

**REFRAMING THE CONSTITUTION: BRANDEIS, “FACTS,” AND THE
NATION’S DELIBERATIVE PROCESS**

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Abstract

During his first years on the Court, Louis Brandeis self-consciously used his opinions to reframe the Constitution and thereby refocus his colleagues’ perspective on judicial review. This article elaborates on his tactical use of opening sentences to frame the Constitution’s deliberative processes in their factual settings.

The reputation of Justice Louis Brandeis rests in significant part on revitalizing American legal positivism through his factual inquiry. Ironically, “Brandeis’s facts,” in particular their persuasive power, are still widely misunderstood. The commonplace is that Brandeis won judicial restraint simply by mustering an imposing array of facts to support rules, in particular social legislation, threatened by the Court’s disapproval. Yet, as I argue here, Brandeis was more concerned with moving the Court away from a role in which it sought to replicate or second-guess the factual inquiries underlying legislative deliberations. To do so he had to divert his fellow justices’ attention from “legislative facts” by using another set of facts that refocused their attention on constitutional processes. For the Constitution’s structure implies requirements for the integrity and complementarity of the various deliberative processes – federal as well as state, local and administrative as well as legislative. So as the nation moved through industrialization and the nationalization of commerce, Brandeis used facts characterizing the transition to help appraise the quality of deliberation underlying the nation’s laws. As I will show, these facts often appeared in the opening sentences of his opinions for the Court.

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During his first years on the Court, Louis Brandeis self-consciously used his opinions to reframe the Constitution and thereby refocus his colleagues’ perspective on judicial review. My recent article on the “Narrative Impulse in Judicial Opinions” elaborates on one literary aspect of judicial advocacy that Brandeis refined.¹ Here I shall elaborate on

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¹ See, Lawrence S. Zacharias, *The Narrative Impulse in Judicial Opinions*, 23 LAW & LIT. 80 (2011).

another aspect of his style, namely his tactical use of opening sentences to frame the Constitution's deliberative processes in their factual settings.

The reputation of Justice Louis Brandeis is prominently tied to two achievements. First, he—along with Justice Holmes—impelled the Supreme Court toward judicial liberalism.² Second, he revitalized American legal positivism through his factual inquiry. The irony is that “Brandeis's facts,” in particular their persuasive power, are still widely misunderstood. Even writers who diverged in their appraisal of Brandeis's contribution seem to proceed from the same misimpression: namely, that Brandeis won judicial restraint simply by mustering an imposing array of facts to support rules – in particular, social legislation – threatened by the Court's disapproval.³ Indeed, among all the writing about Brandeis only one author has sought to link Brandeis's facts to the advent of judicial liberalism.⁴

Just how did Brandeis use facts to impel the Court toward judicial liberalism – that is, toward a role in which justices sought to safeguard and develop the nation's deliberative processes consistently with the Constitution's structure, and away from a role in which they sought to replicate or second-guess legislative deliberations?⁵ In general, Brandeis succeeded in diverting his fellow justices' attention from the facts underlying social legislation by using another set of facts to refocus their attention on constitutional processes. For the Constitution's structure implies requirements for the integrity and complementarity of the various deliberative processes – federal as well as state, local and administrative as well as legislative. So as the nation moved through industrialization and the nationalization of commerce, Brandeis used facts characterizing the transition to help appraise the quality of deliberation underlying the nation's laws. So much of the story is simple; the telling requires more.

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During the Progressive Era state legislatures and Congress increasingly adapted rules to the uncertainties of American social order. It had “become popular,” Justice Holmes

² See, L. S. Zacharias, *Reparing the Brandeis Way: The Decline of Developmental Property*, 82 NW. U. LAW REV. 596 (1988); G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES (1976), at 125-152.

³ Cf., David Bryden, *Brandeis's Facts*, 1 CONST. COMMENT. 281 (1984), at 324-5, with PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE (1984), at 122, 253 and Bernard Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 31 TULSA L. J. 93, 122-126 (1995). See, more recently, Linda Greenhouse, *The Counter-Factual Court (Brandeis Lecture)*, 47 U. LOUISVILLE L. REV. 1, 1-2 (2008).

⁴ Robert Cover, *The Left, the Right and the First Amendment: 1918-1928*, 40 MD. L. REV. 349 (1981). For a critical review of the writing, see, Zacharias, *op. cit.*, *supra* note 2. The most recent extensive biography (and bibliography) of Brandeis is MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE (2009).

⁵ For a thoughtful critique of the dominant strand of American post-war liberalism that developed out of process concerns, see Lon Fuller, *Some Reflections on Legal and Economic Freedoms -- A Review of Robert L. Hale's FREEDOM THROUGH LAW*, 54 COLUM. L. REV. 70 (1954).

wrote of his generation, “to believe that society advantageously may take its destiny into its own hands—may give a conscious direction to much that heretofore has rested on the assumption that the familiar is best, or that has been left to the mechanically determined outcome of the co-operation and clash of private effort.”⁶

One of the problems state legislatures encountered was the increasing nationalization of industry and a corresponding robustness of interstate commerce. Thorstein Veblen, writing in 1904 on the “theory of business enterprise,” described the new social conditions confronting state legislatures as emanating from the “concatenation of industries,”⁷ by virtue of which “the modern industrial system at large bears the character of a comprehensive, balanced mechanical process.”⁸ Whether individual states were competent to regulate this process was a matter for dispute, insofar as a “disturbance of the balance at any point,” in Veblen’s estimation, “means a differential advantage (or disadvantage) to one or more of the owners of the sub-processes between which the disturbance falls; and it may also frequently mean gain or loss to many remoter members in the concatenation of processes, for the balance throughout the sequence is a delicate one, and the transmission of a disturbance often goes far.”⁹

Just how the Supreme Court should respond to the new social legislation became a central dilemma for the justices.¹⁰ Indeed, some of the justices fell into the camp that Veblen facetiously labeled “metaphysics.”¹¹ In Veblen’s characterization:¹²

⁶ Oliver W. Holmes, Jr., *Introduction*, THE RATIONAL BASIS OF LEGAL INSTITUTIONS (A. Kocourek & J. Wigmore, eds., 1923), reprinted in THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS, 399-401 (M. Lerner, ed., 1943).

⁷ THORSTEIN VEBLÉN, THE THEORY OF BUSINESS ENTERPRISE (1904), at 15: “[E]ach industrial unit, represented by a given industrial ‘plant,’ stands in close relations of interdependence with other industrial processes going forward elsewhere, near or far away, from which it receives supplies – materials, apparatus, and the like – and to which it turns over its output of products and waste, or on which it depends for auxiliary work, such as transportation. The resulting concatenation of industries has been noticed by most modern writers.”

⁸ *Id.*

⁹ *Id.*, 25.

¹⁰ See, e.g., MORTON KELLER, AMERICA’S THREE REGIMES: A NEW POLITICAL HISTORY (2007), at 158-159:

The judicial system was the only branch of government that integrated federal, state, and local layers of authority and thus could respond to issues in a relatively coherent way . . .

The most notable constitutional issue of the late nineteenth century was the degree to which the states and the federal government could tax and regulate corporations. That issue was defined primarily through thrust and parry between the legislative and the judicial branches. Most historians conclude that the result of this matchup was courts 1, legislatures 0.

Judges defined acceptable regulation and taxation through an ongoing interpretation of two doctrines: the police power of the states to protect the public’s health, safety, morals, and welfare,

[H]igher courts speak more unequivocally for the metaphysical principles and apply them with a surer and firmer touch. In the view of these higher adepts of the law, free contract is so inalienable a natural right of man that not even a statutory enactment will enable a workman to forego its exercise and its responsibility. By metaphysical necessity its exercise attaches to the individual so indefeasibly that it cannot constitutionally be delegated to collective action, whether legislative or corporate.

Other justices, however, decided the cases less ideologically, focusing more on the reasonableness of the social legislation itself. In their opinions, broadly speaking, they critiqued the regulations on their own terms – whether the statutory language was likely to serve as an effective means to the legislature’s designated ends. This replication of the legislative process, as it were, led to more balanced outcomes in the cases, but it hardly provided the Court’s constituents with the kind of certainty law promises.¹³

This dilemma, as we now know, played itself out in the transition to modern judicial liberalism. Justices Holmes and Brandeis led the Court to a new understanding of the Constitution. In the words of the late Robert Cover, they opposed “constitutionalization of any particular social or economic philosophy—that is, [they were] against substantive due process; [they were] for judicial restraint, but also for enforcement of civil liberties and civil rights as checks against the tyranny of majorities.”¹⁴ G. Edward White offers the following conventional account of how they led the way:¹⁵

American society after World War I was marked by a simultaneous collapse of allegedly timeless values and norms and a pervasive need for governmental policies that responded to the newly perceived facts of modern industrial life. To an extent, Holmes helped make palatable a world without consensual norms, while Brandeis sought to show how governmental institutions could intervene to make that world more livable. Each contributed to the belief of modern liberalism that an activist state could provide both security and progress.

and the check to that power implicit in the due process requirement of the Fourteenth Amendment. Hundreds of court decisions balanced these rules against each other. The result was massive judicial oversight of the states’ ability to tax and regulate an industrial economy.

¹¹ VEBLÉN, *supra* note 7, at 278. There is some ambiguity in Veblen’s use of the term, since he seemed to be characterizing the formalistic theorizing of those justices whose practices Roscoe Pound termed “mechanical jurisprudence” – see Pound’s analysis in *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). Veblen probably did not mean Justice Holmes, who opposed rigid formulations such as “liberty of contract”; yet, it was Holmes, among others, who formed the “Metaphysical Club” – see, LOUIS MENAND, *THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA* (2001).

¹² VEBLÉN, *supra* note 7, at 278-279.

¹³ See discussion of *Holden v. Hardy* and *Lochner vs. New York*, *infra* text at notes 65-94.

¹⁴ Cover, *supra* note 4, at 352.

¹⁵ WHITE, *supra* note 2, at 175.

Indeed, as White describes, Brandeis did use “facts” to project his visions of a better world, to support governmental conclusions about the causes and effects embedded in rulemaking.

Nevertheless, Brandeis also used facts to do more than explain causation in the social world. Judicial “liberalism” typically succeeds by defusing moral conflict, often by diverting attention from substantive debates to ones about process.¹⁶ Still, process is an empty vessel, offering a world without vision or teleology. What Brandeis did was to characterize the deliberative processes underlying laws and orders subject to judicial review by showing how they complemented the realities of American life in transition – the expanding, yet increasingly concatenated range of Veblen’s new economy.¹⁷ In describing the factual settings for those processes, he reframed the Constitution structurally, identifying when it was appropriate or not for particular bodies, including the Court itself, to be making judgments about how to define and address the specific problems of social life. He built new bridges between the activities of the citizens and the political discourses they engaged in.

The Constitution structures the political sphere into deliberative processes without regard to their economic, social or geographic – that is, “factual” – context. Brandeis used his opinions to set those constitutional structures in their factual context. Yet, the oracular quality of his writing tends to conceal this aim from his critics and admirers. Willard Hurst observed that Brandeis’s Court served to “dramatiz[e] fundamental principles . . . [as] a kind of Holy Synod, to be kept untouchable and unsullied.”¹⁸ The drama, I take it, derived from Brandeis’s factual contexts, his penchant for a sort of stark realism that other justices eschewed. But the oddly mystical quality of his writing stems in many opinions from Brandeis’s strange positioning of “the facts.” As I shall explain below, the facts he used to reframe the Court’s understanding of the Constitution often appeared in his opening sentences, sometimes in ways that were confounding, yet readily intuited – Delphic, as it were.

An understanding of Brandeis’s approach to the Supreme Court’s dilemma deserves our attention.

¹⁶ See, e.g., Michael Les Benedict, *Constitutional History and Constitutional Theory: Reflections on Ackerman, Reconstruction, and the Transformation of the American Constitution*, 108 YALE L. J. 2011 (1999).

¹⁷ David Riesman, Brandeis’s one-time Supreme Court law clerk, noted that, “It was Brandeis who, in OTHER PEOPLE’S MONEY, popularised [sic] some of the conceptions set forth in Veblen’s THEORY OF BUSINESS ENTERPRISE . . . ” – see, DAVID RIESMAN, THORSTEIN VEBLÉN, A CRITICAL INTERPRETATION (1953), at 94.

¹⁸ SAMUEL J. KONEFSKY, THE LEGACY OF HOLMES AND BRANDEIS: A STUDY IN THE INFLUENCE OF IDEAS (1956), at 295. Cf., Robert Cover, *Foreward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

REVISITING THE BRANDEIS BRIEF'S "FACT" LEGACY

To which facts did Brandeis assign priority? Was it the facts underlying social legislation? Or was there another set of facts toward which he directed his fellow justices' attention?

Let's begin with the "facts" in the prototype for what came to be known as "the Brandeis brief." Several authors have sought to re-evaluate the legacy of the brief Brandeis submitted to the U.S. Supreme Court in *Muller v. Oregon*.¹⁹ David Bryden, for instance, questioned Brandeis's reputation for, almost singlehandedly, bringing the "facts" of modern industrialization and the plight of the worker to the Supreme Court's attention.²⁰ That issue is of course straw, but the article itself is interesting, and perhaps warranted in its criticism of Brandeis's admirers.²¹ A second author, Melvin Urofsky, concluded that the influence of the *Muller* case on the drift of Supreme Court decisions has been exaggerated (by, among others, the author himself).²² And the authors of a third article suggest that, while the labor legislation in question and its constitutional defense were well-motivated, the pattern set by gender based classification in labor law led to serious problems down the road.²³

The facts surrounding Brandeis's involvement in the *Muller* case are well-known.²⁴ Brandeis was asked to defend the constitutionality of Oregon's maximum hours law before the U. S. Supreme Court after Joseph H. Choate had turned down the case. The law prohibited employers from working women more than ten hours a day at mechanical labor, primarily in factories or laundries, and Choate had seen "no reason why a 'great husky Irish woman should not work in a laundry more than ten hours in one day, if her employer wished her to do so.'"²⁵ The Supreme Court's decision in *Lochner v. New York*²⁶ had recently held a similar law without gender qualification unconstitutional. So Brandeis

¹⁹ Brief for Defendant in Error, in *Muller v. Oregon*, 208 U.S. 412 (1908), reprinted in 16 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 63-178 (P. Kurland & G. Casper eds., 1975) [hereinafter, LANDMARK BRIEFS]

²⁰ Bryden, *supra* note 3, at 283.

²¹ Among the more recent biographers, PHILIPPA STRUM, *supra* note 3, is the most ardent of such admirers.

²² Urofsky's confession appears in Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, in 1983 SUPREME COURT HISTORICAL SOCIETY YEARBOOK [now, J. SUP. CT. HIST.] 53 (1983), at 62 and 71 n.47.

²³ Ronald K. L. Collins & Jennifer Friesen, *Looking Back on Muller v. Oregon*, 69 ABA J. 294, 472 (1983). But *cf.*, Claudia Goldin, *The Earnings Gap Between Male and Female Workers: An Historical Perspective*, National Bureau of Economic Research, Working Paper No. 1888 (April 1986); and Claudia Goldin, *Maximum Hours Legislation and Female Unemployment in the 1920s: A Reassessment*, National Bureau of Economic Research, Working Paper No. 1949 (June 1986). These papers are incorporated in CLAUDIA GOLDIN, *UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN* (1990).

²⁴ *See, e.g.*, ALPHEUS T. MASON, *BRANDEIS: A FREE MAN'S LIFE* (1946), at 245-252.

²⁵ *Id.*, 248.

²⁶ *Lochner v. New York*, 198 U.S. 45 (1905).

sought to distinguish the Oregon law, to demonstrate scientifically “what,” as Brandeis would later put it, “any fool knows,”²⁷ namely that Oregon women could still invite statutory protection under the Constitution in ways a class of New York workers no longer could. Brandeis’s aim was not to press a point about gender differences nor to divide the women’s movement,²⁸ but simply to improve the lot of workers incrementally.²⁹ *Muller v. Oregon* was the wedge to pry open, once again, the constitutional jaws *Lochner* had shut.³⁰

The brief itself, law students sooner or later learn, contained only two pages of legal argument and almost one hundred of “scientific” opinion assembled to thwart Muller’s assault on Oregon’s law.³¹ In David Bryden’s description:³²

Brandeis’s brief began with a short statement of legal principles, amounting to the proposition that the law is to be upheld unless the complainant establishes that it lacks any reasonable police power rationale. The next section summarized American and foreign hours legislation. Then, in the heart of the brief, he presented his evidence, an assortment of excerpts from the plethora of books, reports, and testimony about hours of labor and women at work.

²⁷ LEWIS J. PAPER, *BRANDEIS: AN INTIMATE BIOGRAPHY OF ONE OF AMERICA’S TRULY GREAT SUPREME COURT JUSTICES* (1983), at 166, quoting Dean Acheson. *Cf.*, Collins & Friesen, *supra* note 23, at 297: “What *Every Fool Knows*” (emphasis added).

²⁸ Indeed, Brandeis had changed his views about, among other women’s issues, universal suffrage: As a young man he had spoken out against, but by the turn of the century he supported women’s suffrage. Thus, even those who raise questions about the beneficial impact of maximum hours legislation for women, have not sought to question Brandeis’s motives or suggest that he meant to isolate women workers. For a useful delineation of the various positions on women’s suffrage that suggests the underlying logic of Brandeis’s evolution on the issue, see Ellen C. DuBois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820-1878*, 74 J. AM. HIST. 836 (1987).

²⁹ JOHN R. COMMONS & JOHN B. ANDREWS, *PRINCIPLES OF LABOR LEGISLATION* (rev. ed. 1920 [orig. 1916]), at 221 *et seq.*, gives a short account of the constitutional litigation surrounding maximum hours laws. Certainly, by the time Felix Frankfurter took over the cases from Brandeis, the litigation was being managed strategically, much in the way, for instance, of subsequent civil rights litigation -- see, e.g., RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (1975). On the cases following *Muller v. Oregon*, see also, Bryden, *supra* note 3, at 303-321. Whether, at the time of *Muller v. Oregon*, Brandeis had conceived of a larger strategy that would link the constitutionality of maximum hours laws for women with broad protective legislation for all workers is not apparent from his correspondence.

³⁰ It is in this respect that Urofsky’s reassessment of Brandeis’s contribution understates the case -- see *supra*, text at note 22.

³¹ 16 LANDMARK BRIEFS, *supra* note 19, at 83-177. Bryden, *supra* note 3, observes that one or the other of Felix Frankfurter’s briefs, when he took over Brandeis’s labor litigation, exceeded 1000 pages.

³² Bryden, *supra* note 3, at 293.

Yet, this description is misleading.³³ For Professor Bryden passes over the first *eight* pages of the brief that precede the “legal principles”—to wit, Brandeis’s admonition on page one that:³⁴

The decision in this case will, in effect, determine the constitutionality of nearly all the statutes in force in the United States, limiting the hours of adult women—namely:

MASSACHUSETTS . . . RHODE ISLAND . . . LOUISIANA
. . . CONNECTICUT . . . MAINE . . . NEW HAMPSHIRE . . . MARYLAND
. . . VIRGINIA . . . PENNSYLVANIA . . . NEW YORK . . . NEBRASKA
. . . WAHSINGTON . . . WISCONSIN . . . NORTH DAKOTA . . . SOUTH
DAKOTA . . . OKLAHOMA . . . NEW JERSEY . . . COLORADO . . .
SOUTH CAROLINA . . . [eight pages, citing the laws and quoting their
statutory language]

This compilation, which spells out over 30 years of enactments, was not lost on the Supreme Court;³⁵ and it was this compilation, certainly as much as Josephine Goldmark’s awful melange of scientific opinion,³⁶ that drew Justice Brewer’s attention in the Court’s opinion.³⁷

It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation as well as expressions of opinion from other judicial sources. In the brief filed by Mr. Louis D. Brandeis, for the defendant in error, is a very copious collection of all these matters, an epitome of which is found in the margin.

³³ Bryden's revision, incidentally, seems valuable in criticising past commentary on the Brandeis brief, in questioning whether discriminatory wage and hour legislation or its constitutional defense improved women's lot and working conditions in general, as Brandeis and his allies had expected. Moreover, Bryden presents Brandeis's motivations fairly: that is, he does not doubt that Brandeis hoped to achieve what even now we might take to be progressive ends. Still, the article treats Brandeis's acceptance of contemporary fact-finding too readily; Brandeis's response to the "fact explosion," as Robert Cover describes in an article on Brandeis and the First Amendment, *supra* note 4, was considerably more discerning. Just as the "essential" fact of Brandeis's brief, for example, was the very first one submitted, so too -- as I will show below -- flowed much "reason" in his later decisions. *Cf.* PAUL L. ROSEN, *THE SUPREME COURT AND SOCIAL SCIENCE* 75-82 (1972). *See also, infra*, note 45.

³⁴ 16 LANDMARK BRIEFS, *supra* note 19, at 66.

³⁵ 208 U.S. 412, 419.

³⁶ The brief was subsequently published with Josephine Goldmark's name in the byline -- *WOMEN IN INDUSTRY* (1908). *See also*, Goldmark's later elaborations in *FATIGUE AND EFFICIENCY: A STUDY IN INDUSTRY* (1912). Bryden's ironic review of the brief is descriptive.

³⁷ 208 U.S. 412, 419.

What Bryden labels “Brandeis’s facts”—opinions about the consequences of long working hours on women—is of secondary import.³⁸ What matters is the perspective Brandeis drew in his opening lines.³⁹ In *Muller* the Supreme Court was asking whether the legislation was “reasonable.”⁴⁰ Questions about the fact of “woman’s difference” were simply secondary to the knowledge that 19 state legislatures had deliberated and reached much the same conclusion as Oregon over maximum hours laws—a rule that had in some instances proved viable for over 30 years. What could seem more reasonable than this degree of deliberation and emerging consensus? The “secondary facts,” one hundred pages of them, merely rendered each individual legislature’s deliberations plausible.⁴¹ The power of Brandeis’s strategy is reflected not just in Justice Brewer’s marginalia summarizing the contents of the brief,⁴² but in the body of the opinion itself.⁴³

The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman’s physical structure, and the functions she

³⁸ Indeed, the "facts" about women workers serve much as an appendix -- impressive in bulk, but secondary in view of the legal questions raised. Bryden's thrust is well aimed, if Brandeis's admirers are the object; at the same time, in my opinion, he misses the point about Brandeis's own perspective.

³⁹ *Supra*, text at note 34.

⁴⁰ 208 U.S. 412, 419. *See also*, 16 LANDMARK BRIEFS, *supra* note 19, at 81-82.

⁴¹ The observation of social conditions, the perception that certain conditions require change, and the expectation of what rules will do are the end-products of legislative deliberation. To reach consensus requires that legislators share a perspective on social conditions -- a perspective made up of common experience on which to base observation, common values on which to base judgments about the need for change, and common logic on which to base predictions about rule changes. During Brandeis's lifetime these commonalities were in disarray. As William E. Nelson described it in his *THE ROOTS OF AMERICAN BUREACRACY, 1830-1900* (1982), at 160-161:

The perspective of the upper class was no more self-interested than that of the lower class; in both cases what might be called self-interest arose more from the bitter confrontations with the problems of daily life than from any truly selfish lack of concern about the problems of other people.

Brandeis, while he could shape perspectives to win the case at hand, understood as well that American society's salvation rested in institutionalizing the discovery of shared perspectives. Consider the words of Brandeis's contemporary, Frank Parsons, whose turn-of-the-century lectures on *LEGAL DOCTRINE AND SOCIAL PROGRESS* (1911), describe that tendency, at 218:

[Law] is adjusting the framework of society more and more so as to permit liberty of individual action and yet exerts its force to draw up individuals to lofty ideals of common and social action. . . . In thus holding up social ideals . . . law will continue to develop in the minds of men a social consciousness that each is a living and vital part of the social whole with duties as well as rights. . . . There is much for the law to do for the masses in the further development of that consciousness.

⁴² 208 U.S. 412, 419-420 note. *See, supra* text at note 37.

⁴³ *Id.*, 420-421.

performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion . . . At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration.

The point is that Bryden misconstrues Brandeis by assigning primary significance to the brief's rendering of social scientific evidence. He leads us to the conclusion that Brandeis's facts were not objective because he depended on the observations of "social workers, club women, journalists, bureaucrats, and of course academics."⁴⁴ In doing so, however, Bryden misperceives not just the extent to which Brandeis and his contemporaries understood "fact" to be illusory—that is, a matter of public opinion as much as scientific discovery⁴⁵ -- but also ignores the very battleground on which Brandeis was fighting, namely, judicial review as a general proposition. As I shall explain below, it was the factual setting of judicial review that drew Brandeis's principal attention⁴⁶ – that is, the interplay between, on the one hand, deliberation in state legislatures across the country and, on the other, the Supreme Court's perspective on the case or cases before it.

POSITIVISM, FACTS AND JUDICIAL REVIEW: THE PROGRESSIVE DILEMMA

The battleground was judicial review. James Bradley Thayer writing in 1893 suggested that the Supreme Court had begun "taking a part . . . in the political conduct of government."⁴⁷ Fifteen years later Edward Corwin could add that the Court had changed the meaning of "due process" and so transformed the clause into an instrument of broad judicial review.⁴⁸ Certainly by the time Brandeis came to the Court the constitutional

⁴⁴ Bryden, *supra* note 3, at 325-326.

⁴⁵ *Cf.*, e.g., Robert Cover's interesting article on Brandeis and First Amendment doctrine, "The Left, The Right," *supra* note 4, relying on WALTER LIPPMANN, PUBLIC OPINION (1922) as a point of departure. For an attempt to sketch the Court's reliance on factual inquiry historically, see Rosen, *supra* note 33.

⁴⁶ Urofsky's article, "Myth and Reality," *supra* note 22, seeks to describe the Supreme Court's attitudes toward protective legislation during the progressive era by analyzing the Court's decisions. By and large, however, Urofsky's analysis is more quantitative than qualitative, so that he misses the developments and swings in doctrine that gave particular cases their currency. *Cf.* A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895 (1960) and Cover, *op. cit. supra* note 4.

⁴⁷ James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 152 (1893).

⁴⁸ E. S. Corwin, *The Supreme Court and the 14th Amendment*, 7 MICH. L. REV. 643 (1909). Where once justices had confined their scrutiny merely to the "enforcement" of law, the new meaning unleashed them to apply their interests to the law's "making." Roscoe Pound, William Draper Lewis and others seemed to understand the same; but Corwin's essay, using history to defeat the notion of conceptual consistency, was the earliest to put the transformation in these terms. Not a few Supreme Court scholars have since

transformation was history.⁴⁹ Like Holmes, Brandeis did not doubt the logic of judicial review, nor the right of the Court to exercise it.⁵⁰ The question Brandeis set out to address then was not whether, but when.⁵¹

There are a number of possible ways in which a court can review legislation. Activist justices arrogate more power to the court itself whereas more restrained justices tend to defer to the department or branch from which the rule under review has emanated. But this distinction is not sufficient to distinguish the variety of ways in which courts uphold or overturn rules enacted by other departments or the ways in which “facts” may enter into the decision.

Any rule has three elements. The first is some statement, often implicit, about the larger purposes of the rule – e.g., the orderly transfer of property, peace in the community. The second is a more specific statement, generally explicit, about the behavior the rule seeks to influence or modify directly (i.e., the “antecedent condition”) – e.g., writing a will, assaulting one’s neighbor. Finally, the third is a statement, always explicit, about the means the state will bring to bear on the behavior (i.e., the “consequence”) – e.g., benefits or rewards to encourage certain behaviors, penalties or “costs” to discourage others. When a court subjects a rule to constitutional review, it may judge it based on any of these three elements: is the larger purpose legitimate under the constitution? Is the behavior in question within the particular authority’s (e.g., state legislature’s) constitutional jurisdiction? Is the consequence or means the state relies on likely to achieve or at least capable of achieving the desired result?

Facts do have a place in each of the foregoing inquiries. Although discussions about legitimate purposes tend to be grounded in constitutional and political theory, the “facts” surrounding a particular constitutional provision’s history and drafting are generally of considerable import.⁵² The second form of inquiry above – the jurisdictional question,

counted the rapidly increasing frequency with which Justices invoked the Constitution to overrule the end products of political deliberation. *See e.g.*, ROBERT H. JACKSON, *THE SUPREME COURT AND THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF CRISIS IN AMERICAN POWER POLITICS* 38 *et seq.* (1941); and Nelson, *supra* note 41, at 148-155. *Cf.*, Charles Warren, *Earliest Cases of Judicial Review of State Legislation by Federal Courts*, 32 *YALE L. J.* 15 (1922).

⁴⁹ *See*, KERMIT HALL, *THE SUPREME COURT AND JUDICIAL REVIEW IN AMERICAN HISTORY* 25-35 (1985).

⁵⁰ *See e.g.*, KONEFSKY, *supra* note 18, at 39 *et seq.*

⁵¹ Constitutional questions are raised characteristically in two forms, the one political, the other adjudicative. The constitutional judge's success depends on mediating these forms. However, as 14th Amendment practice moved from its original concerns with slavery to the problems of industrialization and "class legislation," the task of mediating the two forms changed. Two problems in particular vexed the Justices -- namely the changing character of national interest and the beginnings of the "fact explosion" toward the end of the century.

⁵² *See, e.g.*, both sides in *D.C. v. Heller* and in *Citizens United v. F.E.C.*, discussed *infra*, text at notes 204-205, 208-211.

including the competence of the various departments, including the judiciary, to address particular kinds of social conditions or behaviors – is generally couched in interpretation of the constitution’s structure and language. At the same time, these discussions may also resort to factual characterizations of the departments called upon to create or refine particular kinds of rules.⁵³ As we shall see below, these were the facts of “political deliberation” that Brandeis highlighted in order to move the Court toward a more restrained, though still nuanced approach to judicial review. Finally, the third set of questions grows out of the social science of behavior modification – whether a rule’s consequence or enforcement mechanism is likely to achieve the intended outcomes. These were also factual questions, relying on expertise in adapting theories about social causes and effects to empirical observations.⁵⁴

The competing positions over judicial review during the Progressive Era evolved from a shared heritage—the Supreme Court’s *Dred Scott* decision and the debacle that had ensued.⁵⁵ We cannot overestimate the influence of either upon Brandeis’s generation; yet, the “lesson” of *Dred Scott* was ambiguous. Two interpretations of what the case may have meant for Brandeis’s generation help sort out the different judicial approaches to specific cases around the turn of the century.

One interpretation focused on “class legislation,” the sort that condemned the slaves in southern states.⁵⁶ Simply put, class legislation was bad, for it tended to divide citizens permanently from one another in their loyalty to the state. The Fourteenth Amendment empowered the Supreme Court to guard against legislation that reinforced class distinctions—classifications, in other words, that favored the electoral majority over

⁵³ See, e.g., Chief Justice Roberts’s notions about Congressional competence in the health care field in *Federation of Independent Businesses v. Sebelius*, *infra*, text at note 206-207.

⁵⁴ See, e.g., Justice Breyer, dissenting, in *D.C. v. Heller* and *McDonald v. Chicago*, *infra*, note 211, 218.

⁵⁵ *Dred Scott v. John F. A. Sandford*, 19 HOWARD (60. U.S.) 393 (1857). While the literature on the subject has gone through several turns, there is little disagreement on the point that Brandeis’s generation of justices still labored under the influence of that case -- see, e.g., WILLIAM M. WIECEK, *CONSTITUTIONAL DEVELOPMENT IN A MODERNIZING SOCIETY: THE UNITED STATES, 1803 TO 1917*, 31 (1985). For a Brandeis contemporary’s scholarly perspective on the case, see E. Corwin, *The Dred Scott Decision in the Light of Contemporary Legal Doctrines*, 17 AM. HIST. REV. 52 (1911). For more recent discursive accounts of the case and its influence, see, DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978), especially at 568 *et seq.*; and HAROLD HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875* (1982). On its influence on Justice Holmes, see G. Edward White’s “Introduction” to OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (G. E. White, ed., 2009 [orig. 1881]).

⁵⁶ See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905); Francis M. Burdick, *Is Law the Expression of Class Selfishness?* 25 HARV. L. REV. 349 (1912); HALL, *op. cit. supra* note 49, at 23-32.

political minorities by redistributing wealth without apparent, much less compelling, social purpose.⁵⁷

Through this lens of history the justices fixed upon elected officials and their allegiance to particular classes of constituents. They sought to weigh the claims of political rule against the individual freedoms and the formal requirements of justice that political rule impinged. These freedoms and formal requirements were what Veblen termed the metaphysics of law. In reaching their conclusions, the justices fixed upon “facts” that allowed them to decide whether “progress” was better served by autonomous social forces and individual freedom or by governmental interventions, in particular legislative adjustments.

Yet, there was another interpretation of the history surrounding *Dred Scott*. To progressives like Brandeis the problem was not simply winning approval for legislation, but the very fact that justices were ready to disapprove legislation by second-guessing political deliberations and by empathizing with the individual’s intolerance when faced with constraint. That interpretation, one Brandeis himself hardly needed elaborate, was that the Supreme Court’s intervention in *Dred Scott*, much as state slave laws themselves, had brought on civil war.⁵⁸ For Chief Justice Taney had in short order disrupted the existing compromise, short-circuited political deliberation at the federal level, and, in retrospect, denied the constitutional potential for a more peaceful transition from slavery.⁵⁹

⁵⁷ See, e.g., NELSON, *supra* note 41, at 160 *et seq.*; HYMAN & WIECEK, EQUAL JUSTICE UNDER LAW, *supra* note 55, at 335 *et seq.*

⁵⁸ See note 55, *supra*.

⁵⁹ Yet, even progressive scholars who partook in the latter interpretation treated the Taney Court gently and the subject somewhat elliptically, suggesting that the justices had been not so much irresponsible as the victims of legislative abdication of responsibility under the “departmental” theory of constitutional review. We have previously noted Thayer’s and Corwin’s writing to this effect – see, *supra* notes 47 and 48. Consider, now, the writing of Frank Parsons, a “progressive” friend of Holmes who was almost certainly in attendance when Holmes came to Boston University Law School to deliver his “Path of the Law” address. Shortly after Holmes’s address Parsons began lecturing on “Legal Doctrine and Social Progress” at Boston University Law School – see, *supra* note 41. Parsons asserted, *id.*, 214, that, “Progress must always be secured at some cost ... [either] the striving of the radicals under the impulse of ideals to carry new laws or to educate society to the point where it will enact new laws [or] the cramping of society by outworn laws before it generates the energy to slough them off and create new forms.” In balancing those costs, Parsons conceded, the law tends properly toward caution, favoring slow progress over the “whims and passing passion of a great radical uprooting.” Thus, he noted:

[I]t would have been an immense financial saving to say nothing of the still more enormous savings of life, energy and love, if the nation could have paid the South the full market price of the negro slaves before the breaking out of Civil War, but owing to the passions aroused, war was a greatly to be regretted necessity.

Parsons went on to suggest, however, that law was changing from the era when civil war could not be averted, “abandoning the negative ideal, and [taking] up the positive ideal [of civic usefulness and greater

This perspective on the cases raised questions not just about legislative and administrative action, but also about the role of the justices themselves as part of the political “deliberation” process. Here the constitutional significance of comparing the role of government with autonomous social forces in achieving progress dimmed. Only the “fact” of deliberation and prospects for consensus seemed to matter. The justices had to look beyond the legislative process and, in effect, ask themselves what their own intervention might contribute to the system of rules and the achievement of political consensus. Had Freud written about the superego before 1920, one might say that these justices had adapted the concept to their own role in constitutional review.⁶⁰

By and large, progressive historiography has tended to distort the outcome of judicial review before 1920. Melvin Urofsky, in his evaluation of the Court’s protective legislation decisions, points out that progressive historians have exaggerated the frequency of judicial disapproval around the turn-of-the-century.⁶¹ For while the justices did scrutinize laws for class bias, they also tended to favor the lawmakers’ conclusions about social progress notwithstanding the constraints regulation imposed on individual freedom.⁶² Perhaps Urofsky’s conclusion ought not surprise us. Others before him have observed much the same;⁶³ and it is unlikely that the widespread preference for social legislation—a preference Justice Holmes among others noted—would not have touched the Court at all.⁶⁴

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Consider, for instance, the *Lochner*⁶⁵ case that had set the stage for Brandeis’s brief in *Muller v. Oregon*. The circumstances behind *Lochner* reflected a long-standing battle between labor and capital for the worker’s welfare. Labor sought regulations to mandate shorter workdays and workweeks. The underlying theory was that a full-time worker had

social service]. This change has taken place not only in the law as applied to individuals, but as to society and social conditions, *until our legislative halls resound with talk about the effect of law upon society*,” *id.*, 217.

⁶⁰ Freud first wrote about the superego in his 1920 essay “Beyond the Pleasure Principle,” in Sigmund Freud, *Beyond the pleasure principle*, 18 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (1920-1922): BEYOND THE PLEASURE PRINCIPLE, GROUP PSYCHOLOGY AND OTHER WORKS [hereinafter, STANDARD EDITION] 1-64 (1955). He subsequently elaborated on the concept in 1923 – see, Sigmund Freud, *The Ego and the Id*, 19 STANDARD EDITION 12-66 (1923). Did Brandeis have any connection to Freud, or a sense of the superego? *See, e.g.*, 4 THE LETTERS OF LOUIS D. BRANDEIS: MR. JUSTICE BRANDEIS, 1916-1921, 366 (Melvin L. Urofsky, ed., 1971), regarding William C. Bullitt, an acquaintance of Brandeis and Frankfurter, later ambassador to the USSR under Franklin D. Roosevelt, who wrote about Woodrow Wilson with Freud.

⁶¹ Urofsky, *Myth and Reality*, *supra* note 22, at 53-55.

⁶² *Id.*, 69-70. *Cf.*, Wiecek, *supra* note 55, at 55 *et seq.* and Hall, *supra* note 49, at 29-34. *See also*, note 48, *supra*.

⁶³ *See, e.g.*, JOHN E. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890-1920 (1978).

⁶⁴ Holmes, Jr., *Introduction*, *supra* text at note 6.

⁶⁵ *Lochner v. New York*, 198 U.S. 45.

to be paid a subsistence wage regardless of the number of hours he or she worked.⁶⁶ To allow employers to compel workers to work more than 60-hour weeks to earn their living was patently exploitative and would quickly exhaust the individual worker's capacity for labor, much like a prematurely burnt-out baseball pitcher or football halfback.⁶⁷ Shorter hours, moreover, spread work among a larger number of workers. In the absence of a maximum hours law, employers were not only free to extract the maximum possible margin ("surplus") from each worker, but were virtually compelled to do so within a competitive industrial system.⁶⁸ Furthermore, in the context of the increasing immigration of unskilled as well as skilled workers from Europe, employers with ready access to those immigrants were relatively unmoved by the prospect of exhausting their current labor forces.⁶⁹ So in the grand scheme of things legislation enacting a shorter workday or workweek served to normalize standards for rates of exploitation – that is, the extent to which one man could benefit at another's expense – and for preserving workers' labor capacity for the longer duration.⁷⁰

In 1895 the New York legislature enacted the Bakeshop Act restricting bakery workers' hours; at the time much of organized labor was mobilizing for an 8-hour day, whereas the bakery workers had for ten years been pressing for legislation to limit their workdays and workweeks to 10 hours and 60 hours, respectively.⁷¹ Three years later the Supreme Court in *Holden v. Hardy* upheld a Utah law limiting the hours of miners and smelters to eight hours per day, but noted in passing that a generally applicable maximum hours law of eight hours per day was not likely to be reviewed favorably.⁷² Accordingly, as the New

⁶⁶ See, e.g., COMMONS & ANDREWS, *supra* note 29, at 182-187. Note that "minimum wage laws" were an alternative solution to some of the same problems "maximum hours laws" addressed, but with less restrictiveness.

⁶⁷ *Id.*, 221-226.

⁶⁸ *Id.*, 247-248; on employer behavior, see e.g., *id.*, 249, describing government contractors' and subcontractors' justifications ("emergency" loopholes) for forcing workers to work in excess of the protective maximum hours provisions in federal contracts.

⁶⁹ *Id.*, 69-78.

⁷⁰ *Id.*, 221-222: In 1909, the U.S. Census of Manufactures found, 7.9% of wage earners "were employed in establishments where the eight-hour day prevailed"; *circa* 75% worked 54-60 hour weeks; and *circa* 5.2% worked 60-72 hour weeks, like the bakers covered by New York's maximum hours law. In other words, the norm for wage earners was a 60-hour maximum workweek. COMMONS & ANDREWS go on to report that, "beginning in the spring of 1915 an active movement for the eight-hour workday swept the country" that led to roughly 58% of the workforce working a maximum of an eight-hour day by the end of the World War One – *id.*, 222-223.

⁷¹ PAUL KENS, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* (1998); Matthew S. Bewig, *Lochner v. The Journeymen Bakers of New York: The Journeymen Bakers, Their Hours of Labor, and the Constitution: A Case Study in the Social History of Legal Thought*, 38 AM. J. LEG. HIST. 413-451 (1994). See also, COMMONS AND ANDREWS, *supra* note 29, at 262-271.

⁷² "While the general experience of mankind may justify us in believing that men may engage in ordinary employment more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight and is frequently subjected to foul atmosphere and a very

York act passed through the courts, its supporters claimed not only that the state had the power to restrict hours of work in general, but also that long hours exposed bakery workers as well as the industry's consumers to specific health risks. The law won approval from 3 of the 5 judges in the New York Appellate Division and 4 of the 7 judges in the New York Court of Appeals.⁷³ *Lochner*, the bakery owner convicted under the act, then took his case to the Supreme Court for review.

In the Supreme Court the camps were split.⁷⁴ Justice Peckham, writing for the five-justice majority, was a conservative, but activist justice from upstate New York who nine years before had opposed the limitation on mine workers' hours in *Holden v. Hardy*.⁷⁵ In *Lochner*, he questioned not the process that had led to the New York legislation, but the substantive authority and factual conclusions of the legislature: "The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate . . ."⁷⁶

With respect to the purpose of the act, Peckham agreed that under the U.S. Constitution the state legislature could rely on its "police powers" to protect the public's health from significant dangers, but that the state was not authorized to regulate the hours of labor without more: "The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker."⁷⁷ Furthermore, with regard to the issues of health, Peckham noted that a substantial *minority* at each level of judicial review had rejected the legislature's unanimous conclusion that long hours of bakery work posed significant health risks; and so he concluded that "there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the

high temperature or to the influence of noxious gases generated by the processes of refining or smelting." *Holden v. Hardy*, 169 U.S. 366 (1898), at 396 (Brown, J., Opinion of the Court).

⁷³ *People v. Lochner*, 76 N.Y.S. 396 (App. Div., 4th Dept., 1902); *People v. Lochner*, 69 N.E. 373 (NY Ct. of App., 1904).

⁷⁴ *Lochner v. New York*, 198 U.S. 45, 52 (Peckham, J., opinion of the Court); *id.*, 65 (Harlan, J., dissenting).

⁷⁵ *Holden v. Hardy*, 169 U.S. 366, 398 (Peckham, J., and Brewer, J., dissenting). Note that Justice Brewer, who wrote the majority decision in *Muller v. Oregon* -- see, *supra*, text at notes 35-43 -- had lodged the other dissenting vote in *Holden v. Hardy*.

⁷⁶ *Lochner v. New York*, 198 U.S. 45, at 57.

⁷⁷ *Id.*, 57. Later on in the opinion, Peckham reiterates as follows, *id.*, 61: "Statutes . . . limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employes [sic], if the hours of labor are not curtailed."

part of the individual, either as employer or employe [sic].⁷⁸ To clarify his point, he added the following, peculiarly ambivalent factual argument:⁷⁹

In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the Government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty.

Brandeis's brief in *Muller*, with its 100-plus pages of "facts" to show "what any fool knows," was designed as little more than a mockery of Peckham's arrogantly casual analysis.⁸⁰ As Roscoe Pound observed, by no means the least offense in the Court's "liberty of contract" decisions was the justices' resort to artificial criteria of general application – e.g., liberty of contract – to address issues of constitutionality as legal questions; as a result those justices eschewed "effective judicial investigation or consideration of the situations of fact behind or bearing upon the statutes."⁸¹

In the other camp, Justice Harlan wrote the opinion for the minority. He was a famously liberal justice who had sided with the seven-justice majority that had upheld the eight-hour mining law in *Holden v. Hardy*. His approach in *Lochner* was decidedly more restrained than Peckham's. For one, he was inclined to give the legislature a wider berth in deciding what sorts of purposes fell under the police powers, even when its measures – as in the case of a maximum hours law -- tended to compromise the liberty of contract. Moreover, he was also inclined to defer to the legislature's factual conclusions about the significance of particular social conditions, such as health risks in work, and the effectiveness of particular measures to secure improvements. In these respects Harlan's description of his approach was very much reflective of Thayer's departmental theory of constitutional review, an approach virtually opposite Peckham's: ". . . a large discretion

⁷⁸ *Id.*, 58-59.

⁷⁹ *Id.*, 59.

⁸⁰ As Roscoe Pound put it in commenting on the *Lochner* case, "Why is the legal conception of the relation of employer and employee so at variance with the common knowledge of mankind?" Roscoe Pound, *Liberty of Contract*, 18 YALE LAW JOURNAL 454 (1909).

⁸¹ *Id.*, 458 (1909).

‘is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.’⁸²

Harlan accepted that two sets of values, individual freedom and collective welfare, necessarily collided in the Constitution’s structure. Thus he took “it to be firmly established that what is called the liberty of contract may, within certain limits, be subjected to regulations designed and calculated to promote the general welfare or to guard the public health, the public morals or the public safety.”⁸³ To the extent that the legislature may have entered a grey area in effecting the police powers, Harlan asked where the line should be drawn. He answered in no uncertain terms: “Upon this point there is no room for dispute, for the rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power.”⁸⁴ Further, Harlan deferred to the legislature’s expertise on the effectiveness of a rule in achieving its purpose, so long as the legislative process itself had not been tainted by bad faith.⁸⁵ Accordingly, on the issue of labor laws generally and those which attended to health issues specifically, Harlan took an expansive and “progressive” view:⁸⁶

While [the police] power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of the employes [sic] as to demand special precautions for their well-being and protection, or the safety of adjacent property.

The most noteworthy aspect of Harlan’s dissent, however, one that Holmes echoed as well,⁸⁷ was his portrayal of the Court’s role in such cases: “If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation.”⁸⁸ It is commonplace that unwise rulings are more amenable to correction by the legislatures than by the Court; for in the former membership is

⁸² *Lochner v. New York*, 198 U.S. 45, 66 (Harlan, J., dissenting), quoting *Lawton v. Steele*, 152 U.S. 133, 136 (1894).

⁸³ *Id.*, 67 (Harlan, J., dissenting).

⁸⁴ *Id.*, 68 (Harlan, J., dissenting).

⁸⁵ *Id.*, 66 (Harlan, J., dissenting).

⁸⁶ *Id.* 66 (Harlan, J., dissenting). In making the case for deference to legislative expertise on the facts surrounding the rule, Harlan quoted the opinion of the Court in *Holden v. Hardy*, 169 U.S. 366 (1898), at 396, as follows:

These employments [i.e. working in underground mines or in the smelting, reduction or refining of ores or metals], when too long pursued, the legislature has judged to be detrimental to the health of the employes [sic], and, so long as there are reasonable grounds for believing this is so, its decision upon this subject cannot be reviewed by the Federal courts.

⁸⁷ *Lochner v. New York*, 198 U.S. 45, 74 (Holmes, J., dissenting).

⁸⁸ *Id.*, 68 (Harlan, J., dissenting).

determined by regular elections, whereas in the latter membership changes only with death and retirement.

In seeking to define a viable constitutional role for the Supreme Court at the turn of the 20th Century, the justices were essentially grappling with the problem of consistency. Consistency gave the process of making judgments about competing visions of society integrity.⁸⁹ Conservative-activists sought consistency in the time-worn values that they ascribed to the Constitution – liberty, property, and so forth. Justice Peckham no doubt believed that resorting to substantive values like “liberty of contract” to trump legislative modifications of social conditions would enable the Court to guide the nation with reliable consistency.⁹⁰ But while basic values may not change, their adaptation to new social circumstances inevitably does -- that is, their realistic definition in one era may well become incommensurate with their definition in the next.⁹¹

On the other extreme Justice Holmes believed that values were simply a manifestation of larger political struggles.⁹² To achieve consistency the Court should avoid imposing its own values, and certainly not use them to trump legislation, unless specifically called for in the language of the Constitution. Although his view, one formulation of the “process strategy,” led perhaps to a sort of consistency, it was hardly a palliative for conservatives who were skeptical about the directions of the larger political struggles. The pitfall of legislation was its focus on discrete aspects of the social condition; legislative fact inquiries were limited in scope, and the resulting rules achieved some certainty only with respect to severely limited spheres of human endeavor. The rule system that grew out of politics had the capacity to fragment the social order beyond repair.⁹³ This at least was one form of anxiety that prompted conservative restraints on politics.

In contrast to Holmes, Harlan’s version of the “process” strategy was to mediate between the political and timeworn values. Although he leaned largely in favor of legislation and promoted judicial restraint, there was little in his approach to assure the

⁸⁹ See, e.g., Pound, *supra* note 11: Pound, at 605, observes that judges seek to be “scientific” in order to maintain at least the appearance of consistency in their decisions: “the marks of a scientific law are, conformity to reason, uniformity, and certainty.”

⁹⁰ *Id.*, 608, Pound distinguishes what he calls “mechanical jurisprudence” from truly scientific inquiry: “I have referred to mechanical jurisprudence as scientific because those who administer it believe it such. But in truth it is not science at all. We no longer hold anything scientific merely because it exhibits a rigid scheme of deductions from a priori conceptions.”

⁹¹ See, e.g., Zacharias, *supra* note 2, at 596-599, 641-645.

⁹² *Lochner v. New York*, 198 U.S. 45, 74 (Holmes, J., dissenting).

⁹³ This was, for instance, the basis for Justice Holmes’s opposition to the codification of substantive law around the time he published *THE COMMON LAW* (1881). For an interpretation, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 117-142 (1992). Compare the quaint, unified systemic visions of society and its laws that unfold in *BLACKSTONE’S COMMENTARIES* or its earliest American counterpart, *ZEPHANIAH SWIFT, SYSTEM OF THE LAW OF THE STATE OF CONNECTICUT* (1795).

Court's constituents that a society left in the hands of elected officials would remain in tact. The justice who was willing to acknowledge uncertainty about the outcome of any rule still wanted to develop a check on the fragmentation of the social world that self-interested legislation threatened. And this is where Brandeis, with his construction of a perspective on the "facts of deliberation" entered the discussion. What Brandeis spelled out was that consistency required some guarantee of deliberative process in the legislature, one that convinced the justices that the legislature could satisfy the positive "requirements" of rulemaking as well as any court. This strategy required not only insights into the factual inquiries that guided legislative rulemaking, but also a set of facts that persuaded the Court's constituents that the justices were serving as diligent overseers of the nation's political or "deliberative" processes as a whole.⁹⁴

BRANDEIS'S CRITIQUE OF SUPREME COURT INTERVENTION

By the time Brandeis acceded to the Court he could work this insight into his opinions as no one else; yet, as we suggested earlier, he did so with a subtlety that writers have largely ignored.⁹⁵ To begin, in confronting judicial attempts to replicate the rule makers' inquiries, to ask about the "facts" surrounding social progress and "natural rules" that guided individual tolerance when faced with constraints, Brandeis adopted a strategy that evoked discomfort among his colleagues.⁹⁶ He introduced facts less to demonstrate how much legislatures or administrative agencies actually did know than to convince the justices how little they themselves understood.⁹⁷

The justices in replicating legislative judgments were, generally speaking, bound to consider the social conditions the lawmakers had observed, the values they had sought to safeguard, and the predictions they had ventured about conforming "is" to "ought" through particular rules. Brandeis recognized that when the justices looked at legislation

⁹⁴ The Court had to ask whether the three circumstances for legislative enactments—the capacity to articulate conditions, to envision norms, and to imagine dynamic causal relationships between conditions and norms—had been met and the objections to enactment addressed.

⁹⁵ The key distinction is between facts as social events and facts as markers of social deliberation and perspective. SAMUEL KONEFSKY, *supra* note 18, at 306, comes as close to bridging the distinction as any Brandeis scholar in concluding that "Brandeis [was] far more successful than Holmes in adapting law and its techniques to the stark realities of life in the 20th century. The fusion of richly informed judgment and high social purpose is his legacy to the judicial process . . . It is Brandeis' extraordinary gifts as a student of American society as well as the strength of his attachment to the imperatives of the democratic creed which made him the authentic leader of modern constitutional jurisprudence." *See also*, K. Llewellyn, *Book Review* [FELIX FRANKFURTER, MR. JUSTICE HOLMES], 31 COLUM. L. REV. 902, 905 (1931). Cover, *supra* note 4, amplifies the distinction. Meanwhile, ALEXANDER BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK* (1957), remains the only in depth treatment of Brandeis's judicial writing strategies.

⁹⁶ *See, supra*, text at note 27, where Brandeis verges on mocking the Court by suggesting that some justices needed 100 pages in a brief to recognize what "any fool knows" – namely, the "fact" that women differ from men in ways that may have relevance for the workplace. *See also, infra*, notes 103-104.

⁹⁷ *See, infra*, text at notes 101-108.

in terms of its relation to particular classes of grievants, they tended to focus on facts germane only to those classes and predict effects based on normative theory developed around the interests of the affected classes.⁹⁸

Accordingly, Brandeis sought to render the issues more complex.⁹⁹ Where a Joseph Choate might have thought the issue of social conditions in *Muller* was confined largely to a woman's capacity to work more than ten hours a day, "Brandeis's facts" suggested that it was also a case about moral standards, family life, population growth and infant health.¹⁰⁰ Where Choate thought the case involved simply value choices that women made based on self-interest, "Brandeis's facts" suggested that these were social choices quite out of the ordinary woman's control, part of Veblen's "concatenation" of industrial effects. Once he had expanded and intertwined the factual circumstances and moral aims of social legislation, he could question the norms upon which prediction had to be based as well. In Brandeis's writing economic theory with its markets and sharply defined class interests gave way to groping institutional analyses.¹⁰¹ Thus, Brandeis rendered the appearance of class bias in legislation more obscure.

We see this aspect of Brandeis's "fact strategy" taking shape largely in his well-known dissents.¹⁰² Even when Brandeis acceded to majority conclusions about overturning state action, he sought to elaborate on the factual complexity and breadth of values legislative judgments entailed. Thus, his attack on the "rule of *Smyth v. Ames*,"¹⁰³ delivered in an ironic concurring opinion in *Southwestern Bell Telephone v. Public Service Commission of Missouri*,¹⁰⁴ succeeded above all in giving fellow justices pause about the facts, values and

⁹⁸ See, e.g., Burdick, *supra* note 56. For contrasting, but "progressive" historical interpretations of the Court's perspective near the turn of century, see e.g., JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 1-64 (1923), and ARNOLD PAUL, THE CONSERVATIVE CRISIS AND THE RULE OF LAW (1960).

⁹⁹ See, e.g., *supra* text at note 96 *et seq.*

¹⁰⁰ See, *supra* text at notes 24-31. The headings for the brief's parts on women workers, 16 LANDMARK BRIEFS, *supra* note 19, at 83 *et seq.*, read as follows: "The Dangers of Long Hours," "Causes," "Bad Effect of Long Hours on Health," "Bad Effect of Long Hours on Safety," "Bad Effect of Long Hours on Morals," "Bad Effect of Long Hours on General Welfare."

¹⁰¹ Cf., James F. Smurl, "Allocating Public Burdens: The Social Ethics Implied in *Brandeis of Boston*," 1 J. L. & RELIG. 59 (1983), with Bryden, *supra* note 3.

¹⁰² Konefsky, *supra* note 18, is one of several writers who focus exclusively on Brandeis's dissenting opinion: for instance, at 141, he writes, "Brandeis was looking to the future to vindicate the positions he was voicing in dissent; hence the highly didactic nature of his utterances."

¹⁰³ *Smyth v. Ames*, 169 U.S. 466, modified 171 U.S. 361 (1898). See Zacharias, *supra* note 2, at 634-638.

¹⁰⁴ 262 U.S. 276, 289 (1923). The reporter styles the opinion as "dissenting," but Brandeis begins with the words, "I concur in the judgment of reversal. But . . ." The opinion is ironic in a number of ways. Most importantly, Brandeis, in reaching the outcome favored by his colleagues, exposes every conceivable flaw in the Court's approach to that outcome. Indeed, the very need to overturn the state's order in this case stemmed from the Court's creation of a rule that had made it virtually impossible for the state to reach a "fair" result.

theoretical models of prediction their “rule” imposed on state agencies. “To decide whether a proposed rate is confiscatory,” Brandeis wrote, “the [ratemaking] tribunal must determine both what sum would be earned under it and whether that sum would be a fair return.”¹⁰⁵ He continued:¹⁰⁶

The decision involves ordinarily the making of four subsidiary ones:

- (1) What the gross earnings from operating the utility under the rate in controversy would be. (A prediction.)
- (2) What the operating expenses and charges, while so operating, would be. (A prediction.)
- (3) The rate base: that is, what the amount is on which a return should be earned. (Under *Smyth v. Ames*, an opinion, largely.)
- (4) What rate of return should be deemed fair. (An opinion, largely.)

A decision that a rate is confiscatory (or compensatory) is thus the resultant of four determinations. Each of the four involves forming a judgment, as distinguished from ascertaining facts; and as to each factor there is usually room for difference in judgment.

“The doubts and uncertainties incident to the last two factors,” Brandeis argued, “can be eliminated, or lessened, only by redefining the rate base, called value, and the measure of fairness in return, now applied under the rule of *Smyth v. Ames*.”¹⁰⁷ Just to prove the point, Brandeis continued for twenty pages to expound on the intricacies of ratemaking and to demonstrate beyond doubt that the Supreme Court by imposing its “rule of *Smyth v. Ames*” had confounded those proceedings to the point of grave uncertainty and the detriment of all.¹⁰⁸

In addition, Brandeis's opinion happens to serve as counterpoint to Justice McReynolds' opinion for the Court. Commentators and historians have not apparently addressed Brandeis's gibes at the latter in the give and take of court opinions; but there are at least several opinions in which Brandeis seems to be rewriting, with considerable refinement, McReynolds's opinions. While the slights and perhaps outrages McReynolds launched against Brandeis are well known, Brandeis has generally been depicted as the silent and unresponding sufferer. One suspects, however, that, from the time Brandeis advised McReynolds, who was Wilson's Attorney General, on Wilson's “position” with respect to antitrust and other economic legislation, the ill-will on McReynolds's part was as much personal as the product of his reputed anti-Semitism. In Brandeis's opinions one may find some evidence.

¹⁰⁵ *Id.*, 291.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*, 291-292.

¹⁰⁸ *Id.*, 292-312.

Brandeis led the way in complicating facts and adapting contemporary institutional analyses of society to resist judicial intervention.¹⁰⁹ Yet, to dwell on this “fact” strategy alone, as Bryden among others does,¹¹⁰ diminishes Brandeis’s contribution. For Brandeis was above all a mediator, an advocate who in “adapting the law and its techniques to the stark realities of life in the twentieth century”¹¹¹ sought consensus. Nevertheless, as I indicated earlier, Brandeis’s “other” fact strategy is more elusive, and even his more discerning contemporaries failed to grasp it entirely.

Henry Wolff Biklé, for instance, came as close as anyone to describing the thrust of Brandeis’s strategy.¹¹² Biklé, writing for the *Harvard Law Review*¹¹³ in 1924 shortly after Brandeis’s *Southwestern Bell* concurrence,¹¹⁴ began by acknowledging, though somewhat vaguely, that the Supreme Court had legitimate bases for reviewing “factual” determinations. At the same time, Biklé doubted the Supreme Court’s expertise on many of the “facts” on which it was moved to pass judgment. He proposed then to have Congress, or state legislatures, preempt the Supreme Court’s factual inquiries by creating and explicitly instructing more “expert” federal and state agencies (including courts) to devote themselves to that work.¹¹⁵ The Supreme Court would then be obliged to defer.

Yet, even so astute a commentator as Biklé failed to penetrate Brandeis’s core strategy. As we observed earlier, from Brandeis’s historical perspective the facts surrounding social progress and individual will were secondary to constitutional questions about deliberation. Thus, while Brandeis articulated “secondary facts” to win support for

¹⁰⁹ Justice Holmes, in contrast, suffered an aversion to Brandeis’s brand of factual inquiry; at the same time, Holmes seems to have been quite acquiescent in acknowledging his own ignorance about such legislative matters -- see, e.g., HOLMES-LASKI LETTERS 204-205 (M. DeW. Howe, ed., 1953); and 2 HOLMES-POLLOCK LETTERS 13-14 (M. DeW. Howe, ed., 1946). Holmes projects a more philosophical perspective on factual inquiry in HOLMES-LASKI LETTERS, *supra*, at 810.

¹¹⁰ Bryden, *supra* note 3. See *supra* text at notes 31 *et seq.*

¹¹¹ KONEFSKY, *supra* note 18, at 306.

¹¹² Biklé was a long-time Brandeis admirer, his position as General Counsel of the Pennsylvania Railroad Company, notwithstanding. He argued cases before Brandeis frequently and contributed to Felix Frankfurter’s collection of essays, *Mr. Justice Brandeis* (F. Frankfurter ed. 1932), published also as Henry Wolff Biklé, *Mr. Justice Brandeis and the Regulation of Railroads*, 45 HARV. L. REV. 4 (1931). Biklé also taught at the University of Pennsylvania Law School.

¹¹³ Henry W. Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6 (1924).

¹¹⁴ See, *supra*, text at notes 103 *et seq.*

¹¹⁵ Biklé, *supra* note 113, at 21-27. Cf. Brandeis’s dissent in *St. Louis & O’Fallon Railway Company v. United States*, 279 U.S. 461, 488 (1929), at 492:

The Commission is a fact-finding body. The question whether it must give to confessedly relevant facts evidential effect is solely one of adjective law. . . . But no instance has been found where under our law a fact-finding body has been required to give to evidence an effect which it does not inherently possess. Proof implies persuasion. To compel the human mind to infer in any respect that which observation and logic tells us is not true interferes with the process of reasoning of the fact-finding body.

legislation in individual cases, his ultimate aim was to move the Court toward an altogether different perspective on judicial review.¹¹⁶ Biklé's haphazard taxonomy of factual inquiry and vague acquiescence in the Supreme Court's role prevented him from seeing the alternative premises underlying Brandeis's fact strategy.¹¹⁷

BRANDEIS'S FOCUS ON THE FACTS OF DELIBERATIVE PROCESS

Generally speaking, Brandeis sought to make the Court more thoughtful about political deliberation, to reformulate the "departmental theory" of constitutional review that Thayer in 1893 had hoped to revitalize.¹¹⁸ The theory itself was plain. Each branch of government ought to look out for the constitutionality of its own acts. Judicial review of legislative judgments should be confined to egregious cases, to patently unreasonable or arbitrary regulation. The term "due process," for instance, would simply not admit of more.

Brandeis took this thinking a step further. He saw in political deliberation not just the "people's voice," but a positive process like the market that led to ends transcending class interest.¹¹⁹ In his career as "people's counsel" he had taken particular pride in working out compromise. (His renowned feistiness came into play largely in confronting the intractability of his counterparts.) He was, in practice, a student both of the legislative and administrative processes. And as many have sought to describe, perhaps most recently, Clyde Spillenger,¹²⁰ Brandeis developed his own peculiar style of advocacy and deliberation.¹²¹ So long as compromise was possible and deliberation persisted—that is, a reasoned, mutual give and take—the Court, except in rare instances, had no business interfering. The principal exceptions occurred when deliberation at the local level threatened to corrupt the larger national interest or to provoke the sort of divisions that rent the Union before civil war.¹²²

¹¹⁶ See, *supra* text at notes 58-60.

¹¹⁷ Biklé might have organized his factual inquiry more categorically. That is, the Supreme Court was the last in a series of legal decision-making institutions to concern itself with facts; as such, the Court had its eyes on several other perspectives, including that of the society-at-large on social conditions, the legislature on popular perceptions as well as the legislators' more directly on society at large, and finally the petitioners' and respondents' view of the facts in the context of the contested legislation (or administrative order). Each of these sets of facts made for distinct lines of inquiry. For a theoretical approach to the judicial perspective on facts and a discussion of the underpinnings for Biklé's "acquiescence," see discussion *supra*, text at note 46 *et seq.*

¹¹⁸ Thayer, *supra* note 47. See, HALL, *supra* note 49, at 32-33.

¹¹⁹ Brandeis, "The Living Law," reprinted in his BUSINESS -- A PROFESSION (E. Poole, ed. 1933), at 344-363. Cf. Frank Parsons' perspective, *supra* notes 41 and 59.

¹²⁰ Clyde Spillenger, *The Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L. J. 1445 (1996).

¹²¹ See, e.g., Smurl, *supra* note 101.

¹²² See e.g., *infra* text at notes 153 *et seq.* Cf. also Parsons, *supra* note 41. *Roe v. Wade* – *infra* text at notes 199-203 – presents these issues as well.

Much has been written over the years about Brandeis's procedural creativity, even the ways he formalized procedural techniques to restrain judicial activism of various kinds.¹²³ Yet, Robert Cover's article on Brandeis's free speech opinions seems the first to come to grips with Brandeis's larger "deliberative theory" and his attempts to reframe the Constitution accordingly.¹²⁴ In short, the Court had not only to guard the deliberative process, but to ensure its adequacy at the national as well as the local level. Brandeis introduced political deliberation into the cases, though not formally,¹²⁵ to give the justices a deeper perspective on the intricate relation of free speech, interstate commerce, due process and equal protection concerns then pending before the Court.¹²⁶

Indeed, Brandeis did not generally engage in direct debate over his constitutional theory, but relied largely on technique to move the Court.¹²⁷ We observed earlier that Brandeis framed the *Muller* case in its "deliberative perspective" through his opening sentences¹²⁸ - - in other words, that the Oregon legislation, as the most recent product of political deliberation that had progressed over thirty years in twenty states across the nation, withstood constitutional scrutiny. That same opening technique resurfaced when Brandeis spoke for a majority of the Court.¹²⁹ However, before we ask how Brandeis

¹²³ Felix Frankfurter's article on Brandeis's constitutionalism, *Mr. Justice Brandeis and the Constitution*, 45 HARV. L. REV. 33 (1931), points out many of Brandeis's procedural contributions. Several of Brandeis's law clerks also wrote on Brandeis's significance in reforming constitutional procedure -- see e.g., L. Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 HARV. L. REV. 953 (1957) and *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986 (1967); H. Shulman, *The Demise of Swift v. Tyson*, 47 YALE L. J. 1336 (1938); H. Hart, *The Relations Between Federal and State Law*, 54 COLUM. L. REV. 489 (1954). One need only reflect on Brandeis's majority opinion in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and his concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936), to recognize the powerful syntheses that Brandeis worked upon procedural law: see, e.g., TONY FREYER, HARMONY AND DISSONANCE, THE SWIFT AND ERIE CASES IN AMERICAN FEDERALISM 101-164 (1981), and Bickel, *supra* 95, at 1-20.

¹²⁴ Cover, *supra* note 4. Cover's discussion of Brandeis's First Amendment theory, though not about the formalizing of procedural techniques to shape judicial review, does reflect Brandeis's vision of and approach to problems of federalism embedded in the First Amendment. Similarly, the discussion below seeks to elaborate on Brandeis's approach to judicial review of state action caught between constitutional Commerce Clause and Due Process Clause limitations.

¹²⁵ On the informal character of Brandeis's approach, see *infra* text at notes 134 *et seq.*

¹²⁶ See also, E. E. Steiner's piece on Brandeis's *New State Ice* opinion and his attempt to reconcile local experimentation with pluralism on a national scale -- E. E. Steiner, *A Progressive Creed: The Experimental Federalism of Justice Brandeis*, 2 YALE L. & POL'Y REV. 1 (1983). Incidentally, both Steiner and Cover, *supra* note 4, advance our understanding by reexamining Brandeis's legal theory in the light of history: Cover sets Brandeis's opinions against progressive writing on public opinion and political movements; Steiner explores the writing on local authority and pluralism.

¹²⁷ The discussion here focuses on Brandeis's majority opinions, not dissenting or concurring opinions, and his ability to frame an alternative perspective on constitutional adjudication for the majority.

¹²⁸ See *supra* text at note 34 *et seq.*

¹²⁹ The opening technique we focus on here was most apparent during the first 10 years of Brandeis's career on the bench. By the 1930s many things had changed, including the Court's perspective on cases inviting judicial review, Brandeis's relationships with fellow justices, and, of course, the political climate.

adapted the technique to “constitutionalize” deliberation in reviewing state action, we may begin by convincing ourselves briefly that Brandeis’s openings are in themselves significant.¹³⁰

Contrast Brandeis’s opening style with judicial convention, both then and now. Supreme Court opinions routinely proceed from such phrases as: “This case is before us on certiorari . . .”;¹³¹ or, “The question presented today is whether . . .”;¹³² or, “Plaintiff brought this suit in the district court to recover for damages suffered when . . .”¹³³

¹³⁰ This method of judicial analysis is unconventional. But *cf. e.g.*, Jan Deutsch, *Chiarella v. United States: A Study in Legal Style*, 58 TEX. L. REV. 1291 (1980); Jan Deutsch, *Rhetoric of Powell’s Bakke -- A Comment*, 38 WASH. & LEE L. REV. 43 (1981); and Jan Deutsch & Michael H. Hoeflich, *Legal Duty and Judicial Style: The Meaning of Precedent*, 25 ST. LOUIS U. L. J. 87 (1981); with James B. White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415 (1981); and James B. White, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, 82 MICH. L. REV. 1669 (1984).

Nevertheless, I am convinced, after reading through Brandeis’s opinions -- see, 2 SUPREME COURT OF THE UNITED STATES, 1789-1980: AN INDEX TO OPINIONS ARRANGED BY JUSTICE 629-645 (L. Blandford & P. Evans, eds. 1983), for a comprehensive alphabetical listing of the cases, and Frankfurter, *supra* note 123, for a classification of Brandeis cases through the 1931 term -- that Brandeis followed relatively consistent, but among judges unique, stylistic patterns. Indeed, even Brandeis’s protégé, Frankfurter, rarely began opinions with striking openings -- but, *cf.* *Railroad Commission of Tex. v. Pullman Co.*, 312 U.S. 496 (1941), at 497 (Frankfurter, J., Opinion of the Court). The cases selected below constitute no more than a selection; other striking sets of Brandeis openings are found in his FELA decisions and in opinions that concern geographical entities -- e.g., cities and navigable waters.

When I first noticed the pattern -- I was then still in law school -- I was not quite certain what to make of it, whether from a semantic, stylistic or legal standpoint. Originally, I had hoped to write more broadly on the “meaning” of judicial openings. Yet, when I sought to discuss the pattern(s) with my law professors, they dismissed my observations without interest (I might add, with prejudice). At the time, only my classmate, Tom Hazen, now Professor of Law at the University of North Carolina, thought the Brandeis patterns sufficiently provocative to warrant elaboration.

¹³¹ In *McDonald v. Chicago*, Justice Alito begins his opinion for the Court with an explanation of how the case arose: “Two years ago, in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. CT. 2783, 171 L. ED. 2D 637 (2008), we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, and we struck down a District of Columbia law that banned the possession of handguns in the home.” 130 S. CT. 3027. Justice Stevens begins his dissent similarly, *id.* 3089.

¹³² Justice Scalia, writing for the Court in *D.C. v. Heller*, begins as follows: “We consider whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution,” 554 U.S. 573. Similarly, Justice Breyer begins his dissent in the same case with the “question” -- to wit: “We must decide whether a District of Columbia law that prohibits the possession of handguns in the home violates the Second Amendment,” *id.*, at 681. Justice Stevens begins his dissent similarly, but with a twist -- to wit, what the question is “not”: “The question presented by this case is not whether the Second Amendment protects a ‘collective right’ or an ‘individual right.’ . . .” *id.*, at 636.

¹³³ Justice Roberts, for instance, begins his concurring opinion in *Citizens United v. F.E.C.* as follows: “The Government urges us in this case to uphold a direct prohibition on political speech.” 130 S. CT. 876, 917 (2010).

Indeed, Brandeis proceeded with much the same logic—the facts of the case, the procedural history of the case, the rule in question or the constitutional issue presented—but modified the style in ways that went beyond what Walton Hamilton might have thought “charm.”¹³⁴

To begin, what I have in mind illustrates itself simply in two very different kinds of cases:¹³⁵

On August 4, 1914, Great Britain declared war against Germany and on August 12, 1914, against Austria-Hungary.

*

The armistice with Germany was signed November 11, 1918.

The first case involved contract rights in private international law, the second the validity of federal prohibition legislation. Yet, despite their differences, both cases turn on the significance of war itself, the extent to which the prospect and conditions of war call for different rules of social life.¹³⁶ Here in the openings, then, we see Brandeis framing “deliberative” perspectives on the cases.

A second example is even more striking, for it illustrates Brandeis’s keen instinct for building on popular preferences, preferences he did not always share.¹³⁷ In *Chicago Board of Trade v. United States*¹³⁸ Brandeis begins as follows:¹³⁹

Chicago is the leading grain market in the world. Its Board of Trade is the commercial center through which most of the trading in grain is done.

The case involved a cooperative “price-fixing” or clearing rule among the Board’s “1,600 members includ[ing] brokers, commission merchants, dealers, millers, maltsters, manufacturers of corn products and proprietors of elevators.”¹⁴⁰ The rule sought to preserve the integrity of the Board as a market. At issue was the Sherman Act’s prohibition against agreements in restraint of trade, along with the “rule of reason” the

¹³⁴ Walton Hamilton, *The Jurist's Art*, 31 COLUM. L. REV. 1073, 1077 (1931). Hamilton was not referring to Brandeis's openings; rather, he was alluding to aspects of Brandeis's style that seemed out of phase with judicial taste at the time -- cf. e.g., Holmes's comments on Brandeis's advocacy and excessive footnoting, in HOLMES-LASKI LETTERS, *supra* note 109, at 128.

¹³⁵ *Watts, Watts & Co. v. Unione Austriaca di Navigazione & Co.*, 248 U.S. 9, 19 (1918); *Hamilton, Collector of Internal Revenue v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 153 (1919).

¹³⁶ The two cases drew or extended exceptions to a general rule. *See also*, Cover's discussion in *supra* note 4, on war and peace with respect to Brandeis's interpretation of the free speech clause.

¹³⁷ *I.e.*, “bigness” – *see* Zacharias, *op. cit. supra* note 2, at 599 *et seq.*

¹³⁸ *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918).

¹³⁹ *Id.*, 235.

¹⁴⁰ *Id.*, 235-236.

Court's earlier decisions had imputed to the Act.¹⁴¹ Brandeis, for the majority, wrote that the intent and design of the Board's restraining rule was reasonable; and after the first sentence no reader would doubt that there, in Chicago, in the heartland of America, was an institution worth preserving (although we may note with some irony one that was plenty Big as well!).

Note that Brandeis's perspective on the cases presupposes a duality. In the *Chicago Board of Trade* case, for instance, the underlying question opposes two means to social ends—the restrictive rule of cooperation on the one side, on the other untrammelled competition. By alluding so enthusiastically in his opening sentences to the end-product of cooperation, Brandeis all but answers the underlying question. We will find a similar strategy when we turn to Brandeis's opinions for the Court in constitutional cases.

Let's consider, then, some cases that touched on political process. There were, essentially, two kinds. In the one Brandeis asked the Court to abstain, in the other to intervene.¹⁴² To build consensus on abstention, Brandeis drew perspectives on the cases that initially turned the Court's attention away from the substantive issues and at the same time rendered the justices sanguine about deferring to the political process—for instance, that deliberation had run its proper course, was proceeding apace, or probably would.

Take, for example, *Omaechevarria v. State of Idaho*.¹⁴³ The Court is asked to review, on Fourteenth Amendment grounds among others, an Idaho statute penalizing shepherds for allowing their sheep to graze on ranges previously occupied by cattle. Brandeis opens his opinion with this sentence:¹⁴⁴

For more than forty years the raising of cattle and sheep have been important industries in Idaho.

He next lays out the practical constraints facing lawmakers and traces the law's history from its inception by Idaho's then still territorial legislature through several modifications.¹⁴⁵ In conclusion, Brandeis found the statute reasonable—just as one would expect from his opening which makes clear that Idaho's legislature, more than any other political agency, had both the stake and experience to work out a proper compromise.

¹⁴¹ *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

¹⁴² *See supra*, text at notes 47-64.

¹⁴³ *Omaechevarria v. State of Idaho*, 246 U.S. 343 (1918).

¹⁴⁴ *Id.*, 344.

¹⁴⁵ *Id.*, 344-346.

We can find a similarly striking example of deference to local wisdom in *Galveston Electric Co. v. City of Galveston*.¹⁴⁶ The narrow question was whether the ratemaking board had imposed a confiscatory rate on the utility. More broadly, the issue was whether fourteenth and fifth amendment judgments about “fair value,” or the investment basis to be assigned for ratemaking purposes, are best left to the determination of local interests. Brandeis, arguing for deference, begins the Court’s opinion as follows:¹⁴⁷

The street railway system of Galveston was started as a horse car line in 1881.

Simply stated, it is in Galveston’s interests—and the community polity has managed responsibly thus far, to judge by the city’s forty-year oversight of the railway¹⁴⁸ -- to work out a reasonable rate with its utilities. Larger interests such as national integrity or the Fourteenth Amendment simply had nothing to say about this case.¹⁴⁹

By creating a perspective that contrasted the Idaho and Galveston deliberations against national integrity, Brandeis succeeded in winning the Court’s abstention quite readily. Nevertheless, since both *Omaechevarria* and *Galveston Electric* centered on issues of primarily local concern, we should ask how Brandeis might have used the same technique to secure state action even though the issue transcended local boundaries. This was, if you will recall, the case in *Muller*.¹⁵⁰ There Brandeis referred to other states’ legislation to show that Oregon’s law reflected a national deliberative process even though it did not enjoy any official federal approval. He made much the same point even more strikingly in the *Swift v. Hocking Valley Railway* case.¹⁵¹ There petitioners challenged state laws establishing railroad demurrage charges by suggesting that those charges threatened to disrupt the federal transportation system. Brandeis answered by referring to the national deliberative process that had actually given rise to the state law. Thus, he opens the Court’s opinion as follows:¹⁵²

The National Convention of Railway Commissioners, an association comprising the commissioners of the several states, adopted in November, 1909, a Uniform Demurrage Code. Its action was based upon extensive investigations and thorough discussion, participated in by the railroad commissioners, commercial organizations, representatives of railroads, and individual shippers from all parts of the country.

¹⁴⁶ *Galveston Electric Co. v. City of Galveston*, 258 U.S. 388 (1922).

¹⁴⁷ *Id.*, 389.

¹⁴⁸ *Id.*, 389-390.

¹⁴⁹ *Cf., e.g.*, another vivid geographic opening in *Sears v. City of Akron*, 246 U.S. 242 (1918).

¹⁵⁰ *See supra* text at notes 19 *et seq.*

¹⁵¹ *Swift & Co. v. Hocking Valley Railway*, 243 U.S. 281 (1917).

¹⁵² *Id.*, 283.

BRANDEIS'S PERSPECTIVE AND THE POLITICS OF ECONOMICS

Perspective—that is, Brandeis's implicit contrast of different levels of political deliberation to grant or, as we shall see, deny constitutional validity—had important implications for “fact-finding.” We can begin to see this more clearly in the dilemma that Brandeis confronted in reviewing state action. For the states were vulnerable to two very different and potentially contradictory constitutional challenges—namely, Commerce Clause claims on the one hand, and Fourteenth Amendment claims on the other.¹⁵³ These challenges ultimately rested on the competing normative standards built into the Constitution—individual liberty and national unity.

The interpretation of *Dred Scott* that suggested self-restraint to the Court (the constitutional superego, as we put it earlier) allowed justices to reconcile the competing challenges. Simply stated, the legislature had to judge through its factual inquiries the extent to which either constitutional norm was threatened, and the Court could then defer to the legislature's judgment. In contrast, the alternative interpretation of *Dred Scott* that suggested replication of the legislative inquiry held out little hope for reconciling the two challenges in a consistent manner, insofar as it gave the justices virtually a free-hand in deciding which legislation to overturn.¹⁵⁴ For one might use social scientific projections, above all economic theory, to undercut any legislative judgment about the relationship between certain conditions and two competing norms. Brandeis, in moving the Court from one perspective on review to the other, sought to render the constitutional questions ones of political economy, not merely economic projection.¹⁵⁵

Brandeis's facts—that is, the facts he used to introduce his cases—were designed to join economic issues with the problems of political deliberation. It was one thing, for instance, to assume that New York's prosperity was tied to Chicago's by some vague, half-understood “concatenation” of social events.¹⁵⁶ It was quite another to note that trains transported beef from the one city to the other. Through the former perspective any authority that claimed to understand economic theory could see itself empowered to

¹⁵³ See, e.g., BICKEL, *supra* note 95, at 164-201. Commerce Clause claims concerned themselves with the integrity of the national legal system and constrained or bounded “states' rights” from that perspective; Fourteenth Amendment claims concerned themselves with individual liberty and equality, and so bounded the states from another, in some sense, opposite perspective. Thus, the Supreme Court had considerable discretion to restrain or liberate state lawmaking powers. Much of that discretion was, at the same time, intertwined with elusive notions of the “public interest” -- for two influential accounts, see, Walton Hamilton, *Affection with a 'Public Interest,'* 39 YALE L. J. 1089 (1930) and FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* (1937).

¹⁵⁴ See e.g., Urofsky, *supra* note 22, and *supra* text at note 55 *et seq.*

¹⁵⁵ But cf. Arthur Shenfield, *The Influence of Holmes and Brandeis on Labor Law*, 3 GOV'T UNION REV. 30, 50 (1982), asserting that Brandeis's blend of political and economic concerns was tantamount to balancing “truth [i.e., economics] against error [i.e., politics].”

¹⁵⁶ “Concatenation” is Thorstein Veblen's imagery in his *THEORY OF BUSINESS ENTERPRISE* (1904) – see, *supra* text at notes 7-12.

draw legal conclusions. In contrast, through the latter perspective the fact of political interest subjugated any pretense to authority that might accompany an understanding of economic theory.¹⁵⁷ It was in drawing these connections and then elaborating on the adequacy of one forum or the advantages of another that the constructive nature of Brandeis's activism in economic rulemaking comes across.

Consider, for example, the *Western Transit* case.¹⁵⁸ A shipper has won judgment in a New York state court for the full value of copper ingot that disappeared while sitting in defendant's Buffalo warehouse. The defendant attacked the judgment on the ground that ICC regulations limited recovery to the Bill of Lading schedule of liability, in this case a sum roughly a third of the actual loss.¹⁵⁹ The state court ruled for the shipper, but Brandeis speaking for the Court overturned the judgment. The opinion opens by emphasizing the geographical context of the state court's decision:¹⁶⁰

The Western Transit Company, operating steamers between Buffalo and other points on the Great Lakes, formed, with the New York Central Railroad, a "lake and rail" line between Michigan and New York City.

Brandeis then goes on to characterize the joint venture in virtuous terms, as bestowing valuable new services on shippers over a wide region.¹⁶¹ The upshot is that local interest and law must give way. Local deliberation, no matter how well reasoned, is simply incapable of taking into account the larger interstate interests the "facts" encompass.¹⁶²

The *Philippine Sugar Estates* case¹⁶³ provides a similar example of local action falling to national interest. In that case the Philippine Islands Supreme Court had ruled on a matter of Philippine (i.e., local) contract law. The U. S. Supreme Court customarily deferred to rulings on local law by the highest court of a territory or possession.¹⁶⁴ Yet, as in *Western Transit*, Brandeis, for the majority, overturned the Philippine Supreme Court's decision. The first sentence leaves little doubt that the U. S. government has a leading stake in the case:¹⁶⁵

¹⁵⁷ Cf., *supra* text at note 44 *et seq.*

¹⁵⁸ *Western Transit Company v. A. C. Leslie & Co., Ltd.*, 242 U.S. 448 (1917).

¹⁵⁹ *Id.*, 450. Still, the sum at stake in the case was hardly large -- \$ 94 under federal provisions versus \$ 271 and change under the state court judgment.

¹⁶⁰ *Id.*, 449.

¹⁶¹ *Id.*

¹⁶² This case, like many others, may surprise those who have read Brandeis casually; for by and large he is accused of favoring -- almost to the point of obsession -- local business and community interests along with local social control over national industrialization and the efficiencies of consolidation. Quite to the contrary, Brandeis sought a balance, and his constitutional adjudication reflected that balance.

¹⁶³ *Philippine Sugar Estates Development Co. v. Philippine Islands*, 247 U.S. 385 (1918).

¹⁶⁴ *Id.*, 390.

¹⁶⁵ *Id.*, 386.

When Spain ceded the Philippine Islands to the United States large tracts of agricultural lands were owned by the great religious orders.

The point here is that Brandeis sought to justify the Court's intervention in substantive matters by placing the cases in their deliberative perspective. That is, the U.S. Supreme Court, charged as it was with national integrity, had to guard questions of national interest against the corruption or preemption of local politics. The deliberative perspective, moreover, was not a matter of imposing normative theory, whether economic or political, but relied on the "essential facts" that tied economic to political activity.¹⁶⁶ In *Western Transit* it was the fact of an interstate lake and rail system; in *Philippine Sugar Estates* the fact that the United States, as conqueror, had won the spoils.

Both of the preceding cases involved local court decrees, and for that reason we can understand Brandeis's willingness to intervene as but slight deviations from his path toward judicial restraint in reviewing local economic policy.¹⁶⁷ Yet, in *Thompson v. Consolidated Gas Utilities*¹⁶⁸ Brandeis deviated much farther, striking down, on Fourteenth Amendment grounds, a Texas law regulating well-owners' rights to produce natural gas.¹⁶⁹ An administrative order allocating the production of gas had so restricted the production of certain well-owners with substantial pipeline capacity that they were forced, in effect, to purchase gas from competing well-owners (without pipeline capacity) to meet their contractual requirements. The pipelines, in several instances, served out-of-state communities; and nothing precluded the construction of pipelines to other communities by the second class of well-owners. Brandeis, speaking for the Court in 1937, begins the opinion by referring to the state legislature's deliberations, upon which he subsequently elaborates extensively.¹⁷⁰

This case challenges the validity of a gas proration order issued by the Railroad Commission of Texas for the Panhandle fields on December 10, 1935, and

¹⁶⁶ While statements about "essentials" on the part of Brandeis are no less normative than anyone else's, the statements were not part of any broad based normative theory about deliberation, federalism or the like. Over the years many have referred to the fact explosion to which Brandeis's generation was the original witness. The progress of law is attributable to a learning curve: judges learning both to express themselves in new ways and to travel beyond the point of social impact, or hard facts, into the realm of explanation – see, e.g., BRUCE ACKERMAN THE RECONSTRUCTION OF AMERICAN LAW (1982). The problem for judges, in maintaining the legitimacy of their judgments, is in separating explanation from prediction, enforcement from policy. Toward this end judges are ever receptive to formalistic means – see, e.g., Morton Horwitz, *Law and Economics: Science or Politics*, 8 HOFSTRA L. REV. 905 (1979). Yet, Brandeis had to develop an individual style to reach beyond the formalism of his contemporaries. In the national deliberative process and the expertise of public servants he was able to discover meanings that persuaded.

¹⁶⁷ In the two cases the Supreme Court was reviewing local court decisions, not legislative acts. Accordingly the review and overturning was not a direct intrusion into the deliberative process.

¹⁶⁸ *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937).

¹⁶⁹ *Id.*, 57-58.

¹⁷⁰ *Id.*

carried forward in supplemental orders. The orders were entered under chapter 120 of the Texas Acts, 1935, Forty-Fourth Legislature, Regular Session, commonly known as House Bill 266.

In overturning the state's order Brandeis concluded that the allocation was a naked redistribution, undertaken "to prorate not production [i.e., a local matter], but distant markets and the facilities for serving them."¹⁷¹ Once again, in this frame, the matter was one for deliberation not in a state's legislature, but on a national scale, whether by the states collectively, their representatives in Congress, or federal administrators.

Samuel Konefsky, in noting the opinion, did not characterize the *Thompson* case as an anomaly; rather he saw it as the vigorous expression of one who, no less than Holmes, recognized the ends of property.¹⁷² Konefsky is, I think, correct in his insight that Brandeis held fast to property doctrines.¹⁷³ Yet, at the same time, in Brandeis's presentation of the *Thompson* case we are confronted with more than merely "the taking of one man's property and giving it to another." The case was about deliberation; and Brandeis, I suspect, saw the Court's procedural mission quite differently, for instance, than Justice Stone at the writing of footnote four in the *Carolene Products* case.¹⁷⁴ There were times, in Brandeis's estimation, when the national integrity with which the Court was charged would not tolerate the idiosyncrasies of state action. Within the Constitution one might label that intolerance a Commerce or Supremacy Clause intervention. Or, as in *Thompson*, one might envision a need to preserve the larger political process against its reckless parts and label the grounds of intervention "due process."

So far we have pointed to the peculiar nature of Brandeis's first sentences as well as to his overall body of work as evidence of Brandeis's intentions. Admittedly, there is little in the record to confirm my inferences, neither Brandeis's use of first sentences as a tactic, nor his larger "deliberative process" strategy in "reframing" the Constitution. Still, Harvard Law School's special collections contain some of Brandeis's opinions in draft, and the *Thompson* opinion records appear quite complete. Thanks to the late Professor Paul Freund, at the time the trustee of these records, I was granted permission to transcribe and include some of the earlier drafts here. A review of the *Thompson* opinion drafts provides insight into Brandeis's intentions on first sentences.

In all, there are about 38 drafts of the opinion. Interestingly, the body of the opinion was completed relatively early on in the process. Writing and rewriting the first several paragraphs absorbed much of Brandeis's attention. The very first draft, written in

¹⁷¹ *Id.*, 68.

¹⁷² KONEFSKY, *supra* note 18, at 270-271.

¹⁷³ Elsewhere I have explored how Brandeis did so even after property lost meaning in constitutional discourse – see, Zacharias, *supra* note 2.

¹⁷⁴ *United States v. Carolene Products*, 304 U.S. 144, 152-3 (1938). See also, Robert Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L. J. 1287 (1982).

Brandeis's hand, focuses attention on the fact that the Texas legislature has delegated far-reaching power to the Texas Railroad Commission, not only to effect state policies on oil and gas conservation, but to regulate production in the United States' largest natural gas field. In other words, he had in mind a collision between deliberative processes at the state level and the interests of the greater U.S. economy, which by then was in the throes of the Great Depression. The collision is reminiscent of Thorstein Veblen's warnings, quoted earlier,¹⁷⁵ about the potential for widespread disruptions to America's concatenated economy that attended a "disturbance of the balance at any point."

Brandeis's initial draft of the opening paragraph, along with his edits, reads as follows:¹⁷⁶

~~House Bill 26~~ Chapter 120 of the Acts of Texas (House Bill 266) is a comprehensive measure which declares the State's policy with reference to the conservation of oil and natural gas and confers upon the Railroad Commission ~~the broad~~ powers of regulation. . . . this suit was brought [it?] in the federal court for the ~~w~~ western district of that State, ~~challenges the validity of~~ to enjoin the enforcement of proration orders made by the Commission December 10-18, 1935. The orders limits [sic] the production of sweet gas in the Texas Panhandle, the largest natural gas field in the United States, -- an enormous reservoir of gas and oil extending through six counties for a distance of 126 miles with a width of from 10 to 40 miles. ~~and~~ [The?] plaintiffs who are producers in the Western Panhandle field, claim that the orders are invalid, both because they are in excess of the [?] conceived by the statute; -- and because as construed, ~~of certain~~ provisions of the statute, ~~as construed~~, under which the orders purport to be made violate the Federal Constitution and [that of?]. The District Court, three judges sitting, ~~held the orders void~~ [granted a temporary injunction against Texas Pan Gas Co. & Thompson; and against their enforcement. 12 Fed. Supp. 462; and ~~lat. also a permanent injunction made it permanent.~~ 14 Fed. Supp. 318. The case is here on appeal.

After working on the body of the opinion in the following two drafts, Brandeis returned his attention to his opening paragraph.¹⁷⁷ In his fourth draft he adopted most of the changes he had inserted in the first draft, but refined his description of the Texas Panhandle oil field and its oversight in the third sentence of the opening paragraph.¹⁷⁸ In the fifth draft, however, he decided to revise his opening sentence as follows:

¹⁷⁵ *Supra*, text at notes 7-9.

¹⁷⁶ The Louis D. Brandeis Papers, Part 2, 1932-1939, Harvard Law School Library, Microfilm Reel 26, Frame 0794 [hereinafter, Brandeis Papers, Part 2]. The first draft is all handwritten with insertions (underlined words in the text above).

¹⁷⁷ *Id.*, Reel 26, Frames 796-804.

¹⁷⁸ *Id.*, Reel 26, Frame 805.

Chapter 120 of the Acts of Texas, 1935 (House Bill 266) is a comprehensive measure which declares the State's policy with reference to the conservation of oil and natural gas and confers upon the Railroad Commission broad powers of regulation.

became:¹⁷⁹

The orders purport to be issued under Chapter 120 of the Acts of Texas, 1935. This statute commonly known as House Bill 266 is a comprehensive measure which declares the State's policy with reference to the conservation of oil and natural gas and confers upon the Railroad Commission broad power of regulation.

The addition of the phrase "orders purport" shaded the deliberative processes in Texas that had given rise to the orders in question. It virtually imputes a degree of corruption among those – i.e., the Texas Railroad Commissioners – charged with effecting the state's oil and gas conservation policies. This taint, however, persisted only until the following, sixth draft, where Brandeis settles on an opening sentence that he would carry through to the published opinion with only minor edits:¹⁸⁰

This case challenges the validity of gas a [sic] proration order issued [?] by the Railroad Commission of Texas for the Panhandle fields on December 10th, 1935, and carried forward in supplemental orders.

Here, instead of focusing attention immediately on the state's deliberative processes as a whole – that is, "Chapter 120 of the Acts of Texas, 1935 – Brandeis shifts primary attention to the deliberations of the state railroad commission.

The remaining drafts switch their attention back and forth from adjustments to the body of the opinion to re-arranging the central elements in what I have called his argument:¹⁸¹ namely, the powers of the state legislature, the deliberative processes of the state railroad commission, the significance of the oil and gas fields for the U.S. economy as a whole, and the claims of the appellants, who were not only producers,

¹⁷⁹ *Id.*, Reel 26, Frames 808-809.

¹⁸⁰ *Id.*, Reel 26, Frame 813. The misplacement of the "a" was fixed in the subsequent type-set version of this draft. As the writing and refining of the opinion proceed, Brandeis receives memoranda from his law clerk that inform the next parts of his opinion. Thus, following this draft we find a memorandum on the "History of Legislation and Litigation" – see, *Id.*, Reel 26, Frames 816-819; whether his focus on the deliberations of the Railroad Commission prompted him to ask for the memorandum, or whether the memorandum informed his focus on the Commission's deliberations is not clear. We can deduce, however, that the development of the first sentences in the opinion were not happenstance. During the 1936-1937 Supreme Court Term, Brandeis's law clerk was J. Willard Hurst – see, ALPHEUS T. MASON, *BRANDEIS: A FREE MAN'S LIFE* 690 (1946).

¹⁸¹ Brandeis Papers, Part 2, Reel 26, Frame 826 to Reel 27, Frame 206.

but also distributors throughout the United States via pipelines they owned. In the earlier drafts Brandeis follows his first sentence with a description of the procedure in the case at hand. Thus, for instance, in the seventh draft, the opening paragraph reads in full as follows:¹⁸²

This case challenges the validity of a gas proration order issued on December 10th, 1935, and carried forward in supplemental orders by the Railroad Commission of Texas for the Panhandle fields. Two suits to enjoin their enforcement were brought in the federal court for western Texas. One was by Texas Panhandle Gas Utilities Company, for which Consolidated Gas Utilities Corporation was later substituted as plaintiff; the other by Texoma Natural Gas Company. In each suit the members of the Railroad Commission and the Attorney General of the State were made defendants. The plaintiffs claim that the orders are invalid, both because they are in excess of the statutory powers, and because provisions of Chapter 120 of the Texas Acts, 1935, as construed, under which the orders purport to be made, violate the Federal Constitution, and that of the State. The two cases were consolidated for hearing. That the District Court had jurisdiction was conceded. Three judges sitting, granted a temporary injunction, *Tex Pan Gas Co. v. Thompson*, 12 Fed. Supp. 462; and made it permanent, 14 Fed. Supp. 318. The consolidated case is here on appeal. The record is extensive; the findings of fact explicit.

This paragraph remained relatively unchanged while he fiddled with other parts of the opinion.¹⁸³

Then, in his nineteenth draft, he returned his attention to the opening paragraph. There he inserted a second sentence to sharpen his concerns with the Texas railroad commissioners' order. The first two sentences then read as follows:¹⁸⁴

This case challenges the validity of a gas proration order issued by the Railroad Commission of Texas for the Panhandle fields on December 10th, 1935, and carried forward in supplemental orders. The orders limit the production of the

¹⁸² *Id.*, Reel 26, Frame 830.

¹⁸³ In the following 10 drafts he added more substance to the opinion, only occasionally refining the wording, but not the content of the sentences or the structure of the opening paragraph. See, *Id.*, Reel 26, Frames 835 (making small corrections in the text of the first paragraph), 841, 844, 850 (adjusts some word ordering within sentences), 860, 865, 872, 883, 905, and 922. The body of the opinion, which had developed from a two-page handwritten introduction in the first draft into a 19-page type-script at the point Brandeis circulated the final version to his fellow justices, grows out of a series of memoranda from his clerk: two on the "Construction of the Statute," three on "[Evidentiary] Findings" as well as "Conflicts in the Evidence," one on "Texas Law on the Review of Administrative Findings," and one on the "History of Oil Proration in Texas." See, *Id.*, Reel 26, Frames 890-959.

¹⁸⁴ *Id.*, Reel 26, Frame 960.

gas from the plaintiffs [sic] wells to an amount far below the market demand therefor under their existing contracts and likewise far below their production, their transportation and their marketing facilities.

In his twenty-first draft Brandeis inserts a new third sentence to sharpen even further his concerns with the motives of the railroad commissioners and whether they were really carrying out the intent of the Texas legislature's conservation policies. In other words, he implies, there has been a breakdown in the deliberative processes of the state itself on a matter of great national significance. Meanwhile, he has decided in this draft to relegate the procedural history of the case to a second, separate paragraph. The resulting first paragraph reads in full as follows:¹⁸⁵

This case challenges the validity of a gas proration order issued by the Railroad Commission of Texas for the Panhandle fields on December 10th, 1935, and carried forward in supplemental orders. The orders limit the production of the gas from the plaintiffs' wells to an amount far below their market requirements under existing contracts and, likewise, far below their production and their transportation and marketing facilities. It is charged that the purpose of so limiting their production is not to prevent waste or to prevent invasion of the rights of co-owners in a common reservoir, but solely [sic] compel the plaintiffs to purchase gas from other well-owners who wholly lack a market and who must stop production unless such purchases are made by plaintiffs and others similarly situated.

Brandeis remained satisfied with these sentences while he played with the following paragraphs and developed the body of the opinion in the next thirteen drafts.¹⁸⁶ Throughout these drafts he continued to feature the procedure of the case in the second paragraph and his description of the Panhandle gas field's significance and oversight in the third. In several later drafts we find him making minor edits in the first paragraph, mainly moving phrases around in the second and third sentences. It is not till the thirty-third draft that he drops in a new second sentence to clarify the railroad commissioners' relationship with the Texas legislature. That sentence reads as follows:¹⁸⁷

The orders were entered under Chapter 120 of the Texas Acts, 1935, Forty-Fourth Legislature, Regular Session, commonly known as House Bill 266.

¹⁸⁵ *Id.*, Reel 26, Frame 989.

¹⁸⁶ *Id.*, Reel 26, Frames 1002, 1014, 1025, 1035 (some minor changes in wording in the first paragraph), 1047, 1057 (some more minor changes in the first paragraph), 1067; *Id.*, Reel 27, Frames 2 ["0002"], 18, 0031 (in this draft, Brandeis struck out the day the decision had been scheduled to be "issued" in the title of the opinion; to that point, the draft had been dated "Jan. 4, 1937"), 49, 62, and 90.

¹⁸⁷ *Id.*, Reel 27, Frame 130. The new sentence was typed vertically in the margin.

Curiously, we find the sentence above omitted from the following draft.¹⁸⁸ However, the omission may simply have been the result of his working on two separate printed versions of the preceding draft simultaneously, especially in light of the fact that the draft with the sentence in question omitted seems to be the first in which footnotes appear in the introductory paragraphs. In any case, this sentence re-appears in the penultimate (thirty-seventh) draft.¹⁸⁹ This configuration of the opinion's opening paragraph remained in the published version of the opinion.¹⁹⁰

*

"Reason" has no single form. Rather, in the Brandeis "way," reason accommodates situations. It serves to mediate, reconciling the diverse interests in attendance. *Dred Scott* presented the Court with a situation in which the "reasoning" of one set of legislatures seemed inalterably opposed to that of another. National integrity, moreover, could not survive that clash of reason.¹⁹¹ Brandeis, in reconceiving the Court's role as constitutional interpreter, merged two styles of reason. First, he obliged the Court to envision the deliberative processes and institutions that could achieve a "reasonable" accommodation among particular clashes of interest. Second, he led the Court to facilitate deliberation by envisioning the viable solutions toward which an appropriate rulemaking institution might strive.

Brandeis could not project the "reasoning" that power-wielding institutions, both public and private, would bring to bear on controversial issues to win support for their rule. But his "facts," both those that gave the cases their political economic perspective and those that compelled the Court to restrain itself, gave substance to the lens that mediated between national security and decentralized progress.

¹⁸⁸ *Id.*, Reel 27, Frame 153.

¹⁸⁹ *Id.*, Reel 27, Frame 171.

¹⁹⁰ *Id.*, Reel 27, Frame 188. A reprint of this 19-page draft was sent to the printer with a request for "18 copies" that were, presumably, circulated to the other justices. Some of the circulated copies came back to Brandeis with minor corrections (on pages 5 and 13 of the draft). In the accompanying "Memorandum" slips, each justice signaled his approval. Justice Cardozo, for instance, wrote: "Yes, sir. A fine opinion. BNC" – *Id.*, Reel 27, Frame 263. "CJ" (the Chief Justice at the time was Charles Evans Hughes) wrote back: "A very able and important opinion – I agree" – *Id.*, Reel 27, Frame 363. Justice Sutherland wrote: "I agree. A very well considered and unusually well drawn opinion" – *Id.*, Reel 27, Frame 383. Justices Roberts (Frame 283), McReynolds (Frame 303), Butler (343) all also signaled their agreement, and Justice Van Devanter (Frame 323) "Agree[s] to all but the last paragraph and am hoping you will eliminate it." Brandeis kept a tally of votes – see *Id.*, Reel 27, Frame 243 – and indicated Van Devanter's objection as well as the fact that Justice Stone was "not participating." The decision was finally issued on Feb. 1, 1937 – see, *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 57-58 (1937).

¹⁹¹ See, PARSONS, *supra* notes 41 & 59. See also, HYMAN & WIECEK and FEHRENBACHER, both *supra* note 55.

REFRAMING VS. REWRITING: CONTEMPORARY IMPLICATIONS

Elsewhere I have written about Brandeis's reputation and its relationship to the rise and fall of liberal constitutional theory.¹⁹² The point worth reiterating here is that Brandeis was a transitional figure. That is, he moved the Court to a different perspective on its role, even though his own substantive vision of social order was out of phase with the social order that his successors (including many protégés) elaborated during the "Second New Deal."¹⁹³ Nevertheless, Brandeis has been consistently identified not just with judicial liberalism, but – somewhat incorrectly -- with the broader liberal vision of social order the Court has been monitoring since the Great Depression.¹⁹⁴ As a result, the writers have missed some of Brandeis's more useful contributions to the Court's practice during the transitional period.

Just what are the implications then?

Brandeis's career placed him squarely in the midst of the drastically changing social order brought on by American industrialization. The American polity, much as today, was irreconcilably divided. Competing assessments of what was going on and where society was headed abounded at the time.¹⁹⁵ There are countless examples of reformers and social theorists who changed their outlook during that era on what the state should do.¹⁹⁶

¹⁹² See, Zacharias, *supra* note 2.

¹⁹³ Many candidates can be named here – Adolf A. Berle, Jr., Donald R. Richberg, David E. Lilienthal, David Riesman, among others, come to mind. See, Zacharias, *supra* note 2, at 603-608.

¹⁹⁴ In this regard, as the New Deal has gradually been eclipsed, Brandeis's normative prescriptions for social order, though largely irrelevant, have increasingly come under attack.

¹⁹⁵ In writing some thirty years ago about the changing landscape of state-federal jurisdiction in Brandeis's day compared with our own, I concluded as follows:

There are numerous explanations for the breakdown of the liberal social order, but in the end two aspects of current social life will have to be reconciled before another vision can emerge. The current constitutional dilemma stems from much the same dual allegiance that the citizenry confronted in Brandeis's time. On the one hand, citizens are allied with communities of interest, on the other with the state and its power to secure ends that grow out of political consensus. The difference between today's dilemma and that of the earlier era is that the activities carried on by the communities of interest—specifically transnational business enterprises—are not largely confined to the geographic boundaries of the nation. Indeed, we are now in an age when transnational businesses have the potential for integrating economic activities in disregard of national power and even monetary systems. The justices by mediating the individual citizen's choice to ally him or herself either with national political policies or with international economic interests, must contribute to a vision of the kinds and configurations of political institutions that in turn will generate positive substantive visions of a social order.

¹⁹⁶ Herbert Croly, Walter Lippmann and Walter Weyl are best known. But consider Ida M. Tarbell: in 1904 she published her HISTORY OF THE STANDARD OIL COMPANY, an account of John Rockefeller's ruthless monopolizing practices; by 1916, however, she had come to notice the NEW IDEALS IN BUSINESS, AN ACCOUNT OF THEIR PRACTICE AND THEIR EFFECTS UPON MEN AND PROFITS, much as Walter Lippmann had moved from his PREFACE TO POLITICS in 1913, a sharp critique of the politics

As the “legal realists” eventually made clear, decisions based on rules were inconsistent; reliable forms of inquiry into social order and the normative vision effective rules could ultimately depend upon were missing from judicial deliberations. Holmes’s “bad man” reigned supreme.

Brandeis—and he was not alone—understood that a political process for generating clear visions about social order and consensual norms had to complement an understanding of what the society could achieve. And in the Court he saw the constitutional mechanism for developing that process. His greatness is not attributable to the caliber of his personal vision or the “facts” that sustained it, but to his nurturing of a political process that gave credence to competing parts of the vision—the security of the whole as well as the decentralized progress that accompanied individual freedom. Brandeis’s greatness was in his capacity to describe a political process that was attempting to mediate rather than decide conflict. By articulating the facts of the deliberative process – for instance, that not just one state legislature stood behind the rule in question, but twenty or thirty legislatures, and that the history of that legislation portended a clear trend with respect to where all of the states, indeed the nation, would soon stand – he was able to engage his fellow justices in mediating, rather than deciding (and thereby exacerbating) the nation’s conflicts.

The changing facts surrounding the deliberative process today are an extension of those that were characteristic of Brandeis’s time. During the Progressive Era the nationalization of industry compromised the several states’ jurisdictions. The central question for the Court was whether a state’s law could be sufficient to address economic and other social issues, or whether something more was necessary to reinforce state law. As Brandeis so often pointed out reinforcement could take the form of collective action on the part of many states or the adoption of “uniform” laws developed through professional associations; but when the states’ powers or will to coordinate their laws failed, then often the time was ripe for interventions by some branch of federal government.

Thirty years ago when I wrote an earlier draft of this piece, I noted that contemporary industrial concatenation was increasingly tied to international commerce and transnational migration, and accordingly that new national-transnational conflicts were superseding the state-federal kinds of constitutional conflicts that had absorbed the Court in Brandeis’s day. During the years since it has become clearer just what those emerging conflicts entail. We are now a divided nation with divergent interests and divergent allegiances. One “America” comprises the cosmopolitan regions that are closely tied to the international community -- international banking and finance, intense migrations with all of their cultural affects, the influences of the “world wide web”

of indifference and the statecraft of “drift” to his *DRIFT AND MASTERY* in 1914, a more sanguine appraisal of modern management (or managerial capitalism) and the role of business.

(Internet) on commerce and privacy, and so forth. The other “America” consists of the so-called “heartland” regions that have the capacity, at least in theory, to isolate themselves from transnational influences.¹⁹⁷ To some, the notion of the heartland suggests a conservative political idyll, where Americans can live in smaller communities, parents can educate their children at home, property owners can defend themselves with their own arms, government institutions, including schools and police (and organized labor), are scarce, and good order is centrally coordinated by local churches or other religious institutions. Just how much of this idyll is realistic without government support and protection is not clear, but the idyll has generated a set of constitutional ideals and values that are the framework and rallying cries for a new brand of “conservatism” that has dispersed through the nation’s deliberative processes in recent years. Meanwhile, the debating points for these two Americas have become incommensurate, so that the reform of cosmopolitan America, which depends on government institutions for coordination and regulation, has been brought to a standstill. Americans in those regions don’t share “a church”; they need policing that is broadly accountable and transparent; they need schools that are both effective and contribute to the socializing of the region; and they need much more coordination than the pure workings of “the market.”¹⁹⁸

For the Court to have a positive influence on these troubled political relations, it would have to find ways to reconcile the divisions, whether by way of decentralizing the governing authorities or supporting compromises at the federal level that allow both Americas to move on. Just how it can resolve the political conflicts, let alone repair them, is not clear. Many commentators seeking to unravel the current tangle would begin with the aftermath of *Roe v. Wade*,¹⁹⁹ but the lessons of that case are ambiguous.

On the one hand, there are those who view *Roe v. Wade* as divisive, insofar as it cut off debate on central questions still being deliberated at the time in state legislatures and courts. In 1973, when Justice Blackmun published the opinion of the Court, 20 state legislatures had already re-evaluated abortion restrictions and opened the way to reproductive reform. The revisions had occurred in roughly a three-year period leading up to the case. At the same time, 30 state legislatures were still holding fast to laws criminalizing abortions, laws that for the most part had been enacted during the 19th century. We will never know just what might have happened in these other 30 states had the political process been allowed to unfold without interruption, let alone how the

¹⁹⁷ See, e.g., Congressional District level “Maps of the 2012 US Presidential Election Results” -- <http://www.freerepublic.com/focus/news/2957563/posts>, accessed 11/13/2013. In recent years, pundits and scholars alike have sought to unfold the deeper meanings and origins of this divide. See, e.g., Colin Woodward, *AMERICAN NATIONS: A HISTORY OF THE ELEVEN RIVAL REGIONAL CULTURES OF NORTH AMERICA* (2011); Dante Chinni & James Gimpel, *OUR PATCHWORK NATION: THE SURPRISING TRUTH ABOUT THE “REAL” AMERICA* (2010).

¹⁹⁸ See, e.g., Harold L. Wilensky, *AMERICAN POLITICAL ECONOMY IN GLOBAL PERSPECTIVE* (2012).

¹⁹⁹ 410 U.S. 113 (1973).

nation as a whole might have responded;²⁰⁰ yet, the Supreme Court's decision unquestionably cut off the deliberative processes over these issues prematurely.²⁰¹ Justice White, in his dissent in the companion case, *Doe v. Bolton*, pointed this out:²⁰²

The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.

At any rate, the upshot of cutting off the political deliberations around abortion in 1973 is thought to have entrenched the two sides in battle lines that have thwarted all possibilities for compromise, much less reconciliation, in the years since.

On the other hand, there is evidence that *Roe v. Wade* was not the cause of the divisive, no-holds barred kinds of politics that the nation has experienced in recent decades, but simply a side-plot that paralleled ongoing political machinations both before and following the case. In an alternative and insightful analysis of the events, Linda Greenhouse and Reva Siegel suggest that the dominant factor in the abortion debates both before and after 1973 was not the Court's intervention as much as the strategies of the conservative wing of the Republican party to reshape party allegiances at the federal level by attracting Catholic voters and white voters in the South, many of whom had

²⁰⁰ Would women in restrictive states have taken note of the inequalities to which they were subjected? Would they have engaged more actively in their own states' political processes to effect change (leading perhaps to decriminalization, but also to other forms of restraint on abortions)? Would women and medical systems and human rights workers in less restrictive states have reached out and developed new private systems to ensure the full range of reproductive services for women in more restrictive states, including subsidized travel to and from the differing states? Would Congress have intervened to preempt schism among the states? Would the political process have made birth control and sex education more available in states where abortion as a last resort was not an option?

²⁰¹ Justice Blackmun was careful in his opinion for the Court in *Roe v. Wade*, not to assign unconstitutional religious motives to existing laws prohibiting abortions, much as the Court in *Griswold v. Connecticut* had avoided striking down laws banning contraception on religious grounds, even though those laws were at best thinly veiled edicts of "the church."

In any case, the point, made by the dissenting justices in both *Roe v. Wade* and *Doe v. Bolton*, was that the Court could have at least waited for the case to ripen – that is, for some state prosecutor to bring felony charges against and actually convict a woman who had terminated her pregnancy, or to prosecute her doctor. At some point, there would have been more solid grounds for Supreme Court intervention – for instance, when women in some states were permitted to seek abortions freely, whereas in other states similarly situated women wound up in jail. If the Congress had not stepped in by this juncture to ameliorate the situation, then the Court could have sensibly entered the fray to preserve the Union.

²⁰² *Doe v. Bolton*, at 410 U.S. 179, 222 (White, J., dissenting).

formerly been aligned with the Democratic party.²⁰³ In other words, the current intractability of our political divisions is a profound and ongoing political problem, not the outgrowth of misguided judicial meddling. The irony is that these political strategies have led Republican Presidents to appoint five justices who are part and parcel of the realignment – that is, conservative and apparently religious Catholics; in holding sway over the Court, these justices seem to look back on *Roe v. Wade* not as a warning against short-circuiting political deliberation, but as precedent for political opportunism.

Specifically, the Court in recent years has returned frequently to the business of creating substantive constitutional rights where they did not exist before, and in doing so disrupting the political process. Justices Scalia and Alito have rewritten the Second Amendment in order to disable Congress and all state legislatures in their attempts to regulate handguns and other firearms.²⁰⁴ Justice Kennedy has rewritten the First Amendment to disable Congress in its attempts to regulate corporate participation in election campaigns.²⁰⁵ And during the last term, Justice Roberts, in at least a gesture that resembled mediation (or compromise), nevertheless thwarted Congress's effort to regulate health care markets under the Commerce Clause following over 100 years of congressional deliberation on national health care, not to mention multiple federal

²⁰³ Greenhouse & Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L. J. 2028 (2011).

²⁰⁴ *D.C. v. Heller*, 554 U.S. 570 (2008); and *McDonald v. Chicago*, 561 U.S. 3025 (2010). Justice Scalia writing for the Court in *D.C. v. Heller* and Justice Alito for the Court in *McDonald v. Chicago* virtually excised the “prefatory clause” of the Second Amendment, “A well regulated militia being necessary to the security of a free State . . .”

²⁰⁵ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). The First Amendment decrees that “Congress shall make no law . . . abridging the freedom of speech . . .,” not that Congress shall make no law regulating federal elections, or regulating corporations, or regulating corporate participation in federal elections. If we are going to be “originalists,” we should at least get our history straight. At the time of the framing, corporations were chartered by the states. The powers of these corporations were strictly circumscribed in their charters to specific purposes. No one would deny that the promoters and investors in these chartered entities had the right to make their views known in the political affairs of their times, to petition their governments, to assemble in public personally. But they were not permitted to divert corporate funds from the purposes specified in the corporate charters (granted or conceded by the state) to political engagements that were not specified. It was only much later in American history that states began to enact more general laws of incorporation so that, in the earlier versions, all citizens had access to the possibilities of incorporating and that, in later versions, the incorporators were no longer required to circumscribe the corporate purposes strictly. *See, e.g.*, J. WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION* (1970); Morton Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985); and Ruth H. Bloch & Naomi R. Lamoreaux, “Corporations and the Fourteenth Amendment” (2013), Working Paper at <http://economics.yale.edu/sites/default/files/files/Faculty/Lamoreaux/Corps-14th-Amend-13.pdf> (accessed 11/14/2013). For further insights into the Majority's inconsistency and disingenuousness with respect to First Amendment rights, *see, e.g.*, Linda Greenhouse, “Justice(s) at Work,” *NEW YORK TIMES*, Opinionator [Online Commentary], Feb. 6, 2013 -- <http://opinionator.blogs.nytimes.com/2013/02/06/justices-at-work/?emc=eta1> (accessed 11/14/2013).

statutes since World War Two that have enlarged and broadened access to those very markets.²⁰⁶ Further, Justice Roberts's opinion limited the federal government's capacity to contract with the states by inserting some sort of Pareto optimality requirement on federal-state contract conditions.²⁰⁷

The style in all of the more recent decisions differs somewhat from the earlier cases. Unlike Justice Peckham, or for that matter Justice Blackmun, the opinion writers have not relied on the "liberty or property" provisions of the 14th Amendment – that is, "substantive due process"²⁰⁸ – to establish rights that had not existed before under the Constitution. Instead, they created new, ahistorical understandings of what the "framers" of the Constitution had in mind "originally" when they included particular provisions. Here is not the place to review the nonsense; the dissenting opinions in those cases among other writings have attempted to set the record straight.²⁰⁹ My point here is not that the "originalists" on the Court are poor historians; my point is that they are poor constitutionalists, unwilling to find ways to reinvest that great document with the means to foster democratically sustained deliberative processes that can over time forge consensus around divisive issues.²¹⁰ They have failed, as Justice Stevens put it in *D.C. v. Heller*, to differentiate the cases *requiring* intervention from those in which the deliberative processes at the state and/or federal levels seem to be resolving the issues on their own or moving in consensus-building directions.²¹¹

²⁰⁶ National Federation of Independent Business v. Sebelius, 132 S.Ct. 2566, 2577 (Roberts, C.J., Opinion of the Court), at 2584-2591.

²⁰⁷ *Id.*, 2601-2608.

²⁰⁸ Although Justice Alito in *McDonald v. Chicago* does rely on that clause in the 14th Amendment to "incorporate" the right to carry around handguns in the city of Chicago.

²⁰⁹ See, e.g., Frank B. Cross, *Originalism: The Forgotten Years*, 28 CONST. COMM. 37 (2012); Lawrence B. Solum, *Symposium: The Interpretation/Construction Distinction In Constitutional Law: Annual Meeting of the AALS Section on Constitutional Law*, 27 CONST. COMM. 95 (2010); and Tara Smith, *Originalism's Misplaced Fidelity: "Original" Meaning Is Not Objective*, 26 CONST. COMM. 1 (2009).

²¹⁰ See, e.g., Linda Greenhouse, "A Tree Grows in Canada," OpEd Column, NEW YORK TIMES, OCT 16, 2013 (accessed online, 11/14/2013): <http://www.nytimes.com/2013/10/17/opinion/greenhouse-a-tree-grows-in-canada.html>.

²¹¹ "While our entry into that thicket was justified because the political process was manifestly unable to solve the problem of unequal districts, no one has suggested that the political process is not working exactly as it should in mediating the debate between the advocates and opponents of gun control." *D.C. v. Heller*, Stevens J., dissenting, 554 US 570, at 680, fn 39. Justice Breyer's dissent in *Heller* reiterates this sentiment, to wit:

[T]he majority's decision threatens severely to limit the ability of more knowledgeable, democratically elected officials to deal with gun-related problems. The majority says that it leaves the District "a variety of tools for combating" such problems. *Ante*, at 636, 171 L. Ed. 2d, at 684.

It fails to list even one seemingly adequate replacement for the law it strikes down.

In *McDonald v. Chicago*, Justice Breyer, again dissenting, elaborates on the deliberative processes of the 50 states:

More recently the justices had an opportunity to confront these issues in the same-sex marriage cases, *U.S. v. Windsor*²¹² and *Hollingsworth v. Perry*.²¹³ Not surprisingly, a decisive issue in both cases revolved about the deliberative process and the Court's own role. Curiously, but also not surprisingly, the conservative core of the Court – Justices Scalia, Roberts, Alito and Thomas – chose to defend some version of the deliberative process insofar as it vindicated those justices' substantive views.²¹⁴ Perhaps more hopeful was the fact that the fifth member of this core, Justice Kennedy, was willing to take a more open-minded and inclusive approach to the political process. Specifically, in writing for the majority in the *Windsor* case, he recognized that the federal law, The Defense of Marriage Act (DOMA), stood in the way of the deliberative processes that had been going on in the states for almost two decades.²¹⁵ In striking down Section 3 of DOMA, the Court enabled the deliberative processes to unfold more robustly and with more nuance. Interestingly, the national-transnational correlation to the heartland-cosmopolitan divergence that I mentioned earlier is reflected in the case quite strikingly; while Justice Scalia goes on about the American Way in his dissent (contrasting it at one point with German procedure), Justice Kennedy begins his opinion as follows:²¹⁶

Two women then resident in New York were married in a lawful ceremony in Ontario, Canada, in 2007.

The fact is that judges do not know the answers to the kinds of empirically based questions that will often determine the need for particular forms of gun regulation. Nor do they have readily available “tools” for finding and evaluating the technical materials submitted by others . . . We have thus repeatedly affirmed our preference for “legislative not judicial solutions” to this kind of problem, just as we have repeatedly affirmed the Constitution's preference for democratic solutions legislated by those whom the people elect. . . There are 50 state legislatures. The fact that this Court may already have refused to take this wise advice with respect to Congress in *Heller* is no reason to make matters worse here.

²¹² 133 S.Ct. 2675 (2013).

²¹³ 133 S.Ct. 2652 (2013).

²¹⁴ In the *Windsor* case dissents, the conservative four sought to retain a federal law that trumped state laws permitting same-sex couples the “marriage” designation on grounds that the Court ought not second guess Congress's deliberative processes. Ideally, Congressional repeal of DOMA Section 3 would have vindicated the deliberative process more directly, so to some degree Justice Scalia and company have a point; but one doubts that this is the conclusion he sought to facilitate. *See, infra* text at note 211. In the *Perry* case majority, Justice Roberts in effect sustained a California referendum that revoked the marriage designation from previously married same-sex couples and denied it to same-sex couples who would be married by vacating two lower federal court decisions on the grounds of justiciability (standing).

²¹⁵ In some states, the rights have been forged through referenda and legislation, in others by judicial decrees under state constitutions. The spread of these new laws has been fairly recent, and the trend suggests that the phenomenon will spread to other states. There is no reason that these states should not recognize each other's domestic relations laws under the “Full Faith and Credit Clause” of the Constitution, just as they have recognized somewhat variant marriage and divorce laws under the same provision of the Constitution.

²¹⁶ 133 S.Ct. 2675, 2682 (Kennedy, J., Opinion of the Court).

So at least we know that Justice Kennedy is open to the cosmopolitan and international perspective.²¹⁷

As I have noted, there were two sets of facts that Brandeis found noteworthy. One set, those that are conventionally understood as “Brandeis’s facts,” support the legislation – much as Justice Breyer called the empirical evidence on gun crime and gun control to the Court’s attention in the two Second Amendment cases.²¹⁸ The other set, those that, as we noted here, appeared in Brandeis’s opening sentences and paragraphs, framed the constitutional significance of the cases as issues of political or deliberative process. Unlike Brandeis, neither the majority nor the dissenters have used Brandeis’s approach to frame the new “substantive due process” cases: Brandeis might have opened his opinion in *Heller* with reference to the 40 years of deliberation that the D.C. City Council had devoted to local crime and the role of handguns; or in the case of *McDonald* he might have opened by noting the multiple approaches of the 50 states and thousands of localities in mediating the desires of hunters, the fears of homeowners, and the devastation of gun violence for over two centuries of American history. Similarly, in *Citizens United*, Brandeis might at some point in an opinion have enlisted the facts of corporate political behavior in support of federal election laws, but he might well have framed his opinion at the start by noting Congress’s ongoing bipartisan attempts to come to grips with the new realities of campaign finance.

Like Justices White and Stevens, Brandeis was no radical. He simply loved his country and wanted the text of the Constitution to serve as a guide to keeping the nation on course toward consensus or at least peaceful co-existence. Perhaps Justice Roberts’s slight departure from his cohorts in *National Federation of Independent Business v. Sebelius* signaled an intention on his part to stop using the Constitution to further narrow interests and ideological preferences, and instead to support consensus-building through the deliberative processes of democratic representatives. Or perhaps it was an aberration. Time will tell.

²¹⁷ See, Jeffrey Toobin, *Annals of Law: Swing Shift*, 81 THE NEW YORKER 42-51 (September 12, 2005).

²¹⁸ In *D.C. v. Heller*, 554 U.S. 570 (2008), see e.g., 693-705 (Breyer, J., dissenting). In *McDonald v. Chicago*, 561 U.S. 3025, 130 S. CT. 3020 (2010), see e.g., 130 S. CT. 3134-3136 (Breyer, J., dissenting).