

5-15-2012

Mr. Justice Brandeis and the Art of Judicial Dissent

Melvin I. Urofsky

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Courts Commons](#), [Judges Commons](#), and the [Legal History Commons](#)

Recommended Citation

Melvin I. Urofsky *Mr. Justice Brandeis and the Art of Judicial Dissent*, 39 Pepp. L. Rev. Iss. 4 (2013)
Available at: <https://digitalcommons.pepperdine.edu/plr/vol39/iss4/3>

This Lecture is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact Katrina.Gallardo@pepperdine.edu, anna.speth@pepperdine.edu, linhgavin.do@pepperdine.edu.

Mr. Justice Brandeis and the Art of Judicial Dissent

Melvin I. Urofsky*

When the Supreme Court of the United States met for its first Terms, it followed the English pattern of the Justices delivering their opinions *seriatim*; that is, each Justice delivered his own opinion of the case, what the result should be, and the legal reasoning behind it.¹ This could sometimes be confusing, since the various opinions did not always agree on exactly what the result should be or why. The first Chief Justice, John Jay, occasionally managed to get the Court to deliver a single majority opinion,² but when Oliver Ellsworth became Chief Justice in 1796, the Court had not developed a strong pattern regarding the use of either *seriatim* or majority opinions.³ In some cases, the use of *seriatim* opinions indicated differences of opinion among the Justices, but in others, there were multiple opinions even when there was unanimity on the bench.⁴ In the first opinion Ellsworth delivered, the case of *La Vengeance*,⁵ he delivered a consolidated majority opinion, from which Justice Samuel Chase dissented.⁶

Ellsworth was “following the practice to which he had become accustomed when he served upon the Connecticut Superior Court from 1784 to 1789.”⁷ Although a state statute called upon each judge to write an

* A.B., Ph.D., Columbia University; J.D., University of Virginia. Professor of Law and Public Policy, Virginia Commonwealth University. This Article is in substance the annual Brandeis Lecture delivered at Pepperdine University School of Law on March 24, 2011. The same caveat that applied to the lecture also holds true for this Article—it is a report on a work in progress, and is not meant to be a definitive statement about the nature of dissent on the Supreme Court.

1. See Scott Douglas Gerber, *Introduction: The Supreme Court Before John Marshall*, in *SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL* 1, 20 (Scott Douglas Gerber ed., 1998) [hereinafter *SERIATIM*].

2. See, e.g., *Glass v. Sloop Betsey*, 3 U.S. (3 Dall.) 6 (1794).

3. See *SERIATIM*, *supra* note 1, at 20.

4. *Talbot v. Janson*, 3 U.S. (3 Dall.) 133 (1795), and *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796), were in essence unanimous, while in *United States v. Peters*, 3 U.S. (3 Dall.) 121 (1795), a majority opinion announced a split decision.

5. *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297 (1796).

6. WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIP OF JOHN JAY AND OLIVER ELLSWORTH* 110 (1995).

7. *Id.*

opinion in every case, the Connecticut Superior Court ignored the law, and adopted a practice of writing majority and occasional dissenting opinions, an approach that was surely more efficient in the expenditure of judicial labor.⁸ After he became Chief Justice of the Supreme Court of the United States, Ellsworth established a pattern in which he would deliver short opinions of the Court, infrequently accompanied by a dissent.⁹ The practice of using majority rather than multiple opinions, initiated by Ellsworth, became consolidated during John Marshall's long tenure, and while Marshall certainly cemented the practice, the credit should actually go to Ellsworth.¹⁰

Marshall believed, as have his successors, that the force of the Court's decision is greater on the public mind when it is delivered in one voice. He explained:

The course of every tribunal must necessarily be, that the opinion which is to be delivered as the opinion of the court, is previously submitted to the consideration of all the judges; and, if any part of the reasoning be disapproved, it must be so modified as to receive the approbation of all, before it can be delivered as the opinion of all.¹¹

Marshall, it should be recalled, took his seat when the public viewed the judiciary as the least important part of the federal government, and the President of the United States, Thomas Jefferson, made war upon it.¹² It was housed in a basement below the Senate chamber because the Capitol architect had forgotten it in his plans.¹³ In its first decade, five members of the Court had resigned, and two others declined appointment after the Senate had confirmed them.¹⁴ Chief Justice John Jay resigned to become Governor of New York, and John Rutledge to become chief justice of the South Carolina Court of Common Pleas and Sessions.¹⁵

But Marshall wanted not just to place the Judiciary on par with the Legislative and Executive Branches, he also wanted to create a jurisprudence

8. *Id.*

9. *Id.* at 111.

10. *Id.* at 110–12.

11. John Marshall, *A Friend to the Union*, UNION (Phila.), Apr. 24, 1819, reprinted in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 78, 80–81 (Gerald Gunther ed., 1969). John Marshall wrote these essays in defense of the Court's opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

12. See RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* (1971); JAMES F. SIMON, *WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES* (2002).

13. SIMON, *supra* note 12, at 138.

14. Donald G. Morgan, *The Origin of Supreme Court Dissent*, 10 WM. & MARY Q. 353, 361 n.24 (1953).

15. *Id.*; see also SIMON, *supra* note 12, at 139.

for the Constitution that would endow the national government with powers strong enough to govern, and with policies to tie the nation together.¹⁶ In some ways, he hoped to fix for all time the basic meaning of the Constitution, although he understood that new situations in the future would demand new interpretations.¹⁷ “[W]e must never forget,” he declared, “that it is *a constitution* we are expounding,” one that the Framers had meant to last “for ages to come.”¹⁸ To do this, he believed the Court needed not only to expound proper doctrine, but to do so in a manner that would command public respect and obedience, and that required harmony and unity.¹⁹ And for the most part, he succeeded. The great opinions that established our constitutional framework—*Marbury v. Madison*,²⁰ *Fletcher v. Peck*,²¹ *McCulloch v. Maryland*,²² the *Dartmouth College Case*,²³ *Cohens v. Virginia*,²⁴ and *Gibbons v. Ogden*²⁵—are all the more powerful because they came from a united Court. It is amazing to consider that from 1801 to 1823, no member of the Marshall Court, with the exception of William Johnson, spoke out in separate opinions, whether concurring or dissenting, in more than eight cases.²⁶

Not everyone was happy about this, especially John Marshall’s cousin and bitter enemy, Thomas Jefferson, who kept up a constant, but futile, crusade to get the Court to return to the practice of the English courts. In English decisions, Jefferson declared, “[b]esides the light which their separate arguments threw on the subject, and the instruction communicated by their several modes of reasoning, it shewed [sic] whether the judges were unanimous or divided, and gave accordingly more or less weight to the judgment as a precedent.”²⁷ The practice that Marshall had instituted, Jefferson charged in a letter to Justice William Johnson, is “certainly convenient for the lazy, the modest & the incompetent. It saves them the

16. Morgan, *supra* note 14, at 361.

17. *Id.*

18. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819).

19. Morgan, *supra* note 14, at 362.

20. 5 U.S. (1 Cranch) 137 (1803).

21. 10 U.S. (6 Cranch) 87 (1810).

22. 17 U.S. (4 Wheat.) 316.

23. *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

24. 19 U.S. (6 Wheat.) 264 (1821).

25. 22 U.S. (9 Wheat.) 1 (1824).

26. Morgan, *supra* note 14, at 363.

27. Letter from Thomas Jefferson to William Johnson (Oct. 27, 1822), in 12 THE WORKS OF THOMAS JEFFERSON 246, 248 (Paul Leicester Ford ed., 1905).

trouble of developing their opinion methodically and even of making up an opinion at all.”²⁸

Johnson, whom Jefferson had appointed to the Court in 1804,²⁹ although receptive to the former President’s arguments, explained that he believed it unnecessary to write on every issue, especially those not involving constitutional issues, and until the 1920s, a vast majority of the Court’s agenda consisted of cases implicating neither federal power nor constitutional interpretation.³⁰ But Johnson did begin to part company with Marshall,³¹ and his biographer has called him the “first dissenter.”³² Between 1804 and 1822, Johnson delivered exactly half of the concurring and half of the dissenting opinions delivered by all the Justices,³³ and both Marshall and his close associate, Justice Joseph Story, privately grumbled that Johnson had upset the harmony of the Court.³⁴

Today, Johnson, despite his three decades of service on the high Court, is barely remembered. His dissents had no lasting impact, since they neither undermined the general judicial philosophy of Marshall, nor were they accepted as law by later courts. In fact, prior to the Civil War, I would suggest that there were only two major Supreme Court dissents that mattered: those of Justices John McLean and Benjamin R. Curtis in *Dred Scott v. Sandford*.³⁵ Moreover, these dissents did not lead the Court to overrule *Dred Scott*; the Civil War and the Thirteenth and Fourteenth Amendments did that.³⁶

About a year or so ago I posted a query on H-LAW,³⁷ asking my fellow legal historians if they could think of any important dissent—important in that it led the Court to reverse an original ruling of consequence—prior to Justice Stephen Field’s dissent in the *Slaughter-House Cases*³⁸ in 1873. They could not. Thus, it is that dissent, I believe, that is the first modern

28. *Id.* at 250.

29. See DONALD G. MORGAN, JUSTICE WILLIAM JOHNSON: THE FIRST DISSENTER 50–53 (1954).

30. PERCIVAL E. JACKSON, DISSENT IN THE SUPREME COURT: A CHRONOLOGY 25 (1969).

31. MORGAN, *supra* note 29, at 168–69, 290.

32. *Id.* at v.

33. Morgan, *supra* note 14, at 366.

34. MORGAN, *supra* note 29, at 172–73.

35. 60 U.S. (19 How.) 393, 529 (1857) (McLean, J., dissenting); *id.* at 564 (Curtis, J., dissenting).

36. See U.S. CONST. amend. XIII; U.S. CONST. amend. XIV.

37. See H-LAW, H-NET, <http://www.h-net.org/~law/> (last visited Feb. 16, 2012). H-LAW is a humanities social science online discussion network sponsored by the American Society for Legal History.

38. 83 U.S. (16 Wall.) 36 (1873).

dissent; it not only contradicted the ruling and reasoning of the majority, but also set out the arguments that would ultimately be accepted as correct.³⁹

The *Slaughter-House Cases*, you will recall, tested whether a statute passed by the Reconstruction legislature in Louisiana, requiring all butchers in New Orleans to use a single abattoir for slaughtering livestock, violated the Due Process and Privileges and Immunities Clauses of the Fourteenth Amendment.⁴⁰ The majority opinion, by Justice Samuel Miller, dismissed these claims, holding that the law did not prevent anyone from plying their trade as a butcher, but was a simple health measure to protect the community.⁴¹ The Fourteenth Amendment, he declared, as everyone knew, had been adopted to guard the legal rights of the freed slaves, not to protect butchers or other businesses from legitimate state regulation.⁴² The Court, Miller argued, should not become a perpetual censor of state legislation nor the guarantor of individual rights.⁴³

Justice Stephen Field's dissent would, in the end, be triumphant and dramatically affect the future course of American jurisprudence.⁴⁴ He did not fear that the federal courts would become the censor of state action, and in fact welcomed such a development.⁴⁵ Field argued that the Fourteenth Amendment protected the basic rights of all Americans, not just the ex-slaves, and this meant that the New Orleans butchers could not be denied their economic rights without due process of law.⁴⁶ As Field noted, the issue was "nothing less than the question whether the recent amendments to the Federal Constitution protect the citizens of the United States against the

39. *Id.* at 83 (Field, J., dissenting). While the actual holding of the case was never overturned, the jurisprudence of the majority view gave way to Field's argument. See CARL BRENT SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 424 (1930) ("[Field and his minority colleagues'] efforts were not in vain, however, for the Court gradually permitted new meaning to be read into the due process clause of the same amendment, and ultimately embodied in the constitutional law of the country much of the same material which Field had endeavored to introduce by way of the privileges and immunities clause.").

40. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 36–39. The best single book on the case and the issues it raised is RONALD M. LABBÉ & JONATHAN LURIE, *THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT* (2003).

41. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 57–83.

42. *Id.* at 80–81.

43. *Id.* at 78.

44. *Id.* at 83–111 (Field, J., dissenting).

45. *Id.* at 110.

46. *Id.* at 95.

deprivation of their common rights by State legislation.”⁴⁷ The Fourteenth Amendment, in his view, provided that protection.⁴⁸

In essence, Field argued that the Fourteenth Amendment had now created a new standard of rights—those enjoyed by citizens of the United States—and that these rights not only had to be respected by the states, but they could be enforced by federal courts.⁴⁹ This idea took a while to catch on, but eventually, through the process of incorporation of the Fourteenth Amendment’s Due Process Clause, the Court did apply most of the provisions in the Bill of Rights to the states.⁵⁰ More importantly, Field’s exegesis of what due process of law meant, and that it included substantive economic rights, also won over the Court.⁵¹ By 1897, the notion of substantive due process—incorporating economic liberty and standing as a bar against regulation of property or the labor force—had become enshrined in the law,⁵² and would remain there until the great constitutional crisis of the 1930s.

Field’s opinion is not normally included in what some scholars have called the “canon” of great dissents because it did not lead to the reversal of the original case.⁵³ In their view, the first of the great canonical dissents is that of Justice John Marshall Harlan in *Plessy v. Ferguson*, in which he argued that laws segregating people on the basis of race were “inconsistent not only with that equality of rights which pertains to citizenship, National and State, but with the personal liberty enjoyed by every one within the United States.”⁵⁴ The Constitution, he declared, is “color-blind.”⁵⁵ Although it took almost six decades, eventually Harlan’s view won out when the Supreme Court in 1954 struck down racial segregation in *Brown v. Board of Education*.⁵⁶ In fact, Harlan’s dissent still rings strongly, and has been cited in recent Court cases.⁵⁷

47. *Id.* at 89.

48. *Id.*

49. *Id.* at 110–11.

50. *See id.* at 110.

51. *Id.* at 83–111.

52. *See Allgeyer v. Louisiana*, 165 U.S. 578, 590–93 (1897) (holding that a Louisiana statute affecting an individual’s “liberty” to contract violated the Constitution).

53. *See, e.g.*, Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 244 (1998) (identifying “canon” cases like *Marbury v. Madison*, *McCulloch v. Maryland*, and *Brown v. Board of Education*, which appear in “every major constitutional law casebook now on the market”); Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781, 781 (2000) (seeking to explain the methods by which various dissenting opinions became canonized and highlighting such dissents as *Lochner v. New York* and *Plessy v. Ferguson*).

54. *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting).

55. *Id.* at 559.

56. 347 U.S. 483 (1954).

57. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). Note that in *Romer v. Evans*, 517 U.S. 620 (1996), both Justice Kennedy for the majority, *id.* at 623, and

But I would suggest that Field's dissent is equally important. It is true that it did not lead to a reversal of the *Slaughter-House Cases*, as Harlan's helped lead to a reversal of *Plessy*. Rather it deserves our attention because it started a constitutional dialogue over the meaning of key Fourteenth Amendment clauses, a process that took years and which, in many ways, is still not finished.

This dialogue over the meaning of the Constitution has been going on since 1787, as has the debate between Federalists and Anti-Federalists. It is a dialogue not only among the members of the Court, but between them and the other branches of government and, to a large extent, between the Court and the people of the United States. In this constitutional dialogue, dissent plays a critical role.

The constitutional dialogue is necessary for a number of reasons, not the least of which is that it is one of the ways in which we as a people reinvent and reinvigorate our democratic society.⁵⁸ But it is also necessary because so much of the Constitution is general rather than specific. "Originalists" believe that the Framers spelled out the true meaning of the Constitution for all time and that this meaning can be found by close examination of the document's clauses, the minutes of the 1787 Philadelphia Convention, and contemporary documents, such as *The Federalist Papers*.⁵⁹

It is true that some provisions of the Constitution are very precise. Members of the House of Representatives must be twenty-five years old and serve a two-year term;⁶⁰ senators must be thirty and serve for six years;⁶¹ presidents must be thirty-five, born in the United States, and serve for four years.⁶² The provisions for nominating and confirming judges,⁶³ as well as for ratifying treaties,⁶⁴ are also clear. There are a number of other administrative arrangements that mean precisely what they say, such as a two-thirds vote in each house to override a presidential veto.⁶⁵

The important clauses, however, are far from precise. Judges shall serve during "good Behaviour."⁶⁶ The President is "Commander in Chief."⁶⁷

Justice Scalia in dissent, *id.* at 650, appealed to the Harlan dissent, offering differing views of what it meant, but agreeing on its authoritativeness.

58. See DAVID J. BODENHAMER, *THE REVOLUTIONARY CONSTITUTION* 5–6 (2012).

59. See Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 *DUKE L.J.* 239, 243 (2009).

60. U.S. CONST. art. I, § 2, cls. 1–2.

61. U.S. CONST. art. I, § 3, cls. 1, 3.

62. U.S. CONST. art. II, § 1, cls. 1, 4.

63. U.S. CONST. art. III, § 1.

64. U.S. CONST. art. II, § 2, cl. 2.

65. U.S. CONST. art. I, § 7, cl. 2.

66. U.S. CONST. art. III, § 1.

Congress shall make no law “respecting an establishment of religion.”⁶⁸ Congress shall have the power “[t]o regulate Commerce with foreign Nations, and among the several States.”⁶⁹ No state shall deny to its citizens “due process of law.”⁷⁰ A president may be impeached for “high Crimes and Misdemeanors.”⁷¹ These are the clauses that grant power to the government and create rights for citizens, and there has been a debate over the interpretation of these enabling and rights clauses almost from the time George Washington took the oath of office as the first president.⁷²

Since that time, the country has grown across the continent and beyond, it has been industrialized and urbanized, riven by a civil war, and faced the challenges of new technology, such as railroads, automobiles, telephones, and now the Internet—none of which is addressed in the Constitution. During these years, the Court has had to interpret the Constitution in terms of the problems currently confronting the nation. Indeed, James Madison, the “father of the Constitution,” declared that future generations had to read and apply the various clauses according to their own circumstances.⁷³

What the “correct” reading is at any given time is rarely clear, and here the Supreme Court has played a critical role in saying what the Constitution means. But that does not mean that the majority of the Justices are always right. The dissenters, by positing alternative interpretations, initiate the dialogue over what a particular provision should mean. I am not arguing that whenever there is a dissent it is right; many dissents are wrong. But the dialogue is critical. Sometimes the matter is resolved quickly; in some cases it will take decades before the Court adjusts its position.⁷⁴ Often we get a form of Hegelian dialogue, with two positions in one case (thesis and antithesis) leading to a compromise in a new case (synthesis), which in turn triggers a dissent.

The cases that reach the Supreme Court are rarely easy; those get decided in the district courts and the courts of appeals. If a case is accepted for review in the high Court, at least four Justices must believe that it

67. U.S. CONST. art. II, § 2, cl. 1.

68. U.S. CONST. amend. I.

69. U.S. CONST. art. I, § 8, cl. 3.

70. U.S. CONST. amend. XIV, § 1.

71. U.S. CONST. art. II, § 4.

72. See, e.g., *Davidson v. City of New Orleans*, 96 U.S. 97 (1877) (nineteenth century case noting discrepancies in definition of “due process” between states and the federal government).

73. Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), in 3 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 447, 447–48 (Max Farrand ed., rev. ed. 1966); see also Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 *U. PITT. L. REV.* 349, 367 (1989).

74. Compare *Plessy v. Ferguson*, 163 U.S. 537 (1896), overruled by *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (“separate but equal” doctrine overruled fifty-eight years later), with *McConnell v. FEC*, 540 U.S. 93 (2003), overruled by *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (limited rights for corporations in election process overruled seven years later).

presents a constitutional question of large importance.⁷⁵ The majority opinion in such a case establishes what the law is for the near future. The dissent lays down markers that determine the ongoing discussion.

This dialogue takes place at several levels and with different groups. Most immediately, it is a conversation among the members of the Court. If there is disagreement in a case, the Justice assigned to write the majority opinion must not only take care to frame it so as to retain the votes of those supporting that outcome, but also take into account arguments raised in dissent, and, if possible, answer them. On this subject, let me quote from a current member of the Court, Justice Ruth Bader Ginsburg:

On the utility of dissenting opinions, I will mention first their in-house impact. My experience teaches that there is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial circulation. An illustration: The Virginia Military Institute case,⁷⁶ decided by the Court in 1996, held that VMI's denial of admission to women violated the Fourteenth Amendment's Equal Protection Clause. I was assigned to write the Court's opinion. The final draft, released to the public, was ever so much better than my first, second, and at least a dozen more drafts, thanks to Justice Scalia's attention-grabbing dissent.⁷⁷

Sometimes a draft dissent proves so compelling that it wins over previous opponents to provide what Justice William Brennan called the Court's magic number—five.⁷⁸

(Although my subject this evening is dissent on the Supreme Court, I would be remiss if I did not note that dissenting opinions in the federal circuit courts of appeal and on state supreme courts often carry great weight, and, even if failing to win a majority below, may convince the high Court of their correctness.⁷⁹)

75. See Erwin N. Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335, 345–46 (1975) (“[A]t least four Justices must vote to take the case before it will be heard.”).

76. *United States v. Virginia*, 518 U.S. 515 (1996).

77. Ruth Bader Ginsburg, *Dissent is an ‘Appeal’ for the Future*, ALASKA B. RAG, Apr.–June 2008, at 1, 6.

78. Laura Krugman Ray, *Judging the Justices: A Supreme Court Performance Review*, 76 TEMP. L. REV. 209, 209 (2003).

79. See, for example, the dissent in the Virginia Supreme Court by Justice Leroy R. Hassell Sr., in the cross-burning case, *Black v. Commonwealth*, 553 S.E.2d 738, 748 (Va. 2001), which was partially reversed in *Virginia v. Black*, 538 U.S. 343 (2003).

The dialogue also encompasses Congress and the Executive Branch.⁸⁰ Especially when the Court is engaged in statutory construction of federal statutes, a majority may find that the wording in the law should be interpreted one way, while the dissenters would read it differently. Since this is not a question of constitutional restraint, the dissent will often suggest that if Congress had indeed meant the results to be different, then all it needed to do was revise the law.

Perhaps the most striking example of this is a dissent by Justice Joseph Story in the little-known 1845 case of *Cary v. Curtis*,⁸¹ regarding a federal statute governing how courts reviewed appeals from importers of decisions on import duties imposed by the Collector of Custom.⁸² A revision of the law inadvertently left out a key provision, thus depriving importers of the same level of judicial review they had traditionally enjoyed.⁸³ The majority said, in effect, Congress deleted this procedure, so it did not exist anymore.⁸⁴ Justice Story, in his dissent, said Congress could not have meant to upset the customary practice, and invited the legislators to remedy the situation.⁸⁵ Congress did so in thirty-six days, so rapidly in fact, that the revised law was on the statute books before the volume of that Term's opinions could even be printed.⁸⁶

In 1986, the Court heard a case brought by Dr. Simcha Goldman, an Orthodox Jew challenging an Air Force regulation that prevented him from wearing a *kippah*, the traditional skullcap, while in uniform.⁸⁷ Five members of the Court deferred to the military, claiming that Congress had delegated to the military the power to establish rules regarding uniform, and in the absence of any law holding otherwise, would defer to the military's judgment regarding the need for uniformity in military attire.⁸⁸ The dissenters chided the Court for its uncritical deference to the military, and for its somewhat extreme arguments that a small skullcap would somehow undermine military discipline.⁸⁹ Shortly after the decision, Congress passed

80. Although numerous cases could be cited regarding the Executive Branch, one in particular stands out, *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952).

81. 44 U.S. (3 How.) 236, 252 (1845) (Story, J., dissenting).

82. *Id.* at 237–38 (majority opinion).

83. *See id.* at 242–43.

84. *Id.* at 244.

85. *Id.* at 257 (Story, J., dissenting).

86. George Stewart Brown, *A Dissenting Opinion of Mr. Justice Story Enacted as Law Within Thirty-Six Days*, 26 VA. L. REV. 759, 760 (1940).

87. *Goldman v. Weinberger*, 475 U.S. 503, 504 (1986).

88. *Id.* at 509–10.

89. *Id.* at 515, 517–18 (Brennan, J., dissenting); *id.* at 526–27 (Blackmun, J., dissenting); *id.* at 531–32 (O'Connor, J., dissenting).

legislation allowing Orthodox Jews to wear a *kippah* underneath official headgear.⁹⁰

The Court at all times is conversing with the American people,⁹¹ and, especially in controversial areas, dissents carry great weight. One reason that Chief Justice Warren worked so hard to get unity in *Brown v. Board of Education*⁹² is that he understood that anything less than unanimity would undermine the moral force of the decision in segregated areas of the country.⁹³ Certainly, the dissents in *Dred Scott*,⁹⁴ as well as the *Income Tax Cases*,⁹⁵ generated a public outcry that eventually led to the passage of constitutional amendments.⁹⁶

Over the course of our history, dissenters have been both liberal and conservative, rights protective and rights restrictive. This is what makes the constitutional dialogue effective. Dissent is not something that only liberals or defenders of the Bill of Rights do. All Justices will enter dissents, some more frequently than others, and some with greater effect on the dialogue.

One of the things that I tried to show in my Brandeis biography⁹⁷ is how important he believed this dialogue to be. Brandeis often dissented without opinion, because he did not believe the matter to be worth the great effort he poured into his written dissents.⁹⁸ He was even willing to suppress a dissent, and there is a whole volume of extensive dissents Brandeis wrote and then withdrew, usually because the majority had adopted at least part of his position.⁹⁹ Brandeis was trying to persuade not just the other members of the Court, but lawyers and law teachers. He welcomed law review articles that criticized Supreme Court opinions, even his, because he thought it important that the constitutional dialogue take place not just among the nine Justices, but between the different branches of the federal government,

90. See 10 U.S.C. § 774 (1988).

91. This theme is creatively explored in BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

92. 347 U.S. 483 (1954).

93. See Bernard Schwartz, *Chief Justice Earl Warren: Super Chief in Action*, 33 *TULSA L.J.* 477, 483–87 (1997).

94. 60 U.S. (19 How.) 393 (1857).

95. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), *aff'd on reh'g*, 158 U.S. 601 (1895).

96. See U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV; U.S. CONST. amend. XVI.

97. MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* (2009).

98. *Id.* at 579–81.

99. ALEXANDER M. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK* (1957).

between the national government and the states, in the academy, and among citizens.¹⁰⁰

As I also noted in my Brandeis biography,¹⁰¹ dissents did not sit well with Chief Justice William Howard Taft. “I don’t approve of dissents generally,” Taft wrote, “for I think that in many cases, where I differ from the majority, it is more important to stand by the Court and give its judgment weight.”¹⁰² Most dissents, he thought, “are a form of egotism.”¹⁰³ Similarly, Justice Pierce Butler saw dissents as vain, and would have preferred to do away with them.¹⁰⁴ As Chief Justice, Taft worked hard to build consensus, and was even willing to modify his own opinions to gain support from the others. Over his eight-and-a-half years on the Court, Taft dissented only seventeen times, wrote only three dissenting opinions, and suppressed nearly 200 of his own dissenting votes.¹⁰⁵

Brandeis distinguished cases involving constitutional questions from those involving common legal matters.¹⁰⁶ “In ordinary cases there is a good deal to be said for not having dissents. You want certainty & definiteness & it doesn’t matter terribly how you decide, so long as it is settled.”¹⁰⁷ It is usually more important, he declared, “that the applicable rule of law be settled than that it be settled right.”¹⁰⁸

Brandeis also weighed the effect of dissents on relations with the other Justices. “There is a limit to the frequency with which you can [dissent], without exasperating men.”¹⁰⁹ He told Frankfurter that silence did not mean concurrence, but that one had to husband resources, and dissenting too often would weaken the force of an important dissent.¹¹⁰ He said “I sometimes endorse an opinion with which I do not agree, ‘I acquiesce’; as Holmes puts

100. UROFSKY, *supra* note 97, at 609–10.

101. *Id.* at 579–80.

102. Letter from William Howard Taft to John H. Clarke (Feb. 10, 1922), in Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1310–11 (2001).

103. *Id.* at 1311.

104. Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 314. The most extreme view was that of the lawyer Frederick S. Tyler, who said that not even the votes of the Court should be announced, only the results. Frederick S. Tyler, Letter to the Editor, *Vanity of Dissenting Opinions*, 9 A.B.A. J. 398, 398 (1923).

105. Jonathan Lurie, *Chief Justice Taft and Dissents: Down with the Brandeis Briefs!*, 32 J. SUP. CT. HIST. 178, 181 (2007). When Taft had been a U.S. Court of Appeals judge in the 1890s, he wrote 200 opinions for the court and entered only one dissent. *Id.*

106. UROFSKY, *supra* note 97, at 579.

107. *Id.*

108. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). In *Railroad Commission v. Southern Pacific Co.*, 264 U.S. 331 (1924), for example, Brandeis suppressed a dissent because “after all[,] it’s merely a question of statutory construction,” and, at his suggestion, the Chief Justice had removed the worst things. Urofsky, *supra* note 104, at 329.

109. UROFSKY, *supra* note 97, at 579.

110. *Id.*

it ‘I’ll shut up.’”¹¹¹ A dissenting Justice must take care to not “vent feelings or raise a rumpus.”¹¹² “You may have a very important case of your own as to which you do not want to antagonize [other Justices] on a less important case.”¹¹³ For example, in a return of a Stone opinion, Brandeis wrote “I think this is woefully wrong, but do not expect to dissent.”¹¹⁴ And on a Holmes opinion he remarked that “I think the question was one for a jury—but the case is of a class in which one may properly ‘shut up.’”¹¹⁵

This strategy was effective because just as Brandeis acquiesced in others’ opinions, they concurred with him despite their doubts.¹¹⁶ Holmes wrote back on one return, “I am unconvinced. I think the other interpretation more reasonable.”¹¹⁷ In the same case, McReynolds also disagreed, but “I shall not object.”¹¹⁸ Pierce Butler noted that he “inclined the other way,” but Brandeis had made a strong case, so “I am content—& concur.”¹¹⁹

When aroused, however, and when he thought the matter important, Brandeis would enter a powerful dissent, laden not only with references to legal citations, but to economic and social materials as well. After he and his clerk had labored over a dozen or more versions of a dissent, Brandeis would then say, “Now I think the opinion is persuasive, but what can we do to make it more instructive?”¹²⁰ He understood that his brethren might not be persuaded, but he wanted to teach the facts of life to a wider audience, to get politicians, law professors, students, and others engaged in the dialogue.

Some of Brandeis’s admirers wondered on occasion whether he overdid it.¹²¹ “[I]f you could hint to Brandeis,” Harold Laski wrote to Holmes, “that judicial opinions aren’t to be written in the form of a brief it would be a great relief to the world. [Roscoe] Pound spoke rather strongly as to the

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*; Post, *supra* note 102, at 1341.

115. UROFSKY, *supra* note 97, at 579; Post, *supra* note 102, at 1341. Post includes examples from nearly all the Justices, indicating that they shared this view of not dissenting except when it could not be helped. Post, *supra* note 102, at 1341–44 nn.217–38.

116. UROFSKY, *supra* note 97, at 579–80.

117. *Id.* at 580.

118. *Id.*

119. *Id.* The first case was *Taubel-Scott-Kitzmilller Co. v. Fox*, 264 U.S. 426 (1924), and the second is *Davis v. Cornwell*, 264 U.S. 560 (1924). The comments can be found in the case files in the Louis D. Brandeis Supreme Court Papers at Harvard Law School in Cambridge, Massachusetts.

120. Paul A. Freund, *Justice Brandeis: A Law Clerk’s Remembrance*, 68 AM. JEWISH HIST. 7, 11 (1978).

121. Melvin I. Urofsky, *Louis D. Brandeis: Teacher*, 45 BRANDEIS L.J. 733, 742 (2007).

advocate in *B.* being over-prominent in his decisions.”¹²² Holmes apparently agreed, but there was little he could do.¹²³ The massive dissents, especially on economic matters and protective legislation, had a purpose. State and federal legislatures had good reason to pass these laws, and judges should not allow their own views to override those of the people’s elected representatives. Sometimes he did overdo it. In explaining why Nebraska passed a statute regulating the size of a loaf of bread, Brandeis tells us more than we should ever want to know about the baking business.¹²⁴

As I have previously noted in the *Brandeis Law Journal*, if Brandeis, as part of his philosophy of judicial restraint, thought judges should defer to legislative wisdom in matters of economic regulation, he nonetheless believed courts had a more active role to play in the defense of civil liberties.¹²⁵ When the Court heard a challenge to the 1918 Sedition Act, Brandeis joined Holmes in a unanimous opinion upholding the conviction of Charles Schenck, and accepted Holmes’s “clear and present danger” test.¹²⁶ Seven months later, he also joined Holmes, but this time in dissent, in the *Abrams* case.¹²⁷ He later explained this shift when he told Felix Frankfurter “I have never been quite happy about my concurrence [in *Schenck*] I had not then thought the issues of freedom of speech out—I thought at the subject, not through it.”¹²⁸ Once he did think the matter through, Brandeis set out to educate his brethren, and in doing so, transformed the jurisprudence of the First Amendment’s Speech Clause.

The elegance of Holmes’s *Abrams* opinion masked the fact that it gave little guidance to lower courts. “Clear and present danger” is a very subjective test; to conservative jurists, any criticism of the status quo may appear clearly and presently dangerous. As Brandeis noted, “[M]en may differ widely as to what loyalty to our country demands; and an intolerant majority, swayed by passion or by fear, may be prone in the future, as it has often been in the past, to stamp as disloyal opinions with which it disagrees.”¹²⁹

122. WALTER F. PRATT, JR., *THE SUPREME COURT UNDER EDWARD DOUGLASS WHITE 1910–1921*, at 168 (1999).

123. Letter from Oliver Wendell Holmes, Jr. to Harold Laski (Nov. 5, 1923), in 1 *HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI* 556–57 (Mark DeWolfe Howe ed., 1953) [hereinafter *HOLMES-LASKI LETTERS*]; Letter from Oliver Wendell Holmes, Jr. to Harold Laski (Nov. 21, 1924), in 1 *HOLMES-LASKI LETTERS*, *supra*, at 675.

124. *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 517 (1924) (Brandeis, J., dissenting).

125. Urofsky, *supra* note 121, at 745–47.

126. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

127. *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

128. Urofsky, *supra* note 104, at 323–24.

129. *Schaefer v. United States*, 251 U.S. 466, 495 (1920) (Brandeis & Holmes, JJ., dissenting).

Brandeis's greatest contribution to free speech jurisprudence came in his concurring opinion in *Whitney v. California*.¹³⁰ While one may admire Brandeis's opinions for their logic, their technical excellence, and their lucidity, in only a few instances did the prose rise to a level of elegance; in *Whitney*, Brandeis delivered as ringing a defense of liberty as anything the more quotable Holmes ever 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 truth¹³¹

Where Holmes used the metaphor of the marketplace of ideas, which is in essence a negative means of protecting speech, Brandeis suggested a positive reason for the Speech Clause. The highest honor in a democracy is to be a citizen, but it carries the responsibility to participate in the governing process. To make informed decisions on public matters, the citizenry had to have the information necessary to weigh all sides of an issue. If the state silenced unpopular speakers, then it crippled the citizen in the performance of his or her responsibility. Free speech is necessary not just as an individual right, but as the bedrock of democratic government.¹³²

In the dissents in free speech cases that Brandeis wrote between 1920 and *Whitney* in 1927, he slowly worked out the arguments as to why speech had to be protected, and did so in such a manner as to instruct lower court judges, as well as the legal academy. It would take four decades before the Supreme Court finally abolished the crime of sedition,¹³³ but if we trace the opinions and dissents in the cases in those years, we can see the dialogue between Brandeis in *Whitney* and his successors on the Court, grappling with the issues he raised and finally accepting his argument in full.

130. 274 U.S. 357, 372 (1927) (Brandeis & Holmes, JJ., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

131. *Id.* at 375.

132. The best explication of this opinion is Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653 (1988).

133. *Brandenburg*, 395 U.S. 444.

The last issue I want to talk about is Brandeis and the right to privacy which I also explored in the aforementioned *Brandeis Law Journal* article.¹³⁴ Brandeis had been an advocate of privacy ever since the early days of his practice.¹³⁵ He and Sam Warren had written a pioneering article on the subject,¹³⁶ which Dean Roscoe Pound said did “nothing less than add a chapter to our law.”¹³⁷ Although there may be no mention of the word in the Constitution, Brandeis believed that the “right to be let alone” constituted a basic right of the American people.¹³⁸ He got the chance to explicate this view when the Court first confronted wire-tapping in *Olmstead v. United States*.¹³⁹

In investigating a prohibition ring, government agents tapped the suspects’ homes, and on the basis of some 775 pages of notes, secured a conviction under the National Prohibition Act.¹⁴⁰ At the trial, the defendants had raised the constitutional issue that a search had been made without a warrant.¹⁴¹ On appeal, Chief Justice Taft, speaking for a 5–4 majority, dismissed the Fourth Amendment argument.¹⁴² No actual intrusion had been made into the house, therefore no search within the meaning of the Fourth Amendment had taken place.¹⁴³ Holmes entered a short dissent, and the Brahmin in him came through in his characterization of wire-tapping as a “dirty business.”¹⁴⁴ But he deferred to and joined in what he termed Brandeis’s “exhaustive” opinion.¹⁴⁵

Brandeis objected to the Court’s opinion on three grounds. The Fourth Amendment did not just protect against actual invasion of one’s home; rather, the Framers had intended it to protect the sense of security one felt in one’s home, knowing that the government could not enter without a warrant issued under probable cause.¹⁴⁶ To allow someone to eavesdrop may have met some fine technicality, but it violated the very spirit that the Fourth Amendment had been intended to provide.¹⁴⁷

134. Urofsky, *supra* note 121, at 747–49.

135. *Id.* at 747.

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

137. ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN’S LIFE* 70 (1946).

138. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967), *and* *Berger v. New York*, 388 U.S. 41 (1967).

139. *Id.* at 471.

140. *Id.*

141. *Id.* at 455–57 (majority opinion).

142. *Id.* at 466.

143. *Id.*

144. *Id.* at 470 (Holmes, J., dissenting). Justice Butler also entered a well-reasoned dissent that shredded the Chief Justice’s arguments. *Id.* at 485–88 (Butler, J., dissenting).

145. *Id.* at 469 (Holmes, J., dissenting).

146. *Id.* at 474–75 (Brandeis, J., dissenting).

147. *Id.* at 482.

Second, he objected—as did Holmes—to the government acting lawlessly in order to catch criminals.¹⁴⁸ “Our Government,” he lectured the majority, “is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law”¹⁴⁹ Discussing the case, he told his niece Fannie that “[l]ying and sneaking are always bad, no matter what the ends . . . I don’t care about punishing crime, but I am implacable in maintaining standards.”¹⁵⁰

The bulk of his opinion, however, laid out his views on the meaning of privacy in a free society. “The makers of our Constitution,” he declared, undertook “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.”¹⁵¹ This “right to be let alone,” because of its importance, had to be given the greatest protection, and any unauthorized intrusion into a person’s privacy “must be deemed a violation of the Fourth Amendment.”¹⁵²

Brandeis worried that new inventions would make it ever easier for the government, unless restrained, to invade the sanctity of a home or office without actually entering the premises.¹⁵³ In their law review article in 1890, Warren and Brandeis had warned about new inventions. “[M]echanical devices,” they declared, “threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”¹⁵⁴ Four decades later he warned:

The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day 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 to a jury the most intimate occurrences of the home.¹⁵⁵

148. *Id.* at 485.

149. *Id.*

150. PHILIPPA STRUM, *BRANDEIS: BEYOND PROGRESSIVISM* 139 (1993).

151. *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

152. *Id.* at 478–79.

153. Warren & Brandeis, *supra* note 136, at 195–96.

154. *Id.* at 195.

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

In his folders on *Olmstead*, Brandeis had a newspaper clipping about a new device called “television.”¹⁵⁶ Brandeis, like most men of his time, believed in progress, but he did not consider all change for the good, and refused to use the telephone, which he condemned as an invasion of his privacy.¹⁵⁷

Taft, needless to say, was furious with this dissent. “If they think we are going to be frightened in our effort to stand by the law and give the public a chance to punish criminals,” he told his brother, “they are mistaken, even though we are condemned for lack of high ideals.”¹⁵⁸ He termed Brandeis the “lawless member of our Court,”¹⁵⁹ and predicted that in the future people would see that “we in the majority were right.”¹⁶⁰

In fact, just the opposite would happen. In his dissent, Brandeis did not just condemn the “dirty business” of wiretapping, he laid out very carefully why it should be condemned as a violation not only of the Fourth Amendment, but also of the right to privacy, which he believed the Constitution also protected.¹⁶¹ His arguments set the stage for a constitutional dialogue that would eventually embrace his views.

Brandeis lived to see Congress prohibit wiretapping evidence in federal courts in the Communications Act of 1934,¹⁶² and for the Court to partially reverse *Olmstead* in 1937.¹⁶³ In 1967, the Court fully adopted Brandeis’s position and overturned *Olmstead* completely, bringing wiretapping within the ambit of Fourth Amendment protection.¹⁶⁴ That same year, Justice Potter Stewart explained the Court’s new philosophy in words that grew directly out of Brandeis’s dissent: “[T]he Fourth Amendment protects people, not places.”¹⁶⁵ A few years earlier, in the landmark decision *Griswold v. Connecticut*, the Court embraced privacy as a constitutionally protected right.¹⁶⁶

There is so much more that can be said about dissent, but for that I am afraid you shall have to await the book upon which I am now working.

156. NORMAN K. RISJORD, REPRESENTATIVE AMERICANS: POPULISTS AND PROGRESSIVES 192 (2005).

157. UROFSKY, *supra* note 97, at 716. In this regard, see Justice Scalia’s majority opinion in *Kyllo v. United States*, 533 U.S. 27 (2001), which directly reflects the concerns about intrusive technology Brandeis raised more than seventy years earlier.

158. ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 259 (1964).

159. *Id.* at 227.

160. *Id.* at 259; *see also* 2 HENRY F. PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT: A BIOGRAPHY 991 (1939).

161. *Olmstead v. United States*, 277 U.S. 438, 471–85 (1928) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347 (1967), *and Berger v. New York*, 388 U.S. 41 (1967).

162. 47 U.S.C. § 605 (1934).

163. *Nardone v. United States*, 302 U.S. 379 (1937) (Brandeis was in the 7–2 majority upholding the Communications Act provision that wiretapping without a warrant was illegal).

164. *Berger*, 388 U.S. 41.

165. *Katz*, 389 U.S. at 351.

166. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Needless to say, Louis Brandeis shall play a prominent role in that book, since I believe that he understood not only the nature of the constitutional dialogue, but also the need for it. Years earlier, during his campaign to establish savings bank life insurance in Massachusetts, Brandeis had written: "If we should get tomorrow the necessary legislation, without having achieved that process of education, we could not make a practical working success of the plan."¹⁶⁷ To change judicial habits, to look at the Constitution anew, also required education, and his dissents are models of how that process works. He well realized, however, that education took time; one should not expect immediate results. But, as he often said, "My faith in time is great."¹⁶⁸ Looking back, we can now see that time rewarded that faith.

167. Letter from Louis D. Brandeis to Henry Morgenthau, Sr. (Nov. 20, 1906), in 1 LETTERS OF LOUIS D. BRANDEIS 482, 483 (Melvin I. Urofsky & David W. Levy eds., 1971).

168. UROFSKY, *supra* note 97, at 756.
