

Louis D. Brandeis: American Prophet

By Jeffrey Rosen

Yale University Press, New Haven, CT, 2016.

256 pages, \$25 (cloth), \$15 (paper).

Reviewed by R. Mark Frey

I was pleased to learn about the publication of Jeffrey Rosen's *Louis D. Brandeis: American Prophet*. It is a fascinating book that offers new insights into this eminent jurist's life, his views on the law, and his philosophy of life. Having had a lifelong interest in Justice Brandeis, I was not disappointed with the book. Nor, I think, would the reader with merely a passing interest in his life and work.

Over the course of the book, Rosen teases out the basic tenets of Brandeis' philosophy from his writings, including his court opinions, articles, and speeches, as well as comments made by his family, friends, and colleagues over the years and in discussions with the author. Brandeis lived from 1856 to 1941—from the Civil War through World War I to the beginning of World War II—and Rosen places his life within the context not only of these conflicts, but also of the income inequality of the Gilded Age and economic dislocations of the Great Depression.

Most striking about Brandeis is the power of his mind, a first-rate one that had the ability described by F. Scott Fitzgerald in his 1936 essay "The Crack-Up" "to hold two opposed ideas in the mind at the same time, and still retain the ability to function."

Brandeis' intellectual rigor was demonstrated, according to his law clerks, by never-ending attention to the wording and logic of his opinions, subjecting them to numerous revisions in order to get them just right. He viewed the law not as a sterile mathematical formulation, but as functioning within the social, economic, and political realms of human experience. That meant that, in interpreting the law, Brandeis relied on insights provided by the social sciences as well as by other countries' laws and legal systems, most tellingly in the development of what became known as the "Brandeis Brief."

Brandeis rejected the limitations of ideology because he had an intellect that was too inquisitive and probing to be impeded by such constraints—somewhat akin to an ant that escaped becoming entombed in a slowly solidifying deposit of amber. He demanded facts and, through inductive reasoning, his thinking evolved. But, notwithstanding this, certain key concepts informed his perspective over the years. First and foremost was his opposition to "bigness," whether with respect to government or corporate entities. He was Jeffersonian in outlook and believed in the importance of small businesses and farms. Opposition to bigness also called for an educated citizenry actively engaged in the affairs of government, rather than passively sitting by while affected by the decisions of others. Brandeis believed that democracy required this. He viewed monopolies, even if regulated (and still susceptible to the influence of special interests), as an evil, and he believed in the power and efficacy of regulated competition. The connection between constitutional and economic liberty formed a critical feature in his perspective.

In a speech that he delivered to the Economic Club of New York in November 1912, Brandeis noted, "We learned long ago that liberty could be preserved only by limiting in some way the freedom of action

of individuals; that otherwise liberty would necessarily lead to absolutism and in the same way we have learned that unless there be regulation of competition, its excesses will lead to the destruction of competition, and monopoly will take its place." As Rosen writes, "Brandeis and [Woodrow] Wilson were concerned ... not only about the effect of monopoly on the economy but also about its effect on democracy." When monopolists "appropriated the businesses and property of independent citizens," they "harmed democratic institutions at the local, state, and federal levels."

As Brandeis saw it, the true curse of bigness was not economic inefficiency, but, given his focus on the connection between constitutional and economic liberty, the creation of a financial and political oligarchy. He believed with both Madison and Jefferson that the cure was to maximize the number of independent citizens and thereby to ensure their control over their own economic destiny. He thought that economics was best viewed in both democratic and constitutional terms.

Most insightfully, Rosen observes, "The idea of 'too big to fail' was the perverse culmination of Brandeis's dystopian view of high finance. His main concern was not, as his critics suggest, the economic inefficiency of large firms, but the oligarchic influence they wielded over the American financial and political system that allowed them to shield themselves from accountability for their own greed and recklessness."

Brandeis believed in the notion of industrial democracy, envisioning workers being given a part in management and ensuring that employers were more invested in their employees and more willing to ensure "regularity of employment." Brandeis believed that all citizens should have an opportunity—and in fact had a duty—to educate themselves in order to be capable of self-government. This belief, according to Rosen, suffused Brandeis' thinking about the Constitution and the workplace.

A second key concept that informed Brandeis' perspective was his view of the proper role of the judiciary. He was committed to judicial restraint, arguing for

deference to legislative experimentation (he popularized the view of the states as “laboratories of democracy”) and unwilling to strike down laws unless they clearly violated the “rights and limitations enumerated in the text of the Constitution.” Brandeis argued that the Court should refrain from formulating “a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”

A third key concept in Brandeis’ framework dealt with interpretation of the Constitution. According to Rosen, Brandeis advocated neither originalism nor a living constitution but rather a synthesis of the two into a “living originalism.” Living originalism took into account the values of the framers and the text of the Constitution while acknowledging our nation’s changing social and technological landscape. Consider, for example, Brandeis’ dissent in *Olmstead v. United States* (1928), the case that held wiretapping did not violate the Fourth Amendment because a “search” required a physical intrusion. As Brandeis observed in his dissent:

Moreover, “in the application of a constitution, our contemplation cannot be only of what has been, but of what may be.” The progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions.... Can it be that the Constitution affords no protection against such invasions of individual security?

Rosen writes, “Here Brandeis connects the privacy of the mind, or cognitive liberty, with the importance of protecting the political dissent that sparked the American Revolution.” He quotes another passage from Brandeis’ dissent:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness.

They recognized the significance of man’s spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights, and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

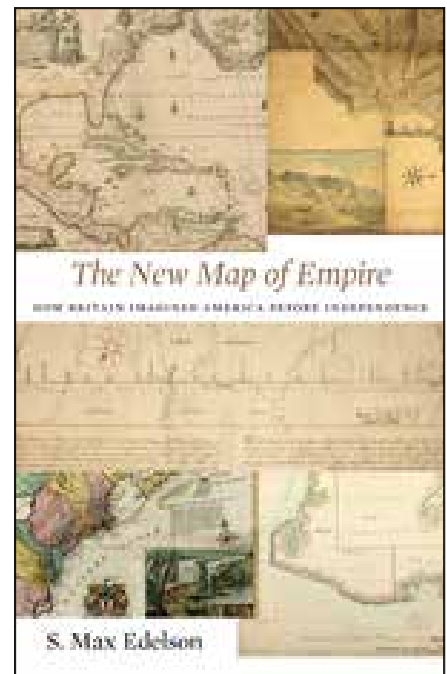
The Constitution serves to protect individuals from abuses of power and, according to Brandeis’ living originalism, must be capable of adapting to a changing world. If it does not, then the rule of law loses credibility and the people view it with contempt. We all lose out at that point. In 1967, in *Katz v. United States*, the Court overruled *Olmstead*.

The American experiment, for Brandeis, is a process in democracy guided ever so carefully by our most venerated document, the Constitution. It is an experiment calling for the involvement of all; in fact, it’s our responsibility to grapple with the facts and review all sides of the issues so that, in Rosen’s words, “we can translate and preserve constitutional principles in light of changed circumstances.”

Louis D. Brandeis: American Prophet is a fine book with much food for thought that is timely today. In fact, thinking about current problems, I found myself asking on more than one occasion, “What would Justice Brandeis do?” The fact that this book came out 100 years after his becoming a Supreme Court justice speaks to the enduring quality of his works and their continued relevance. I can’t cease marveling at Brandeis’ intellectual prowess and the manner in which he employed it, while at the same time venerating the Constitution at a moral, almost spiritual, level. Clearly, he’s one for the ages. ☺

R. Mark Frey is an attorney based in St. Paul, Minn., who writes extensively on immigration law and policy. He is an active member of the Federal Bar Association’s Immigration Law Section and the American Immigra-

tion Lawyers Association (AILA), currently serving on AILA’s Board of Publications. Frey has practiced immigration law for almost 30 years, with an emphasis on asylum and other forms of humanitarian relief, family and marriage-based immigration, removal defense, appeals, naturalization, and various temporary worker visas.



The New Map of Empire: How Britain Imagined America Before Independence

By S. Max Edelson

Harvard University Press, Cambridge, MA, 2017.

464 pages, \$35.

Reviewed by Henry S. Cohn

University of Virginia history professor S. Max Edelson’s *The New Map of Empire* begins with the Privy Council, the pre-Revolutionary body that had jurisdiction of appeals from England’s American colonies. In 1727, Connecticut colonials brought one of the most important cases to the Privy Council, *Winthrop v. Lechmere*, which considered whether the Connecticut General Assembly could abolish primogeniture and establish a different rule for intestate succession.

The Privy Council also had a division called the Board of Trade, whose function was to control and develop colonial land. In a series of conflicts in Europe and in America, ending in 1763 with the conclusion of the Seven Years War and the Peace