Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century

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In this essay, originally delivered as a David C. Baum Memorial Lecture on Civil Liberties and Civil Rights at the University of Illinois, Professor Daniel A. Farber confronts the critics of legal pragmatism. He offers Justice Louis Brandeis as a response to their criticisms, arguing that a discernable and coherent thread of legal pragmatism runs through Brandeis's opinions. He advocates taking a Brandeisian approach to difficult contemporary legal issues and urges a return to Brandeis's pragmatism.

If Brandeis is the answer, what was the question?

No doubt many different responses are possible. My purpose is to consider whether Brandeis can help resolve the postmodernist crisis in constitutional law. Many scholars have now lost faith in the possibility of providing constitutional law with a firm theoretical foundation. One response would be to give up on the entire constitutional enterprise, but another is to abandon the need for a foundational theory. Legal pragmatists, looking for inspiration to pragmatist philosophers, such as William James and John Dewey, favor this nonfoundationalist approach. But, if we are to proceed without a foundation, is anything left for us but a rudderless journey of ad hoc decision making?

Critics on both the Left and the Right argue that pragmatism is bankrupt as a source of legal theory. Opponents on the Left consider
it a complacent ideology based on facile acceptance of the status quo. Thus, legal pragmatism stands accused of being on the one hand tradition-bound and on the other a source of unrestrained judicial activism. As a legal pragmatist, I consider these to be serious criticisms which implicate important legal values.

It is certainly possible to fight out this dispute purely on the level of theory, but that strategy itself seems decidedly unpragmatic, for pragmatism is, in part, a call for less obsession with theory and more attention to concrete practice.

Taking a more concrete approach, I will argue that Justice Brandeis provides a strong counterexample to these criticisms. While a notable practitioner of pragmatism, he also was known for his crusades for social change, his deep adherence to moral principle, and his legal craftsmanship. His example can teach much about how legal pragmatism can be translated from jurisprudence to practice.

In part I of this essay, I will explain the genesis of legal pragmatism and explore the arguments of its critics. Part II then presents Brandeis as a counterexample to these criticisms. Critics might well respond that Brandeis did have various admirable qualities, but that those qualities were independent of—or even inconsistent with—his pragmatism. In part III, I will argue that the various themes in Brandeis’s thought are coherent. In his judicial opinions, we can discern a basis for a coherent pragmatist vision of law and community. Consideration of this vision also highlights connections between Brandeis and another current school of constitutional theory known as republicanism.

The Brandeisian vision combines the claims of individuality with those of community. In the course of this essay, I hope to dispel the view—common among both its critics and supporters—that legal


4. Farber, supra note 1, at 1335-49.


6. As the title indicates, this essay is not intended as an exercise in biography or intellectual history, either of which would mean placing Brandeis firmly in the context of his own time so as to understand his views more deeply. I am interested instead in what we can extract from Brandeis’s work as a judge for our own contemporary purposes.
pragmatism is essentially banal. On the contrary, it can offer passion and principle as well as prudence.

I. LEGAL PRAGMATISM AND ITS CRITICS

A. Foundationalism and Its Discontents

Judicial review is something of a puzzle in a democracy. If we accept the general premise that the majority should rule, allowing majority decisions to be overturned by judges seems anomalous. What otherwise might have been an esoteric academic dispute about this issue has been given immediacy throughout this century by such controversial decisions as *Lochner,*6 *Brown,*8 and *Roe v. Wade.*10 These decisions led to a call for neutral legal principles as a basis for judicial review.11 Ideally, such legitimating principles also would provide judges with a constrained, nonpolitical method of deciding constitutional issues. Unfortunately, the project of providing such a foundation for constitutional law has proved unsuccessful.12

Despite the efforts of a series of brilliant scholars, none of the proposals has been satisfactory. For example, originalism was widely espoused in the 1980s by conservatives, such as Robert Bork, as the key to constitutional interpretation.13 It is hard to quarrel with the proposition that the views of the Framers are relevant to constitutional interpretation. But original intent has proved incapable of carrying the entire weight of constitutional interpretation, for reasons that are by now quite familiar. These reasons range from the ambiguities and gaps in the historical record, vexing problems in defining the object of the search, and troublesome normative problems about the entire enterprise.14

13. See Bork, supra note 11.
Prior to originalism, John Ely's theory of representation reinforcement offered the most serious foundationalist effort.\textsuperscript{15} Ely argued that the primary role of courts should be to strengthen democracy, either by eliminating institutional barriers such as malapportioned legislatures or else by ensuring that the interests of minority groups were taken fully into account by legislatures. Though promising, this theory, too, proved incapable of doing the work assigned it. If democracy is defined very narrowly to include only formal compliance with the requirements of majority voting, then the theory is incapable of justifying judicial review except in the most limited contexts. Yet, if defined more broadly, to include some deeper concept of equal participation (as in the work of Lani Guinier\textsuperscript{16}), the theory seems to provide hardly any constraint on judges. As with originalism, troublesome normative and empirical issues also must be confronted.\textsuperscript{17}

More recently, Bruce Ackerman has offered a kind of synthesis of Ely and Bork.\textsuperscript{18} Like Ely, he seeks to ground judicial review in majoritarianism; like Bork, he views that intent as best expressed in historical episodes, such as the framing of the Constitution. He goes beyond Bork, however, in identifying at least one additional constitutional moment, the New Deal. This theory, too, is flawed. Constitutional moments are difficult to identify, and even once they are identified, interpreting past constitutional moments seems to involve all the difficulties of originalism.\textsuperscript{19}

An alternative approach to constitutional theory is to turn to some political or moral theory for guidance about the outcomes of cases. Among the sources of guidance have been philosophical liberalism,\textsuperscript{20} public choice theory,\textsuperscript{21} and feminism.\textsuperscript{22} None of these theories has been able to command a consensus, and each raises familiar problems of definition, application, and justification.\textsuperscript{23} They also tend

\begin{itemize}
\item \textsuperscript{15} Ely, \textit{supra} note 11.
\item \textsuperscript{18} \textbf{Bruce A. Ackerman, \textit{We the People}} (1992).
\item \textsuperscript{19} For critiques of Ackerman's project, see Terrance Sandalow, \textit{Abstract Democracy: A Review of Ackerman's \textit{We the People}}, \texti{9 Const. Commentary} 309 (1992) (book review); Suzanna Sherry, \textit{The Ghost of Liberalism Past. \textit{We the People}}, \texti{105 Harv. L. Rev.} 918 (1992) (book review).
\item \textsuperscript{22} See, \textit{e.g.}, \textbf{Feminist Legal Theory: Readings in Law and Gender} (Katharine T. Bartlett & Roseanne Kennedy eds., 1991); \textbf{Catherine A. MacKinnon, Only Words} (1993).
\item \textsuperscript{23} See Ely, \textit{supra} note 11, at 43-72; Ortiz, \textit{supra} note 12, at 311.
\end{itemize}
to trench uncomfortably closely on the terms of ordinary political debate. If the Constitution takes a decisive position on the proper scope of income redistribution, economic regulation, and gender relations, law seems to leave little room for democratic politics.

Several responses to this state of affairs are possible. We could continue to work on the process of theory building. After all, one of the extant theories might be correct, though in need of some elaboration and modification. Alternatively, some new theory may soon emerge and carry the day. Given the brilliant efforts that have already been expended on this enterprise, however, the chances for either an existing or new theory to triumph seem remote, though people who are so inclined are certainly welcome to make the effort. Alternatively, we could give up on the search for some foundation for constitutional law. We would then have several further options. We could declare constitutional law illegitimate. We could abandon the distinction between law and politics, frankly admitting that judges are making antidemocratic, quasi-legislative decisions, but supporting those decisions to the extent they fit our own political values. Or, we could argue that, even without foundations, constitutional law could still have its own integrity and value. It is this final option that is characteristic of legal pragmatism.

B. An Introduction to Legal Pragmatism

Like most intellectual movements, legal pragmatism is not easy to define. It is part of a loosely connected collection of antifoundationalist views, a category that includes believers in Aristotelian practical reason, some feminist theorists, adherents to literary theories such as hermeneutics and deconstruction, and students of the philosophy of language. Despite earnest arguments among these groups, it is

24. See Smith, supra note 3, at 447-48 (criticizing all existing theories as insufficiently foundationalist).
26. Martha Minow & Elizabeth V. Spelman, In Context, in Pragmatism, supra note 1, at 247; Margaret J. Radin, The Pragmatist and the Feminist, in PRAGMATISM, supra note 1, at 127.
29. Note the debates between Fish, supra note 27, E. D. Hirsch, Jr., Comment on Paper by Stanley Fish, in PRAGMATISM, supra note 1, at 83, Posner, supra note 7, Rorty, supra note 7, and Joan C. Williams, Rorty, Radicalism, Romanticism: The Politics of the Gaze, in PRAGMATISM, supra note 1, at 155.
often unclear whether deep philosophical issues are really at stake, or whether they are expressing similar perspectives in different vocabularies. Indeed, the term legal pragmatism has sometimes been used as an umbrella for all of these groups.  

In a more specific sense, however, legal pragmatists are distinguished by their orientation toward an American philosophical tradition tracing back to William James and John Dewey. Even in this narrow sense, pragmatism accommodates a variety of views ranging from Judge Richard Posner\(^3\) to the philosopher Richard Rorty. In a wry tribute to this diversity, Jack Balkin provided the following list of the "top ten reasons to be a legal pragmatist":

10. It works.  
9. Being a legal pragmatist means never having to say you have a theory.  
7. If you're left wing, you can finally find something to agree with Richard Posner about.  
6. You can read all your philosophical sources in the original.  
5. If you're right-wing, you can finally find something to agree with Frank Michelman about.  
4. You can avoid seeing the world in terms of rigid philosophical dichotomies (or not).  
3. Because you're socially constructed, it really isn’t your fault that you became one.  
2. You can also be (a) a civic republican, (b) a feminist, (c) a deconstructionist [like Balkin], (d) a case-cruncher, (e) a crit, (f) a law-and-economics type, or (g) anything else.  
1. No one has yet discovered John Dewey's anti-semitic writings for Le Soir [a reference to a scandal involving deconstructionist Paul de Man].\(^3\)

As with many intellectual movements, pragmatism is partly defined in opposition to other views. In particular, pragmatists reject foundationalism, both in legal theory and in philosophy. They reject the picture of reasoning in which both the acceptable methods of reasoning and the permissible raw materials are specified fully in advance. Rather, they believe that reasoning cannot be reduced to an algorithm or predetermined methodology. It is often said that pragmatists equate "truth" with whatever "works." If so, however, this should not be considered a reductionist theory of truth (reducing

30. See, e.g., PRAGMATISM, supra note 1; Farber & Sherry, supra note 5, at 820-22.  
31. See, e.g., POSNER, supra note 12; Posner, supra note 7.  
32. See, e.g., RICHARD RORTY, CONSEQUENCES OF PRAGMATISM (1982); Rorty, supra note 7.  
theory to instrumental value), but rather a reminder that the only available standards to apply in a given venture are the standards we actually already have. When those standards prove problematic, we must contend with the difficulty as best we can in each instance, without hoping for rescue from some acontextual theory of truth.34

In the legal context, pragmatism implies a certain degree of eclecticism. Pragmatism provides no reason to exclude consideration of original intent, precedent, philosophy, social science, or anything else that might be appropriate and helpful in resolving a hard case.35 Ide ally, all of these factors point to the same outcome. When they conflict, the only recourse is to make the best decision possible under the circumstances. Although this methodology, if it can even be called one, may seem quite open-ended, pragmatists argue that in concrete cases it is often possible to identify the most reasonable resolution to such conflicts. Decisions are channelled by the professional training and experienced judgment of the judge, which do not provide unlimited leeway and may in fact be felt as coercing a single "right answer."36

The pragmatist’s judicial decision will rarely claim to rest on a single premise. Rather than using the metaphor of the foundation as a means of support, pragmatists prefer to speak of a web of beliefs or a many-legged stool. Foundationalism, to succeed, requires a completely and securely defined foundation, as well as unimpeachable connections between the foundation and the edifice. As we have seen, no foundationalist theory to date has been able to satisfy these demands. But the pragmatists’ web has a greater degree of tolerance for stress, for the web can hold even if one of its individual strands frays or breaks.37

C. Critiques of Pragmatism

Pragmatism has not gone without criticism. Some of these criticisms are pitched at the level of philosophical theory and fall outside

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34. Cf. Katharine T. Bartlett, Feminist Legal Methods, in Feminist Legal Theory: Readings in Law and Gender 370, 389 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991). Positionality is a stance from which a number of apparently inconsistent feminist "truths" make sense. The positional stance acknowledges the existence of empirical, truths, values and knowledge, and also their contingency ... [P]ositionality retains a concept of knowledge based upon experience ... [and] rejects the perfectibility, externality, or objectivity of truth. Instead, the positional knower conceives of truth as situated and partial. Id. at 339. See generally Pragmatism, supra note 1.

35. See Posner, supra note 12, at 37, 455; see also Farber, supra note 1, at 1334-38, 1366-76.


the scope of this essay. Others, however, bear more directly on legal applications of pragmatism.

The standard critique of pragmatism from the Left can be explained by returning to the web metaphor. The web provides greater security, but by the same token, one might argue, it hinders change through entanglement with the status quo. To the extent that pragmatists rely on coherence with existing beliefs as the basis for decisions, those beliefs limit the possibility of radical improvement, and indeed, the beliefs themselves are legitimized through repeated use. Thus, we find Richard Rorty—a radical egalitarian and feminist—accused of endorsing political complacency and quietism.

To shift metaphors, by giving up the Archimedean standpoint, the pragmatist seems to have lost the leverage to move the world. In more simplistic terms, by adopting as a standard “whatever works,” pragmatism may seem to reinforce existing social values, or perhaps to reduce law to a series of cost-benefit analyses (based, of course, on existing economic values).

From the Right, a different critique emerges. The conservative complaint is not that pragmatism is too apt to resist change, but, on the contrary, that it invites judicial activism. Given the eclectic collection of tools available to the pragmatist judge, the judge has free rein to implement his own view of social policy. Indeed, because pragmatists often focus on the consequences of actions, they may be attacked for making essentially political judgments. A related concern, shared by Centrists as well as conservatives, is that pragmatism is simply too open-ended. As a result, judicial decisions may become unpredictable, or at least uncoupled from such sources of legitimacy as precedent and text. Thus, what are properly considered some of the major virtues of the rule of law may be in peril.

In short, where the Left sees the spectre of Felix Frankfurter, the Right (and to some extent the Center) fears the reincarnation of William O. Douglas. To some extent, these criticisms are aimed at different strands of pragmatism. One element of pragmatism is the sort of coherence theory I mentioned before. Because it seeks to situate decisions within an existing practice or an existing web of beliefs, this strand of pragmatism has ties to Aristotelian practical reason and some forms of hermeneutics. The risk is that coherence will prove too confining. Other strands of pragmatism place more stress on experi-

38. Eskridge, Gaylegal Narratives, supra note 27; Radin, supra note 26.
40. See Katharine T. Bartlett, Rumpelstiltskin, 25 CONN. L. REV. 473 (1993); Radin, supra note 26; Ruthann Robson, Posner's Lesbians: Neither Sexy Nor Reasonable, 25 CONN. L. REV. 491 (1993); Williams, supra note 29; Levit, supra note 2.
41. RONALD DWORKIN, LAW'S EMPIRE (1986); Smith, supra note 3, at 447-49.
42. Smith, supra note 3, at 443-44 (pragmatism cannot provide solutions to legal problems).
mentalism, valuing creativity and learning from experience. This strand of pragmatism raises the risk of unconstrained activism. Both strands have in common the belief that the ultimate test is experience; but one strand emphasizes the "funded knowledge" of past experience, while the other emphasizes the open possibilities offered by future experience.\footnote{The contrast between these two tendencies in pragmatism is well-explained (perhaps at the expense of being reified) in Eskridge, Gaylegal Narratives, supra note 27, at 613-23.} Pragmatists generally seek to avoid both sets of risks by interweaving the two strands. Critics apparently are unconvinced of the success of this strategy.

The fears of critics from both sides converge on the leading contemporary judicial exponent of pragmatism, Richard Posner. From the perspective of many conservatives, his instrumentalism is alarming. In at least some passages, he seems close to endorsing social engineering as the definition of the judicial role.\footnote{See, e.g., POSNER, supra note 12, at 29 (law is basically instrumental); id. at 457 (law should be concerned with consequences of decisions, not interpretation of legal texts).} While many of his policy positions are congenial to many conservatives, some are at least highly controversial, such as his views on gay partnerships, sodomy laws, and reproductive freedom.\footnote{See, e.g., RICHARD A. POSNER. SEX & REASON (1992).} But many liberals (and those farther to the Left) find him equally unacceptable. His allegedly cold-blooded reliance on economic analysis is thought to indicate a lack of moral values, and in line with the criticisms discussed above, he is often criticized for adopting the status quo as a baseline.\footnote{See generally TOMAS J. PHILIPSON & RICHARD A. POSNER, PRIVATE CHOICES AND PUBLIC HEALTH: THE AIDS EPIDEMIC IN AN ECONOMIC PERSPECTIVE (1993).}

These criticisms of Posner are not completely lacking in substance, but they are badly overdrawn. He does refer to social welfare more than many of his fellow judges, and his opinions sometimes suggest that he does not view membership in the judiciary or Congress as guarantees of wisdom or virtue.\footnote{See, e.g., Bastanipour v. Immigration & Naturalization Serv., 980 F.2d 1129, 1133 (7th Cir. 1992); Tom v. Heckler, 779 F.2d 1250, 1259 (7th Cir. 1985) (Posner, J., dissenting). For a favorable comparison of Posner's judicial writings with today's typical Supreme Court opinion, see Daniel A. Farber, Missing the "Play of Intelligence," 36 WM. & MARY L. REV. 147, 153 (1994).} Nevertheless, he has also retained a firm grip on conventional legal reasoning in most of his judicial opinions. As to the charge of quietism, whatever else might be said against Posner, no one has ever accused him of intellectual timidity. His economic analysis does sometimes seem oblivious to deeper human values.\footnote{See generally TOMAS J. PHILIPSON & RICHARD A. POSNER, PRIVATE CHOICES AND PUBLIC HEALTH: THE AIDS EPIDEMIC IN AN ECONOMIC PERSPECTIVE (1993).} Recently, however, he has begun to devote more attention to, and even to show passion regarding, matters of principle.\footnote{Central States, Southeast & Southwest Areas Pension Fund v. Lady Baltimore Foods, Inc., 960 F.2d 1339 (7th Cir. 1992); United States v. Evans, 924 F.2d 714 (7th Cir. 1991);} Thus, the
example of Posner neither confirms these criticisms of pragmatism nor disproves them conclusively. To defend the case for legal pragmatism, we need a stronger counterexample, such as that provided in my view by Justice Brandeis.

II. THE PRAGMATIC JUSTICE

Although most readers probably have some general recollection of Brandeis, a brief reprise of his life and character may be helpful before we consider his judicial pragmatism. What follows is meant only to convey a quick impression of Brandeis and his times.

Louis Brandeis was born November 13, 1856, in Louisville, Kentucky, the son of German Jewish emigrants.50 His earliest memory was of his mother taking soup and coffee to Union soldiers.51 He graduated at the head of his class from Harvard Law School in 1877, reputedly with the highest grades of all time.52 After a brief period in St. Louis, he returned to Boston to practice law. He was remarkably successful, ultimately becoming a multimillionaire.53 His approach to practice was unusual for that time in two respects and would be even more peculiar today. First, he had the odd notion that the lawyer’s duty is not to act as a hired gun but to advance the public interest as well as that of his client.54 Second, he not only devoted much of his time and energy to pro bono work, but also reimbursed the firm of which he was the senior partner for his time, in order to avoid any financial impact on the younger lawyers arising out of his pro bono work.55

Partly because of his unorthodox legal practice, and partly because of anti-Semitism, vociferous opposition arose when he was nominated for the Supreme Court by President Wilson on January 28, 1916.56 After his confirmation, he became the leading progressive voice on the Supreme Court. Along with Holmes, who was thought by some of their colleagues to be under Brandeis’s thumb, he staunchly

52. Strum, Justice for the People, supra note 50, at 18.
53. Id. at 47.
55. Strum, Beyond Progressivism, supra note 51, at 50-51. Some of this work is discussed later in this essay. See infra notes 117-18 and accompanying text.
opposed conservative efforts to limit economic regulations under the aegis of the Due Process Clause. He and Holmes also championed freedom of speech.7 Although he was often in the dissent in major cases, a prominent political scientist recently characterized him as the intellectual leader of the Court.58 He retired on February 13, 1939.59

Even after he left practice, Brandeis's activities were not limited to the Court. Although he was nonreligious and completely assimilated, he became an enthusiastic Zionist.60 He also continued to play a part in governmental and academic affairs, partly through his protégé, Felix Frankfurter.61 He exerted some degree of influence on important New Deal legislation.62

Those are the bare facts of his life. It is more difficult, however, to plumb his personality. He was apparently an austere and formidable person, known to open a casual conversation with a question about the Danish trade deficit.63 His memory was legendary. For instance, he once correctly informed a law clerk that the statistics he needed could be found in the third chapter of a small green book on a certain shelf at the Library of Congress.64 He was jealous of his time and sometimes, as a consequence, quite abrupt. While in practice he kept his office uncomfortably cold to dissuade clients from dawdling.65 To judge from the reports of many of his biographers,66 he was like George Washington—highly admirable, to be sure, but hardly imaginable as a live human being. Indeed, one biographer67 refers to him as a mysterious, almost alien creature.68

He does seem, however, to have had his human side, though it was normally hidden from public view. He was intensely involved in his family. Unusual for his time, he encouraged his two daughters to become professionals (an economist and a lawyer).69 He hated tele-
phones and automobiles, but loved sailing and horseback riding.\(^{70}\) (One of my senior colleagues who met him socially remarked that Brandeis was, after all, old enough to have driven a carriage as a young man.) It is a bit of a relief to learn that he was not entirely a plaster saint. This intensely upright man was capable of disparaging the character and abilities of his colleagues in private moments. Speaking to Felix Frankfurter, he remarked that McReynolds was lazy, possessed of irrational impulses, and looked at times like an "infantile moron," while the only way of dealing with Joseph McKenna was to "appoint guardians for him."\(^{71}\) But he was the soul of courtesy in his interactions with these fellow Justices, whatever his private views.\(^{72}\)

With this brief background on his life and somewhat elusive character, we turn to Brandeis's credentials as a pragmatist. As we will see, whatever the mysteries of his private life, his public self was unmistakable.

### A. The Paradigmatic Pragmatist

Among current pragmatist writers, Holmes is popular as an example of pragmatist jurisprudence.\(^{73}\) Holmes's jurisprudential views were akin to pragmatic philosophers; indeed, he was personally familiar with William James and his work.\(^{74}\) He stated those views with exceptional elegance and wit. But Holmes's pragmatism was more theoretical than practical. As he was wont to say, he detested facts and admired grand generalities—a turn of mind reflected by his refusal even to read the newspaper.\(^{75}\) The jewel-like clarity of his judicial opinions is gained at the expense of close attention to the record or prior law; sweeping generalities were more feasible for a judge who liked to circulate his opinions almost immediately after they were assigned.\(^{76}\)

Brandeis, in contrast, loved facts and distrusted philosophy, which he viewed as an escape from the real intellectual battles of life.\(^{77}\) As a practicing lawyer, he is most famous for authoring the

\(^{70}\) Strum. Justice for the People, supra note 50, at 47.

\(^{71}\) Id. at 371.

\(^{72}\) Id.

\(^{73}\) See, e.g., Posner, supra note 12, at 16; Grey, supra note 1; Hantzis, supra note 1.

\(^{74}\) Grey, supra note 1, at 788, 864-70.

\(^{75}\) Strum. Justice for the People, supra note 50, at 310; Strum. Beyond Progressivism, supra note 51, at 69.

\(^{76}\) See David M. O'Brien, Storm Center: The Supreme Court in American Politics 296 (2d ed. 1990).

\(^{77}\) Strum. Justice for the People, supra note 50, at 310. Brandeis called philosophy "the cyclone cellar for finer souls." Id.
"Brandeis brief" in the Muller case. Muller was a Lochner-like challenge to an Oregon statute limiting the working hours of women. After only a few pages of citation to precedent, the brief proceeds with many pages of detailed factual information about maximum hour laws for women. He succeeded in persuading the Court that this particular form of regulation was reasonable enough to pass constitutional muster.

The Muller brief was not an aberration. Brandeis had an extraordinary interest in facts. He was known to read consular circulars for recreation. He once remarked that "a lawyer who has not studied economics and sociology is very apt to become a public enemy." His opinions are packed with footnotes detailing factual and historical background.

Brandeis's dissent in New State Ice Co. v. Liebmann illustrates his pragmatism. New State Ice involved an Oklahoma regulatory scheme that imposed public utility-like regulations on the ice industry (a major business in the days before refrigeration). The Court held the statute a violation of due process because selling ice was not, in the majority's view, a business affected with a sufficient public interest to justify regulation. In an era when footnotes were rare in judicial opinions, Brandeis's dissent contains fifty-seven footnotes, and it cites a mix of sources that would still be unusual today: the tenth edition of the Ice and Refrigeration Blue Book, a journal called Refrigerating World, law review articles (rarely cited in judicial opinions of the day and disliked by some Justices even today), statutes from other states, testimony before Congress of the director of research and statistics of the Federal Reserve Board, and U.S. census monographs. It was one of the chief tasks of his law clerks to track down this information. Though this portion of his opinion hardly consists of scintil-

79. Muller, 208 U.S. at 417.
81. Muller, 208 U.S. at 419-21.
82. Strum, Justice for the People, supra note 50, at 50.
86. Id. at 271.
87. Id. at 287 n.9.
88. Id. at 287 n.8.
89. Id. at 283 n.3.
90. Id. at 299 n.40.
91. Id. at 307 n.49.
92. Id. at 287 n.9.
93. Strum, Justice for the People, supra note 50, at 357.
lating prose, it does make a strong case for the reasonableness of the regulation in question. This elaborately detailed demonstration is all the more impressive because Brandeis almost certainly disapproved of the regulation as anticompetitive.\textsuperscript{94}

The dissent in \textit{New State Ice} is well known today, but not for its footnotes or its erudition regarding circumstances in the ice manufacturing industry.\textsuperscript{95} Rather, it is famous for its closing paragraph:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.\textsuperscript{96}

As this passage indicates, Brandeis's passion for detail was not the result of intellectual timidity.

Indeed, Brandeis endorsed even experiments he thought almost certain to fail. Prior to the famous paragraph quoted above, Brandeis expressed grave doubts about the workability of the general approach to regulation exemplified by the Oklahoma statute (and much more notably by the National Recovery Act and other early New Deal statutes).\textsuperscript{97} Still, he added, advances in science and technology "remind us that the seeming impossible sometimes happens."\textsuperscript{98} Just as "trial and error" has been a major source of advance in science and technology, so too "[t]here must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs."\textsuperscript{99} It is little wonder that Brandeis was embraced by John Dewey as the model of judicial pragmatism.\textsuperscript{100}

\begin{itemize}
\item \textsuperscript{94} \textit{Strum. Beyond Progressivism}, supra note 51, at 65.
\item \textsuperscript{95} \textit{New State Ice}, 285 U.S. at 280-311.
\item \textsuperscript{96} \textit{Id.} at 311.
\item \textsuperscript{97} \textit{Id.} at 306-11.
\item \textsuperscript{98} \textit{Id.} at 310.
\item \textsuperscript{99} \textit{Id.} at 311.
\item \textsuperscript{100} \textit{Strum. Beyond Progressivism}, supra note 51, at 6.
\end{itemize}
B. Brandeis and the Rule of Law

But was this pragmatism gained at the expense of fidelity to the rule of law? Or, as Louis Jaffe once asked, was Brandeis an activist?101

As we will see in the next section, Brandeis was not a captive of judicial passivity. When appropriate, he favored bold judicial innovation to bring individual rights. But he was also a staunch believer in what Alexander Bickel would later call the "passive virtues,"102 including scrupulous attention to such limitations on the judicial power as standing and ripeness. Indeed, through his influence on his disciple Frankfurter and his law clerks Willard Hurst and Henry Hart, Brandeis could well claim intellectual ancestry for the Legal Process school.103

Brandeis's best known statement of the limitations on judicial power is found in his concurring opinion in Ashwander v. TVA.104 The Ashwander concurrence catalogues the previous case law on avoidance of constitutional issues, including discussion of standing and various prudential doctrines (such as the canon of construing statutes to avoid constitutional doubts). For the first time, the Brandeis concurrence melded what had been a miscellany of cases declining to reach the merits of various constitutional challenges into the beginning of a unified set of doctrines.105 In a very direct sense, the Ashwander concurrence was the grandfather of Hart and Weschler's classic casebook on federal jurisdiction.106

For much of Brandeis's time on the bench, the Court's exercise of judicial review was likely to lead to results he disliked. It is natural to wonder whether his endorsement of the passive virtues was simply a method of diverting the Court from disagreeable outcomes. We cannot know, of course, whether Brandeis would have favored similar barriers to more liberal forms of activism, as Frankfurter would later do on the Warren Court. But it is at least an oversimplification to view Brandeis's desire to limit the judicial power as purely opportunis-

tic.\textsuperscript{107} By the time of \textit{Ashwander}, the judicial tide clearly had turned in Brandeis's favor. Indeed, the majority opinion in \textit{Ashwander} upheld the TVA against constitutional challenge, a ruling that was surely congenial to Brandeis.\textsuperscript{108} Yet he refused to join the opinion and chose the occasion to celebrate the virtues of avoiding constitutional decisions.

It may be useful to contrast Brandeis with a later Justice who became almost the epitome of judicial activism, Justice Douglas. Like Brandeis, Douglas was wont to bring unconventional and "nonlegal" material into his opinions. Also like Brandeis, he had strong views about social reform. But he had none of Brandeis's sensitivity to the limits of the judicial function.\textsuperscript{109} Nor did Douglas share another of Brandeis's traits, excellence in judicial craftsmanship. Justice Sutherland once remarked that, much as he detested Brandeis's ideas, Brandeis was one of the "best technical lawyers" he had ever encountered.\textsuperscript{110}

Not surprisingly, Brandeis's opinions have been a generative source of legal doctrine. Significant aspects of modern administrative law trace back to his work.\textsuperscript{111} In federal jurisdiction, not only the modern doctrines of judicial restraint, but also the \textit{Erie} doctrine\textsuperscript{112} stemmed from his opinions. He pioneered reliance on legislative history in statutory cases,\textsuperscript{113} a practice that became commonplace (but is now again controversial). The lineage from his civil liberties opinions, which are discussed below, to modern decisions such as \textit{Katz}\textsuperscript{114} and \textit{New York Times Co. v. Sullivan}\textsuperscript{115} is clear. In short, for those who fear that pragmatism is incompatible with respect for the conventional legal process, Brandeis is a compelling counterexample.

\begin{thebibliography}{9}
\bibitem{107} Strum, \textit{Beyond Progressivism}, \textit{supra} note 51, at 89.
\bibitem{108} \textit{Id.} at 145.
\bibitem{110} Strum, \textit{Beyond Progressivism}, \textit{supra} note 51, at 62 ("My, how I detest that man's ideas. But he is one of the greatest technical lawyers I have ever known."). Chief Justice Stone compared Brandeis to the great common-law judge, Lord Mansfield. Baskerville, \textit{supra} note 83, at 233.
\bibitem{112} Erie \textit{R.R. v. Tompkins}, 304 U.S. 64 (1938).
\bibitem{113} Alexander M. Bickel, \textit{The Unpublished Opinions of Mr. Justice Brandeis: The Supreme Court at Work} 34-60 (1957).
\bibitem{114} \textit{Katz v. United States}, 389 U.S. 347 (1967).
\end{thebibliography}
C. Moral Principle or Utilitarian Balancing

In defending Brandeis from the charge of judicial activism leveled by the Right against legal pragmatism, I may have only added fuel to the Left's concerns. Here, Posner and Frankfurter, rather than Douglas, embody the fears about pragmatism. Rather than activism, the fear is that pragmatists lack the passion to challenge the existing order, their fire being doused either by cold utilitarianism (as with Posner) or by obsession with precedent and legalisms (as with Frankfurter).

Certainly, nothing in Brandeis's pre-Court career justifies such a charge. Although his pre-Court career cannot be discussed in detail here, he was in many respects the Thurgood Marshall of his generation. He was a leading advocate for progressive forces in domains ranging from labor law and conservation to consumer protection and restrictions on big business. He favored a radical transformation of labor relations in the direction of economic democracy. True, he was no revolutionary, a species of which this century has had more than enough. But he can hardly be accused of complacent acceptance of the status quo.

On the Court, Brandeis and Holmes were the main champions of progressive views for much of their tenures, just as Brennan and Marshall were to be in a later era. Brandeis's great dissents are not the work of a Benthamite utilitarian. They ring with passion and moral conviction—it is not for naught that Franklin Roosevelt customarily compared Brandeis with the prophet Isaiah. Those dissenting opinions are arguably too famous to require quotation, but their moral fervor cannot be conveyed by paraphrase. Still, I will limit myself to single paragraphs drawn from two of Brandeis's most influential dissents.

Whitney v. California was one of a series of dismal First Amendment cases decided in the 1920s. In previous cases, Brandeis had mostly joined Holmes's espousals of the clear and present danger test. In Whitney he struck out on his own in a concurring opinion that is justifiably renowned as a statement of First Amendment values. To give the flavor of the concurrence, here is one of the crucial paragraphs:

116. See supra notes 38-40 and accompanying text.
117. ALPHEUS T. MASON, BRANDEIS: A FREE MAN'S LIFE 141-52 (1946); see also GAL, supra note 66, at 55-65.
118. STRUM, BEYOND PROGRESSIVISM, supra note 51, at 34-40.
119. STRUM, JUSTICE FOR THE PEOPLE, supra note 50, at 390.
120. 274 U.S. 357 (1927).
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. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that . . . it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government . . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form.\footnote{122}

It is tempting to continue with the memorable phrases that follow, but this is enough to convey Brandeis's moral passion.

As Vincent Blasi observes, the cumulative effect of Brandeis's rhetoric is powerful:

The eloquence of the \textit{Whitney} opinion is of a special sort. In the apt characterization of one experienced observer, the opinion contains "what may well be the most powerful judicial rhetoric of this century, emanating from a Justice not given to flights of eloquence." Brandeis's prose does not display the lyrical grace that Holmes commanded, or the dazzling word selection that Cardozo employed. "Men feared witches and burnt women" is a sentence that speaks volumes and certainly sticks in the mind, but not because of the flow or lilt of its language. What makes Brandeis's writing eloquent is its simplicity. His crisp, unadorned cadence bespeaks a depth of conviction seldom encountered in legal discourse. The \textit{Whitney} opinion is not so much an argument as a testament.\footnote{123}

As Blasi adds, this is a particularly "credible testament because it comes from a man whose idealism had nothing whatever to do with escapism, ignorance, or inexperience."\footnote{124} The power of the Brandeis's rhetoric is simply the power of his vision of democratic community.

The other example is equally well known. \textit{Olmstead v. United States}\footnote{125} involved wiretapping by federal agents, which the majority
concluded was outside the scope of the Fourth Amendment because the defendant's property rights were not violated. As the author of perhaps the most influential law review article in history,\textsuperscript{126} devoted to the subject of the right to privacy, Brandeis could not agree. Although the Framers knew nothing of wiretapping, the Constitution must adapt in order to retain validity in a changing world, or else "[r]ights declared in words might be lost in reality."\textsuperscript{127} The right to privacy has a far deeper significance than protection against the particular forms of trespass known to the Framers:

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.\textsuperscript{128} In closing, referring to the government as the "potent, the omnipresent teacher," he called upon the Court to renounce the pernicious doctrine that "the Government may commit crimes in order to secure the conviction of a private criminal."\textsuperscript{129} This is not the voice of the cost-benefit analyst or the hidebound captive of precedent.

If Brandeis is any example, then, pragmatism cannot be convicted of either indifference to the rule of law or unimaginative complicity in the status quo. Brandeis managed to combine the prophetic and lawyerly in his opinions. Still, a critic might respond, perhaps it was only a coincidence that these traits were found in the same person. In the final section of this essay, I will argue that Brandeis was not simply a pragmatist who happened to have some particular virtues. Rather, I will suggest that we can find in his thought important clues about how pragmatism can encompass both tradition and prophecy.

III. PRAGMATISM AND COMMUNITY

In recent years, a revisionist reading of Brandeis has linked his thought with civic republicanism. So read, Brandeis can provide a source of inspiration for a pragmatist conception of community.


\textsuperscript{127} Olmstead, 277 U.S. at 472-73.

\textsuperscript{128} Id. at 478.

\textsuperscript{129} Id. at 483.
A. Brandeis and Republicanism

Brandeis has traditionally been considered an exemplar of the liberal tradition. In some important recent writings, however, scholars such as Philipa Strum, Pnina Lahav, and Vincent Blasi have observed that elements of his thought resonated with civic republicanism. Before considering these elements of his thinking, a brief discussion of civic republicanism is in order. Republicanism, as the term is used by legal scholars, refers to a tradition extant at the time of the American Revolution, but somewhat submerged for much of our subsequent history. Rather than stressing individualism, today's republicans stress community. They favor a deliberative political process, capable of creating public values rather than just reflecting preexisting preferences. As opposed to self-seeking individual fulfillment, they urge the importance of civic virtue. Often, they defend the demands of subordinated groups for equal membership in the larger community.

Republicanism offers a welcome corrective to what sometimes seem an atomistic obsession with individual rights in our society. Yet it is not without its difficulties. Although republicans do in fact favor individual liberty, they have trouble defending the claims of individual autonomy in the face of community norms. And while they favor deliberative democracy, their own normative commitments may seem to leave little of fundamental importance for that democratic community to decide. While they favor civic virtue, in practice they have more to say about the demands of groups against society than about the responsibilities of individuals toward society.

Brandeis's example suggests a possible resolution of these republican dilemmas. Although it may seem paradoxical to connect Bran-

130. STRUM, JUSTICE FOR THE PEOPLE, supra note 50, at 239.
132. Blasi, supra note 121, at 666.
133. For a discussion of usage among historians, see FARBER & SHERRY, supra note 14, at 3-9.
deis, who was often a champion of individualism, with republicanism, he managed to combine both individualism and republicanism in a way that has relevance to our current problems. The best starting point toward understanding his views is the Whitney concurrence, which I discussed above. At first look, Whitney seems a paradigmatically libertarian opinion, extolling the importance of individual rights at the expense of a claimed societal interest. But a deeper look is revealing. As Blasi points out, the recurring theme in the Whitney concurrence is civic courage, that is, courage on behalf of the community. Early on, Brandeis says that the revolutionary generation “believed liberty to be the secret of happiness and courage to be the secret of liberty.” He juxtaposes fear as an emotion destructive of society, reminding us that irrational fear led to the burning of witches. Rather than being simply an individual right, he says that political discussion is a public duty. Throughout the dissent, he harps on the theme that free speech is necessary to the political health of the community—without it, democracy cannot be viable.

It is no coincidence that Brandeis's language resonates with civic republicanism. The sentence linking happiness, liberty, and courage was lifted from the Funeral Oration of Pericles. Brandeis deeply admired Periclean Athens. He spoke of his abolitionist uncle, Lewis Dembitz—whom he admired to the point of changing his middle name from David to Dembitz—as a true Athenian. His reading of Zimmern’s book on classical Greece may well have helped convert him to Zionism by providing a model of democratic community. His leading contemporary biographer considers Zimmern's The Greek Commonwealth the most important book Brandeis ever read. Current civic republicanism traces its ultimate roots to the same classical traditions. Thus, connecting Brandeis with republicanism is no anachronism.

Brandeis's republicanism was not merely a rhetorical garnish. The legal doctrines discussed in part II are well rooted in his view of

139. See supra notes 120-24 and accompanying text.
140. Blasi, supra note 121.
142. Blasi, supra note 121, at 690-91.
143. Whitney, 274 U.S. at 376.
144. Id. at 375.
145. Strum, Justice for the People, supra note 50, at 237.
146. Id.
147. Id. at 10-11.
149. Strum, Beyond Progressivism, supra note 51, at 100-115. But see Baskerville, supra note 83, at 208.
150. Baskerville, supra note 83, at 208. Brandeis apparently was fond of giving friends copies of the book.
community. That view of community helps account for his federalism, as expressed in cases like New State Ice and Erie, and his reluctance to countenance judicial interference with democratically adopted norms, as expressed in Ashwander. Rather than being anomalies, these doctrines cohered with his general philosophy. But is that philosophy internally consistent? Can his republicanism be reconciled with his pragmatism and his individualism?

B. The Brandeisian Community

Brandeis was not merely a precursor of contemporary civic republicans. He had something important to add, for his vision encompassed another element of the classic tradition, the vital importance of individual flourishing to the health of the community. As Blasi remarks, Pericles did not stress such classical Greek virtues as balance and search for the golden mean, but rather courage and the spirit of adventure.151 These characteristics of Athens are the subject of another remarkable passage from Thucydides, quoting a warning to the Spartans about the Athenian character. An Athenian, so we are told "is always an innovator, quick to form a resolution and quick at carrying it out . . . [;} Athenian daring will outrun its own resources; they will take risks against their better judgment, and still, in the midst of danger, remain confident."152 The theme here is not only civic courage but individual daring. The thrust of Pericles's Oration is that Athens is a great city, not because of a conformist mentality, but because its citizens combine courage, individuality, and civic responsibility.153

Recall that in the Whitney concurrence, Brandeis states that the goal of government is "to make men free to develop their faculties."154 This could be seen as an endorsement of the self-development theory of the First Amendment, under which the purpose is to aid individual fulfillment.155 But this interpretation seems implausible, because Brandeis is speaking of government in general, rather than merely the First Amendment. Also noteworthy is the goal: not self-actualization

151. Blasi, supra note 121, at 687.
152. Id. at 687-88.
153. See ZIMMERN, supra note 148, at 197-98. He writes:
For our government is not copied from those of our neighbours: we are an example to them rather than they to us. Our [C]onstitution is named a democracy, because it is in the hands not of the few but of the many. But our laws secure equal justice for all in their private disputes, and our public opinion welcomes and honours talent in every branch of achievement, not for any sectional reason but on grounds of excellence alone.
Id.
154. See supra note 122 and accompanying text.
155. Blasi, supra note 121, at 695-96 (considering, but rejecting, this interpretation).
in some broad sense, but rather the development of human faculties—that is, of abilities or competencies of action and perception.

Though only mentioned in passing in Whitney, this goal was something Brandeis took quite seriously. He ranked the right to an education as having equal importance with freedom of speech. For this reason, he joined Supreme Court opinions such as Meyer, striking down restrictions on the educational process. He was also deeply involved with educational activities for much of his life and viewed the Court itself as a forum for public education.

Brandeis was able to blend individualism and republicanism because he had a special vision of each. His republic—his Athens—was a community defined by its celebration of courage and individuality. Its goal was to develop the faculties of individuals so they could achieve their potentials as members of that community. But that potential was not purely individualistic, for, in Brandeis's view, the fully developed human would have a profound sense of responsibility to the community. Brandeisian citizens have the "right to be let alone," not so they can pursue lives of private fulfillment, but so they can develop their abilities and imaginations, to be applied creatively to the needs of those around them, free from the deadening weight of government or group pressure. Pragmatism embodies the life of this community, because pragmatism means an openness to experimentation and the courage to live without the comfort of unquestioned dogma.

As Brandeis's own scrupulous craftsmanship as a judge indicates, the rejection of dogma does not mean disrespect for tradition. Indeed, imagining a viable community that did not draw allegiance to its traditions is difficult, for tradition is a crucial difference between a true community and a collection of people who merely live in proximity. To be truly creative, as Dewey once said, one must have deeply imbued and reworked a tradition.

As noted earlier, republicanism has come under fire because of its inability to reconcile the claims of individuality and community. The general notion of community, or even that of the egalitarian community, does not suffice. Sparta had a powerful sense of community and a strong strain of egalitarianism, but it is an uninspiring model. On the other hand, by leaving the concept of individuality equally thin, liberalism seems to have the opposite vice, for it includes complete self-directedness (either hedonistic or otherwise) as a permissible modality of individual life. By adding substance to both concepts,

157. Strum, Justice for the People, supra note 50, at 322.
158. Id.
159. Strum, Beyond Progressivism, supra note 51, at 3, 8-9, 46.
160. Farber, supra note 1, at 1345.
161. See supra notes 134-38 and accompanying text.
Brandeis was able to escape this dilemma. Thus, Brandeis's vision of community and his individualism were not only consistent but harmonized. A Brandeisian community could consist only of Brandeisian individualists, while the Brandeisian individualist could flourish only by living in and serving the Brandeisian community.

One might wonder whether this vision of community can be reconciled with pragmatism. Some forms of pragmatism may be too individualistic to provide much sustenance for community. Posner's economic orientation often leads him to assume self-interested behavior and to minimize claims of community. Rorty's vision of the ideal pragmatist as an ironist or poet is similarly monistic. But pragmatism has another strand as well. That stand derives from John Dewey's brand of democratic pragmatism.

As Hilary Putnam interprets him, Dewey viewed democracy as "not just a form of social life, among other workable forms of social life; it is the precondition for the full application of intelligence to the solution of social problems." "Intelligence, for Dewey, is not a transcendental faculty; it is simply the ability to plan conduct, to learn relevant facts, to make experiments, and to profit from the planning, the fact, and the experiments." These activities can only flourish in the context of democratic institutions, such as freedom of speech, because they require the freedom to propose new ideas, criticize them, and exchange information. Nor does Dewey endorse a technocracy. Experts suffer from the distortions caused by their elite status, and, in any event, could only tell other people how to act, which Dewey regarded as a false solution to social problems. In Dewey's view, social problems can only be resolved by releasing human energies so that people will be able to act for themselves. This vision of democracy seems quite close to Brandeis's view. Individuals can only live successfully as pragmatists with the individual virtues celebrated by Brandeis and in a democratic community that fosters their ability to bring pragmatism to bear on group life.

C. The Brandeisian Vision Today

For many years, Brandeis's social vision was considered obsolete. In the middle part of this century, it was taken for granted that the

162. PHILIPSON & POSNER, supra note 48, at 84-108.
163. Williams, supra note 29, at 165-66.
165. Id. at 1683.
166. HILARY PUTNAM, RENEWING PHILOSOPHY 188 (1992).
167. Id. at 188-89.
168. Id. at 168.
future lay with the harnessing of expertise in giant bureaucracies. Only an embarrassing nostalgia for a by-gone Jeffersonian American could account for Brandeis’s “small is beautiful” view. Today, that part of Brandeis’s vision is not only alive but flourishing. Giant organizations, such as our largest corporations, have encountered unexpected reverses. They have been forced to reinvent themselves by dismantling bureaucracies and learning how to draw on the energy and initiative of those at the bottom of their pyramids. We may never see the implementation of Brandeis’s workplace democracy, but a dozen management gurus are peddling Brandeisian advice to major corporations.

Similarly, localism and federalism are now the rage among progressives, and even the President of the United States wants to dismantle hierarchy and “reinvent government.” Additionally, for very practical reasons, education is high on the agenda for public discussion, as Brandeis would have wished. Responsibility, too, has reemerged as a topic for discussion. In these respects, Brandeis seems very much au courant.

As discussed above, Brandeis may also provide some help at a deeper level by pointing toward a possible resolution of some recurring jurisprudential issues. He also may serve as a source of inspiration in dealing with some contemporary legal problems. We should be suspicious of efforts to draw too much substantive content from a pragmatist like Brandeis. Pragmatism would have little point if all of the hard questions facing society could be answered by studying classical texts, even classical texts of pragmatists. Nevertheless, the Brandeis—


172. OSBORNE & GAEBLER, supra note 170 (quoting Bill Clinton on the bookjacket: “Those of us who want to revitalize government in the 1990’s are going to have to revi...”; see also GORE COMM’N, REINVENTING GOVERNMENT (1993).


sian vision may have something to add to our understanding of some issues currently facing the legal system.

Many of those issues involve inequality. In Brandeis's day, the main aspect of inequality on the legal agenda related to social class, an issue about which he cared passionately. But today, race and gender are more in the foreground. His vision is broad enough to encompass these as well, for these forms of discrimination are serious barriers to the full development of human faculties. To begin with, of course, he would have wanted a full view of the facts before making up his mind about possible remedies; such attention to empirical reality unfortunately is in somewhat short supply these days. Even on issues as hotly contested as affirmative action, much can be learned from a more empirical approach.

More intriguingly, the Brandeis vision might assist in clarifying some of the value issues posed by today's problems. Consider the problem of hate speech. This problem is customarily viewed as posing a conflict between the values of free speech and equality. How a scholar resolves the conflict often seems to turn largely on which of the conflicting values receives priority. From Brandeis's view, however, this is a false conflict. Censorship and racial inequality are both bad because they impair the development of human faculties. More specifically, they both prevent the operation of the kind of democratic dialogue Brandeis prized. Thus, for Brandeis, hate speech would not pose a conflict of incommensurable values, in Cass Sunstein's terms, but instead would involve two different means of achieving the same values.

It would be pointless to speculate about precisely what resolution of this problem Brandeis would have preferred. He would undoubtedly have felt drawn to both sides. The free speech side resonates with his Whitney opinion, while the psychic trauma caused by hate speech would surely have brought to mind his famous article on privacy.

176. Brandeis's views on both issues were enlightened for his times, but they were not at the forefront of his interest. See STRUM, BEYOND PROGRESSIVISM, supra note 51, at 30-31, 107-08, 141-43, 163.
177. For a start in this direction, see Daniel A. Farber, The Outmoded Debate over Affirmative Action, 82 CAL. L. REV. 701 (1994).
180. See supra text accompanying notes 120-24.
But this is the wrong question to ask. Even if it could be answered, Brandeis himself would probably have doubted the relevance of the views of someone so far removed from the current context. We can speculate usefully, however, about what a Brandeisian method of analyzing the problem would look like.

From Brandeis's perspective, while hate speech does not involve truly conflicting values, it does involve conflicting groups. As "counsel to the situation," Brandeis would not have tried to solve the problem, but to bring the contesting parties into an intelligent effort at problem solving. In short, he would have tried to constitute the parties into the kind of democratic community endorsed by his theory. He would have counseled them to approach the problem calmly, to consider the other side's arguments, to bring to bear on the problem as much factual information as can be mustered. He would have advised imagination in envisioning the perspective of the other side and creativity in searching for solutions. It may be too much to expect such a discussion to take place in the midst of an immediate controversy, at least without a Brandeis on hand to act as a catalyst. It does not seem too much to hope, at least, that such a discussion might take place among legal scholars, though he might have been disappointed by much of the scholarship on the issue to date.

In considering the campus context in which these issues arise, Brandeis might well wonder whether hate speech was the fundamental issue truly concerning either side. Opponents of hate speech regulation are not, in the final issue, defending the right to make ethnic jokes; they are defending the right to engage in frank and controversial discussion of racial issues within the university. Or at least, that would be their goal if they shared Brandeis's vision. On the side, Brandeis would wonder if racist jokes were really the ultimate problem facing minority students within universities. Rather, he might suggest, the ultimate concern should be the extremely high attrition rates for some groups of minority students, thereby preventing them from fully developing their abilities. Hate speech regulations are not irrelevant to the concerns of both sides, but they probably should not be considered central either. Broadening the debate in this way would be productive, because both sides should be able to embrace each other's ultimate goal. This would leave, of course, the difficult problem of how to achieve those goals, but that problem does not seem impossible to solve.

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182. See Simon, supra note 54, at 568.
183. Farber, supra note 177, at 729 n.169 (discussing minority attrition).
Thus, the Brandeisian vision might produce a better way of talking about the problem of hate speech. It would not in itself solve the problem, either as a matter of policy or of constitutional law. Given the appraisal of the situation described above, a Brandeisian approach to hate speech would probably not be a sweeping victory for either side. Rather, Brandeis would likely have resisted premature judicial entry into the area (compare Ashwander), preferring to allow cases to be decided on a fuller factual record, and only when necessary. He would surely have attempted to distinguish between fighting words and genuine speech. He would not have found regulatory form as important as does Justice Scalia, without some showing that it made a practical difference. He would, however, be suspicious of empowering university bureaucrats to make ad hoc decisions about student or faculty speech.

We cannot be sure of the Brandeisian solution, but we can have confidence in the goal: to produce a vibrant and creative intellectual community, and one genuinely open to full participation by all groups within society. Agreement on that goal would not resolve the problem, but it would be an important first step.

* * * *

Though he has been dead for over half a century, much of Brandeis's message remains fresh and urgent today. We cannot begin to solve the hard problems facing our society until, as Brandeis put it, the "logic of words" has yielded to the "logic of realities." And above all, Brandeis would remind us, "[i]f we would guide by the light of reason, we must let our minds be bold."