

# The mind of a prophet

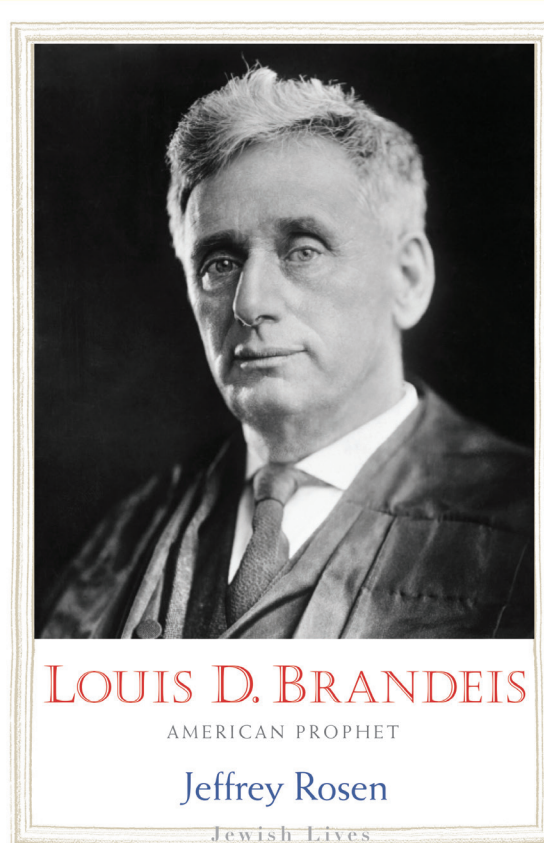
*A new look at the far-reaching influence of Louis D. Brandeis*

One hundred years after he was appointed to the Supreme Court we have the pleasure of an absorbing and insightful analysis of the philosophies and thoughts of Louis Brandeis, a man who played a leading role in America's affairs as a lawyer, judge, and leader of the Zionist movement.

In *American Prophet*, author Jeffrey Rosen, professor of law at George Washington University, has produced an unconventional biography of Louis Brandeis. Readers are warned that those who seek a full account of Brandeis' life should read biographies such as Alpheus Thomas Mason's *Brandeis: A Free Man's Life*, Philippa Strum's *Louis D Brandeis: Justice for the People* and Melvin I. Urofsky's *Louis D Brandeis: A Life*. Rather than provide a detailed biographical account of Brandeis's extraordinary life, Rosen examines the thought processes that underpinned the justice's actions and decisions. Rosen also provides an intriguing analysis of the value of Brandeis' philosophies for contemporary society and the continuing influence of his legacy, particularly on Supreme Court Justices Ruth Ginsburg, Stephen Breyer, and Elena Kagan. Rosen divides his book into an introduction, four interweaving chapters, and an epilogue, each of which provides a standalone account of the key events that shaped the philosophies and thoughts of Louis Brandeis.

## ISAIAH AND JEFFERSON

Rosen begins by comparing Brandeis with the prophet Isaiah and Thomas Jefferson, a bold and intentionally thought-provoking comparison. Rosen weaves into his narrative the name by which Brandeis was known in some circles. Thus we are reminded that, when on May 27, 1935, the Supreme Court struck down three aspects of President Franklin Roosevelt's First



*Louis D. Brandeis: American Prophet*  
by Jeffrey Rosen  
YALE UNIVERSITY PRESS 2016

New Deal legislation, the President is said to have expressed surprise at the court's unanimity and asked, "Well what about old Isaiah?" He was told that Brandeis had sided with his brethren on the court.

The comparison of Brandeis with Isaiah goes further: As Rosen explains, Brandeis behaved like the Old Testament prophet. For example, he warned President Roosevelt that his First New Deal reforms would bring the President into sharp conflict with the Supreme Court. Rosen also skillfully develops this comparison when analyzing the role that Brandeis played in shaping the Balfour Declaration of the United Kingdom's support for the creation of a Jewish state and the occupation of Palestine

by Jewish settlers prior to the formation of the state of Israel.

In comparing Brandeis with Thomas Jefferson, Rosen first focuses upon their common economic and political philosophies. Both were determined to protect individual liberties and the economic opportunities of ordinary workers, farmers, and producers by restricting the economic and political power of monopolies. Brandeis articulated his advocacy of capitalism and his opposition to monopolies in his influential essay "Other People's Money — And How The Bankers Use It" (*Other People's Money*), published in 1914 and the focus of a separate chapter in Rosen's book.

But the comparison also transcends their political and economic philosophies. Rosen points out that Brandeis, like Jefferson, strongly believed in the authority of state legislatures and superior courts. Brandeis' faith in federalism was on full display in his opinion in *Erie Railroad Co. v. Tompkins*,<sup>1</sup> which reflected the essence of Jeffersonian federalism. Rosen notes that Brandeis and Jefferson both firmly believed in the education of all as a means of protecting the basic principles of American government.

Like Jefferson, Brandeis also appears to have had an unfortunate blind spot in relation to matters of race. As a consequence, Brandeis displayed a degree of racial ambivalence when he sided with the majority of the Supreme Court in every major race case decided during his tenure. (Although it was not a case involving race, Brandeis even joined with Justice Oliver Wendell Holmes Jr. in his infamous opinion in *Buck v Bell*<sup>2</sup> legitimizing a state statute authorizing the compulsory sterilization of disabled people.) Rosen suggests that Brandeis' apparent indifference towards racial equality contrasted markedly

with his views about women's suffrage, which he came to fully support.

Rosen also correctly recognizes the limits of these comparisons. For example, unlike Jefferson, Brandeis was a meticulous manager of his personal finances. He lived a frugal life and, as a consequence, left a sizeable estate. Jefferson, on the other hand, spent well beyond his means and was fortunate to avoid bankruptcy after leaving the White House. Another clear point of difference between Brandeis and Jefferson that Rosen touches upon but does not develop concerns Brandeis's remarkable indifference to the separation of powers when he continued to provide advice and guidance to the executive branch of government after his appointment to the Supreme Court. Jefferson fully appreciated the importance of judges maintaining strict independence from the other branches of government. For reasons Rosen does not explore, Brandeis did not hesitate to counsel Presidents Woodrow Wilson, Herbert Hoover, and Franklin Roosevelt while serving on the Supreme Court. Rosen describes this practice as "questionable at the time." This is an understatement. Although Brandeis lived during an era in which leading politicians moved seamlessly to high judicial office, he appears to have consistently breached basic conventions restraining judges from engaging in the affairs of the other branches of government — a practice of which Jefferson would not have approved.

### THE CURSE OF BIGNESS

In chapter 1, Rosen describes the arrival in America of the parents and other members of the Brandeis family, their establishment in Louisville, the birth of Louis Brandeis and his siblings, and the family's return to Europe for a three-year period in 1873 following the collapse of Louis' father's businesses. Rosen traverses Louis Brandeis' decision to return to America and enroll at Harvard Law School, his spectacular record as a student in that institution, and the publication of "The Right to Privacy" in the 1890 *Harvard Law Review*, in which Brandeis and his co-author Samuel Warren advanced their theory of "the right to be left alone." It was also in 1890 that Brandeis fell in love with his second

In 1905, Brandeis started assembling his ideas about "industrial co-operation" and laying the foundation for his theory that industrial and political democracies depend on employees and voters continuing to educate themselves.

cousin, Alice Goldmark. Their courtship was swift. They became engaged in October 1890 and married in March 1891.

Rosen suggests Brandeis' views concerning the dangers of economic monopoly evolved during a period when, as an attorney, he appeared to be willing to simultaneously represent the interests of both labor and management in a role Rosen calls a kind of "Jeffersonian/McKinsey consultant." Rosen explains that Brandeis attempted to identify what both parties to a dispute wanted and, after fully immersing himself in the facts, devised creative solutions that served the best interests of both parties. This highly unusual practice is illustrated by a 1902 case in which Brandeis was consulted by a New England shoemaker who wanted to persuade his employees to accept a cut in wages without going on strike. Brandeis immersed himself in the details of the employer's business methods and concluded the best solution was for the employer to plan production on a more regimented and consistent basis, thereby increasing the hours of work available to the employees.

Two years later, Brandeis undertook his first crusade against monopolies when he successfully challenged the planned reorganization of the Boston Gas utility system. The result was a successful partnership between the public and the private stockholders of the company that gave the public an increasing share in the business's profits. The Boston Gas case was an example of what Brandeis called "regulated competition" — a compromise between unregulated monopolies and total public

ownership of a fundamental utility.

In 1905, Brandeis started assembling his ideas about "industrial co-operation" and laying the foundation for his theory that industrial and political democracies depend on employees and voters continuing to educate themselves. Brandeis referred to this as men having the "opportunity to develop their faculties." Brandeis' theories about labor markets evolved at both practical and theoretical levels, Rosen writes. For example, in the celebrated case of *Muller v Oregon*,<sup>3</sup> he persuaded the Supreme Court to depart from the philosophy that underpinned its *Lochner*<sup>4</sup> decision declaring that limits on working hours were unconstitutional, and instead to uphold an Oregon state law setting a maximum for the number of hours women could work. Brandeis succeeded in that case by compiling an exhaustive brief of facts and sociological data from within America and Europe on the impact of long working hours on women. This was the birth of the Brandeis Brief.

The development of Brandeis' labor and economic theories further evolved through the publication of his essays "Business — A Profession," published in 1914, and "The Constitution of the Minimum Wage," published in 1915. In the first essay, Brandeis explained that increased productivity was entirely consistent with the enhanced health and well-being of employees but that monopolies were a curse that the state may ultimately have to control through strict regulations.

In his minimum wage paper, Brandeis argued that the Oregon legislature was correct in regulating the maximum hours of work for women employees. Judges should uphold legislation, he argued, unless driven to the conclusion that the legislation in question was "completely irrational." Here we see the foundations of Brandeis' views on judicial restraint and the constitutional importance of states having the latitude to engage in social experiments as "laboratories of democracy."

Rosen also recounts the role Brandeis played as counsel for *Collier's* magazine in the *Pinchot-Ballinger* affair, a dispute over conservation policy between the Department of the Interior and the Department of Agriculture's Forestry

Division. *Collier's* published a piece supporting the Forestry Division's views. Brandeis' support of the piece caused considerable embarrassment for President William Howard Taft. The squabble split the Republican Party and indirectly led to Woodrow Wilson becoming the next president. Perhaps as a result, President Taft later vigorously opposed Brandeis' nomination to the Supreme Court.

### OTHER PEOPLE'S MONEY

Next Rosen examines Brandeis' 1914 collection of essays, *Other People's Money*, first published in *Harper's Weekly* and later as a book, in which he criticized the influence of financial oligarchs such as J.P. Morgan.

Brandeis was particularly concerned with how investment bankers formed and controlled massive trusts to acquire stock and seize control of companies. Brandeis warned that when a banker who is a director of a railroad company decides as a railroad man that the company shall issue securities, and then sells those securities to himself as a banker at a price he has fixed, inevitably the interests of the railroad man will suffer. He advocated full disclosure of the underwriting fees, commissions, and profits made by investment bankers who profited through the use of other people's money.

In *Other People's Money*, Brandeis argues that once bankers start to trade instruments that are too complicated for buyers and sellers to comprehend, the financial system is placed at risk.

Rosen recognizes that the global financial crisis of our century occurred in a different economic climate from that which had prevailed in 1907 and 1929. Nevertheless, he suggests that our recent experiences vindicated Brandeis' fears about the concentration of other people's wealth in the hands of investment bankers. He suggests that the modern concept of "too big to fail" reflects Brandeis' concerns that financial oligarchs asserted too much influence over America's financial and political systems and were not accountable for the damage they inflicted in pursuing their ambitions.

In 1912, Brandeis helped influence the antitrust policies that President Wilson introduced. He assisted with developing the Clayton Antitrust Act of 1914 and played a

**In *Other People's Money*, Brandeis argues that once bankers start to trade instruments that are too complicated for buyers and sellers to comprehend, the financial system is placed at risk.**

significant role behind the scenes in creating the Federal Reserve in 1913. President Wilson seriously considered appointing Brandeis as attorney general. Wall Street interests, however, campaigned against it, and Wilson appointed James McReynolds instead. He and Brandeis would later serve together on the Supreme Court, and although Rosen does not dwell on the issue, McReynolds viewed Brandeis with disdain.

In 1916, Brandeis delivered his "The Living Law" address to the Chicago Bar Association in which he praised the notion of the "all round lawyer" whom he said should be versed in economic, sociological, and political facts. A few weeks later President Wilson nominated Brandeis to the Supreme Court.

Brandeis' nomination to the Supreme Court was rigorously opposed by business interests. The most determined opponents criticized his social and economic views. Others opposed the nomination because of Brandeis' unpopularity at the bar. He was considered to be too much of an "active radical." Former President Taft, no doubt mindful of the embarrassment he suffered as a result of Brandeis' advocacy in the *Pinchot-Ballinger* affair, described Brandeis as "a muck raker" and "emotionalist." To his credit, when Taft became chief justice he and Brandeis treated each other with courtesy and respect.

After two months of hearings, the Senate Judiciary Committee voted 3-2 in favor of Brandeis' nomination. On June 1, 1916, the Senate voted 56-28 to confirm the appointment. One of the senators who opposed Brandeis' appointment was George Sutherland of Utah, who later served on the Supreme Court with Brandeis and formed part of the notorious

"four horsemen" who vehemently opposed President Roosevelt's New Deal policies.

### LABORATORIES OF DEMOCRACY

Rosen suggests Brandeis' judicial philosophies rested on three pillars: a commitment to judicial deference to legislatures and states' rights, ongoing opposition to big business and big government, and a commitment to interpret the Constitution not just in light of its original intention but also in a way that reflected the history of America.

Rosen elaborates upon each of these values by taking readers to Brandeis' leading opinions. He devotes special attention to Brandeis' concurring opinion in *Whitney v. California*,<sup>5</sup> in which Brandeis explained that speech could only be restricted if it threatened to result in both imminent and serious harm and if there was no time to diffuse the danger. These concepts prevailed until the *Brandenburg* decision of 1967.<sup>6</sup>

Brandeis' approach to constitutional interpretation was perhaps best illustrated in his dissent in *Olmstead*.<sup>7</sup> It was in that case that Brandeis resurrected features of his concept of the "right to be left alone" that he first reflected upon in the 1890 *Harvard Law Review* article he co-wrote.

Here Rosen touches upon Brandeis' role as a behind-the-scenes advisor to presidents and politicians. We learn that in 1921, after Woodrow Wilson had left the White House, he and Brandeis drafted a progressive manifesto that Wilson hoped would guarantee victory for the Democratic Party in 1924. In October 1930, Brandeis briefed President Hoover about the settlement of members of the Jewish community in Palestine. In September 1933, President Roosevelt consulted with Brandeis over New Deal policies. When, on May 27, 1935, the court handed down three opinions striking elements of President Roosevelt's First New Deal policies, Brandeis communicated indirectly with the President by explaining to Felix Frankfurter that the court's decisions that day "changed everything" and that future New Deal policies had to avoid the "curse of bigness."

One of the few shortcomings in Rosen's excellent book is his failure to critically examine Brandeis' reasons for engaging in the affairs of other branches of government

whilst presiding as a judge in America's highest court.

### THE PERFECT CITIZEN IN THE PERFECT STATE

Chapter 4 traces Brandeis' evolution from a young man who was skeptical of Zionism to one of the world's prominent advocates of the creation of a Jewish state in Palestine. Rosen sympathetically describes how leading Zionists such as Jacob de Haas and Alfred Zimmern helped Brandeis see Zionism as consistent with American patriotism.

Brandeis met with Lord James Balfour, the United Kingdom's foreign secretary, in 1917 and helped modify the Balfour

Declaration, which proclaimed support for establishing a Jewish homeland in Palestine. Brandeis also acted as a conduit between the British government and President Wilson during the development of the Balfour Declaration. But Brandeis' views on how Zionist objectives could be achieved were not always embraced by others, particularly Zionist leaders in Europe. His idealistic vision of a democratic secular and co-operatively owned Jewish state in Palestine in which Arab civil and political rights would be respected contrasted markedly with the views of Jewish immigrants to Palestine. Rosen recognizes that Brandeis failed to understand Arab nationalism but argues that Brandeis' vision of cultural pluralism remains pertinent today.

### WHAT WOULD BRANDEIS DO?

In the final portion of his book, Rosen examines Brandeis' legacy and its relevance to contemporary society, based in part on interviews with Justices Ginsburg, Breyer, and Kagan, all of whom are Brandeis devotees who particularly appreciate his views on judicial restraint, his willingness to

immerse himself in facts, and his collegiality. Rosen also speculates on how Brandeis' political and judicial philosophies would translate today, arguing that Brandeis likely would be particularly concerned about the concentration of power in entities such as Google and Facebook and their ability to control free speech, the demise of democratic participation, and the curtailment of individual liberties through state surveillance. Altogether, Rosen's book is a satisfying examination of the philosophies and thoughts of a man who was not only one of America's greatest judges, but a person whose economic and political views continue to resonate today.



**DAVID COLLINS** is a justice of the High Court of New Zealand. He previously served as Solicitor-General of New Zealand and is an honorary member of the Law Faculty of Victoria University of Wellington.

- <sup>1</sup> *Erie Railroad Co. v Tompkins* 304 US 64 (1938).
- <sup>2</sup> *Buck v Bell* 274 US 200 (1927).
- <sup>3</sup> *Muller v Oregon* 208 US 412 (1908).
- <sup>4</sup> *Lochner v New York* 198 US 45 (1905).
- <sup>5</sup> *Whitney v California* 274 US 357 (1927).
- <sup>6</sup> *Brandenburg v Ohio* 395 US 444 (1969).
- <sup>7</sup> *Olmstead v United States* 277 US 438 (1928).



**DAVID W. ICHEL**  
is pleased to be a sponsor  
of *Judicature*.

David teaches Complex Civil Litigation at Duke Law School and, upon retiring from Simpson Thacher & Bartlett LLP after 37 years, now devotes himself to service as a mediator, arbitrator and special master.

**DAVID W. ICHEL DISPUTE RESOLUTION**  
MEDIATOR + ARBITRATOR + SPECIAL MASTER  
DICHEL@X-DISPUTE.COM WWW.X-DISPUTE.COM  
917-837-5529