Louis D. Brandeis:

American Prophet

by Jeffrey Rosen

Reviewed by Marc Alexander

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Jeffrey Rosen, law professor, legal commentator, and President and CEO of the National Constitution Center, is an excellent advocate on behalf of Justice Brandeis' greatness, in *Louis D. Brandeis: American Prophet*. Indeed, Rosen has made a convincing case that Justice Brandeis was the most impactful judge during the first half

of the 20th century. Rosen's brief for Brandeis provides a thematic account of Brandeis' main ideas. The book is short, smart, epigrammatic at times, and always illuminating about Brandeis as a thinker and as a man.

In photographs, Brandeis appears at times to have an ascetic, other-worldly look. FDR referred to him as "Old Isaiah." Even before he was appointed to the Supreme Court, however, Brandeis demonstrated his very practical accomplishments. After a stellar academic career at Harvard Law School, Brandeis and his law school classmate Samuel Warren co-authored the seminal law review article, *The Right to Privacy*, 4 Harv. L.R. 193 (1890)—an enormous contribution to American law, considering that the word "privacy" is nowhere to be found in the Constitution. Before joining the Supreme Court in 1916, Brandeis had obtained financial security, earning $100,000 a year, and saving $2,000,000—adjust that to present value for 100 years of inflation. But Brandeis looked beyond any confining legal practice, engaging himself in issues of public interest, and earning the title of "the people's lawyer." He became involved in political issues locally, as well as nationally, as a political advisor to President Wilson.

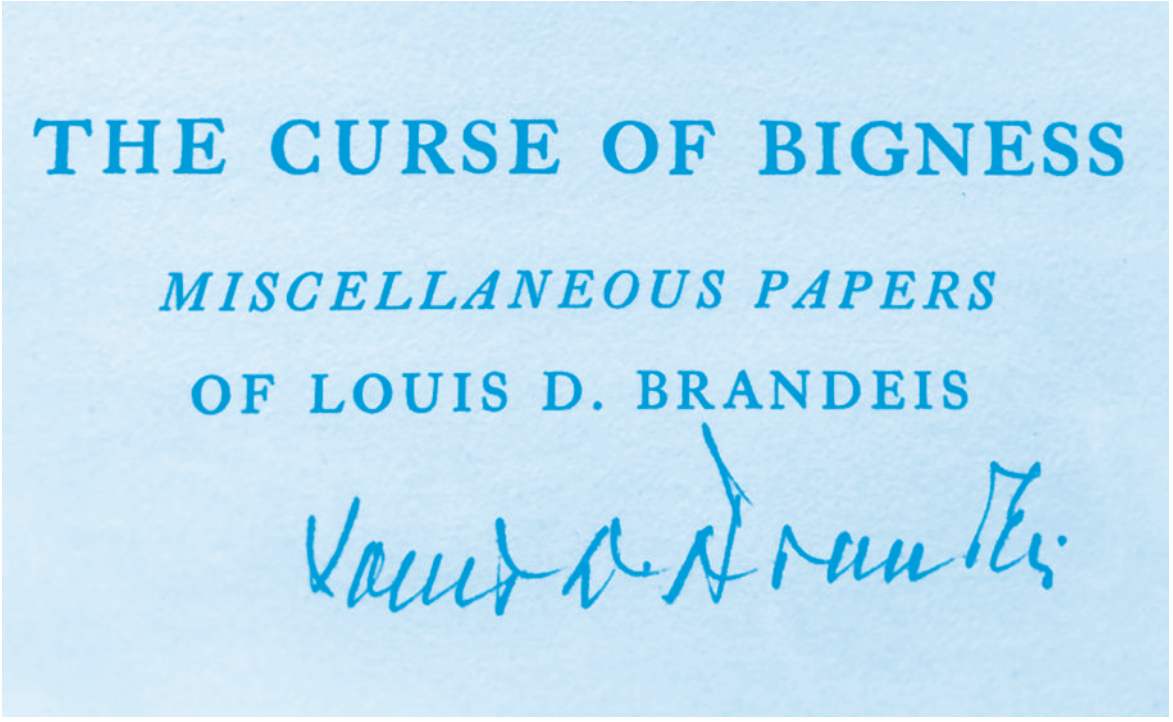
He is remembered for "the Brandeis brief"—advocacy grounded in social statistics, using empirical studies to persuade—or, "What every damn fool knows," as Brandeis once declared. In 1908, he submitted such a brief in *Muller v. Oregon* (1908) 208 U.S. 412, successfully arguing that Oregon's labor law limiting the hours that women could work was necessary to protect their health. Brandeis took pride "that no one shall ever trip me on a question of facts." A striking example of the influence of the Brandeis brief is seen in *Brown v. Board of Education* (1954) 347 U.S. 483, in which the doll tests of Kenneth and Mamie Clark were introduced to demonstrate the damaging psychological effects of segregation on African-American children.

Brandeis's Supreme Court nomination was controversial. He was viewed as a radical, and the confirmation process had an ugly underside because he was the Supreme Court's first Jewish nominee. Prominent Boston attorney Arthur D. Hill urged his friend Senator Henry Cabot Lodge to block the nomination, explaining that Brandeis had "a certain hard and unsympathetic quality which is largely racial," and Brandeis had "none of that spirit of playing the game with courtesy and good-nature, which is part of the standard of the Anglo-Saxon." Facing a confirmation fight, Brandeis worked behind the scenes to marshal support. After Brandeis joined the Supreme Court, the anti-Semitic Justice James Clark McReynolds notoriously refused to sit next to him or shake his hand. In fact, Justice McReynolds once declined an invitation from Chief Justice Taft to attend a court event, replying, "I am not always to be found when there is a Hebrew abroad." But who remembers McReynolds today?

Of course, on the Supreme Court, Justice Brandeis's influence only grew. Consider that his law clerks included David Riesman, the famous sociologist and author of *The Lonely Crowd*, Dean Acheson, who became Truman's Secretary of State, James M. Landis, future Chairman of the SEC, Calvert Magruder, future First Circuit Judge, and Paul M. Freund, who became an eminent constitutional scholar at Harvard.

A great strength of Rosen's book is that it lays bare Brandeis's core beliefs, and repeatedly returns to those beliefs as Rosen ana-

lyzes Brandeis thought. Brandeis was a great admirer of the Jeffersonian virtues. He believed in the need for an educated public, free speech and dialogue, small scale business and agrarianism. Brandeis was influenced by reading the classical scholar Alfred Zimmern's book on Greek political thought, illuminating the Athenian ideals of civic virtue and democracy. With the Greek ideal in mind, Brandeis believed in the importance of leisure to cultivate the mind, essential for workers in a healthy democracy. Indeed, Rosen believes that Brandeis greatest legacy is "his insistence on lifelong self-education."



Brandeis's writing is fresh, clear, vigorous, and eloquent. His voice, unlike that of many of his contemporaries, is a modern voice. Brandeis authored an influential concurrence in *Whitney v. California* (1927) 274 U.S. 357, a paean to the necessity for free speech in a democracy. While concurring with the result—conviction of Anna Charlotte Whitney under the 1919 Criminal Syndicalism Act of California—Brandeis rejected the view that "utterances inimical to the public welfare" could be punished: "Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that, in its government, the deliberative forces should prevail over the arbitrary." (*Id.* at p. 375 (conc. opn. of Brandeis, J.).) There you have a powerful statement of Brandeis' belief in free speech, the need for an educated public, and rational

deliberation—reflecting the ideals of Athenian democracy.

In *Olmstead v. United States* (1928) 277 U.S. 438, Brandeis penned a prescient dissent about privacy and surveillance. The government had wiretapped the phone conversations of a bootlegging operation managed by Roy Olmstead. The majority opinion, by Chief Justice Taft, held that wiretapping did not constitute a search or a seizure. Brandeis, however, recognized the threat to privacy presented by wiretapping surveillance. He viewed the wiretapping as a search and seizure and a Fourth Amendment violation. Brandeis recognized that the drafters of the Fourth and Fifth amendments feared government compelling self-incrimination by "force and violence," i.e., by physical search and seizure. Unlike the majority, Brandeis had the imagination to recognize that technological advances facilitated search and seizure by non-violent means. Thus, *Olmstead* also provides a fine example of Brandeis's view that the Constitution is a living document that must be interpreted in the light of history—and in the case of *Olmstead*, in the light of technological change.

Rosen's thematic treatment includes discussion of Brandeis's views on "the curse of bigness" (the title of one of Brandeis's books), "other people's money and how the bankers use it" (the title of another one of Brandeis's books), regulation, antitrust law, privacy, libel laws, free speech, the need for transparency in government ("sunlight is the great disinfectant") and Zionism, of which Brandeis was an important American proponent. Many of Brandeis's concerns—e.g., that lawyers have become the tools of large corporations that are not devoted to promoting the public interest, that government protection is necessary to protect investors from the financial sector's reckless use of other people's money, and that advances in technology will lead to greater surveillance and incursions on privacy—remain highly relevant today.

Rosen proposes a "thought experiment," asking, "what would Brandeis do?" (WWBD). While this leads to some tendentious speculation, Rosen nevertheless convincingly argues for Brandeis's continued influence today. Brandeis favored judicial deference, and in fact voted to strike down the most centralizing aspects of the New Deal. He viewed states as "laboratories of democracy." He feared the effects of big corporations and big government on democracy. He believed that the Constitution must be interpreted as a living document in light of history. He powerfully defended free speech. In short, Brandeis has something to offer for judges of just about any political stripe.

Rosen suggests seductive connections between Brandeis and recent Supreme Court Justices. Justice Kagan occupies Brandeis's Seat No. 3, and writes with the clarity and vigor associated with Brandeis's style. Justice Roberts's efforts at constitutional avoidance (ditto Scalia and Thomas) echo Brandeis. Justice Breyer favors fact heavy appendices—homage to the Brandeis brief. And the spirit of Justice Brandeis might smile upon Justice Ginsburg—to the extent that she represents progressive judicial restraint.

Rosen has made his case: Justice Brandeis' legacy endures. Seventy-five years after Justice Brandeis's death is a good time to revisit his life and thought.

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