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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, towards 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

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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*.¹

I.

In speaking of the criticism of judicial opinions I mean to accept, though only for the moment, the rather common separation of the opinion from the result, the form from the content, and to focus upon the former: the text in which the judge explains or justifies or otherwise talks about the decision that he, and his court, have reached in the particular case.

It is, after all, to a large degree in the opinion, not the decision, that the great judge manifests his or her greatness: anyone can vote his intuitions or biases or feelings—for or against the plaintiff, the poor, the rich, the government—and in the nature of things all our decisions of that kind are ultimately mysterious, even to ourselves. The great contribution of the judicial mind is not the result but the judicial opinion, the text in which the case is characterized and located with respect to a series of prior, authoritative texts, perhaps assimilated to one line, distinguished from another; in which competing lines of argument are developed fully and fairly, with the object of exposing to view what

¹ *Olmstead v. United States*, 277 U.S. 438 (1928), *overruled*, *Katz v. United States*, 389 U.S. 347 (1967).

is most deeply problematic both in our resources of legal meaning and in the case upon which they bear; in which all the power of generality is brought to bear upon a case presented in full particularity; and in which the speaker is constantly sensitive to the imperatives and limits of his or her institutional situation. Such are the opinions we were as students taught to admire, that themselves taught us what there was to admire in the law and in the legal process. Of course, results matter too; but most cases that reach the Supreme Court, at least, are hard—decent and intelligent people could vote either way and in fact have usually done so—and in an important sense what most distinguishes the work of a good judge is not the vote but the achievement of mind, essentially literary in character, by which the results are given meaning in the context of the rest of law, the rest of life.

Of course, I do not mean to say that the results in particular cases, their “merits,” do not matter. The result is always important to the parties and in a series of results a court defines itself, the law, and us, in important ways. But what are those “results”? At the most rudimentary level they are a series of judgments of affirmance or reversal, or perhaps refusals to review, each of which may be of great significance to the parties involved and perhaps of some interest to others. But beyond this simple act of approval or disapproval the meaning of the case—of the result—must lie in the language and opinion of the court, in what it is made to mean in the first instance by the judges, and in the second instance by us.

The distinction between result and opinion with which I began thus itself breaks down, for perhaps the most important result is the opinion itself.² This line is blurred in another way as well, for part of our faith as lawyers is that the process of judgment and explanation that the opinion requires, or makes possible, is itself deeply educative, a training of the mind and sensibility of the individual judge—of the collectivity of judges, of the lawyers and the public—of such a kind that over time the decisions in

² The “result” may also be the absence of an opinion, as where a court denies certiorari, or exercises one of the other passive virtues (or vices), without an opinion, or with a rudimentary one, in an act of expressive, perhaps even eloquent, silence.

the cruder sense, the votes, as well as the opinions, will be more sound, more intelligent, and more just.

Another way to suggest the line of thought I am taking is to invoke the feeling, familiar I suppose to all lawyers and law professors, that there is often something to admire in an opinion with the result of which we disagree (in the simple sense that we would have voted the other way) and often something to deplore in opinions which "come out" the way we would vote if we had the responsibility of judging. There is, then, for all of us a standard of judicial excellence that is different from the standard by which we determine how we would have voted on the question of affirmance or reversal. My questions are, what is that standard of judicial excellence, and what can it become?

Our language for talking about these matters is not very satisfactory, a fact that is revealed with special sharpness by the difficulty many of us have in explaining our strong but inarticulate feeling that the art-form of the judicial opinion has in recent years fallen on very hard times indeed. "Judicial opinions are becoming worse and worse," we find ourselves saying with increasing frequency. But when we are asked to explain what we mean, most of us fall into an embarrassed silence: we perhaps claim that the "level of analysis" is "lower" than it used to be, or the "quality of mind" less "acute," or some such thing, but beyond that kind of conclusory remark we have very little to say. Some people—notably my colleague Joseph Vining at Michigan—have tried to explain the deterioration in quality as resulting from the bureaucratization of law, from the writing of opinions by law clerks for example, and there is a great deal of force in that line of thought. But at the moment I am interested less in why the discourse of the law has deteriorated than in what that deterioration itself consists of: What do we mean—or what can we mean—when we say that judicial opinions are worse than they used to be? Does this deterioration really matter much, and if so, why?

These are large questions, to say the least, and today I can at most make a beginning on them. My main objective is to start to work out a language of judicial criticism, a language in which

the various possibilities of this form, for good and ill, can be identified and judged.

II.

It may be surprising to suggest that we do not know how to criticize judicial opinions well, for in law school, both as students and as teachers, we seem to do little else. The judicial opinion is the center of our work. Learning to "analyze" and judge the opinions is what we do—it is the core of a legal education—and we have traditionally believed that this is a good thing. Learning to read judicial opinions is the best possible way to learn to "think like a lawyer," we say, and thus the best possible way to prepare to engage not only in judicial argument but in all the other activities that make up a lawyer's life, such as negotiation and drafting. Nearly everything that lawyers do takes place on the understanding that our ultimate forum is likely to be judicial, and this means that some kind of judicial criticism is necessarily present in all that we do.

But what kind of judicial criticism do we actually practice and teach? What is the language in which we describe how opinions are made, in which we admire and condemn what we see? What, that is, is the equivalent in law and law school of historiography, of the philosophy of science, or of literary criticism, in the fields to which those disciplines relate?

A.

The established tradition of judicial criticism, like the legal tradition more generally, has been a craft tradition, in which we all too often speak as if all "good lawyers" (and sensible people) will automatically see what is to be admired in a judicial opinion, and what condemned, as soon as it is pointed out to them. This form of judicial criticism is in structure similar to the old-fashioned kind of literary criticism that consisted of pointing out "beauties" and "defects." Thus in class we will work over a judicial opinion, testing its "reasoning," looking for omissions or weak arguments and the like, and leave the class with a sense, usually, of defectiveness. The students learn to criticize by imitating and pleasing a master, and all too often the kind of crit-

icism they learn is fundamentally destructive in nature. (One is sometimes reminded of Swift's definition of the "*True Critick*": he is "*a Discoverer and Collector of Writers Faults.*")³ But the students are to imagine themselves doing it better, and it is in this imagined compositional process that the center of a legal education can be found.

I believe that there is much to be said for this kind of teaching, not only intellectually but ethically;⁴ but it requires some shared sense of what we admire and what we deplore, or at least a language in which to talk about our different views of these things. And the craft tradition does not supply this need, both because that tradition by its nature provides almost nothing to serve as a language of criticism and because the consensus of taste or value underlying it has for some time been breaking down, leaving little or nothing to take its place. We are left with the question, how can we make what we do the subject of conscious and critical thought of a respectable kind?

One common academic tendency has been to disregard the opinion itself and to focus solely on the result, piercing the felt artificiality of the words to reach the "reality" that lies behind them. Such was the effort of the "legal realism" that sought to penetrate the seemingly deceptive, or self-deceptive, formulations of traditional legal discourse. This of course did not wholly avoid the problem of criticism, for one had still to ask how the results were to be explained and criticized; but it did relocate it, by directing attention away from the composition the judge makes towards the holding and its consequences. And it suggested a method too, at least for minds inclined to think in terms of social science. Surely one social science or another would be adequate to the job—at the beginning, and on the left, sociology and psychology; latterly, and on the right, economics. The idea of all of them is that we can "see through" the opinion (which is, after all, only words) to the reality that lies behind it, which can

³ J. SWIFT, *A TALE OF A TUB* 95 (A.C. Guthkelch & D.N. Smith eds. 1920).

⁴ For development of this view, see my article *Doctrine in a Vacuum: What a Law School Ought (and Ought not) To Be*, 18 MICH. J. LEGAL REFORM 251 (1985), reprinted in 36 J. LEGAL ED. 155 (1986), and my book *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* chs. 2, 5 (1985) [hereinafter J.B. WHITE, *HERACLES' BOW*].

best be talked about not in legal but in social, psychological, or economic terms.⁵ About that kind of reality we all have a lot to say and a lot of languages to say it in. The extreme step in this direction is to declare that there is, or ought to be, no discourse that is distinctively legal, no distinctive legal questions, methods, or institutions. All is reduced to the level of policy or politics.⁶

But important as the "results" of opinions are, and necessary as it is that we be able to talk about them in many ways, in my view these efforts have failed badly, in large part because they have denied another reality, that of the opinion itself, which gives the "results" their most important definition and meaning or, to put it another way, in which the most important "results" can actually be found. In doing so, they erase what is distinctive about legal judgments: that they are not simply policy or political judgments, made by actors with assumed despotic powers, but judgments made by actors with limited authority, an authority that is governed by texts, external to themselves, to which they must look to determine both the proper scope of their power and

⁵ There is a tendency in this tradition to avoid the problem of criticism by seeing the task of the analyst as that of scientific explanation alone. One shows how the result was determined not by the law but by social, political, psychological, or economic forces external to it. In form this is not to judge but merely to explain. The nonlegal reality examined by this method is the antecedent, not the result, of the opinion. But this exclusively backward-looking focus is hard to maintain, to say the least, and when such an analyst looks forward and seeks to describe, and to judge, the future created by an opinion, he is likely to do so in the particular language that he has used to describe, or create, past reality.

In its crudest form the tendency of this kind of realism is to reduce not only the opinion but all verbal activity (except its own) to an epiphenomenon at best, hypocrisy at worst, and all conduct to behaviorism. This kind of thinking obviously offers little assistance either to the judge faced with the tasks of deciding a case and writing an opinion or to the lawyer addressing him or her. And in all the forms that I know it, including the most sophisticated, "legal realism" suffers from the defect of being unaware that what we see as the larger social "reality" is itself in large measure the function of our language and our habits of mind, not simply and factually "there" to be observed. "Reality," that is—like the "law"—is not discovered but made; and we are responsible for the realities we make, including those by which we propose to test the law.

⁶ This is the dominant assumption of much academic legal criticism today, for the assumptions stated in this paragraph are the foundation of "law and economics" and "critical legal studies" alike.

the standards by which it is to be exercised. Every lawyer, after all, must ground almost every argument she makes in an interpretation of a text external to her and to her audience alike. The statute, the opinion, the contract, the constitution, the regulation—these give her the terms with which her issues are stated, they define the topics she and her audience must address. At its heart, law is a process of the interpretation and composition of authoritative texts, a fact that is simply ignored or denied by those who would “look through” the text to something else.

The policymaker—whether he speaks in the classroom, on the pages of journals, in the legislature, or in the courts—assumes for the purposes of his present speech that he has despotic powers to create “the best results” for the parties and for society as a whole, whether this is defined in terms of solving a problem, or maximizing utility, or defending rights or liberties. The only question is, what is the best result? This question can be asked in general terms or particular ones, it can exclude or include questions of institutional competence, expected rates of voluntary compliance, and so forth. It can be a complex investigation that includes an abstract inquiry as to the standards by which the “best” should be determined. But in all cases, unlike conversation in the law, this kind of conversation takes place on a plane removed from the processes of institutional life, without any sense of obligation to texts or choices made by others, among a “we” who are defined only by our commitment to this sort of talk.

In the law, by contrast, every speaker is particularly located, both rhetorically and socially. He or she is a lawyer or a judge, a judge of a state or federal court, a lawyer arguing to a jury or making a motion to a judge, and in every instance is situated with reference to a set of prior and arguably authoritative texts: constitutions, statutes, earlier cases and the like. This is the context in which “policy” questions are discussed in law, and these conversations receive their proper shape from that context. The authority of the legal actor is never self-established, but always rests, at least in argument, upon prior authoritative texts, which provide the standards that govern the exercise of the authority they establish. This means, among other things, that the legal speaker must always look outside himself for his source of authority; that his every action rests upon a claimed interpretation of those sources of authority; and that these interpretations, of

necessity, are compositions to which he or she asks that authority be given.

B.

The general perception that law is interpretive, and with it an associated suggestion that literary criticism may provide a model for judicial criticism, have considerable currency at the moment. Indeed, to judge by the amount of writing one finds in the law journals about "hermeneutics" or "literary theory" and the law, it is something of a fad. (Interestingly the corollary, that law is compositional, is rather overlooked.) Much of this work, however, argues at an abstract plane about questions that are so theoretically stated as to be virtually false—for example, whether meaning resides "in the text," or in the "interpretive community," or whether "original intention" should bind absolutely or not at all.⁷ Some of this work has a related weakness, namely that it is not actually grounded in the intellectual or literary disciplines out of which the theoretical debates arose in the first place, and this tends to render the discussion empty. All too often, we see lawyers reach for what they call literary theory, not to learn how to think better about the process of reading, but to support predetermined legal positions of their own, thus carrying over the shell of one conversation to a new context, without much attention to the particulars that gave the original conversation life and significance, much as poor translations might carry over to a new language the forms of an original text, whether poem or law, without adequate sensitivity to the context that gave the original its meaning. What is needed, I think, in law and literature alike, is not more theoretical argument but more fully informed and argumentative critical practice, from which generalizations of a different sort might emerge. Practice—not theory—is the level at which comparison is likely to be most

⁷ These questions are false, as I have elsewhere argued, because neither extreme can be adopted to the exclusion of the other—they are like asking whether you favor "form" over "content," for example, or "reason" over "emotion," or wish to follow the "letter" or the "spirit" of the law. See J.B. WHITE, HERACLES' BOW, *supra* note 4, at 79-81.

helpful, at which the work of one community can best illuminate that of another.

But critical practice of what kind? In particular, how helpful to the law can the practices of contemporary literary criticism be?

Here I have to say that contemporary literary criticism, natural ally as it seems to be, is in something of a crisis of its own and this renders it much less useful as a model or analogy than one might have hoped. For one thing, literary criticism—like legal criticism—has recently been in my view rather too obsessed with questions of theory, rather too abstractly and conceptually put, and has accordingly tended to neglect the more difficult and interesting engagements, practical in kind, that the great texts with which literary criticism is concerned naturally afford. I suppose it has been driven by the desire to attain the purportedly higher status of science, which has led not only to a focus on theory but to a method of analysis and explanation that tends to avoid critical judgment of individual works. It is now thought to be old-fashioned, for example, to ask whether a novel or poem is great, or greater than some other, or to suggest that there may be proper standards of literary excellence. The modern critic will often engage instead in a process of explanation that connects the configuration of a particular text with its literary, political, psychological, or economic context, asserting a causal connection, a thematic or generic parallel, or a new relation to another field of literature, and then stop.

But as “legal realism” in all of its forms tends to deny what is distinctively legal in our thought and expression as lawyers, this kind of literary criticism tends to deny what is distinctively literary in our reading of literature and in our writing about it, to reduce the processes by which we have engaged with these great texts to another mode entirely, that of explanation in non-literary terms. At its most extreme, this method reduces all texts to the same level and abandons the central function of criticism, namely the formation of taste and judgment. And in reducing the text to an object, as science necessarily does, it assumes that the critic and his audience have nothing to learn from this text or others like it. Thus a critic of the reader-response school will often outline, as a kind of engineer, the kinds of responses the text seems designed to elicit but without ever himself seeming

actually to respond, in this or any other way, to the text. He is an analyst, not a reader. Of course the critics may have much to learn from each other—or at least you from me—but rather little attention seems to be given to the possibility that we have something to learn, as individuals, as communities, and as cultures, from the texts we study, and from the minds who composed them, as if they spoke to us. This kind of criticism, in short, seeks to become a science that can explain certain phenomena rather than an art of understanding, response, and judgment. At its most extreme, it results in the destruction—I think the modern word is “trashing”—of an entire cultural inheritance.⁸

All this means that in literature and in law alike there is often a perceptible want of love for the subject matter, for the texts and what they mean, and for what can be learned from them. The driving emotion often seems not to be love but a desire to dissect, to dominate, to conquer, both the past and one's contemporary peers. The erotics of this kind of criticism is not reciprocal or mutually recognizing, but competitive and dominating. One way to put our question could be: what should be the erotics of legal criticism?

If I am right in all this: that what is needed in law is not more theory, but more practical criticism; that legal criticism of the craft variety is outmoded; that legal criticism based upon policy analyses is necessarily incomplete; and that literary criticism of the sort generally practiced today is defective in the respects I have described; what kind of criticism can we engage in? It is now my aim to say something about that question, both by way of description and by way of exemplification.

⁸ The refusal to judge may perhaps be explained by the anxiety produced by a false sense of cultural relativism. Many critical writers are naturally conscious of, and disturbed by, the fact that their own responses are shaped by their cultures, by their individual histories, and this makes them reluctant to engage in the process of critical engagement itself. Where, after all, can we stand to make the judgments that old-fashioned criticism seems to call for? This is a large question, for it is not limited to literary judgments, but includes ethical and moral judgments as well: Where can we stand to judge anything? The question is thus a version of an even larger one, who can we confidently be? I speak to this set of issues in *Is Cultural Criticism Possible?*, forthcoming in the *Michigan Law Review*.

C.

As for the kind of criticism that I think is called for, 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*,⁹ in which I elaborate a way of reading that focuses attention: (1) upon the state of the language and culture that a particular writer inherits and must use; (2) upon the ways in which that language is reconstituted, for good or ill, in his or her use of it; and (3) 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 to the rightness of the result reached and the propriety of the analysis used, but to his or her understanding of what the judge, the law, the lawyer, and the citizen are and should be, in short, to 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

⁹ J.B. WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984).

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 a 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?

III.

I turn now to the famous case of *Olmstead v. United States*,¹⁰ 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?

¹⁰ 277 U.S. 438 (1928).

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.¹¹

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 criminals 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.¹² Subsequent cases have involved such things as affixing a beeper to a car in order to trace its movements;¹³ scraping paint from a car in order to make a chemical analysis;¹⁴ taking fingerprints, blood samples or hair clippings, or

¹¹ *Id.* at 40.

¹² See generally *Goldman v. United States*, 316 U.S. 129 (1942) (admitting evidence obtained by placing a microphone against a common wall), *overruled*, *Katz v. United States*, 389 U.S. 347 (1967); *Silverman v. United States*, 365 U.S. 505 (1961) (a slight physical intrusion in placing microphone on wall was “an actual intrusion into a constitutionally protected area”); *Katz v. United States*, 389 U.S. 347 (1967) (bugging a defendant in a telephone booth “violated the privacy upon which he justifiably relied while using the telephone booth”); *Rawlings v. Kentucky*, 448 U.S. 98 (1980) (no expectation of privacy in the purse of an acquaintance).

¹³ See, e.g., *United States v. Knotts*, 460 U.S. 276 (1983) (monitoring of beeper signals did not invade any legitimate expectation of privacy).

¹⁴ See, e.g., *Cardwell v. Lewis*, 417 U.S. 583 (1974) (no expectation of privacy infringed when paint scrapings were taken from the exterior of a vehicle left in a public parking lot).

stopping and frisking people;¹⁵ examining bank records or employment files;¹⁶ and using marijuana-sniffing dogs and undercover agents.¹⁷ 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.¹⁸

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.

. . . .

¹⁵ See, e.g., *Davis v. Mississippi*, 394 U.S. 721 (1969) (fingerprints obtained during defendant's illegal detention were a product of that detention and could not be admitted into evidence); *Schmerber v. California*, 384 U.S. 757 (1966) (taking blood sample was permissible); *Terry v. Ohio*, 392 U.S. 1 (1968) (no violation of the fourth amendment when a police officer conducted a limited search for weapons where the officer had reasonable grounds to believe that the individual searched was armed and dangerous).

¹⁶ See, e.g., *United States v. Miller*, 425 U.S. 435 (1976) (bank accounts and other bank transactions not protected by the fourth amendment).

¹⁷ See, e.g., *United States v. Place*, 462 U.S. 696 (1983) (trained canines sniffing luggage located in a public place held not a search); *United States v. White*, 401 U.S. 745 (1971) (tape recording made by undercover agent did not invade the defendant's expectation of privacy).

¹⁸ U.S. CONST. amend. IV.

. . . 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.¹⁹

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.²⁰ 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.

¹⁹ *Olmstead*, 277 U.S. at 464.

²⁰ *Id.* at 438, 478 (Brandeis, J., dissenting).

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.²¹

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 co-

²¹ See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (when information is obtained by unconstitutional search and seizure, the fourth amendment protects the recipient from subsequent compulsory production of the information).

pyright 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*,²² which dealt with a surreptitious filching of papers, that it "carried the inhibition against unreasonable searches and seizures to the extreme limit."²³ But he says nothing to explain or validate that characterization.)

I think that the answer to the question, upon what Taft relies 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

²² *Gouled v. United States*, 255 U.S. 298, 305-06 (1920) (when a representative of the government by "stealth, or through social acquaintance, or in the guise of a business call" enters the house or office of a person suspected of a crime, his subsequent seizure of a suspect's papers violates the fourth amendment).

²³ *Olmstead*, 277 U.S. at 463.

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.²⁴

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."²⁵ 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.²⁶

²⁴ *Id.* at 455-56.

²⁵ *Id.* at 457.

²⁶ Taft's summary of the cases dealing with the fourth amendment since

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 1930's 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

Boyd v. United States, 116 U.S. 616 (1886), are, as I said above, descriptive and conclusory. His apparent aim—as it is with respect to the language of the fourth amendment, too—is that you instantly see that *this* has nothing to do with *that*.

His treatment of the defendant's claim that the criminality of the Government's conduct requires exclusion of the evidence is of a piece with the rest. He simply subsumes it under a common-law rule of evidence, that admissibility is not affected by illegality. This move, the conclusory reduction of the constitutional to the merely evidentiary, is similar in structure to his definition of the Constitution and of his own role. He defines the common-law rule, then says "the common law rule must apply in the case at bar." *Olmstead*, 277 U.S. at 468. But he gives no reason why it "must."

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.²⁷

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 au-

²⁷ This would, of course, require considerable skill. Consider, for example, the comprehensiveness of Taft's summary of a statute, made in his description of the *Boyd* case:

The fifth section of the Act of June 22, 1874, provided that in cases not criminal under the revenue laws, the United States Attorney, whenever he thought an invoice, belonging to the defendant, would tend to prove any allegations made by the United States, might by a written motion describing the invoice and setting forth the allegation which he expected to prove, secure a notice from the court to the defendant to produce the invoice, and if the defendant refuses to produce it, the allegation stated in the motion should be taken as confessed, but if produced, the United States Attorney should be permitted, under the direction of the court, to make an examination of the invoice, and might offer the same in evidence.

Olmstead, 277 U.S. at 458.

thority 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.²⁸ We often see a similarly authoritarian claim, acquiesced in for similar reasons, in the interpretation of sacred texts: a person, or a group, claim 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"²⁹ 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."³⁰ 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 con-

²⁸ *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting) (all of the guarantees specified in the Bill of Rights are incorporated in the fourteenth amendment); *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965) (Black, J., dissenting) (only those rights explicitly protected by a specific Bill of Rights provision are protected by the fourteenth amendment).

²⁹ *Olmstead*, 277 U.S. at 455.

³⁰ *Id.* at 471 (Brandeis, J., dissenting).

cludes 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."³¹

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?³²

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."³³ 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."³⁴ This is a way of showing that the kind of "non-literalist" 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

³¹ *Id.* at 471-72.

³² Of course he does this in apparent confidence that he can persuade us that his view on this question is right, but this confidence may in fact be misplaced. To raise such a question is to start a conversation which may result in one's own refutation.

³³ *Olmstead*, 277 U.S. at 472 (Brandeis, J., dissenting) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819)).

³⁴ *Olmstead*, 277 U.S. at 472 (Brandeis, J., dissenting).

half a century ago, probably would have been rejected as arbitrary and oppressive.”³⁵ 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*:³⁶

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.³⁷

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

³⁵ *Id.* (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926)).

³⁶ 217 U.S. 349 (1910).

³⁷ *Olmstead*, 277 U.S. at 472-73 (Brandeis, J., dissenting) (quoting *Weems*, 217 U.S. at 373).

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' 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, “non-literally.” 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."³⁸ 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."³⁹ 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."⁴⁰ 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?"⁴¹

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

³⁸ *Olmstead*, 277 U.S. at 473 (Brandeis, J., dissenting).

³⁹ *Id.*

⁴⁰ *Id.* at 474.

⁴¹ *Id.*

“principles.” The text must be removed from the web of associations that once gave particular meaning to its terms and re-located 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*,⁴² 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*,⁴³ 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.”⁴⁴ 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’ 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

⁴² 116 U.S. 616 (1886).

⁴³ 96 U.S. 727 (1877) (letters and sealed packages in the mail can be opened only under warrant).

⁴⁴ *Olmstead*, 277 U.S. at 475 (Brandeis, J., dissenting).

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.⁴⁵

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.

⁴⁵ *Id.* at 477-78.

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.⁴⁶

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.⁴⁷

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.”⁴⁸ 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

⁴⁶ *Id.* at 478.

⁴⁷ Compare here the way poets and other writers often give plain or ordinary speech a new freshness and power by locating it in a complicated context. See, for example, my discussion of Swift and Johnson in chapters 5 and 6 of *WHEN WORDS LOSE THEIR MEANING*, *supra* note 9, or better, read George Herbert’s poem, *Jordan (I)*, in *GEORGE HERBERT AND THE SEVENTEENTH-CENTURY RELIGIOUS POETS* 25 (M.A. Di Cesare ed. 1978).

Taft in a sense claims that the Constitution is simply written in the vernacular, that there is nothing special about this language at all. But his simplicities are not embedded in a justifying complexity, and the result, as I suggest above, is an opinion of hidden authoritarianism.

⁴⁸ *Olmstead*, 277 U.S. at 482 (Brandeis, J., dissenting).

official is authorized to commit a crime on its behalf.”⁴⁹ 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.⁵⁰ 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.⁵¹

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.

⁴⁹ *Id.* at 483.

⁵⁰ *Id.*

⁵¹ *Id.* at 485.

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' 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' 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 re-translation—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 as 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' opinions have that flavor,⁵² as indeed does Justice Stewart's opinion in *Katz v. United States*,⁵³ the case that finally overruled *Olmstead*: "The Fourth Amendment protects people, not places."⁵⁴) It is also true that I would not subscribe to every aspect of Brandeis' 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 law-breakers, 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

⁵² See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Henry v. United States*, 361 U.S. 98 (1959).

⁵³ 389 U.S. 347 (1967).

⁵⁴ *Id.* at 351.

appropriate. As you can tell from this summary, I think it would be hard to do this very persuasively, but we can not 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.

IV.

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’

claims about "privacy" and the intentions of the "Framers" is open to question. It is certainly true that Brandeis' 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' 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.