JUSTICE BRANDEIS AS LEGAL SEER

By Justice Stephen G. Breyer

"Justice Breyer delivered this address on February 16, 2004 at the Brandeis School of Law of the University of Louisville, at which time he was presented with the school's highest honor, the Brandeis Medal. The Medal is given annually to an individual whose life reflects Justice Brandeis's commitment to the ideals of individual liberty, concern for the disadvantaged, and public service. The lecture was previously published in 42 Brandeis Law Journal 711-720. It is abridged here with permission.

It is an honor to be asked to give this lecture, associated with Justice Louis Brandeis. To set the scene, let me remind you of several basic biographical facts of Brandeis's life.

Louis Brandeis was born here in Louisville in 1856. A few years earlier, his family had left Prague, fearing a conservative reaction to the failed democratic revolution there. The family prospered as merchants and was able to give Louis a good education—both here in Louisville and in Germany, where he attended high school. Although Louis's family was Jewish, they did not observe Jewish customs or religious practices. Louis maintained that secular life, although he felt the influence of his uncle Lewis Dembitz, a practicing lawyer and orthodox Jew; indeed, he took Dembitz's last name as his middle name.

Brandeis was a brilliant law student, lawyer, and judge. I should like to read an excerpt (quoted by Tom McCraw) from a letter about him written by a fellow student at Harvard Law School. Brandeis, it says:

Graduated last year from Law School and is now taking a third year here—was the leader of his class and one of the most brilliant legal minds they have ever had here—and is but little over twenty-one years of age. He has spent many years in Europe, e.g. Tall, well-made, dark, beardless, and with the brightest eyes I ever saw. He is supposed to know everything and to have it always in mind. The Prof's. listen to his opinions with the greatest deference, and it is generally correct. There are traditions of his omniscience floating through the school. One I heard yesterday—A man last year lost his notebook of Agency lectures. He hunted long and

found nothing. His friend said—Go and ask Brandeis—he knows everything—perhaps he will know where your book is—He went and asked. Said Brandeis—"Yes—go into the Auditor's room, and look on the west side of the room, and on the sill of the second window, and you will find your book." And it was so.

This letter suggests that Brandeis was omniscient, indeed, a seer, a matter to which I shall return.

Brandeis's professional accomplishments lived up to his law school reputation. For thirty years, first with his partner Samuel Warren, and later with other associates, he practiced law in Boston, where he turned his raw intelligence, powerful legal imagination, unusual capacity for hard work, and love of advocacy into a highly successful career. That is to say,

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A Letter from the President

The Supreme Court Historical Society performs its mission primarily through the work of committees: the Executive Committee, which meets quarterly and is responsible for the governance of the Society; the Program Committee, primarily responsible for the annual meeting; and the Publications Committee, which submits reports and recommendations at each meeting of the Executive Committee; and various special committees, such as the ad hoc committee that successfully helped bring about the passage of the John Marshall Commemorative Coin Bill this year. These committees are of vital importance to the well-being of the Society but the core substantive activities are planned and implemented primarily by three of them—the Acquisitions Committee, the Program Committee, and the Publications Committee.

In the last issue of the Quarterly, I discussed the work of the Acquisitions Committee. In this issue I will summarize the programs of the Society that are planned and supervised by the Program Committee. The next issue of the Quarterly will feature the Publications Committee. Hopefully these letters will give newer members a better understanding of what the Society does—a question I am sometimes asked—and will serve as refreshers for longtime members.

(a) Organization of the Program Committee

For the past several years, this committee has been ably chaired by Philip Allen Lacovara. He was preceded by Vice President E. Barrett Prettyman, Jr., who continues to serve on the committee. The other members of the Program Committee are Herman Belz, James C. Duff, Roy Englert, and Jerry Horman, currently an Executive Committee member, and Kathleen Shurtleff, Associate Editor.

(b) Lectures

Since 1993, the Society has sponsored a lecture series each year. This was formally named the Leon Silverman Lecture Series to honor our distinguished Chairman of the Board, who served for 11 years as President of the Society. There are usually five or six lectures in each series; they are held in the courtroom of the Supreme Court and last about one hour each, with an introduction of the speaker by one of the Justices who acts as host for the evening, with a reception afterwards, and are well attended. The text of each lecture is subsequently published in the Journal of the Supreme Court Historical Society, and further disseminating the fruits of the speakers’ efforts.

Through experience it has been concluded that the most effective way of creating an interesting lecture series is by the use of a thematic approach. The theme for the Leon Silverman Lecture Series this past year was Advocacy before the United States Supreme Court. The lecture series for 2005, which will be presented between February and May 2005, will have the theme of Mr. Jefferson and the United States Supreme Court, and will focus on President Thomas Jefferson, the Supreme Court, John Marshall and the Constitution. As in the past, an outstanding group of scholars and historians have agreed to make presentations. In addition to Judge Cross and JudgeHome, the Program Committee is exploring the possibility of having one or more at a suitable venue in the State of Virginia. This would provide another opportunity for the Society to expand its geographic wings, so to speak.

One of the highlights of the year is the Annual Lecture that is delivered in the Supreme Court courtroom on the afternoon of the day on which the Annual Meeting and Dinner take place—usually the last Friday in June. There is no charge for attending the Annual Lecture but reservations are required.

We participate with the United States Capitol Historical Society and the White House Historical Association, in a rotating basis each year, in presenting the National Heritage Lecture. The lecture returns to the Supreme Court Historical Society in the first year of its outstanding 150th anniversary.

From time to time, special lectures of one kind or another are held either in Washington or in other parts of the country, as further pointed out below.

(c) Other Educational Programs

One of the most successful activities of the Society is the conduct of the Summer Institute for high school teachers. A total of 60 teachers come to Washington in two separate segments in June of each year for an intensive indoctrination about the Constitution and the role of the Supreme Court. The participants then share this knowledge with other teachers and students throughout the nation. Thus for a total of 545 high school teachers have participated in the Washington sessions. The Summer Institute is so popular that the Society is exploring ways of increasing the number of participants.

In addition, the first New York City Supreme Court initiative was held last November in New York at the offices of Fried, Frank, Harris, Shriver & Jacobson LLP. The Society received a generous grant from the Carnegie Corporation of New York to implement this program, which hopefully will serve as a model for future out-of-town seminars. This is an expensive endeavor but worthy of the full support of the Society in my judgment. It is hoped that other law firms and foundations will be willing to fund the cost of programs in their home states.

These programs are made possible by a very happy partnership between the Society and Street Law, and the Street Law program would like the once again be grateful for its support and valuable assistance. You have never attempted to describe. I hope the foregoing should like the 2005 Summer Institute sessions will read more about the 2004 Summer Institute Sessions administrated by Street Law on page 16 of this issue, where you will learn in more depth about its approach to teaching about the Constitution and the Supreme Court.

For many years the Society has provided financial, administrative and moral support for "The Documentary History of the Supreme Court of the United States, 1789-1800," a history of the early history of the Supreme Court. I hope the foregoing demonstrates that the Program Committee is doing a splendid job for the Society, and I want to express my appreciation to all of its members and to the staffers who provide assistance to the committee.

Of particular interest to me has been the recreations of oral arguments before the Court in famous cases of the past. For example, several years ago the early case of Chadbourne v. Georgia was reenacted, (or more accurately, re-imagined) with Chief Justice Marshall being represented by Justice Antonin Scalia (in fact, he represented the entire Marshall Court that evening). When the case was originally argued in 1880, Attorney General Edmond Randolph appeared as private counsel for Chisholm. Contending that the Supreme Court lacked jurisdiction of the case, the State of Georgia declined to appear (unwisely in retrospect), and no member of the Supreme Court bar accepted the invitation of the Justices to speak in its behalf. In the recent recreation, Solicitor General Seth Wiseman, a member of the Society’s Executive Committee, appeared and argued for Chisholm. Former Attorney General Griffin Bell then accepted the invitation of the Court to appear for the State of Georgia and he presented in my judgment a spirited argument but the outcome was the same, of course. As you know, this decision precipitated the passage of the Eleventh Amendment a few years later.

In another recreation, Philip Lacovara and Teresa Wynn Roush attended (as was the present author) an event at the White House in June 2004, entitled "Reenactment of a Supreme Court Oral Argument." The text of each lecture is subsequently published in the Journal of the Supreme Court Historical Society. There are other programs that because of space limitations, I have not attempted to describe. I hope the foregoing demonstrates that the Program Committee is doing a splendid job for the Society, and I want to express my appreciation to all of its members and to the staffers who provide assistance to the committee.

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The schedule for the 2005 Leon Silverman lecture series appears on page 11 of this magazine and on the Society's website.
FESTIVITIES HELD MARKING THE 29TH ANNUAL MEETING

Educational training sponsored by the Society included a special program for history teachers and selected students of Chaver High School in Washington, DC. In addition to these programs were the traditional two sessions of the Summer Institute in which 60 high school teachers received intensive training focusing on teaching about the Supreme Court and constitutional issues. This on-going program has garnered much praise and support. (See story on page 16 of this magazine.)

Acquisitions of note obtained during the year included memorabilia and photographs from the families of Justice Tom C. Clark and Chief Justice Charles Evans Hughes. Purchases included significant autograph letters by Chief Justice Marshall and Justice Noah Swayne, and antique photographs and engravings.

Among the most important purposes of the Annual business meetings is the election of officers and members of the Board of Trustees. Nominations to office were made by Virginia Warren Daly acting in her capacity as Secretary of the Society and Chair of the Nominating Committee. The first elections concerned individuals nominated to serve on the Board of Trustees. The following individuals were nominated to serve an additional three-year term as members of the Board of Trustees: George R. Adams; Vincent R. Ballaggio, Jr.; Barbara Black; Vincent C. Burke, Jr.; Patricia Dwinnell Butler; Andrew Coats; James Goldman; John D. Gordon III; Philip A. Lacovara; Ralph I. Lancaster, Jr.; Leon Polsky; Cathleen Douglas Stone; Seth P. Waxman; Agnes N. Williams; and W. Foster Wollen.

In addition, the following individuals were elected to an initial three-year term of service as members of the Board of Trustees: J. Bruce Alverson; Nancy Brennan; Edmund N. Roberts; and Frank Gundlach. Ralph I. Lancaster, Jr.; Jerome Libin; Mrs. Thurgood Marshall; Maureen Mahoney; Joseph Modernow; John Nannes; Leon Polsky; Teresa Wynne Roseborough; and Seth P. Waxman. All were elected by unanimous vote.

Following the elections, Mr. Silverman called upon Justice Clarence Thomas to assist in presenting awards to a number of members who deserved special recognition. All of them have contributed generously of their time and substance to the work of the Society during the past year.

The first awards presented were the literary prizes awarded for outstanding articles published in the Journal of Supreme Court History. The Hughes-Gossett Literary Prize, carrying a cash award of $1,500, was presented to Judge John Ferren for his article on the life of Wiley Rutledge. This article was developed from a book-length biography of Justice Rutledge published after the Annual Meeting was held. The student literary prize was awarded to Daniel Hamilton for his article, "A New Right of Property: Civil War Confiscation in the

Justice Thomas presented the Hughes-Gossett Literary Prize to Judge John M. Ferren for an article derived from Ferren's new biography of Justice Wiley Rutledge.

Reconstruction of the Supreme Court." Mr. Hamilton was unable to attend the ceremony but his achievement was recognized.

Following the elections, Mr. Silverman called upon Justice Clarence Thomas to assist in presenting awards to a number of members who deserved special recognition, by promoting membership in the Society within their home states.

Mr. Gundlach worked tirelessly during the year to encourage the network of state chairs. While some were recognized at the dinner held in April (reported in the last issue of the Quarterly), those recognized at the Annual Meeting were: J. Bruce Alverson of Nevada; William I. Edland of California North (for the FY 03 campaign); James Falk, Jr. of Washington, DC; Robert Gwinn, Texas-Dallas; Wayne Mark, Nebraska; James Schaller, Washington, DC; R. Bruce Shaw, South Carolina (for the FY 03 campaign); and James Wyrsch, Missouri-West.
Wayne J. Mark received an award in recognition of his outstanding service as membership state chair for Nebraska.

The next item of business was the presentation of awards for donors to the Society. For this portion of the meeting, Jerome Libin, Chair of the Development Committee, joined Justice Thomas at the podium. Those present to receive recognition for significant contributions to the Society during the year were recognized for personal donations, or as representatives of firms or foundations: Fred Bentley, Sr., for contributions of historically significant items, as well as funds to purchase items for that collection; Patricia Butler, for contributions to the Acquisitions fund and other programs; Dorothy Goldman, for her frequent and generous donations to almost every program, James Goldman, for his support of many Society programs and causes; Frank G. Jones, of the Fulbright Jaworski law firm; Robert Juceam of the Fried Frank Harris Shriver and Jacobsohn law firm; Gregory Michael for his personal generosity; Jay Sekulow of the American Center for Law and Justice; Foster Wollen of the Bechtel Foundation; Donald Wright for his personal assistance; and William Yarbrough for his personal contribution.

The last, but an extremely important item of business, was recognition for outstanding service on the Ad Hoc Coin Committee. The members of this Committee have performed valiantly in obtaining the necessary number of sponsors in Congress to insure the passage of a bill to mint a John Marshall commemorative coin. Committee Chair Ralph J. Lancaster, Jr. assisted Justice Thomas in making awards. Those present to be recognized for their service were: James Morris; Scott McGearry; Ed Mullins; Lively Wilson, and Foster Wollen.

At the conclusion of the awards ceremony portion, the meeting of the Board of Trustees was adjourned until 2005. Those holding reservations for the reception and dinner then adjourned to the East and West Conference Rooms where they enjoyed the opportunity to meet and greet other members of the Society and invited guests. During the reception, string quartets from the U.S. Air Force Band under the direction of Assistant Director Master Sergeant Paul Swantek provided beautiful chamber music.

Dinner was served in the Great Hall. Flags from each of the fifty states, as well as a large flag of the United States suspended near the front entrance, decorated the room. These flags were provided through the courtesy of the Military District of Washington. Mr. Jones welcomed those present to the dinner, recognizing the Justices who were present. After his brief remarks, the Chief Justice proposed a toast to the President of the United States.

After-dinner entertainment was introduced by Annual Meeting Chair Charles Cooper. This consisted of a brief concert performed by the U.S. Army Chorus. The chorus was created in 1956 as a choral counterpart of the U.S. Army Band, "Pershing's Own," and the group has serenaded national and international heads of state at many events.

American folk tunes and Broadway show tunes, and solo performances as well as ensemble numbers.

At the conclusion of the concert, Mr. Cooper thanked the members of the chorus and the musicians of the string quartets for their contributions to the evening. The meeting was adjourned until 2005. The Thirtieth Annual Meeting will be held on Monday, June 6, 2005. The Honorable J. Harvie Wilkinson III of the Fourth Circuit will present the Annual Lecture at 2 PM. The reception and dinner will start at 7 PM and 8 PM, respectively. Invitations will be mailed to members approximately six weeks prior to the date of the event.

At the conclusion of the business meetings, Justice Thomas Fred Bentley, Sr. received an award from Justice Thomas in greeting President Frank C. Jones and his wife, Annie.
Justice John Paul Stevens hosted the event held in the East Conference Room at the Supreme Court. Justice Stevens clerked for Rutledge after graduation from law school at Northwestern University in 1947. In his remarks, the Justice reflected upon this important aspect of his life and how it had impacted upon his career. He also observed that Judge Ferren’s biography was an example of what judicial biography should be.

A reception on September 13, 2004 celebrated the publication of Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge. The Society sponsored the event in conjunction with the University of North Carolina Press to celebrate this book written by Judge John M. Ferren.

A In the 1920’s, when Felix Frankfurter was still a young law professor, he regularly lamented that there were very few adequate biographical studies of Supreme Court Justices. Aside from a few nineteenth century works of the life and letters category—more hagiographical than analytical—only a handful of judicial “lives” had been written. Frankfurter believed that the work of the Court could never be fully understood without satisfactory study of the economic, political and psychological forces which shaped the philosophies of individual Justices. Fortunately, over time, systematic, well-written works have appeared, and now about a third of all the Justices who have served during the Court’s long history are represented by competent biographies.

John Ferren, a senior Federal appellate Judge, has now joined the list of able authors who have contributed to the genre. Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge, published by the University of North Carolina Press, fills a real gap. Most of the Roosevelt era Justices have been subjects of analytical biographies, but Rutledge had been neglected. Scholars have long noted the need for a detailed look at the life of Justice Rutledge, whose influence and contributions were far greater than his short service of less than six years would imply. Judge Ferren’s book wonderfully meets the need.

Wiley Blount Rutledge, the subject of a new biography, was appointed to the Court by FDR in 1943. Rutledge had first come to his attention in 1937 when as Dean of the University of Iowa College of Law he became an outspoken advocate of the President’s “Court-packing” plan. Rutledge’s path to Washington was unusual, even unique. He was born in Kentucky in the coal and agricultural region on the Ohio River south of Louisville. His father was a Southern Baptist preacher; his mother, a typical small town minister’s wife who died of tuberculosis at the age of 33 when the future Justice was only 9. But Rutledge was given a small measure of love by his maternal grandmother and a spinster aunt. He got good grades at local schools, then later matriculated at Marysville College, a small Presbyterian preparatory school.

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There was little to suggest a career path leading to the pinnacle of American law. Two factors changed that. First was the celebrated "court-packing" proposal made by Roosevelt after his 1936 landslide re-election. This legislation would have enlarged the Court up to a possible fifteen Justices—a ploy denounced not only by Roosevelt foes, but by many of his usual supporters. Rutledge, almost an afterthought, was favored for the measure, and this attracted the attention of Roosevelt's inner circle. A second factor was the active and persistent support of Irving Brant, a well-known journalist and author (now mostly remembered for his definitive, six-volume life of James Madison). Based in St. Louis with the old Star Times, Brant was a New Deal enthusiast whose opinions were sought and needed by Roosevelt's closest advisors. As vacancies to the Supreme Court occurred in the late 30's, Brant began a stream of suggestions, some private, some in print, that Wiley Rutledge would be an excellent addition to the high court.

As a result, Dean Rutledge was seriously considered for the vacancies of 1939, 1940 and 1941. As a mark of presidential approval he was named in 1941 to the Appeals Court for the District of Columbia, which at that early date had not yet moved the esteem and respect now enjoyed by its similarly named successor.

Rutledge appeared in an essay on sources is very useful. A fine set of photographs is strategically placed within the text. Everyone who loves the Court and its history is in Judge Ferren's debt.

Rutledge was his eighth appointment of an Associate Justice.

During his service as President, Franklin Delano Roosevelt appointed eight Associate Justices and raised Harlan F. Stone to the center chair. Rutledge was his eighth appointment of an Associate Justice.

The general reader while still providing substance for the sophisticated student of the Court. Wiley Rutledge was never flamboyant; he was not self-absorbed. He emerges from these pages as a warm, gentle human being, a loving husband and devoted father, self-effacing for someone in public life. But there was a touch of eccentricity in his honesty, for the law, for justice. He was an unpretentious New Dealer, in awe of FDR, a relative liberal. As a writer, he was slow and deliberate, excelling the emotional extremes of a Murphy and the slap-dash superficiality found in so much of Douglas. He did not permit himself the luxury of sloganeering, and in a few cases wrote with uncanny prescience about then unpopular causes. Rutledge was a man of significance, whose brief tenure made him a forgotten figure of the Roosevelt/Truman era. Justice Ferren's book will change that.

The research behind this book is extensive, and the brief essay on sources is very useful. A fine set of photographs is strategically placed within the text. Everyone who loves the Court and its history is in Judge Ferren's debt.

Two members of the Society's Board of Trustees have received honors this year. Both are from Texas and both have a special connection to the University of Texas School of Law at Austin. Harry M. Reasoner of Houston, and Charles O. Galvin of Dallas, were honored for their outstanding professionalism and commitment to the legal profession. Mr. Reasoner is a member of the Ad Hoc Coin Bill Committee, and in his capacity provided important assistance in securing passage of the coin bill. Mr. Galvin, a longtime member of the Society, has served in a variety of positions of leadership and has rendered valuable insight and assistance to the Society.

Two Society Trustees receive Honors

Mr. Reasoner of the Houston office of Vinson & Elkins was awarded the 2004 American Inn of Court Professionalism Award for the Fifth Circuit. Judge Patrick E. Higginbotham of the U.S. Court of Appeals for the Fifth Circuit, former President of the American Inn of Court, presented the award to Mr. Reasoner on May 13th at the 2004 Fifth Circuit Judicial Conference in Austin, Texas.

The Circuit Professionalism Award is presented to honor a senior trial lawyer whose life and practice display sterling character and unquestioned integrity, coupled with ongoing dedication to the highest standards of the legal profession. Candidates are nominated through circuit-wide open nominations and selected by a panel of representatives from both the circuit and the American Inns of Court Foundation.

Mr. Reasoner graduated from Rice University in 1962 with a degree in Business Administration. He then clerked for Judge Charles E. Clark on the U.S. Court of Appeals for the Second Circuit in 1963. He joined Vinson & Elkins in 1963, where he served as Managing Partner from 1992 to 2001. His principal area of practice is general litigation, including antitrust and securities litigation.

Mr. Reasoner is a Trustee of the Supreme Court Historical Society, and a member of the American Bar Foundation's Social Justice Committee and the American Bar Foundation. His professional memberships are numerous, and he has completed many special assignments, including serving on the Supreme Court of Texas Advisory Committee and as a member of its Task Force.

Mr. Reasoner is a Life Trustee and Past President of the University of Texas School Law Foundation and served on boards for other universities, including Baylor College and Rice University. He has received distinguished alumnus awards from The University of Texas and its Law School, as well as the Anti-Defamation League's Lifelong Achievement Award.

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Brandeis as Legal Seer—continued from page 1

**The Ice truck in the photo above shows 1937 prices for ice.**

Was Brandeis the regulatory economist of one of Brandeis’s most famous dissenters, New State Ice v. Liebmann.

Brandeis did well financially, but he did not ignore the public interest dimension of the profession. Indeed, he argued many of his cases without charge, winning most of them, and earned the “fact” that the railroads were operating inefficiently, he convinced the Interstate Commerce Commission that it should deny significant increases in railroad rates. Filling his famous addresses brief with “facts” about the effects of working long hours on women’s health, he convinced the Supreme Court to uphold as constitutional an Oregon law limiting the number of hours that women could work. (And that was not an easy legal task because the Supreme Court had struck down a similar law limiting bakers’ hours in *Lochner v. New York*.) Brandeis worked for stronger antitrust laws, for a new regulatory agency, the Federal Trade Commission, and other ordinary commodities; that new, electric refrigeration service and lower prices. They refer to economists who argued that providing ice was no longer a special kind of small business, seeking to enter an industry dominated by existing firms, that Brandeis would ordinarily have supported, given his opposition to big business and trusts.

Brandeis disagreed with the majority. His 31-page dissenting opinion contains 57 footnotes, almost every one of which is crammed full of facts. I cannot reproduce the text and footnotes explain the nature of public utility regulation. They demonstrate that ice manufacturing had become an important industry by the early 1930s (22,202,160 tons were produced in 1927) with widespread industrial, agricultural, and domestic uses. They make clear that, without ice, life for much of the population would be unendurable for all these years? Is it because, as his classmate’s letter suggests, he was a señor, someone who knew everything? Is it because, as Louis Jaffe once told me, he was the greatest liberal of his day? Is it because of his unflagging support for average working people? Court historian Maeva Marcus writes that Brandeis’s opinions reflected his experiences with the problems of industrial democracy, including mediating a garment workers’ strike. Another scholar, Tom McCraw, argues that the central theme of his Supreme Court majority was crammed full of facts. I cannot reproduce the text and footnotes explain the nature of public utility regulation. They demonstrate that ice manufacturing had become an important industry by the early 1930s (22,202,160 tons were produced in 1927) with widespread industrial, agricultural, and domestic uses. They make clear that, without ice, life for much of the population would be unendurable. The Supreme Court decided New State Ice Co. v. Liebmann in 1923. Oklahoma had enacted a statute that included the “public interest” industry. They argued that providing ice did not differ significantly from providing meat, vegetables, or other ordinary commodities; that new, electric refrigeration service and lower prices. They refer to economists who argued that providing ice was no longer a special kind of small business, seeking to enter an industry dominated by existing firms, that Brandeis would ordinarily have supported, given his opposition to big business and trusts.

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regulation has proved counter-productive. As a consequence, we no longer argue among ourselves in absolute terms—i.e., no regulation or full-blown "command control" regulation. But we may have seen regulation as an answer; today we see it as a question of questions.

Was Brandeis trying to show that states must have greater regulatory powers in order to help small business, workers, and consumers? If so, the facts of New State Ice offer only a modicum of support for that proposition. And the need to augment state powers for that purpose proved less important with the advent of the New Deal. Under Roosevelt, the federal government, not the states, proved the instrument of policy change. The federal government's regulatory powers continued to expand for decades, as late as the 1970s and under Republican as well as Democratic Presidents. Where Brandeis envisioned the states as saving the day, it ended up being Congress that enacted far-reaching regulatory statutes and deployed them. Brandeis, while on our guard, lest we erect our prejudices into legal principles.

If history fails to validate at least some of Brandeis's economic views, however, that fact does not diminish the life and force that his dissenting opinion retains to this day. According to Westlaw, the New State Ice decision has been cited 1,679 times, in recent Supreme Court opinions, in untold numbers of law review articles, and elsewhere. Why? I suspect it is because his fact-based discussion helps to support two important general statements, and it embodies an important constitutional attitude.

The First statement concerns the relation between the Supreme Court and the states. Brandeis's opinion says that "it is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as the laboratory for libelous opinions. By using facts to show what plausibly might be so—just as Brandeis said they were. (It might be true, for example, that freight costs were so high that local ice plant were immune from competition—even if we cannot be certain.) The change, from the actual to the possible, makes a difference. The opinion's detailed discussion of ice manufacturing, temperature changes, destructive competition, and class public utility regulation then serve to demonstrate the following lasting truths:

- First, a truth about the world, the namely the relevance of factual matters to the solution of an economic problem;
- second, a truth about the fundamental importance of judges to find remedies for substantive economic problems;
- third, a truth about legislatures, namely their comparative advantage when it comes to investigating the facts, understanding their relevance, and finding solutions;
- and fourth, a truth about the Constitution, namely its democratic preference for solutions legislated by those whom the people elect.

By using facts to show what plausibly might be so, Brandeis demonstrated the truth of these propositions. This, in my view, is the key to the opinion's greatness and enduring constitutional value.

To repeat what I see as the connection that the New State Ice dissent shows: that strict judicial review of the "evidence" before Congress was not appropriate. In both cases, the underlying issue concerned the basic Brandeis question—the structural proposition of the proper relation between the Court and Congress. I cannot prove that Brandeis was right, nor can I even prove that he would have found himself in dissent. But I can say that his view of the proper Constitutional relation has influenced my own views, three-quarters of a century later.

My reading of the New State Ice dissent suggests that Brandeis, perhaps, was not a seer in respect to details. Whether Brandeis was right or wrong about ice-making and natural monopoly is a contingent matter, not determined by our Constitution. But whether Brandeis was right about political democracy is a non-contingent matter permanently inscribed in our Constitution. And here New State Ice suggests that Brandeis was a seer. He was right in urging deference to legislative judgments, when economic regulation and ordinary social legislation is at issue. And he was right that we must continue to use facts and consequences to distinguish permissible from impermissible or worse, interpretations of the Constitution and of law.

Brandeis's dissent shows the need for, and provides, a standard that permits courts to separate the contingent from the permanent. Brandeis remains a seer, not because he could find a lost book in class nor because of his use of factual detail, but because of his prescient sense of the role of judges interpreting a Constitution, that, while protecting human liberty, even more importantly, creates a democracy.
Justice O'Connor spoke with Janet Emond, a social studies teacher in Oregon's Grove, Illinois, during a reception for participants of the Supreme Court Summer Institute for Teachers. Justice O'Connor has been involved with the program since its inception in 1996.

The successful alliance of the Supreme Court Historical Society and Street Law, Inc. has produced yet another exemplary learning experience for teachers. The 10th annual Supreme Court Summer Institute for Teachers (SCSI) took place June 17-22 and June 24-29, 2004. It brought 60 of the country's most qualified secondary teachers of law, civics, and government to Washington, DC for six days of immersion in the U.S. Supreme Court.

SCSI began in 1995 with the goal of providing teachers with a professional development experience unlike any other. The Institute provided teachers with insight into the Court by the first-hand knowledge of the guest presenters, the camaraderie of their fellow participants, and the opportunity to immerse themselves in the activities at the Court. The Institute provided teachers with multiple perspectives of the nation's highest Court. Teachers left the Institute with a greater pleasure of meeting Justice O'Connor. One teacher summed up his time in Washington and echoed the thoughts of his fellow participants when he said, "Without reservation, the fun seminar I have ever attended." Teachers had many positive things to say about their experiences at SCSI.

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Clark, recently donated a collection of photographs to the Society. The pictures had been part of her late mother’s collection and date primarily from the 1960s. Most of the photographs show Justice Clark with other members of the Court during his term of service. The collection includes images that were taken by news service photographers and recorded events such as the presentation of books to the Court by leaders in the professions. A photograph appeared in two Arizona newspapers in May 1962.

The photographs are a rich addition to the collection of images owned by the Society and will doubtless grace the pages of many future publications.

Donations to the Acquisitions fund would be welcome. You may also reach the Society through its website at www.supremecourthistory.org.

SOCIETY RECEIVES COLLECTION OF PHOTOS OF JUSTICE TOM C. CLARK

Below: Justice Clark, Chief Justice Warren and Justice Reed were photographed on April 6, 1957 on the occasion of the installation of a plaque honoring Justice Reed. The photo was taken in Marysville, Kentucky, the birthplace of Justice Reed. Justice Clark was the subject of a public safety billboard. This photograph appeared in two Arizona newspapers in May 1962.

NEW MEMBERSHIPS July 1, 2004 through September 30, 2004

WANTED

In the interest of preserving the valuable history of the highest court, The Supreme Court Historical Society would like to locate any new members who might be able to assist the Society’s Acquisitions Committee. The Society is endeavoring to acquire artifacts, memorabilia, and any other materials related to the history of the Court and its members. These items are often used in exhibits by the Court Curator’s Office. If any of our members, or others, have anything they would care to share with us, please contact the Acquisitions Committee at the Society’s headquarters, 224 East Capitoil Street, N.E., Washington, D.C. 20003 or call (202) 543-4920. Donations to the Acquisitions fund would be welcome. You may also reach the Society through its website at www.supremecourthistory.org.

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Written by Judge Ferren, the winner of the 2004 Hughes-Gossett Prize for Literary Excellence, this book has already become the definitive work on Justice Rutledge. A limited number of copies signed by the author are available. To order, please call (202) 553-8300, or visit the Society's website, www.supremecourthistory.org and access the gift shop component.

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