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The Quotable Brandeis

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Foreword

By Melvin I. Urofsky

Why is Louis Dembitz Brandeis relevant today? This is not a question asked by the ill-informed; rather it is a rhetorical question that constitutional scholars in general, and Brandeis specialists in particular, ask so that we can then go off and explain why this man, who died three-quarters of a century ago, still matters, and in so many ways.

Brandeis is probably best known as an associate justice of the United States Supreme Court from 1916 to 1939, and his views on free speech, the Fourth Amendment's search clause, privacy, antitrust and administrative law, and jurisdiction still influence contemporary jurisprudence. In every survey of constitutional scholars, Brandeis always ranks among the top three, along with his good friend and colleague Oliver Wendell Holmes, Jr., and the great Chief Justice, John Marshall.

He entered the law in the 1870s, at a time when the practice of law was undergoing great change, and he not only succeeded in his profession, he helped mold it in ways copied by subsequent generations. The development of *pro bono* work, in which lawyers work without compensation for good causes, owes much to his development of that idea.

During that great period of ferment we call the Progressive Era, Brandeis was one of the linchpins that held together often disparate groups of reformers, and their success led to protective legislation including maximum hours and minimum wage laws, as well as employer liability laws. A generation later, Isaiah, as Franklin Roosevelt and his allies called him, continued to influence much of the legislation in what we call the Second New Deal.

He was an early opponent of bigness, and while some of his economic ideas have not stood the test of time, his warning about the deleterious effect of big business and its monetary resources on the political process has been borne out repeatedly.

He became the leader of the Zionist movement in the United States at a time when the Zionist Federation was practically moribund, and in four years he led its resurgence and made Zionism an important and lasting influence in American life. His views of what the *yishuv*, the Jewish settlement in Palestine, could become and his idealized view of the Jewish settlers there, have continued—for better or for worse—to influence how not only American Jewry, but most Americans, view the State of Israel.

Although Brandeis could rise to eloquence at times—witness his opinions in the *Whitney* and *Olmstead* cases included in this collection—what strikes the reader with greatest impact is the common sense integrity of the man. Brandeis believed in eternal verities, that the great principles of honesty, truth-telling, and equal standing of all people before the law, remained the bedrock of a civilized and democratic society. But he also understood that times changed, and that while the great principles did not become obsolete, they had to adapt to the facts of an evolving society. He believed in a living Constitution, whose basic premises still represented the best thinking of mankind upon how a democratic society could be governed. The task of judges was to interpret those great principles in a way that made sense decades and now centuries away from the Philadelphia Convention.

Peter Scott Campbell, to whom all Brandeis scholars owe a great deal for his guidance through the Brandeis papers at the University of Louisville's Brandeis Law School, can now rightfully claim to be a Brandeis scholar himself—although many of us recognized him as such even before this collection. What he has done here is capture the answer to why Brandeis is relevant today, and he does so in Brandeis's own words.

I write this shortly after the presidential election of 2016, and the Brandeisian view of the responsibilities of candidates and citizens and how they should behave, is seemingly a world away from

what we have seen and heard. His is a voice of sanity that will, we hope, eventually prove his idea that over time the great democratic principles will prevail, and that the cure for bad speech is good speech.

Peter Scott Campbell has not only compiled a testament to Brandeis's greatness, but also a handbook for everyone interested in democracy and its values.

Introduction

Whenever Louis Dembitz Brandeis is thought of, it is usually “just” as one of the most influential justices to have ever sat on the United States Supreme Court. But Brandeis’s years on the bench make up less than half of the 59 years he spent as a tireless champion of the rights of everyday people. Brandeis spent his entire career using the law to shape what he thought life in a democracy should be like: an egalitarian society where neither the government nor businesses infringed upon the rights of its citizens and where everybody strove to improve both themselves and the world around them. His Supreme Court opinions are justly remembered for illustrating this vision, but Brandeis had been writing on these themes for nearly all of his adult life. This book is an attempt to pull together pieces of Brandeis’s writing from all stages of his career and life and to organize them in a way that displays and enhances his philosophy.

Brandeis was born in Louisville, Kentucky on November 13, 1856. His parents, Adolph and Frederika Brandeis, were part of a mid-19th century wave of Jewish immigrants who left Europe because of the political and social restraints placed upon them. Their love of American democracy, as well as the value they placed upon education and culture were instilled into Brandeis at an early age. His career as a lawyer and social reformer and his judicial philosophy were the direct result of his upbringing.

Shortly after moving to Louisville in 1851, the Brandeises established themselves as one of the city’s most prominent families. Adolph founded a very successful grain business, while his brother Samuel Brandeis became one of the city’s leading doctors and his brother-in-law Lewis Dembitz became a similarly prominent lawyer. Not content simply to do well for themselves, they wanted to use their skills to educate others. Samuel was a faculty member

of the Kentucky School of Medicine, while Dembitz wrote a number of learned treatises and contributed heavily to *The Jewish Encyclopedia*. They also used their professions to give back to the community. Samuel was a surgeon for the Union Army during the Civil War and served as the president of Louisville's Board of Health, while Dembitz helped reform the city's election and tax laws. Louis Brandeis's earliest memory was of performing a public service: helping his mother pass out coffee and doughnuts to Union soldiers in the street in front of his house.

When an economic downturn threatened Adolph Brandeis's business in 1872, he closed up shop and took his family on an extended trip to Europe, where Louis finished high school. While they were there, however, the economic downturn became a full-scale panic and wiped out most of Adolph's savings. This event impacted Louis Brandeis's life in two ways. The first was his observation that although his family was not what could be considered rich any more, they did not seem to be any less happy. This gave him a skeptical attitude toward money, which stayed with him for the rest of his life. Even after he became a successful attorney, he continued to live simply, never spending any more money than he needed to.

The second impact involved Brandeis's education. Because of his family's financial straits, Brandeis decided to forego getting a college degree and enrolled directly into Harvard Law School in 1875. Despite being the youngest member of his class, Brandeis's keen intellect and retentive memory quickly gained him the admiration of his peers. He ended up graduating two years later at the top of his class with the highest grade point average ever achieved at the Law School—a record that taking grade inflation into account apparently still stands.

After graduation, Brandeis spent a year performing post-graduate studies at Harvard before moving to St. Louis to start his legal career. But he never warmed up to St. Louis and when classmate Samuel D. Warren (whose academic standing had been just behind Brandeis's) invited him to come back to Boston, Brandeis quickly accepted. The two of them founded the firm Warren and

Brandeis in 1879, which still exists today under the name Nutter, McClennen and Fish.

The combination of Warren's social connections and the legal acumen of the two partners led to quick success. While the firm took on many types of clients, Brandeis proved to be especially adroit at business law. His practice of thoroughly researching his clients' businesses (sometimes to the point that he knew more about their businesses than they did), his innovative approach to solutions that satisfied all parties, and his aggressive courtroom advocacy combined to make him one of the most successful, and wealthy, lawyers in Boston. According to Melvin Urofsky, by 1891 Brandeis was earning more than \$50,000 a year, at a time when most American lawyers were making one-tenth of that.¹

While most people would be content to follow that path until retirement, Brandeis quickly became restless. Following the example set by his family, he began to spend his spare time performing public service. He joined a number of political reform organizations and co-founded the Good Government Association. In the early 1890s he lobbied for reformation of Boston's liquor laws and the way the city operated its paupers' home. His success in these campaigns whetted his appetite for more reform work, thus beginning a string of cases, legislative hearings and other work that would not only take up most of his time, but would also make him nationally famous.

In 1893, he led the fight to keep a street railway company from laying tracks through Boston Common. Starting in 1897, he fought for years to keep Boston from relinquishing ownership of its subway lines. In 1906, he devised a novel scheme that ensured fair gas rates for Boston consumers. In 1907, in response to abuses committed by life insurance companies, Brandeis created the savings bank life insurance system so that poor and working class families could safely purchase insurance. During the years 1907 to 1913, Brandeis fought against the merger of the New Haven and the Boston and Maine railroad companies. He made national

1. Melvin I. Urofsky, *Louis D. Brandeis: A Life* (New York: Pantheon Books, 2009), 73.

headlines in 1910 when he publicly exposed President Taft's engagement in a cover-up during Congressional hearings in the Ballinger-Pinchot affair.

Brandeis made legal history in 1907 in a case called *Muller v. Oregon*, when he appeared before the US Supreme Court to defend an Oregon law that limited the number of hours that women could work in laundries. The brief he prepared contained only ten pages of legal argument and over 100 pages of citations to medical and sociological studies that discussed the physical dangers of overwork to women. This was the first brief ever presented to the Supreme Court that included extra-legal data and it (as well as his oral advocacy before the bench) was so effective that he ended up prevailing in a case that was widely considered unwinnable. This style of brief became known as the "Brandeis Brief" and is now used regularly in cases involved with social issues.

Brandeis enjoyed doing this type of work both because of its benefit to the public good and because of the challenges it presented. He also felt that public service work was its own reward, and as a result, refused to accept any fees for it. This is accepted as standard practice in *pro bono* work now, but at the time, it was such a novelty that there were incredulous reports of it in the newspapers. In 1907, he took this practice a step further. Worried that his partners might start to resent the amount of non-profit work he was performing, he began to reimburse his firm for the lost fees out of his own pocket. While many people might find this practice extreme, for Brandeis it was worth it to ensure that he would have the independence to take the cases he wanted.

In 1914, Brandeis took up a cause that would make him internationally famous: Zionism. Before Brandeis got involved, the movement to create a Jewish homeland in Palestine was flourishing. The advent of World War I left European organizers isolated in their respective countries, making communication, and even more important, fundraising, next to impossible. Additionally, the movement did not have much of a following in America. The majority of the American Jewish population were either unaware of the idea, or were actively opposed to it. All of that changed once

Brandeis took over the American Zionist organization. With his talent for publicity and organization, Brandeis increased the number of dues paying American Zionists by over 150,000 in five years, filling the coffers of the world organization with much needed capital. Also, while the world Zionist leaders were primarily preoccupied with politics, Brandeis pursued a more practical approach, spearheading efforts to build schools and hospitals and to help stamp out malaria.

Publicity and public relations were always part of his campaigns and he spent years crisscrossing the country, giving speeches and interviews, and he employed his pen to great effect as well.

In 1890, Brandeis co-authored a legal article with partner Samuel D. Warren, which is often credited with the creation of a new constitutional right. Published in the *Harvard Law Review*, “The Right to Privacy,” argued that the law had an obligation to protect a person’s “right to be left alone,”—a completely novel idea at the time. The article is one of the most cited legal articles of all time, and it started a new area of law—one that Brandeis would refine further once he was on the Supreme Court.

He also wrote a series of articles for *Harper’s Weekly Magazine* about the abuses of investment bankers and their effect on business and the economy. In 1914, these articles were published in *Other People’s Money*, a book that has remained in print to this day. Many of Brandeis’s speeches and interviews on trusts, competition, unions, Zionism, the rights and duties of citizens in a democracy, and the social responsibility of lawyers were later published in the books *Business—A Profession*, *The Curse of Bigness*, and *Brandeis on Zionism*.

Brandeis’s growing reputation as the “People’s Lawyer” made him an influential figure in the 1912 presidential election. He had been a Republican up until this election, but he was disappointed in William Howard Taft and Theodore Roosevelt’s views on how to handle monopolies, and so he ended up supporting the Democratic Party nominee, Woodrow Wilson. Wilson relied on Brandeis for his views on trusts and regulating competition, which became the basis of Wilson’s campaign platform—a series of

economic reform measures that became known as “The New Freedom.” Brandeis’s influence and support were considered by many to be key factors in Wilson’s victory and Wilson was keen to reward Brandeis with a suitable position. Plans to make Brandeis the United States Attorney General fell through, and so on January 28, 1916 Wilson announced that he was nominating Brandeis for the Supreme Court.

The nomination was enormously controversial. The Supreme Court was widely viewed as a bastion of conservative and monied interests. Corporate businessmen, bankers and Wall Street investors were appalled that a man they considered to be a dangerous radical might end up on the Court, while workingmen and progressive reformers were elated by the prospect. Both sides exerted enormous pressure on the Senate and as a result, the contentious confirmation hearings lasted for months before Brandeis was finally confirmed on June 1, in a vote that largely split along party lines.

Brandeis would serve on the Court for nearly 23 years, during which time he would write 530 opinions. Naturally, Brandeis’s opinions expounded the philosophy he developed in his years before arriving on the Court. However, since he was in the minority in many of the Court’s decisions, most of his most passionate declarations of his positions are found in his dissents. Dissenting opinions have no precedential value and most of them end up in the dustbin of legal history. Brandeis’s dissents, however, tended to be ahead of their time, and many of them would end up being adopted by the Supreme Court decades later.

Opinion writing was not a duty Brandeis took lightly. He would rewrite them repeatedly, often generating over a dozen drafts, in an effort to perfect his message. Brandeis saw each opinion as an educational opportunity. Rather than just explaining the reasoning behind his decision, he would give the background of the matter and the implications it produced. As he did with the cases he tried as an attorney, Brandeis would research the matter thoroughly. He would send his clerk to the Library of Congress and other government agencies to retrieve committee reports, legislative histories and other relevant documents, which he would then

incorporate into his opinions. As with the “Brandeis Brief,” this has become an accepted practice, but at the time it was unprecedented.

This approach gives an interesting glimpse into an alternate life Brandeis could have led. Education was highly valued by his family and teachers seem to have been particularly esteemed. In 1882, when Brandeis received an opportunity to teach evidence for a year at Harvard, his uncle Dembitz sent him a letter expressing his delight. When he was later offered a full time position at Harvard, Brandeis seriously considered taking it. Once he was on the Court, he always tried to steer his clerks into teaching jobs, and was delighted whenever one of them settled into academia.

In addition to education, Brandeis also inherited his immigrant family’s love of democracy, and his opinions were infused with both of these interests. He felt that every citizen in a democratic society had a duty to participate in its functions, and that effective participation would be impossible without an understanding of how democracy worked. Rather than just writing his opinions for other lawyers, he constructed them so that the average citizen could understand the importance of the issues.

This approach could lead to didactic writing. While Brandeis’s colleague Oliver Wendell Holmes, Jr. delighted in inserting epigrams into his opinions, Brandeis distrusted this approach, preferring clarity over eloquence. But, despite that, Brandeis’s passion would sometimes shine through almost despite himself, leading him to produce passages that rank among the most memorable writing in legal history—quotes that continue to influence our political discourse to this day, decades after the cases themselves were resolved.

The Quotable Brandeis has three purposes. The first is to gather together Brandeis’s quotes, both famous and obscure, in a subject-related order. The researcher or writer should be able to use this book to find something written by Brandeis that will bolster (or challenge) their viewpoint. The range of quotes here is far greater than what can be found on the Internet, and they are more accurate, since they have been taken directly from the original sources.

These sources include not only his most famous writings, but also letters, newspaper and magazine articles, and reminiscences written by other people.

Another aim of this book is to provide accurate information for the source of the quotes. As ubiquitous as many of Brandeis's quotes are, they are rarely accompanied by citations, thus making it difficult for many writers to include them in their articles. The citations will also assist researchers who want to read the quotes in their original context so that they can get the full meaning of what Brandeis was trying to say.

Finally, there are a number of quotes out in the Internet and the public sphere that are misattributed to Brandeis. Some are "Brandeisian" in nature, while others have little to do with Brandeis's actual philosophy. All of the fake quotes that are included here in the last chapter have been attributed to Brandeis so often that his authorship of them has become accepted as a matter of fact. This book attempts to set the matter straight, not only by stripping Brandeis's name from them, but also by tracking down the actual authors when possible.

Every effort has been made to reproduce the quotes as accurately as possible. However, changes to punctuation and capitalization have been made to make the quotes conform to modern usage. Also, some quotes have gaps in the middle of them, which are marked by ellipses. These reflect statements not immediately germane, usually citations to court cases, that interrupt the flow and thought of the quote. I have also added the occasional word that either was clearly left out of the originals by accident or that I thought would help clarify the context of the quote. These words have been marked by brackets.

In selecting what quotes to include the rule has generally been to favor brevity whenever possible. However, a number of quotes are somewhat long. Since Brandeis viewed all of his writings as educational opportunities, often a point he was trying to make was so involved that pulling a sentence or two out of context runs the risk of substantially changing its meaning. I have tried to keep the size of the quotes down to manageable lengths, but it was not easy.

His opinions in the *Olmstead* and *Whitney* cases are so stirring that it was hard to resist the impulse to reprint them in their entirety.

Each chapter represents a broad topic, which is then broken down into smaller sub-topics. The seventh chapter contains quotes on a variety of topics that did not fit easily into the earlier chapters. The final chapter is a collection of quotes that are either from original sources that have become lost over the years or have been mis-attributed by people to Brandeis (a practice that seems to be occurring with increasing frequency since the advent of the Internet.)

Citations for quotes that came from newspaper articles are given in full at the end of their respective quotes. However, in order to keep from repeating lengthy publication information throughout the book, all other citations are given in short form at the end of their respective quotes. The full bibliographic information for these works can be found in the first appendix at the end of the book. The second appendix is a reprint of an article I wrote for the journal *The Green Bag* that explains the background to one of Brandeis's more famous quotes.

This book is the product of many years' work, during which time I have received the encouragement and help of many people. Kurt Metzmeier, David Ensign, Erin Gow, Laura Rothstein, Les Abramson, Mel Urofsky, Frank Gilbert, Robert F. Cochran Jr., Neal Rechtman, Jim Jones, Chloe Morse-Harding, Sarah Shoemaker, Anne Woodrum, and especially Beth Nahinsky, were all instrumental in the creation of this book. I am deeply grateful to them all.

