

**Jeffrey Rosen.** *Louis D. Brandeis: American Prophet*. New Haven: Yale University Press, 2016. 242 pages \$25.00, cloth, ISBN 978-0-300-15867-0.

**Reviewed by** Britt P. Tevis

**Published on** H-SHGAPE (September, 2018)

**Commissioned by** William S. Cossen (The Gwinnett School of Mathematics, Science, and Technology)

In *Louis D. Brandeis: American Prophet*, Jeffrey Rosen, a law professor at George Washington University Law School and the president and CEO of the National Constitution Center, paints Brandeis as the “spiritual descendent” (p. 4) of Thomas Jefferson and Isaiah, an eighth-century BCE Jewish prophet. With Jefferson, Brandeis shared an aversion to centralization and monopolies and a devotion to education and federalism, while with Isaiah, he shared a visionary outlook and a physical resemblance. Brandeis was an associate justice of the US Supreme Court from 1916 to 1939 and the first Jew to serve on that bench. Rosen’s intellectual history charts the justice’s path to the court, analyzes his decisions, and explores the causes he championed. Rosen argues that Brandeis’s understanding of American democracy and law proved prophetic and is useful for our own times.

Rosen’s book begins in 1848, when Brandeis’s father left Prague for America. Brandeis had something of an idyllic albeit financially unstable childhood in Kentucky. He was close with his siblings and parents, especially his mother, an abolitionist who raised Brandeis without religion. After a brief stint in Germany, where his family had decamped after the Panic of 1873, Brandeis returned to the United States to study at Harvard Law School. He graduated at the top of his class at the

tender age of twenty-one and then built a practice in Boston, married, and fathered two daughters.

In 1910, Brandeis defended individuals central to the Ballinger-Pinchot Affair, a scandal that paved the way for Woodrow Wilson’s election and Brandeis’s appointment to the Supreme Court. In his discussion of Wilson’s selection of Brandeis, Rosen illuminates the era’s antisemitism. He also discusses Brandeis’s perspectives on the period’s pressing financial questions, revealing how he shaped Wilson’s efforts to break up trusts and his distaste for investment bankers such as J. P. Morgan, whom he thought used other people’s money to control companies and secure personal profit. Rosen also shows how the 2008 financial crisis, which saw large investment banks rely on the federal government to bail them out, vindicated Brandeis’s aversion to “bigness.”

Rosen discusses Brandeis’s tenure on the Supreme Court by exploring what Rosen identifies as the “three pillars” (p. 100) of Brandeis’s judicial philosophy: deference to state legislatures; opposition to large institutions, which Brandeis believed wielded too much power and undermined democratic norms; and interpreting the Constitution to reflect both its original meaning and modern times, what Rosen calls “living originalism” (p. 121). Tracing these three tenets through a sample of Brandeis’s 520 published opinions, Rosen

makes the case that Brandeis “became the most far-seeing progressive justice of the twentieth century ... whose judicial philosophy is most relevant for the court today” (p. 100). The cases that Rosen uses to illuminate Brandeis’s judicial outlook highlight the evolution of Brandeis’s understanding of the First Amendment and privacy rights, and showcase his preference for small government.

In the book’s final chapter, Rosen engages a long-standing debate among historians about how Brandeis came to embrace Zionism. Rosen contributes to this discussion by pointing to a confluence of factors. His first meaningful interactions with eastern European Jews, the death of a beloved uncle who was an Orthodox abolitionist Zionist lawyer, and meeting Theodore Herzl’s American secretary, Jacob de Hass, first prodded Brandeis towards Zionism. Soon after, Aaron Aaronsohn, a Jewish agronomist, Horace Kallen, a champion of cultural pluralism, and Alfred Zimmerman, a classicist whose vision of Greek democracy closely aligned with Brandeis’s own, convinced Brandeis of Zionism’s righteousness. Brandeis took up the mantle of the American Zionist movement in August of 1914, proclaiming that by supporting Zionism, American Jews confirmed their commitment to America, a sentiment that, as Rosen points out, continues to underpin many American Jews’ support for the Jewish state.

One the best parts of Rosen’s book is his inclusion of criticisms expressed by David Riesman, one of Brandeis’s former law clerks, about Brandeis’s commitment to judicial deference. Riesman recalled Brandeis’s 1935 decision about the constitutionality of an Oregon law that required berry boxes to be a specific shape and size, which was clearly meant to protect the interests of Oregon berry box makers, a purpose that conflicted with the stated reason Oregon gave for passing such a law. Championing judicial deference to states’ rights, when a Californian berry box manufacturer challenged the law, claiming it was “arbitrary,

capricious, and not reasonably necessary for the accomplishment of any legitimate purpose of the police power,” Brandeis sided with Oregon. Hypothesizing how Brandeis would have ruled in a more recent case, Riesman posited that Brandeis would have been “horrificed” (p. 56) by the Court’s 1996 decision to strike down the male-only admission policy at Virginia Military Institute. This assertion was somewhat surprising to read because Ruth Bader Ginsburg, an admirer of Brandeis, authored the majority decision in that case, which symbolized the apex of a career spent challenging discrimination against women in the law. Especially given the fault lines of today’s Supreme Court, it is hard to imagine Brandeis and Ginsburg falling on opposite sides of a decision. (Rosen only partially explains this disjuncture in the epilogue, in which he discusses the opinions of Ginsburg, Elena Kagan, and Stephen Breyer on Brandeis.)

While excellent, this book includes some factual errors. Rosen mischaracterizes Brandeis’s involvement in the 1910 cloak makers’ strike in New York City, writing that he “represented immigrant garment workers” (p. 48). In fact, socialist labor lawyer Meyer London represented the approximately sixty thousand striking workers. Brandeis served as a mediator between the workers and their employers, who formed a protective organization called the Cloak Suit and Skirt Protective Association. This distinction is significant because, presumably, had Brandeis represented the workers, he would have proposed a more favorable instrument than the one he convinced the parties to accept; the nonbinding industrial agreement known as the “Protocol of Peace,” which embodied Brandeis’s notions of industrial democracy, ultimately proved to be a poor mechanism for protecting workers’ interests. Likewise, Rosen mischaracterizes the background of the manufacturers, asserting, “Both the workers and management involved in the strike were Russian Jews” (p. 48). Most of the garment manufacturers, while Jewish, actually hailed from central Europe or were the children of central European immi-

grants. Max M. Schwarcz, the association's treasurer and owner of a women's cloak firm, for example, was from Budapest.

These missteps highlight the book's main shortcoming, which is the dearth of Jewish historical context. To his credit, unlike some recent Brandeis biographers, Rosen acknowledges the antisemitism that Brandeis endured. Likewise, Rosen discusses Brandeis's embrace of Zionism at length. What is missing, however, is American Jewish history beyond antisemitism and Zionism. Brandeis's personal trajectory differed from those of his American Jewish contemporaries for reasons beyond the fact that he was appointed to the Supreme Court. His regrettable failure to engage with African Americans' civil rights, for example, distinguished him from many Jews and other prominent Jewish lawyers such as Louis Marshall. Had Rosen framed Brandeis through the lens of Progressive Era Jews generally or even Progressive Era American Jewish lawyers, rather than as an early twentieth-century biblical prophet, Brandeis's unique Jewish life would have been laid out in full relief. Given that this is an intellectual history rather than a proper biography, one might consider this criticism quibbling; however, Yale University Press published this book as a part of the Jewish Lives series and thus such context is relevant.

Despite as much, Rosen's Brandeis is compelling. The clarity of his writing alone makes this volume worth reading. In addition to being suitable for the casual reader, it can be assigned in undergraduate and graduate classes on American legal and American Jewish history. Ultimately, Rosen convincingly shows how Brandeis's early twentieth-century ideas pertain to contemporary questions of law and policy.

If there is additional discussion of this review, you may access it through the network, at <https://networks.h-net.org/h-shgape>

**Citation:** Britt P. Tevis. Review of Rosen, Jeffrey. *Louis D. Brandeis: American Prophet*. H-SHGAPE, H-Net Reviews. September, 2018.

**URL:** <https://www.h-net.org/reviews/showrev.php?id=52195>



This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.