

March 21st,  
1 9 3 3.

Hon. Louis D. Brandeis,  
Justice of the Supreme Court,  
Washington, D. C.

Dear Judge Brandeis:

I have read with deep interest the opinions in the Florida Chain Store case, and herewith my thanks for your kindness in sending me the same.

Permit me also to take this occasion to express some thoughts with respect to the manner in which the Supreme Court should express its views on constitutional problems, a matter brought out rather pointedly in the dissenting opinions in this case, and I hope that you will not find my remarks impertinent.

In my "Government By Judiciary" I have expressed the general view that the peculiar character of our Supreme Court, combining as it does purely legislative with judicial functions, is a rather unfortunate circumstance, making our form of government the most clumsy and unserviceable that could be devised. The present case seems to me a good illustration in point. It is, of course, not only proper, but required by the basic theory of the exercise by the Supreme Court of the power to declare laws unconstitutional, that no law should be declared unconstitutional unless absolutely necessary to the decision of the case in hand. But that is quite another matter from avoiding the expression of any general opinion on a given subject which comes before the court, involved in the case and involved in the general problem under consideration, even though a decision may be reached by deciding a more narrow point.

Such a procedure seems to me anything but conducive to the shaping of an intelligent public opinion or helpful in the shaping of effective legislative policies. The result of such a policy, seemingly imposed upon the court by its judicial character, of necessity results in chaotic conditions both in the public mind and in the legislative halls--legislatures being continually compelled to make "stabs in the dark" and the public mind being in a continual state of bewilderment as to what's coming next.

It is, therefore, with deep regret that I notice that my friend Judge Cardozo, for whom I have a warm affection and great admiration, thought himself compelled by an outworn tradition, based on the fictitious notion of the functions of the Supreme Court, to refrain from concurring in your opinion in the present case, and leave the great problems touched upon in your dissenting opinion "open" for future consideration. It seems to me that now more than at any other time previously in our history we ought to have as much light as possible on what may

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Hon. Louis D. Brandeis,

3/21/33

Page 2.

or may not be done by way of legislation, and since such light can only come from the Supreme Court, or its members, the sooner we get it the better off the country will be.

Thanking you again for your kindness in sending me these opinions, I beg to remain, as ever,

Sincerely yours,

L. B. Boudin

LBB:ML