

# DEMOCRACY AND CIVIC DUTY: A BRANDEISIAN THEORY OF JUDICIAL REVIEW

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## INTRODUCTION

*“The most important political office is that of the private citizen.”* -Louis Brandeis<sup>1</sup>

Justice Louis Brandeis was committed to the decentralization of political and economic power. He was a fervent advocate of judicial restraint. He memorably referred to states as "laboratories of democracy," and argued that they must be allowed to legislate and experiment in the social and economic realms. But in his free speech opinions, notably his famous *Whitney* concurrence, he is entirely comfortable using the power of the federal judiciary to void the products of such state experimentation. Is this intervention a betrayal of his commitment to judicial restraint?

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<sup>1</sup> Justice Louis Brandeis, Statement to a reporter in the Boston Record, 14 April 1903. (quoted in Alpheus Thomas Mason, *Brandeis: A Free Man's Life* (1946), p. 122.).

For Brandeis, free speech served many values: the ideal of civic courage,<sup>2</sup> deliberative democracy, the futility of censorship, government accountability, and self-development. But why is speech, even thus understood, worthier of protection than the liberties infringed on by state social and economic regulations, which Brandeis thinks deserve deference? In other words, why are speech regulations entitled to greater judicial scrutiny under the Constitution than laws regulating, say, freedom to contract? After all, Brandeis repudiated the *Lochner* era as unconstitutional and undemocratic.

Notable scholars have argued that Brandeis is simply inconsistent, imposing his personal views about free speech while excoriating the *Lochner* Court for doing the same thing with non-speech legislation. But there is a better way to understand him. Brandeis's conception of American democracy provides the basis for a consistent theory of judicial review—one with room for both deference to legislatures and strict protection of speech.

Brandeis was a democratic republican. He understood the promise of the Constitution to be, above all, freedom for the people to actively and virtuously participate in their own self-government. His theory of judicial review reflects this understanding. It is aimed at protecting the country's democratic republican character.

Brandeis's democratic theory of judicial review resembles, but is also distinct from and in some ways superior to, John Hart Ely's well-known argument. In addition to affording speech robust protection, Ely's theory states that the judiciary's legitimate role in a democracy is to protect the democratic process and ensure access to that process. Brandeis, like Ely, thinks that judicial nondeference is appropriate only if the legislature is impairing the democratic process. But while Ely primarily addresses the *process of* democracy, Brandeis is preoccupied with the *precursors to* democracy. Speech is a necessary input to a functional democratic process because it creates a citizenry capable of truly participating in that process.

Brandeis and Ely each have blind spots. Ely largely ignores or takes for granted that people with access to the democratic process will be capable of participating vigorously and intelligently. Brandeis does not appear to notice that some groups, most obviously African-Americans, may be discriminated against and prevented from participating in the democratic process altogether. Read together, however, these theories provide a more complete democracy-based justification for and theory of judicial review than either can offer alone. The resulting theory can be characterized as a "democratic republican" form of judicial review, adapting a term from Professor Cass Sunstein. Ultimately, this paper will show that this integrated

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<sup>2</sup> See Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in *Whitney v. California**, 29 Wm. & Mary L. Rev. 653 (1988).

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theory provides new ways to think about judicial review of important issues in our modern debates, such as campaign finance reform.

This Article will proceed in three parts. Part I explores the tension between Brandeis's views on free speech, judicial restraint, and federalism – a tension that leads some scholars to reproach Brandeis for “judicial activism.” Part II rebuts the charge by explaining Brandeis's judicial philosophy through the lens of his democratic theory. Finally, Part III will describe John Hart Ely's theory of judicial review, compare it to Brandeis's theory, and outline the approach that emerges when the two are taken together.

### I. WAS BRANDEIS INCONSISTENT?

Justice Brandeis was committed both to judicial deference for economic and social regulations and to close judicial scrutiny for rights like speech and education. Each of these views is familiar in the scholarly literature on Brandeis. Yet the tension between them has either been glossed over or, in some cases, attacked as judicial activism.

#### A. THE TENSION BETWEEN FREE SPEECH, JUDICIAL RESTRAINT, AND FEDERALISM

Even before Brandeis sat on the high court, he was committed to judicial deference to state legislation. As an advocate before the Supreme Court, Brandeis became famous for his brief in *Muller v. Oregon*,<sup>3</sup> in which he included more than one hundred pages of sociological, economic, and scientific facts to support his three pages of legal argumentation. His point, which the Court accepted in that case, was that the state legislature was in a better position than the Court to determine the facts on the ground and create legislation to protect its citizens.<sup>4</sup> He believed that the Constitution gave the states flexibility to respond to changing times. Jeffrey Rosen, one of Brandeis's biographers, explains his judicial philosophy as “a commitment to judicial deference to legislative experimentation and states' rights . . . and a determination to translate the text of the Constitution and the values of the framers into concepts and rulings that were demanded by an era of social and technological change.”<sup>5</sup>

In *Erie Railroad Co. v. Tompkins*,<sup>6</sup> Brandeis, writing for the Court, held that federal courts exercising diversity jurisdiction must apply state decisional law rather than federal common law. A key part of his rationale

<sup>3</sup> *Muller v. Oregon*, 208 U.S. 412 (1908).

<sup>4</sup> *Id.* at 419.

<sup>5</sup> JEFFREY ROSEN & LOUIS D. BRANDEIS, *AMERICAN PROPHET* 100 (2016).

<sup>6</sup> *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

was that the Constitution “recognizes and preserves the autonomy and independence of the states—independence in their legislative and independence in their judicial departments.”<sup>7</sup>

He also recognized that courts generally lacked legislatures’ knowledge of fact and democratic accountability and should thus defer to legislative findings of a regulation’s necessity.<sup>8</sup> In *New State Ice Co. v. Liebmann*, Brandeis dissented against an opinion that voided a state law regulating ice manufacturers.<sup>9</sup> He reasoned that regulation of business was well within the state’s police power, that the state was better able to fashion regulation in response to local conditions, and that all of this was a healthy part of our Constitutional democracy.<sup>10</sup> Writing for the Court in *Pacific States Box & Basket Co. v. White*,<sup>11</sup> Brandeis upheld a state trade law regulating fruit basket dimensions and materials. He applied the same deference to a state administrative agency as he thought the Court must apply to a state legislature.<sup>12</sup>

These concerns for federalism and legislative experimentation mutually reinforced each other. As one commentator observes, “Brandeis’s dissent [in *Liebmann*] articulated a basis to defer *more* strongly to state legislatures than to Congress: that the states could serve as ‘laborator[ies]’ of ‘experimentation.’”<sup>13</sup> Regardless of a law’s point of origin, however, Brandeis believed that the Constitution generally commanded judicial restraint. In his *Ashwander v. Tennessee Valley Authority* concurrence, Brandeis laid out the Court’s prudential rules for exercising judicial self-restraint and avoiding ruling on the constitutionality of congressional legislation.<sup>14</sup> These rules stand for the idea that the Court should exercise its power to void democratically-made laws as rarely as possible.<sup>15</sup>

Given his commitment to these principles of judicial restraint, federalism, and experimentation, why does Brandeis abandon that restraint in cases involving free speech and education?

Concurring in *Whitney v. California*, Brandeis declared that legislatures could prohibit speech, expression, and assembly in only the most extreme circumstances: “To justify suppression of free speech there must be

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<sup>7</sup> *Id.* at 79.

<sup>8</sup> See, e.g., *O’Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251 (1931) (upholding state law regulating fire insurance rates).

<sup>9</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

<sup>10</sup> *Id.* at 302-11.

<sup>11</sup> *Pacific States Box & Basket Co. v. White*, 296 U.S. 176 (1935).

<sup>12</sup> See *id.* at 185-86 (explaining that “the contention [that a state administrative agency does not receive the same rebuttable presumption of sufficient fact to justify regulation as a state legislature] is without support in authority or reason, and rests upon misconception.”).

<sup>13</sup> Vicki C. Jackson, Thayer, *Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality*, 130 HARV. L. REV. 2348, 2354 (2017); See *id.* at 159-60.

<sup>14</sup> *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288 (1936).

<sup>15</sup> *Id.* at 346-49.

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reasonable ground to fear that serious evil will result if free speech is practiced . . . that the danger apprehended is imminent . . . that the evil to be prevented is a serious one.” Thus, “even advocacy of violation [of the law], however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.”

If the state attempts to censor allegedly subversive speech, Brandeis thought, the Court must not defer to the legislature. The fact that the state found a danger “does not preclude inquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the federal Constitution.” “The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the State, creates merely a rebuttable presumption that these conditions have been satisfied.” In cases of speech and assembly, Brandeis envisioned a much more active role for the courts under the Constitution.

He was similarly skeptical of state restrictions on education. Brandeis voted with the majority in two cases that voided restrictive state education laws and found freedom from state interference with education to be fundamental and protected by the Fourteenth Amendment. He explained to his friend and mentee Felix Frankfurter that “as to things fundamental [and within the scope of due process]: Right to speech, education, choice of profession, [and] locomotion.”

This apparent inconsistency is what I have referred to as “the tension.” How can Brandeis be committed to federalism, judicial restraint, and state experimentation while also calling for strict judicial scrutiny of laws that might inhibit values like free speech and education?

### B. UNADDRESSED BY THE CURRENT SCHOLARSHIP

Many scholars of Justice Brandeis have left this tension untouched.<sup>16</sup> Others have simply concluded that Brandeis was an unprincipled judicial activist. Brandeis’s defenders have not persuasively answered these charges.

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<sup>16</sup> See, e.g., Bradley C. Bobertz, *The Brandeis Gambit: The Making of America’s “First Freedom,”* 40 WM. & MARY L. REV. 557 (1999) (discussing why free speech was so prominent an issue in Brandeis’s time and why its protection eventually gained such unquestioned allegiance); Ronald K. L. Collins & David M. Skover, *Curious Concurrence: Justice Brandeis’s Vote in Whitney v. California*, 2005 SUPREME COURT REVIEW 333 (2006) (providing possible explanations for Brandeis’s concurrence in *Whitney*); Helen Garfield, *Twentieth Century Jeffersonian: Brandeis, Freedom of Speech, and the Republican Revival*, 69 OR. L. REV. 527 (1990) (describing Brandeis as “the first republican revivalist of the twentieth century” in regard to his constitutional jurisprudence); PHILIPPA STRUM, *SPEAKING FREELY: WHITNEY V. CALIFORNIA AND AMERICAN SPEECH LAW* (2015) (providing a comprehensive background of the *Whitney* opinion); PHILIPPA STRUM, *BRANDEIS: BEYOND PROGRESSIVISM* (1993) (describing Louis Brandeis’s life, judicial, and political philosophies); JEFFREY ROSEN, *LOUIS D. BRANDEIS: AMERICAN PROPHET* (2016); James Boyd White, *Living Speech: Resisting the Empire of Force* (2006) (arguing that Brandeis’s

Perhaps the preeminent treatment of Brandeis's conception of free speech is Professor Vincent Blasi's *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*.<sup>17</sup> Blasi argues that Brandeis offers an all-too-rare affirmative vision of the value of free speech.<sup>18</sup> Rather than simply piling up various justifications for free speech, Blasi says that the *Whitney* concurrence represents one coherent overarching value: civic courage.<sup>19</sup> This is in contrast to the otherwise typically negative ideas underlying first amendment doctrine, like "[a]pathy, fatalism, skepticism, relativism, noblesse oblige, fear of the slippery slope, distrust of government, the need for countervailing power, [and] the object lessons of McCarthyism."<sup>20</sup> Professor Blasi explains that, to Brandeis, the "character of a political community is both revealed and defined by how it responds to the challenge of threatening ideas."<sup>21</sup>

But why does Brandeis value free speech more than the liberty to contract? Why are state polities that create licensing or maximum hours laws upheld, while legislatures may not abridge speech liberty as defined by the federal judiciary? Why does speech develop civic courage better than contracting?

Blasi does seem to touch upon these questions. After explaining that Brandeis believed in the "moral legitimacy of majority rule," he asks "[h]ow then to reconcile his respect for the majority with his strong view of minority rights in the realm of speech?"<sup>22</sup> Blasi reconciles this by pointing to Brandeis's fear of "occasional tyrannies of governing majorities."<sup>23</sup> In other words, Brandeis understood the power of mass hysteria. But why should we believe that speech restrictions are more likely to reflect occasional tyrannies than other restrictions?

Louis Jaffe concluded that Brandeis was a judicial activist.<sup>24</sup> Jaffe agreed with the view of many at the time of his writing that the Warren Court was an "activist" Court, imposing the judges' own personal preferences in the guise of answers to constitutional questions.<sup>25</sup> He noted that when Brandeis thought that reaching a decision was unavoidable, his deeply felt convictions on social, economic, and political issues shaped his decisions;

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great achievement in *Whitney* was his recognition that speech has unique value to both the individual and the community).

<sup>17</sup> Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 Wm. & Mary L. Rev. 653 (1988).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 694

<sup>21</sup> *Id.* at 695

<sup>22</sup> *Id.* at 677

<sup>23</sup> *Id.* at 677-78

<sup>24</sup> Louis L. Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986 (1967).

<sup>25</sup> *Id.*

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but Brandeis was “neither eager to exercise power nor wholly without question as to the efficacy and propriety of judicial power in a democratic system.”<sup>26</sup>

Jaffe observed that Brandeis reluctantly agreed with the Court (or at least acknowledged the precedent) that fundamental substantive rights were protected by the Fourteenth Amendment.<sup>27</sup> He described opinions in which Brandeis applied these fundamental rights and others in which he argued that the Court should leave the state legislature’s laws alone.<sup>28</sup> The fundamental problem, to Jaffe, was that “[o]nce it is conceded that the liberty of the fourteenth amendment protects the so-called ‘fundamental rights,’ the judges are in a predicament. They must decide, yet there is no authoritative schedule of fundamental rights.”<sup>29</sup>

Jaffe observed that in Brandeis’s *Whitney* concurrence:

without asking whether the legislators' position was 'reasonable,' he forthrightly substituted his evaluation of the situation for the legislators'. I suggest that in so doing he gave effect to his intensely felt philosophy of government, to his whole-hearted belief in the primacy of uninhibited discussion.<sup>30</sup>

About a decade later, Nathaniel Nathanson seems to partially agree with Jaffe, but also to begin an implicit partial defense of Brandeis.<sup>31</sup> Nathanson’s purpose in his paper is to discuss Brandeis’s constitutional philosophy, which he thinks cannot be entirely divorced from his philosophy of life.<sup>32</sup> He notes Brandeis’s preoccupation with self-government in the political, economic, and personal realms.<sup>33</sup> Nathanson discusses a distinctive Brandeisian “Right of Self-Development,” under which he includes Due Process, Freedom of Speech, and Zionism.<sup>34</sup>

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<sup>26</sup> *Id.* at 989

<sup>27</sup> *Id.* at 992

<sup>28</sup> As to fundamental rights cases, Jaffe cites Brandeis’s opinion in *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., dissenting) (finding speech to be a fundamental right included in the “liberty” protected by the Fourteenth Amendment), and his votes with the majority in *Meyer v. Nebraska*, 262 U.S. 390 (1923) (finding education to be a fundamental right included in the “liberty” protected by the Fourteenth Amendment), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (applying *Meyer* and reaffirming education as a fundamental right), and *Farrington v. Tokushige*, 273 U.S. 284 (1927) (applying *Meyer* and *Pierce* and reaffirming education as a fundamental right). *Id.* at 992-94.

<sup>29</sup> *Id.* at 998

<sup>30</sup> *Id.* at 1000

<sup>31</sup> Nathaniel L. Nathanson, *The Philosophy of Mr. Justice Brandeis and Civil Liberties Today*, 1979 U. ILL. L. F. 261 (1979).

<sup>32</sup> *Id.* at 261

<sup>33</sup> *Id.* at 263-71

<sup>34</sup> Self-government is here used as a broad term to encompass both directing one’s government and governing one’s self. Self-development fits within self-government, but refers only to the

He notes that although Brandeis on multiple occasions wrote in opposition to imposing substantive values through the due process clause, he came to accept it and even gave it “substantive content when his own sense of justice, or rather injustice, was deeply offended.”<sup>35</sup> Nathanson writes that, though *Whitney* was strictly speaking a Fourteenth Amendment case and not a First Amendment case, Brandeis employed language from the First Amendment.<sup>36</sup> But he also relied heavily on the role of free speech in a participatory democracy, explaining that it is not merely a right, but a political duty.<sup>37</sup> He argues that “[i]n the *Whitney* concurring opinion, one can find some indications that Brandeis regarded freedom of speech primarily as an instrument of participatory democracy.”<sup>38</sup>

That statement resembles the partial defense of Brandeis’s judicial philosophy put forth by his former clerk, Professor Paul Freund.<sup>39</sup> Freund starts his memoir of the Justice by demonstrating his “deep sense of attachment to the small community.”<sup>40</sup> Of his overarching philosophy of life, Freund writes:

In all his endeavors there was a steady vision of the creative powers of ordinary men and there was the resourcefulness to devise structures and processes to release those powers . . . At the root of his philosophy, in short, lay the issue of responsibility — the diffusion of responsibility, the assumption of responsibility, and the identification of responsibility.<sup>41</sup>

Freund acknowledges that Brandeis was acutely aware of the importance of judicial restraint. His dissent in *Myers, Administratrix v. United States*, which addressed a law that diminished the President’s executive officer removal power, explained that the “act of Congress reflected a democratic impulse, an appreciation of the safeguards of shared responsibility, that was wholly compatible with the principle of separation of powers and the nature of the executive office.”<sup>42</sup> Here Brandeis seemed to be making a constitutional argument based on structure and process. Freund says that “[h]is role was to create and maintain the structures and processes

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second aspect, “governing one’s self.” Although, Brandeis would likely consider directing one’s government as essential to that second aspect as well. *Id.* at 281.

<sup>35</sup> *Id.* at 283

<sup>36</sup> *Id.* at 289

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 295.

<sup>39</sup> Paul Freund, *Mr. Justice Brandeis: A Centennial Memoir*, 70 HARV. L. REV. 769 (1957).

<sup>40</sup> *Id.* at 770.

<sup>41</sup> *Id.*

<sup>42</sup> *Myers v. United States*, 272 U.S. 52, 240 (1926) (Brandeis, J., dissenting).

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of a working democratic federalism — to maintain them so that the creative energies of a free people might find expression.”<sup>43</sup>

Freund does touch on the tension between judicial self-restraint and Brandeis’s conception of free speech. He says, “[i]n one realm the currents were strikingly at odds: the realm of governmental curbs on freedom of speech and assembly.”<sup>44</sup> The professor quickly explains away the tension by saying that:

Brandeis's was a concurring opinion, joining in the affirmance of Miss Whitney's conviction, but on the ground that she had not properly raised the issue of clear and present danger in the trial court and so could not call upon the Supreme Court to pass upon the question. And so Brandeis, who would have given priority in this case to the mandate for maintaining structure and process over tolerance for legislative experiment, in the end gave primacy to the canon of self-limitation.<sup>45</sup>

This is a weak response. Although Brandeis’s concurrence on procedural ground is puzzling,<sup>46</sup> it is very likely that he would have

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<sup>43</sup> See Freund, *supra* note 46 at 786.

<sup>44</sup> *Id.* at 789.

<sup>45</sup> *Id.* at 789.

<sup>46</sup> Professors Collins and Skover explain why this concurrence is puzzling:

Given Brandeis's faith in speech freedoms, why did he concur in the judgment of the Court in *Whitney v California*? When commentators have addressed that question at all, they have given variations on the same simple answer: Brandeis (joined by Holmes) concurred with the majority, 'but only because the question of freedom of expression had not been raised sufficiently at trial to qualify as an issue on appeal.' Virtually everyone has accepted, with little or no question, Justice Brandeis's assertion that jurisdictional impediments necessitated his vote in the case . . . But what if those commentators (and many others) were too credulous? What if such jurisdictional impediments were more deliberately chosen than doctrinally compelled? Or what if there were jurisdictional problems, but of a rather different order than Justice Brandeis had suggested? What if Brandeis were wrong in the reasons he tendered for voting to uphold Ms. Whitney's conviction? Such queries raise yet larger questions: Is it possible that the *Whitney* case was far more complex than Brandeis's concurrence suggested?

Ronald K. L. Collins, David M. Skover, Curious Concurrence: Justice Brandeis's Vote in *Whitney V California*, 2005 Sup. Ct. Rev. 333 (2005). Collins and Skover provide a comprehensive historical background for the *Whitney* case. They then show evidence of Brandeis’s views on the wisdom of reaching the First Amendment issue. Brandeis’s law clerk produced a memo that detailed why *Whitney* could not, as a matter of federal jurisdiction, remain on the Court’s docket. *Id.* at 380. Although he did not take this legal position, Brandeis did originally prepare a two-paragraph opinion dismissing Whitney’s appeal for procedural reasons. *Id.* at 383. Collins and Skover argue that Brandeis was likely frustrated by Charles Ruthenberg’s death (and thus the redundancy of his dissent in that case) and the *Whitney* majority’s leaping over the federal jurisdictional hurdles to decide the case on its merits. *Id.* He therefore felt obligated, they argue,

invalidated the conviction if he could have. Freund overlooks an important fact: Brandeis borrowed his *Whitney* concurrence from an earlier unpublished dissent.<sup>47</sup> In *Ruthenberg v. Michigan*, Brandeis wrote in dissent to overturn a conviction based on a “far more radical creed, conduct, and association” than that addressed in *Whitney*. The dissent remained unpublished only because the case was mooted by the defendant’s death after Brandeis had written it.<sup>48</sup> Surely, then, self-limitation is not enough to explain the tension.

So, the argument stands. No one has adequately rebutted the allegation that Brandeis is simply a judicial activist, imposing his own values in speech cases. Each of these defenses gesture toward his concern for democratic process and structure, or political participation, but do not explain how his free speech decisions are consistent with his advocacy of restraint. To begin imagining that picture, we must turn to Brandeis’s understanding of the democracy that our Constitution created.

## II. THE JUDICIARY AS A DEFENSE FOR DEMOCRATIC SELF-GOVERNMENT

Brandeis’s judicial philosophy was focused on protecting democratic self-government. He believed that the Court’s constitutional duty “was to interpret a generalized statement of principles designed to be [read] in light of the needs of society at differing historical moments.”<sup>49</sup> The Constitution, he thought, structures American democracy and protects the rights and duties of citizenship necessary for its success. He upheld statutes when democracy was working properly, even if he thought it was working foolishly. He intervened when democracy’s necessary inputs were being threatened. In this way, his judicial philosophy is reminiscent of John Hart Ely’s.

Because Brandeis’s judicial philosophy is rooted in his democratic philosophy, we must begin by understanding the latter. Only with a clear view of Brandeis’s ideal healthy democracy can we determine the characteristics of an unhealthy one. Physiology precedes pathology. To Brandeis, the proper remedy to fix an unhealthy democracy is considering where judicial intervention was and was not appropriate. This Section will

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“to counter both their jurisdictional and substantive arguments.” *Id.* at 384. Ultimately, they “return to the place from whence [they] began, namely, that Brandeis concurred in *Whitney* for jurisdictional reasons.” *Id.* at 387. But they contend that Brandeis’s *Whitney* concurrence would have been better had he applied its insights to the facts of the case. *Id.* What is important for the purposes of this paper, however, is not the rationale for Brandeis’s concurrence that Collins and Skover lay out, but that they agree that Brandeis would have invalidated the conviction if he could have.

<sup>47</sup> *Id.* at 336.

<sup>48</sup> *Id.* at 336, 371-72.

<sup>49</sup> PHILIPPA STRUM, *BRANDEIS ON DEMOCRACY* 16 (1995).

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explain why there is no inconsistency between his general philosophy of judicial restraint and his protection of certain fundamental rights from legislative encroachment.

### A. THE HEALTHY DEMOCRACY

To Justice Brandeis, democracy was not merely a system of choosing administrators, but a system of active citizen participation in self-government. It was a path to individual and societal fulfillment.<sup>50</sup> It was a way of being.<sup>51</sup> Broadly defined, self-government includes citizens' participation both in their own development and in the deliberate direction of their governing institutions. A healthy democracy, then, was one that achieved this good. Perhaps the best way to understand Brandeis's conception of democracy is by examining what he took to be the proper relationship between the citizen and the state. We will begin by considering Brandeis's vision of democratic rights and duties, and then show how this vision entailed his suspicion of large institutions and his valuation of experimentation.

#### 1. Rights and Duties

In a democracy, the people are the rulers. It then follows, Brandeis thought, that they must behave and be treated as such. He said that, "with us every man is of the ruling class . . . Our great beneficent experiment in democracy will fail unless the people, our rulers, are developed in character and intelligence."<sup>52</sup> As rulers, democratic citizens have both rights and responsibilities, which to Brandeis, were different sides of the same coin.<sup>53</sup> He said that "[a]ll rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community."<sup>54</sup> One may legitimately claim a right to her duty to self-govern. And by fulfilling that duty, she is in a better position to protect that right. Her right to self-govern is safer if she is actively directing her government. A healthy democracy is this self-reinforcing process in action.

Brandeis wrote that "the final end of the state," according to the Founders, "was to make men free to develop their faculties."<sup>55</sup> The right to

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<sup>50</sup> See Philippa Strum, *BRANDEIS: BEYOND PROGRESSIVISM* (1993) (excerpt from Blasi, *IDEAS OF THE FIRST AMENDMENT*, pg. 430).

<sup>51</sup> Indeed it seems possible that Brandeis's view was akin to John Dewey's—our democratic government was merely a product of a larger, living democratic ethical ideal.

<sup>52</sup> L. Brandeis, *Hours of Labor*, Address to the Civic Federation of New England (1906).

<sup>53</sup> *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (explaining that liberty is both a means and an end in our democracy).

<sup>54</sup> *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 488 (1921).

<sup>55</sup> *Whitney* 274 U.S. at 375.

free speech and thought was necessary for democratic citizens to fully develop themselves.<sup>56</sup> Because it was the purpose of our democracy to allow citizens to achieve this ultimate good, it must necessarily bestow the right on them to do it. Once again invoking the “makers of our Constitution,” Brandeis describes “the right to be let alone” as necessary to “protect Americans in their beliefs, their thoughts, their emotions, and their sensations.”<sup>57</sup> The reason for this privacy right becomes clearer by viewing its tension with freedom of speech.

Neil Richards addresses the seeming conflict between a right to free speech and a right to privacy—one person exercising free speech may violate another’s privacy right—by viewing them both in relation to democratic self-government.<sup>58</sup> Richards describes this privacy right as “protection from surveillance or interference when we are engaged in the processes of generating ideas.”<sup>59</sup> In other words, privacy provides freedom to come up with governing philosophies without interference. The two rights are consistent because they are both necessary to self-rule. The overarching right, for which both privacy and free speech are necessary, is self-government.

In his most cited opinions on speech<sup>60</sup> and privacy,<sup>61</sup> Brandeis describes this overarching right as the goal of American democracy. He claims that the Declaration of Independence,<sup>62</sup> and the revolutionaries who won the United States, recognized the importance of applying reason “through the process of popular government.”<sup>63</sup> For American democracy to work well, as the Constitution intended it to, the rulers had to be free from governmental interference with speech and privacy.

Brandeis makes a teleological argument. Government, at least American constitutional democracy, is formed for a specific end: to make the people free to govern themselves. (Again, by “govern themselves,” Brandeis means both the freedom to develop themselves and to direct their government.) When the government interferes with this process or its necessary inputs—speech and privacy, for example—it is acting in opposition to its very purpose. Such action is thus illegitimate—or, in judicial language, unconstitutional. Democracy is more than just citizen rule. It is citizens fulfilling their obligation to understand and participate in popular government.

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<sup>56</sup> *Id.*

<sup>57</sup> *Olmstead v. United States*, 277 U.S. 438, 478-79 (1928).

<sup>58</sup> Jeffrey Rosen, *LOUIS D. BRANDEIS: AMERICAN PROPHET* (2016), pg. 143.

<sup>59</sup> Neil Richards, *Intellectual Privacy: Rethinking Civil Liberties in the Digital Age* 5 (2015).

<sup>60</sup> *Whitney*, 274 U.S. at 357.

<sup>61</sup> *Olmstead*, 277 U.S. at 438.

<sup>62</sup> *Olmstead*, 277 U.S. at 478 (noting that the founders “undertook to secure conditions favorable to the pursuit of happiness”).

<sup>63</sup> *Whitney*, 274 U.S. at 377.

This is perhaps one of the most important aspects of a healthy Brandeisian democracy. The core of democracy is not just voting in elections, but active and thoughtful citizen participation.<sup>64</sup> It was not enough that citizens merely had the right to participate in the political process or be free from government interference. In doing so, they had to exercise that right diligently. Not only would this protect democratic government, but it would also promote individual development, which is the means of democracy and its ultimate end. “The great developer,” Brandeis said, “is responsibility.”<sup>65</sup> In order for citizens to participate in this meaningful way, however, certain conditions had to be obtained.

## 2. *Institutions and Experimentation*

Although the core of democracy is this participation in self-rule, not all social conditions were suitable to its optimal functioning. First, governing institutions had to remain close to individuals so that they could meaningfully participate in their own rule. Second, citizens working together in these smaller institutions had to be free to innovate and experiment, for their own sake and for society at large.

Antitrust theory today aims at efficiency rather than local control.<sup>66</sup> As such, some modern-day theorists view Brandeis’s antitrust thought as an “old romance,” lacking in the rigorous economic thought of the modern world.<sup>67</sup> But Brandeis was no naïve economic observer.<sup>68</sup> Rather, his priorities were different. He thought that “[d]emocratic values [were] more fundamental than the demands of corporate, technological progress.”<sup>69</sup> In other words, there are higher values than efficiency. He said that “in a democracy, it is the part of statesmanship to prevent the development of power which overawes the ordinary forces of man.”<sup>70</sup>

In *Louis K. Liggett Co. v. Lee*,<sup>71</sup> Justice Brandeis found occasion to further explain a danger that large institutions—in this case big business—posed to democracy: the stifling of individual initiative necessary to self-government. Brandeis explains how small institutions, conducive to

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<sup>64</sup> Louis D. Brandeis to Robert W. Bruere, Letter of February 25, 1922, summarizing at the latter’s request informal remarks that Brandeis had delivered to the Federal Council of Churches.

<sup>65</sup> *Id.*

<sup>66</sup> Edward A. Purcell, Jr., *Brandeis and the Democratic Vision*, 1 *Reviews in Am. History* 253, 254 (June 1973).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Louis K. Liggett Co. v. Lee*, 288 U.S. 517 (1933).

individual initiative and effort, create people capable of self-government. He writes:

There is a widespread belief that the existing unemployment is the result, in large part, of the gross inequality in the distribution of wealth and income which giant corporations have fostered; that by the control which the few have exerted through giant corporations individual initiative and effort are being paralyzed, creative power impaired and human happiness lessened; that the true prosperity of our past came not from big business, but through the courage, the energy, and the resourcefulness of small men; that only by releasing from corporate control the faculties of the unknown many, only by reopening to them the opportunities for leadership, can confidence in our future be restored and the existing misery be overcome; and that only through participation by the many in the responsibilities and determinations of business can Americans secure the moral and intellectual development which is essential to the maintenance of liberty.<sup>72</sup>

Thus, a certain kind of citizen is necessary to the maintenance and prosperity of a democracy. We also see clear parallels to his writing on free speech. The “faculties” of the many, developed by their “participation . . . in the responsibilities and determinations of business,” are necessary to our form of government.<sup>73</sup> If we hope to turn the many into the citizens that Brandeis envisions, we must pay attention to the institutions that govern them.

This individual initiative was also present in the democratic experimentation of Brandeis’s time. In *New State Ice Co. v. Liebmann*,<sup>74</sup> the Court confronted an Oklahoma licensing law that in essence allowed a company at least temporary monopoly power. The Court held that the state’s law was unconstitutional and therefore void.<sup>75</sup> In dissent, Brandeis argued that the process of trial and error was invaluable in democratic government, particularly in the changing world of the early 1900s.<sup>76</sup> He then noted that the Court blocking experimentation of this type “may be fraught with serious consequences to the nation.”<sup>77</sup> He ended the opinion by describing the courage it takes for a people to be guided by reason.<sup>78</sup> This experimentation

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<sup>72</sup> *Id.* at 580.

<sup>73</sup> *See* *Whitney*, 274 U.S. at 375; *Liggett*, 288 U.S. at 580.

<sup>74</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 307-11.

<sup>77</sup> *Id.* at 311.

<sup>78</sup> *Id.*

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and moral development, he asserts, is exactly the kind that democratic self-rule provides when operating at its best.

Brandeis believed that rights came with duties, and that duties would turn people into proper rulers. Democracy made citizens free to speak and learn in public or in private without restraint in order to better themselves and their governments. Democracy required small institutions so that individuals could take part in the systems that governed them, and it thrived when the people were allowed room to experiment so that they may innovate and grow through the experience. In short, a healthy democracy, in Justice Brandeis's view, was a system in which people could truly and actively govern themselves—thus actively fulfilling their civic duty.

He thought that both judges and legislatures could improperly intervene, albeit in different ways, in a healthy democracy. They both had to be prevented from doing so. The judiciary must prevent legislatures from intervening in the citizens' duty to deliberate and run their government. It must also prevent itself from intervening in the citizens' duty to experiment and use the process of democracy to enact their common will in order to address new problems that arise in changing times.

## B. THE UNHEALTHY DEMOCRACY

A society that deems itself a democracy can also act in anti-democratic ways. In some cases, an unhealthy democracy does not warrant judicial intervention. Eventually, however, the state could, by democratic means, threaten the precursors necessary to a functioning democracy altogether. At this point, Brandeis believed the judiciary was obligated to intervene. This distinction illuminates Justice Brandeis's theory of judicial review.

### 1. Improper Judicial Intervention

Justice Brandeis once remarked to Felix Frankfurter that “the most important thing we do is not doing.”<sup>79</sup> There were many occasions in which Brandeis argued that judicial interventions against the products of democratic government were unwarranted.<sup>80</sup> This restraint was proper even when the laws in question seemed unwise or even directly opposed to democratic principles.

<sup>79</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 71 (2nd ed. 1962).

<sup>80</sup> *See, e.g.*, *Muller v. Oregon*, 208 U.S. 412 (1908) (citing the Brandeis brief and deferring to the state legislature); *O’Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251 (1931) (upholding state law regulating fire insurance rates); *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (Brandeis, J., dissenting) (arguing that the Court should have deferred to the state legislature); *Pacific States Box & Basket Co. v. White*, 296 U.S. 176 (1935) (upholding state trade law regulating fruit basket dimensions and materials).

Although he was not on the Court when the now-infamous *Lochner*<sup>81</sup> case was decided, it seems clear that Brandeis would have dissented. In his “Living Law” speech, Brandeis directly addressed *Lochner* as a bad decision that prevented a community from adapting to the changing facts of life.<sup>82</sup> He said, alluding to *Lochner* and similar cases, “where statutes giving expression to the new social spirit were clearly constitutional, judges, imbued with the relentless spirit of individualism, often construed them away. Where any doubts as to the constitutionality of such statutes could find lodgment, courts all too frequently declared the acts void.”<sup>83</sup> Here, Brandeis is accusing the *Lochner* era Court of bad statutory interpretation and abuse of judicial review, both in favor of the judges’ strongly held beliefs. He argued that statutes like the one at issue in *Lochner* represented crude (because social and economic regulation is complex and requires trial and error) attempts to adjust legal rights to the demands of social justice in changing times.<sup>84</sup> Brandeis incorporates this criticism of *Lochner* as part of his broader argument that judges should let society experiment and adapt through social and economic legislation.<sup>85</sup> “Small wonder,” he said in conclusion, “that there arose a clamor for the recall of judges . . . The assaults upon courts and constitutions culminated in 1912 [but they centered on] the *Lochner* case.”<sup>86</sup>

Brandeis thought that the legislature was in a better position to determine proper remedies for social and economic ills than the courts.<sup>87</sup> Society changes quickly over time and laws need to be able to adjust to society’s changing needs.<sup>88</sup> The *Lochner* Court showed clearly that the judiciary was unable (or perhaps unwilling) to understand the facts on the ground necessary to keep up with life.<sup>89</sup> He wrote in *International News Service v. Associated Press*:

Courts are ill-equipped to make the investigations which  
should precede a determination of the limitations which

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<sup>81</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>82</sup> LOUIS D. BRANDEIS, *The Living Law* (1916), in BRANDEIS ON DEMOCRACY 59 (1995).

<sup>83</sup> *Id.* at 61-62.

<sup>84</sup> *Id.* at 62.

<sup>85</sup> *See id.* at 59-66.

<sup>86</sup> Brandeis is seemingly referring to the contentious issue of popular control over judges and judicial rulings that culminated in the 1912 presidential election. *Id.* at 62.

<sup>87</sup> *Id.* at 63-64.

<sup>88</sup> “Growth implies changes, political, economic and social. Growth which is significant manifests itself rather in intellectual and moral conceptions than in material things. Because our Constitution possesses the capacity of adaptation, it has endured as the fundamental law of an ever-developing people.” A. Bickel, *supra* note 86, at 107-08 (quoting language dropped from a Brandeis dissent).

<sup>89</sup> L. Brandeis, *The Living Law* (1916) in PHILIPPA STRUM, BRANDEIS ON DEMOCRACY 59 (1995) (noting that social and economic science had done well at keeping up with the changing times while legal science had not).

should be set upon any property right in news or of the circumstances under which news gathered by a private agency should be deemed affected with a public interest. Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for enforcement of such regulations. Considerations such as these should lead us to decline to establish a new rule of law in the effort to redress a newly disclosed wrong, although the propriety of some remedy appears to be clear.<sup>90</sup>

The legislature, on the other hand, (in particular state legislatures<sup>91</sup>) could better handle the changing social and economic facts of the world.

Still, the more important reason that the judiciary must exercise restraint is because the inputs of the democratic process are generally more important to protect than any unwise outputs. In *New State Ice Co. v. Liebmann*, the Court confronted a state statute that essentially created a monopoly power.<sup>92</sup> It seems clear that Brandeis would have disagreed with the wisdom of the statute.<sup>93</sup> Indeed, he nearly said so himself: “Whether that view is sound nobody knows. The objections to the proposal are obvious and grave. The remedy might bring evils worse than the present disease. The obstacles to success seem insuperable.”<sup>94</sup> Even if the products of the democratic process are detrimental to society, it is not the Court’s place, in these cases, to intervene. The people need to build character through practice—“If we would guide by the light of reason, we must let our minds be bold.”<sup>95</sup> Democratic experimentation is a good way to make good laws, but even if it occasionally fails in that respect, it is an excellent way to make good people.

Brandeis did not think that legislatures with more room to legislate would necessarily come up with the best solutions to societal problems. Rather, leaving legislatures to legislate would provide room for the experimentation that only *could* provide new solutions, but certainly *would* create a kind of people capable of self-government. The judiciary must stay back in these kinds of cases so that the people can become the brave social experimenters that a democracy requires.

## 2. *Judicial Intervention as the Right Medicine*

<sup>90</sup> *International News Service v. Associated Press*, 248 U.S. 215, 267 (1918).

<sup>91</sup> The states are the laboratories of democracy. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

<sup>92</sup> *New State Ice Co.*, 285 U.S. 262.

<sup>93</sup> See generally, L. Brandeis, *The Curse of Bigness* (1934).

<sup>94</sup> *New State Ice Co.*, 285 U.S. at 309-10.

<sup>95</sup> *Id.* at 311.

A democracy, however, can become unhealthy through these duly democratic practices. Consider that a state, following its proper law-making procedures, might create a statute that prohibits speech that it deems dangerous to its existence. Such a state would seem to be engaging in the vigorous self-rule that Brandeis so cherished. But it is in this very case that Brandeis as Justice was willing to intervene.<sup>96</sup> Herein lies the central issue of this paper. Why is enforced silence a unique pathology of democracy that requires judicial medicine?

*i. Free Speech*

The answer lies in communication's unique place in democracy. Free speech is necessary to the informed direction of one's government. It also allows for self-development. Indeed, Brandeis spoke about self-development as a core American ideal in his "True Americanism" speech: "What are the American ideals? They are the development of the individual for his own and the common good; the development of the individual through liberty, and the attainment of the common good through democracy and social justice."<sup>97</sup> Free speech is both the means to democracy and democracy's end. It creates citizen-rulers capable of doing their jobs. When a state suppresses speech, it is prohibiting the means of democracy. It is when the means of democracy are removed from their proper place in the citizens that the judge must intervene.

Above all, free speech and discussion are necessary means to self-government. In his *Gilbert v. State of Minnesota* dissent, Brandeis explains that "the right of a citizen of the United States to take part, for his own or the country's benefit, in the making of federal laws and in the conduct of the government, necessarily includes the right to speak or write about them."<sup>98</sup> This is because "[f]ull and free exercise of this right by the citizen is *ordinarily also his duty*; for its exercise is more important to the nation than it is to himself."<sup>99</sup> Again, one may legitimately claim a right against a government for an obligation that he or she has to that government.

In the same dissent, Brandeis cites *Johnson v. Maryland*<sup>100</sup> to back his view that the state law was unconstitutional and void. In *Johnson*, the Court reversed the conviction of a federal post officer who was charged with driving a government motor truck over a Maryland road without a state license.<sup>101</sup> Brandeis explained the relevant reasoning as follows: "The

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<sup>96</sup> See *Whitney*, 274 U.S. 357.

<sup>97</sup> L. Brandeis, *True Americanism* (1915).

<sup>98</sup> *Gilbert v. State of Minnesota*, 254 U.S. 325, 337-38 (1920).

<sup>99</sup> *Id.* at 338 (emphasis added).

<sup>100</sup> *Johnson v. Maryland*, 254 U.S. 51 (1920).

<sup>101</sup> *Id.* at 51.

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prohibition of state action rests, as the court pointed out there, ‘not upon any consideration of degree, but upon the entire absence of power on the part of the states to touch the instrumentalities of the United States.’”<sup>102</sup> Turning back to *Gilbert*, Brandeis argued that the state acted with an entire absence of power over the most important instrumentality of the people of the United States – speech.<sup>103</sup>

Brandeis’s argument here is subtle and important to reiterate: an individual speaking and writing for his own or his country’s sake is acting as an instrument of the United States. More than that, he is fulfilling his civic duty. As such, the states have “an entire absence of power”<sup>104</sup> to prevent him from doing so. We are again reminded of his view that rights and duties are two sides of the same coin. The United States needs these citizen-communicators to operate. The states cannot interfere with the functioning of the general government. Therefore, one can claim a right against the state for its noninterference in her speech.

In *Near v. Minnesota*,<sup>105</sup> the Supreme Court struck down a Minnesota state nuisance law that was used to forbid the publication of a viciously anti-Semitic newspaper. The publishers wrote in response to alleged Jewish mafia violence and illegitimate control of the Minneapolis government.<sup>106</sup> The state’s lawyer hoped to appeal to Justice Brandeis at oral argument as the only Jewish member of the Court, and one who himself had faced much anti-Semitism.<sup>107</sup> Brandeis responded, however, with what might fairly be characterized as admiration for the publishers of the vile material in question. He admonished the state’s counsel:

We do not know whether these allegations are true or false, but we do know that just such criminal combinations exist to the shame of some of our cities. What these men did seems like an effort to expose such a combination. Now, is that not a privileged communication if there ever was one? How else can a community secure protection from that sort of thing if people are not allowed to engage in free discussion of such matters? . . . [These writers] went forward with a definite program, and certainly they acted with great courage.<sup>108</sup>

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<sup>102</sup> *Id.* at 55.

<sup>103</sup> *Gilbert*, 254 U.S. 325.

<sup>104</sup> *Johnson*, 254 U.S. at 55.

<sup>105</sup> *Near v. Minnesota*, 283 U.S. 697 (1931).

<sup>106</sup> *Id.*

<sup>107</sup> See BLASI, FREEDOM OF SPEECH IN THE HISTORY OF IDEAS 691-94 (2015) (*Near v. Minnesota* oral argument excerpt).

<sup>108</sup> *Id.* at 693

Regardless of whether these authors were writing the truth, they displayed courage through speech that was necessary to a functioning democracy. They did their democratic duty.

Deliberation is a fundamental part of that duty. And because deliberation is part of one's civic duty, necessary for democratic self-government to function, legislatures cannot interfere when the people are deliberating. Brandeis began to develop this point while expanding the "clear and present danger" test in his *Schaefer v. U.S.*<sup>109</sup> and *Pierce v. U.S.*<sup>110</sup> dissents. In *Schaefer*, Brandeis described the character demanded by the clear and present danger test.<sup>111</sup> "It can be applied correctly only by the exercise of good judgment; and to the exercise of good judgment calmness is, in times of deep feeling and on subjects which excite passion, as essential as fearlessness and honesty."<sup>112</sup> Self-government demands a lot from its governors.

In *Pierce*, the Court addressed a Socialist pamphlet that the prosecution had found to be full of "false reports and false statements with intent to interfere with" the operation of the military.<sup>113</sup> Brandeis took issue with even calling the disputed language "fact." He painstakingly laid out the entire pamphlet and each sentence at issue. He then showed why those sentences were, variously, predictions,<sup>114</sup> judgments, deductions, or conclusions from fact,<sup>115</sup> but never "false reports or false statements" as contemplated by the law.<sup>116</sup> Democracy will not survive if "efforts to secure it by argument to fellow citizens may be construed as criminal incitement . . . merely because the argument presented seems to those exercising judicial power to be unfair in its portrayal of existing evils, mistaken in its assumptions, unsound in reasoning or intemperate in language."<sup>117</sup> Ultimately, the power to deliberate, draw conclusions, make predictions, and act on speech lies with the people.

Brandeis appears to have written only one opinion deferring to the legislature in a speech matter. In *Packer Corporation v. Utah*, he upheld a state law that made it a misdemeanor to display on any billboard, streetcar, placard, or other object or place of public display, any advertisements having to do with cigarettes, tobacco, or related symbols.<sup>118</sup> Understood in terms of deliberation and civic duty, however, this opinion is not an exception to his free speech rule. It is instead part and parcel of a free speech theory centered

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<sup>109</sup> *Schaefer v. U.S.*, 251 U.S. 466 (1920) (Brandeis, J., dissenting).

<sup>110</sup> *Pierce v. U.S.*, 252 U.S. 239 (1920) (Brandeis, J., dissenting).

<sup>111</sup> *Schaefer*, 251 U.S. 466.

<sup>112</sup> *Id.* at 482-83.

<sup>113</sup> *Pierce*, 252 U.S. 239.

<sup>114</sup> *Id.* at 264.

<sup>115</sup> *Id.* at 266.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 273.

<sup>118</sup> *Packer Corporation v. Utah*, 285 U.S. 105 (1932).

on democratic citizens' civic responsibilities. Brandeis explained that these advertisements were not part of the active, deliberative process of self-government:

Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard. These distinctions clearly place this kind of advertisement in a position to be classified so that regulations or prohibitions may be imposed upon all within the class.<sup>119</sup>

In a democracy, people must form opinions through an active process of education, not through a bombardment of information. Informed opinions precede one's duty to speak, listen, and argue for the sake of one's government and oneself. That realm of active citizenship is off-limits to the legislature.

When the duty to self-govern is obstructed through the suppression of speech—when the instrumentalities of self-government are denied to the rulers—the judiciary must step in. The Constitution commands, Brandeis argued in *Whitney*, that “if authority is to be reconciled with freedom,” only fear of a serious and imminent evil can justify repression of speech.<sup>120</sup> Otherwise, the remedy for speech that the community believes to be “false and fraught with evil consequences” is “more speech, not enforced silence.”<sup>121</sup> Attributing the sentiment to Thomas Jefferson, Brandeis reiterated the “fundamental principle of the American government” that citizens had a political duty to participate in public discussion.<sup>122</sup> Public discussion, however messy, is necessary for the citizen-driven political process that the Constitution requires. “The greatest menace to freedom is an inert people;”<sup>123</sup> the greatest threat to an operational democracy is state suppression of speech.

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<sup>119</sup> *Id.* at 110-11.

<sup>120</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927).

<sup>121</sup> *Id.* at 374-77.

<sup>122</sup> *Whitney v. California*, 274 U.S. 357, 375 (1927).

<sup>123</sup> *Id.*

One might still argue, as Professor Jaffe does, that Brandeis relies on personal preference in affording speech such a high priority in his constitutional interpretation. Brandeis said that “[t]hose who won our independence believed that the final end of the state was to make men free to develop their faculties.”<sup>124</sup> But no judge can properly find a single intention of the collective founders and argue it as a constitutional imperative. Even if one could, what is it about speech that uniquely and necessarily develops the faculties?<sup>125</sup>

Brandeis certainly thought that speech was necessary for self-development, and that individual development was important for a democracy. Much of his thought centered on it—constitutional, economic, or otherwise. For instance, in arguing for more leisure time, he says that “with us, every man is of the ruling class.”<sup>126</sup> Because of this, “[o]ur education and condition of life must be such as [to] become a ruler.”<sup>127</sup> This necessary development can come from “classes or from the political platform, in the discussion of the lodges or in the trade unions, or...from the reading of papers, periodicals, or books.”<sup>128</sup>

All the activities that Brandeis contemplates as developing the people as rulers come from speech. But recall that engaging in speech is also a citizen’s duty. A flourishing democracy requires active citizen input in government, and that requires communication. The goal of developing an individual’s faculties was not just for his own good, but for the good of the community, as he would then participate fully in the democratic process.<sup>129</sup> The self-development benefits of speech flow from the citizen’s duty to participate in democratic communication.<sup>130</sup> While one could reasonably dispute Brandeis’s argument that speech uniquely develops human faculties, those are contentions for another paper. His beliefs on self-actualization do not change the fact that, more importantly for first amendment theory, he

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<sup>124</sup> *Whitney*, 274 U.S. at 375.

<sup>125</sup> Robert Bork states this objection in his work criticizing Brandeis’s approach to free speech: “An individual may develop his faculties or derive pleasure from trading on the stock market, following his profession as a river port pilot, working as a barmaid, engaging in sexual activity, playing tennis, rigging prices or in any of thousands of other endeavors. Speech with only the first two benefits can be preferred to other activities only by ranking forms of personal gratification.” Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L. J.* 1, 25 (1971).

<sup>126</sup> L. Brandeis, *Hours of Labor*, Address to the Civic Federation of New England (1906).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 *U. Ill. L. Rev.* 163 (1995).

<sup>130</sup> In *Whitney*, for example, although Brandeis begins by describing the “final end” of the state, the rest of his opinion relies on the ways in which speech protects a democratic government, on the political duty to participate in public discussion, and on the importance of reason in the process of popular government. See 274 U.S. at 375-77. He describes “liberty both as an ends and as a means,” but discusses free speech throughout much more as a means to self-government, suggesting that the most important role for the judge (as this is the position from which he was writing) was to protect the means of self-government. *Id.*

was protecting the duty to communicate in service to democracy. Individual development was an incidental benefit- although it was one to be expected-but not the primary reason for speech's high priority.

The bedrock of free speech, to Justice Brandeis, was duty.<sup>131</sup> The state cannot legitimately attack its rulers as they are participating in the process of ruling. Regardless of the good that speech can bring to the people, the judiciary must step in when free speech is threatened solely because citizens in a democracy need it to do their job as the decision makers.

## ii. Education

During his time on the Court, Brandeis joined the majority in two well-known opinions holding education to be a fundamental right. Both decisions included it in the "liberty" protected by the Fourteenth Amendment. Those cases- *Meyer v. Nebraska* and *Pierce v. Society of Sisters*-stand for the proposition that a state cannot interfere with its citizens' freedom to educate their children as they see fit.<sup>132</sup> Justice Hugo Black later criticized both cases as relics of the *Lochner* era. He said in his *Griswold v. Connecticut* dissent that *Meyer* and *Pierce* both "elaborated the same natural law due process philosophy found in *Lochner v. New York*."<sup>133</sup> Because the cases applied the same faulty reasoning that the Court had since repudiated, Justice Black could not accept their application to the issue before him. How then can Brandeis defend his votes in *Myer* and *Pierce* while similarly repudiating *Lochner*?

The answer is that education is inextricably intertwined with speech, and both are necessary for citizens to properly fulfill their civic duty to democracy. In response to the *Meyer* opinion, Brandeis told Felix Frankfurter that "the right to an education was so fundamental that any impairment of it had to be judged by the clear and present danger test," applying the same rule as he would in free speech cases.<sup>134</sup> As Philippa Strum explains, "free speech and the electorate's access to all ideas were central to

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<sup>131</sup> Again, he claimed "[f]ull and free exercise of this right by the citizen is ordinarily also his duty; for its exercise is more important to the nation than it is to himself." *Gilbert*, 254 U.S. at 338.

<sup>132</sup> See *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that Nebraska law restricting foreign-language education violated the Due Process clause of the Fourteenth Amendment); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925) (finding that a state law requiring parents to send their children to public school violated the Due Process clause of the Fourteenth Amendment because "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only").

<sup>133</sup> *Griswold v. Connecticut*, 381 U.S. 479, 515 (1965) (Black, J., dissenting).

<sup>134</sup> These comments come from Brandeis's conversations with Frankfurter in response to the 1923 *Meyer* education case. Philippa Strum, *Brandeis: The Public Activist and Freedom of Speech*, 45 *BRANDEIS L.J.* 659, 692 (2007). (citing Memorandum written by Felix Frankfurter after conversations with Brandeis 21 (on file with Library of Congress, Frankfurter Papers, Box 224)).

education, which was in turn central to democracy.”<sup>135</sup> One needs speech to give and receive education, and education to realize the value of speech in the democratic process.

Brandeis thought education was intertwined with free speech in making citizens capable of self-government. This theme runs through Brandeis’s dissenting opinion in *Gilbert v. State of Minnesota*, which addressed a state law that prohibited teaching that the abolition of war was possible.<sup>136</sup> As discussed above, Brandeis saw the law at issue in *Gilbert* as a violation of the right to free speech.<sup>137</sup> He also put important emphasis on its prohibition of the *teaching* of a doctrine.<sup>138</sup> “It applies alike,” Brandeis said, “to the preacher in the pulpit, the professor at the university, the speaker at a political meeting, [and] the lecturer at a society or club gathering.”<sup>139</sup> The majority of the Court in *Gilbert* thought that this teaching of doctrine was the state’s problem alone, and thus that the Court could not interfere.<sup>140</sup> Brandeis argued that “the matter is not one merely of state concern” because it directly affects the functions of the federal government.<sup>141</sup> It prohibits the constitutional right and duty to direct one’s government through persuasion, and to choose whom to persuade and whom to be persuaded by.<sup>142</sup> Teaching requires speech, and the education that comes from certain forms of speech, like those examples that Brandeis gives, is what enables a people to dutifully direct their government.

Here again we see his focus on a certain kind of citizen. Silenced and ignorant people cannot run a democracy. Education is similarly interwoven with speech in his *Whitney* concurrence.<sup>143</sup> He says that education is a better protector of democracy than censorship: if there is time “to avert the evil [that a censorious law targets] by the processes of education, the remedy to be applied is more speech, not enforced silence.”<sup>144</sup> It creates citizens of a certain character, capable of behavior befitting a ruler rather than a reprobate. In a democracy, one of the best deterrents of criminal

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<sup>135</sup> Philippa Strum, *Brandeis: The Public Activist and Freedom of Speech*, 45 BRANDEIS L.J. 659, 660 (2007).

<sup>136</sup> *Gilbert v. State of Minnesota*, 254 U.S. 325, 334 (1920) (Brandeis, J., dissenting).

<sup>137</sup> *Id.* at 336

<sup>138</sup> *Id.* at 335

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 336

<sup>141</sup> *Id.*

<sup>142</sup> Brandeis uses the term persuasion as a force that may be dangerous to society, but also one that might be beneficial to society and lead to unorthodox but favorable ideas. For instance, “Congress, legislating for a people justly proud of liberties theretofore enjoyed and suspicious or resentful of any interference with them, might conclude that even in times of great danger, the most effective means of securing support from the great body of citizens is to accord to all full freedom to criticize the acts and administration of their country, although such freedom may be used by a few, to urge upon their fellow citizens not to aid the government in carrying on a war, which reason or faith tells them is wrong, and will therefore bring misery upon their country.” *Id.*

<sup>143</sup> *Whitney v. California*, 274 U.S. 357 (1927).

<sup>144</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927).

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behavior is “education . . . not abridgment of the rights of free speech and assembly.”<sup>145</sup>

Brandeis reiterated this point in later speeches and letters. An educated citizenry, he believed, was necessary to protect the community from the dangers inherent in a democracy. In an address to the New England Civic Federation, he said:

The educational standard required for a democracy is obviously high. The citizen should be able to comprehend, among other things, the many great and difficult problems of industry, commerce, and finance, which with us necessarily become political questions. He must learn about men as well as things. In this way can the commonwealth be saved from the pitfalls of financial schemers on the one hand and ambitious demagogues on the other.<sup>146</sup>

The people are the rulers in a democracy. Their access to information is important, but not enough on its own to accomplish what democracy requires of them. They must have the ability to understand the plethora of topics that will inevitably become political issues.

Democracy cannot succeed without these free and developed citizens.<sup>147</sup> “It is only possible where the process of perfecting the individual is pursued.”<sup>148</sup> In this way, education is a kind of political speech. The citizen benefits from its protection, but more importantly, she is freed to fulfill her duty to the democratic community. Both rights deserve significant judicial protection because the litigant invoking them has a duty to the community to exercise them.<sup>149</sup> To apply reason to the issues presented by self-government, one must be free to learn the necessary methods and facts.

Second, to Brandeis, education was a part of the communal work of self-governance. It was necessary to his vision of a thriving democratic society. His distrust of bigness in government and business was also present in education, again because of its effect on a community’s ability to govern itself. For example, as Dean Donald L. Burnett explains, “when Harvard law dean Roscoe Pound proposed to increase enrollments at that school, Justice Brandeis objected, calling instead for smaller, better schools.”<sup>150</sup> Brandeis

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<sup>145</sup> *Id.* at 378

<sup>146</sup> L. Brandeis, Address to the New England Civic Federation (1906).

<sup>147</sup> Louis D. Brandeis to Robert W. Bruere, Letter of February 25, 1922, summarizing at the latter’s request informal remarks that Brandeis had delivered to the Federal Council of Churches.

<sup>148</sup> *Id.*

<sup>149</sup> See Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163 (1995) (arguing that Brandeis “ranked the right to an education as having equal importance with freedom of speech” because the person engaging in them would fulfill their profound responsibility to the community).

<sup>150</sup> Dean Donald L. Burnett, Jr., The Brandeis Vision, 37 *BRANDEIS L.J.* 1, 3 (1999).

wanted “not a bigger H.L.S., but 20 Harvard Law Schools.”<sup>151</sup> With education further dispersed and available to more communities, the people could become the nimble, responsive governors that Brandeis imagined.

In order to improve the educational landscape in his home state, Brandeis contributed a significant sum of money to the University of Louisville.<sup>152</sup> Education, particularly law school, could prepare young people to be useful to democracy and to do the great work necessary for its prosperity.<sup>153</sup> His collaborator, Robert N. Miller, described his vision in the following way:

[A law school should] be one of the leaders of legal thought in the state . . . an influence tending to maintain the highest standards of legal and judicial thought and policy; among other services it can render, it will be ready with wise advice with regard to the new legislation which changing conditions from time to time may require . . . Such a school may be at the same time closely in touch with modern thought everywhere, and yet an integral part of Kentucky, Kentuckian to the backbone. A law school which rises to the point of fully meeting the needs of its own state will find itself honored by the respectful admiration of all other states. In solving its home problems with distinction, it acquires specialized knowledge of which even the proudest institutions of other states are glad to avail themselves.<sup>154</sup>

Education is necessary for a state to be able to run the experiments in democracy that Brandeis so cherished.<sup>155</sup> It is part of the democratic character of a community. It makes individuals capable of self-government and communities capable of maintaining a vibrant democratic process.

In sum, free speech and education are two rights that we know Brandeis believed were fundamental to the liberty protected by the Fourteenth Amendment. As Strum says, “there was a reason Brandeis told Frankfurter that the first fundamental rights were speech and education . . . In a democratic society, where citizens had to be informed, education was a process that continued throughout life. Only citizens could decide who among those who sought to ‘educate’ them deserved their attention.”<sup>156</sup> The

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<sup>151</sup> PHILLIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 398 (1984).

<sup>152</sup> Burnett, *The Brandeis Vision*, *supra* note 156 at 3.

<sup>153</sup> *See id.*

<sup>154</sup> BERNARD FLEXNER, MR. JUSTICE BRANDEIS AND THE UNIVERSITY OF LOUISVILLE 65 (1938) (quoting Ernest Poole, Brandeis, *Am. Mag.*, Feb. 1911).

<sup>155</sup> *See New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).

<sup>156</sup> *See Strum, Brandeis: The Public Activist*, *supra* note 141 at 702.

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most fundamental attribute of a democracy, at least in Brandeis's mind, was that citizens dutifully participate in their self-government. To do so, they must learn the necessary facts and freely communicate with one another. In instances of state infringement of either of these rights, he understood that the judiciary must intervene to protect the means of self-government.

Let us now return briefly to *Meyer* and *Pierce*. Both opinions include language that frames uninhibited education as a necessary means to self-governance. In *Meyer*, the Court invalidated a law that prohibited foreign language instruction.<sup>157</sup> Brandeis would have certainly agreed with the insertion of the following passage from a 1787 Ordinance: "Religion, morality and knowledge *being necessary to good government and the happiness of mankind*, schools and the means of education shall forever be encouraged."<sup>158</sup> The opinion goes on to argue that education and the teaching profession have always "been regarded as useful and honorable, essential, indeed, to the public welfare."<sup>159</sup> Though stated somewhat vaguely, it is clear that the Court contemplated some role for education in democratic government beyond its mere individual benefit to the student or teacher. Brandeis's views on education, as described at length above, find voice in these sections on education's democratic purpose.

In *Pierce*, the Court (applying *Meyer*) invalidated a law that required parents to send their students to public schools rather than their private Catholic or military counterparts.<sup>160</sup> The opinion was largely based on the theory of non-interference with parents' choice of how to raise and educate their children.<sup>161</sup> But again we find language throughout that seems quite Brandeisian. "The fundamental theory of liberty upon which all governments in this Union repose," the Court said, "excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only."<sup>162</sup> This is because the "child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."<sup>163</sup> Life in our democracy entails certain high duties and obligations, which education prepares children to fulfill. It is antithetical to our Constitution for a state to attempt to standardize its citizens through the prohibition of a certain curriculum—it is the citizen's duty to decide how to direct the state.

Unfortunately, we do not have Supreme Court opinions written by Brandeis directly addressing education. But the opinions that he voted in

<sup>157</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>158</sup> *Id.* at 400 (emphasis added).

<sup>159</sup> *Id.*

<sup>160</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>161</sup> *Id.* at 534.

<sup>162</sup> *Id.* at 535.

<sup>163</sup> *Id.*

favor of fit neatly into his democratic constitutional theory. Citizen-rulers must be uninhibited in speech and education so that they can learn, deliberate, and live up to the demanding duties that self-government requires of them.

### III. PROCESS BASED JUDICIAL REVIEW

Brandeis's theory of judicial review resembles the better-known work of John Hart Ely. Both worried about the Court's anti-democratic nature and developed their theories of judicial review with that nature in mind. Both responded by focusing on the ways in which judicial review can protect democracy. This Section will review Ely's theory, compare it to Brandeis's, and conclude by describing the new approach to judicial review that emerges when they are read together. This approach, which I will call "democratic republican" judicial review, aims to protect both the precursors to and the process of democracy. In doing so, it draws upon an understanding of the Constitution that was prominent at the Founding.<sup>164</sup>

#### A. JOHN HART ELY

Ely lays out his process-based theory of judicial review in his book *Democracy and Distrust*.<sup>165</sup> He argues that the judiciary should not make substantive value judgments about rights.<sup>166</sup> Rather, the judiciary should protect democracy by "insuring access of all groups to the process and insuring, further, that the dominant majority coalition will not prescribe one set of rules for itself and another, less favorable set for groups that are not part of that coalition."<sup>167</sup>

Ely observes that the Constitution contains many vague and open-ended provisions.<sup>168</sup> He argues that it would be undemocratic and thus

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<sup>164</sup> Professor Sunstein describes this liberal republican understanding of American politics as faithful to the Founding period and as useful in some ways to modern politics. *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988). Sunstein shares both Ely's concern with access to the political process and with individuals' ability to check the government, and Brandeis's concern with cultivating citizens with civic virtue. Regarding the importance of political participation to a democracy under this liberal republican view, Sunstein says, "a large purpose of participation is to monitor the behavior of representatives in order to limit the risks of factionalism and self-interested representation. But on the republican view, political participation is not only instrumental in the ordinary sense; it is also a vehicle for the inculcation of such characteristics as empathy, virtue, and feelings of community (and this is so even if the motivation for participation is instrumental)." *Id.* at 1556.

<sup>165</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

<sup>166</sup> *See, e.g., Id.* at 74-75 (arguing that the Warren Court properly pursued the participation goals of extended access to the political process rather than providing some set of substantive goods).

<sup>167</sup> JOHN HART ELY, *ON CONSTITUTIONAL GROUND* 9 (1996).

<sup>168</sup> Many provisions are open ended, and thus, up for debate. For example, the Ninth and Fourteenth Amendments do not exactly provide judges with clear instructions. How should the judge read the Constitution in these tough cases? *See Ely, supra* note 171 at 11.

improper for the courts to use these as a basis for imposing its own understanding of fundamental values.<sup>169</sup> Thus, like Brandeis, he thinks that *Lochner* was decided incorrectly.<sup>170</sup> He is, of course, more thorough than Brandeis in refuting the various justifications for fundamental-values review, since most of those justifications were articulated after Brandeis's death. He concludes that there is not "any impersonal value source out there waiting to be tapped" by the judiciary, but that this fact does not mean that judges must impose their own values nor that they should rubber stamp everything that a legislature does.<sup>171</sup> Instead, he thinks that courts can play a democratically legitimate role by policing the process of representation and ensuring that government is genuinely accountable to the electorate.<sup>172</sup> Freedom of speech and the press are crucial means for ensuring this accountability. Ultimately, Ely argues, this representation-reinforcing approach of judicial review is more supportive of American representative democracy and "assigns judges a role that they are conspicuously well situated to fill."<sup>173</sup>

The Court's legitimate role, for Ely, is not protecting substantive values, but rather clearing the channels of political change. Free speech under the First Amendment, for instance, is important for courts to protect "because we cannot trust elected officials to do so: ins have a way of wanting to make sure the outs stay out."<sup>174</sup> Speech is how we decide as a people who is in and who is out. The right to vote, though not mentioned in the Constitution, is also a right that Ely argues deserves judicial protection.<sup>175</sup> This is because "unblocking stoppages in the democratic process is what judicial review ought preeminently to be about, and denial of the vote seems the quintessential stoppage."<sup>176</sup> Again, as in the case of speech, "[w]e cannot trust the ins to decide who stays out."<sup>177</sup> In these cases the courts must step in, not to impose their values, but to protect the democratic process.

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<sup>169</sup> The "counter-majoritarian" difficulty is a term coined by Alexander Bickel and describes the issue that Ely is addressing in his book; that is, how can an unelected and largely unaccountable court legitimately rule in opposition to the majority in a democracy. *See id.* at 43.

<sup>170</sup> Throughout *Democracy and Distrust*, Ely uses the *Lochner* decision to demonstrate an "activist" Court that improperly inserts its substantive values into its constitutional judgment. *See, e.g., id.* at 73 (explaining the Court's deserved interventionist or activist reputation after *Lochner*, before differentiating the *Lochner* Court from the Warren Court).

<sup>171</sup> *Id.* at 72

<sup>172</sup> The Warren Court implicitly understood this, and properly focused its jurisprudence on two political process concerns: "clearing the channels of political change on the one hand, and [] correcting certain kinds of discrimination against minorities on the other." *Id.* at 74. It did so by following *Carolene Products* footnote 4, which Ely argues is largely about protecting democracy without imposing judicial values in place of those of a legislature. *Id.* at 73-76

<sup>173</sup> *Id.* at 102

<sup>174</sup> *Id.* at 105-116

<sup>175</sup> *Id.* at 116

<sup>176</sup> *Id.* at 117

<sup>177</sup> *Id.* at 120

It is clear why, for Ely, free speech deserves robust judicial protection in a democratic regime: “Rights like [free speech, press, and political association], whether or not they are explicitly mentioned, must nonetheless be protected, strenuously so, because they are critical to the functioning of an open and effective democratic process.”<sup>178</sup> But Ely is not an absolutist; that is, he does think that there is *some* speech that the state can prohibit.<sup>179</sup> How then does this theory work in practice?

For Ely, everything depends on whether the government is restricting speech on the basis of its content – a distinction that is now a settled part of First Amendment law. He offers a justification for that distinction: he thinks it is necessary in order to permit the government to legislate in cases where its judgment is trustworthy, while imposing limits where its motives are suspect.

Ely presents two approaches to free speech analysis: the “specific threat” approach<sup>180</sup> and the “unprotected messages” approach.<sup>181</sup> These terms correspond to the now-settled distinction between content-neutral restrictions on speech, which the Court treats with substantial deference, and content-based restrictions, which are presumptively invalid. He shows that these approaches are actually complementary and not, as commentators traditionally believed, mutually exclusive.<sup>182</sup> I will take each in turn.

When the regulation at issue applies across the board without reference to an expression’s specific content, Ely argues that courts should use the “specific threat” approach.<sup>183</sup> For instance, if a state merely bans sound trucks at 3:00 a.m., and a hypothetical candidate named Ely contends that this is a violation of his free speech right to blare “Ely for Congress” through his neighbor’s window, the issue is not about the message; but about a law that inadvertently prohibits him from saying what he wants to say.<sup>184</sup> Of course, the state could still create a content-neutral law that intentionally or unintentionally blocks a certain viewpoint—maybe a sound truck is all that the Ely campaign can afford, while his well-funded opponent can advertise on TV and radio—but there is less of a risk of prohibiting specific viewpoints in speech neutral legislation, and the state is more often targeting a legitimate, non-speech danger. When a non-speech, ideologically neutral evil is being targeted, some restriction of expression may be properly balanced against the state’s interest in its citizens’ safety and wellbeing.<sup>185</sup>

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<sup>178</sup> Ely, *supra* note, 171 at 105.

<sup>179</sup> Indeed, Ely argues that even “absolutists,” like Justice Black, are not actually absolutists. They simply use creative arguments, for example, that speech being restricted is really conduct, to get around the most difficult cases. *Id.* at 109

<sup>180</sup> *Id.* at 111

<sup>181</sup> *Id.* at 111

<sup>182</sup> *Id.* at 110-11

<sup>183</sup> *Id.* at 111

<sup>184</sup> *Id.* at 111

<sup>185</sup> *Id.* at 113

Although Ely does not explicitly explain the mechanics of this balancing test, he cites the test from *United States v. O'Brien*: “if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of [a substantial government] interest,” the law is valid.<sup>186</sup>

Ely cites *Prince v. Massachusetts*<sup>187</sup> as an example of the appropriate application of the “specific threat” approach.<sup>188</sup> In *Prince*, the Court affirmed the conviction of a Jehovah’s Witness under state child labor laws when she sent her child to distribute religious literature.<sup>189</sup> Here, “the evil the state was trying to avert was one that would have been equally implicated had the child been engaged in work with no communicative component whatever.”<sup>190</sup> This law clearly prohibited a form of expression, but political or religious views per se were not at issue here, and thus “specific threat” balancing was appropriate.<sup>191</sup> In the context of preventing the evil of child labor, this restriction on expression was appropriate.

The second approach, the “unprotected messages” approach, applies when the regulation targets a specific message.<sup>192</sup> Here, the “hazards of political distortion and judicial acquiescence are at their peak.”<sup>193</sup> Ely distrusts judges as well as legislatures.<sup>194</sup> The First Amendment is meant to assure open dialogue and process, so “we must seek to minimize assessment of the dangerousness of the various messages people want to communicate.”<sup>195</sup> For laws like these, then, the Court needs a categorical approach to apply regardless of the message. The message at issue is either protected or unprotected, regardless of context. (This approach is obviously the most relevant of the two for this paper—Brandeis’s free speech opinions addressed content specific laws.<sup>196</sup>)

Ely cites *Brandenburg v. Ohio*<sup>197</sup> as the best example of this “unprotected messages” approach.<sup>198</sup> In *Brandenburg*, the Court held that the Ohio Criminal Syndicalism Act violated the First and Fourteenth

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<sup>186</sup> *Id.* at 232 n. 22

<sup>187</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>188</sup> Ely, *supra* note 171 at 113.

<sup>189</sup> *Prince* 321 U.S. at 158.

<sup>190</sup> Ely, *supra* note 171 at 113.

<sup>191</sup> It is a bit unclear what level of scrutiny Ely thinks the Court should use here. He notes that “‘strict review’ is always appropriate where free expression is in issue,” but does not explain how that review would apply in the “specific threat” balancing test. *Id.* at 116.

<sup>192</sup> *Id.* at 111

<sup>193</sup> *Id.*

<sup>194</sup> He quotes Judge Learned Hand to show this distrust. “Besides even their Ineffabilities, the Nine Elder Statesmen, have not shown themselves wholly immune from the ‘herd instinct.’” *Id.* at 112.

<sup>195</sup> *Id.* at 112.

<sup>196</sup> See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919) (addressing antiwar speech); *Debs v. United States*, 249 U.S. 211 (1919) (addressing socialist speech); *Abrams v. United States*, 250 U.S. 616 (1919) (addressing speech condemning U.S. intervention in Russia); *Whitney v. California*, 274 U.S. 357 (1927) (addressing association with communists).

<sup>197</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>198</sup> Ely, *supra* note 171, at 114-15.

Amendments.<sup>199</sup> Because the evil that the legislature aimed to prevent here arose out of the message itself, Ely believed that the Court properly used a categorical “unprotected messages” approach.<sup>200</sup> Legislatures can only forbid specific speech if it “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>201</sup> Speech either fits in that category or it does not. The *Brandenburg* test is especially important for this point because it applies to subversive speech about the very nature of our democratic government.<sup>202</sup> The First Amendment requires that legislatures and courts do not deem messages “dangerous,” and therefore properly prohibited, simply because they strongly disagree or fear the content of the message.<sup>203</sup>

Importantly, both approaches specify occasions for strict judicial scrutiny.<sup>204</sup> Ely says that “‘strict review’ is always appropriate where free expression is in issue,” although he does not explicitly describe how it would be applied in the “specific threat” balancing scenario.<sup>205</sup> It is at least clear that, when speech is at issue, the legislature does not get ordinary deference.<sup>206</sup> This framework makes it more likely that the judiciary will not be swept up in the same hysteria that overcomes a legislature in times when free speech is most at risk.<sup>207</sup> It is about keeping the “ins” from keeping the “outs” out, either of the government or of the political discussions that move it.

Ely’s earlier writing foreshadows the comprehensive theory he laid out in *Democracy and Distrust*.<sup>208</sup> It also provides more examples of the

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<sup>199</sup> *Brandenburg*, 395 U.S. at 445.

<sup>200</sup> Ely, *supra* note 171, at 114-15.

<sup>201</sup> *Id.* at 115

<sup>202</sup> Ely says that “by silencing people, we may be protecting something, but we certainly won’t be protecting ‘the American Way.’” *Id.* at 116.

<sup>203</sup> It is not likely a coincidence that the laws addressed by this category often have to do with the overthrow of the current government. *See, e.g.,* *Whitney*, 274 U.S. 357 (voiding a Criminal Syndicalism Act that prohibited, in relevant part, communist agitators). Again, the “ins” have a habit of wanting to stay in.

<sup>204</sup> *Id.*

<sup>205</sup> Again, he seems to rely on the heightened review balancing test that he describes in an earlier article, and that comes from the Court’s test in *O’Brien*: “if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of [a substantial government] interest,” the law is valid. *See* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV., 1482 (1975).

<sup>206</sup> Ely, *supra* note 171, at 116.

<sup>207</sup> *Id.* at 112. (explaining the advantageous, but still suboptimal position that judges are likely to be in a better position to be objective as unelected, legally trained officials compared to legislators). But even so, (“[J]udges by and large are drawn from the same political and social ranks as elected officials, and are subject to many of the same anxieties”).

<sup>208</sup> JOHN HART ELY, *Trial by Newspaper and Its Cures* (1967), in ON CONSTITUTIONAL GROUND 152, 169 (1996). (In the first of his free speech articles, *Trial by Newspaper and Its Cures*, Ely addresses the problem of allowing the press freedom to report on the criminal process while

theory in action. In *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*,<sup>209</sup> Ely deals with a few concrete examples.<sup>210</sup> First, he argues that the Court properly applied the *Brandenburg* categorical approach in *Cohen v. California*.<sup>211</sup> There, the Court reversed the conviction of a young man whose jacket said “Fuck the Draft.”<sup>212</sup> The jacket was only “dangerous” if one understood the message.<sup>213</sup> It was the speech itself being targeted. The speech did not fit in the “unprotected messages” category—it was not directed to inciting or producing imminent lawless action—and was therefore unconstitutionally prohibited.<sup>214</sup>

Next, Ely addresses American flag laws. He explains that there are generally two kinds of these laws: “desecration provisions,” which use words like “mutilate, deface, defy, or cast contempt upon,” and “improper use provisions,” which “outlaw affixing to the flag any ‘word, figure, mark, picture, design, drawing or advertisement of any nature’ and publicly displaying a flag so embellished.”<sup>215</sup>

The first of these kinds of laws, “desecration provisions,” proscribe only ideologically charged acts, and are thus clearly subject to the *Brandenburg/Cohen* categorical approach.<sup>216</sup> The second kind, however, are ideologically neutral. “All that matters is that [the violator] is interrupting the message conveyed by the flag.”<sup>217</sup> It would appear, then, that the Court should use a balancing test on this law. But Ely argues that a closer look at the law reveals that the government is singling out an ideological view for

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aiming to protect the individual right to a fair trial). Here we see that free speech is essential to the democratic process because it provides a check against the government:

The First and Fourteenth Amendments to the U.S. Constitution, which safeguard the freedom of the press, reflect a judgment that the integrity of all governmental processes (the criminal process included) is rendered more secure by the existence of a press willing and free to expose to public view their workings and to comment adversely upon them when they are malfunctioning. Democratic theory presupposes that it is the people who provide the ultimate check on how the government is run; but this theoretical check will be of little avail unless the public is kept informed of what is going on.

<sup>209</sup> John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

<sup>210</sup> Ely, *supra* note 211 (citing this theory in Democracy and Distrust and applying it to arrive at the “specific threat” and “unprotected messages” approaches).

<sup>211</sup> *Id.* at 179 (citing *Cohen v. California*, 403 U.S. 15 (1971)).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 182 (“Had his audience been unable to read English, there would have been no occasion for the regulation”).

<sup>214</sup> *Id.* at 179

<sup>215</sup> *Id.* at 184.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 185.

special protection: the symbol of the flag.<sup>218</sup> As such, this law also must be subject to the categorical approach and held unconstitutional.<sup>219</sup> This is perhaps why strict judicial review is appropriate for both tests. Ely is suspicious that purportedly content-neutral laws may in fact target specific content.

The players in Ely's story are primarily government actors trying to keep themselves in power. The only characteristic of the people that Ely cares about is their freedom to check those in power. The Court's democratic function is to vigorously protect speech so that the incumbents do not illegitimately keep themselves in power.

Beyond rights to speak, associate, and vote, and to further the goal of policing the democratic process, Ely finally argues that the Court should prevent dominant majorities from passing laws that are less favorable to discriminated-against minorities.<sup>220</sup> "No matter how open the process, those with most of the votes are in a position to vote themselves advantages at the expense of the others, or otherwise to refuse to take their interests into account."<sup>221</sup> He argues that while the pluralist model-disparate groups wheeling and dealing to form mutually interested coalitions-can work to protect rights in some cases, it is far from sufficient to so in many.<sup>222</sup> The chief example of this failure is the experience of Black people in America.<sup>223</sup>

Here some challenges arise: first, all laws discriminate against some group in some way—murder laws discriminate against those who murder—and second, it is difficult, if not impossible, to determine officials' motivation in lawmaking.<sup>224</sup> Ely presents Justice Stone's original *Carolene* Footnote Four language to combat these issues: "prejudice against discrete and insular minorities may be a special condition" that requires judicial intervention to maintain a functioning political process.<sup>225</sup> The Court can get around problems of appropriate and inappropriate discrimination, as well as indeterminate official motivation, by protecting discrete and insular minorities from being treated unequally without compelling cause.<sup>226</sup> In doing so, it makes up for the failings of pluralism in the political process.

### B. ELY VERSUS BRANDEIS

Within this political process theory, however, Ely seems to take for granted that people with access will, in fact, participate, and more

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<sup>218</sup> *Id.* at 186.

<sup>219</sup> *Id.*

<sup>220</sup> See Ely, *Democracy and Distrust*, *supra* note 171 at 88-94.

<sup>221</sup> Ely, *Democracy and Distrust*, *supra* note 171 at 135.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 136-145.

<sup>225</sup> *Id.* at 153.

<sup>226</sup> *Id.*

specifically, will participate wisely and virtuously – or, at least, wisely and virtuously enough to make their choices legitimate.<sup>227</sup> Brandeis did not take these facts for granted though he did fail to address the challenges to democratic participation that Ely saw.

Because Brandeis only confronted speech laws that Ely would consider content-specific, and thus falling within what Ely calls the “unprotected messages” approach, I will only compare their theories in relation to these laws.<sup>228</sup> Ely viewed the *Brandenburg* test as the correct one for laws prohibiting speech on the basis of its purported tendency to incite lawbreaking.<sup>229</sup> That test resembles the test that Brandeis created in his *Whitney* concurrence. In fact, *Brandenburg* specifically overruled *Whitney*.<sup>230</sup> *Brandenburg* was a per curiam decision but the original draft of the opinion was written by Justice Abe Fortas, whose law clerk claims that Fortas consciously modeled his *Brandenburg* rule on Brandeis’s concurrence, among others.<sup>231</sup> The *Brandenburg* test says that states may only prohibit free expression “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>232</sup> Brandeis, in comparison, wrote that legislatures can prohibit free expression only where there is “reasonable ground to fear that serious evil will result if free speech is practiced . . . that the danger apprehended is imminent . . . that the evil to be prevented is a serious one.”<sup>233</sup> In application, then, Ely and Brandeis’s free speech theories are strikingly similar. However, in underlying philosophy, their theories clearly differed.

Ely was most concerned with the abuse of speech restrictive laws by incumbent officeholders to silence opposition and keep themselves in power. Brandeis, on the other hand, was most concerned with the character of the people.<sup>234</sup> He thought that free speech created a courageous and deliberative people that formed the brain of a healthy democratic body. Under Ely’s theory, individual preferences are taken as exogenous to the political

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<sup>227</sup> The closest that Ely gets to discussing the precursors to the democratic process is in arguing for a more transparent legislative process. He argues that we must be able to see what legislatures do, and be more able to determine their purpose for doing so. *See id.* at 125-34. Ely says that “popular choice will mean relatively little if we don’t know what our representatives are up to.” *Id.* at 125. But that assumes that once voters have the raw material through a transparent legislative process they will know what to do with it. It assumes the civic character that Brandeis hopes to build.

<sup>228</sup> *See supra* note 202 (listing Brandeis’s major speech opinions, all of which address content-specific regulations).

<sup>229</sup> *See Ely, Democracy and Distrust, supra* note 171 at 114-15.

<sup>230</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>231</sup> *See* Martha A. Field, *Brandenburg v. Ohio and Its Relationship to Masses Publishing Co. v. Patten*, 50 ARIZ. ST. L.J. 791, 792 (2018).

<sup>232</sup> *Brandenburg*, 395 U.S. at 447.

<sup>233</sup> *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring).

<sup>234</sup> *See Blasi, The First Amendment and the Ideal of Civic Courage, supra* note 2.

process.<sup>235</sup> It does not matter what the people want or how they developed those wants as long as they have equal access and share in the outcome.<sup>236</sup> Under Brandeis's theory, the appropriate process of preference formation is an essential part of democracy.<sup>237</sup>

This underlying difference is apparent in their broader theories of judicial review and restraint. Ely aimed to prevent the judiciary from imposing its own substantive values under the guise of constitutional law. Brandeis wanted to keep the court out of the way of the character-building process of democratic participation. This accounts for their different responses to the education decisions *Meyer* and *Pierce*.<sup>238</sup> To Ely, regulating education in the manner that the states did in those cases neither blocked channels of political change, nor prevented a discrete and insular minority from accessing the political process or sharing in its outcomes.<sup>239</sup> To Brandeis, however, the state laws interfered with the citizen's right and duty to develop himself in order to direct his government.<sup>240</sup> Without that right, one could not fulfill one's constitutional duty as a citizen.<sup>241</sup>

More generally, Brandeis counsels the judiciary to promote and protect deliberative and experimental democratic activity, particularly at the state level. He cares about the civic character of the people, democracy as an ethic or way of life, federalism, and the role institutions play in promoting or inhibiting civic engagement. But he misses aspects of the judicial role that Ely properly recognizes as necessary for a functioning democracy. Those are, for example, protection for discrete and insular minorities from being kept out of the political process or being treated unequally by its products, protection of voting rights (which are as essential as the right to free speech), and preventing incumbents from entrenching themselves by virtue of already being in power.

These shortcomings in Brandeis's philosophy are highlighted in Professor Christopher Bracey's *Louis Brandeis and the Race Question*.<sup>242</sup>

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<sup>235</sup> This form of liberalism is criticized by Sunstein. See Sunstein, *infra* note 268.

<sup>236</sup> The Court's legitimate role is "to ensure, first, that everyone had a vote on and a chance freely to debate the issues of public policy, and second, that whatever values the legislature chose after such debate to protect would be protected equally for all alike—black and white, poor and rich." John Hart Ely, *Abortion for the Rich* (1977) in ELY, ON CONSTITUTIONAL GROUND 303 (1996).

<sup>237</sup> This is why, for example, state experimentation is so beneficial in Brandeis's thought. The Court is not merely avoiding substituting its own values for those of the people, it is allowing the people to form preferences and values through the process of participating in their self-governance. It is allowing them to build the civic virtue necessary for a functioning, deliberative democracy. See *supra* notes 86-103 (Unhealthy Democracy).

<sup>238</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925).

<sup>239</sup> See Ely, *Democracy and Distrust*, *supra* note 171 at 243-44 n. 17.

<sup>240</sup> See *supra* notes 138-169 (Education) (describing Brandeis's conception of education's role in a democracy).

<sup>241</sup> *Id.*

<sup>242</sup> Christopher A. Bracey, *Louis Brandeis and the Race Question*, 52 ALA. L. REV. 859 (2001).

Bracey argues that the celebration of Brandeis as a champion of the people in legal culture and academia leaves out embarrassing facts: “namely, his conspicuous evasion of public issues that dealt with inter-ethnic relations between African-Americans and Euro-Americans and his complicity in rendering judicial decisions that reinforced core principles of the segregation regime.”<sup>243</sup> Here, Ely stands in stark contrast to Brandeis. Bracey shows that, in cases of race, voting rights, and their intersection, Brandeis was not the staunch defender of civil liberties that his reputation portrayed him to be. In cases that challenged racially discriminatory primary voting laws, like *Nixon v. Herndon*<sup>244</sup> and *Nixon v. Condon*,<sup>245</sup> Brandeis merely voted with the majority to provide weak relief to the Black litigants.<sup>246</sup> This relief was ultimately not successful at righting the wrong, and was a far cry from the civil liberty protection that Brandeis advocated in cases like *Whitney* and *Olmstead*.<sup>247</sup>

Bracey also shows that Brandeis was uncritical of the regime of segregation when relevant cases crossed his desk, including in the context of education. In *Gong Lum v. Rice*, the first case of Brandeis’s tenure to address racial segregation in public schools, the Court reviewed a state law that classified a Chinese student as “colored” and required that she attend a “separate but equal” black school.<sup>248</sup> It held that the statute did not violate the Equal Protection clause of the Fourteenth Amendment.<sup>249</sup> The Court thus suggested that the issue of racial segregation in public schooling was no longer open to debate, and it did not revisit the question for eleven years.<sup>250</sup> Even then, Bracey points out, there came only a very small victory for African-Americans, and it did not come until near the end of Brandeis’s time on the Court.<sup>251</sup> That case, *Missouri ex rel. Gaines v. Canada*,<sup>252</sup> held that a Missouri statute violated the Equal Protection Clause of the Fourteenth Amendment by offering to pay out-of-state tuition for black prospective law students in order to keep its state school entirely white. This case was one of the “periodic symbolic victories” that only provided “a thin gloss on an otherwise lackluster period in the history of race relations law.”<sup>253</sup>

This lackluster record on racial equality issues is again striking in comparison to Brandeis’s commitment to civil liberties in cases like *Whitney*

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<sup>243</sup> *Id.* at 861.

<sup>244</sup> *Nixon v. Herndon*, 273 U.S. 536 (1927).

<sup>245</sup> *Nixon v. Condon*, 286 U.S. 73 (1932).

<sup>246</sup> Bracey, *supra* note 248 at 892.

<sup>247</sup> *Id.* at 885.

<sup>248</sup> *Id.* at 893 citing *Gong Lum v. Rice*, 275 U.S. 78 (1927).

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 893-94.

<sup>252</sup> *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

<sup>253</sup> *Supra* note 248 at 894.

and *Olmstead*.<sup>254</sup> From the difference in Brandeis's creative and forward thinking opinions in those matters, "one cannot help but conclude that his strikingly deficient record on matters of race evinces a conscious avoidance of the race question (whenever such avoidance was possible) and a certain complicity in the continued subjugation of American blacks."<sup>255</sup> Nevertheless, Bracey explains that Brandeis's models of public interest lawyering, social science brief writing, and judicial decision-making, though not his substantive views, all influenced later successes for racial equality.<sup>256</sup> Ultimately, Bracey offers a few plausible explanations<sup>257</sup> for Brandeis's evasion of race questions, the most important of which include his commitment to federalism, the public/private discrimination distinction, "separate but equal" as settled doctrine (or a commitment to *stare decisis*), and the fact that African-American issues were not on the progressive agenda.<sup>258</sup> Whatever the reasons for Brandeis's blind spots in race and voting rights cases, it is clear that Ely's theory can account for these important issues far better than Brandeis's can.

Ely championed a procedural liberalism. The Court, Ely wrote, "rather than dictating the substantive result, [should] intervene only when the 'market,' in our case the political market, is systematically malfunctioning."<sup>259</sup> Brandeis, also a liberal, espoused a kind of civic republicanism.<sup>260</sup> He thought that the Court's decision to act or not should take into consideration its effect on the civic character of the people. Again, in short, Ely focused on maintaining an open process of democracy while Brandeis focused on its precursors. Still, these theories are not mutually exclusive. One can read them together.

### C. WHAT BRANDEIS ADDS

Brandeis's civic republicanism may seem strange to modern readers. Modern liberal discourse leaves citizens to form themselves in any way they choose, and then allows them to bring whatever preferences they happen to

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<sup>254</sup> *Id.* at 895.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 897-905.

<sup>257</sup> On the more conjectural personal issues, Bracey offers: the "combination of self-interest and 'polite racism' [or, in other words, the risk of aligning oneself with a disfavored public cause] . . . Brandeis's experience as a Jew in American culture . . . [and his potential misgivings about the melting pot model of assimilation given his Zionism, though] one might argue that Brandeis's connection to Zionism supports the opposite conclusion." *Id.* at 905-06.

<sup>258</sup> *Id.* at 905-10.

<sup>259</sup> *Supra* note 171 at 102-03.

<sup>260</sup> That is, he "emphasize[d] many common [republican] ideas and concerns, such as the importance of civic virtue and political participation, the dangers of corruption, the benefits of a mixed constitution and the rule of law." See Frank Lovett, *Republicanism*, Stanford Encyclopedia of Philosophy (June 4, 2018), <https://plato.stanford.edu/entries/republicanism/>; See also Garfield, *supra* note 23 (describing Brandeis's republicanism).

form into politics. Brandeis's citizenship ideal is more demanding. It looks more like an updated version of classical republicanism, which holds that "the widespread enjoyment of republican liberty is most likely to be maximized in a community where the citizens are committed to [developing civic virtue in an active, collective pursuit of the common good]."<sup>261</sup>

This ideal may strike some readers as antithetical to liberalism. An extreme version of either liberalism or republicanism may indeed be incompatible with the other; however, certain civic virtues, characteristic of a more modern republicanism like Brandeis's, are necessary to preserve liberalism. Cass Sunstein argues this in his article *Beyond the Republican Revolution*—liberalism is not only compatible with republicanism, but ought to draw on certain of its elements.<sup>262</sup> For example, political equality, deliberation, and guaranteed rights of participation all fit neatly into modern liberalism. Brandeis anticipated Sunstein's argument.

Brandeis offers a constitutional framework that has affinities with the "liberal republican" understanding of the Constitution put forward by Sunstein. Sunstein invokes Founding-era Republican values, like community and citizenship, to enrich an individualist or pluralist liberal view. Brandeis, in a similar fashion, offers an educative model to emphasize certain important citizenship or communal prerequisites of democracy that are neglected by a more procedural democratic theory like Ely's.

If Sunstein is right about liberalism's dependence on republicanism, then a picture of democratic judicial review like Ely's, which leaves out character formation, is incomplete. Ely can only account for cases like *Pierce* and *Meyer* as bad motive cases.<sup>263</sup>

Professor Sunstein argues that republicanism is consistent with modern liberalism, that our Constitution was indeed founded on "liberal republicanism," and that certain aspects of republicanism can help us deal with the political and legal issues that we face today.<sup>264</sup> The republicanism he describes is broadly characterized as a deliberative, democratic pursuit of a common good.<sup>265</sup> He compares this theory with a pluralist approach, which "consists of a struggle among interest groups for scarce social resources,"<sup>266</sup> and with a liberalism that is characterized by a commitment to private rights and "individual or group autonomy from state control."<sup>267</sup>

Liberal republicanism is the theory that arises when liberalism is understood as encompassing the most basic commitments of

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<sup>261</sup> Frank Lovett, *Republicanism*, Stanford Encyclopedia of Philosophy (June 4, 2018), <https://plato.stanford.edu/entries/republicanism/>.

<sup>262</sup> CASS R. SUNSTEIN, *BEYOND THE REPUBLICAN REVIVAL*, 97 YALE L.J. 1539 (1988).

<sup>263</sup> *Supra* note 171 at 243-44 n. 17.

<sup>264</sup> CASS R. SUNSTEIN, *BEYOND THE REPUBLICAN REVIVAL*, 97 YALE L.J. 1539 (1988);

<sup>265</sup> *Id.* at 1539-40

<sup>266</sup> *Id.* at 1542

<sup>267</sup> *Id.* at 1551

republicanism—namely, deliberation, political equality, universalism, and citizenship. Sunstein offers this theory as a response to a supposed inconsistency between them, put forth in scholarly work at the time, which he argues only arises out of extremist versions of either theory.<sup>268</sup> He argues that “only through a caricature of the tradition can liberalism be thought to be an antonym of the species of republicanism that operated during the constitutional period.”<sup>269</sup> That caricature treats “possessive individualism or modern neo-Lockeanism” and the idea that threats lay only in government and not private power as central.<sup>270</sup> He then shows that a more modern understanding of liberalism, characterized best by John Rawls’s “original position” theory,<sup>271</sup> cuts against the interest-induced pluralist model that favors beneficiaries of the status quo; it means that “individual preferences should not be taken as exogenous to politics.”<sup>272</sup>

On the other hand, extreme versions of classical republicanism can skew into militarism or exclusion of certain disfavored or minority groups.<sup>273</sup> But the basic republican commitments—deliberation in government, political equality, universality (or agreement as a regulative ideal), and citizenship—are all consistent with this normatively better, modern Rawlsian understanding of the liberal tradition.<sup>274</sup> Both reject the contention that individual preferences should be taken as exogenous to politics. Both preserve space for government action in favor of political equality. Republican thought, Sunstein argues, provides a powerful conception of our constitutionalism and offers “institutional arrangements and doctrinal shifts . . . that might serve to implement the most attractive features of the republican vision.”<sup>275</sup>

<sup>268</sup> *Id.* at 1566

<sup>269</sup> *Id.* at 1567

<sup>270</sup> *Id.*

<sup>271</sup> The “original position” theory aims to create a fair and impartial point of view for thinking about justice in society. Its main feature is the “veil of ignorance,” which is characterized as follows:

To insure impartiality of judgment, the parties are deprived of all knowledge of their personal characteristics and social and historical circumstances. They do know of certain fundamental interests they all have, plus general facts about psychology, economics, biology, and other social and natural sciences. The parties in the original position are presented with a list of the main conceptions of justice drawn from the tradition of social and political philosophy, and are assigned the task of choosing from among these alternatives the conception of justice that best advances their interests in establishing conditions that enable them to effectively pursue their final ends and fundamental interests.

Samuel Freeman, *Original Position*, Stanford Encyclopedia of Philosophy (Apr. 3, 2019).

<sup>272</sup> Sunstein, *supra* note 268 at 1549.

<sup>273</sup> *Id.* at 1539

<sup>274</sup> *Id.* at 1540, 1567

<sup>275</sup> *Id.* at 1541

In the same way, Brandeis's republican views of American democracy are consistent with Ely's liberal theory of representation reinforcement. By reading the two together, we are left with a clearer set of instructions for a judiciary tasked with protecting our constitutional democracy. The implications of Brandeis's theory are quite similar to the implications of the republican revival that Sunstein lays out in his article. Brandeis's ideal judiciary and democracy are represented in many of Sunstein's suggested "institutional arrangements and doctrinal shifts."<sup>276</sup>

Take for instance campaign finance laws. Under Ely's theory, decisions like *Citizens United*<sup>277</sup> and *Buckley v. Valeo*,<sup>278</sup> which both overturned campaign finance regulations as violations of the First Amendment, make sense as protections of speech that challenges incumbents. But under Brandeis's theory, campaign finance laws might be seen as a form of regulation that promotes deliberation and builds character. As Sunstein says, "at least some forms of regulation would be seen as plausible efforts to promote rather than to undermine First Amendment purposes."<sup>279</sup> "A deliberative conception of the First Amendment, incorporating a norm of political equality, would lead to a quite different analysis from the marketplace model [implied in *Buckley*], which has significant pluralist overtones."<sup>280</sup> This is because, from the liberal republican point of view, free expression is necessary for a well-functioning, deliberative democratic body politic. A "principal current threat to a well-functioning system of free expression lies, not in government regulation, but in government 'inaction' that allows the political process to be excessively influenced by disparities in private wealth and private access."<sup>281</sup>

Under a republican theory, Sunstein says, concentrated power and "large disparities in political influence are disfavored."<sup>282</sup> Political equality, not just undefined access to the political process, is a central value.<sup>283</sup> And importantly for constitutional theory, "many of the American framers, including Madison, expressed concern about both political and economic inequality," believing relatively equal power to be necessary to a functioning democratic government.<sup>284</sup>

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<sup>276</sup> Not coincidentally, one of Brandeis's biographers, Jeffrey Rosen, says that "in many ways, Sunstein has inherited the mantle of Louis Brandeis." Jeffrey Rosen, Sunstein and Brandeis: The Minimalist and the Prophet, 43 *Tulsa L. Rev.* 885 (2008).

<sup>277</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

<sup>278</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976)

<sup>279</sup> *Id.* at 1577

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 1577-78

<sup>282</sup> See Sunstein, *Beyond the Republican Revival*, *supra* note 268 at 1552.

<sup>283</sup> *Id.* at 1552

<sup>284</sup> *Id.* at 1553

Of course, the idea that concentrated power, or “bigness,” could distort democracy was not foreign to Brandeis.<sup>285</sup> In fact, Brandeis once said that “there can be no safety for the people unless they serve notice upon the corporations that they must keep out of politics.”<sup>286</sup> Although it may seem intuitive that Brandeis would side with the *Citizens United* Majority—he thought that “the remedy to be applied [to a feared evil] is more speech, not enforced silence”—after a deeper reading, it seems equally plausible that he would write in dissent.

Brandeis never participated in a campaign finance case and was otherwise highly protective of free speech.<sup>287</sup> Indeed, the Court’s per curiam *Buckley* opinion invoked Brandeis.<sup>288</sup> But Judge Jon Levy argues that Brandeis would have upheld the law at issue in *Citizens United*, showing that Brandeis’s *Whitney* opinion has been used to argue on either side of the Court’s campaign finance cases.<sup>289</sup> Levy argues that, understood with Brandeis’s view of the primacy of the individual citizen and the evolving nature of corporate power, *Whitney*’s description of the “individual citizen as the primary unit of democratic government” counsels against striking down such campaign finance regulations.<sup>290</sup> Free speech allows the individual citizen—the essential unit of democracy—to fulfill her duty to deliberately direct her government. Providing corporations a constitutional right to be heard at such a disproportionate volume would frustrate that fundamental purpose of the First Amendment. Here we see one way in which Brandeis’s free speech theory adds to Ely’s. The First Amendment is not solely about preventing the “ins” from keeping the “outs” out. It contains an affirmative vision<sup>291</sup> for a deliberative and relatively politically equal community.<sup>292</sup>

Both sides of the *Citizens United* debate have plausible Brandeisian arguments. But the important point here is that Brandeis’s theory of judicial review, which maintains robust protection for free speech, is not incompatible with all possible regulations of speech. It is concerned foremost with the character of the political community.

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<sup>285</sup> Brandeis, *The Curse of Bigness*, *supra* note 100.

<sup>286</sup> See *Brandeis on Corporations and Voting*, Brandeis and Harlan Watch, (Mar. 9, 2012), <https://brandeiswatch.wordpress.com/2012/03/09/brandeis-on-corporations-and-voting/>.

<sup>287</sup> See Jon D. Levy, *The Brandeis/Citizens United Question*, LOUIS D. BRANDEIS 100: THEN & NOW (2016).

<sup>288</sup> *Id.* at 3

<sup>289</sup> *Id.* at 3-5

<sup>290</sup> *Id.* at 6

<sup>291</sup> Blasi, *supra* note 2 at 694 (arguing that Brandeis’s free speech theory uniquely offers an affirmative vision while others, like the futility of censorship and checking governmental power, merely view free speech as a negative liberty).

<sup>292</sup> Here is an area where Ely’s theory serves as a useful supplement to Brandeis’s. The power to regulate campaign finance can be abused and become mere incumbent protection legislation. A theory of review that focuses too much on civic duty and character, then, might miss this vice. Such a theory must be tempered by a distrust of incumbents legislating in the electoral realm.

Brandeis's theory also adds a federalism-oriented dimension to democratic review. It forces the court to address federalism not merely as a feature of the separation of powers, but as a way to promote deliberation and citizenship at the local level. Sunstein's suggestions here are strikingly Brandeisian. Though Brandeis may disagree<sup>293</sup> with Sunstein's contention that "a critical feature of the learning of the New Deal period . . . is that the original constitutional structure of dual sovereignty was a large mistake . . . and inconsistent with the need for continuing national intervention into marketplaces," he would most certainly agree that "one of the great strengths of the original constitutional system was its simultaneous provision of deliberative representation at the national level and self-determination at the local level."<sup>294</sup> Here we are reminded of Brandeis's repudiation of the *Lochner* Court for preventing state self-determination. Sunstein thinks we ought to aim for "reconstitutive law" that allows "state and local flexibility by restructuring markets rather than imposing inflexible national commands."<sup>295</sup> Or, in Brandeis's words, we need states and municipalities to serve as laboratories of democracy.<sup>296</sup> Smaller institutions, Brandeis teaches us, build the kind of people that a democracy requires. Democracy, and the judiciary charged with protecting it, must thus preserve and promote civic virtue in this way.

What Brandeis adds, then, is a role for the judiciary in protecting and promoting the civic character required of a democratic people. By strictly scrutinizing laws that prevent the citizen from fulfilling her duty to deliberately direct her government through speech, the judiciary protects the means of democratic decision-making. By allowing legislatures to experiment (essentially to exercise their democratic muscles), particularly at the state level, the Court protects the *conditions* contemplated by a liberal republican Constitution. These means and conditions, Brandeis might argue, create the people that Ely assumes are participating in the constitutionally-protected democratic process. Democracy requires not only an open and equal process, but a people with the character and ability to successfully practice it.

## CONCLUSION

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<sup>293</sup> Leading up to the New Deal, Brandeis was in constant conversation with FDR's advisors, some of whom clerked for the Justice. One of his former clerks, Harry Shulman, wrote a memorandum about a conversation he had with Brandeis on the subject of the New Deal. During this conversation, Brandeis urged that, among other things, the Depression was caused in large part by bigness in business and industry, and that enlarging the federal government would only create similar problems. The answer, he thought, was not simply to make the federal government bigger than the big businesses. See HARRY SHULMAN, MEMORANDUM OF TALK WITH L.D.B. (Dec. 8, 1933).

<sup>294</sup> Sunstein, *supra* note 268 at 1578.

<sup>295</sup> *Id.* at 1578

<sup>296</sup> See Liebmann, 296 U.S. at 185-86 (Brandeis, J., dissenting).

Brandeis understood the Constitution's primary purpose to be to structure and protect a dynamic, democratic society. Such a society is characterized by citizen-rulers vigorously and actively participating in their civic duties. The judge's constitutionally-prescribed role is to ensure that government officials, including judges themselves, do not undermine these democratic principles.

The legislature might at times prevent the people from fulfilling their duty to actively and intelligently participate in their self-government. In those cases—for example, in restrictions on speech or interference with education—the judiciary must intervene. Democracy cannot function if its rulers cannot effectively participate in (and, in doing so, fulfill their civic obligations to) the decision-making process. Similarly, the judiciary, as the least democratic branch, might at times halt the people's individual initiative and democratic experimentation by declaring democratically-made laws void. To prevent this anti-democratic tendency, the judiciary must give great deference to legislatures in the realm of social and economic regulation. The process of making and testing those laws is more important to the democratic character of the citizens than their substantive outcomes.

In some ways, Brandeis's theory resembles John Hart Ely's representation-reinforcing approach. Both aim to protect a certain conception of democracy, though they differ in exactly what that conception is. Ely is concerned with the process of democratic political institutions: courts must make sure that everyone has access and that discrete and insular minorities will not be kept out. Brandeis, on the other hand, is most concerned with the precursors to democracy. He worries less about group access to democratic machinery and more about the character of the people pulling its levers. There are two dangers: legislatures and courts can each, in a different way, prevent people from becoming the active and capable democratic citizens that our form of government requires.

Ely is liberal and Brandeis is republican. But, as Professor Sunstein demonstrates, "the common opposition between liberalism and republicanism is a false one; the founders were liberal republicans."<sup>297</sup> So too are these liberal and republican approaches to the judge's constitutional role in American democracy compatible. Ely and Brandeis, appropriately combined, command the judiciary to protect both the precursors to and the process of democracy.

Under the resulting "democratic republican" judicial review, some of the shortcomings of each individual theory are avoided. Ely's overly

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<sup>297</sup> Cass R. Sunstein, *Beyond the Republican Revival*, 97 Yale L.J. 1539 (1988); see also Kloppenborg, *The Virtues of Liberalism: Christianity, Republicanism and Ethics in Early American Political Discourse*, 74 J. AM. HIST. 9 (1987) (arguing that the framers were both liberals and republicans).

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optimistic assumption that, once given access, the people will be engaged and capable citizens is addressed by Brandeis's concern for civic virtue, deliberation, and political character development. Brandeis's failure to address political equality for systemically discriminated-against groups is answered by Ely's representation-reinforcing approach. Although it deserves further scholarly treatment, this "democratic republican" perspective offers a theory of judicial review that allows for the interpretation of open-ended constitutional provisions without simply defaulting to the judge's personal values.