis proposed for consumers. The CFPB also has the authority to bring enforcement actions against firms that violate federal consumer financial laws. In its short life, the CFPB has already returned over $11.2 billion to 25.5 million Americans scammed by their financial companies.

The CFPB was the brainchild of a Harvard law professor specializing in bankruptcy who served on the Congressional Oversight Panel that monitored the administrations implementation of the $700 billion TARP bailout. Elizabeth Warren, whose work and writings have been compared to Brandeis, tirelessly championed the CFPB in the press, on television appearances, and in Washington, and helped ensure it was included in Dodd-Frank. For her advocacy, Warren, like Brandeis did in his time, has earned the ire of the financial sector she works to reform. Both Warren and Brandeis were the targets of paid advertising campaigns against them. The New Haven railroad that Brandeis fought
to break up “paid for a series of anti-Brandeis articles in newspapers and magazines and the services of a Harvard Law School professor who delivered supposedly scholarly lectures on the virtues of the New Haven.” Warren is no stranger to such tactics. She was attacked in an advertisement run during the November GOP Presidential Debate, and she has criticized the very scholar-for-pay model New Haven deployed to attack Brandeis.

Warren was the natural choice to run the new Bureau after Dodd-Frank was signed into law, but like Brandeis himself, was vehemently opposed by the banking sector. Her would-be nomination became an extended fight, as ugly as the fight for Brandeis to serve on the Supreme Court. But unlike Brandeis, in the end she was not given a nomination. She made her way to Washington anyway, winning a seat in the Senate in the 2012 election. There, she has given barn-burning speeches on the Senate floor, railing against the political power of Citigroup, that are reminiscent of Brandeis’ long campaign against the concentrated political power of JP Morgan.

Despite these many victories—from wringing transparency out of the Fed to an entire agency dedicated to protecting consumers—much remains to be done. The banks still wield enormous economic power, and they increased it beginning in the 1980s through a steady drumbeat of deregulation.

Growing Large in the Shadows

The Return of the “Curse of Bigness”

In Other People’s Money, Brandeis describes how concentrations of power that threaten democracy do not happen overnight. “Usurpation,” Brandeis writes, proceeds “by gradual encroachment rather than by violent acts” that are “subtle and often long-concealed.” Brandeis tells us that it was by these sorts of slow and steady moves that “Caesar Augustus became master of Rome.”

This slow and steady usurpation of power by the financial sector that Brandeis described occurred in banking regulation in the 1980s and 1990s with little fanfare and public scrutiny. A banking regulator less known by the public—the Office of the
Comptroller of the Currency (OCC)—played a central role in this drama in the mid-1980s. In her paper “The Quiet Metamorphisis,” Cornell Law Professor Saule Omarova painstakingly documented the slow erosion of restrictions on commercial banks, and how these erosions have helped banks to consolidate power. The OCC began broadly interpreting the “business of banking” to mean dealing in any kind of financial risk, allowing commercial banks to begin dealing in riskier products like derivatives, which are largely traded off of centralized exchanges, in “over-the-counter” markets that are hidden from the public. As Omarova writes, the transformations happened in the shadows: “It was not the highly visible acts of Congress but the seemingly mundane and often nontransparent actions of regulatory agencies that empowered the great transformation of the U.S. commercial banks from traditionally conservative deposit-taking and lending businesses into providers of wholesale financial risk management and intermediation services.” But everything came to a head in 1998, when Travelers Insurance and Citicorp merged to form the largest corporation ever: the behemoth Citigroup with $700 billion in assets. The merging of an insurance company and a bank violated the 1956 Bank Holding Company Act. Sandy Weill moved ahead anyway because current law allowed for a two to five year window to come into compliance, and he believed the law would change prior to that window being over.

Weill was right. The final nail in the coffin of Glass-Steagall came with the signing in 1999 of the Gramm-Leach-Bliley Act. The law’s proponents proclaimed that we were in a new, more modern era of banking, and that the old rules didn’t apply. Bankers and politicians, from Travelers’ Chairman Sanford “Sandy” Weill to Citigroup Chairman John Reed, from Treasury Secretary Robert Rubin to President Bill Clinton, all failed to heed Brandeis’ warnings.

A period of extreme consolidation of banks followed, as firms merged to create “financial supermarkets” that combined all aspects of financial services into one institution: banking, insurance, mortgages, credit cards, investment banking, brokerage services, and mutual funds. According to Jeffrey Rosen in American Prophet, these new concentrations of financial companies “surpassed even the concentrations that galvanized
Brandeis during the Progressive Era.” Rosen also points to a 2011 Fox Business interview with Thomas Hoenig, who is now vice chairman of the Federal Deposit Insurance Corporation (FDIC) but was the president of the Federal Reserve Bank of Kansas City at the time. Hoenig said that following overturn of Glass-Steagall “the largest 20 institutions of this country went from controlling 35 percent of the financial assets in this country to 70 percent.”48

This dramatic concentration of economic power came to an infamous head during the 2008 financial crisis, when the U.S. government rescued the nation’s biggest banks from a disaster brought on by their own excessive risk taking, hyper short-termism, and predatory lending.

**Wall Street’s Control of Physical Commodity Markets**

But Gramm-Leach-Blilely didn’t just allow the nation’s banking system to consolidate. It also allowed banks to quietly expand into activities totally outside the traditional realm of banking—with little to no disclosures to the public required about them.

Prior to 1999, the Bank Holding Company Act (BHCA) of 1956 restricted bank involvement in non-banking business activities like mining and storing metals or running power plants. But Gramm-Leach-Bliley amended the BHCA and rolled back these restrictions. Again, we turn to Professor Omarova, who documents the deregulation and the dangers it presents in the pinnacle paper on the topic, *Merchants of Wall Street: Banking, Commerce and Commodities.* After Gramm-Leach-Bliley, the Federal Reserve could grant banks permission to conduct non-banking business through new structures called “financial holding companies.” So long as the non-banking business was deemed to be “complementary” to their financial activities, and didn’t threaten the “safety or soundness” of either the bank of the financial system as a whole, the Fed could approve the activity.49

But Wall Street’s participation in these markets has led to allegations of everything from artificially driving up prices to costing consumers millions in ill-gotten fees. The global risk manager at beer-maker MillerCoors told a Senate Subcommittee that
Goldman and JPMorgan—who control aluminum warehouses—were purposely delaying deliveries in order to maximize profits. The longer the aluminum stays in the warehouses, the more MillerCoors has to pay in rent.\textsuperscript{50} Coca-Cola, who also needs aluminum for the cans its drinks come in, has faced similar problems.\textsuperscript{51} These beverage manufactures have accused a “cadre of Wall Street banks” of artificially inflating the price of aluminum by as much as $6 billion.\textsuperscript{52} News reports have shown that zinc has been affected by the same problem.\textsuperscript{53} Finally, the Federal Energy Regulatory Commission accused JPMorgan of manipulating power markets in California and the Midwest from 2010 to 2012,\textsuperscript{54} which cost those consumers $125 million. JPMorgan paid $410 million to settle the allegations.\textsuperscript{55}

In addition, serious conflicts of interest have arisen as banks simultaneously own the raw materials, their storage facilities or mining operations, and trade them on behalf of clients. For example, in 2014 Reuters found that Morgan Stanley owned three power plants—giving its energy traders special insight into the power markets.\textsuperscript{56} It begs Brandeis’ question from a century ago, “Can there be real bargaining where the same man is on both sides of a trade?”\textsuperscript{57}

Omarova juxtaposes the problems with conducting physical commodities activities by the banks with Brandeis’ prior warnings, noting that Brandeis “famously warned against the dangers of combination . . . that gave financial institutions direct control over industrial enterprises.”\textsuperscript{58} Omarova continues:

By giving banks that are already “too-big-to-fail” an additional source of leverage over the economy—and, consequently, the polity—it elevates the dangers inherent in cross-sector concentration of economic power to a qualitatively new level. When large financial conglomerates that control access to money and credit also control access to such universal production inputs as raw materials and energy, their already outsized influence on the entire economic—and, by extension, political—system may reach alarming proportions.\textsuperscript{59}
The firms that the Fed has granted permission to conduct physical commodities activities under the complementary authority are among the nation’s largest banks: they include Citigroup, Goldman Sachs, Deutsche Bank, and JPMorgan. And while Deutsche Bank and JPMorgan have publicly said they intend to cease these activities, Citigroup and Goldman Sachs have publicly stated their intentions to either continue, or to grow their commodity activities.

This expansion is still poorly understood, and the public remains mostly in the dark about it, which is due to the serious lack of disclosure requirements. Brandeis would surely be horrified to learn that public disclosure only comes through a single metric supplied to the Board on a quarterly basis, and supplied to the Securities and Exchange Commission as a part of the quarterly reports they must file. Most of the transparency and insight to date have come only through press reports.

Former Senator Carl Levin (D-MI) and Senator Sherrod Brown (D-OH) have both fought to bring new light to these shadowy activities. Levin, acting in his capacity as Chairman of the Senate’s Permanent Subcommittee on Investigations, launched a two-year investigation into the issue, and found that both Goldman and JPMorgan can influence prices in the commodity markets. And Brown held two hearings about bank involvement in physical commodities in the Senate Committee on Banking, Housing, and Urban Affairs in the last two years. This Congressional scrutiny has put pressure on the Fed to act. In 2014, the Fed finally made some preliminary motions, and it has since claimed that it would propose new rules to address the problem. But at the time of this writing, no proposal has been released. In the meantime, a bipartisan coalition of Senators—Senators Elizabeth Warren (D-MA), John McCain (R-AZ), Angus King (I-ME), and Maria Cantwell (D-WA) have stopped waiting. As part of larger bill to restore the separation of commercial and investment banking (“The twenty-first-century Glass-Steagall Act”), the Senators have included language would repeal the portions of Gramm-Leach-Bliley that allow for banks to participate in physical commodities.
**Dominating the State: Post-Crisis Concentration and Unaccountability**

The consolidation that Gramm-Leach-Bliley began only accelerated after the financial crisis. The five biggest banks in 2015 were 38 percent larger than they were in 2008, a fact that Senator Elizabeth Warren (D-MA) is quick to repeat.\(^{67}\) Brandeis’ nemesis JPMorgan is the largest U.S. bank with $2.6 trillion in assets—a massive sum that’s nearly 15 percent of the United States 2014 Gross Domestic Product.\(^{68}\) This concentrated economic power also translates into political power: In the 2013–14 election cycle, Wall Street banks and financial interests reported spending more than $1.4 billion to influence decision-making in Washington.\(^{69}\)

Brandeis long feared that outsized firms would find many noxious uses for their bigness. In his Supreme Court dissent to *Liggett Co. v. Lee*, Brandeis got very specific about the risks. He wrote that by growing so large, corporations had developed “such concentration of economic power that so-called private corporations are sometimes able to dominate the state,” removing “many of the checks which formerly operated to curb the misuse of wealth and power.”\(^{70}\)

In the years since the 2008 financial crisis, the ability of banks to “dominate the state” remains on full display. None other than former Attorney General Eric Holder described the problem at a speech at New York Law School, where he said that in corporate America, “the buck still stops nowhere” when wrongdoing occurs, because “responsibility remains so diffuse, and top executives so insulated, that any misconduct could again be considered more a symptom of the institution’s culture than a result of the willful actions of any single individual.”\(^{71}\) But Holder’s remarks are very curious, since Congress and the Bush Administration passed the Sarbanes-Oxley Act (SOX) of 2003 to mitigate this exact problem in the wake of corporate accounting scandals.

In addition, the size and complexities of U.S. banks are things that the financial regulators have the tools to impact. And there are a number of ways the Attorney General could have held financial firms accountable for the crisis—bringing criminal cases against banks that illegally foreclosed on service members of the U.S. military, to name just one.\(^{72}\) Unfortunately, in too many instances, America’s law enforcement and
regulatory agencies not only fail to use the tools they possess that could limit bank size, they also sometimes work to ensure a soft landing for any bank guilty of malfeasance or mismanagement.

To take just a few examples: When the British multinational banking and financial services company HSBC was found to have laundered billions of dollars to drug cartels, the Department of Justice declined to pursue criminal charges, and instead allowed the bank to settle for $1.9 billion, an amount estimated at just five weeks income for the firm. After four banks were convicted in 2015 of conspiring to manipulate currency prices (by using chatrooms called “The Cartel” and “The Mafia,” no less) several regulators including the Securities and Exchange Commission (SEC) and the Department of Housing and Urban Development took drastic steps to waive any automatic penalties the banks’ criminal conviction would otherwise have triggered. And when Credit Suisse pled guilty in 2014 to helping American clients dodge U.S. taxes, the Department of Labor chose to waive away the automatic penalties triggered by the conviction. Following the granting of the waiver, a lawyer representing Credit Suisse sent an email to the Department with “thank you” repeated 600 times.

Regulators have tried to explain away the lack of consequences for banks’ crimes. At an event at the London School of Economics, Treasury Secretary Jack Lew said that the waivers regulators sometimes issue to overturn the consequences of convictions are there to “make sure that the impact of the penalties doesn’t have unintended consequences.” But Congress created automatic disqualifications that are triggered by criminal convictions for a reason—it was very much an intended consequence. Unfortunately, it’s an intended consequence that regulators continue to ignore.

Conclusion

Rather than waiting for another crisis, we must heed Brandeis’ call to break up concentrations of economic power, and we must create policy that prevents them from forming in the first place. In some sectors, firms are breaking themselves up voluntarily. In 2014, Hewlett-Packard made the decision to split itself into two companies: one that
would focus on PCs and printers (HP, Inc), and another that would focus on providing services and hardware to businesses (Hewlett-Packard Enterprise). Activist investor Carl Ichan successfully pressured eBay to spin off its payment processor PayPal. And IBM “routinely sheds big units that no longer fit with its strategy.”

The financial services industry, however, is still bucking this trend. Bank CEOs of today laud their size as a virtue. JPMorgan CEO Jamie Dimon has spoken of the “huge benefits to size,” while Bank of America CEO Brian Moynihan has said they need to be large because “our clients are operating around the world.” They aren’t just larger. They are increasingly consolidating the most important management of their sprawling firms in a single individual: five out of six of the largest U.S. banks have their CEO also serving as chairman of the board. But change may not be as hard as it seems.

In the years following the 2008 financial crisis, some of the very executives who benefitted from the undoing of pieces of Brandeis’ economic legacy have found that Brandeis’ “curse of bigness” was not a misnomer. First, there was Sanford “Sandy” Weill, who in 2012, to the visible shock of the news anchors on the business channel CNBC, called for a return to the Glass-Steagall separation of commercial and investment banking. Then, in November 2015, former Chairman and Chief Executive of Citigroup Jack Reed wrote an op-ed for the Financial Times that not only said that overturning Glass-Steagall was a mistake, but, in comments that echo what Brandeis said over one hundred years ago, said that “there are very few cost efficiencies that come from the merger of functions—indeed, there may be none at all.” Reed explained that he and his fellow bankers were wrong to believe that “the larger the institution the more efficient it would be” and admitted that bigness may well drive up price:

It is possible that combining so much in a single bank makes services more expensive than if they were instead offered by smaller, specialized players . . . As I have reflected about the years since 1999, I think the lessons of Glass-Steagall and its repeal suggest that the universal banking model is inherently unstable and unworkable. No amount of restructuring, management change or regulation is ever likely to change that.”
With *mea culpas* from former bank executives, and a 2016 election that keeps asking of candidates, “Do you support bringing back Glass-Steagall,” or “will you break up the banks?” we are living in a moment that brings great opportunity to complete the unfinished business of financial reform.

Phillipa Strum wrote in *Justice for the People* that Louis Brandeis and President Woodrow Wilson were a “formidable team that changed the terms of political debate.” But she notes that they didn’t achieve all they set out to: “They would have liked the country to ask, ‘How can the trusts be destroyed?’ instead of ‘Should the trusts be controlled?’” Instead, they got the country to ask ‘How should the trusts be regulated?’

We can imagine that Brandeis probably would have similar concerns about the way Dodd-Frank dealt with bigness: by giving regulators tools they could use to break up the banks. Brandeis would have preferred the approach still championed by Senator Sherrod Brown, who has introduced legislation such as the Safe, Accountable, Fair, and Efficient (SAFE) Banking Act, and the Terminating Bailouts for Taxpayer Fairness (TBTF) Act, both of which would actually force such break ups.

But we can draw an important lesson in patience from the pace at which Brandeis managed to achieve his goal of breaking up corporate power that threatened democracy: Brandeis waged a nine-year war against the JPMorgan-controlled New Haven railroad, seeking to prevent a railroad monopoly from forming. As Strum notes, the battle began in 1905, and Brandeis “lost a number of rounds, including prevention of the New Haven–B&M merger, but eventually won the war in 1914 when President Wilson’s attorney general forced New Haven to give up both the B&M and all its trolley and steamship lines.” In 2015, we were seven years out from the financial crisis and five years out from Dodd-Frank. With the public spotlight and scrutiny that elections can bring in 2016, there are many reasons to be optimistic in the ongoing war against the “curse of bigness.”

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Notes

1. Phillipa Strum, *Louis D. Brandeis: Justice For The People* 134 (1984), (On Brandeis representing *Collier’s* magazine before a Congressional Committee charged with investigating the Ballinger-Pinchot affair: “It was obvious from the start that the committee would not be convinced by anything he proved, but that the public might be, Brandeis played to the press.”)


10. Strum, *supra* note 1 at 211.

11. *Id.*


21. *Ivry, supra note TKId.* at 59TK.<AU: complete. Done. AMG>>


26. *Id.*

27. Rosen, *supra* note 7 at 56.

28. *Id.*


35. Brandeis, supra note 2 at 71.


40. Strum, supra note 1 at 160.


44. Brandeis, supra note 2 at 4–5.


46. Id. at 1044.


51. Omarova, supra note 49 at 266–267.


57. Brandeis, supra note 2 at 8.

58. Omarova, Merchants, supra note 49 at 350.

59. Id.

60. Goldman Sachs, Shareholder Letter, 2013 Annual Report, available at http://www.goldmansachs.com/s/2013annualreport/shareholder-letter/?cid=corp-amplification-shareholderlettertwitter1 (“Some of our competitors may elect to deemphasize or exit some [Fixed Income, Currency and Commodities Client Execution] businesses, given their particular circumstances. But, we believe this is likely to increase the value that clients place on the services provided by those who remain, especially as broader economic activity rebounds and the trading environment improves.”).

61. Dakin Campbell and Elisa Martinuzzi, “Citigroup Bets on Commodities as Rivals Consider Retreat,” Bloomberg (Dec. 7, 2013), http://www.bloomberg.com/news/2013-12-07/citigroup-bets-on-commodities-as-rivals-consider-retreat.html (“We are only willing to do these transactions in situations where we feel comfortable owning that physical commodity if ultimately the client doesn’t buy it back,” [Jose Cogolludo, Citigroup’s global head of sales] said. “It makes no sense to own oil in a location where we have no ability to sell it.”)


63. Id, at 296.


65. Regulating Financial Holding Companies and Physical Commodities: Hearing before the Subcommittee On Financial Institutions And Consumer Protection of the Senate Committee on


70. Liggett Co. v. Lee, 288 U.S. 517 (1933) (Brandeis, J., dissenting)


77. Zachary Warmbrodt, Twitter (May 27, 2015, 8:10 AM EST), https://twitter.com/Zachary/status/603533671241523200 (“Lew says waivers for banks ‘make sure that the impact of the penalties doesn’t have unintended consequences’ https://www.politicopro.com/go/?wbid=54275”).


84. Id.

85. Strum, supra note 1 at 222.

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PART III:
PRIVACY, TECHNOLOGY
AND THE MODERN SELF
The Declining Significance of Home: Privacy “Whilst Quiet” and of No Use to Artists or Anyone

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Which is more important, privacy or art? In New York City, home to many artists and aspiring artists from around the world, the answer is clear: art. One enters juridical public spaces—say, Times Square—potentially objectified as someone’s art subject (so, the modest or reserved had best go about veiled). Despite traces of “home is castle” discourse throughout American law, under New York state law, one’s actual home—say, the Zinc Building in Tribeca—is insecure and non-exclusive, open to artists by legal rules that elevate voyeuristic, contemporary, fine art photography and videography above what Louis Brandeis called the “inviolate personality.”

Arne Svenson is a fine arts photographer. His photographs have been exhibited in the US and in Europe. According to New York state court documents, in 2012 a friend who was a bird watcher gave Svenson a telephoto camera lens.¹ Svenson used the lens to photograph the people living near him in the Zinc Building in Tribeca.² The Zinc Building has a largely glass facade, and each apartment has large windows. The vertical and horizontal arrangement of rectangular windows is reminiscent of the iconic paintings of modernist Piet Mondrian. Hiding in the shadows of his residence, for about a year Svenson photographed Zinc Building residents of all ages without their knowledge. He
eventually selected some of the pictures he shot for display in Los Angeles and New York galleries: “The Neighbors” first opened in 2013 at the Julie Saul Gallery in New York.

One might suppose that such a project raised major privacy concerns for the artist. But instead, “the exhibit’s promotional materials on the artist’s website stated that for his ‘subjects there is no question of privacy; they are performing behind a transparent scrim on a stage of their own creation with the curtain raised high.’”\(^3\) Discounting ordinary expectations of privacy in this mythic, intellectualized disclaimer of voluntarism, Svenson further explained in his own defense that his “performing” subjects did not know they were being photographed, and that he took care to remain in the shadows within his apartment as he shot into theirs. Apparently a reporter for the *New Yorker* joined Svenson as he surreptitiously photographed some people, including a “little girl, dancing in her tiara; half naked.”\(^4\)

**Home as Castle**

Though no guarantor of repose, an American’s home is often at the center of their intimate lives. It is a domain culturally marked for the enjoyment of the highest expectations of physical privacy from strangers. The idea of a household whose physical walls define political limits and opportunities came to North America as a transplant of English law, only to be used as ammunition against British colonial authority. A Massachusetts lawyer and inspiration for patriots of the American Revolution, James Otis is chiefly remembered for a five-hour speech he delivered in Boston in February 1761. It was an oration in *Paxton’s Case*, against the issuance of certain “writs of assistance.”\(^5\) When issued, the writs that Otis objected to would allow British officials broad and long-term authority to enter and search the colonists’ private homes and businesses. Otis asserted in the famous speech that “one of the most essential branches of English liberty is the freedom of one’s house. A man’s house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle.”
Louis D. Brandeis is famous as the first Jewish member of the United States Supreme Court and for his intellectual role in shaping the jurisprudence of privacy. An 1890 *Harvard Law Review* article persuasively made the case for a common law “right to privacy.” This rhetorically powerful article, coauthored with his legal colleague Samuel D. Warren, warned against “intrusion upon the domestic circle” through business methods and technologies that lead to publication of intimacies and secrets. Warren and Brandeis urged the courts to deter publication in newspapers of gossip and photographs of the sort that “invaded the sacred precincts of private and domestic life” and thereby injured “inviolate personality.” The successful article inspired many twentieth-century state courts to adopt the privacy rights against unwanted, highly offensive publications and intrusions, especially those that open up home life to scrutiny. And while New York’s high court has never embraced the full panoply of common law privacy states that most other states have adopted, it was the very first to enact a right to privacy statute, New York Civil Law 50 and 51, creating civil liability for appropriation of name or likeness for trade or commercial purposes.

When it came to articulating the significance of a private sphere in association with the home, no one in the last century except Justice Louis Brandeis himself in *Olmstead v. United States*, surpassed political philosopher Hannah Arendt in insight about the “sanctity of the hearth.” In *The Human Condition*, Arendt narrates an ancient history of the Western world, still relevant today, in which we are driven together behind the walls of the *oikos* by biological wants and needs, our escape into the *polis* depending upon mastery of households of our own that are materially grand enough to define us as persons worthy of participation in civic governance. A refugee to America from Hitler’s Europe, for a time Arendt went so far as to oppose mandatory public school integration in Little Rock because she thought the privacy of families meant the federal government should not interfere with racist educational preferences. Brandeis never thought the privacy of the home was as expansive as all that.
Quiet

History remembers James Otis’s venerated pronouncement that “a man’s house is his castle.” But it has tended to forget the qualifier: that a person in his castle is “well-guarded” (only) “whilst he is quiet.” That is, Otis interprets “freedom of one’s house” as both essential and as not absolute. For once a man (or woman) at home fails to be “quiet,” they cannot expect to be let alone by others. They invite entry and intrusion.

As a general matter, this analysis of the privacy of the home makes sense. Imagine that I lean out of an open window at my house and for hours shout obscenities at passers-by. Well, then passersby may shout back, throw things at me, or call the police. Who could much blame them? If I persist, authorities are justified in coming into my house to investigate the cause of my anti-social behavior, even taking me to a jail or a hospital. I am not being quiet. I have therefore forfeited the freedom of my house; I have called attention to myself, signaling that I do not want the privacy homes afford.

Or suppose that I throw a party, blasting loud music far into the night. Here, too, the authorities may penetrate the curtilage, come inside my dwelling to check things out. The police would be warranted in coming inside a rowdy house to issue a warning or to break things up for the night. Why is the interference warranted? It is warranted because the occupants are not quiet. By being noisy, one has forfeited the “freedom of one’s house” to which one was presumptively entitled.

But the failure to be quiet in the literal, aural, sense is not the only condition that qualifies the privacy of the home. Otis was surely making a more general point that our Anglo legal tradition calls for strong protection of the home (hence his castle metaphor) but that protection is subject to our cooperative self-concealment, our not being a nuisance to others, and our being otherwise law-abiding (hence the quietude qualifier).

In a free society everyone should be able to expect the freedom of their houses—meaning the privacy of their homes, and privacy while at their home. The Fourth Amendment warrant requirement enshrines such an ideal. Moreover, an international “home is castle” ideal is symbolized by the influential Article 12 of the United Nations Declaration of Human Rights (1945); Article 17 of the International Covenant on Civil
and Political Rights (1966); Article 8 of the Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms; and Article 7 of the Charter of Fundamental Rights of the European Union. These decry arbitrary interference with or attacks on privacy, family, home, correspondence and communications, along with attacks on honor and reputation. “Everyone has the right to the protection of the law against such interference or attacks.”

As in the United States, in Europe a person’s home is supposed to be a “castle.” Parties have appealed to Article 8 in European Court of Human Rights cases to defend a wide range of interests related to homes and intimate life. In the case law of the Court of Human Rights, the term “home” applies to houses, apartments, and other residences. In *Buckley v. UK* (1996), the Court’s majority recognized the mobile trailer of a Roma family as a “home” protected under Article 8 of the European Convention. The Court concluded, though, that Article 8 had not been violated when permission was denied to the assembly of a large caravan.\(^\text{13}\) In *Camenzind v. Switzerland* (1997), a leading case concerning search and seizure, the European Court of Human Rights recognized that home searches may be “in accordance with the law,” pursued for aims consistent with the Convention’s tolerance of measures necessary for “prevention of disorder or crime” and proportionate.\(^\text{14}\) In a striking judgment of a completely different variety, in *Lopez Ostra v. Spain* (1994), the Court of Human Rights extended the right to the privacy of the home to freedom from environmental pollution caused by a waste treatment plant.\(^\text{15}\) The essence of the judgment was that severe environmental pollution may adversely affect the enjoyment of private lives and family health.

While accepting the “home is castle” principle, most people in the US, Europe and the UK simultaneously embrace a pragmatic “quietude qualifier.” The quietude qualifier is a cornerstone of the way American law and the judges who interpret it have tended to think about the privacy of the home. Under the qualifier, one no longer merits privacy protection against “interference or attacks” when one either (1) breaches the peace in some way and one’s privacy becomes a danger to society (kill someone and try to hide the body in the basement); or (2) one exposes one’s self, voluntarily, signaling to others
that one is willing to be known, seen, heard, smelled, or felt (host a lively holiday party and invite the whole neighborhood).

_Not Useful_

So far it sounds like all anyone has to worry about if they want legally protected privacy at home is whether they are “quiet.” But this is not so. In a suggestive analysis, Ken I. Kersch has argued that the American state—different from both the “rural and agricultural” and the “urban and industrial” state—is now a “corporate-administrative” capitalist state, whose success depends on detailed knowledge of who and what it must manage and control. According to his theory, anything invisible or in a dark corner is a potential threat or impediment. Granular access to personal life is in the interest of the state; thus we could expect the quietude qualifier to be subject to expansive, permissive interpretations that free the hands of industry and government. What gets defined as harmful to society could come dangerously close to knowing no bounds. What counts as a voluntary waiver or forfeiture of privacy could come perilously close to being considered just about anything anybody does that increases accessibility to another human being, such opening a curtain to get a bit of natural light.

If I want privacy, I have to worry not only whether I am quiet enough, but also whether I am useless enough. No matter how quiet I am, in today’s world, I cannot expect privacy if knowledge about me may be _useful_ to others. In an article in the June 28, 2015, _New York Times_ about US national security laws, the Foreign Intelligence Surveillance Court, and the Obama administration, the author pointed to what he felt is a trend in thinking about surveillance: anything useful to government has come to be fair game; in particular, “because massive sets of metadata are useful . . . they are relevant [to public order], even though they draw almost exclusively on the private lives of innocent people.”

Is it as bad all that? If my private life is useful to others, does it matter whether I am law-abiding and self-concealed? Does the presumptive status of home-as-castle yield whenever breaching our walls is useful to a government agency, a business, or a fellow
citizen with clout? If so, the James Otis of today would be reduced to saying that “A man’s house is his castle; and whilst he is quiet or of no use to government or big business or important people, he is as well guarded as a prince or princess in their castle.” I will come back to this.

A Popular Metaphor in the Law

The home-as-castle trope is both in old law and in new law: homes are exclusive, secure, and private. (They are also sentimentalized as warm and nurturing.) In the United States, our Supreme Court has issued many important decisions in which the Court stresses the importance of the privacy of the home and the measures that individuals and the state may take to protect it. Justice Louis Brandeis was among the first jurists to emphasize the importance of limiting access to the home and to telephonic communications because of the value of privacy to civility. In 1928 in *Olmstead v. US*, he warned of the technologies that threatened the home then, and would threaten it in the future: “Discovery and invention have made it possible . . . to obtain disclosure . . . of what is whispered . . . Ways may someday be developed by which . . . it will be enabled to expose . . . the most intimate occurrences of the home.”

The Fourth Amendment, he felt, was an important constraint on official uses of technology to invade the home. Brandeis is aptly considered a parent of American privacy for his generative role in articulating the need for a common-law right to privacy to protect what he referred to as the “sacred precincts of private and domestic life.” The language Justice Brandeis used in 1928 to describe privacy as a constitutional value in his *Olmstead* dissent, attacking warrantless wiretapping, strongly echoes the language he used to describe privacy as a general common-law value in the opening paragraphs of “The Right to Privacy” in 1890. In both places he speaks of the importance of “man’s spiritual nature” and of regard for “his feelings and his intellect.” In the *Harvard* article he observed that: “Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that “what is whispered in the closet shall be proclaimed from the house-tops.” And now
we see in the New York law of privacy and art, which I address herein, judges effectively blowing the roofs off of our houses, so that all can freely see what is inside.

**Without Castles, without Constitutional Liberty**

The opinion of Judge Andrew Jackson Cobb, in the first US state supreme court case to recognize a common law right to privacy in 1906, compared the privacy invasion of using someone’s photograph without their permission in an advertisement to enslavement. Imagine a merciless master dragging his slave into the public streets against the fibers of his will. Why does privacy matter? The answer could be put in the form of a counter question: Why does liberty itself matter?

Although the US Supreme Court has emphasized that the right to privacy is not limited to the home as such—it even applies to conversations in a phone booth—it even applies to conversations in a phone booth its justices have continued into the twenty-first century in rhetoric and holdings to the elevate the home as the place where the strongest privacy rights obtain as against the state and private actors. And the concerns about technology, which worried Justice Brandeis, remain salient worries for our contemporary Supreme Court justices. Thus the Court concluded in *Kyllo v. United States* (2001) that when the government uses a technology, such as thermal imaging devices not in general public use, to “explore details of the home that would previously not have been knowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.” Justice Scalia feared thermal imaging might reveal details of the “lady in her bath.” (Recall how privacy got its gender.) Justice Scalia later opined in the *Heller* decision, striking down gun control laws in the District of Columbia, that the Second Amendment elevates “above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”

Looking back, the variety of contexts in which the Supreme Court historically has drawn upon the privacy-of-the-home ideal is remarkable. Viewing adult obscenity, unlawful outside the home, is lawful inside the home under the Court’s ruling in *Stanley v. Georgia* (1968), the opinion delivered by Justice Thurgood Marshall. In explaining
why abortion protesters’ free speech rights cannot immunize them from a local ordinance, the Court wrote in *Frisby v. Shultz* (1988): “The type of picketers banned . . . intrude upon the targeted resident, and do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy . . .”

In the Court’s historic *Obergefell* decision in 2015, legalizing same-sex marriages nation-wide, the home was a central and sentimental image—respect for equal dignity of marriage allows same-sex couples to create and enjoy homes of their own.

Wrote Justice Kennedy, quoting precedent: “The Court has recognized . . . as a unified whole”: “[T]he right to ‘marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause.”

Before *Obergefell*, Professor Carlos Ball argued that “The Court’s ‘geographization’ of sexual liberty has resulted in the protection of sexual conduct that takes place in the home (and, presumably, in analogous sites such as hotel rooms) while leaving unprotected sexual conduct that occurs in public sites” such as restrooms. His point was that for gay men neither sex at home nor sex outside of the home was deemed legitimate and worthy of legal protection. Progressive critics notice that *Obergefell* confers marriage and domesticity to homosexual couples without doing anything to end the “geographization” of sexual privacy, represented by its continued association of proper sex within hearth and home.

**Realism About Homes**

Now, we all know that the ideal of the privacy of the home is at odds with reality. Too many people do not have homes at all (look around the streets of Paris or Washington DC), and the condition for people inside the home is not a condition of meaningful solitude or security as a result of sharing, caregiving, or even domination and control. Marriage is considered a private relationship, yet governments require licenses and medical tests, impose age limits, and prohibit polygamous and incestuous marriages. Procreation and childrearing are considered private, but government child-abuse and
neglect laws regulate, if at times inadequately, how parents and guardians must exercise their responsibilities. The private sphere can only be understood as a set of entitlements to be relatively free of the most direct forms of outside intrusion, interference and constraint.

In late nineteenth century intellectual E. L. Godkin offered a dose of realism and reminded his audiences that privacy of the home is a distinctive product of modernity and a luxury at that. Private homes do not deliver privacy in fact, but that has done little to curb the romance: As Godkin observed, and it is still true today, “To have a house of one’s own is the ambition of nearly all civilized men and women, and the reason which most makes them enjoy it is the opportunity it affords to decide for themselves how much or how little publicity should surround their daily lives.” In an 1898 book, *Women and Economics*, the utopian feminist Charlotte Perkins Gilman, took on the myth of homes as intimate havens. She explained that how much privacy and intimacy a person is able to enjoy at home depends not only on the architecture of the home and the ability to avoid the attention of newspapers and gossips, but also on the responsibilities, personalities, needs, ages, and genders of a home’s co-inhabitants. But rather than reject the home, Gilman proposed changes in domestic organization and the status of women to better realize the “fond ideal” of the family home. Her beef was not with “loving home” but with the perpetuation of a certain “kind of a home and in the kind of womanhood that it fosters.”

**Declining Significance of the Home**

We may need the “fond ideal” more than ever. Government and private sector surveillance cameras line the street. The internet-linked cameras of friend, foe, and stranger are ubiquitous. Employers monitor us, online and offline, throughout the workday. Group life is all about homogenizing consumerism and celebrity. If not privacy at home, then where can the inviolate personality grow and renew itself?

The castle metaphor and myth lives on in constitutional jurisprudence and ordinary life. And so does the quietude qualifier. But there are important questions, suggested by
recent legal disputes implicating state privacy law, about how we understand the condition of quietude that should protect us from interference or attack. When is a person in her home really protected from assaults on privacy? In the age of social media, revenge porn, meta-data collection, big data and the “internet of things” that even has our thermostats, televisions, and refrigerators online and speaking to the outside world—what kinds of privacy of the home have we not forfeited?

Useful to Others

State privacy law is telling us that being quiet doesn’t matter if we are useful to business, government, or other people. A family, the Borings, lost a tort case in which they claimed that Google Street View, by coming onto their secluded private road to photograph their house and post the image on its popular website, invaded their privacy. They eventually won a pitiful $1 award on a trespass claim against Google, but they lost their privacy case and an appeal. With respect to the Boring’s privacy intrusion claim, the court found that: “No person of ordinary sensibilities would be shamed, humiliated, or have suffered mentally as a result of a vehicle entering into his or her ungated driveway and photographing the view from there. . . . Indeed, the privacy allegedly intruded upon was the external view of the Borings’ house, garage, and pool—a view that would be seen by any person who entered onto their driveway, including a visitor or a delivery man. Thus, what really seems to be at the heart of the complaint is . . . the photographic image captured at that time. The existence of that image, though, does not in itself rise to the level of an intrusion that could reasonably be called highly offensive.” Though engaging in lawful activity, the Borings are no more entitled to privacy with respect to the curtilage of their Pennsylvania home than would be the pot growers whose marijuana garden is visible to police from an airplane.

We are at the mercy of what our courts will deem highly offensive to a person of ordinary sensibilities. Who is that person? It could be the opportunistic straight guy in an intolerant community. In a Mississippi state law case from the late 1990’s a gay woman brought an invasion of privacy suit against the ex-husband of her lover. The ex-husband
crept up to her home, peered in her bedroom window, retrieved a camera from his car, and took photos of her intimate contact with his ex-wife. Remarkably the lesbian in her supposed castle lost to the peeping Tom. The judge wrote: “In the present case, Michael did want to file for modification of child custody. However, he had no proof that there actually was lesbian sexual relationship, which could be adversely affecting his minor child. In order to obtain such proof, he went to the cabin, peered through the window and took pictures of the two women engaged in sexual conduct. Three pictures were actually developed which were of Plaxico in a naked state from her waist up in her bed. Michael believed that he took these pictures for the sole purpose to protect his minor child. Although these actions were done without Plaxico’s consent, this conduct is not highly offensive to the ordinary person which would cause the reasonable person to object. In fact, most reasonable people would feel Michael’s actions were justified in order to protect the welfare of his minor child. Therefore, the elements necessary to establish the tort of intentional intrusion upon solitude or seclusion are not present.”

These two cases illustrate that that even when we are being quiet, our castles are not necessarily protected by law. A big company like Google, or our lover’s small-minded ex, can get away with using us for their own purposes. Artists can use us for their purposes, too, a point illustrated by Foster v. Svenson.

**Appropriated for Art**

Some of the Zinc Building neighbors, the Fosters, brought a law suit against Svenson, on the ground that their family members’ privacy rights under a Brandeis era New York law had been violated. New York Civil Law Sections 50 and 51 make persons civilly liable for the appropriation of others’ names or likeness for commercial or trade purposes. The Fosters managed to convince Svenson remove certain photos of their children from his exhibition. But they lost their court case completely, and lost again on appeal. The judges ruled against them on the law, unanimously. Neither taking the pictures, exhibiting the pictures in a gallery, nor advertising the exhibition and availability of the pictures for sale was an invasion of privacy under the statute:
Defendant’s used [sic] of the photos falls within the ambit of constitutionally protected conduct in the form of a work of art. . . . Indeed, plaintiffs concede on appeal that defendant, a renowned fine arts photographer, assembled the photographs into an exhibit that was shown in a public forum, an art gallery. Since the images themselves constitute the work of art, and art work is protected by the First Amendment, any advertising undertaken in connection with the promotion of the art work was permitted. Thus, under any reasonable view of the allegations, it cannot be inferred that plaintiffs’ images were used “for purpose of advertising” or “for purpose trade” within the meaning of the privacy statute. . . . [D]efendant’s conduct, however disturbing it may be, cannot properly, under the current state of the law, be deemed so “outrageous” that it went beyond decency and the protections of Civil Rights Law sections 50 and 51. To be sure, by our holding here—finding no viable cause of action for violation of the statutory right to privacy under these facts—we do not, in any way, mean to give short shrift to plaintiffs’ concerns. Undoubtedly, like plaintiffs, many people would be rightfully offended by the intrusive manner in which the photographs were taken in this case.34

Other voyeuristic artists have turned neighbors into objects for their own purposes in violation of common privacy expectations. Video artists Michel Auder has captured images that include a woman emerging from her bath35—the very thing Justice Scalia marked as a special concern in Kyllo. Auder has likened himself to one of those nature documentarians shooting beasts in the wild.36 Privacy just is not a meaningful concern when you can get some really interesting shots of apes, lions or zebras living naturally unaware of observation. The same is true of putting a camera on people. Yet people are animals with inviolate personalities, spiritual natures and religion.

Artist Philip-Lorca DiCorcia prevailed in a suit against a religious Hassidic Jewish man photographed as he walked through New York’s Times Square between 1999 and
2001. Mr. Nussenweig’s captivating photograph had been included without his knowledge or consent in an exhibition, “Heads.” In an amended complaint, Mr. Nussenweig explained how the display and sale of his photograph violated his religious faith and the Biblical ban against graven images. But the court utterly dismissed the considerations of the photographic subject’s religion or personal values as irrelevant under Sections 50 and 51. Under the court’s interpretation of the law, the central issue was whether the photograph was used without permission for trade or commercial purposes not incidental to its status as art.

I know that many people who hear about the Svenson case will side with the artist and the court. The point of the work is to interrogate the public-private distinction, some will argue in defense of the artist. Yet, Van Gogh interrogated that distinction a hundred years ago by painting pictures of his bed. And artists have been painting and sculpting and plasticizing vaginas for centuries. We get it. The private is beautiful, interesting, dangerous, nasty, depressing, forbidden. Do the ends of art justify the means of using living breathing people? Does every ethical boundary have to be crossed?

Another line of defense has weaknesses, too. You can’t have an expectation of privacy if you stand in an open the window, it is argued. The Zinc Building neighbors chose to appear in front of open windows, albeit, above street level, where they knew they and their children might in theory be observed standing squatting, reclining, running, caregiving, and so on. By this analysis, the residents were not “quiet”; they called attention to themselves. The social norms that they assumed would confer castledom on their glass houses proved illusory. A graduate student I encountered at Cornell’s School of Criticism and Theory last summer offered a twist on the argument that the Fosters brought this problem on themselves. She observed that the “privileged, rich” people living in this chic glass apartment building purchased the right to be seen conspicuously consuming Manhattan. The joke is on them that someone dared to take the photographs they assumed no one would dare to take of people like them, the non-slave class. Why should we (or the law) care about an affront to such privilege? Why should we care that the rich can be exploited, used, dominated like the rest of us?
The graduate student’s clever write-off cannot be correct, though. Glass architecture and big windows are indeed luxury items. But acquiring them does not in fairness end the purchaser’s entitlement to residential privacy, sunshine and fresh air. Enjoying light from within an apartment in a city cannot be deemed an utter forfeiture of expectations of privacy. When was that made the social or ethical norm? That it is not the social or ethical norm is what makes Svenson the kind of “bad boy” artist willing to exercise power over others to gain the edge the art world loves.38 We might do well to focus on the ethics of power grabs rather than the ethics of standing in front of a window in one’s residence.

The Foster neighbors lost their case against Svenson because they were useful to Svenson. The neighbors were useful to Svenson in the production of art qua art and art qua commodity. Mr. Erno Nussenweig was useful, too; but then, it seems to matter that he was photographed in Times Square and not spied on at home.39 The Borings were useful to Google in the production of a commodity, Google Street View. Plaxico was useful to Michaels in the preservation of heterosexual privilege. Home-as-castle says homes are private, exclusive, secure. But homes are not private, not exclusive, not secure if the lives inside are deemed not quiet and are quite useful to the right people and institutions.

People like the Neighbors, the Heads, the Borings, and Plaxico are to differing degrees dragged out of their homes and made subject to the gazes of others. Privacy invasions can feel like and be coercive limits on liberty. The victim of a commercial appropriation of likeness is like a slave to a merciless master. Why does privacy matter? It is the opposite of slavery. The characteristic activities of the household (Hannah Arendt offered an enlightening account) carry the aura of appropriately private activities, even though the modern state can respect no impervious boundary at the threshold. Collective welfare, sometimes justifies incursions into home life.

Yet opportunities for privacy are vital for personality, character, reputation, relaxation, creativity, reflection, civility, and intense intimate relationships.40 Privacy affords groups of like-minded individuals the opportunity to plan undertakings and live in
harmony with their own preferences and traditions. Respect for privacy is, in many ways, respect for human dignity itself. Moreover, because self-governing communities benefit from the psychological wellbeing and independent judgments of their members, privacy is distinctly a social good. The liberal democratic way of life requires public policies that are mindful of the subtle and cumulative threats to privacy—including fine art photography.

In an increasing variety of ways, our lives are being emptied of privacy, especially physical and informational privacy. Liberal government will have to proscribe and regulate data collection, disclosure, publication, and retention in the interest of preventing cumulatively harmful diminutions of the taste for or the expectation of privacy. If we care about Brandeis’ inviolate personality and meaningful liberal democracy, our courts are well advised to make sure that the excuses for interfering with the privacy of the home identified in this essay—the “unquiet” excuse and the “useful to others” excuse—are kept in check.

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Notes

1. *Foster v. Svenson*, 2015 NY Slip Op 03068, Decided on April 9, 2015, New York Supreme Court, Appellate Division, First Department, Renwick, J.

2. The Zinc Building at 475 Greenwich Street, New York, New York, is a triangular loft, luxury residential apartment building in lower Manhattan.


4. *Foster* at 2.
5. James Otis, Oration in *Paxton’s Case* Against writs of Assistance (Boston, February 1761): “Now one of the most essential branches of English Liberty is the freedom of one’s house. A man’s house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and everything in their way; and whether they break through malice or revenge, no man, no court may inquire. Bare suspicion without oath is insufficient.”


8. New York’s Civil Rights Law §§ 50 and 51:

   §50. Right of privacy. A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

   §51. Action for injunction and for damages. Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person’s name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article. . . .


11. Ibid.
12. I allude to Arendt’s infamous essay “Reflections on Little Rock,” in which she argued against mandatory school desegregation on ground that schools are extensions of the private family. Cf. https://lapa.princeton.edu/content/hannah-arendt-and-little-rock


20. *Katz v. US*, 389 US 347. Harlan, concurring: “I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, . . . a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic, as well as physical, intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment, and (c) that the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.”

21. *US v. Karo*, 468 U.S. 705 (1984). “At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable.”


23. *Kyllo*, 533 US at 40. “The Agema Thermovision 210 might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider “intimate”; and a much more sophisticated system might detect nothing more intimate than the fact that someone left a closet light on.”


29. Ibid.
31. E. L. Godkin (1890), “Privacy is a distinctly modern product, one of the luxuries of civilization, which is not only unsought for but unknown in primitive or barbarous societies. The savage cannot have privacy, and does not desire or dream it. To dwellers in tents and wigwams, it must have been unknown. The earliest houses of our Anglo-saxon ancestors in England, even among the Thanes, consisted of only one large room in which master and mistress, and retainers, cooked, ate and slept. The first sign of material progress was the addition of sleeping rooms, and afterward of “withdrawing-rooms” into which it was possible for the heads of the household to escape from the noise and publicity of the outer hall. One of the greatest attractions of the dwellings of the rich is the provision they make for the segregation of the occupants. All of the improvements, too, of recent years to the dwellings of the poor, have been in the direction, not simply of more space, but of separate rooms.”
34. Foster v. Svenson, 2015 NY Slip Op 03068, Decided on April 9, 2015, New York Supreme Court, Appellate Division, First Department, Renwick, J.
35. Michel Auder, “Untitled” (I was looking back to see if you were looking back at me to see me looking back at you), three-channel video. Color. Sound, 15:12 minutes (2012). Cf. http://whitney.org/Exhibitions/2014Biennial/MichelAuder
36. Cf. http://www.martosgallery.com/michel-auder/ (“Auder, who would describe himself as an untrained anthropologist, shows in his films both the beautiful and the terrifying sides of daily life and looks at people coming together in situations ranging from the banal to the extreme, as painful and real as in our own lives.”)
38. In a piece in the *Village Voice*, art critic Peter Schjeldahl wrote about the “bad boy” who becomes an artist to continue, without shame, to make transgressive depictions of women: “The transgression momentarily relieves the boy’s woe at being short, all ways, on power.”

39. I have elsewhere defended the concept of privacy in public. Anita L. Allen, *Uneasy Access: Privacy for Women in a Free Society* (Totowa, NJ: Rowman and Littlefield, 1988). Erno Nussenweig was photographed while voluntarily walking in the most public of public spaces, Times Square. He may have been going to work or shopping. But the invasion of privacy there was paying attention to Nussenweig whose dress and manners ought to have suggested that he would not wish to have especial attention called to him.


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Privacy Imperiled: What Would Brandeis Make of the NSA & Edward Snowden?

Shane Harris*

As a journalist who has covered government and corporate surveillance for nearly fifteen years, “the right to privacy” is a term that I hear routinely invoked. And many of the people who use it, whether they’re privacy advocates or national security officials, seem to assume that Americans have naturally, always been afforded legal protections from intrusive inspection of their ostensibly private communications.

But I don’t know that most people could say where the term and the concept of a right to privacy originated. I suppose that’s a measure of how significant Louis Brandeis and Samuel Warren’s article, “The Right to Privacy,” actually was, and how prescient. Like great novelists, the authors of the article seem to have expressed a truth that was already there, inside our minds, and one that we can’t imagine never existed, even if we couldn’t name it. Their then-radical assertions seem so obvious now that they’ve faded into the wallpaper.

And that’s too bad, because there’s much in this 125-year-old essay that is still useful and instructive in our present debate about privacy rights. Indeed, their insights are astoundingly durable. The authors had the good sense to understand that technologies evolve, and that laws can and should evolve along with them. This is a core tenet of
today’s debate over how to restrict U.S. intelligence and law enforcement surveillance of potential terrorists, and it is one deployed by people on all sides of the argument.

Brandeis and Warren weren’t intimidated by technology. Were they alive today, they would probably marvel at the invention of the Internet. (Who doesn’t?) But they would also have understood that the right to privacy could be applied to this new, pervasive—and invasive—technology, just as they applied it to new, instant cameras in the hands of journalists in the 1890s.

It’s the way that technology disrupts the contours of private life that so profoundly concerns the authors. I’m sure they would quickly grasp the unnerving capability that search engines give even not-very-talented snoops to make public that which was intended to be intimate, to make the obscure discoverable.

It’s in that spirit that I decided to consider two questions: In light of their article, and the value they place on the right to privacy, if Brandeis and Warren were alive today what would they have to say about surveillance by the U.S. National Security Agency? And what would they have to say about Edward Snowden, the former NSA contractor who revealed so much about that agency’s operations?

I emphasize at the outset: I’m not a Brandeis scholar. Or a Warren scholar for that matter. But I do have a certain expertise on the nature and operations of the NSA, having written about them in hundreds of magazine and news articles and two books. I won’t try and read into Brandeis’ mind—and I will from here on focus on Brandeis as the chief author. But I will take key passages from this seminal essay that, I think, stand the test of time and feel especially relevant to the two questions I posed—two questions that are at the heart of our current national debate over the right to privacy in 2016.

But before I do that, I feel compelled, perhaps out of some professional devotion and camaraderie, to defend the particular group of people that prompted Brandeis to argue the right to privacy in the first place. Namely, people like me. Journalists. And nosy ones at that.
Brandeis evinced little patience in his essay for practitioners that many of my peers would describe as aggressive, relentless, and fearless, even if we might turn up our noses at the salacious, “yellow” work they were cranking out. Yet these reporters exhibited the same brand of tenaciousness that we applaud today in reporters who expose corruption, official abuse, and injustice. We give them awards for their work.

But Brandeis writes of a meddlesome press that seems to have lost its professional and societal moorings: “The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery.” I wonder what Brandeis would say about the online tabloid TMZ, but that’s a subject for another essay.

Yet Brandeis doesn’t limit his critique to journalists, nor are they really the object of it. He’s more concerned with the way they use the tools of their trade, and of the extraordinary power of those tools. “Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right ‘to be let alone,’” Brandeis writes. “Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”

Brandeis has put his finger on a threat that we still feel today from technology, one that creeps into the corners of our everyday lives, not necessarily welcome or invited. Some of this technology we enable. (Hello, Facebook?) Much of it, though, is passive. Google—or its algorithms—pitch us ads based on what we write in our emails. We live with the inescapable sensation that we are being watched—if not exactly by someone, then by something. And we worry that that what we read, write, or say in private is being turned into grist for some commercial, or perhaps official purposes without our clear consent.
Now, Brandeis goes on to write that public figures, such as elected officials, shouldn’t be exempt from public scrutiny, namely at the hands of the press. And he’s certainly not arguing that there’s no place for an aggressive and free press to root out facts that some might prefer to keep to themselves. Rather, it’s the invasiveness of the technology more than the person wielding it that really seems to distress him.

I’m fascinated that rowdy, pain-in-the-neck reporters provided Brandeis with the object lesson to write one of the most important and resilient essays on the nature of privacy. And I’m fascinated by it because the people in my industry wield tremendous authority—social and legal—to enter uninvited the daily comings and goings of all kinds of people, notable or otherwise.

So do government authorities. And like the journalists of Brandeis’ day, they are equipped with very powerful technology.

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We know best Brandeis’ views on the government’s invasion of privacy from his dissent in *Olmstead,* where we see Brandeis once again measuring the evolution of technology and, along with it, the government’s capability to spy:

“When the Fourth and Fifth Amendment were adopted, ‘the form that evil had theretofore taken,’ had been necessarily simple,” Brandeis writes, alluding to the Supreme Court’s decision in *Weems v. United States.* “Force and violence were then the only means known to man by which a Government could directly effect self-incrimination. . . . But ‘time works changes, brings into existence new conditions and purposes.’ Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.”

These words could have been written today by a jurist wary of the far-reaching surveillance capabilities of the NSA, which has, pursuant to legal authorities, demanded private communications from a number of large American technology companies,
including Google, Facebook, Microsoft, and Yahoo, and has, pursuant to executive authority, taken that information without consent from companies in their overseas data centers or on submarine cables.

Judge Richard Leon, in his recent ruling against NSA surveillance in *Klayman v. Obama*, invokes Brandeis when he writes, “The Court’s vigilance in upholding the Constitution against encroachment is, of course, especially strong in the context of the Fourth Amendment,” and the amendment, Leon says, rests on the principle of recognizing what Brandeis called “the right to be let alone.”

I don’t mean to compare Leon to Brandeis, but only to make the point that the latter’s thinking is still bearing directly on a case involving powerful technological capability in the hands of an intrusive power.

Whether Brandeis would find certain NSA surveillance operations unconstitutional, I’m not qualified to judge. And that matter has come before the courts and surely will again, perhaps the Supreme Court if it decides to reconsider whether Fourth Amendment protections should be applied to phone records and other so-called metadata. Justice Sonia Sotomayor has already indicated she thinks the Court should take up this question.

But having read Brandeis’ dissent in *Olmstead*, and having absorbed his thoughts in “The Right to Privacy,” which gives us his intellectual blueprint, I feel safe in concluding that Brandeis would be profoundly disturbed by the burgeoning, global information-gathering behemoth that is today’s NSA. That’s not to say he’d think it was illegal or should be banished. But analogous to his concerns about nineteenth-century journalists, I think Brandeis would be unsettled, not so much by today’s legally enforced effort to find and deter terrorists, but by the technological enterprise we’ve constructed to do that work.

I’ve long held, and written, that the potential for abuse posed by NSA surveillance is greater than any legal violations that the agency has committed. It’s not that I think the agency has never abused its authority. Nor do I support or condone all the agency has done under law. But we don’t live in a world in which large numbers of people are spied on for their political beliefs, or in which people are rounded up or arrested based simply on what they said, read, or wrote. We’ve been down that road before. And if we traveled
it again, NSA’s capabilities would enable violations of civil liberties on a mass scale. We must guard against that.

I suspect Brandeis would agree with this argument, and perhaps would have emphasized that it’s the job of the law to restrict those awesome technical forces that reside in our nation’s biggest intelligence agency.

Brandeis clearly understood the power of government surveillance to deprive people of their rights. But he also beautifully expressed the corrosive effects that surveillance has on society.

Early in his essay, Brandeis writes passionately about the need for people to claim some small private space in his modern world, and you can just feel that space getting smaller as the technology of the day crowds it:

The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Brandeis isn’t just concerned with the people who are the direct objects of scrutiny. He thinks the whole business of gossip peddling (or what we might call today, “information gathering,”) is insidious:

Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts.
It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people.”

Brandeis couldn’t have known it then, but he’s actually offering an often-argued critique of the NSA and its penchant for gobbling up as many digital fragments of intelligence as its gargantuan databases can hold. There, too, is a vicious circle of demand and supply, perhaps most succinctly captured by former NSA Director Keith Alexander’s stated approach to global surveillance: “Collect it all.”

I know Brandeis is bemoaning in these passages the unseemly, tawdry press that makes us all feel dirty for reading it. (That press, by the way, is flourishing today.) But he’s also pointing to the persistent nature of that press—that surveillance—and the ill effects it has on all of us. In the footnotes, he mentions a famous case of the day, a stage actress who was surreptitiously photographed from the audience in mid-performance. It’s as if that actress stands in for all of us, anxiously waiting for someone in the dark to snatch our image without our permission.

Even if you aren’t the direct subject of surveillance—and most of us aren’t—the pain you feel by knowing your emails or phone calls might be scooped up and scrutinized is significant. This is known as the “chilling effect.” You behave differently because you know someone might be watching you. Brandeis is warning us of that chill, and trying to banish it with the law.

Yet the chill persists. One of the first cases brought against NSA surveillance, in 2006, was by journalists and lawyers who argued that they had to curtail their contacts with foreign sources and clients, because those people could be the subject of warrantless phone surveillance by the NSA, and in turn, the journalists and lawyers could be monitored, too.

This isn’t an academic point. Just think about how many times you may have wondered, as you sent an off-color text or an intemperate email, “Is someone collecting this?” Maybe you’ve thought that and not adjusted your behavior at all. But I doubt that the thought has never crossed your mind. And once implanted, that thought, and the anxiety it creates, is not easy to clear away.
In polls, the American public is usually about evenly split between those who say they’re mostly comfortable with broad, government surveillance of electronic communications, and those who object to it. These are admittedly clumsy polls, because you have to ask a lot of nuanced questions to understand what really bothers people. For instance, you might feel comforted knowing that the government needs a warrant to listen to your phone call, whereas it can tap the phone of a foreign person pretty much when it wants. But then how would you feel about the government maintaining a database of all the times that you made a phone call, which number you called, and how long you spoke? That’s just what it’s been doing from the days after the 9/11 attacks until late 2015. Knowing this, you might tilt towards the camp that does harbor objections to surveillance.

But if, generally speaking, half of all Americans have some degree of misgivings about a national surveillance apparatus that has the technical and legal ability to monitor their communications, that means millions of people worry about their government’s ability to intrude in their private life. And I think Brandeis would say this is a big problem.

I’m confident that Brandeis would acknowledge the government’s interest in reading some emails, in targeting some individuals for scrutiny. And to be sure, the NSA is a regulated enterprise that’s only allowed to target the contents of non-U.S. persons’ communications with a warrant.

But in the sweeping up of non-U.S. persons’ emails, text messages, and other communications, U.S. persons’ information is inevitably gathered and stored. Even if it’s never examined, I think Brandeis would, at the least, recognize that this capability, were it turned deliberately on innocent Americans, could lay bare all that was whispered in the closet, the bedroom, and the chat room.

Now, there’s a reason we know so much about the NSA’s capabilities. Part of the credit goes to investigative journalists, who have, over the years, managed to pry loose details of the inner workings. Much of what we know about the legal rationale for surveillance flows from a series of investigative reports in 2006 and 2007, ignited by a
New York Times front-page article on the NSA’s so-called warrantless wiretapping program, or Stellar Wind. Some top members of the George W. Bush administration, including the attorney general and his deputy, the director of the FBI, and the head of the Justice Department’s Office of Legal Counsel, believed a key part of this program was illegal, and they were preparing to resign over it.

More articles and books on the NSA followed, culminating in a public debate about reforms to the Foreign Intelligence Surveillance Act, which Congress took up and that resulted in a significant legal expansion to how the agency spies and who it is allowed to monitor.

We weren’t lacking information about the NSA and how it spies. But in 2013, former NSA contractor Edward Snowden exposed more information about the agency’s operations than anyone before him, through a cache of classified agency documents that he gave to at least three journalists. Snowden ignited a global debate about surveillance and privacy unlike any the world has seen so far in the twenty-first century.

Brandeis would have welcomed the debate. This is the man who, after all, wrote in Olmstead what has to be one of the most quoted warnings about the perils of government overreach:

Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Brandeis wasn’t just ready for a debate; he was leading it. But would he have supported the means by which that debate came about? What would he have thought of what Snowden did?

Let’s remember how Brandeis felt about journalists. If he was disturbed by a press that exposed the inner workings of private lives, do we really think he would have no
problem at all with a press that exposed the inner workings of classified intelligence operations? I can’t imagine Brandeis having boundless confidence in the ability of the press to decide which secrets were fit to print and which ones should stay hidden. Journalism is, after all, an industry that feeds on gossip and salacious detail, in Brandeis’ opinion. Were he alive today, he would accuse many of us of chasing clicks with exaggerated facts and baited headlines. And judging by some of the articles that have been written about NSA operations, he would have a fair point.

I can’t say that Brandeis would lump Snowden, the leaker, in with the people who willingly received and published the information he took. He was smarter than that. Unlike some law enforcement officials in the Obama administration, and the Bush administration before it, who thought journalists who publish classified information about intelligence operations should be prosecuted under the Espionage Act, I think Brandeis would have recognized the incredible threat that would pose to the freedom of the press and the First Amendment.

But I can’t shake the idea that Brandeis would have been troubled by Snowden’s decision to let journalists decide which secrets to expose. And that he would worry that the mass distribution of articles via the Internet and social media, and the blood-curdling headlines that attend them, would unsettle and confuse those citizens whom he described as “easy of comprehension,” “the ignorant and thoughtless” who can’t discern the relative importance of information that has real value versus idle gossip meant to titillate or, in the case of the NSA, to scare.

Indeed, many current intelligence officials feel this way. In conversations with me, and in their public remarks, they’ve criticized much of the reporting on Snowden’s leaks as overblown, tendentious, and deliberately overlooking mitigating information contained in some of the very documents that Snowden disclosed.

For instance, he gave journalists a lengthy set of highly technical “minimization” procedures that the NSA uses to determine who it can monitor, and what information about U.S. persons it cannot examine or keep. That document and others describe a massive surveillance apparatus that is arguably the most regulated on the planet, and that
stands in contrast to other Western nations with highly developed technical intelligence capabilities, including the United Kingdom, which makes little distinction between foreign and domestic intelligence, and where journalists can be thrown in prison for reporting on classified government operations.

But, many intelligence officials have complained: to read the press, you’d think the NSA is an unchained, digital dog, roaming wildly through the Internet, seizing on every piece of data it can find. Those officials primarily blame journalists for what they view as that popular misconception.

Maybe I’m too defensive, but I think Brandeis would judge harshly a lot of the reporting that’s been done on the NSA, even if he were shaken to his core by the spying powers that those journalists exposed. And to the extent that Snowden was the source for these journalists, I think he might judge him harshly too. Maybe even as he applauded his actions, which of course sparked the debate.

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I return to Brandeis’ writing in *Olmstead* that “crime is contagious.” In that case, government agents had clearly broken wire-tapping laws. There was no real argument about that. But in the case of NSA surveillance, nearly everything the agency has done is legal. (Though some unlawful operations were made legal after the fact.) The thrust of the debate—notable court cases aside—hasn’t been about whether NSA broke the law so much as what the law should allow the NSA to do.

Would Brandeis say Snowden committed a crime by taking classified secrets from the agency and giving them to journalists? I have to conclude that he would. One can praise Snowden for starting a necessary debate and adding to our collective knowledge about surveillance, and still recognize that he broke the law to relay these secrets. Snowden himself has said that he’s willing to serve time in prison, if it means that he can return to the United States from his residence in Russia.

Anyone with as much respect for the law as Brandeis would have to see Snowden as a law-breaker. What intrigues me more, though, is a question that I can’t really answer:
Would Brandeis have seen Snowden as someone who “breeds contempt for law,” and who “invites every man to become a law unto himself”? Would he see Snowden as a man who “invites anarchy”?

I can’t say. But I think Brandeis, no simple mind, would have been able to separate the leaks from the leaker, the debate from the instigator.

There’s a quote I came across years ago reporting on press leaks, the provenance of which I’ve since forgotten. But it stuck with me. In effect, the speaker was congratulating someone for spilling secrets, but recognizing that he had to be punished.

“Give him a medal, then throw him in jail.”

Brandeis didn’t say it. But I think he might have agreed with the sentiment.

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Translating Justice Brandeis’ Views on Privacy for the 21st Century

Steven A. Mirmina ’89*

When I was a Brandeis student, I learned a lot about Justice Brandeis: I knew he was the first Jewish person to be nominated to the Supreme Court; I knew he was sometimes known as the “People’s Lawyer” or the “Robin Hood of the Law;” and I knew that he was respected for submitting what later became known eponymously as the “Brandeis Brief.” The Brandeis Brief is interesting because it uses non-legal (e.g. social science) arguments to bolster one’s legal case.

Since I became a practicing attorney and law professor, I have studied Justice Brandeis’ career and jurisprudence in greater detail. His ideas were extremely ahead of his time. In 1877, Brandeis graduated first in his class from Harvard Law School. He was valedictorian; his good friend Samuel Warren was salutatorian. Together, Brandeis and Warren penned the seminal article entitled, “The Right to Privacy.” The right to privacy is something in everyday parlance today—but 125 years ago, when it was published in 1890, there was no “right to privacy.” Those words are not enshrined in the Declaration of Independence, the Constitution, or even the Fourteenth Amendment. The concept of a “right of privacy” did not exist until Brandeis and Warren created it.
The views Brandeis held in the late nineteenth century as a young lawyer and the opinions he wrote in the early twentieth century as a Justice of the U.S. Supreme Court were prescient and are equally compelling today as they were more than a century ago. But much more than a retrospective, hermeneutic exegesis on Brandeis’ writings, this essay takes Brandeis’ opinions from a century ago and applies them to the very real Constitutional issues society is struggling with today.

After examining Brandeis’ writings on privacy, I wondered how he would feel about today’s headlines: electronic surveillance of citizens at public events; the government collecting metadata of Americans’ phone calls; or reading the emails of U.S. citizens. Would Justice Brandeis find these practices tantamount to search and seizure in conflict with the fundamental principles underlying the Fourth Amendment? How would Justice Brandeis feel about government’s use of GPS-related data (for example, tracking an individual via his cell phone) or placing a GPS tracker on a suspect’s vehicle—all without warrants? What would he think about using remote-sensing data collected from satellites in outer space to assist in prosecuting drug traffickers? Brandeis was known to fight for the common man and protect individuals from unwarranted government power; in that light, I examine Brandeis’ views on privacy and apply them in a modern-day, twenty-first century technological context.

One other note: the term “translation” is being used in this article as a legal term of art. Translation is a strategy used for interpreting a text such as Brandeis’ writings or the Constitution itself. Rather than talking about what the “framers” or the “founders” would do if they could teleport to the twenty-first century and apply their original words to technologies that did not exist at the birth of our nation, translation in this context refers to finding a modern reading of original text that preserves its original intentions but in the context of the present day; that is, for present purposes, we preserve the meaning and intention of the words in the Constitution, changed circumstances notwithstanding. It is in that context that this article translates Brandeis’ views on privacy to twenty-first century circumstances.
But before we can view Brandeis in a contemporary light, let’s examine his work in the light in which it was written.

The Year Is 1890
Louis Brandeis, and his school chum and law firm partner Samuel Warren, just published their article “The Right To Privacy” in the *Harvard Law Journal*. The article begins by stating the thesis that “the individual shall have full protection in person and in property is as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection.” The authors acknowledge that political, social, and economic changes “entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.” Brandeis and Warren explain the evolution of remedies for privacy violations, noting that the law first provided a remedy for privacy violations that also caused physical interference with life and property. Later, the law recognized protection for “man’s spiritual nature, of his feelings and intellect” and the right was broadened over time “to mean the right to enjoy life,” and “the right to be let alone.” The authors stated that this “development of the law was inevitable” asserting that: “The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition. . . .”

In the next part of the article, Brandeis and Warren turn to an offensive practice that was gaining in popularity—“instantaneous photography.” Mass-produced newspapers had begun “gossip pages,” which widely circulated intrusive portraits of individuals without their consent. The authors then reach the central tenet of their article: “It is our purpose to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is.” Brandeis and Warren then go on to explain how they reached their conclusion that there should be a “right to privacy” or a “right to be let alone,” as well as the limitations on this newly conceived right.
And to understand the context of Brandeis’ suggested “right to privacy,” we have to go back in time one century more.

The Year Is 1789

In 1789, James Madison, twenty years before he would become the fourth President of the U.S., was a member of Congress from Virginia. Madison’s story is interesting. Some scholars suggest that, were it not for very bad weather on Election Day, which kept a lot of voters home, he would have lost his Congressional seat to James Monroe (who later would become first a Congressman from Virginia and then the fifth President of the United States). Madison stood no more than five feet, four inches tall and never weighed more than a hundred pounds. Nevertheless, he is known as the “Father of the Bill of Rights”—that is, the first ten amendments to the U.S. Constitution.

The fourth of those Amendments is the one most closely related to the “right to privacy.” The Fourth Amendment provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

After the American Revolution had ended, the American people demanded guarantees against “unreasonable searches and seizures.” Many Americans had been subject to abuses by British soldiers under what were called “writs of assistance” that allowed the British soldiers to search any place where goods might be found (with no limit in the writ to the place or duration). Colonial officials also utilized “general warrants” that merely specified an offense and let the soldiers decide which persons should be arrested and which places searched. These writs and warrants empowered officials to search at will, and break open receptacles or packages wherever they suspected illegal (or untaxed) goods to be.6
The Year Is 1886

Just a few years before Brandeis authored his groundbreaking article on the right to privacy, the U.S. Supreme Court decided the first substantial case involving the Fourth Amendment to the Constitution and the “right to privacy.” In the case of *Boyd v. United States*, the Supreme Court heard a case involving the propriety of using evidence gathered in violation of the Fourth Amendment in a criminal proceeding, and whether a defendant’s Fifth Amendment right against self-incrimination would be violated.

Specifically: In 1884, the State of New York sued E. A. Boyd and Sons (Boyd), a company that imported plate glass from England. The State of New York asserted that Boyd never paid customs duty for importing the glass. Several cases of plate glass were confiscated from the defendants by federal customs agents because of suspicion that certain documents had been falsified for the purposes of avoiding customs fees or duties. During the course of the proceedings, the defendants were ordered by the judge to produce documents showing the quantity and value of the shipments. The defendants protested under the theory that they could not be compelled to produce evidence against themselves. Nevertheless, Boyd delivered the evidence to the Court, but asserted that the law unconstitutionally amounted to an unreasonable search and seizure. The Supreme Court held that the Fourth Amendment protected against government action that demanded private papers as a condition of a criminal charge or a forfeiture of property (like a fine). The Court asserted that the Fourth Amendment must be understood in the context of the Revolutionary War’s discussions regarding the searches and seizures in both the Colonies and Great Britain. Historically, the Court noted, British officials would break into homes for the purpose of seizing evidence of tax evasion or political sedition. The Court emphasized that the Fourth Amendment protects “the sanctity of a man’s home and the privacies of life.”

The “privacies of life” includes the ability to exclude the government from one’s home. Thus, Brandeis will be aware of the holding (or outcome) of this case—that there does not need to be a physical invasion of one’s home to constitute a violation of the
Fourth Amendment—both at the time he writes his article, and four decades later, when he is hearing a case as a Justice on the Supreme Court.

The Year Is 1928

Brandeis has now been a Supreme Court judge for more than a decade. A case similar to Boyd is now before him, but instead of seizing one’s personal papers, the government wanted to seize one’s personal conversations. Specifically, the case of Olmstead v. United States involved the government installing wiretaps to listen to the defendants’ conversations. It is important to note that the government did not break into the defendants’ houses—but rather, the wiretap equipment that intercepted the conversations was installed on telephone lines exterior to Mr. Olmstead’s house. Recall that the Fourth Amendment protects: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . .” Because the wiretaps were placed outside Mr. Olmstead’s home, and because the Amendment provides protections for “persons, houses, papers, and effects,” one could ask whether there was any Fourth Amendment violation at all.

Roy Olmstead and his codefendants were bootleggers. Rumrunners. Smugglers. And very successful bootleggers they were. Recall that in the 1920s, alcohol was prohibited in the U.S.—the Eighteenth Amendment (passed in 1919) prohibited the manufacture, transportation, and sale of “intoxicating liquors.” Many citizens ignored the ban on alcohol and opposed the government’s role in the private lives of citizens. Federal enforcement of these laws began relying on new kinds of evidence gathering, including by wiretapping phones. Roy Olmstead imported liquor from Canada and sold it throughout Seattle. He had a huge business and employed many people in his enterprise. When the Federal officials wiretapped his phone line, they heard conversations between him and members of his gang, who were all charged with conspiracy to violate the National Prohibition Act. The Court faced the impact of new technology (in this case, the telephone) and the application of the Fourth Amendment to conditions unimaginable to James Madison, James Monroe, or any of the framers of the Bill of Rights.
In this 5–4 case, the Court reasoned that the wiretaps required no entry into Olmstead’s house or office and thus the wiretap evidence obtained was not unconstitutional under the Fourth Amendment. In addition, the opinion stated that the phone conversations were not the equivalent of sealed letters, which previous Supreme Court decisions had protected from warrantless searches and seizures. The Court stated that the invention of the telephone had not changed the meaning of the Fourth Amendment. “The language of the Amendment cannot be extended and expanded to include telephone wires reaching to the whole world from the defendant’s house or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched.” Finally, the Court stated that Congress was free to protect telephone communication through legislation, but the courts could not do so without distorting the meaning of the Fourth Amendment. In the majority opinion, Chief Justice Taft reasoned that once a person “projects” his voice over wires exterior to his home, he has lost the ability to control or exclude others from accessing it.

Brandeis did not agree with the opinion. In fact, his dissent in the Olmstead case may be better known than the opinion signed by the majority of Justices. Brandeis wrote about a general “right to be let alone” from government intrusion, and he asserted that the purpose of the Fourth Amendment was to secure that right. Contrary to the majority opinion, Brandeis determined that “there is, in essence, no difference between the sealed letter and the private telephone message.” Brandeis saw no distinction between the government’s opening and reading a sealed letter entrusted to the postal service (citing an earlier case *Ex Parte Jackson*9 and the Government eavesdropping on a phone call over phone lines. Brandeis stated that the protections of the Fourth Amendment did not only apply to the forms of media familiar to the framers of the Constitution. “Time and again, this Court in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it.” Since Brandeis determined the Fourth Amendment was violated, he also would have concluded that the use of the wiretap evidence had violated the defendants’ Fifth Amendment protection against self-incrimination.
Brandeis’ dissent in *Olmstead* was prescient. Brandeis referred to and built upon the Boyd case, and he suggested that the Fourth Amendment extends to concepts of privacy even broader than physical property. His dissenting opinion foresaw that technology would continue to evolve and that the government would eventually have the ability to access “what is whispered in the closet,” the contents of papers without ever removing them from the drawers, and other “intimate occurrences of the home.” Next, Brandeis offers the most famous passage of his dissent:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Brandeis wanted the focus to shift from constitutional protection of places (houses, papers, and effects) to constitutional protections of privacy of the person. In his dissent, he further argued that: “It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property. . . .”

Brandeis expressed his “right to be let alone” in his dissent—implying, unfortunately, that his view was in the minority. But as times change, laws change as well. There was a time that *Plessy v. Ferguson* was the law of the land—*Plessy* was the 1896 case held that “Separate but Equal” facilities (and, thus, racial segregation) was constitutionally permissible. But, that changed in 1954 with *Brown v. Board of Ed.*, which overturned *Plessy* by a 9–0 vote, holding that “separate but equal is inherently unequal.” Similarly, Brandeis’ dissent in *Olmstead* was proven correct in a subsequent case in 1967, 25 years after Brandeis’ death.
The Year Is 1967

Brandeis’ views on privacy are celebrated in the *Katz* case. Charles Katz enjoyed gambling. And he was smart enough not to use the phone in his own house. When he wanted to share wagering information, he frequently used a public phone booth on the street. The FBI, suspicious of Katz, installed a microphone on the exterior of the phone booth to record his conversations. In the course of his prosecution, Katz’s attorneys asserted that his Fourth Amendment rights were violated.

Recall that the text of the Fourth Amendment protects: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . .” Since the microphone was placed outside of his home, on the street, on the outside of a public phone booth, one might wonder whether any violation of the Fourth Amendment occurred. Would there even exist a “right to privacy” in a public phone booth? If you thought the Fourth Amendments was not violated, then you would be correct, according to both the trial court judge and the Court of Appeals.

However, the U.S. Supreme Court felt differently. Justice Potter Stewart wrote the majority opinion overturning Katz’s conviction and holding that installation of the listening devices had violated Katz’s constitutional rights. The Court rejected the reasoning of *Olmstead* and other decisions that required physical penetration of property to establish a Fourth Amendment violation. Changes in technology, including “the vital role that the public telephone has come to play in private communication,” had altered the idea of “trespass” as the Court relied on in the *Olmstead* case. “Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures.” The Court famously stated that the Fourth Amendment “protects people—and not simply areas . . .”

Brandeis’ scholarship—starting with his seminal article on the right to privacy and continuing through his time on the Court—was responsible for this fundamental shift in Constitutional interpretation of the Fourth Amendment. That is, from protection that, on its face, was limited to “The right of the people to be secure in their persons, houses, papers, and effects, . . .” to what became almost synonymous with a “right to privacy,”
Brandeis’ views that people are entitled to reasonable expectations of privacy even if they are outside of their own home leads to some very interesting questions. With the development of technology over the last hundred years since Brandeis’ nomination to the Court, one wonders what Brandeis might have thought about modern day issues—for example, is there privacy on public streets? Does one have a privacy interest in one’s car under surveillance by police (while driving down public roads)? Or what about in one’s basement? Would it be okay for the police to monitor the temperature of the basement from the street outside? Does it matter if the curtains are open or closed? Is there a privacy interest in one’s completely fenced-in backyard? Assuming nothing is visible from the street, is it permissible that police use airplanes and helicopters (or drones) to peer down? Would it be permissible for the Government to use satellites in outer space for surveillance of suspects or their vehicles?

The Year Is 1989
What would Justice Brandeis think about reasonable expectations of privacy when the government uses advanced technology to increase its ability to perform surveillance? Mr. Riley was a rather entrepreneurial farmer, growing a crop of marijuana inside his Florida greenhouse. The greenhouse, and the fence surrounding his farm, prominently displayed DO NOT ENTER signs. Acting on a tip, the local sheriff flew over the greenhouse with a helicopter. Unfortunately for Mr. Riley, the roof of the greenhouse was missing some shingles, and the police took photos of the marijuana through the holes in the roof. In this case, the Court held that there was no Fourth Amendment violation, because any member of the public could have been operating a helicopter at that altitude, and thus, Mr. Riley would not have had a reasonable expectation of privacy for his property. Justice O’Connor added in her concurrence that in her view, aerial traffic was a common enough occurrence that it would trump any expectation of privacy.

How would Brandeis have considered this issue? He would not have joined the majority. In fact, on this one, he would have been one of the dissenter. In this case, Justice Brennan (joined by Justices Marshall and Stevens) dissented asserting that it was
necessary to consider the frequency of air travel above Mr. Riley’s property, and specifically whether ordinary citizens were normally in the air over the greenhouse:

The police officer positioned 400 feet above Riley’s backyard was not, however, standing on a public road. The vantage point he enjoyed was not one any citizen could readily share. His ability to see over Riley’s fence depended on his use of a very expensive and sophisticated piece of machinery to which few ordinary citizens have access.

To acquire this evidence, the government went through a lot of effort and expense: utilizing a helicopter to fly over his greenhouse and peer into it, combined with expensive photo apparatus. It reminds one of Brandeis’ prediction that “[w]ays may someday be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose a jury the most intimate occurrences in the home.”

Taking into account Brandeis’ view that people possess the “right to be let alone,” I believe that Brandeis would have found a Fourth Amendment violation in this case, joining his voice along with those of the three other dissenters. As Brandeis noted in his Olmstead dissent, “It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property.”

The Year Is 2001
Danny Lee Kyllo lived in Oregon. Danny was a similar entrepreneurial agriculturalist in the same vein as Mr. Riley—except rather than using a greenhouse, Mr. Kyllo grew his crop in his basement. The Oregon police used a remote sensing device to measure the temperature around his house, and they noticed an inordinate amount of heat coming from his basement. The police presumed that this heat was coming from Mr. Kyllo’s grow-lights, necessary for the marijuana plants to photosynthesize. On the basis of the information gleaned from the thermal imaging device, along with tips from informants and Mr. Kyllo’s higher than average utility bills, the police obtained a warrant and then
found over a hundred marijuana plants inside. Justice Scalia wrote the majority opinion, holding that there was a violation of the Fourth Amendment in this case, because obtaining any information through sensory enhancing technology that one could not normally obtain without intruding into the home would amount to a result of a Fourth Amendment search, and thus, it triggered Fourth Amendment protections.18

This was another 5–4 case in which one vote could have swung the decision a different way. Justice Stevens argued in his dissent that thermal imaging (alone) did not constitute a search or require a warrant. He reasoned that any person could detect the heat emissions—for example by merely feeling that some parts around the house are warmer than others; or that snow is melting more quickly on one side of the house than the other. Since any member of the public could collect this information, there would be no need for a warrant. Additionally, Stevens argued that Kyllo was trying to incorporate something as intangible as “heat” into the realm of “privacy.” Stevens explained that: “Heat waves, like aromas that are generated in a kitchen, or in a laboratory or opium den, enter the public domain if and when they leave a building.”19 The dissent also noted that there is a long line of cases stating unequivocally that: What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.

Where would Brandeis have come out on this one? With the majority holding that a warrant was necessary to conduct this search? Or with the dissent, asserting that the search was an ordinary one that could have been made by any passerby, required no warrant, and was perfectly reasonable? Personally, I think that Brandeis would have sided with the majority. Given his views that the Courts are to protect “man’s spiritual nature, . . . his feelings . . . his intellect . . . , pain, pleasure and satisfactions of life,” and his view that the founding fathers “sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations,” he would have felt that the Government surveillance in this case would have required a warrant. Recalling the text of the Fourth Amendment’s protections of “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,” Brandeis would
have ensured that the burden of proof remain with the Government to demonstrate why the search was reasonable. And, in this case, given that the Special Agent had several compelling justifications for believing that Mr. Kyllo was growing marijuana inside his house, it would not have been difficult to convince a judge merely to issue a warrant for a search. And if it were, for some reason, difficult to convince a judge to issue a warrant, then maybe there was not sufficient evidence to justify the invasion of Mr. Kyllo’s “right to be let alone.”

The Year Is 2012
Antoine Jones was a nightclub owner in Washington, DC. In 2004, the FBI, along with the DC Police Department, began investigating Mr. Jones on suspicion of cocaine trafficking. As part of the investigation, the police applied for, and got permission from a judge, to attach a Global Positioning System (GPS) device to Mr. Jones’ Jeep Grand Cherokee. For four weeks, 24 hours a day, this device tracked Jones’ vehicle’s movements. Later, as part of his criminal defense, his attorneys protested the use of the GPS data in the trial.

Even though the police in this case had obtained a search warrant, they had not followed the judge’s instructions for installation of the device. Thus, the case needed to be prosecuted as if the police did not have a search warrant. Justice Scalia wrote the majority opinion for the Court, which held that the Government’s attachment of the GPS device to Mr. Jones’s vehicle, and its use of that device to monitor the vehicle’s movements, did constitute a search under the Fourth Amendment. The Court reasoned that the Fourth Amendment protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” (emphasis supplied). Here, the Government’s physical intrusion on an “effect” (Mr. Jones’ car [in fact, it was a car registered to Mr. Jones’ wife]) for the purpose of obtaining information constitutes a “search.” The Court justified its decision, asserting that this type of encroachment on an area enumerated in the Amendment would have been considered a search within the meaning of the Amendment at the time it was adopted.
Justice Brandeis would have been fascinated by this case. As had been mentioned earlier, the legal doctrine of “translation” is used as one way to consider what the “framers” or “founders” would do, if we could teleport them to the twenty-first century and have them opine on technologies that did not exist when they were practicing law. The goal of translation is to preserve the original intentions of the Constitution’s provisions and apply them in present day circumstances. It is not critical that we apply their words per se—rather, we apply their intentions. In this case, Brandeis would have looked at the facts, including that this GPS tracker was about the size of a credit card, weighed about two ounces, was affixed to the outside of the vehicle, and required no genuine physical trespass into Mr. Jones’ “person, house, papers, or effects.” When one reads the opinion of the Court, along with the various concurrences, one can see the disagreements of the justices. For example, Scalia said (correctly) that we need to examine whether this would have been a search within the meaning of the Amendment at the time it was adopted. His opinion went on to explain that this would imply imagining a constable riding along in a coach with Mr. Jones, taking notes of all of his movements, nonstop, for 24 hours per day, for 28 days. To Mr. Scalia, that clearly would have constituted a search under the Fourth Amendment. On the other hand, Justice Alito published his own concurrence, which concurred in the decision but for different reasons (which distinguishes his opinion from a dissent). Justice Alito finds it very hard to imagine a late eighteenth-century analogy to installation of the GPS tracker as occurred in this case. Brandeis would have chuckled at Alito’s comment that: “The [majority opinion written by Scalia] suggests that something like this might have occurred in 1791, but this would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience.”

So, what would Brandeis have thought about this? First, let’s recall that the Fourth Amendment provides in relevant part that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” Was Mr. Jones in his house? No. He was on a public street. In fact, he wasn’t even the one tracked. It was his car. His wife’s car. His wife’s car’s movements
on a public street. One possibility is that Brandeis might conclude that no search occurred here, since Jones had no “reasonable expectation of privacy” in the area of the Jeep accessed by Government agents (its underbody) and in the locations of the Jeep on the public roads, which were visible to all.

Brandeis would have recalled some of the Court’s earlier jurisprudence. For example, in *Olmstead*, from which he dissented, the Court held that wiretaps attached to telephone wires on the public streets did not constitute a Fourth Amendment search because there was no entry of the houses or offices of the defendants. He also would recall that the Court abandoned that strictly property-based approach in the *Katz* case, where they held that “the Fourth Amendment protects people, not places,” and found a violation in attachment of an eavesdropping device to a public telephone booth. He also would have considered the cases of Mr. Riley (aerial surveillance with a helicopter (held: no search, though we think Brandeis would have dissented) and Mr. Kyllo (using remote sensing technology to measure indoor house temperature held to be a search).

On one hand, Brandeis would agree that this particular case of Mr. Jones is an expansion of the Fourth Amendment—in essence, it is a request for what some might consider to be privacy in public. It started with Mr. Olmstead, who expected privacy when he spoke on the telephone from his house. But then, the “circle of privacy” widens: Mr. Katz expected privacy when he used a public phone booth. Later, Mr. Riley expected privacy for the sky above his greenhouse; as Mr. Kyllo expected privacy for the heat rising out of his basement. And Mr. Jones expected privacy when he drove his wife’s car around town. It is not likely that any of these individuals imagined there was the equivalent of a little, tiny constable driving around with him (or flying in a helicopter over his house, or surveilling his basement, or miniaturized and sitting in his phone receiver).

On the other hand, Brandeis might have signed onto Justice Alito’s concurrence. He would have not agreed with the Scalia opinion that a physical trespass (here, putting the device on the car) was required for there to be a search. Remember the passage from Brandeis’ Olmstead dissent: “It is not the breaking of his doors and the rummaging of his
drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property.” The problem with the majority opinion, Brandeis would reason, is that it implies that when there is no trespass, there is no search. Thus, remote electronic monitoring of individuals would never constitute a Fourth Amendment violation under the majority opinion—it could go on endlessly without any judicial review—something that Justice Sotomayor viewed as inimical to a democratic society, because it could chill the exercise of constitutionally protected freedoms.23 Brandeis would assert that even when electronic means are the sole method used to violate an individual’s privacy, Fourth Amendment protections are implicated.24

Recalling both Brandeis’ dissent in Olmstead, as well as his law journal article from 1890, Brandeis foresaw increasing government intrusion into the private lives of individuals, without the individuals ever knowing: “Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual . . . the right ‘to be let alone’ . . . Numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”25 Brandeis was right. The government can do all those things today.

The Year Is Today
My smartphone is next to me as I write this—and I’ll bet yours is near you as you read this. Smartphones are great. They work as flashlights, cameras, navigators, personal shoppers, and some people even use them for talking to each other. But many folks may not be aware that they can also be used to track their owners. This can occur in several ways, but one of them is based on CSLI. That is, when one makes a call, sends or receives a text message, or accesses the Internet, the phone company collects “cell site location information” or CSLI. It makes a log of which cell tower accessed the phone, along with what time you were in that location. In every state, upon request, U.S. law enforcement can access that historical information about your phone without a warrant.
Today’s “war on terror” has fundamentally changed Americans’ views on privacy. There was a time when people used to lock their luggage before handing it to the airlines. Now, people consent to random bag searches and airline security personnel rummaging through their suitcases daily. This is in addition to passing through millimeter wave scanners, which reveal to airport personnel a virtual, naked image of a traveler. Video surveillance of crowds on the street or at sporting events is another daily occurrence—it’s been used in venues ranging from Olympic stadiums to protests and marches to the Super Bowl. After the London bombings in 2005, New York City instituted warrantless searches of luggage and personal belongings of citizens riding the subways.

Perhaps the nature of privacy is changing.

In 2013, Edward Snowden caused the release of thousands of previously classified government documents. The documents revealed the existence of programs by the National Security Agency (NSA) to track cell phone calls and monitor Internet traffic and email of virtually all Americans. Snowden commented: “Even if you’re not doing anything wrong you’re being watched and recorded.”

Subsequently, in 2014, NBC’s Brian Williams interviewed Edward Snowden. Snowden revealed that the NSA can remotely activate your cell phone, so that it seems like it is off, but they can use the microphone and the camera to listen to phone calls and conversations, seeing everything that the camera on the phone would see.

So, today, the Government can listen to our phone calls, read our emails, track our movements with our cell phones (and activate them remotely so that we wouldn’t even know they were turned on) and listen to our conversations and/or video us as we go through our lives. And these are the programs about which we know.

All of this warrantless surveillance would be inimical to Justice Brandeis. These activities seem to go against the very integrity of Brandeis’ feelings about privacy. How could they not have a chilling effect on what would otherwise be constitutionally protected freedoms (speech and association, in particular, but life and liberty also). Recall in Justice Brandeis’ dissent from Olmstead, Brandeis illustrated his understanding that technological advancements and innovation would have adverse impacts for personal
privacy, and thus, the Fourth Amendment needed to be interpreted more broadly in light of such technological innovations. In his dissent, he quoted on an earlier case *McCulloch v. Maryland* for the proposition that: “[W]e must never forget that it is a Constitution we are expounding.”

Brandeis observed correctly that: “[i]n the application of a constitution . . . our contemplation cannot be only of what has been, but of what may be.” And Brandeis was right. The Constitution, as amended, needs to be interpreted both in light of what has been, what is, and what is still to come. As he profoundly noted 125 years ago: “Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual . . . the right ‘to be let alone. . . .’”

As Justice Brandeis noted in his *Olmstead* dissent, technology has continued to evolve, and the government does possess the ability to access “what is whispered in the closet, the contents of papers without ever removing them from the drawers, and other intimate occurrences of the home.” And, that time is now, and that technology is real.

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**Notes**


3. Ibid.

4. Ibid., 195.

5. Apparently, some things never change—they had the equivalent of supermarket tabloids then as well.


7. The Court also held that forcing the defendant to produce papers violated the Fifth Amendment by forcing Boyd to be a witness against himself. It went on to explain that the Fourth and Fifth Amendment “throw great light on each other. For the ‘unreasonable searches and seizures’ condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, . . . And we have been unable to perceive that the seizure of a man’s private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.” *Boyd v. United States*, 116 U.S. 616, 628 (1886).

8. Interesting to note, it was often said that conspiracy charges were easier to prove than the actual liquor law violations themselves. Olmstead was a former police lieutenant. He used the bribes he took in as a police officer to bankroll his bootlegging operations. He procured his liquor in Canada, and Canada charged an extra tax on liquor destined for the U.S. Olmstead lied to Canadian authorities saying he was shipping the liquor to Mexico. Thus, he got liquor at a far cheaper price than other bootleggers. At his peak, he was delivering over 200 cases of liquor daily to Seattle residents, hotels, and restaurants. He had an expensive house and opened Seattle’s first radio station. Since he bribed the Seattle police and local sheriffs to look the other way, he only needed to be concerned about the Feds going after him.

9. 96 U.S. 727 (1877).


11. Id., at 474–475.


17. *Olmstead*, 277 U.S. at 474 (Brandeis, J., dissenting)


20. Specifically, the judge authorized installation of the device in the District of Columbia within ten days of the issuance of the warrant; the police, however, installed the device on the eleventh day and in Maryland. The GPS data were relevant because they connected Jones to the alleged conspirators’ stash house that contained $850,000 in cash, 97 kilograms of cocaine, and 1 kilogram of cocaine base.


24. In the case of *Goldman v. United States*, 316 U.S. 129 (1942), the Government installed a listening apparatus (a “detectaphone”) in the office next to the defendants which had the capacity to amplify sound waves so conversations could be heard in the next room. In that case, the court found no trespass, and thus no Fourth Amendment violation. Brandeis would have dissented in that case, along with Justice Murphy, who wrote: “science has brought forth far more effective devices for the invasion of a person’s privacy than the direct and obvious methods of oppression which were detested by our forebears and which inspired the Fourth Amendment.” Id., at 139 (Murphy, J. dissenting).


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PART IV:
JEWISH JUSTICES AND
THE EXPANDING DIVERSITY
OF THE SUPREME COURT
The sudden death of Justice Joseph R. Lamar of Georgia on January 2, 1916, created an unexpected vacancy on the Supreme Court for President Woodrow Wilson to fill. Over the next twenty-six days, Washington, D.C., was abuzz with rumors about who President Wilson would appoint to succeed him on the Court. Although Louisiana’s Jewish Senator Judah P. Benjamin had been offered a nomination to the Supreme Court by President Milliard Fillmore in 1853, he had turned it down to remain in the Senate, and no Jew since had ever received a presidential appointment to the Supreme Court. When President Wilson announced the nomination of Louis D. Brandeis on January 28, 1916, he precipitated a four-month Senate confirmation battle, the most contentious fight over the confirmation of a Supreme Court justice in American history until the 1987 Senate battle over the confirmation of Robert Bork.

Brandeis, the nationally known “people’s attorney” from Boston and one of the country’s most celebrated progressive reformers, had been one of Woodrow Wilson’s most influential advisers and political confidants since Wilson’s campaign for the presidency in 1912. After Wilson’s election, Brandeis played a major role in helping to shape the President’s “New Freedom” economic policies and programs. Wilson had
initially hoped to appoint Brandeis to his Cabinet. Much to his disappointment, antisemitic opposition, organized and financed by leaders of Boston’s banking and legal establishment, had prevented Wilson from appointing Brandeis as the country’s first Jewish Attorney General in 1913. Wilson, however, remained determined to appoint Brandeis to his Cabinet or to the Supreme Court, and the unexpected resignation of Justice Lamar created the Court vacancy that Wilson had been waiting for.

The Brandeis appointment came as a surprise to many politicians and pundits alike. Very few people outside of Wilson’s small circle of trusted White House advisers would have anticipated that the President, facing what would be a tough reelection fight only eight months later, would make such a controversial political appointment. At least one important member of Wilson’s inner circle, Colonel Edward House, was apparently not consulted beforehand about the Brandeis nomination. When he later heard of the nomination, House was reportedly “appalled.”

Brandeis had learned about the possible appointment a few days earlier, but said nothing about it until the White House announcement was made. “I am not exactly sure,” he wrote his brother Alfred in Louisville, “that I am to be congratulated, but I am glad the President wanted to make the appointment and I am convinced, all things considered, that I should accept.”

Secretary of the Treasury William Gibbs McAdoo, a Brandeis friend and political ally, and President Wilson’s son-in-law, was one of two Wilson Cabinet members who first urged Wilson to nominate Brandeis to the Supreme Court. His advice was perhaps not surprising, as it had been Brandeis who had earlier urged Wilson to appoint McAdoo Secretary of the Treasury. Wilson’s Attorney General, Thomas W. Gregory also enthusiastically recommended Brandeis, although Gregory, while praising Brandeis as “the greatest lawyer in the United States,” warned Wilson that Brandeis’ nomination would result in a “tempest.”

Gregory’s warning, if anything, was understated. President Wilson’s unexpected announcement, as the White House had expected, stirred up a torrent of opposition. Appointment of a justice to the Supreme Court is a lifetime appointment, or until the
appointee retires. It is an opportunity for a liberal President, such as Wilson, to impose his liberal judicial philosophy on his political adversaries for a much longer period than he actually serves in the White House. While this upset Wilson’s conservative opponents, Brandeis’ long record as a people’s attorney committed to progressive reform upset them even more. Only fifty-nine years old at the time of his appointment, Brandeis, his critics feared, might very well enjoy a tenure of more than twenty years on the Court, as indeed he did.

Conservatives reacted with shock and anger to the President’s bombshell announcement. The New York Sun denounced the appointment of such a radical to “the stronghold of sane conservatism, the safeguard of our institutions, the ultimate interpreter of our fundamental law.” Former President William Howard Taft, who had hoped against hope that Wilson would transcend partisan politics and appoint him to the Court, was livid when he heard the news of Brandeis’ nomination. “It is,” he wrote, “one of the deepest wounds that I have had as an American and as a lover of the Constitution and a believer in progressive conservatism, that such as man as Brandeis could be put on the Court, as I believe he is likely to be. He is a muckraker, an emotionalist for his own purposes, a socialist, prompted by jealously, a hypocrite . . . who is utterly unscrupulous . . . a man of infinite cunning . . . of great tenacity of purpose, and, in my judgment, of much power for evil.” Even the New York Times was unhappy with the appointment, lamenting that Brandeis “is essentially a contender, a striver after change and reforms. The Supreme Court by its very nature is the conservator of our institutions.”

On Wednesday, February 9, 1916, according to procedure, a subcommittee of the Senate Judiciary Committee, chaired by Senator William Chilton of West Virginia, met to begin discussion of the nomination of Brandeis to the Supreme Court. Over the next three months, the five members of the Senate subcommittee, heard testimony, discussed petitions and other correspondence, and evaluated the criticism and support for Brandeis’ nomination, before issuing a report to the full Senate Judiciary Committee. The full Judiciary Committee would then make a recommendation to the Senate, which is empowered by the Constitution to advise and consent on all Supreme Court nominations.
A majority of the U.S. Senate would then have to vote in favor of his nomination before he could be confirmed.

Day after day, for the next four months, there was standing-room-only in the Senate chamber, which was crowded with senators and witnesses, pundits and reporters, and friends and opponents of Brandeis. Never present, however, was the nominee himself. Senate tradition dictated then—and that tradition would continue until Felix Frankfurter’s Supreme Court nomination twenty-three years later—that Supreme Court nominees were not permitted to appear at their confirmation hearings. Thus, Brandeis, under the Senate rules of that time could not speak in his own defense. In his absence, Edward McClennen, a junior partner in Brandeis’ law firm in Boston, moved to Washington for the next several months to lead and coordinate the campaign for Senate confirmation of his colleague’s nomination.

While much of the opposition to Brandeis’ nomination was directed at Brandeis’ reputation as a radical social reformer and vocal opponent of big business and the “money trusts,” there is little question that some of the campaign against the Brandeis nomination was antisemitic in origin. Antisemitism was certainly a factor in the opposition of A. Lawrence Lowell, Harvard University’s virulently antisemitic President. Immediately after the 1912 election, Lowell, an early supporter of the Immigration Restriction League and one of its national vice-presidents, had publicly opposed Brandeis’ appointment to Wilson’s cabinet, notifying the President that Brandeis did not “stand very high in the opinion of the best judges in Massachusetts.” When Brandeis’ Supreme Court nomination was announced, Lowell wrote his good friend Massachusetts’s Republican Senator Henry Cabot Lodge: “Are we to put on our Supreme Bench a man whose reputation for integrity is not unimpeachable? It is difficult—perhaps impossible—to get direct evidence of any act by Brandeis that is, strictly speaking, dishonest; and yet a man who is believed by all the better part of the bar to be unscrupulous ought not to be a member of the highest court of the nation. Is there anything that can be done to make his confirmation less probable?”
Louis D. Brandeis 100: Then & Now  

Lowell subsequently gathered a petition of protest against Brandeis that had fifty-five signatures, including most notably that of the Boston patrician lawyer Charles Francis Adams, Jr., Treasurer of the Harvard Corporation, former president of the Union Pacific Railroad and descendant of two American Presidents, who shared his brother Henry’s antisemitic bias. Besides Adams, the Lowell petition included the names of many of the most eminent Brahmin leaders of Boston’s business and legal establishment, such as Sargent, Gardner, Peabody, Shattuck, and Coolidge. Lowell sent his signed petition to his good friend Massachusetts Republican Senator Henry Cabot Lodge who, on Lincoln’s birthday, inserted a copy into the Congressional Record, before presenting a copy of the document to the Senate subcommittee’s chairman, Senator Chilton. Lowell, whose antisemitism was well known, later became notorious for trying to place a quota limiting Jewish admissions to Harvard. To Lowell’s evident chagrin, the Harvard Law School faculty, with one exception, publicly endorsed Brandeis’ nomination. Brandeis’ friend and close political ally Felix Frankfurter, who with Brandeis’ glowing recommendation to Dean Roscoe Pound had been appointed to the Harvard Law School faculty the previous year, mobilized nine of his other ten faculty colleagues at the Law School to support the Brandeis nomination. Throughout the four-month-long confirmation battle, Frankfurter wrote a score of magazine editorials, letters, and articles in support of his friend. On February 5, The New Republic published an editorial, unsigned but written by Frankfurter, reviewing Brandeis’ accomplishments, praising him for his judicial qualities and for seeking “to make the great reconciliation between order and justice.” At Frankfurter’s suggestion, Roscoe Pound wrote to Senator Chilton praising the Brandeis appointment. So did Harvard University’s revered former President, Charles W. Eliot, who wrote to Chilton that “I have known Mr. Louis D. Brandeis for forty years and I believe that I understand his capacities and character.” Recalling Brandeis as a “distinguished student” at Harvard and referring to his “practical altruism and public spirit,” Eliot concluded his letter by saying “that the rejection by the Senate of his nomination to the Supreme Court would be a grave misfortune for the whole legal community, the Court, all American business and the country.” 

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God,” Brandeis’ law partner Edward McLennen cheerfully declared of Eliot’s letter, “we have got the best.”\textsuperscript{14}

Numerous other letters in support of Brandeis’ candidacy were sent to the Senate Judiciary Subcommittee as well. Among those writing to the subcommittee, or testifying on his behalf, were Newton Baker, the reform mayor of Cleveland, president of the National Consumers League and Wilson’s future Secretary of War, Frances Perkins, who would later be Franklin D. Roosevelt’s Secretary of Labor, Henry Morgenthau, Sr., who had just returned home to America after serving three years as Wilson’s Ambassador to Turkey, Walter Lippmann, the editor of \textit{The New Republic}, \textit{Harper’s Weekly} editor Norman Hapgood, who would later serve briefly as Wilson’s Ambassador to Denmark, and Rabbi Stephen S. Wise.

As anticipated, liberal politicians from across the political spectrum voiced support for Brandeis. Social Reformers in the Democratic Party and Progressive Republicans alike applauded Wilson’s appointment, hailing the Brandeis nomination as an historic moment for America. Within days of Justice Lamar’s death, Attorney General Gregory had met with Senator Robert La Follette of Wisconsin, who was the only senator consulted about the Brandeis nomination prior to the White House’s January 28 announcement. At Wilson’s behest, he asked La Follette “whether Progressive Republicans in the Senate could be counted on to cross party line and vote to confirm Brandeis. La Follette enthusiastically said yes.”\textsuperscript{15}

Also, as anticipated, many Southern Democrats vocally opposed Brandeis’ nomination. Brandeis’ law partner Edward McClennen, “later placed anti-Semitism on the top of the list of the reasons for the opposition to Brandeis . . . among Southern Democrats.”\textsuperscript{16} Since the Supreme Court vacancy for which Brandeis was being nominated had been created by the death of Justice Lamar of Georgia, Southern Democrats in the Senate expected that Wilson would appoint a Southerner to fill Lamar’s seat. They were disappointed, and some angered, when Wilson did not. Also, as Colonel House reportedly told Henry Morgenthau, Sr., some Southern Senators feared that, if confirmed, Brandeis would try to undo the separate but equal doctrine.\textsuperscript{17}
Throughout the long Senate confirmation battle, the anti-Brandeis campaign was largely organized and financed by Henry Lee Higginson, the wealthy head of the most powerful banking house in Boston, a pillar of the Boston Brahmin establishment, and for many years Brandeis’ most bitter political foe. He had earlier helped organize and finance the antisemitic campaign that had helped to derail Brandeis’ appointment to Wilson’s Cabinet. Shocked by the news of the Brandeis nomination, Higginson wrote his close friend Senator Lodge, warning him that Brandeis “has not the judicial quality. It would be well to investigate sundry questions about him.”\textsuperscript{18} Some opponents of the Brandeis nomination were more explicitly antisemitic. George Wickersham, a former U.S. Attorney General during the Taft Administration and the president of the New York Bar Association at the time of the Senate confirmation battle, attacked Brandeis’ supporters as “a bunch of Hebrew uplifters.”\textsuperscript{19} William F. Fitzgerald, a conservative Boston Democrat and longtime political foe of Brandeis, wrote that “the fact that a slimy fellow of this kind by his smoothness and intrigue, together with his Jewish instinct can be appointed to the Court should teach an object lesson” to true Americans.\textsuperscript{20}

At the same time, within days of Wilson’s surprise announcement, William Howard Taft began mobilizing opposition to Brandeis amongst the leadership of the American Bar Association. Taft and six other former American Bar Association Presidents, including Elihu Root, the former Secretary of War and Secretary of State, sent a scathing letter of protest to the Senate Judiciary Committee stating that “the undersigned feel under the painful duty to say to you that in their opinion, taking into view the reputation, character and professional career of Mr. Louis D. Brandeis, he is not a fit person to be a member of the Supreme Court of the United States.”

Taft, it should be noted, did not share the antisemitic bigotry of A. Lawrence Lowell and other vocal opponents of the Brandeis nomination. Taft, who enjoyed close ties to the Jewish community of his native Cincinnati, had appointed Julian Mack as the first Jew to serve as a Federal judge on the U.S. District Court of Appeals, and counted Jewish leaders such as Mayer Sulzberger and Julius Rosenwald amongst his political confidants and friends. He was personally distressed by the anti-Jewish comments of George
Wickersham directed at the “Hebrew uplifters,” especially Walter Lippmann and Felix Frankfurter, campaigning in support of Brandeis.\textsuperscript{21} And, as is well known, while serving as chief justice of the Supreme Court from 1921 to 1930, Taft eventually developed a genuine affection and respect for Brandeis, despite their longstanding (and continuing) differences on issues of law and politics. Taft reportedly was “won over by the luminous mind and great learning of Justice Brandeis.”\textsuperscript{22} In 1923, after two sessions of the Court during which Taft and Brandeis had worked together as colleagues, Taft wrote his daughter Helen about his old rival: “I have come to like Brandeis very much indeed . . . he is a very hard worker . . . He thinks much of the Court and is anxious to have it consistent and strong, and he pulls his weight in the boat.”\textsuperscript{23} In 1912, however, Taft had not yet had the opportunity to develop these more charitable views about Brandeis.

More than the opposition of Taft, the equally strong opposition of Massachusetts senior Senator Henry Cabot Lodge’s was of particular concern to Brandeis’ supporters. By longstanding tradition, according to what was known as the rule of Senatorial courtesy, before a President announces the name of a Supreme Court nominee, and sends the Supreme Court nomination to the Senate for confirmation, he must first get the approval of the two senators from the nominee’s state. At the very least, congressional custom mandates, he must notify the senators of his intention. In the case of his nomination of Brandeis, Wilson did neither. Massachusetts Senator Henry Cabot Lodge, the state’s senior senator and a conservative Republican, had close ties to the Boston Brahmin establishment opposing Brandeis’ nomination. As commentators noted at the time, Wilson was not so much defying him, as ignoring him. Lodge’s position of influence, as the senior Senator from the nominee’s state would probably have brought about Brandeis’ defeat had Lodge invoked the rule of Senatorial courtesy. But, to the surprise of many of his Senate colleagues, Lodge, despite his open disdain for both Brandeis and Wilson, did not choose to do so.

Indeed, although Henry Cabot Lodge did urge the American Bar Association leadership to oppose the Brandeis nomination, and did bring A. Lawrence Lowell’s anti-Brandeis petition to the attention of his colleagues in the Senate, he did not take the major
leadership role in mobilizing the political opposition against Brandeis as many had expected he would do. One writer’s explanation is that Lodge feared the political repercussions in the upcoming Senate election of November 1916, when he would have to face Massachusetts voters for the first time since the beginning of his Senate career in 1892. Since the ratification of the Seventeenth Amendment to the Constitution three years earlier, which Lodge had strongly opposed, he would no longer be chosen by the state senate that had selected him four times previously; now, for the first time, he would have to campaign for the support of newly-enfranchised voters, that would include many Catholics and Jews. He could not predict, or so the speculation goes, the political impact of what his leading the fight against Brandeis would have on his chances for reelection in November. Indeed, some of Lodge’s friends and advisers appreciated the acute dilemma that the Brandeis nomination had caused for the senior Senator from Massachusetts.

Arthur D. Hill, a Boston lawyer and close friend who managed Lodge’s personal legal affairs and investments, wrote the Senator at once urging him not to publicly oppose the nomination and risk defeat in the election later in the year.24

Hill’s advice was prescient: Lodge followed Hill’s counsel, and won a close, hotly contested reelection bid the following November. Lodge’s opponent in that Senate race, John “Honey Fitz” Fitzgerald, the flamboyant former mayor of Boston, applauded Wilson’s nomination of Brandeis, as did most of the Irish Democrats in the city. Years later, “Honey Fitz’s” grandson, John Fitzgerald Kennedy, would say that the Supreme Court justice he most admired, and sought to emulate in deciding on his own Supreme Court nominations, was Louis D. Brandeis.

Woodrow Wilson did not consult Jewish leaders, such as Jacob Schiff, before naming Brandeis to the Court, as Theodore Roosevelt had consulted Schiff before appointing Oscar Straus to his cabinet in 1906. Nonetheless, Schiff and many other Jewish leaders, including some who had earlier been Brandeis’ critics, came together in support of his appointment during the four months of his Senate confirmation battle. Schiff praised the appointment both publicly and privately, predicting that Brandeis would become “an adornment” to the Court, and that his Senate confirmation would be “an honor to our...
people.” Henry Morgenthau, Sr. played an especially prominent role in orchestrating support for Brandeis throughout the Senate confirmation battle, conferring almost daily in strategy sessions in New York with Stephen S. Wise and Norman Hapgood, and serving as the Brandeis campaign’s liaison to Colonel House. Oscar Straus’s brother Nathan, a preeminent Jewish merchant prince and philanthropist, convinced the journalist Arthur Brisbane to write an editorial for the New York Evening Journal, in support of the Brandeis nomination. Straus subsequently wrote Brandeis a personal note encouraging him not to be distressed by the opposition for “you will be most admired through the enemies you made.”

Some Jewish leaders, however, were less vocal in their support. For Louis Marshall, as Jonathan D. Sarna has suggested, Wilson’s appointment of Brandeis was “particularly galling,” since during the Taft administration he had lobbied for a Supreme Court appointment for himself and had been bitterly disappointed when he was not selected. In a confidential handwritten note to Marshall, his close friend and associate Cyrus Adler expressed his personal views about the Brandeis nomination that Marshall presumably also shared:

I do not view the nomination of Mr. Brandeis with complacency; he may have sufficient legal learning, but he seems to me to be a partisan and agitator and not the type of fair character and dispassionate type of mind which should be possessed by members of the most distinguished tribunal in the world.

In public, however, Adler like Marshall remained silent. “I have kept silent for many months,” Adler wrote Jacob Schiff, “because I did not want to be accused of endeavoring to injure his [Brandeis’] confirmation to the Supreme Court.” It may well be, as William Howard Taft later claimed, that Jewish leaders like Marshall and Adler, “all ha[d] to praise the appointment and all hate[d] Wilson for making it.”

On April 1, 1916, the Senate subcommittee voted 3 to 2 in favor of Brandeis’ confirmation. On May 24, 1916, after several weeks of further deliberation, during which Senate Republicans still tried unsuccessfully to defeat the nomination, the Senate
Judiciary Committee as a whole, by a strict party vote of 10 to 8, recommended that Brandeis be confirmed. The full Senate followed its recommendation and, on June 1, 1916, Wilson’s Vice President Thomas Riley Marshall, in his role as president of the Senate, announced that Louis D. Brandeis had been confirmed as an associate justice of the Supreme Court by a vote of 47 to 22. While the Senate was still in session that afternoon, Brandeis had taken the train from his Boston office to his summer home in Dedham. When he arrived home, his wife Alice happily conveyed the good news, greeting him with “Good evening, Mr. Justice Brandeis.”

After finally winning his bitter Senate confirmation battle, Brandeis went on to become one of the most important and influential justices ever to sit on the United States Supreme Court. Legal scholars and historians have consistently confirmed Brandeis’ enduring reputation as one of our “greatest” Supreme Court justices. In each of the several polls ranking or rating Supreme Court justices in terms of judicial “greatness,” conducted over four decades, Brandeis has invariably been ranked, following John Marshall and Oliver Wendell Holmes, Jr. as one of the three greatest justices in American history. During his twenty-three years on the Court, Brandeis played a singular role in developing the modern jurisprudence of free speech and the doctrine of a constitutionally protected right of privacy. As Alan Dershowitz has aptly noted, “The First Amendment’s right of free expression, the Fourth Amendment’s right to privacy and the due process clause’s focus on personal liberty (rather than property) all owe their current vitality to the creative genius of Justice Brandeis, whose dissenting opinions have become the law of the land.”

Much of Brandeis’ enduring legacy derives, of course, from his having been the first Jewish justice on the Supreme Court and, unquestionably, one of the greatest justices in the Court’s history. Brandeis’ appointment in 1916 set a precedent for more Jewish appointments and greater religious diversity on the Supreme Court. When on January 15, 1932, Justice Holmes retired from the Court at the age of ninety, President Hoover nominated Benjamin N. Cardozo, the chief judge of the New York Court of Appeals, to succeed him. In appointing Cardozo, Herbert Hoover became the second president to
appoint a Jew to the Supreme Court. During the next six years, for the first time in American history, two Jews served together on the Supreme Court.

With Brandeis’ appointment in 1916 began the tradition of a single, informally designated “Jewish Seat,” on the Supreme Court. There was no single “Jewish Seat” between 1932 and 1938, when two Jews served on the Court simultaneously. Both Cardozo’s appointment and his untimely death occurred during Brandeis’ long tenure. There had been speculation that President Franklin D. Roosevelt intended to appoint his trusted adviser Harvard Law School Professor Felix Frankfurter to succeed Justice Brandeis upon Brandeis’ retirement. However, when Justice Cardozo died suddenly in 1938, FDR appointed Frankfurter to fill Cardozo’s seat, which came to be known as the Court’s “Jewish Seat,” that would later be occupied by Justices Arthur Goldberg and Abe Fortas. The emergence of a single, informally designated “Jewish seat,” occupied by Justices Cardozo, Frankfurter, Goldberg, and Fortas in direct succession, thus came about after FDR’s appointment of Felix Frankfurter to replace Cardozo. Although Brandeis still remained on the Court after Frankfurter’s appointment in January 1939, he resigned three weeks later. Upon Frankfurter’s retirement from the Court in 1962, President Kennedy appointed his secretary of labor, Arthur Goldberg, to the Court’s Jewish seat. When Goldberg unexpectedly resigned from the Court in 1965 to accept Lyndon Johnson’s appointment as ambassador to the United Nations, LBJ appointed his close friend and adviser Abe Fortas to replace him. Only with Abe Fortas’s resignation in 1969, and President Richard Nixon’s appointment of Harry Blackmun, a Protestant, to the seat vacated by Fortas, would the fifty-three-year tradition of a “Jewish seat” on the Court come to an end. It would not be until twenty-four years later that another Jew, and the first Jewish woman, Ruth Bader Ginsburg, would join the Court. The following year, 1994, President Bill Clinton would appointment a second Jew, Stephen G. Breyer, to succeed Harry Blackmun. When Elena Kagan was appointed by President Barack Obama in 2009, she became the eighth Jewish justice, and second Jewish woman, to serve on the Supreme Court. (Justice Kagan sits on the seat that Justice Brandeis once held.)
Throughout his twenty-three year tenure as a justice of the Supreme Court, and at the time of his death in 1941, Louis D. Brandeis was among the best-known and highly respected Jews in the United States. During the 1930s, only Albert Einstein, George Gershwin, and the great Jewish baseball superstar Hank Greenberg may have eclipsed Brandeis in terms of fame and celebrity. Franklin D. Roosevelt famously called him Isaiah, as did members of FDR’s inner circle during the New Deal. Some Christian admirers went so far as to praise him as “the Greatest Jew in the World since Jesus Christ.”

To this day, Brandeis remains the only American Jew after whom a great university has been named. Part of his enduring Jewish legacy is attributable to his leadership of the American Zionist movement, both prior to and following his appointment as the first Jewish Justice of the Supreme Court.

This distinction as the first Jewish justice is in some ways ironic, because Brandeis’ upbringing was the least Jewish of any of the eight Jewish justices of the Supreme Court. His parents, well-educated German speaking Jews from Prague, did not observe any Jewish holidays. His mother Frederika, especially, “was adverse to religious enthusiasm of any sort and raised her children to cherish the ethical teachings of all religions and the rituals of none.” Brandeis celebrated Christmas every year with his parents and continued to do so when raising his own family. He did not live near or socialize with other Jews, did not belong to a synagogue, and until he discovered the Zionist movement he contributed little to Jewish charities—indeed until then he had nothing to do with organized Jewish life. Nor did Brandeis observe any part of the Jewish dietary laws. Much later in life, even after he had become a leader of the Zionist movement, he was still delighted to receive the hams that his brother Alfred occasionally sent him from Louisville. “There is great rejoicing over the ham—which has just arrived,” he wrote, thanking his brother.

Although for the first half century of his life Brandeis was a highly assimilated Jew who cared little about the religious observance of Judaism, by 1914 Brandeis had assumed the leadership of the American Zionist movement. His mid-life “conversion” to Zionism, as it has often been known, and his meteoric emergence as the preeminent
Zionist leader in America, comprise an important chapter in Brandeis’ life, that I shall discuss in more detail in my forthcoming book.

Brandeis’ formal leadership of the American Zionist movement continued for seven years, from 1914 to 1921. During this period, Brandeis spearheaded a dramatic rise in Zionist movement memberships and fundraising, and helped to organize new Zionist chapters throughout the United States. Brandeis strongly supported the work of Henrietta Szold, the founder of Hadassah (the American Women’s Zionist organization), and Hadassah’s program of practical health care in Palestine. Brandeis personally sought and won for the Zionist movement the financial support of several wealthy American Jewish philanthropists, who were his friends, such as the Filene’s Department Store Vice President Louis E. Kirstein of Boston, the financier and Washington Post owner Eugene Meyer, and Nathan Straus, the president of Macy’s. Prominent non-Jews, such as Norman Hapgood, the editor of Harper’s Weekly, became interested in Zionism because of their friendship with Brandeis, and for the first time the Zionist movement thus “gained access to major non-Jewish journals of opinion.”

Beginning in 1917, Brandeis also played a crucial behind-the-scenes role in formulating and winning Wilson administration support for the Balfour Declaration, and helped author what became the official program of the American Zionist movement, the so-called Pittsburgh Program of 1918. Brandeis became so devoted to the Zionist cause that, for a short time in 1917, he gave serious thought to resigning from the Supreme Court to devote himself fulltime to work on behalf of Zionism. Even after stepping down from the leadership of the American Zionist movement in 1921, following a bitter dispute with the eminent European Zionist leader Chaim Weizmann, Brandeis would continue to play an important behind-the-scenes role in Zionist affairs throughout his tenure on the Court during the 1920’s and 1930’s. As the best-known American Zionist leader of his era, Brandeis gave legitimacy to Zionism, and made it fashionable amongst Jews and Christians alike. Through his leadership of the American Zionist movement from 1916 to 1921, and his continuing involvement in Zionist affairs thereafter, Brandeis was and
remains the only Jewish Supreme Court justice to have combined service on the Court with a leadership role in American Jewish public life.

Part of Brandeis’ enduring Jewish legacy is also attributable to the fact that he was the first Supreme Court justice to hire Jewish law clerks, setting an historic precedent that subsequent Supreme Court justices, Jewish and non-Jewish alike, would follow.

The position of the Supreme Court law clerk began with the appointment of Justice Horace Gray in 1882. Gray had begun the practice of hiring a law clerk while serving as chief judge of Massachusetts’ Supreme Judicial Court, and Brandeis, who had graduated Harvard Law School with the highest scholastic average in the school’s history, had been one of his clerks. For many years, Horace Gray and other Supreme Court justices who hired clerks “paid for them out of their own pockets until 1922, when Congress allowed each justice to hire one clerk at an annual salary of $3,600.” In 1924, Congress made law clerk positions at the Supreme Court permanent.

Gray relied on Harvard Law School faculty to select the law clerks for him, as did Oliver Wendell Holmes, Jr. who was appointed to Gray’s seat on the Supreme Court in 1902. Upon his joining the Harvard Law School faculty in 1915, Felix Frankfurter selected the clerks for Holmes, and, upon his appointment in 1916, Brandeis asked Frankfurter to do the same for him. The first law student Frankfurter chose for Brandeis, Calvert Magruder, clerked for one year. The next two Harvard students, William A. Sutherland and Dean Acheson, stayed on for two years, and the rest of Brandeis’ clerks served for one year each. It has long been assumed that Brandeis, like Holmes automatically took the clerks that Frankfurter recommended. “As for choosing the man,” Brandeis told Frankfurter, “I shall leave your discretion to act untrammeled.”

Brandeis had encouraged his law clerks to use their Supreme Court clerkships as a springboard to go into law school teaching and/or government service. “Other things being equal,” he wrote Frankfurter, “it [was] always preferable to take someone whom there is reason to believe will become a law teacher.” Brandeis was notably successful in attaining this goal for his law clerks, as more than half—52 percent—of his law clerks obtained academic appointments. His first clerk, Calvert Magruder, who had been
Frankfurter’s student before clerking for Brandeis, later returned to Harvard Law School to teach, becoming a full professor at the age of thirty-one. Magruder worked for several New Deal agencies, before Franklin D. Roosevelt appointed him to a federal judgeship on the U.S. Court of Appeals. Paul Freund, who would teach at Harvard Law School for more than forty years, became one of the foremost legal scholars of his generation, and was considered to have been “the dominant figure of his time in the field of constitutional law.” Louis Jaffe, who, upon Frankfurter’s recommendation, served as Brandeis’ law clerk during the 1934 Court term, was a professor and dean of the University of Buffalo Law School, before returning to Harvard Law School, where he would teach until his retirement. David Riesman, Brandeis’ clerk during the 1935 term, began his academic career as a law professor at the University of Buffalo, where he devoted his early scholarship to analyzing the interplay between law and society. After joining the social science faculty of the University of Chicago in 1949, Riesman would gain both fame and celebrity as one of the most influential and popular sociologists of the twentieth century with his best-selling book *The Lonely Crowd*. Brandeis was also proud of his law clerks who entered government service, such as James Landis, who (on his recommendation) served as a member of the Federal Trade Commission and as Chairman of FDR’s Security and Exchange Commission, before beginning an academic career at Harvard Law School, where he would serve as dean from 1938 to 1946. Over the years, Brandeis would maintain an especially close relationship with Dean Acheson, who clerked for Brandeis from 1919 to 1921. Brandeis would personally recommend Acheson to Franklin D. Roosevelt for appointment as solicitor general in 1933, and Acheson would later serve as an assistant secretary of state and assistant secretary of the treasury, before being appointed secretary of state by President Truman in 1948. When Acheson was appointed assistant secretary of state for economic affairs by FDR, he asked Justice Brandeis to administer the oath of office.

Beginning with Brandeis, Supreme Court clerkships became the most coveted and prestigious attainments, and avenues of upward mobility within the legal profession for ambitious Jewish law school graduates, especially those coming from poor, immigrant
backgrounds. Several of the Harvard Law School students that Felix Frankfurter selected as law clerks for Brandeis were Jewish. A few of these Jewish Harvard Law School graduates first clerked for Julian Mack, Learned Hand, or other Federal judges, before moving up to their Supreme Court clerkships with Brandeis. Mack, the first Jew appointed to a Federal judgeship, had first met Brandeis in 1887 when, as a law student at Harvard, he had been one of the founders of the Harvard Law Review, which Brandeis helped fund and sponsor. Almost immediately upon his appointment to a Federal judgeship on the U.S. Court of Appeals in 1911, Julian Mack had begun a tradition of choosing his law clerks from among the top Harvard Law graduates, as recommended to him first by Harvard Law School dean Roscoe Pound and then by Felix Frankfurter. Brandeis, like Mack and Frankfurter, was very interested in placing Jewish Harvard Law School graduates who, because of antisemitism still prevalent within the legal profession, would otherwise have had few Supreme Court clerkship opportunities. Prior to Brandeis’ appointment, no Jewish Law School graduate had ever served as a clerk to a Supreme Court justice. During the 1920s and the 1930s, the “overwhelming majority” of Brandeis’ law clerks were Jewish.44

Throughout the 1920s and 1930s, the country’s major law schools had few if any Jews on their faculty. During his twenty-five years as a law professor at Harvard, before his appointment to the Supreme Court, Felix Frankfurter was the one and only Jewish member of the faculty. Brandeis sought to change this situation. During his years on the Court, Brandeis had “made a special project of finding law faculty positions for young Jewish lawyers whom he regarded as particularly talented.”45 He was notably successful in this effort. Within a few years of Frankfurter’s appointment to the Supreme Court, two of Brandeis’ law clerks, Paul Freund and Louis Jaffe, would succeed Frankfurter on the faculty of Harvard Law School, establishing a precedent for the appointment of a growing number of Jewish Harvard Law professors during the 1950s and 1960s. Brandeis, with the help of Judge Julian Mack, was able to place his law clerk Nathaniel Nathanson on the Northwestern University Law School faculty, which had not hired a Jew since Mack had taught there briefly in the 1890s. Nathanson, who had clerked for
Julian Mack before serving as one of Brandeis’ law clerks in 1934, would teach law at Northwestern for several decades, and would be the first of several Jews to serve on the Northwestern Law faculty during his long tenure there. Also, before his appointment at Harvard, Jaffe would break a major glass ceiling for Jews in the American legal profession by becoming the first Jewish dean of a law school, at the University of Buffalo, in 1948.

One of Brandeis’ law clerks, Harry Shulman, would later break another major glass ceiling for Jews in the American legal profession by becoming the first Jewish dean of Yale Law School in 1951. One of these young Jewish lawyers whom Brandeis was instrumental in placing on a law school faculty was Schulman, his law clerk for the 1929 Court term. In the fall of 1929, when Brandeis was encouraging Shulman to seek a law school teaching position, Frankfurter was still the only Jew on the Harvard Law School faculty, as he had been since his appointment in 1914. There were no Jews on the law school faculties of Yale, Columbia, the University of Pennsylvania, or Northwestern. In October 1929, Brandeis wrote to Frankfurter asking for his help in finding a law school teaching position for Shulman. “It seems to me,” Brandeis wrote, “that a great service could be done generally to American law and to the Jews by placing desirable ones in the law school faculties. There is in the Jew a certain potential spirituality and sense of public service which can be more easily aroused and directed, than at present is discernible in American non-Jews.” Shulman was apparently the right man: A Russian-born graduate of Brown University and a student of Frankfurter’s at Harvard Law School, Shulman joined the Yale Law School faculty in 1930, immediately following his clerkship with Justice Brandeis. At the age of thirty-six, Shulman was first considered for the Yale Law School deanship in 1939, while Brandeis, who publicly voiced his support for Shulman’s appointment, was concluding his final term as a justice on the Court. Despite the fact that legal scholars and eminent attorneys from throughout the country supported Shulman’s appointment as Dean, and that one of the nation’s most respected
jurists Judge Learned Hand wrote “my choice remains Harry Shulman,” because of antisemitic opposition to the appointment, Shulman was not selected.48 When, seventeen years later, in 1953, Shulman’s name was again presented to the Yale Corporation for appointment as dean of the law school, a new fight broke out “entirely because of the Jewish issue.” An enthusiastic six-page letter of support for Shulman sent by former Brandeis law clerk and former secretary of state Dean Acheson, to his fellow trustees on the Yale Corporation, played a major role in convincing the Yale trustees to confirm Shulman’s appointment as dean.49 Shulman would be the first of a number of Jews to serve as dean of Yale Law School over the next several decades.

Not all of Brandeis’ Jewish law clerks sought jobs in academia or the government. As Harvard Law School graduates, with a prestigious Supreme Court clerkship now on their resumes, some received (and accepted) job offers from elite Wall Street law firms that had previously hired few (if any) Jews. Henry J. Friendly, for example, the editor-in-chief of the *Harvard Law Review*, who legend has it achieved the highest grade point average at Harvard Law School since Brandeis himself was a student there, and clerked for Brandeis in 1929, turned down a teaching job at Harvard Law to accept a more lucrative offer at Root, Clark, one of only two Wall Street law firms with a Jewish partner.50 Friendly continued to practice law in New York City until 1959, when President Eisenhower appointed him to a federal judgeship, on the Second Circuit Court of Appeals in New York, where he served until his death in 1986, establishing an enviable reputation as one of the greatest American jurists of the twentieth century.

During the 1960s, Henry Friendly and Harvard Law School professor Paul Freund, one of the nation’s most renowned scholars of constitutional law, who had served as Brandeis’ law clerk in 1934 and, like Friendly, had been one of Felix Frankfurter’s star protégés at Harvard, would be considered for appointment to the Supreme Court by three presidents.

As the first Supreme Court justice to hire Jewish law clerks, Brandeis introduced a new dimension of religious diversity that had heretofore been absent from the Supreme Court. Moreover, in hiring Jewish law clerks, and helping them to find employment in
academia and the federal government, as well as in private practice, Brandeis did much to promote the advancement of Jewish lawyers within the American legal profession. This achievement is an important part of his enduring Jewish legacy that should not be forgotten.

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Notes
1. David N. Atkinson, Leaving the Bench: Supreme Court Justices at the End (Lawrence, Kansas: University Press of Kansas, 1999), 88.
12. Ibid., 106.
14. Ibid.
15. Strum, 291.
17. Strum, 297–98.
23. William Howard Taft, letter to Helen Taft Manning, June 11, 1923, as quoted in Pringle, 97.


38. Ibid.

39. Ibid., 464.


44. Ibid., 76; and Strum, 359.


47. Louis D. Brandeis, letter to Felix Frankfurter, October 13, 1929, Peppers, “Isaiah and His Young Disciples, 76; and Burt, *Two Jewish Justices*, 65.


49. Ibid., 279.


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Diversifying the Supreme Court: Brandeis, Marshall, Sotomayor

Linda S. Greene*

In this essay I focus—as we all do here—on the Brandeis appointment as a significant landmark in the history of the federal judiciary. I explore this topic initially through a comparison of President Wilson’s 1916 appointment of Louis Brandeis with President Johnson’s 1967 appointment of Thurgood Marshall as a symbolic opening of the federal bench to African American lawyers. Both Brandeis and Marshall were well known nationally prior to their appointments, with Brandeis engaged in significant domestic and international activities including his embrace of Zionism, and Marshall engaged in an almost four-decade long assault on racial segregation and *Plessy v. Ferguson*. Perhaps not ironically, both endured aberrationally long waits between nomination and confirmation while their opponents raised substantive objections that thinly veiled the opposition to the placement of a member of their respective racial and ethnic groups on the highest court.

Although both Brandeis and Marshall opened the door for a more diverse federal judiciary, the debate over the importance of diversity continues. There is a robust scholarship on the extent to which the federal judiciary is more diverse, on the effect of diversity on the outcomes of judicial decisions, and on the contribution of diversity to the legitimacy of the judiciary. More recently, a debate over judicial diversity on the federal
bench was televised for the nation during the confirmation of Sonia Sotomayor to the United States Supreme Court. In the course of that debate, proponents celebrated her educational qualifications, her professional achievements, and her Horatio Alger-like up-from-poverty story, while detractors suggested that Sotomayor’s embrace of her Latina identity would prevent her from following the law. Like Brandeis and Marshall, she was confirmed despite substantial opposition, and like them, she has already added a distinctive judicial voice to the highest court.

Brandeis and Marshall: Defying Sisyphus
Though decades passed between Brandeis’ confirmation and that of Marshall’s, their best known characteristics brought heavy odds against the improbable feat of their ascension to the High Court.

Brandeis
Brandeis was the first Jewish Justice on the Supreme Court, though historians have suggested that another may have been considered in the nineteenth century.1 Though he did not deny his Jewish identity, it was not a defining feature of his identity during most of his life and throughout his very visible legal career.2 He did publicly embrace Zionism3—“a belief in the need for a Jewish state and the concomitant duty to ‘educate’ the American Public about its necessity”4—in 1913, becoming a visible leader of the cause in 1914,5 through 1916,6 on the virtual eve of Wilson’s nomination of Brandeis to the high court in 1916.7 He continued his involvement after he assumed his role as Associate Justice of the Supreme Court.8

But Brandeis became well known prior to the turn of the century when his article “The Right to Privacy” was published in 1890 in the Harvard Law Review.9 In the article, he and his co-author asked “whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is. . . .”10 Brandeis insisted that the right to privacy was not “a matter of mere property rights,” but rather the right to “an inviolate
personality.” Here, Brandeis would lay the foundation for his dissent in *Olmstead v. United States*, in which he argued that government eavesdropping on telephone conversations violated the “right to privacy” and the right “to be let alone.” In that same 1890 article, he also anticipated Supreme Court doctrine that would develop decades later by proposing an exception to the right of privacy for discourse on “concerns of the public general interests,” as well as remedies for the invasion of that right. The article remains a relevant source for discourse on contemporary issues of privacy.

Brandeis was also well known for his activities on behalf of workers who were powerless in their “economic class conflict” struggle. One of his causes was “constructive legislation designed to solve in the public interest our great social, economic and industrial problems. . . .” A well-known example was his defense of Oregon’s legislation to protect women workers, which became *Muller v. Oregon*, and was put in jeopardy by the Supreme Court decision in *Lochner v. New York*, which struck down legislation that protected bakers from excessive exposure to flour inhalation. Nonetheless, Brandeis innovated by pursuing a dense and lengthy factual exploration of the dangers women and their children experienced as a result of long employment hours, which persuaded the Supreme Court to uphold the Oregon statute.

Though Brandeis’ arguments, and the Court’s reasoning that were based upon female vulnerability and incapacity would haunt women for decades to come, it was judged a brilliant victory in the press and is remembered not merely because “Muller became a landmark decision . . .” but also “for the brief that Louis Brandeis filed. The singular and detailed focus on the societal context of a potential legal decision, which came to be known as a ‘Brandeis Brief’ . . . altered the way that lawyers approached defense of public matters” and burnished Brandeis’ reputation as a courageous reformer.

Brandeis was also a visible opponent of government corruption. He was involved at the turn of the century in disputes over the allocation of railway rights to monopolistic and monied interests in Boston, and railway tariffs. He represented the head of the United States Forestry Service, whom President Taft had fired to clear the way for private coal deals on valuable public lands. Brandeis was also a visible advisor to President
Woodrow Wilson on antitrust policy during the 1912 election, and he advised the president on the legislation that created the Federal Trade Commission.

He spoke out on a wide array of topics, amassing a record that would be prodigious in any era. He testified before legislative bodies, gave speeches, and wrote legal briefs and newspaper opinion columns.

Ordinarily, both legal stardom and presidential will are necessary for a nomination to the Supreme Court, but presidential will is sufficient for that honor. In this respect, Brandeis’ biographers seem to agree that Wilson not only “rewarded and honored Brandeis for the services he had rendered to the President,” but also put him forward as a part of Wilson’s ongoing effort to appoint Brandeis to a position commensurate with his energies and abilities. Therefore, although there may be some truth in the notion that Wilson nominated Brandeis to “appeal . . . to certain groups in the electorate whose support Wilson would need in order to be re-elected in 1916,” there’s no question that Wilson thought highly of Brandeis and wanted to afford Brandeis an opportunity to serve the nation in an important official capacity.

Scholars agree that the opposition to his confirmation was “veiled anti-Semitism,” an antisemitism that opponents of his reformer efforts had expressed several years before Wilson’s nomination, and provocative headlines and opinion commentary do bear this out. But another view is that his opposition to powerful business interests insured that his nomination would be controversial. As one biographer put it, “[the] nomination became a confrontation of interests and ideologies rather than a display of prejudice.” His opponents marshaled both Harvardians and prominent members of the bar to shore up their cause. Brandeis had organized support from the law faculty, as well as friends who countered newspaper stories potentially damaging to his confirmation. The hearings on his confirmation focused on several matters opponents relied upon to say that Brandeis was unfit to serve. There were charges that his testimony during 1913 hearings on railroad tariffs before the Interstate Commerce Commission was “a betrayal of his trust relationship,” to the detriment of the New Haven Railroad. Other issues that arose included his performance as a lawyer in a matter involving a will, his role as a
lawyer and board member for a large shoe company, and a generalized attack on his integrity led by Moorfield Storey, “a highly respected member of the bar . . . [who] had had a distinguished career as a lawyer, . . . Harvard Overseer, and president of the American Bar Association.” Nonetheless, the Committee on the Judiciary voted out his nomination to the full senate, which in turn confirmed him 47–22 a week later. His nomination had lingered in the Senate from January 28, 1916, to June 1, 1916—125 days.

Marshall

Thurgood Marshall was as well known as Brandeis was at the time of Johnson’s nomination but for different reasons. Marshall spent most of his career, including his time as a law student, focused on the battle against Jim Crow. With Charles Hamilton Houston, he mounted a multi-year battle against racial segregation that culminated in the stunning nature of his victory over Plessy v. Ferguson, in Brown v. Board of Education, in which the Supreme Court declared that state-mandated segregation in the nation’s public schools was unconstitutional. In 1962, President Kennedy chose Marshall to become the second African American to serve on a United States Court of Appeal, the prestigious Second Circuit. President Kennedy’s successor, Lyndon Johnson, plucked Marshall from his seat on the Second Circuit Court of Appeals in 1965 to elevate him to Solicitor General of the United States, reportedly to prepare him for a Supreme Court nomination as the first African American to join the Court. In 1967, President Johnson nominated Marshall to serve as an Associate Justice on the Supreme Court.

It was not surprising that Marshall’s nomination would face opposition. After all, the record that qualified him for service—thirty-five arguments before the Supreme Court and victories in many important constitutional cases—was the same record that threatened the American racial order generally and especially in the South:

By the time Johnson appointed Marshall to the Supreme Court, his history and his contributions to American constitutional law were fairly well known to Congress and the public. As a co-architect of legal doctrine
that eliminated official American apartheid, his work had affected the lives of millions of Americans, and had received editorial notice in major newspapers. President Johnson had indeed prepared Marshall to both withstand criticism and to receive praise. And the course of his confirmation encompassed both extremes.\footnote{61}

Marshall was familiar with what might come. Indeed, Lyndon Johnson, ever colorful when determined, reportedly said that “he was determined that he had to outfit Thurgood Marshall and armor him with the kind of battle plates that no opposition could penetrate.” He had a preview of that experience after Kennedy nominated him to the United States Court of Appeals for the Second Circuit in 1962. After a contentious hearing and a wait of eleven months, the Senate confirmed 54–16.\footnote{62}

Southern senators on the judiciary sought to delay his Senate confirmation with lengthy questions about judicial philosophy and judicial authority. A team of southern senators (North Carolina’s Sam Ervin, Sr., South Carolina’s Strom Thurmond, and Arkansas’s John McClellan) dominated the hearings, opposing Marshall’s confirmation on multiple grounds: he would be too sympathetic to criminal defendants;\footnote{63} he would be unlikely to exercise judicial restraint;\footnote{64} he was too enamored of the notion of a “living constitution;”\footnote{65} he was insufficiently sympathetic to states’ rights;\footnote{66} and he was lacking in basic constitutional knowledge.\footnote{67}

The southern senators on the committee voted against his nomination while denying that their opposition was grounded in race. Instead, the erudite Ervin spoke for them, stating that the opposition was based on the prediction that Marshall “would align himself with the judicial activists now serving on the Supreme Court.”\footnote{68}

On the Senate floor, there was both praise and outcry. The Judiciary Committee opponents joined other southern senators, including John C. Stennis (Mississippi), Spessard Holland (Florida), and Robert Bryd (Virginia) in condemnation of the nomination on activist and stare decisis grounds.\footnote{69} And as to the proponents of Marshall, how ironic it is to recall today that during the floor debate Senator Robert Kennedy
compared Marshall to the first chief justice of the Court, as well as to Story, Holmes, and Brandeis.

Yet despite the accolades upon nomination,\textsuperscript{70} it took over two months to reach the eve of confirmation. Was Marshall’s race the reason confirmation took so long? Yes—and, no. The confirmation process took seventy-eight days to complete,\textsuperscript{71} significantly longer than the eight to twenty-six days taken to confirm the three nominees who preceded him on the Court,\textsuperscript{72} but not the eleven months attributable to the Second Circuit nomination just six years earlier. The opposition to both Brandeis and Marshall was grounded in the change that these two men might bring to judicial doctrine on behalf of the powerless. As to Marshall, the question was change in the racial status quo in America, but I contend that that change was already underway:

\begin{quote}
[In] the abstract, the opponents did address valid issues of constitutional law, the resolution of which did depend on legal ideology and philosophy. When the opposition to Marshall’s nomination is viewed in the context of voting patterns on racial equality legislation the opposition [was] . . . an integral part of the larger pattern of southern opposition to the advancement of civil rights for Blacks. [That] opposition to Marshall must be understood in the broader context of southern opposition to the new legal doctrines . . . that [would] result . . . in meaningful and enforceable equality.\textsuperscript{73} thus ending the constitutionality of American apartheid. In 1967, those battles were not yet over, but the handwriting was on the wall . . .\textsuperscript{74}
\end{quote}

\section*{A Just Order in the Court?}

\textbf{Diversity on the Federal Bench after Brandeis and Marshall}

Since Wilson’s appointment of Brandeis 100 years ago and the appointment of Marshall almost fifty years ago, the federal bench has become much more diverse. There is an expanding body of literature on the characteristics of the federal judiciary. The Congressional Research Service periodically examines both the diversity of the federal judiciary as a service to lawmakers in both houses,\textsuperscript{75} and the burgeoning academic
scholarship on the topic. The literature has also focused on the relationship between various characteristics (e.g. gender, race, religious beliefs) on the outcomes of judicial decisions.

**Jewish Americans on the Bench since Brandeis**

The Supreme Court has had a small number of Jewish justices relative to the history of all appointments from 1789 to the present, but Wilson’s appointment of Brandeis to the Court was unique. It began a discussion of a “Jewish Seat” on the Supreme Court. The second Jewish justice was Benjamin Cardozo in 1932, but unlike Brandeis, the Senate confirmed him swiftly and without controversy. President Roosevelt nominated Felix Frankfurter to replace Cardozo, who was in turn replaced by Kennedy’s Arthur Goldberg, who resigned to become Ambassador to the United Nations. Johnson nominated Abe Fortas to replace Goldberg, but Fortas resigned just three years after a scandal. In 1987, President Reagan nominated Douglas Ginsburg, but that nomination was short lived and was never transmitted to the Senate. President Clinton nominated Ruth Bader Ginsberg in 1990, then Stephen Breyer in 1994. President Obama nominated Elena Kagan.

**African Americans on the Bench since Marshall**

With respect to Blacks on the federal bench, the life-tenured federal judge that preceded Marshall was William H. Hastie, whom President Truman appointed to the United States Court of Appeals for the Third Circuit in 1949. When Kennedy appointed Marshall to the United States Court of Appeals for the Second Circuit in 1963, Marshall was then the second Black to serve as Court of Appeals judge. The third was Wade McCree, whom Johnson appointed in 1966. President Jimmy Carter, though president for only four years, would have the greatest influence on diversification of the federal bench, generally, and on opportunities for Blacks to serve, more specifically; the second most influential in diversifying the federal bench was Clinton.
As of 2014, there were 21 African American Circuit Court judges, out of a total of 162 Circuit Court judges. Of all the African Americans who have served as a circuit court judge, 89.7 percent were appointed after 1977. As of March 7, 2014, there were 76 African American District Court judges out of 603 District Court judges in the United States. The number of African American women who have served as federal judges remains small. Constance Baker Motley was the first in 1966, and Amalya Kearse was the first Black woman and woman of color to serve on the United States Courts of Appeal. And the number of Blacks to serve on the Supreme Court is merely two, with Justice Clarence Thomas succeeding Marshall.

Defending Diversity on the Bench: This Discussion Will Go On

The debate about the importance of diversity in the judiciary continues today. Of course the discussion includes a myriad of viewpoints including the view that background is irrelevant to judging. But there are important perspectives that are worthy of discussion in light of the fact that only a handful of Jewish judges have served on the highest Court, just two African Americans have served, and no African American woman has served.

One viewpoint on the importance of judicial diversity focuses on diversity as a key indicator of the legitimacy of government—a view contested by some. Another rationale for diversity is the symbolic function of judicial diversification. In addition there is a robust body of work on the relationship of the characteristics and experiences of judges to judicial decision-making. Some researchers have concluded that certain background characteristics are associated with different outcomes for litigants in particular kinds of cases, such as sexual harassment and sex discrimination cases, employment discrimination cases, as well as cases that implicate religious issues.

Though a deep evaluation of this body of research is beyond the scope of this paper, there are valuable insights about the benefits of judicial diversity. Our common law culture is a flexible one that has historically accommodated—though not without controversy—a range of approaches and methodologies of judicial interpretation. With respect to constitutional interpretation specifically, the line between experience and
judicial decision-making is difficult to draw in light of the fact that “[it] is a Constitution we are expounding.” We may conclude on the basis of this developing body of research that robust judicial diversity may be the very best approach to the continuing development of legal principles across the board. It is inevitable that a judge will draw on her insights and experiences consciously and unconsciously, and inevitable as well that a truly diverse judiciary will bring a cross-section of human experience to the judicial decision-making bench.

Nonetheless, that the legitimacy of conscious commitment to broader judicial diversity remains a contested ideal was clearly demonstrated during the debate over President Obama’s nomination of Sonya Sotomayor to be an Associate Justice on the United States Supreme Court. In all likelihood, President Obama did not mean to “throw down the diversity gauntlet” when he nominated Judge Sotomayor, praising her “quality of empathy, of understanding and identifying with people’s hopes and struggles.” The president began his remarks with the well-known quote of Oliver Wendell Holmes that “the life of the law has not been logic but experience.” Nonetheless, the nomination was to become a textbook case of opposition to a nominee based upon not only identity and experience but also on concerns about neutrality, merit, and ideology.

Defending Diversity—The Case of Justice Sonia Sotomayor
President Obama began his May 26, 2009, press conference on his nomination of Judge Sotomayor to be an Associate Justice of the United States Supreme Court by focusing on his criteria for judicial nominees:

While there are many qualities that I admire in judges across the spectrum of judicial philosophy . . . there are few that stand out that I just want to mention. First and foremost is a rigorous intellect—a mastery of the law, an ability to hone in on the key issues and provide clear answers to complex legal questions. Second is a recognition of the limits of the judicial role, an understanding that a judge’s job is to interpret, not make, law; to approach decisions without any particular ideology or agenda, but
rather a commitment to impartial justice; a respect for precedent and a
determination to faithfully apply the law to the facts at hand. . . . And yet,
these qualities alone are insufficient. . . . as Supreme Court Justice Oliver
Wendell Holmes once said, “The life of the law has not been logic; it has
been experience.” Experience being tested by obstacles and barriers, by
hardship and misfortune; experience insisting, persisting, and ultimately
overcoming those barriers. It is experience that can give a person a
common touch and a sense of compassion; an understanding of how the
world works and how ordinary people live. And that is why it is a
necessary ingredient in the kind of justice we need on the Supreme
Court.105

After the president set forth his criteria, he summarized Sotomayor’s legal and
experiential qualifications. He noted her undergraduate degree from Princeton summa
cum laude, her Yale law degree, her service on the staff of the legendary District
Attorney Robert Morganthau, her partnership in a New York law firm specializing in
global transactions, and her service for seventeen years as a District Court and United
States Court of Appeals judge.106 Equally important, the president hailed her as a judge
with “a sweeping overview of the American judicial system, but [also] a practical
understanding of how the law works in the everyday lives of the American people.” Her
life and her nomination, he said, were evidence that “no dream is beyond reach in the
United States of America.”107 In her remarks, Sotomayor emphasized that her
jurisprudence would reflect both a commitment to the “rule of law” tempered by her
experience-based understanding of the concerns of litigants who come before the highest
Court:

I firmly believe in the rule of law as the foundation for all of our basic
rights. For as long as I can remember, I have been inspired by the
achievement of our Founding Fathers. They set forth principles that have
endured for more than two centuries. Those principles are as meaningful
and relevant in each generation as the generation before. [My] wealth of
experiences, personal and professional, have helped me appreciate the variety of perspectives that present themselves in every case that I hear. It has helped me to understand, respect, and respond to the concerns and arguments of all litigants who appear before me, as well as to the views of my colleagues on the bench. I strive never to forget the real-world consequences of my decisions on individuals, businesses, and government.108

Between May 26, 2009, when President Obama announced her nomination109 and July 13, when the Chair of the United States Senate Committee on the Judiciary gavelled her nomination hearings to order,110 it was clear that the opposition to her confirmation would center on whether her stated determination to temper law with her experience rendered her a jurist unfit to dispense “equal justice under law.”111

In the course of her hearings and the subsequent Senate debate it became clear that the opposition to her candidacy never focused solely on her identity per se. Her opponents acknowledged that her storied career and her nomination were important breakthroughs in the history of the federal opportunity to serve on the judiciary.112 It was also clear that her objective professional qualifications were exceptional,113 even though some attempted to promote a disparaging-media argument that she might be “good” but was “not that smart,”114—this, despite accolades from the Standing Committee on the Federal Judiciary of the American Bar Association that unanimously rated her well-qualified.115 In the end, the opposition sought to link her explicit embrace of her experience116 to the argument that she harbored impermissible bias117 and would allow the “empathy”118 to distort her judging.119

The debate over her nomination therefore took a predictable turn; the import, the opponents insisted, was that their opposition was on the basis of her impermissible bias and ideology. The proponents dismissed these views, stressing instead her long judicial service, the absence of controversy about her decisions, with a few exceptions,120 and the importance of expanding the diversity of the highest court.
The official discourse was similar to that during the confirmation of both Brandeis and Marshall with no official opposition to her confirmation on the explicit ground of her race, ethnicity, or gender. Rather, the objection to the appointment was based upon the possibility that the ideology that these justices would bring to the court might unsettle the doctrinal order. In the case of Brandeis it was the prediction that his business decisions and labor decisions would disfavor powerful interests, and that his decisions would be influenced by potential societal consequences of powerless people. With respect to Marshall, his opponents predicted that he would bring a skeptical judicial eye informed by history and experience to status quo arguments in equality and criminal system cases. And as to Sotomayor, of course, the prediction was that she would evaluate claims of racial equality and governmental abuse of power from the perspective of the powerless in society—with empathy, and knowledge of the effects of those decisions—a perspective with which she was very familiar despite her improbable professional achievements.

And it is the focus on the value of our varied experiences as Americans that shapes my own thinking about the importance of diversity on the bench, as well as my appreciation of the openings represented by the elevation of Brandeis, Marshall, and Sotomayor to the highest court of our land.

The work of Scott Page, on the importance of diverse workgroups in *The Difference*, is consistent with Holmesian admonition about experience and judging. Our most powerful positions and teams, whether led by head football coaches, university presidents, Fortune 100 CEOs, Governors, or Presidents remain virtually off limits to women and minorities. As a society, we remain confortable with the assumption that this exclusion is consistent with the meritocratic ideal. In contrast, Page’s work emphasizes the positive difference that diverse teams make in quality of decision-making. In *The Difference*, Page demonstrates that diverse teams possess the cognitive diversity that allows them to outperform homogeneous teams.

Page examines the sources of cognitive diversity. Those sources are not only in the infinite variety that makes up each representative of human species, but also the
differences in our accumulated life experiences.\textsuperscript{128} Our different training experiences influence our approaches to interpretation.\textsuperscript{129} Moreover, in addition to these objective differences, our societally constructed identities on which so much of our experience depends, such as race, physical ability, gender, sexual orientation, religion, class, and culture, shape our identities—our subjectivities.\textsuperscript{130} As a result of our experience with these socially constructed identities, we tell different and diverse stories about others and ourselves, and about the world as we interpret our own and human experience.\textsuperscript{131}

Our inherently “plastic” brains, Page argues, are differently shaped by our experiences, and those diverse experiences create diverse cognitive tools that shape our interpretation approaches.\textsuperscript{132} Our experiences affect our thinking and our strategies. More pointedly, if I may, we still react to men and women differently; we treat them differently. As a result, men and women have different experiences, and they learn to think about identical factual situations differently.\textsuperscript{133} So it is, as well, with Blacks, with Latinos, with Gays and Lesbians, and differently abled people.\textsuperscript{134} We understand the world differently not because we possess a characteristic, but because the characteristics society deems most significant drive our experiences, map our permitted territory, and determine our worldview. No experience is devalued by these truths.

These differences in understanding are central to what we do as lawyers, and even more importantly to our role as arbiters—as judges. As the Honorable Edward M. Chen said in 2003, “judges draw upon the breadth and depth of their own life experience, upon the knowledge and understanding of people, and of human nature. And inevitably, one’s ethnic and racial background contributes to those life experiences.”\textsuperscript{135}

Race, ethnicity, and religion matter, among other demographic and experiential markers, not because of physical characteristics, or even notions of historical entitlement due to past discrimination, or the unforgiving, limited, and often patronizing attributes (such as result orientation) the privileged often ascribe to judicial insurgents. Rather, in a society in which we may live within a few miles of each other yet have radically different realities and life prospects,\textsuperscript{136} identity often means a different “well” of experience upon we draw to interpret the language of law and its consequences for people. “It is a
constitutions we are expounding”¹³⁷ for an increasingly diverse America. Judicial diversity will insure that we share that task in our tricentennial century.

Conclusion
We celebrate the breakout moments in judicial diversity for several reasons. The appointments of Brandeis and Marshall both lead to greater visibility for the outsider and the marginalized in American Society. According to Robert Burt, Brandeis contributed by his “extensive recitation of the factual background of the dispute at issue intended to enlarge his colleagues’ range of vision to include facts and perspectives outside their ordinary experience.”¹³⁸ Burt continues: “Brandeis maintained this vision by standing at the social margin between those who were comfortably included and those bitterly outside, and he pleaded for the disappearance of the distinction.”¹³⁹ Brandeis also “penned . . . the definite judicial pronouncement on the necessity for free speech in a democracy,”¹⁴⁰ which provided the foundation for the Court’s ultimate decision to unequivocally protect unpopular speech.¹⁴¹ Likewise Marshall also cast a bright light on circumstances that other justices thought irrelevant: whether the poor ought to be excused from having to save the money to file for bankruptcy,¹⁴² or whether an impoverished minority woman actually has the freedom to reject the government’s offer of paying for childbirth in light of government refusal to pay for an abortion,¹⁴³ or whether poor Mexican children in Texas suffered from lack of opportunity as a result of the effect of ill-funded schools.¹⁴⁴ Through his illumination of the facts surrounding the existence of outsiders, Marshall also argued that a more sweeping examination of the realpolitik of outsider existence was necessary to determine whether the government denied equal protection or fundamental rights. As I wrote in 1989:

Marshall’s confirmation placed on the Court a member whose theoretical understanding of equality had been altered and enriched by exposure to the myriad manifestations of racial subordination. Marshall’s confirmation created the possibility that Marshall, indelibly influenced by experiences unique among his fellow justices, might forcefully urge the
Court to invest the Equal Protection Clause with content worthy of its aspiration, and with tools equal to its corrective task. After all, the last Supreme Court justice from Marshall’s home state of Maryland, Roger Taney, had authored the infamous Dred Scott majority opinion that summed up all that Marshall had worked to correct. Marshall’s appointment to the Court broke remaining barriers to inclusion and pluralism in America’s highest judicial institution.\textsuperscript{145}

The Senate’s confirmation of both Brandeis and Marshall also symbolized the possibility that any citizen in both their groups might hold the highest position of public responsibility in the United States. I imagined that someone might become President Obama one day when I wrote of the significance of Justice Marshall.

Marshall’s confirmation led the country to consider the quixotic possibility that exclusion of African-Americans from the United States Supreme Court might be unacceptable, indeed, perhaps unthinkable. The confirmation of Marshall signaled a weak spot in “the last remaining color barrier in high public service, save for the Presidency itself.”\textsuperscript{146}

So too was Brandeis’ confirmation significant as a marker of trust and inclusion for Jewish citizens. Urofsky wrote: “The Victory cheered the progressives as little else had done for several years, and reform journals and the Jewish press carried one article after another praising “Mr. Justice Brandies.” Jacob Shiff predicted that he would become “an adornment” to the bench, and called the confirmation an honor to our people.”

Ironically, at the outset of the Sotomayor hearings, Senator Patrick Leahy referred to the opposition both Brandeis and Marshall faced during their respective confirmation processes: “Those who break barriers often face the added burden of overcoming prejudice. That has been true on the Supreme Court. Thurgood Marshall graduated first in his law school class, was the lead counsel for the NAACP Legal Defense Fund, sat on the United States Court of Appeals for the Second Circuit, and served as the Nation’s top lawyer, the Solicitor General of the United States”: 
He won a remarkable 29 out of 32 cases before the Supreme Court. Despite his qualifications and achievements, at his confirmation hearing, he was asked questions designed to embarrass him, questions such as “Are you prejudiced against the white people of the South?”

[...]

The confirmation of Justice Louis Brandeis, the first Jewish American to be nominated to the high court, was a struggle rife with anti-Semitism and charges that he was a “radical.” The commentary at the time included questions about “the Jewish mind” and how “its operations are complicated by altruism.”

How fitting that Senator Leahy would refer to the breakthrough legacies of Brandeis and Marshall during the Sotomayor hearings. Senator Leahy use their examples to show that the opponents of diversity on the Supreme Court have targeted the most accomplished minorities in their quest to maintain a two class society and an homogenous judiciary. Although I disagree with one who obsequiously called Louis D. Brandeis the “visible manifestation of the greatest legal mind of the past one hundred years,” I would agree with her later statement that he was one of the greatest lawyers of the twentieth century. My list would also include Thurgood Marshall and Charles Hamilton Houston, among others. One author has forcefully argued that the failure of Brandeis to distinguish himself as a lawyer or jurist in the area of racial equality tarnished his legacy, even as his method and approach to litigation set a powerful paradigm that Houston and Marshall would emulate. Justice Marshall distinguished himself as both a writer of majority opinions in areas of his expertise such as civil procedure, as well as a powerful dissenting voice on behalf of Blacks, the poor, the mentally ill, minority women, and inmates sentenced to death. Marshall also wrote significant unanimous opinions in areas not usually associated with his legacy, such as civil procedure, among others.

Sotomayor’s record is yet young, but she has already written dissents that suggest that she will develop, as did Thurgood Marshall, a jurisprudence of judicial protection for
minorities, criminal suspects, and those condemned to death. In *Schuette v. Bamn*, she dissented from the Court’s decisions upholding a Michigan ban on race conscious affirmative action in higher education as inconsistent with established precedent that forbade white majorities from structuring political processes to disadvantage minorities. She observed dryly, “[T]o know the history of our Nation is to understand its long and lamentable record of stymieing the right of racial minorities to participate in the political process.” In *Glossip v. Gross*, she wrote the principle dissent in a 5–4 decision that placed the burden on inmates condemned to death to identify an alternative method of execution that would cause substantially less severe risk of pain, characterizing the majority decision as one that would subject the condemned men to “what may well be the chemical equivalent of being burned at the stake.” And in *Mullenix v. Luna*, she dissented from the courts decision to reject civil liability for deadly force when an officer had a less lethal option available, characterizing the courts decision as encouragement to a “rogue” officer and the establishment “of the culture . . . to use deadly force for no discernible gain . . . By sanctioning a “shoot first, think later” approach to policing, the Court renders the protections of the Fourth Amendment hollow” she admonished. She has also urged the Court to adhere to its prior decisions, and she has cautioned the Court to not to announce new law without full exploration of its consequences.

The lives of these three Justices demonstrate the potential of a diverse judiciary to shore up and strengthen our constitutional fabric. Despite their differences and disparate emphases, Brandeis and Marshall wanted to expand the American dream to outsiders, and Sotomayor has already that she will follow suite. All would join Langston Hughes’ cry in his poem “Let America be America again.”

“Oh, yes, I say it plain, America never was America to me, / And yet I swear this oath— / America will be!”

Notes
10. Ibid., 205.
11. Ibid.
15. Ibid., 219.


21. An important issue in *Lochner* was whether the occupation of baker was associated with lung disease.


32. Ibid., 86.


36. See Ezekiel Rabinowitz, *Justice Louis Brandeis: The Zionist Chapter of His Life* (1968), 48 (discussing Brandeis’ service for the president on the United States Commissions on Industrial Relations, as well as “the counsel of Brandeis on trust legislation, currency and labor problems”).

37. Previously, Wilson wanted Brandeis to be Chairman of the Commission on Industrial Relations. Rabinowitz, *Brandeis: The Zionist Chapter*, (1968), 48. Wilson had also considered the possibility of appointing him to be Attorney General of the United States or Solicitor General, but prominent lawyers opposed these possible appointments (ibid., 51–52). See also Gal, *Brandeis of Boston*, 188.


39. See Strum, *Louis Brandeis: Justice for the People*, 293 (anti-Semitism in a letter opposing Brandeis); and, Brandeis also shared that belief (ibid., quoting Brandeis’ journal).


42. Phillipa Strum, *Louis D. Brandeis: Justice for the People*, 294


46. Ibid., 448.


52. Ibid., (last accessed November 13, 2015). The next time a nominee had to wait as long to be confirmed was in 1959: Potter Stewart was nominated January 17, 1959, and confirmed with 17–0 votes on May 5, 1959—a wait of 117 days.


57. In 2006, then-Judge Sonia Sotomayor discussed the prestige of the United States Court of Appeals for the 2nd Circuit (Sonia Sotomayor, “Another Historical Moment,” *Federal Law* 29–30 [2006]: 53). “Throughout the years from 1925 to 1960, historians consider the U.S. Court of Appeals for the Second Circuit to be among America’s strongest and most influential courts, mostly due to the quality of its bench, which included Learned Hand, Thomas Swan, Augustus Hand, Charles E. Clark, Jerome Frank, and Harrie B. Chase. In more recent times, we were graced by the presence of Thurgood Marshall, who served on our court from 1961 to 1965, and who later became our circuit justice until his death” (ibid.). See also John J. Hoeffner, “One

58. I noted in my 1989 article on Marshall’s confirmation to the Supreme Court that in “a *New York Times Magazine* article written shortly after [the Solicitor General] appointment, Marshall was asked whether Johnson had such a plan. Marshall answered ‘Look, there’s nothing to that; it’s the purest of speculation. I can tell you the President made no promises, there were no deals, and there was no talk of it. He wanted me for Solicitor General. That’s all.’ But an aide to Johnson Jack Valenti, remembers differently; he remembered ‘a plan’ despite public denials by both Johnson and Marshall . . . He recalls Johnson saying: ‘By God, that son-of-a bitch will have prosecuted more cases before the Supreme Court than any lawyer in America. So how is anybody gonna turn him down.” Linda Greene, “The Confirmation of Thurgood Marshall to the United States Supreme Court,” *6 Harv. Black Letter J.* 27, 29 (1989) (footnotes omitted).

59. Johnson was determined to bring Blacks into positions of importance: “Before he nominated Marshall to the Supreme Court, President Johnson had already appointed Blacks to a number of posts, including Robert Weaver as Secretary of the Department of Housing and Urban Development. Johnson’s judicial appointees included Court of Appeals Judges William Hastie (3rd Circuit) and Wade McCree (6th Circuit) and Federal District Court Judges Constance Baker Motley (NY), Spottswood Robinson (DC), and Leon Higginbotham (PA).” See 113 Cong. Rec. H16443–44 (remarks of Senator Ernest Gruening of Alaska); Linda Greene, “The Confirmation of Thurgood Marshall to the United States Supreme Court,” *6 Harv. Black Letter J.* 28–29 (1989).


62. 1962 Congressional Quarterly Almanac 686, Vote #175.


64. Ibid., 34.
65. Ibid., 36–37 (Ervin); ibid., 46–48. Marshall stated during his confirmation, “It is the duty of the Court to keep stability in the law.” He went on to testify, “I think of the Constitution as a living document [that] needs someone to interpret it . . . I would hope that my own ideas of fairness are based entirely on the Constitution, and I would not under any circumstance find where the Constitution says this and my ‘personal feelings’ say that, I would go with the Constitution. I am obliged to.”


67. Ibid., 38–39 (Thurmond).


70. Ibid., 30.


73. Ibid., 49–50.


77. Brian Bornstein and Monica Miller, *God in the Courtroom* (2009), 92.


92. In an address on the twenty-first anniversary of the District of Columbia Emancipation Act, Frederick Douglas said that the discussion of race would go on. “What Abraham Lincoln said in respect of the United States is as true of the colored people as of the relations of those States. They cannot remain half slave and half free. You must give them all or take from them all. Until this half-and-half condition is ended, there will be just ground of complaint . . . Until the colored man’s pathway to the American ballot box, North and South, shall be as smooth and safe as the same is for the white citizen, this discussion will go on . . .” Hon. Frederick Douglass, “The United States Cannot Remain Half- Slave and Half-Free” (speech on the occasion of the Twenty-First Anniversary of Emancipation in the District of Columbia, April 16, 1883), in *Frederick Douglass: Selected Speeches and Writings*, edited by Philip S. Foner (Chicago, 1999). I say as well that the discussion of judicial diversity will go on.


100. See, for example, Donald R. Songer and Susan J. Tabrizi, “The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts,” 61 J. Pol. 507, 507 (1999) (concluding that “the decisions of state Supreme Court justices who are evangelicals provide evidence for the claim that their beliefs have an influence on decisions in the areas of gender discrimination, obscenity, and the death penalty”).


104.Ibid.

105. Ibid.

106. Ibid.

107. Ibid.


110. The statement of Mr. Ensign, 155 Cong. Rec S8822 (July 14, 2009), included reference to the Supreme Court motto. “In conclusion, when thinking back on the phrasing engraved in marble above the entrance to the United States Supreme Court, ‘equal justice under law,’ Judge Sotomayor’s record and testimony provide uncertainty and doubt that she will rule with a fair and
impartial adherence to the rule of law.” There were numerous analyses of then-Judge Sotomayor’s opinions. These included nonpartisan ones by the Congressional Research Service. These analyses reveal that then-Judge Sotomayor adhered to precedent in her decisions. The result in these analyses depended on whether the group supported her nomination or opposed it. See, for example, Anna C Henning, & Kenneth R. Thomas, *Judge Sonia Sotomayor: Analysis of Selected Opinions*, Cong. Res. Serv. (Sept. 15, 2009); John O. Shimabukuro, *The Nomination of Judge Sonia Sotomayor: A Review of Second Circuit Decisions Relating to Reproductive Rights*, Cong. Res. Serv. (July 7, 2009). There were also extensive analyses by various groups in support of and against the nomination. See, for example, the NAACP Legal Defense and Education Fund Inc.’s report on the nomination of Judge Sonia Sotomayor to the Supreme Court (July 10, 2009), *Hearings* at 1015; the Association of the Bar of the City of New York’s report on the nomination of Judge Sonia Sotomayor (June 30, 2009); Americans United for Life, “Worse Than Souter: A Comparison Chart,” *Hearings* at 741.

111. See, for example, statement of the Hon. John Cornyn, U.S. Sen. From Tex. (July 13, 2009), acknowledging her distinguished career as a lawyer and a judge, *Hearings* at 853; statement of the Hon. Orrin Hatch, U.S. Sen. from Utah, *Hearings* at 11 (“compelling life story and a strong record of educational and professional achievement”).


114. Statement of Kim Askew concerning the nomination of the Honorable Sonia Sotomayor to be an associate justice of the Supreme Court of the United States before the Committee of the Judiciary United States Senate (July 16, 2009). Ms. Askew reported that the standing committee conducted an “extensive investigation into the personal qualifications of Judge Sotomayor,” concluding “that Judge Sotomayor was well qualified to be associate justice of the United States.” *Hearings* at 775. See also the analysis by Guy-Uriel Charles, Daniel L. Chen, and Mitu Gulati, “*Not that Smart*”: *Sonia Sotomayor and the Construction of Merit,* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3039&context=faculty_scholarship (last accessed Dec. 9, 2015), concluding “Sotomayor was easily in the top 25% of all of the judges on the Court of Appeals in almost all of the categories that we examined. Moreover, in more than half the categories, she was in the top 10%. These results should at least bring into
question the claims of her mediocrity. Indeed, based on our results, there is the strong possibility that she was, during her tenure on the Second Circuit, among the most capable and influential appeals court judges in the country.” Guy-Uriel Charles, Daniel L. Chen, and Mitu Gulati, “Not that Smart”: Sonia Sotomayor and the Construction of Merit,” 33, http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3039&context=faculty_scholarship (last accessed Dec. 9, 2015).

115. See, for example, statement of William Sessions, U.S. Sen. from Ala., ranking member of Comm. on the Judiciary, Hearings at 5, stating that “empathy . . . is another step down the road to a liberal activist, results oriented, and relativistic world where laws lose their fixed meaning [and] unelected judges set policy . . .” Hearings at 6; 155 Cong. Rec. S8736 (Aug. 4, 2009) (statement of Sen. Sessions) (“. . . concerns about her deep commitment to the ideal of objectivity and impartiality”).


117. See statement of John Kyl, U.S. Sen. From Ariz. (July 11, 2009), Hearings at 1005 (“public statements suggest . . . decision-making based on her biases and prejudices”); Hearings at 1006.

118. As is customary, there were numerous analyses of Sotomayor’s performance on the Second Circuit.

119. Her decision in Ricci v. Destanfo.

120. FOR an early discussion of empathy in judging see Lynne N. Henderson, “Legality and Empathy,” 85 Mich. L. Rev. 1574 (1986–87), quoting Justice Thurgood Marshall in United States v. Kras, 409 U.S. 434, 460 (1973). “It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.” Id. A literature on the definitions and propriety of empathy in judging has thrived before and after Justice Sotomayor’s confirmation. See also Susan Bandes, Empathy and Article III: “Judge Weinstein, Cases and Controversies,” 64 DePaul L. Rev. 317, (2014), quoting Judge Jack Weinstein: “Sympathy for the poor or well-to-do must not affect substantive results. But empathy is not forbidden: it allows the court to better understand the positions of the parties,” 15. “Understanding what is at stake for the parties does not, without more, lead to sympathy for the parties, or to actions on behalf of one party or


124. The Difference, 320–27.

125. Ibid., 300–12.

126. Ibid., 300.

127. Ibid., 303–05.

128. Ibid., 302–03.

129. Ibid., 305–08.

130. Ibid., 305.

131. Ibid., 301.

132. Ibid., 307.

133. Ibid., 306.


138. Ibid., 87.


145. Ibid.

146. *Hearings*, at 1085–86.


148. *Id.*


153. Id. at 1651 (Sotomayor, J., dissenting).
154. Id.
156. 135 S. Ct. 2726, 2780 (Sotomayor, J., dissenting.)
158. Id. at 315 (Sotomayor, J., dissenting).
159. Schuette v. Bann.
PART V:
SPEECH AND PARTICIPATION IN A DEMOCRACY: WHAT ARE THE RIGHTS AND RESPONSIBILITIES OF THE EDUCATED CITIZEN?
Brandeis, Speech, and Money

Leslie Kendrick*

Justice Louis D. Brandeis was a driving force across a vast expanse of law. To study his life is to gain introduction to an astounding range of jurisprudence, from health and safety regulation, to labor law, to antitrust to federal jurisdiction, to privacy law, to freedom of speech. This breadth was extraordinary enough at the time, but as the practice of law has become more specialized over the past century, it has become more extraordinary still.

But something else has changed in the hundred years since Brandeis’ appointment to the Supreme Court. One of Brandeis’ many interests—freedom of speech—has increased its dominion. A right invoked in 1919 by lowly dissenters defending themselves against felony charges has become an all-purpose tool used by businesses and individuals to challenge a wide array of regulations. This expansion has led the First Amendment to encroach on many of Justice Brandeis’ other areas of expertise. Products manufacturers claim First Amendment rights not to provide health and safety information to consumers. Labor unions are beset by the First Amendment claims of nonmembers on one side and employers on the other. Internet service providers and search engines claim First Amendment rights to avoid anticompetitive regulation.

These are cases that Brandeis would have recognized, but this is not Brandeis’ First Amendment. In these cases and others, a surprising number of Brandeis’ other interests
have taken on First Amendment overtones that they would not have had in his time. To illustrate this phenomenon I discuss cases involving health and safety regulation, labor law, and the law of unfair competition. I then note that, although these cases would not likely have raised First Amendment issues in Brandeis’ eyes, they would have been familiar to him from another part of the Supreme Court’s docket. Finally, I ask what Brandeis’ view of freedom of speech can tell us about how to understand these cases and our own First Amendment moment.

Contemporary Claims in First Amendment Litigation
In recent years, a wide variety of regulation has given rise to First Amendment claims. From labels on food to net neutrality rules, various state and federal requirements have come under challenge on First Amendment grounds. This trend is apparent in three substantive areas in which Brandeis was influential: health and safety regulation, labor law, and the law of unfair competition.

Health and Safety Regulation
As a litigator, Brandeis became famous for championing health, safety, and welfare legislation enacted by states to protect workers. His voluminous “Brandeis Briefs” sought to demonstrate the factual basis for such legislation and thus to frame it not as an encroachment on business owners’ constitutional liberties, but as a legitimate exercise of the state’s power to protect citizens.1 As a justice, he continued to champion states’ experiments with progressive legislation.2 While the Court that Brandeis joined in 1916 was in the thick of the “Lochner era,” in which the Justices struck down public welfare legislation in the name of the economic due process rights of business owners,3 the Court he left in 1939 had abandoned Lochnerism and acquiesced in the progressive legislation Brandeis had long championed.4

In recent years, certain types of public welfare legislation have come under renewed attack. Many businesses have challenged labeling and disclosure requirements as unconstitutional compelled speech under the First Amendment. Just as the state cannot
force schoolchildren to recite the Pledge of Allegiance, the businesses argue, so it cannot force businesses to provide information that they do not wish to provide. Businesses have made this claim against requirements including nutritional labeling, country-of-origin labeling for meats, hormone labeling for milk, labeling for genetically modified foods, securities disclosures regarding whether minerals are conflict-free, radiation warnings for cellular telephones, graphic warnings on cigarette labels. Moreover, many of these challenges have succeeded. When they succeed, they block disclosure requirements that are usually part of a larger regulatory regime governing a particular product or service.

Labor Regulation

Similar claims have arisen in the labor context. In 2001, the National Labor Relations Board required workplaces to display a poster informing workers of their rights under federal labor law. In 2013, the Court of Appeals for the District of Columbia Circuit struck down the posting requirement. Likening the employers to schoolchildren being forced to recite the Pledge of Allegiance, the court concluded that requiring employers to display a poster that they did not want to display violated their First Amendment rights.

An interesting aspect of this case is that the poster in question was entitled “Employee Rights Under the National Labor Relations Act” and consisted entirely of summaries of key provisions of that Act. Thus, for example, the poster stated that an employee has a right to join a union, as well as a right not to join a union. The poster was, put simply, a restatement of the National Labor Relations Act, a law that unquestionably governs the relationship between covered employers and employees. The National Labor Relations Act is itself constitutional: Brandeis himself helped to determine that when he voted to uphold it against a Commerce Clause challenge in 1937. Yet, according to the D.C. Circuit, requiring workplaces to display a poster summarizing the National Labor Relations Act is unconstitutional.

But the First Amendment may be poised to make a much more significant foray into labor law. In the Supreme Court’s current term, the Court is hearing a challenge to “agency shop” fees for public sector unions. Employees who choose not to join the union
are typically required to pay an “agency shop” fee to the union. This fee is designed to combat a free-rider problem: Without the fees, nonmembers would benefit from the union’s collective bargaining efforts without having to pay for them. Every employee would have an incentive not to join the union but instead to free-ride on other people’s dues. In *Friedrichs v. California Teachers Association*, the Supreme Court will decide whether agency shop fees violate the First Amendment.\(^{17}\) In this case, government employees who pay agency shop fees to public-sector unions claim that these fees are used for collective bargaining activities with which they do not agree. In their view, their forced contribution to collective bargaining amounts to a form of compelled speech that violates their First Amendment free speech rights. If the Supreme Court agrees, agency shop fees will be unconstitutional for public-sector unions. If this occurs, the First Amendment will have accomplished one of the most profound revolutions in labor law since the passage of the National Labor Relations Act in 1935.

*Antitrust and Unfair Competition*

The First Amendment has also encroached on the law of unfair competition. Although Brandeis took a dim view of consumers (calling them “servile, self-indulgent, indolent, ignorant”\(^{18}\)), he took an even dimmer view of anticompetitive practices and what he called “the curse of bigness,” as manifested in large corporate entities.\(^{19}\) Accordingly, Brandeis advocated various reforms to limit big business and monopolistic practices. Although some of his views proved idiosyncratic, he was at the center of major cultural and political discussions that culminated in the Clayton Antitrust Act of 1914.

Today, antitrust and the law of unfair competition fall short of Brandeis’ personal vision, but they do implement various protections against monopolistic and anticompetitive conduct. Conflicts arise, however, when the law of unfair competition meets the information economy. Businesses that center around information find it relatively straightforward to frame their activities as “speech.” This framing, as we have already seen, has important implications for the fate of economic regulation. Two
examples illustrate what is at stake and how prominent the First Amendment may become.

First, the idea of net neutrality is that Internet service providers should treat all data on the Internet the same way (rather than, say, privileging content from business partners). This idea, which extends beyond the protections of antitrust, nevertheless reflects similar ideas about protecting the interests of consumers by preventing certain agreements and acts of favoritism by service providers. A 2010 attempt to implement net neutrality principles by the Federal Communications Commission was challenged by Verizon and ultimately struck down by the D.C. Circuit on administrative law grounds. In response, in 2015 the FCC reclassified Internet service as a telecommunications service and implemented new net neutrality rules, which took effect in June 2015.

While administrative law principles have taken center stage in the net neutrality debate, the First Amendment has also played a part. In challenging the 2010 net neutrality rules, Verizon also asserted that the rules violated its First Amendment rights. Verizon likened itself and other Internet service providers to editors of a newspaper. Just as newspapers exercise editorial discretion in deciding what news to publish and how to arrange it, Internet service providers decide which content to privilege on the Internet—what content moves at a fast speed, what moves at a slower speed, and so on. Net neutrality rules interfere with the Internet service providers’ editorial discretion and thus infringe on their First Amendment rights. Because the D.C. Circuit struck down the 2010 net neutrality rules on other grounds, the court did not reach Verizon’s First Amendment argument. After the publication of the 2015 rules, some Internet service providers challenged the new rules in the D.C. Circuit on First Amendment and other grounds. Those cases are still pending.

Meanwhile, Internet search engines, such as Google, have already had success in using the First Amendment to block challenges to their business practices. Recently, a Federal Trade Commission investigation indicated that Google sometimes skews search results to favor its own services over those of rivals. This type of conduct would usually raise questions under antitrust law. And on occasion, individual businesses have
challenged search engines like Google on the ground that their search processes involve unfair or monopolistic practices. While these claims may or may not ultimately have merit, so far search engines have avoided litigating the merits by invoking the First Amendment. Like Internet service providers, search engines allege that they are akin to newspaper editors and that search results are the products of editorial discretion. Courts, accepting the framing of search processes as speech, conclude that these processes are immune from review for unfair or anticompetitive practices. Because information is their business, these businesses claim—and so far receive—immunity from anticompetition laws.

New Claims, Old Structure
It is safe to say that, to Brandeis, the cases just summarized would have been unrecognizable as First Amendment cases. He would have viewed them as matters of public welfare, labor, and competition, far afield from the concerns of the First Amendment. This is not to say that Brandeis would necessarily have supported all of the laws that have come under challenge. For example, while Brandeis supported state public welfare legislation, his worries about the curse of bigness applied to the federal government as well as to big business. He might have had some qualms about the extent to which the modern administrative state—the Food and Drug Administration, for example, or the United States Department of Agriculture—regulates alongside (and often to the displacement of) the states. Whatever objections Brandeis might have had to these regulations, however, they would not have been First Amendment objections.

But the fact that Brandeis would not have recognized these cases as First Amendment cases does not mean that he would not have recognized them at all. Their structure would have been all too familiar from another part of the Supreme Court docket: the Lochner era challenges to public welfare legislation. During the Lochner era, businesses claimed immunity from various forms of regulation by invoking the Due Process Clause of the Fourteenth Amendment: “[N]or shall any state deprive any person of life, liberty, or property, without due process of law.” Business entities claimed that the Due Process
Clause protected economic rights, particularly liberty of contract. They further claimed that many forms of public welfare regulation, such as minimum wage and maximum hours laws, unconstitutionally infringed their Fourteenth Amendment economic due process rights.

Thus, businesses in the *Lochner* era claimed a liberty right to be immune from certain forms of economic regulation. Similarly, today some businesses claim a liberty right to be immune from certain forms of economic regulation. This time, however, the right they claim is a First Amendment right, and the regulations at issue involve the provision of information. Thus, instead of challenging regulations governing the health and safety of workers, business challenge regulations governing the health and safety information they must supply to consumers. Instead of claiming immunity from labor laws, employers claim immunity from having to post the very laws that now govern the employment relationship. Instead of challenging unfair competition laws wholesale, Internet service providers and search engines claim that such laws do not apply to them because their business activities are immunized by the First Amendment. Such claims echo the structure of *Lochner*-era claims, and their thrust is the same: businesses have a constitutional right to be left alone to make their own decisions. To Brandeis—progressive reformer, father of the Brandeis Brief—this basic claim would have been all too familiar.

Brandeis was also prescient in recognizing the potential for overlap between economic and speech claims. Not all of the speech claimants he encountered were lone dissenters and lowly pamphleteers: he also heard claims by entities that made money by publishing speech, such as newspapers. In a case involving the denial of second-class mail rates to a Socialist newspaper, Brandeis pointed out to his colleagues that the First Amendment claim they were rejecting could be reframed as of “the same nature as—indeed, it is a part of—the right to carry on business which this court has been jealous to protect against what it has considered arbitrary deprivations.”

This argument should not be mistaken for a belief on Brandeis’ part that free speech and economic liberty were one and the same. His remarks here and elsewhere suggest
that his aim was to point out what he perceived as the hypocrisy of protecting economic rights while disregarding free speech and other civil liberties. Privately, he told Felix Frankfurter that he had grave doubts about using the Fourteenth Amendment Due Process Clause to protect substantive rights at all, but that if it were to be used, it ought to protect “fundamental rights” such as the rights of free speech, education, choice of profession, and locomotion.29 It was “absurd,” he went on, to characterize property rights as fundamental “in the sense that you can’t curtail [property’s] use or its accumulation or power,” though perhaps property rights might be fundamental in some more limited respect. Speech, by contrast, was fundamental in the sense that it ought not to be impaired except in the case of a clear and present danger.30

Brandeis, then, distinguished free speech from economic due process and became a champion of the former while remaining hostile to the latter. How did he understand the difference, and can his views assist us with the free-speech claims of today?

**Brandeis’ First Amendment**

Brandeis’ writings on free speech are the single richest juridical contribution to our understanding of the First Amendment. Very few other opinions remotely approach the work that Brandeis did in explicating what freedom of speech is and why the Constitution protects it. I cannot do justice to these writings here, nor do I intend to try. Instead, I will draw briefly upon the most famous of Justice Brandeis’ First Amendment opinions, his concurrence in *Whitney v. California*, 31 to begin to gain a foothold on modern developments in the First Amendment.

At the outset, let us note that Brandeis would not have made the mistake that characterizes so much free-speech litigation today: the notion that because something is made of words it is protected by the First Amendment. This proposition is, and has always been, false. It goes without saying that First Amendment protection does not extend to insider trading, anticompetitive agreements, contracts, bad advice from lawyers, conspiracy to commit murder, or any number of other ways that people use speech every day. The phrase “the freedom of speech” in the First Amendment does not cover
everything that is called “speech” in real life. Instead, the phrase “the freedom of speech” indicates that speech sometimes serves a function that is important enough to find special protection within the Constitution. We use speech for any number of reasons, however, and not all of them will serve the function that makes “the freedom of speech” worth protecting. Therefore, the bare fact that mandated product labels are made of words—or that agency shop fees underwrite a process of collective bargaining that involves words, or that internet companies traffic in data that can be analogized to words—is not enough to bring these activities under the umbrella of the First Amendment.

What is the special purpose that speech sometimes serves? Brandeis had a complex view, set forth most comprehensively in his *Whitney* concurrence. It begins with the purpose of democratic government. The “final end of the state,” Brandeis says, is “to make men free to develop their faculties.” Democracy provides opportunities for the development and fulfillment of individual citizens. This view is itself impliedly premised on the idea that individual citizens are beings capable of, and entitled to, development and fulfillment. Individual “liberty”—in a larger sense than simply freedom of speech—is thus at the root of Brandeis’ conception of the First Amendment. Human beings are entitled to development and fulfillment, and the aim of democracy is to promote those ends.

Democracy itself, however, depends upon freedom of speech. Brandeis argues that “freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.” He bolsters this claim from two directions. First, he seems genuinely to believe that free speech leads toward good policymaking—toward “political truth.” He attributes to the Founders, and endorses himself, an optimistic belief “in the power of reason as applied through public discussion.” Second, he warns that, whatever the truth-producing powers of free speech, repression inexorably leads to bad policymaking and ultimately to instability within the democratic state. The Founders, he says, knew

that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable
government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.\textsuperscript{36}

With freedom of speech, democratic government may be good government; without it, democratic government will certainly be poor and unstable. Free speech is so important that individuals not only have a \textit{right} to freedom of speech, but they also have a \textit{duty} to engage in public discussion.\textsuperscript{37} In light of its importance to democracy, freedom of speech may not be abridged except in the face of a \textit{clear and present danger} of serious injury to the State.

Thus, democratic legitimacy depends upon freedom of speech. Free speech is necessary to democratic government, which in turn enables the development and fulfillment—and ultimately the happiness—of individual citizens.

If such is the function of the freedom of speech, what are its bounds? What speech does it encompass? Brandeis does not give a full answer, nor does he need to in order to answer the questions before him. The cases Brandeis saw involved speech that anyone would classify as political, though the various Justices disagreed about how dangerous it was. But Brandeis does characterize the freedom of speech as denying the state \textit{“the power to prohibit dissemination of social, economic and political doctrine.”}\textsuperscript{38} This suggests two important points about Brandeis’ view of free speech.

First, Brandeis’ view of \textit{“the freedom of speech”} extends beyond purely political speech to speech on social, economic, and political conditions. This is a large sphere, but it is not all speech. It may not include, for example, negotiations over a business contract, or the final contract itself. Most people would find it very strange if a party agreed to a contract one day and the next day reneged, invoking \textit{“freedom of speech.”} Similarly, the freedom of speech may not include collective bargaining, which is a similar negotiation process. Although individuals are entitled to have and express views on the law of contracts, collective bargaining, and particular instantiations of both of these, the process of negotiation may fall outside the realm of public deliberation.
Second, Brandeis’ primary concern was with the state restricting dissemination of information. Public discussion was necessary to good government because it provided information and ideas, from which good policies could arise. Many of today’s challenges involve “speakers” who object to the government’s requiring them to provide factual information to the public: nutritional information, country-of-origin information, information about labor law. It is difficult to see how the provision of such information to the public implicates the danger Brandeis saw in the restriction of information. Similarly, the First Amendment claims of Internet service providers and search engines assert control over how information is provided to the public. It seems likely that Brandeis would be more concerned about the public’s right to access information than in internet businesses’ right to control it. If the government were to restrict dissemination of information over the Internet, then that would raise First Amendment problems. But these cases ask whether the government has a role to play in ensuring that information is disseminated to the public in ways that do not involve anticompetitive behavior. It is easy to imagine how Brandeis would answer that question.

One objection to this view is that it underestimates the damage that the government can do in the name of providing information to the public. Often the objections to compelled disclosures are that they are expensive and unnecessary. Business entities must spend money to comply with them. Meanwhile, the government can be selective or arbitrary in the information it requires. And compelled disclosures certainly change the baseline levels of information that would exist in the absence of governmental intervention. The question is why these objections implicate the First Amendment rather than embodying a general libertarian sentiment of the kind that drove the invalidation of public welfare legislation in the name of economic due process. Brandeis did not share this libertarian distrust. Even in the context of free speech, he understood the importance of representative democracy, and he did not take lightly the overriding of majoritarian processes through judicial review. He would demand a good reason for invalidating legislation that provides information to the public. The bare fact that the information is made of words would not suffice.
Decades ago, when the First Amendment was in its infancy and economic due process in its heyday, Brandeis reminded his fellow Justices that the speech claims they rejected could be reframed as the economic liberty claims they embraced. Today, when economic regulation receives the lightest of scrutiny and the First Amendment is a powerful tool, many entities have every reason to frame their objections in free-speech terms. As long as economic and speech regulations are treated differently, someone will attempt to leverage the difference between the two. As long as they are treated differently, the challenge for courts will be to distinguish them in a principled fashion. The task is daunting, perhaps insuperable. But one could do worse than to begin with the distinguished Justice who figured centrally in both the end of the *Lochner* era and the dawn of the modern First Amendment.

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**Notes**


13. Thus far, the nutritional labeling and country-of-origin challenges are alone in finding no success in any court of which I am aware. A challenge to Vermont’s genetically engineered foods labeling law, the first in the country to take effect, is still ongoing.


15. Versions of the poster in various languages may be viewed at https://www.nlrb.gov/poster.


17. Friedrichs v. California Teachers Association (S.Ct. No. 14–915). In the 1970s, the Supreme Court concluded that it would violate the First Amendment rights of nonmembers for the unions to use the agency shop fees on matters that did not relate to collective bargaining (such as political efforts). Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977). Thus the First Amendment has already limited agency shop fees to collective bargaining efforts that benefit nonmembers.


22. 740. F.3d at 634.

23. See U.S. Telecom Ass’n v. FCC, No. 15–1063 (and consolidated cases) (D.C. Cir. 2015).


27. U.S. Const. amend. XIV, § 1.


30. Id.


32. Id., 375 (Brandeis, J., concurring).

33. Id.

34. Id.

35. Id.

36. Id.

37. Id. (“[P]ublic discussion is a political duty”).

38. Id., 374 (Brandeis, J., concurring).
The Brandeis/Citizens United Question

Jon D. Levy*

The Question

How would Justice Louis Brandeis have decided Citizens United v. Federal Election Commission (2010)? This question has been asked regularly at the presentations I have given on Brandeis’ life and legal vision to both lay and legal audiences. The Brandeis/Citizens United question is not unexpected. Citizens United, like the body of Supreme Court campaign-finance decisions that preceded it, is legally complex and steeped in electoral law jargon. But the decision’s legal complexity has not prevented the American public from appreciating the social significance of the key question that the case decided: Is a corporation a person for purposes of the First Amendment’s guarantee of free speech?

In Citizens United, the Supreme Court ruled on the provision of the Bipartisan Campaign Reform Act of 2002 (“§ 441b”), which prohibited corporations and unions from using their general treasury funds to pay for “electioneering communications” that advocate for or against a candidate in the period immediately preceding a federal primary or election. The Court determined that this provision violated the First Amendment because it chilled the right of corporations and unions to engage in protected political speech. The case was brought by Citizens United, a nonprofit corporation that wanted to
run television ads advertising a documentary it had produced that was critical of Hillary Clinton, then a candidate for the Democratic Presidential nomination.

The Court concluded that § 441b was facially unconstitutional and, therefore, void. In reaching this result, the Court repudiated two rationales that it had previously identified and approved in *Austin v. Michigan Chamber of Commerce* (1990) as compelling governmental interests supporting the constitutionality of restrictions on corporate campaign spending: (1) preventing corruption and the appearance of corruption to protect the integrity of elections and the government (the “corruption rationale”), and (2) preventing the distortion of the nation’s political dialogue that would result if corporations were free to spend unlimited amounts of their wealth, the accumulation of which is made possible by the state-authorized corporate form (the “antidistortion rationale”). In 2002, Congress embraced these rationales when it enacted the Bipartisan Campaign Reform Act, and in 2003 the Court upheld the constitutionality of § 441b in *McConnell v. Federal Election Commission* (2003).

The *Citizens United* majority opinion, authored by Justice Anthony Kennedy, concluded, however, that these rationales and the § 441b restriction could not be reconciled with the First Amendment. As to the corruption rationale, the Court concluded “that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” The Court also rejected the antidistortion rationale because it “would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form.” Thus, a lynchpin of the *Citizens United* decision is that corporations are “associations of citizens—those that have taken on the corporate form,” entitled to the same level of First Amendment protection as are individual citizens.

The *Citizens United* decision served as a foundation for the Court’s subsequent decision in *McCutcheon v. Federal Election Commission* (2014), invalidating § 441b’s limits on the total amount that an individual or group may contribute to candidates or political committees in an election cycle. Together, these two cases have altered America’s campaign-finance landscape. Corporations no longer face limits on the
amounts they can spend on electioneering communications so long as they do not coordinate their spending with a candidate or party. In 2014, for example, the total amount spent by outside groups on U.S. Senate races was more than double the amount spent in 2010.9

The audiences at my presentations connect Justice Brandeis and *Citizens United* because of the work he performed during his thirty-nine-year legal career prior to his appointment to the Supreme Court in 1916. Brandeis became known as the “People’s Lawyer” for his advocacy of progressive policies. He was “the nation’s preeminent lawyer and among its leading public intellectuals—a combination of David Boies and Paul Krugman, with a touch of the early Ralph Nader thrown in.”10 In a letter to the editor of the *Boston Evening Transcript*, published in 1901, Brandeis was unequivocal about the role that corporations should play in American politics: “There can be no safety for the people unless they serve notice upon the corporations that they must ‘keep out of politics.’”11

Brandeis’ pre-judicial career strongly suggests that he would have supported § 441b and the objectives of reducing the potential corrupting and distorting effects that unrestricted campaign expenditures by corporations may have on government. But whether Brandeis, the “People’s Lawyer,” would have supported § 441b’s restriction on campaign communications by corporations as a matter of sound public policy does not answer how he would have ruled as a judge on the constitutionality of the provision.

Speech as a “Political Duty”

Brandeis did not author or participate in a campaign finance-related First Amendment opinion during his twenty-three years on the Supreme Court. He has nonetheless figured prominently in the Supreme Court’s modern campaign-finance decisions, beginning with the seminal case of *Buckley v. Valeo* (1976).12 In *Buckley*, the Court recognized that campaign contributions and expenditures qualify as “speech” protected by the First Amendment. The Court’s per curiam opinion invoked Brandeis’ declaration “that in our country ‘public discussion is a political duty,’’” in concluding that legislated limits on
candidates’ use of their own money violated the First Amendment’s guarantee of free speech.\(^{13}\) Brandeis’ characterization of public discussion as being a “political duty” comes from his concurring opinion in *Whitney v. California* (1927),\(^{14}\) which set forth his most complete formulation of the purpose of the First Amendment’s guarantee of free speech. In *Whitney*, Brandeis identified the “freedom to think as you will and to speak as you think,” as a foundation for the discovery of “political truth” and, therefore, an essential ingredient of democracy. He wrote:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.\(^{15}\)

Thus, Brandeis conceived of free speech as an essential facet of liberty, and liberty as both an end in itself and also the vehicle by which our democracy is maintained. Freedom of speech and the active public discourse it facilitates, he believed, produce a government in which “deliberative forces” will prevail over “the arbitrary.”

Since *Buckley*, Supreme Court justices have relied on Brandeis’ *Whitney* concurrence both to support and oppose the constitutionality of various campaign-finance laws.\(^{16}\) For example, it was quoted by Justice William Brennan in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* (1986) to emphasize that not only does the First Amendment “protect the integrity of the marketplace of political ideas,” it also serves to advance liberty “both as an end and as a means.”\(^{17}\) In contrast, the *Whitney* concurrence
was invoked by Justice Antonin Scalia in his dissent in *Austin* to support his position that Michigan’s regulation of campaign spending by corporations violated the First Amendment because the regulation was not shown to be narrowly tailored to serve a compelling state interest—a constitutional requirement traceable to several opinions, including the *Whitney* concurrence. The opinion was cited most recently by Justice Stephen Breyer in his dissenting opinion in *McCutcheon*. He explained that by creating a politically oriented marketplace of ideas, the First Amendment ultimately produces the public opinion that guides the nation’s elected leaders. “This is not a new idea,” Breyer observed. “Eighty-seven years ago, Justice Brandeis wrote [in *Whitney*] that the First Amendment’s protection of speech was ‘essential to effective democracy.’”

In *Citizens United*, the *Whitney* concurrence surfaced in Justice John Paul Stevens’s dissenting opinion, which quoted Brandeis’ statement that “[f]reedom of speech helps ‘make men free to develop their faculties’” to support the proposition that the First Amendment protects “the individual’s interest in self-expression” as distinguished from corporate speech, which, according to Stevens, “is derivative speech, speech by proxy.” Justice Stevens thus reasoned that “[a] regulation such as [§ 441b] may affect the way in which individuals disseminate certain messages through the corporate form, but it does not prevent anyone from speaking in his or her own voice.”

*Whitney* concerned the constitutionality of a California law that criminalized speech advocating the overthrow of the government and thus had nothing to do with the regulation of campaign spending by corporations. Nonetheless, Brandeis’ concurring opinion has been influential in campaign-finance cases because it establishes the importance of speech to the speaker, to society, and to democratic governance. The *Whitney* concurrence sheds light on how Brandeis would approach the issues presented in *Citizens United* when read in conjunction with other Brandeis opinions addressing (A) the primacy of the individual citizen under the Constitution, (B) the evolving nature of corporations in American society, and (C) the importance of judicial restraint.
The Constitutional Primacy of the Individual Citizen

Brandeis’ Whitney concurrence was not the first time that he spoke of the individual citizen as the primary unit of democratic government. Writing in dissent in Gilbert v. State of Minnesota (1920)—a First Amendment challenge to a Minnesota statute that criminalized teaching or advocating against enlisting in the military—Brandeis equated the individual citizen with the government itself, reasoning that the Minnesota law “affects directly the functions of the federal government” because it “affects rights, privileges, and immunities of one who is a citizen of the United States, and it deprives him of an important part of his liberty.”24 The Gilbert dissent also introduced the idea that public speech is a “political duty.” Brandeis wrote that the “[f]ull and free” exercise of First Amendment rights “by the citizen is ordinarily also his duty; for its exercise is more important to the nation than it is to himself,” and in “frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril.”25 Thus, the First Amendment protects the ability of individual citizens to develop themselves intellectually, culturally, and otherwise, so as to be capable of fulfilling their political duty to engage in the public discourse from which “the greatest promise of wisdom in governmental action” derives.26

Brandeis’ belief in the constitutional primacy of the individual citizen is similarly reflected in his treatment of the Fourth and Fifth Amendments in his dissenting opinion in Olmstead v. United States (1928),27 where he articulated, for the first time in American legal history, a constitutionally based right of individual privacy. Writing in decidedly humanistic terms, Brandeis cast the Constitution as having been designed to advance human potential:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their
thoughts, their emotions and their sensations. They conferred, as against
the government, the right to be let alone—the most comprehensive of rights
and the right most valued by civilized men. ²⁸

It is hard to reconcile Brandeis’ humanistic expression of the Constitution’s purpose with
the view adopted in *Citizens United* that all corporations, regardless of their size,
function, or purpose, are equivalent to “associations of citizens.” In describing the aspects
of liberty secured by the First, Fourth, and Fifth Amendments in *Whitney, Gilbert,* and
*Olmstead,* Brandeis employed terms that apply exclusively to human beings—“citizen,”
“American,” “beliefs,” “thoughts,” “emotions,” “sensations,” “spiritual nature,”
“feelings,” “pain,” “pleasure,” and “satisfactions of life.” Brandeis understood people to
be the primary object of the liberty protected by the Bill of Rights.

Thus, the “duty” of speech that Brandeis identified in *Gilbert* and *Whitney* is foremost
a duty owed by the individual citizen. In addition, although one can easily conceive of
ways in which this individual duty may be fulfilled by groups of citizens working in
association with one another, it is hard to imagine that Brandeis would have agreed that a
large business corporation would or should fulfill this essential duty. This does not
exclude the possibility that he might have been persuaded that a nonprofit corporation,
such as *Citizens United,* organized for the specific purpose of expressing the shared
political views of its members, should be treated as an association of citizens who have
joined together to engage in protected speech, and is thus deserving of the same level of
First Amendment protection as each of its individual members. Large business
corporations, however, are neither organized nor equipped to express the shared beliefs of
the multitude of shareholders who own the corporation. A publicly traded corporation, for
example, does not express the collective spirit, feelings, intellect, and beliefs of the
thousands of shareholders (many of which may also be corporations or other types of
business or financial entities) who own it. Brandeis would likely have concurred with the
statement in Justice Stevens’s *Citizens United* dissent that our nation’s founders “had
little trouble distinguishing corporations from human beings, and when they
constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.”

The Evolving Nature of Corporations
Brandeis’ probable approach to the First Amendment question in Citizens United becomes clearer when one considers his understanding of the nature of corporations and the role they had come to play in American society by the early part of the twentieth century. In Louis K. Liggett Co. v. Lee (1933), the Court ruled that a Florida statute that imposed a greater licensing tax on chain stores with locations in more than one county, than on those with locations within a single county, violated the Fourteenth Amendment’s equal protection guarantee. The majority opinion explained that basing an increased rate of tax on nothing more than the presence of a company’s stores in more than one county “finds no foundation in reason or in any fact of business experience.”

Brandeis disagreed, basing his dissent on the majority opinion’s failure to recognize that because the corporate form is created by the state, corporations are properly subject to extensive regulation and restrictions. The “privilege of doing business in corporate form” was not, he wrote, “inherent in the citizen,” and society need not “accept the evils attendant upon the free and unrestricted use of the corporate mechanism as if these evils were the inescapable price of civilized life, and, hence, to be borne with resignation.”

Brandeis invoked the concentration of wealth made possible by the corporate form as further justification for the Florida statute:

[S]ize alone gives to giant corporations a social significance not attached ordinarily to smaller units of private enterprise. Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business, have become an institution—an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the state. The typical business corporation of the last century, owned by a small group of individuals, managed by their owners, and limited in size by their personal
wealth, is being supplanted by huge concerns in which the lives of tens or hundreds of thousands of employees and the property of tens or hundreds of thousands of investors are subjected, through the corporate mechanism, to the control of a few men. Ownership has been separated from control; and this separation has removed many of the checks which formerly operated to curb the misuse of wealth and power. And, as ownership of the shares is becoming continually more dispersed, the power which formerly accompanied ownership is becoming increasingly concentrated in the hands of a few. The changes thereby wrought in the lives of the workers, of the owners and of the general public, are so fundamental and far-reaching as to lead these scholars to compare the evolving “corporate system” with the feudal system; and to lead other men of insight and experience to assert that this “master institution of civilised life” is committing it to the rule of a plutocracy.

Louis K. Liggett Co. came before the Court during the Great Depression. In his dissent, Brandeis attributed the nation’s economic woes to income disparities that he ascribed to the concentration of individual wealth enabled by the corporate form: “Such is the Frankenstein monster which states have created by their corporation laws,” he wrote. Brandeis found no reason to hold that the Fourteenth Amendment prevented state governments from treating corporations less favorably than people. He concluded, “The difference in power between corporations and natural persons is ample basis for placing them in different classes.”

Brandeis’ position in Louis K. Liggett Co. harkened back to his earlier dissenting opinion in Quaker City Cab Co. v. Commonwealth of Pennsylvania (1928), another equal protection case. There, the Court’s majority invalidated a Pennsylvania gross receipts tax imposed on taxis operated by corporations, but not on taxis operated by individuals and partnerships. Brandeis dissented, explaining that Pennsylvania had good reason to distinguish corporations from citizens:
But there are still intelligent, informed, just-minded, and civilized persons who believe that the rapidly growing aggregation of capital through corporations constitutes an insidious menace to the liberty of the citizen; that it tends to increase the subjection of labor to capital; that, because of the guidance and control necessarily exercised by great corporations upon those engaged in business, individual initiative is being impaired and creative power will be lessened; that the absorption of capital by corporations, and their perpetual life, may bring evils similar to those which attended mortmain; that the evils incident to the accelerating absorption of business by corporations outweigh the benefits thereby secured; and that the process of absorption should be retarded.  

Brandeis thus condemned the concentration of wealth under the control of the managers of America’s “great corporations” as harming the lives and property of the very workers and shareholders who made the corporations possible. His distrust of the corporate form evidences that, unlike the Court’s majority in Citizens United, Brandeis would probably have found the corruption and antidistortion rationales underlying § 441b to be supported by both reason and experience and, therefore, sufficiently compelling to satisfy the requirements of the First Amendment. Brandeis himself is echoed in the assertion in Justice Stevens’s Citizens United dissent “that corporations have ‘special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets’—that allow them to spend prodigious general treasury sums on campaign messages that have ‘little or no correlation’ with the beliefs held by actual persons.” And Justice Stevens’s dissent cited favorably to Brandeis’ Louis K. Liggett Co. dissent and its discussion of the “fears of the ‘evils’ of business corporations.”

For Brandeis, the corporate form had, as he wrote in Louis K. Liggett Co., pointed the country toward the “rule of a plutocracy,” and had enabled a growing aggregation of capital, which was, as he wrote in Quaker City Cab Co., “an insidious menace to the liberty of the citizen.” If he had sat on the Citizens United case, Brandeis surely would
have been inclined to respect the Court’s existing precedent in *Austin* and *McConnell*, and Congress’s determination of the need to impose limits on independent campaign spending by corporations.

**Judicial Restraint**

Another fault-line in *Citizens United* was whether the constitutionality of § 441b should be judged by an “as-applied analysis” that focuses on the relevant facts surrounding the actual speaker (Citizens United) and speech (its advertisements for its video-on-demand documentary about Hillary Clinton) at issue in the case, or by a “facial analysis” that determines the constitutionality of the provision on its face. In its appeal to the Supreme Court, Citizens United asserted an as-applied challenge, claiming that § 441b was unconstitutional as applied to it, a nonprofit corporation funded overwhelmingly by individuals, and organized to engage in and, in fact, engaging in political speech. The Government, in defending the law, similarly urged the Court to judge the constitutionality of the statute as applied. The Court’s majority in *Citizens United* opted instead to judge the facial constitutionality of § 441b and to not limit its review to an as-applied challenge. Justice Kennedy explained that deciding the case on a narrower “as-applied” basis would leave the constitutionality of the law to be settled on a case-by-case basis, which would have the effect of chilling political speech: “Any other course of decision would prolong the substantial, nationwide chilling effect caused by § 441b’s prohibition on corporate expenditures.”

Writing in dissent, Justice Stevens took the majority opinion to task for not limiting itself to the as-applied challenge presented by the parties: “It is all the more distressing that our colleagues have manufactured a facial challenge, because the parties have advanced numerous ways to resolve the case that would facilitate electioneering by nonprofit advocacy corporations such as Citizens United, without toppling statutes and precedents.”

Whether the Court should have limited its review in *Citizens United* to an as-applied challenge is a question Brandeis would have undoubtedly had an opinion on. He joined
the Supreme Court at the height of the *Lochner* era, a period in which the Court tended not to defer to legislative judgments, particularly with respect to laws related to economic and commercial issues, and Brandeis frequently wrote of the need for the Court to exercise greater restraint. In *New State Ice Co. v. Liebmann* (1932),\(^42\) he explained that a judge’s “decision that the Legislature’s belief of evils was arbitrary, capricious, and unreasonable may not be made without enquiry into the facts with reference to which it acted[,]” and the Court’s function “is only to determine the reasonableness of the Legislature’s belief in the existence of evils and in the effectiveness of the remedy provided.”\(^43\) “[G]overnment,” he stressed in another dissenting opinion, “is not an exact science” and “[w]hether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary can ordinarily be determined only by a consideration of the contemporary conditions, social, industrial and political, of the community to be affected thereby.”\(^44\)

Brandeis’ emphasis on the importance of judicial deference to legislative judgments was related to his core belief that the Constitution should not be applied by judges so as to impose their own personal policy preferences. Thus, he warned in *New State Ice Co.*: “[I]n the exercise of this high power [of constitutional review], we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.”\(^45\) And democratic decision-making, he explained in *Eisner v. Macomber* (1920), requires deference to legislative judgments: “[T]he high prerogative of declaring an act of Congress invalid, should never be exercised except in a clear case,” and the Court must “presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt.”\(^46\)

In his concurring opinion in *Ashwander v. Tennessee Valley Authority* (1936), Brandeis set forth what is among the most authoritative accountings of the self-imposed rules that govern the Supreme Court’s exercise of its constitutional review authority.\(^47\) The *Ashwander* concurrence was cited in *Citizens United* in both Chief Justice John Roberts’s concurring opinion and Justice Stevens’s dissenting opinion. Brandeis explained in *Ashwander* that the Supreme Court should not anticipate a question of
constitutional law in advance of the need to decide it. Further, “[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”48

Brandeis adhered to the Ashwander principles in his Whitney concurrence. There, he deferred to the California Legislature’s findings that the Criminal Syndicalism Act was needed to preserve public peace and safety (a need that Brandeis might have been personally skeptical about), and therefore treated the law as facially constitutional. He explained that given the legislative determination of the need for the law, its constitutionality should remain open to be determined based on the facts and circumstances in which the law was sought to be applied: A defendant charged with violating the Act must have the right to challenge “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.”49 Because Brandeis concluded that Whitney had not demonstrated that the Act was unconstitutional as applied to her expressive conduct, he concurred in the conclusion that the First Amendment had not been violated and that Whitney’s conviction should be upheld.

Using Brandeis’ opinions as guideposts, it is fair to reason that if he had participated in Citizens United, he would have limited his constitutional review to the as-applied challenge presented by the parties, thereby focusing on the facts and circumstances of the actual speaker and speech at issue in the case. With this approach, he may or may not have found § 441b unconstitutional as applied to Citizens United and its advertisements, but the law would have remained in effect. The question of the statute’s constitutionality, as applied to other types of corporations under different circumstances, would have been preserved for future cases.

The Answer

The “political duty” Brandeis spoke of in his Whitney concurrence is a duty owed by the individual citizen, and it is the speech associated with the exercise of that duty that is
entitled to the highest degree of First Amendment protection. Accordingly, it is fair to project that if Brandeis were to decide *Citizens United*, he would not agree that every corporation, regardless of size, organization, or purpose, is an “association of citizens” whose speech is entitled to the same heightened First Amendment protection as that of individual citizens. He would also recognize that Congress may have a valid and compelling basis on which to differentiate between the campaign-related speech of individual citizens and that of corporations in the period immediately preceding a federal primary or election. In addition, his philosophy of judicial restraint would have led him to limit his constitutional analysis in the case to the as-applied challenge presented by the parties.

Ultimately, it is highly probable that Brandeis would have found the statute at issue in *Citizens United*, § 441b of the Bipartisan Campaign Reform Act of 2002, to be constitutional.

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**Notes**

1. 558 U.S. 310.
2. The provision passed by Congress in 2002 was § 203 of the Bipartisan Campaign Reform Act, which amended the federal statute at 2 U.S.C. § 441b.
3. 494 U.S. 652.
4. 540 U.S. 93.
5. 558 U.S. at 357.
6. *Id.* at 349.
7. *Id.* at 356.

8. 134 S. Ct. 1434.


12. 424 U.S. 1.

13. *Id.* at 53.

14. 274 U.S. 357, 375.

15. *Id.* at 375 (footnote omitted).


17. 479 U.S. 238, 257 & n.10 (1986).

18. 494 U.S. at 689.

19. 134 S. Ct. at 1467.

20. I note that though Justice Stevens’s opinion concurred in part and dissented in part, for the purposes of this article, I refer to the opinion as a dissent.

21. 558 U.S. at 466.

22. In *Whitney*, the Court’s majority viewed California’s Criminal Syndicalism Act as an appropriate exercise of the State’s police power to punish those who abuse the right to free speech, “by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means.” 274 U.S. at 371. This standard is commonly referred to as the “bad tendency test.” In his concurring opinion, Brandeis contended that the rights of free speech and free association are so vital to liberty that “even imminent danger cannot justify resort to prohibition...
of these functions essential to effective democracy, unless the evil apprehended is relatively serious.” *Id.* at 377. Thus, Brandeis believed that the First Amendment bars the government from criminalizing speech that advocates the use of force or the violation of the law unless the speech is likely to produce imminent and serious harm. The majority decision in *Whitney* was overruled more than forty years later in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and the Court has since followed Justice Brandeis’ heightened standard—commonly referred to as the “imminent lawless action test.”

23. 254 U.S. 325, 334.
24. *Id.* at 336.
25. *Id.* at 338.
26. *Id.*
27. 277 U.S. 438.
28. *Id.* at 478.
29. 558 U.S. at 428.
30. 288 U.S. 517.
31. *Id.* at 534.
32. *Id.* at 548.
33. *Id.* at 565 (footnote omitted).
34. *Id.* at 567 (footnote omitted).
35. *Id.* at 572.
36. 277 U.S. 389.
37. *Id.* at 410–11.
38. 558 U.S. at 438 (citations omitted).
39. *Id.* at 427.
40. *Id.* at 333.
41. *Id.* at 405.
42. 285 U.S. 262.
43. *Id.* at 285–87. *New State Ice Co.* concerned the Fourteenth Amendment’s due process clause for which the Court generally reviews legislative judgments for “reasonableness,” and not the First Amendment’s free speech clause for which the Court applies strict scrutiny and requires a compelling state interest.

45. 285 U.S. at 311.
47. 297 U.S. 288, 341.
48. *Id.* at 348.
49. 274 U.S. at 379.

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Speech and Democracy: The Legacy of Justice Brandeis Today

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Justice Louis Dembitz Brandeis is widely regarded by legal scholars as having been one of the “great” justices of the United States.¹ Although he is known for his emphasis on judicial restraint and his delineation of the right to privacy, his reputation rests as well on his having penned what remains the definitive judicial pronouncement on the necessity for free speech in a democracy. He did not begin his tenure on the U.S. Supreme Court in 1916 with a coherent philosophy of speech, however. It evolved gradually during the second and third decades of the twentieth century, in response to societal conditions. What follows is an exploration of that evolution and some questions about whether today’s societal conditions warrant even further thinking about speech, limitations on governmental power, and the rights and responsibilities of American citizens.

Let’s begin as Justice Brandeis did, by looking at what the Constitution has to say about speech. The First Amendment is remarkably straightforward: “Congress shall make no law . . . abridging the freedom of speech or press.” In other words, Congress can’t interfere with speech.

Nonetheless, in 1917, when the United States was two months into World War I, Congress passed the Espionage Act.² One section outlawed speech and actions designed
to hamper the draft or the war effort in general. It was amended by the Sedition Act of 1918, which said in part, “Whoever, when the United States is at war . . . shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States . . . or advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated . . . shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.”³

Taken as a whole, the amended Espionage Act criminalized speech that, for example, criticized the original Constitution’s endorsement of slavery; or asserted that the military uniforms issued by the government during World War I were not warm enough; or argued that both war in general and World War I in particular were wrong and the United States should never have entered the war, or that the draft was unconstitutional.

Over 2,000 people were actually prosecuted under the Act for saying some of those things. Charles Schenck, the general secretary of the Socialist Party, was convicted for hindering the war effort by publishing a two-page leaflet calling the draft a violation of the Thirteenth Amendment’s prohibition of involuntary servitude. Newspaper publisher Jacob Frohwerk was also convicted under the Act for writing and circulating articles that were allegedly designed to cause disloyalty in the armed forces by questioning the legality of the draft and depicting the war as having been caused by a combination of American capitalists and England. He was so certain that his articles were legal that he sent the paper to the Justice Department office in Kansas City each week. It nonetheless took a Kansas City jury only three minutes to find him guilty.⁴

Schenck’s and Frohwerk’s appeals were heard by the U.S. Supreme Court in 1919. So was the case of labor leader and Socialist Party presidential candidate Eugene Victor Debs, who had been convicted for making a fiery anti-war speech in Canton, Ohio. At his trial, Debs had declared, “I believe in the right of free speech, in war as well as in peace . . . I would under no circumstances suppress free speech. It is far more dangerous to attempt to gag the people than to allow them to speak freely what is in their hearts.”⁵
The Supreme Court disagreed, and upheld both the constitutionality of the Espionage Act and all three convictions under it. The decisions were unanimous. Brandeis’ fellow justice Oliver Wendell Holmes spoke for the court in Charles Schenck’s case, penning language that was to become familiar to many Americans. “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing panic,” Holmes wrote. He continued with what would become known as the clear and present danger test:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

The problem with the “clear and present danger test” was that Holmes did not define “clear” or “present” or “danger.” Supreme Court Justice Robert Jackson, referring to the test three decades later, commented, “All agree that it means something very important, but no two seem to agree on what it is.” The doctrine had become something of an ideological Rorschach test, allowing people of widely differing opinions to interpret it in ways that reflected their own attitudes towards speech.

That ambiguity became apparent to Justice Brandeis not long after the 1919 decisions were handed down. In 1924, looking back, he would tell Professor Felix Frankfurter of the Harvard Law School that when the Schenck case was decided, “I had not then thought the issues of freedom of speech out—I thought at the subject, not through it.” In the years after 1919 he began to think “through” the question of what speech should be permitted in a democracy, and why. His thinking culminated in the concurring opinion he wrote in the 1927 case of Whitney v. California. It remains the Supreme Court’s most comprehensive and eloquent discussion of the rationale for free speech, and it makes today’s American speech jurisprudence the most permissive in the world. It also lays out the connection between the right to free speech and the responsibilities of citizens.

Earlier in the post-World War I years, thirty-four of the states reacted to the anti-Communist, anti-union hysteria of the period by enacting criminal syndicalism and
criminal anarchy laws, which criminalized advocating or organizing for the purpose of altering the political or economic system of the United States. California was one of them. In 1920, its criminal syndicalism law was used to convict a woman named Anita Whitney.

Whitney was the descendant of five people who had arrived on the Mayflower in 1620. Believing both that the country had turned its back on what she saw as the egalitarian principles of her ancestors and that the American political and economic systems of the early twentieth century would never solve the problems of poverty and inequality, she turned first to socialism and then to communism. She was ostensibly convicted for helping to organize the Communist Labor Party of California, which advocated non-violence and participation in the political process but also supported direct action such as strikes and demonstrations. In fact, as her trial made clear, she was doomed by her advocacy of political and economic change. She was sentenced to one to fourteen years in the San Quentin penitentiary.

The Supreme Court upheld her conviction. Justice Brandeis concurred with the result for procedural reasons. He was a firm believer in judicial restraint and the importance of adhering to established procedures, which meant in part that the Supreme Court should not consider issues that were not raised in the courts below. Brandeis did not think that Whitney should have been prosecuted, but he also thought that the only way to keep the Supreme Court within its appropriate bounds was to follow the rules. Whitney’s lawyers had not argued at trial that there was no clear and present danger justifying either the statute or her indictment under it. Brandeis therefore concurred. At the same time, however, he wrote an opinion for himself and Justice Holmes that reads very much like a dissent. It was the first time that a member of the court had made the argument for free speech in detail.

Brandeis placed the rationale for free speech in the context of American history and ideology. The Founding Fathers, he declared, “believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them,
discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.”

The Framers, in Brandeis’ interpretation, understood that finding “political truth”—that is, answers to the question of what would best serve society and the individuals in it—was dependent upon full discussion, which was itself in turn dependent on “free speech and assembly.” The guarantee of free speech protected the citizen’s freedom to hear, without which the citizen could not make intelligent choices.

To Brandeis, speech was both something of a panacea and an obligation. When he wrote that “discussion affords ordinary adequate protection against the dissemination of noxious doctrine,” he was asserting that incorrect ideas would soon be exposed as such if they were held up to public scrutiny. That did not mean that people could not be misled by wrong ideas: the Founding Fathers, he said, “recognized the risks to which human institutions are subject.” They also knew, however, that democracy required “public discussion” rather than “an inert people.”

Brandeis saw the state as an inevitably imperfect instrument, not only because “arbitrary” forces will challenge “deliberative” forces and because institutions are run by fallible human beings, but because it is in the nature of humanity to generate and heed what he called “evil counsels,” at least temporarily.

At the same time, Brandeis insisted that a balance must be struck between two societal imperatives: the first, a government strong enough to protect citizens and their rights from over-zealous majorities; the other, the kind of protection needed by citizens from that very government. No government is to be entirely trusted, no matter who are its administrators, and every democratic government must be subjected to constant examination by the people.

The Founders, he continued, knew:

that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable
government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion . . . they amended the Constitution so that free speech and assembly should be guaranteed.17

Brandeis was not naïve. He understood that ideas could be dangerous, and was aware of the possible impact of the kind of “noxious” political ideas that Anita Whitney believed in. “Every denunciation of existing law tends in some measure to increase the probability that there will be a violation of it,” he acknowledged.18 And yet that risk did not negate the greater danger of government repression. When speech is repressed, what follows is the “hate” that “menaces stable government.” Stability and lawfulness were crucial to a free society. The safest course was not to repress speech but to count on “the power of reason as applied through public discussion.” People could be misled, but not permanently, and so Brandeis fashioned a standard that he was convinced would protect both speech and the security of the nation:

To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent . . . even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on . . . In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.19

And, he added, “no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the
falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”

Fear that words might be persuasive is not sufficient reason to ban or punish them, Brandeis declared in that paragraph. The clear and present danger doctrine means that speech cannot be suppressed unless it is “reasonable” to believe that “serious” and “imminent” evil is about to occur. As long as there was time for more reasoned voices to respond, speech, however noxious, could not be abridged or punished. Brandeis trusted that truth ordinarily would conquer error; otherwise, democracy made no sense. Perhaps more importantly, he believed that the difficult job of engaging in debate and refuting error, unlike the comparatively easy method of suppressing it, would contribute to building democratic habits and character. The answer to bad speech was good speech, and lots of it.

The Brandeis formulation is as persuasive as it is eloquent. One of its elements, however, has been given far too little attention. In addition, in the world of the twenty-first century, there is something important missing from it. Let’s return to Brandeis’ language to pick up first on the piece that has been largely ignored. It is exemplified by the sentence that reads in part, “the greatest menace to freedom is an inert people . . . public discussion is a political duty.”

Freedom—or democracy—cannot exist without an involved citizenry, according to that passage, and it is therefore the obligation of all citizens to involve themselves in the political process. They must engage in “public discussion” of the pressing issues of the day. Or, to put it somewhat differently, the right to speak is inextricably tied to the responsibility to participate.

Brandeis did not mean mindless participation, of course. He assumed that in order to fulfill their democratic responsibility, citizens would educate themselves about public policy. Education, to him, was not a matter only for the schoolroom, nor does “educated citizen” in the title of this essay imply that he was referring only to people with college degrees. On the contrary, Brandeis was insistent that education in a democratic polity was a lifelong process, and that all citizens had to keep educating themselves in order to fulfill
their civic responsibility. In 1906, ten years before he was appointed to the Supreme Court, he told the Civic Federation of New England that citizens had to be educated because they were the “rulers” of a democracy. “The citizen should be able to comprehend . . . the many great and difficult problems of industry, commerce and finance,” he said, because they affect public policy decisions.22 The right to assemble brought with it the responsibility to participate, Brandeis added in a 1920 Supreme Court case, for the citizen’s “exercise” of the right “is more important to the nation than it is to himself.”23

The bottom line, to summarize, was that democracy was impossible without citizen participation, and the right to speak and to assemble—the right to hear and discuss ideas—brought with it the responsibility of citizens to educate themselves for active political participation.

Let us examine the way that responsibility is approached today. In 2012, a presidential election year, the Center for the Study of the American Dream at Xavier University telephoned 1,023 native-born citizens to ask them some of the questions on the naturalization test given to immigrants. It took 6 out of 10 correct answers to pass. Of those surveyed 35 percent failed; only 6 percent got all 10 correct. And 85 percent could not answer the question, “What is the rule of law?”; 75 percent did not know what the judicial branch does. Only 37 percent knew the name of one of their state’s U.S. senators; only 38 percent could name the governor. Fewer than half of the respondents replied correctly to the question, “What does the Constitution do?” It is relevant to a discussion of rights that less than half—47 percent—could name “two rights of everyone living in the United States” or one power of the federal government (41 percent).24

Two years later, in September 2014, the University of Pennsylvania’s Annenberg Public Policy Center conducted a national survey of 1,416 American adults. When they were asked, “Do you happen to know any of the three branches of government?” 72 percent said yes, but then 35 percent could not name a single branch of the national government, and another 13 percent could name only one. Asked “which party has the
most members in the United States House of Representatives,” 44 percent did not know, and an additional 17 percent guessed wrong.25

Only slightly more than 54 percent of eligible voters went to the polls in 2012, and in 2014 the turnout was somewhat over 35 percent.26 Voting rates are not the only indicator of citizen participation, but it seems reasonable to assume that those who are active in the political process in other ways—through contributions to candidates, involvement in political parties and political campaigns, and so forth—are likely to be a good proportion of those who vote. There is of course no way of knowing how many of the people who did vote fell into the category of those unable to identify a branch of Congress or explain what the rule of law means. A cynic might comment that given the citizenry’s appalling lack of knowledge about the government, it is just as well that more people did not vote. That cynic, however, would not be a fan of democracy, because as Justice Brandeis understood, democracy is meaningless without real citizen participation.

To Brandeis, there was no such thing as rights without responsibilities; there was no such thing as a well-functioning democracy if citizens did not accept the responsibility to remain informed. An updated version of the Brandeisian approach comes from Michael Sandel, who has noted that “sharing in self-rule requires the capacity to deliberate well about the common good.”27 So one problem today is how to deal with the lack of informed citizens and with what appears to be the reluctance of too many citizens, especially younger ones, to exercise their responsibility to be politically engaged. A 2005 Brookings Institution report stated that “American democracy is at risk” because “Americans have turned away from politics and the public sphere in large numbers, leaving our civic life impoverished.” It added that this is particularly true of younger Americans.28 Scholars have documented younger adults’ disinterest in following the news.29 The authors of a recent book surveyed 4,200 high school and college students and reported that they “see politics as pointless and unpleasant ” and would prefer to do almost anything else in life than run for political office.30

A number of scholars have argued that young Americans are simply fulfilling their citizen responsibility in different ways, by participating in demonstrations and consumer
boycotts, petitioning media and entertainment corporations, and engaging in discussions on social media.\footnote{The numbers of young Americans taking part in such activities is very low. Involvement in no more than the occasional demonstration or boycott, coupled with a lack of sustained interest in public policy matters, does not fulfill a citizen’s responsibilities. Substituting such activities for voting means not participating in choosing the government and holding it accountable. If democracy is not “by” the people, can it really be called democracy?}

The failure of so many young Americans to involve themselves in electoral politics may be due to a variety of factors, including the current political gridlock in Washington and the resultant despair about the efficacy of the political system, voter identification laws that make registration and balloting difficult for many, holding elections on work days rather than the week-end, and the way campaign consultants assume that young people will not vote in substantial numbers and so fail to produce information in formats likely to engage them.\footnote{It nonetheless seems clear that part of the blame for the failure of citizens to fulfill their responsibility lies with our schools. Almost all the states mandate at least a minimum of civic education at the high school level.\footnote{It is, however, a minimum, and the results either of the limited time devoted to civic education or the poor teaching of it (including relying on textbooks rather than teaching in more interactive ways to engage today’s young adults) or both speak for themselves: students are not learning about either their rights or their responsibilities.\footnote{The phenomenon is perhaps exacerbated by No Child Left Behind, which does not make civic education a priority.\footnote{While some states have begun to incorporate the citizenship exam mentioned earlier into their curricula, as of this writing, only two states—Arizona and North Dakota—require high school students actually to take it.\footnote{Is this something that colleges and universities might also think about? Can we increase citizen responsibility by educating for it?}}}}

But there is another aspect to the connection between speech rights and citizen responsibility that deserves to be explored. A number of American critics have questioned the American approach for its failure to include what we might label here as the responsibility not to speak. It is an issue that Brandeis, living in a world far different
from that of the twenty-first century, did not consider. It is, however, one that deserves our attention.

What is perhaps the sharpest criticism of American speech jurisprudence and the Brandeis model comes from the Critical Legal Studies school of thought. Its proponents, most of them law professors, argue that the ideas and doctrines that underlie American law are merely extensions of a political system that legitimizes injustice and the dominance of American society by groups such as white people, men, and the wealthy. Their critique says in part that by permitting what legal scholar Mari Matsuda and others have labeled “words that wound,” or what we usually refer to as hate speech, the law effectively implies that groups such as racial and ethnic minorities, women, gays and lesbians, employees, low income people, and persons with disabilities are lesser human beings. In doing so, it effectively denies them full citizenship by penalizing their participation in the public sphere or silencing them entirely. In this view, some speech can actually prevent participation in the political process.37

Similarly, Feminist Legal Theory focuses on the effect of pornography and verbal sexual harassment on women. Critics such as Catharine MacKinnon and Andrea Dworkin have argued that the concept of free speech has been misused to allow sexually explicit material that subordinates women, condones violence against them, and denies them full equality at home, in the workplace, and in society at large.38 Does permitting “words that wound” and denigrating sexual language conflict with the democratic goals of equality and inclusiveness?

It is worth noting that nations ranging alphabetically from Austria to Zimbabwe outlaw the kind of hate speech that is permissible in the United States. That includes, for example, Argentina, Brazil, Cameroon, Chile, China, Colombia, Cuba, Mexico, Niger, Senegal, and Venezuela. In Great Britain, a person who uses abusive or intentionally harassing language about race, religion, or sexual orientation can be fined or sentenced to prison. The German Criminal Code bans attacks on “the human dignity of others” that are likely to breach the peace because of “inciting to hatred against part of the population” or “insulting, maliciously making them contemptible, or defaming them.” The South
African constitution declares, “Everyone has the right to freedom of expression” but the right “does not extend to . . . advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

Put differently, what these countries do is emphasize the responsibility of citizens to each other and to the maintenance of civility in the public sphere, along with the right to speak. Is that the kind of legislation needed in this country, or would it result in too much government control and the resultant stifling of useful speech? And would it work? Justice Samuel Alito commented in a 2015 interview that European countries “have laws against hate speech, including Holocaust denial speech, and yet you see what’s happening with anti-Semitism in Europe so it doesn’t seem to be very effective.”

A second critique of American speech jurisprudence has emerged as a result of the late twentieth- and early twenty-first- century decisions by the Supreme Court, which relied in some measure on Brandeis’ language about speech, striking down laws designed to regulate the flow of money into political campaigns. The Court has ruled in cases such as *Citizens United v. Federal Election Commission* (2010) that contributions to political campaigns and expenditures to publicize a candidate’s views are a form of speech, and so the First Amendment’s speech clause prohibits the government from limiting the amount of money that can be contributed to and spent on election campaigns by individuals, political groups and corporations. Those decisions have generated criticism from people who argue that money is not speech and that the democratic process is in danger of being undermined by the infusion into it of large amounts of money from the wealthy. If we say that the expenditure of money is speech, have we made a mockery of the democracy that free speech is meant to safeguard and enhance?

An equally important question about our speech laws today arises in the context of the Internet, which has altered our world in dramatic ways. It has created a “global village,” where in seconds we can access an astonishing amount of information about people all over the world and from cultures far different from our own. To quote Sandel again, our society “is situated in a global economy whose frenzied flow of . . . information and images, pays little heed to nations, much less neighborhoods.” While
the Internet expands the reach of political speech, it also gives both our neighbors and complete strangers enormous power without accountability. The anonymity of the Web permits posts of questionable veracity, which frequently go viral and misinform the very public so crucial to the democratic proves. In addition, anyone can say anything on the Internet about anyone else, and whether it is true or false it is immediately—and, in most cases, permanently—accessible by people we know and others whom we do not.

We have seen this in the phenomenon of cyberbullying: the use of cell phones, computers, and other electronic communication devices to harass and threaten others. Cyberbullying has resulted in a number of widely covered adolescent suicides as well as in severe psychological damage that stops short of self-destruction, and research suggests that the bullying phenomenon is fairly widespread.44

In addition, the web has made incursions into the zone of personal privacy that has historically contributed to the kind of civic courage and political participation that were so important to Justice Brandeis. In the past, people could participate in public discussions and then retire to the relative anonymity of their homes. The Internet and the availability of large amounts of information about almost everyone have severely limited privacy and anonymity. There may be ways in which the rights to speech and privacy conflict. Then-attorney Brandeis and a colleague famously extolled what they called the “right to be let alone” in an 1890 law review article, and Justice Brandeis elaborated on the right in the 1929 case of Olmstead v. United States.45 A United Nations Special Rapporteur on speech, writing in 2013, echoed and updated the Brandeis formulation: “Privacy can be defined as the presumption that individuals should have an area of autonomous development, interaction and liberty, a ‘private sphere’ with or without interaction with others, free from State intervention and from excessive unsolicited intervention by other uninvited individuals. The right to privacy is also the ability of individuals to determine who holds information about them and how is that information used.”46 Privacy can also be necessary for the kind of intellectual exploration that is a key aspect of citizen responsibility. Citizens must be able to access ideas (in books, websites, etc.) and discuss them without wondering if the government, employers, colleagues or
others are listening. Edward Snowden’s revelations about the National Security Agency’s monitoring of Americans’ phone calls and Internet use has made it clear that the government is in fact listening.

What might be viewed as the conflict between privacy and some speech can be seen rather dramatically in the phenomenon of revenge porn: pictures or videos, showing an identifiable person either nude or engaged in a sex act, that are taken consensually but are later posted, shared, and distributed without the consent of the subject. Internet postings are a form of speech. At the same time, they can be a devastating violation of the right to privacy, and two of the important features of the Internet are that postings can command a huge audience and it is extremely difficult to make anything posted there go away permanently. The potential for assaults on a person’s dignity is substantial. Do we need tighter speech laws, or might it be sufficient to make greater use of state laws (where they exist) governing invasion of privacy, appropriation of one’s likeness and intentional infliction of emotional distress? Social media websites such as reddit, Gawker, and Twitter have recently banned cyberbullying and revenge porn. Google and Microsoft’s Bing now allow the subjects of revenge porn to request that the search engines remove links to such material—another way of attacking the problem without government censorship. Is it possible that part of the answer lies in encouraging all such sites and platforms to adopt similar policies, just as most of them now ban child pornography?

Internet speech that is potentially incendiary but perhaps not immediately inciteful and that therefore cannot be punished under current law raises yet another issue. An example might be a post that says, “Abortion is murder, Dr. Smith performs abortions, here is his address,” or “Councilwoman Jones is threatening to vote to take away the guns we all need to protect ourselves, and she lives at 461 Elm Drive.” (A website that named abortion providers and marked off those injured or killed was held by a federal appeals court in 2005 to constitute a “true threat” not protected by the First Amendment.) Still another concern comes from the national security and law enforcement communities, which point to the problem of the spread of terrorist recruitment and communications on the Internet.
The question of what to do about these phenomena, while remaining committed to the kind of robust speech rights that are crucial in a democracy, is not an easy one. Presumably we can all agree that cyberbullying, for example, is unacceptable; one might define it as a growing public health problem. Is the answer, however, a limitation on speech, or better education about bullying and the importance of civility—that is, the responsibility not to speak, or to speak in a civil manner? Do we need to rethink what education for democracy means in the age of the Internet? The majority of states have enacted laws either prohibiting cyberbullying or directing school districts to adopt regulations that do so. Massachusetts’ anti-bullying law is typical. It requires school districts to develop a plan to keep children safe from both physical and cyber bullying. The plan must including training for teachers and all other school personnel as well as lessons for children from kindergarten through grade twelve. Some websites now teach children and young adults about Internet safety, cyberbullying, and sexting. Would making that kind of information part of school curricula solve the problem, or do we need somewhat different speech laws? Can we teach Americans that the opposite side of the coin of their right to speak, and their responsibility to speak, is that they sometimes have a responsibility not to speak? Should education for responsible use of the Internet and social media be a requirement on college campuses as well as in the lower schools?

And above all, as we examine those questions, we must deal with the danger of government power implicit in Justice Brandeis’ thought. “We must bear in mind why a State is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence,” he wrote in Whitney. His answer was that both the State—the government—and the “vast majority of its citizens” could be wrong. Human beings were both inherently conservative and fallible, Brandeis knew, and that was true of human beings in government and of those outside it. It was perilous to give the government the right to censor speech. Viewed from the vantage point of the twenty-first century, we can see that a government with the power to prohibit “dangerous” speech could have punished so many of the ideas that have enhanced American freedom and equality: the
abolition of slavery, racial integration, gender equality, and LGBTQ rights, to cite but a few. In fact, at various moments, such as the World War I era and the McCarthy Red-baiting period of the 1950s, the federal and state governments did indeed punish speech. “It’s not that I believe the exercise of the freedom of speech will always bring about good results,” law professor Alan Dershowitz writes; “it’s that I believe that the exercise of the power to censor will almost always bring about bad results. It’s not that I believe the free marketplace of ideas will always produce truth; it’s that I believe that the shutting down of that marketplace by government will prevent the possibility of truth.”Former New York Times journalist David Shipler adds, “Denial of the right to speak silences the speaker and also deafens the audience, impoverishing everyone.”

Let us return here to Justice Brandeis’ insistence in Whitney that speech rights properly exist only in the context of citizen responsibility. Part of the responsibility of the citizen is to consider issues such as the ones discussed above. It is no answer to fall back on, “Oh, but the First Amendment says . . .” because, as we have seen, the speech clause, along with virtually all the other clauses of the Constitution, has been interpreted and reinterpreted in the light of changing societal necessities. Woodrow Wilson noted more than a hundred years ago, “Government is not a machine, but a living thing” that is “accountable to Darwin, not to Newton . . . Living political constitutions must be Darwinian in structure and in practice.” Constitutional interpretation, and our laws generally, must evolve to keep pace with society. The question of what speech laws—and what kind of education—are appropriate for the American democracy in the early decades of the twenty-first century is one that we, as citizens, have the responsibility to address. The legacy of Justice Brandeis demands no less.

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Notes


7. Schenck v. United States, at 52.


10. “Memorandum” written by Felix Frankfurter after conversations with Brandeis during the years 1922–1926. Frankfurter Papers, Library of Congress, Box 224, p. 23. The memorandum in the Library of Congress is a typescript of Frankfurter’s notes, reportedly put together by Alexander Bickel. The original notes are in the Brandeis Papers, Harvard Law School (Untitled...
Notebook, Box 114–7 and 114–8). They are difficult to read but differ in some ways from the typescript, probably because of the problems presented by Frankfurter’s handwriting. Another transcription is in Melvin I. Urofsky, “The Brandeis-Frankfurter Conversations,” 1985 *The Supreme Court Review* 299 (1985). The conversation about speech, dated August 8, 1923, is at pp. 323–324.


32. There are of course other reasons for lack of engagement, including the belief that the heavy injection of money into the electoral process has made individual citizen’s participation meaningless. For information about the participation or lack thereof by young adults, see CIRCLE, The Center for Information & Research on Civil Learning and Engagement, www.civiyouth.org. See also the United States Elections Project, www.electproject.org;


1 Stephen Macedo et al., Democracy at Risk: How Political Choices Undermine Citizen Participation and What We Can Do about It (Brookings Institution Press, 2005), 1, 2.


Laws against hate speech in most countries can be found by searching on the Web for the name of the country and “speech” or “constitution.” The website LegislationLine has a list, with links, of the criminal codes of many countries: http://www.legislationline.org/documents/section/criminal-codes.

40. Cf. Article 29 of the Universal Declaration of Human Rights: “Everyone has duties to the community in which alone the free and full development of his personality is possible,” http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement; Frank La Rue, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,” U.N. Human Rights Council, 16 May 2011: “legitimate types of information which may be restricted include child pornography (to protect the rights of children), hate speech (to protect the rights of affected communities), defamation (to protect the rights and reputation of others against unwarranted attacks), direct and public incitement to commit genocide (to protect the rights of others), and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (to protect the rights of others, such as the right to life),” http://www2.ohchr.org/English/bodies/hrercouncil/docs/17session/A.HRC.17.27_en.PDF, p. 8.


43. Sandel, Democracy’s Discontent, 317.


47. For the argument that privacy and speech are inextricably connected, see, e.g., Neil Richards, Intellectual Privacy: Rethinking Civil Liberties in the Digital Age (Oxford University Press, 2015).

48. A number of states have enacted or are considering criminal and/or civil laws about revenge porn, either as a subset of acts such as harassment or as a stand-alone phenomenon. “States with Revenge Porn Laws,” http://www.endrevengeporn.org/revenge-porn-laws/; C. A. Goldberg, “State with Revenge Porn Criminal Laws,” http://www.cagoldberglaw.com/states-with-revenge-porn-laws/.


51. Planned Parenthood v. American Coalition of Life Activists, 422 F.3d 949 (9th Cir. 2005). The decision defined “true threats” as “a threat where a reasonable person would foresee that the listener will believe he will be subjected to physical violence” and added, “true threats of the sort ACLA made in order to intimidate physicians are not protected under the First Amendment.” The decision is available at http://openjurist.org/422/f3d/949. For more recent “true threat” jurisprudence, see Elonis v. U.S., 575 U.S. ____ (2015).

52. See, e.g., Gabriel Weimann, Terrorism in Cyberspace: The Next Generation (Woodrow Wilson Center Press, 2015). Also see J. M. Berger and Jonathon Morgan, “The ISIS Twitter


55. www.childline.org.uk;www.thinkuknow.co.uk

56. For information about methods of teaching young people about bullying and acceptable cyber behavior, see, e.g., Nancy E. Willard, Cyberbullying and Cyberthreats: Responding to the Challenge of Online Social Aggression, Threats, and Distress (Research Press, 2007); Jennifer Masters and Nicola Yelland, “Changing Learning Ecologies: Social Media for Cyber-citizens,”

57. Whitney v. California, at 374.


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Selected Bibliography

Anu Shah ’16

The bibliography offers a selection of works designed to complement the spring 2016 events, which examine the life and thought of Louis D. Brandeis and the continuing resonance, in the twenty-first century, of the issues that he cared about. It is organized around the topics of the March and April panels. Papers commissioned specifically for the LDB 100 celebration begin each section; author names appear in bold.

We thank Anu Shah ’16 for his work on this document.

Louis D. Brandeis, the Supreme Court and American Democracy
(January 28, 2016) brandeis.edu/ldb-100/events


(March 1, 2016) brandeis.edu/ldb-100/events


Citizenship and the Economy: 
Labor, Inequality and Bigness 
(March 7, 2016) brandeis.edu/ldb-100/events

Adelstein, Richard, “The Last Autonomist” (commissioned for LDB 100: Then and Now) http://bir.brandeis.edu/handle/10192/31440

Goldstein, Alexis, “What a Little Sunlight Can Do: Learning from the Economic Legacy of Louis D. Brandeis” (commissioned for LDB 100: Then and Now) http://bir.brandeis.edu/handle/10192/31439


Privacy, Technology and the Modern Self

(*March 21, 2016*) [brandeis.edu/ldb-100/events](http://brandeis.edu/ldb-100/events)

**Allen, Anita,** “The Declining Significance of Home: Privacy ‘Whilst Quiet’ and of No Use to Artists or Anyone” (commissioned for LDB 100: Then and Now) [http://bir.brandeis.edu/handle/10192/31438](http://bir.brandeis.edu/handle/10192/31438)

**Harris, Shane,** “Privacy Imperiled: What Would Brandeis Make of the NSA and Edward Snowden?” (commissioned for LDB 100: Then and Now) [http://bir.brandeis.edu/handle/10192/31437](http://bir.brandeis.edu/handle/10192/31437)

**Mirmina, Steven A.**, “Translating Justice Brandeis’s Views on Privacy for the 21st Century” (commissioned for LDB 100: Then and Now) [http://bir.brandeis.edu/handle/10192/31436](http://bir.brandeis.edu/handle/10192/31436)


Jewish Justices and the Expanding Diversity of the Supreme Court

*(April 4, 2016)* [brandeis.edu/ldb-100/events](http://brandeis.edu/ldb-100/events)

**Dalin, David**, “The Appointment of Louis D. Brandeis, The First Jewish Justice on the Supreme Court” (commissioned for LDB 100: Then and Now)

[http://bir.brandeis.edu/handle/10192/31435](http://bir.brandeis.edu/handle/10192/31435)

**Greene, Linda**, “Diversifying the Supreme Court: Brandeis, Marshall, Sotomayor” (commissioned for LDB 100: Then and Now)

[http://bir.brandeis.edu/handle/10192/31434](http://bir.brandeis.edu/handle/10192/31434)


Speech and Participation in a Democracy:

What Are the Rights and Responsibilities of the Educated Citizen?

*(April 18, 2016)* [brandeis.edu/ldb-100/events](http://brandeis.edu/ldb-100/events)

**Kendrick, Leslie**, “Brandeis, Speech, and Money” (commissioned for LDB 100: Then and Now) [http://bir.brandeis.edu/handle/10192/31433](http://bir.brandeis.edu/handle/10192/31433)

**Levy, Jon D.**, “The Brandeis/Citizens United Question” (commissioned for LDB 100: Then and Now) [http://bir.brandeis.edu/handle/10192/31432](http://bir.brandeis.edu/handle/10192/31432)

**Strum, Philippa**, “Speech and Democracy: The Legacy of Justice Brandeis Today” (commissioned for LDB 100: Then and Now) [http://bir.brandeis.edu/handle/10192/31431](http://bir.brandeis.edu/handle/10192/31431)


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