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### Judicial Criticism

James Boyd White

University of Michigan Law School, [jbwhite@umich.edu](mailto:jbwhite@umich.edu)

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Interpreting  
Law and  
Literature

A Hermeneutic  
Reader

Edited by  
Sanford Levinson  
and  
Steven Mailloux

Northwestern University Press  
Evanston, IL

# Judicial Criticism

James Boyd White

Today I shall talk about the criticism of judicial opinions, especially of constitutional opinions. This may at first seem to have rather little to do with our larger topic, "The Constitution and Human Values," but I hope that by the end I will be seen to be talking about that subject too. In fact I hope to show that in what I call our "criticism," our "values" are defined and made actual in most important ways.

I will begin with a double quotation. I recently heard my friend and colleague Alton Becker, who writes about language and culture, begin a lecture by saying that one universal aspect of cultural life is the keeping alive of old texts, a reiteration of what was said before in a new context where it can have a life that is at once old and new. (The Javanese even have a name for it.) The text that Becker chose to keep alive in his lecture was a remark made by John Dewey when, toward the end of his long life, he was asked what he had learned from it all. He said, "I have learned that democracy begins in conversation." In this lecture I will try, by locating it in a new context, to give that same sentence a continued life.

The process of giving life to old texts by placing them in new ways and in new relations is of course familiar to us as lawyers. It is how the law lives and grows and transforms itself, for the law is nothing if it is not a way of paying attention and respect to what is outside of ourselves: to texts made by others in the past, which we regard as authoritative, and to texts made in the present by our fellow citizens, to which we listen. We try to place texts of both sorts in patterns, of what has been and what will be, and these patterns are themselves compositions. The law is at its heart an interpretive and compositional, and in this sense a radically literary, activity.

Such at least is my view: for others the law is policy, nothing but policy, and the only question what results we prefer; or power, nothing but power, and the only question who has it; or perhaps it is morality, and the only question what is "right" or "wrong." So in these remarks I will be making a claim for the character of law itself, as a way of reading, composing, and criticizing authoritative texts, and in so doing, as a way of constituting, through conversation, a community and a culture of a

certain kind. In doing this I will try to give two other texts renewed life too, namely the opinions of Chief Justice Taft and Justice Brandeis in the famous case of *Olmstead v. United States*.<sup>1</sup>

## I

Much of my previous work has been devoted to trying to work out a method of criticism, or what I call a way of reading, that can afford the grounds upon which we can engage with legal and literary texts alike. This is the object especially of my book *When Words Lose Their Meaning*,<sup>2</sup> in which I elaborate a way of reading that focuses attention (a) upon the state of the language and culture that a particular writer inherits and must use; (b) upon the ways in which that language is reconstituted, for good or ill, in his or her use of it; and (c) upon the social, ethical, and political relations that the text establishes both with its reader and with others. The first stage of the criticism is cultural; the second is literary; and the third ethical and political. A full essay in judicial criticism would address all of these questions, but today I shall direct your attention especially to this last aspect, that is, to the way a judge constitutes a social and political world in his writing; to the way his opinion constitutes him as a mind and as a judge, his colleagues as a court, and his readers as lawyers, citizens, or other kinds of legal and nonlegal actors.

In every opinion a court not only resolves a particular dispute one way or another, but validates or authorizes one kind of reasoning, one kind of response to argument, one way of looking at the world and at its own authority, or another. Whether the process is conscious or not, the judge seeks to persuade the reader not only of the rightness of the result reached and the propriety of the analysis used, but of his or her understanding of what the judge, the law, the lawyer, and the citizen are and should be—in short, of his or her conception of the kind of conversation that does and should constitute us. In rhetorical terms, the court gives itself an ethos, or character, and does the same both for the parties to a case and for the larger audience it addresses—the lawyers, the public, and the other agencies in government. It creates by performance its own character and role and establishes a community with others. This is, I believe, the most important part of the meaning of what a court does: what it actually becomes, independently and in relation to others. It is here that we can find its values most fully defined and realized.

The life of the law is in large part a life of response to these judicial texts. They invite some kinds of response and preclude others; as we deal with these invitations, both as individuals and as a community, we define our own characters, our minds and values, not by abstract

elaboration but in performance and action. The life and meaning of an opinion, or a set of opinions, lie in the activities it invites or makes possible for judges, for lawyers, and for citizens; in the way it seeks to constitute the citizen, the lawyer, and the judge, and the relations among them; and in the kind of discoursing or conversational community it helps to create.

When we turn to judicial opinion, then, we can ask not only how we evaluate its “result” but, more importantly, how and what it makes that result mean, not only for the parties in that case, and for the contemporary public, but for the future: for each case is an invitation to lawyers and judges to talk one way rather than another, to constitute themselves in language one way rather than another, to give one kind of meaning rather than another to what they do, and this invitation can itself be analyzed and judged. Is this an invitation to a conversation in which democracy begins (or flourishes)? Or to one in which it ends?

## II

I turn now to the famous case of *Olmstead v. United States*, to ask of each of the two primary opinions how it constitutes the conversation that defines us. How does it define the Constitution it is interpreting; the process of constitutional interpretation in which it is engaged; the meaning of the Fourth Amendment; the place and character of the individual citizen in our country, and that of the judge, the law, and the lawyer? What conversation does it establish, with what relation to “democracy”? What community does it call into being, constituted by what practices and enacting what values?

To start with the facts of the case: federal officials, with some state police assistance, systematically tapped the telephone wires of persons they suspected to be involved in a large-scale bootlegging operation. They did so without probable cause or a warrant, and in violation of state laws that made wiretapping a crime. Upon the basis of evidence obtained as a result of this activity, the defendant was convicted of a federal offense and appealed. The question is whether the wiretapping violated the defendant’s Fourth Amendment rights, for if it did, the government concedes that the exclusionary rule applies to prohibit the admission of that evidence.<sup>3</sup>

It is important to emphasize that the question is not whether the intrusion was justified—by reason of the degree of probable cause, by the presence of a judicial warrant, or on some other ground—but whether or not what the officers did counts as an intrusion to which the Constitution speaks at all. If it does not, then the police may tap the wires not only of

suspected criminal but of everyone, without constitutional consequence. In this respect *Olmstead* is one of a series of cases that mark out what we are now likely to call the “privacy interests” protected by the Fourth Amendment, the invasion of which requires prior or after-the-fact judicial approval.<sup>4</sup> Subsequent cases have involved such things as affixing a beeper to a car in order to trace its movements;<sup>5</sup> scraping paint from a car in order to make a chemical analysis;<sup>6</sup> taking fingerprints, blood samples, or hair clippings; stopping and frisking people;<sup>7</sup> examining bank records or employment files;<sup>8</sup> and using marijuana-sniffing dogs and undercover agents.<sup>9</sup> The Court’s view on these questions does much to define what it means to be a citizen in our country, for these cases tell us what actions by officials count as intrusions to which the Constitution speaks.

The text of the Fourth Amendment is as follows: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.”<sup>10</sup>

## A.

In his opinion for the majority, Chief Justice Taft makes short work of the defendant’s claim:

The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized. . . .

. . . The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the sense of hearing and that only. There was no entry of the houses or offices of the defendants.<sup>11</sup>

The Fourth Amendment does not apply, he says, because there was no “search” and there was no “seizure,” defining these words in terms of trespass and materiality. This definition is itself arguable—in his dissent, for example, Justice Brandeis will argue that the Fourth Amendment should be conceived of as protecting privacy rather than property.<sup>12</sup> But let us suppose for the moment that we are not to go so far as that, but actually accept Taft’s view that the Fourth Amendment requires a trespassory invasion of an individual’s right. Let us also put aside the argument that the illegality of the conduct itself should require exclusion. Accepting Taft’s property-trespass theory, then, is the result

in *Olmstead* as self-evidently clear and correct as the opinion makes it seem?

I think not. Even on Taft's view of the law the defendant has much to say. After all, the officials undoubtedly trespassed against the telephone company in inserting tapping wires into its lines, and the defendant might well be given standing to protect that interest, especially since in this case the telephone company entered an appearance to argue on his behalf. Or, if a "property" or "possessory" interest on the part of the defendant himself is required, one might argue that he had a leasehold or easement in the wires, created by contract with the telephone company, or an interest created by the operation of trust law—the telephone company holding the wires beneficially for the defendant—or even by the penal law of Washington that made the tapping of the wires a crime. Or the company could be seen as the custodian of the defendant's interests by contract, just as the bank that holds papers in a safe deposit box, the lawyer who holds papers in a file, the United Parcel Service which contracts to deliver a package, can be said to be custodians of someone else's interest. There was, in brief, a trespass, notwithstanding Chief Justice Taft's claim; and there are at least colorable arguments either that the trespass was upon an interest of the defendant, or that, owing to his relation to the holder of the primary right, the defendant ought to have standing to raise the question. But in the Taft opinion no response whatever is made to these lines of argument.

Taft makes another conclusory claim that is also based on what appears to him the plain language of the Fourth Amendment. The amendment speaks of the seizure of "persons or things," and requires a warrant "particularly describing" the "persons or things to be seized." Taft reads this language as saying that intangibles are not protected by it. This is of course one possible reading, but even if it is accepted, it does not necessarily follow that the officer's testimony as to the overheard words should not be excluded. Even if the words themselves are not seizable objects under the Fourth Amendment, their exclusion could be required, for example, because the proffered testimony is the fruit of the admittedly unlawful trespassory invasion.<sup>13</sup>

Moreover, a different reading of the language of the amendment is itself also possible, namely that the seizure of words, oral words, is not covered by the amendment in another sense: not that they are unprotected by the amendment, but that under its provisions they are immune from seizure, at least whenever there is an ancillary trespass. This immunity, it would be argued, arises from the fact that no warrant could properly issue for them (since it would never be possible to meet the particularity requirements of the warrant clause). Finally, and most significantly, it is simply conclusory to say that words cannot be seized—in fact, what took place in this case could fairly be described without any

violence to the term as the "seizure" of words. Analogies from property law can be employed to support this result, for under federal law today, and under state and federal law then, words can be made the object of property under copyright laws. The right to say or to write them can be bought and sold. And if the state may create a property right directly, through its copyright laws, why can it not do so indirectly, through its penal law, prohibiting the seizure of some words in some circumstances?

The point of these remarks is not to argue that words are seizable objects, or that a trespass against the defendant occurred, or any of the other matters suggested above, but merely to make plain that colorable arguments along these lines can be developed, none of which was addressed by Taft. If Taft did not meet such obvious arguments in his opinion, upon what do you suppose he relied to make the conclusory language quoted above persuasive to his readers? You will read his opinion in vain for an explicit justification of those characterizations. He discusses cases, but only in the most conclusory way, summarizing their facts and sometimes their holdings, but never attempting to draw in an analytic way a connection between those cases and the case before him. (He says, for example, of *Gouled v. United States*,<sup>14</sup> which dealt with a surreptitious filching of papers, that it "carried the inhibition against unreasonable searches and seizures to the extreme limit."<sup>15</sup> But he says nothing to explain or validate that characterization.)

I think that the answer to the question of what Taft relies upon to make his conclusions persuasive to his reader is that he depends more than anything else upon the very power of characterization that he has exemplified throughout his opinion, upon the voice of authority with which he has been speaking. For he repeatedly characterizes both the facts and the other judicial opinions with a kind of blunt and unquestioning finality, as if everything were obviously and unarguably as he sees them, and in doing this he prepares us for the conclusory and unreasoned characterizations upon which the case ultimately turns. He makes a character for himself in his writing and then relies upon that created self as the ground upon which his opinion rests. This character, as I will suggest more fully below, is that of a simple, even simple-minded, authoritarian.

There is a kind of self-evident circularity about this, of course, but here as elsewhere arguments from self-evidence have a remarkable power, at least to those disposed to share the basic premises. And if we accept his lesser characterizations of fact and law, for whatever reason we do so, we find ourselves increasingly ready to submit to the final and conclusive characterization.

What is the view of the Constitution, the law, the citizen, the reader, that is enacted in this writing? For Taft the Constitution is a document that is in its own terms authoritative, telling the rest of us what to do. It has, so far as can be gleaned from this opinion, no higher purposes, no

discernible values, no aims or context; it is simply an authoritative document, the ultimate boss telling the rest of us what to do. The task of the judge is to be an intermediate boss, producing a text that has a similar structure: not reasoned, not explained, not creating in the reader the power that reason and explanation do—for if you are unpersuaded by an opinion that purports to rest upon reason you may reject the authority of the opinion itself—but an act of power resting upon power, pure and simple. The Constitution is a document written in plain English making plain commands: if you think they are not plain, wait till I have spoken and I will make them plain.

If one were to read this text as a literary text, and ask what it is that Taft really values and thinks is important, the first answer would be his own voice and his own power; the second, rather surprisingly, would be the criminal enterprise itself. He describes this at great length and in glowing terms:

The evidence in the records discloses a conspiracy of amazing magnitude to import, possess and sell liquor unlawfully. It involved the employment of not less than fifty persons, of two seagoing vessels for the transportation of liquor to British Columbia, of smaller vessels for coastwise transportation to the State of Washington, the purchase and use of a ranch beyond the suburban limit of Seattle, with a large underground cache for storage and a number of smaller caches in that city, the maintenance of a central office manned with operators, the employment of executives, salesmen, deliverymen, dispatchers, scouts, bookkeepers, collectors and an attorney. In a bad month sales amounted to \$176,000; the aggregate for a year must have exceeded two millions of dollars.<sup>16</sup>

Taft then describes with similar, but perhaps somewhat less intense, feeling the attempts of law enforcement agencies to bring this conspiracy to its knees: “The gathering of evidence continued for many months. Conversations of the conspirators of which refreshing stenographic notes were concurrently made, were testified to by government witnesses. They revealed the large business transactions of the partners and their subordinates.”<sup>17</sup> That is what this voice admires: organization, scale, enterprise, and success. It would be possible to imagine someone saying, “The Constitution of the United States is an achievement of amazing magnitude.” But Taft’s enthusiasms and admiration, as expressed in this text at least, lie elsewhere.

Not that he makes no reference to the Constitution: at the end of this long statement of the facts Taft abruptly interposes the language of the Fourth Amendment, flopped before us like a pancake. The reader cannot help wondering what this language can possibly have to do with the detective story we have just read, with this thrilling world of organized scale and competition, for Taft—in this sense a “realist”—the real world.

This is of course exactly the feeling that Taft's opinion is designed to elicit in us, the sense that the Fourth Amendment has nothing to do with what is really at stake in the case. And this narrative implicitly supports the constitutional ideology he has been obeying, for it invites us to see power and force as real, language as simple, and government as about the struggle between the forces of good and the forces of evil. Nothing more than that and nothing less. And law is simply the will of good authority.<sup>18</sup>

To sum up: Taft has, and exemplifies in this opinion, a view of the process in which he is engaged that goes something like this: "My job is to decide this case in light of the Constitution. Here are the facts. They are as plain as can be. Here is the text. It is as plain as can be. It speaks of searches and seizures and here there is neither." This is a commitment by Taft to a particular text and to a particular way of reading it: for him it is simply authoritative, composed in plain English—therefore plainly readable and simple—and to be read "literally." Since there is no such thing as "literal" reading of words, that repudiation of ambiguity and complexity itself works as an unexposed, unexplained, and unjustified claim to authority, including the authority to reduce difficulty to simplicity—a claim to an authority that is in fact implicit in every claim to read language "literally."

The function of the court as Taft enacts it is thus not to reason, not to argue, not to explain, but to declare the meaning of an authoritative text. The judge is qualified for this function primarily by his position as judge; but also self-qualified, in the opinion itself, by the skill and force with which the facts and law are stated, and by the very force of his voice: in this instance a no-nonsense voice, business-like, a bit that of a crusty old boss from a 1930s movie. And the congruence or harmony between Taft's view of the Constitution and his view of his own role under it, between his voice and his sense of the Constitution's voice, gives his performance the great rhetorical force that arises when different dimensions of meaning coincide.

What kind of argument does this opinion invite in future cases, what kind of conversation does it establish? The answer is, "Make any argument you want and I'll tell you what the result is." The opinion invites a conversation of countering characterizations, conclusory in form, between which the judge will choose, or which he will resolve by making characterizations of his own.

What kind of education is required to perform the function Taft defines, or to argue to him, or to be a lawyer or judge in our system as he sees it? The answer is very little. You must know the legal categories in which the conclusions will be stated, and be able to relate them to each other. But the only question contemplated in this opinion is whether the person speaking has the authority to make his characterizations, not

whether something is right or wrong. Legal training, if it were guided by this opinion, would be training in making one's voice authoritative, unquestioning and unquestionable.<sup>19</sup>

To judge from this opinion, what is the Constitution in general, the Fourth Amendment in particular, really about? What values do these texts establish, what values do we serve in our reading of them? For Taft, as he writes here, neither the Constitution nor the Fourth Amendment is about anything very important or valuable; it is simply a set of words that tells us what to do. Real value is to be found in the fact of authority, in the reduction to simplicity, in the "no-nonsense" voice, in the very control, acquiesced in by his reader, over the facts and the language of the case.

Why does this kind of performance work as well as it does? I think because it appeals to our desires for simplicity, for authority of a certain kind, and for a boss who will tell us what things mean and how they are. These desires show up again, with quite a different quality, in the work of Justice Black, who struggled valiantly to see in the Bill of Rights a certain and clear body of law by which "due process of law" could be defined.<sup>20</sup> We often see a similarly authoritarian claim, acquiesced in for similar reasons, in the interpretation of sacred texts: a person, or a group, claims the authority to declare the meaning of the sacred language, with which it is in fact the individual's responsibility to engage as an autonomous and present person, and we yield to the claimed authority. We do so because it relieves us of the task and responsibility of facing what is difficult, complex, and uncertain, of making judgments of our own, of responding as ourselves. To yield in either context is to destroy the life the text makes possible; yet we do it. When we do so we participate in a conversation that is not the beginning but the end of democracy.

## B.

The opinion of Mr. Justice Brandeis, justly famous, is different in almost every respect. To begin with the statement of the facts, Justice Brandeis (not surprisingly) describes not the "conspiracy of amazing magnitude"<sup>21</sup> of the defendants but the behavior of the federal officials who arranged to tap the defendant's telephone wires: "To this end, a lineman of long experience in wire-tapping was employed, on behalf of the Government and at its expense . . . . Their operations extended over a period of nearly 5 months. The typewritten record of the notes of conversations overheard occupy 775 typewritten pages."<sup>22</sup> This is to focus the reader's attention not on the criminal enterprise engaged in by the defendant but upon the government's conduct. Brandeis concludes by saying that the government concedes that its conduct was unreasonable and thus, if

there is a search or seizure, that the evidence must be excluded. It "makes no attempt to defend the methods employed by its officers," but instead "relies on the language of the Amendment; and it claims that the protection given thereby cannot properly be held to include a telephone conversation."<sup>23</sup>

This is to put directly in issue the question how that language should be read. Instead of simply asserting a conclusion, or implying as Taft did when he quoted the language, that one answer was obviously right, Brandeis focuses our attention on the general question of interpretation and puts the burden of advancing its interpretation on the government. He thus poses a question, never explicitly addressed by Taft: how are we to think about our reading of this text?<sup>24</sup>

His first step in responding to that question is to begin his next paragraph with the famous remark of Chief Justice Marshall: "We must never forget that it is *a constitution* that we are expounding."<sup>25</sup> This is to assert, against Taft, that the question how the Constitution ought to be read, or expounded, deserves explicit thought of a special kind. Brandeis next defines what *expounding* has meant in the past by summarizing cases in which the Court sustained the exercise of powers by Congress over "objects of which the Fathers could not have dreamed."<sup>26</sup> This is a way of showing that the kind of "nonliteralist" reading he favors, which he calls "expounding," has been part of our tradition not only on behalf of the individual in his struggles with the government, but on behalf of Congress itself. The next series of examples shows that the Court has expressed a similar view of the Constitution in its approval of state regulations which, quoting *Euclid v. Ambler Realty Co.*, "a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive."<sup>27</sup> Only then does Brandeis move to clauses protecting the individual and claim that they must be read in the way he has now established as traditional and neutral, to allow for adaptation to a changing world.

But exactly what is this way of reading? If a "literalist" reading of the Constitution will not do, what will? Brandeis has given examples of flexibility but no general principle, and the principle of "adaptation" alone will not do, for it is a principle of change for its own sake. To meet the need he has created, he now quotes from *Weems v. United States*:<sup>28</sup>

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions . . . . [O]ur contemplation cannot be only of what has been but

of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power.<sup>29</sup>

Brandeis uses this language to define his own fundamental attitude: that the interpretation of the general language of the Constitution, though naturally to be informed by the nature of the evils or mischiefs which gave rise to the language in the first place, must not be limited by those configurations, but should be guided by an understanding of the general evils, or goods, of which these are local examples. This view of what the Constitution is and how it is made is altogether different from Taft's, and it is ultimately based on a different vision of human life: that we have limited intelligence, limited imagination, limited grasp of facts; that our thinking is naturally shaped by our immediate experience; that we live in time, through which our experience and every aspect of our culture changes; that a central object of collective life is at once to maintain a central identity while undergoing this process of change and to learn from that process; and that all this was as true of the Framers of the Constitution as it is of us today.

In Brandeis's view the Constitution in fact addresses these very limitations, for it provides us with collective experience and with institutions by which we can to some degree transcend our circumstances. The point of the Constitution is to enable us to bring into our minds at once both our own experience and that of our predecessors, and to think about that experience as a whole in a disciplined way: it is in principle a mode of education and self-creation over time.

The Framers, that is, sought at once to establish and to limit their government, basing their effort on views of the individual, of democracy, and of republican government that made sense to them, and that were partly—but like all views, only partly—susceptible to definition and expression in their own language. They spoke that language directly and with confidence. But they also wished this text to be authoritative in other contexts, in other configurations of social reality, in conjunction with other languages. They therefore must have meant it to be read in a way that would permit it to be relocated in a new, and in principle to them unknowable, context, that is, “nonliterally.” What is required in interpreting the Constitution, therefore, is something like translation, a bringing into the present a text of the past. But we all know that perfect translation is impossible—no one thinks that Chapman's Homer is Homer, or Lattimore's either—and this in turn requires us to recognize that our own formulations of the meaning of the text to which our primary fidelity extends must be made in the knowledge that they are in part our own creation.

This view of constitutional interpretation requires of the reader not merely the explication of plain English, as Taft's method does, but the

capacity to penetrate the surface of language, and of social and cultural reality as well, in order to reach an understanding of the deepest questions that arise in social life, forever changing their particular forms. It requires, as all translation does, an attempt to be perfectly at home in two worlds, an attempt that must always fail. Our compositions should therefore reflect an awareness of the silence, the ignorance, that surrounds them. What Brandeis asks of the judge, and therefore of the lawyer, is not merely the ability to characterize facts and language as meaning one thing or another, but the capacity to find out what has been, what is, and what shall be, and to conceive of the Constitution as trying to provide, through its language, and through the general principles that it expresses, a way of constituting ourselves in relation to our self-transforming world.

But how is all this to be done? Brandeis has implicitly committed himself to exemplifying the process that he recommends, and he proceeds to do that. He says, "When the fourth and fifth amendments were adopted, 'the form that evil had theretofore taken,' had been necessarily simple. Force and violence were then the only means known to man by which a government could directly effect self-incrimination."<sup>30</sup> But circumstances have since changed—"time works changes"—and the government has already discovered other means for achieving its primary objective, "to obtain disclosure in court of what is whispered in the closet."<sup>31</sup> And since we are to think about "what may be," it also becomes important for Brandeis to say that "the progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping."<sup>32</sup> One can scarcely imagine what may be possible in the future. He concludes by asking, "Can it be that the Constitution affords no protection against such invasions of individual security?"<sup>33</sup>

Or, to put his question slightly differently, are we unable to think about this question in any terms other than those actually used by the Framers, not only in the Constitution but in the rest of life? If so, the Constitution in the nature of things cannot endure, for its continued life requires its constant translation into new circumstances, new terms, a translation to which the Constitution itself offers guides, through what Brandeis calls its "principles." The text must be removed from the web of associations that once gave particular meaning to its terms and relocated in a new set of such associations. The text remains the same, but its translation—its being carried over—to our own time locates it in a new context of particularities which will, and should, give it a transformed meaning.

How is this to be done in practical terms? Here Brandeis shows what is peculiar to the lawyer's way of facing these questions, by turning to precedent. He begins with *Boyd v. United States*,<sup>34</sup> defined now not merely as an invoice-discovery case, but as establishing the right to

personal security, personal liberty, and private property. For Brandeis *Boyd* is about the relation between the individual and the government on the most fundamental level, establishing zones into which the government may not enter. *Ex parte Jackson*,<sup>35</sup> which held that a sealed letter in the mails was entitled to Fourth and Fifth amendment protection, is for him not distinguishable, as it is for Taft, but squarely on point. Taft had wanted to say that *Jackson* was different from *Olmstead* because the government had created the monopoly involved in that case. Brandeis denies the distinction: "The mail is a public service furnished by the government. The telephone is a public service furnished by its authority. There is, in essence, no difference between the sealed letter and the private telephone message."<sup>36</sup> It is true that one is tangible and the other not, but the evil—the invasion of privacy—of wiretapping is actually far greater than that involved in tampering with the mails. That is, when you look at judicial precedent the way that Brandeis's conception of the Constitution and of law more generally requires us to do, with an eye to the general principles and aims of the texts in question, the distinctions upon which Taft relies disappear. Conceived of as a case about privacy, as Brandeis says it should be, *Jackson* actually establishes the principle for which the defendants argue.

Brandeis then turns again to the general question of constitutional construction, arguing that "an unduly literal" method of construction ought to be rejected in this case as it has been in others. The nature of the Constitution requires an examination not merely of its words but of its "underlying purposes." In this spirit he summarizes the holdings of the cases since *Boyd*, which have, he says, settled the following things:

Unjustified search and seizure violates the Fourth Amendment, whatever the character of the paper; whether the paper when taken by the federal officers was in the home, in an office, or elsewhere; whether the taking was effected by force, by fraud, or in the orderly process of a court's procedure. From these decisions, it follows necessarily that the Amendment is violated by the officer's reading the paper without a physical seizure, without his even touching it; and that use, in any criminal proceeding, of the contents of the paper so examined—as where they are testified to by a federal officer who thus saw the document or where, through knowledge so obtained, a copy has been procured elsewhere—any such use constitutes a violation of the Fifth Amendment.<sup>37</sup>

This is an argument from a series of holdings to a general conclusion (which he will shortly state in terms of "privacy") that determines the result in the particular case. Brandeis here exemplifies the process by which the Constitution, according to him, should be read—the method of "expounding" that is required by the temporal and shifting nature of our experience, and by the central aim of the Constitution, which is to

provide a matrix of relations between the individual and the government that can endure throughout the changes of social and intellectual forms. In making the translation from one context to another, in pushing the old text into current life, Brandeis shows that the lawyer and judge are not at sea but have the assistance of precedent, the set of prior translations, that themselves form a kind of bridge from one world to the other.

In his most famous passage Justice Brandeis states as fully as he can the general principle which he perceives lying behind the constitutional language.

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the Government, a right to be let alone—the most comprehensive of rights and the right most valued by civilized men.<sup>38</sup>

This is a translation not only into contemporary legal language but beyond it, into contemporary ordinary language, into the vernacular. It thus invites a conversation not only among lawyers but among citizens, a conversation in that sense democratic. But this language does not supplant the law—the last thing Brandeis argues for is the elimination of our cultural past in favor of the uninformed view of the moment. It is in fact his work with the legal language preceding this passage that has both made possible and justified this return of the Constitution to the people.<sup>39</sup>

As a second ground of reversal, Brandeis says that the crime committed by the federal officers renders the evidence seized inadmissible. "Here, the evidence obtained by crime was obtained at the Government's expense, by its officers, while acting on its behalf."<sup>40</sup> For Brandeis the admission of the evidence constitutes a ratification of the lawbreaking. "When these unlawful acts were committed, they were crimes only of the officers individually. The Government was innocent, in legal contemplation; for no federal official is authorized to commit a crime on its behalf."<sup>41</sup> But the admission of evidence constitutes a deliberate ratification of the illegal conduct, and this is violation of the deepest principles of self-government. He also invokes the settled principle that a court will "not redress a wrong when he who invokes its aid has unclean hands," and applies it to the present case.<sup>42</sup> What is significant here, especially after his earlier invocation of the vernacular, is his confidence in traditional legal language and categories—"ratification," "clean hands"—as his language of judgment. This embeds his opinion in the legal context as his earlier paragraph embedded it in the vernacular.

In his final paragraph he establishes himself, and his voice, in the following terms:

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.<sup>43</sup>

It is not only the government that is the teacher: Brandeis establishes his own voice as that of a teacher, a teacher who must first learn, and who by having learned may teach. This is in turn to define the law, legal education, the Constitution, and all that is involved in thinking about a case such as this, as challenging every intellectual and moral capacity.

So what for Brandeis is a constitution? What is the judge's role? How is one to be qualified for the role that he defines? What is the meaning and importance of the enterprise in which he is engaged?

As for the Constitution, his view is, as I said above, that the Framers, located in one cultural and social context, sought to create a document that would establish a government, limit that government, and protect individuals, all in the service of a larger understanding of the individual and his relation to his polity. The formulations employed by the Framers were necessarily rooted in their experience, and have a necessarily incomplete reach because the power of the human imagination to grasp the future is limited. For the most part they employed not archetypal examples or strict rules, but generalizations as their way of establishing a set of relations, a set of institutions, and a set of ways of thinking and talking that could structure our common life in the future. Certain language was broken out of its original context, set aside, and given special authority, so that it could be given a new range of significances, in new and in principle unknowable contexts, for it was meant to reach not only what was but what might be.

Since everything shifts constantly, as time goes on, how can the Constitution possibly reach what might be? The answer is only through the process by which we read it correctly and well. The Constitution is made, then, according to Brandeis, not merely by the Framers, but by those who read the language of the Framers well, who translate—"carry

over"—its terms to the contemporary world, aided as they are by the earlier efforts at translation.

What is involved in this enterprise as Brandeis defines it? The answer is everything: the intellect, the capacity to read and express, the ability to penetrate surface forms to underlying truths, the sensitivity to shifts in social and intellectual forms, all in the service of the wise and just definition of the individual and his government. The reading of the Constitution is a stage in the making of the Constitution, and everything that is present in that activity is present in this one: the definition of a civilized polity operating under the rule of law and protecting the deepest values of the culture. Accordingly, to become a good judge requires the greatest education imaginable: education that will train us to see what the Framers saw; to hear their language and to penetrate it; to see by analogy what fits and what does not; to see through the surface to the underlying truth, almost as Plato says one sees through the surfaces to permanent ideas and ideals; to translate an old text into the current world.

But more even than this is required, for the opinion, on Brandeis's view, is constitutive in another way: it becomes part of the Constitution itself, and this means that the judge must be able to create a constitution, with his readers, of a kind that fits with, and carries forward into the future, the earlier constitution out of which he speaks. This requires Brandeis to become a maker and remaker of language. He makes a formulation, "the right to be let alone," that connects our own vernacular with the language of the Constitution and our past. A proper legal education, for lawyer as well as for judge, will be an education into the past as well as the present, an education of the vision and the imagination, and will ultimately require all of us to be, as Brandeis demonstrates himself to be, a teacher. For as judges, as well as in our other capacities, we teach our values by what we do, whether we know it or not. In the world defined by Brandeis, who would not be a lawyer?

The heart of Brandeis's opinion lies in a vision of human culture working over time, in a sense that we have something to learn from the past as well as something to give to the future. Nothing could be farther from our contemporary idea of the individual as sovereign consumer, implementing his tastes in competition with others. Brandeis had a vision of the individual and the community alike engaged in a continual process of education, of intellectual and moral self-improvement, and of the law in general, and the Constitution in particular, as providing a central and essential means to this process. The community makes and remakes itself in a conversation over time—a translation and retranslation—that is deeply democratic not in the sense that it reflects, as a market or referendum might, the momentary concatenation of individual wills, but in the sense that in it we can build, over time, a community and a culture that will enable us to acquire knowledge and to hold values of a sort that

would otherwise be impossible. The conversation is democratic in its ultimate subjection to popular determination, in its openness to all who learn its terms, in its continuity with ordinary speech, but most of all in its recognition that the essential conditions of human life that it takes as its premises are shared by all of us.

### C.

One final point remains. The reader will have noticed that in this case it is the law-and-order man who is authoritarian in his voice and style, and the defender of individual rights who speaks as an individual himself and to us as individuals. Could this pattern be reversed?

I certainly think it would be possible to write an opinion that was authoritarian as Taft's but came out the other way, say by simply declaring that this is a search or that the amendment protects privacy and stop. (Some of Justice Douglas's opinions have that flavor,<sup>44</sup> as indeed does Justice Stewart's opinion in *Katz v. United States*,<sup>45</sup> the case that finally overruled *Olmstead*: "The Fourth Amendment protects people, not places."<sup>46</sup> It is also true that I would not subscribe to every aspect of Brandeis's opinion; his prose is sometimes too heavy-handed for me, and I would have preferred to expand the meaning of "search" and "seizure" rather than leaping to "the right to be let alone," language that in fact has authoritarian elements of its own.

But how about an opinion "coming out" the way Taft's opinion does: can one imagine a good opinion doing that? It is certainly possible to imagine a better opinion doing so: one, for example, that spoke of the dangers that a new technology presented in the hands of lawbreakers, of the national crisis of law enforcement presented by bootlegging, of the respect to be accorded the judgment made by the executive (which is, after all, democratically accountable), of the reasons why the states should not be able to interfere with a national solution to a national problem, of the need for adaptation in constitutional interpretation, and so on, or perhaps one explaining by reference to history why a strictly material conception of "search" or "seizure" is appropriate. As you can tell from this summary, I think it would be hard to do this very persuasively, but we cannot know that until someone has earnestly tried it.

To return now to my earlier claim that the distinction between opinion and result, form and content, ultimately disappears: for me all this means that the standards of excellence by which I have suggested that we measure the literary work of the judge—his definition of himself, of us, and the conversation that constitutes us—are not merely technical, or verbal, but deeply value-laden and substantive. If we can arrive at shared standards of excellence in the domain that has been my main

concern today, that of the nature and quality of judicial thought, of the ethics and politics of the judicial text, I think this will limit the range of substantively permissible, or reachable, decisions, including in "hard" cases. You cannot write a great novel in support of anti-Semitism, says Sartre, and I think you cannot write a great opinion that denies that sense of the ultimate value of the individual person that is necessarily enacted in any sincerely other-recognizing expression.

Will the range of permissible or good decisions ever narrow to "one correct result" in every case? Not while we are human beings, living in the world Brandeis defines—full of ignorance, with disturbed and feeble imaginations, caught by motives of which we are incompletely aware. We will always have much to disagree about. But if we focus real attention on the aspects of meaning I have tried to identify above, and ask ourselves and each other what excellences we demand there, we shall be engaging in a conversation that will move us in the direction of enlightenment and justice in our votes, as well as our expressions.

### III

I have offered you one reading of these opinions. There is much more to say about them, for example that it is in some sense "unfair" to abstract Taft's opinion from the larger context of his work as a whole, or, more accurately, to draw sweeping conclusions about his work as a whole from this one text; that a part of the meaning of both opinions, untraced here, lies in their interactions with each other, with the other opinions in the same case—especially the striking opinion by Holmes—and with those from earlier cases as well; and that the soundness of Brandeis's claims about "privacy" and the intentions of the Framers is open to question. It is certainly true that Brandeis's image of the Framers is romantic and itself unargued; that his talk about "principles" is a bit simple-minded and his application of them more than a bit authoritarian; and that he may be thought inadequately respectful of the language actually used in the constitutional text.

I also want to make explicit what the reader has no doubt felt, that I myself give, by construction, Brandeis's opinion some of the meaning I claim for it, just as he gives the Fourth Amendment some of the meaning he claims for it. This, I think, is inevitable. The reader of this paper will in turn give it much of whatever meaning he claims for it. The text at once creates and constrains a liberty (or a power) in its reader, and in doing so defines for the reader a particular kind of responsibility. It is in that combination—liberty, constraint, and responsibility, for the reader and maker of texts—that the ethical and intellectual heart of the law can be found.