

The Brandeis Legacy*

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Louis Brandeis was the greatest lawyer of the early twentieth century, and perhaps of the entire century. He was brilliant, driven, charismatic, and absolutely devoted to improving the lives of the common people of the United States. Put in more contemporary terms, he was committed to the notion that technological and economic advances should not widen the gap between the haves and the have-nots. His causes were the environment, citizenship, freedom of expression, quality of life in the workplace, protection against increasing power wielded by large corporations, and protection of individual privacy. All were issues that emerged at the beginning of the twentieth century and that are still with us today.

It would be appropriate for any occasion to look back one hundred years to see just what has happened to the causes he championed; but that is not the real reason why I chose Brandeis and his causes as my topic. I chose this topic because I knew and loved Nat Nathenson, and Nat was a clerk for Louis Brandeis.

Nat was my very own link to the immortals: those men, and alas they were all men, who articulated and shaped the way we think about the law today. Nat was a colleague of my husband when he visited Arizona State University. I now realize that I had a professor or two who had known Brandeis on a professional level, but Nat was someone I could more closely relate to as a contemporary and a colleague. He had twinkling eyes and an unprepossessing air that told you right away he was kind and smart. I met Nat before my own children were born, or at least before they had gotten very far along in *Mother Goose*, so I

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thoroughly discounted the effects of both nature and nurture in Nat's personality. I credited all of Nat's charm, wit, and intelligence to Louis Brandeis. I now offer my inadequate and belated apologies to Nat's parents.

There is a bust of Justice Brandeis in one of the beautifully paneled formal rooms of the Supreme Court. It is unforgettable for the angles that define the profile and for the intensity that shines forth from the eyes. I once asked Nat whether that intense light was really there. He responded, "Oh yes, always." I have since checked out all of the photographs, drawings, and caricatures of Brandeis I could over the years, and that intensity is always there. It is the visible manifestation of the greatest legal mind of the past one hundred years.

So let me begin with some of the things we should know about Brandeis as we look back on his work a century later. Though he practiced law in Boston, Brandeis was not a Brahman. He was not even from the East Coast; he was from Kentucky. And although he did not have a religious upbringing, his family was Jewish. Brandeis is identified with Zionism, but that was very much a product of his life experiences, not his birthright.¹ His brain was what we would call photographic. One famous letter from a classmate at Harvard Law School deserves quotation here. Brandeis

[i]s supposed to know everything and to have it always in mind. The professors listen to his opinion with the greatest deference. And it is generally correct. There are traditions of his omniscience floating through the school. One I heard yesterday. A man last year lost his notebook of Agency lectures. He hunted long and found nothing. His friends said: 'Go and ask Brandeis—he knows everything—perhaps he will know where your book is.' He went and asked. Said Brandeis, 'Yes, go into the auditors' room, and look on the west side of the room, on the sill of the second window, and you will find your book.' And it was so.²

It is said that as a Justice on the Supreme Court, Brandeis did not engage in the customary reading of his opinions. He spoke them from memory, and the newspaper reporters played a game of following along to see if he ever made any mistakes. He rarely did.

Brandeis was not an ideologue. He had no ingrained commitment to one cause that he carried forward from puberty. His sensitivity to social problems never wavered, but his solutions—how the law should address those problems—changed as society and his perceptions changed. For example, he thought the common law—the courts' incremental adaptation to change—would take care of the welfare of industrial workers—until he witnessed the cruelty of U.S. Steel during the great

1. See ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN'S LIFE* 441-64 (1946).

2. *Id.* at 3.

Homestead Steel strike, which convinced him that the state needed to regulate industrial working conditions.³ Brandeis thought that women should be cared for and coddled—until the suffrage movement made him a true believer.⁴ He was no doubt nudged by his own two daughters—one an economist and one a lawyer.

Brandeis invented public interest law. By representing wealthy interests, he was a millionaire while still in his forties.⁵ But he never had a corporation on retainer as a client; he never accepted money for public service work.⁶

Brandeis also invented the phrase “the curse of bigness,” and he fought concentration of economic power and its effects all of his life.⁷ His style was to teach by marshaling facts, not theories. He invented the so-called “Brandeis brief” as a way to present data and information to the court. He supported, as in his most famous case, *Muller v. Oregon*,⁸ the efforts of states to deal with terrible conditions in the work place.

To study how business treated other businesses, he helped create the Federal Trade Commission (FTC) on behalf of the Wilson administration.⁹ The FTC was first to study and then to regulate anti-competitive trade practices by big business.¹⁰ Brandeis ended his career on the Supreme Court by striking down New Deal legislation, some of which was in many ways ill conceived and all of which Brandeis may have feared as foreshadowing the ultimate curse of bigness—the federal government.¹¹ He was, as I learned from Nat Nathenson and gleaned from all of the writings of those who knew him, profoundly respected by those who were fortunate enough to have worked closely with him.

Brandeis was a man with regular habits. He retired at ten p.m. and

3. *See id.* at 87, 141-42.

4. *See id.* at 422-23.

5. *See* Phillippa Strum, *The Unlikely Radical*, AM. LAW., Dec. 1999, at 43.

6. *See* MASON, *supra* note 1, at 92-93.

7. *See* LOUIS D. BRANDEIS, *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS* (Osmond K. Fraenkel ed., 1934).

8. 208 U.S. 412, 421 (1908).

9. *See* MASON, *supra* note 1, at 402-04.

10. *See id.* at 402-03.

11. *See generally*, *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down the Live Poultry Code, which regulated hours and wages of Brooklyn-area slaughterhouse workers); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (voiding the Frazier-Lemke Act, which provided bankrupt farmers with alternatives to mortgage foreclosure); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (holding that the Presidential power to remove executive officers does not allow removal of members of the Federal Trade Commission).

rose at four-thirty a.m., ate lunch at the same places and never had to worry about domestic burdens. He was driven to the office while he read the papers, he broke for lunch at one, and came home at six for dinner.¹²

Any ranking would put Brandeis among the top lawyers and judges of the century. The *American Lawyer* recently listed and profiled in alphabetical order the top one hundred lawyers of the twentieth century, which included, apart from Brandeis, prominent litigators, such as Melvin Belli and Clarence Darrow; presidential advisors, such as Elihu Root; judges, such as Hugo Black, Benjamin Cardozo, and Oliver Wendell Holmes; founding fathers of firms like Paul Cravath and William Nelson Cromwell; and pioneers who spoke out for great causes of human and civil rights, such as Thurgood Marshall, Telford Taylor, and Ralph Nader.¹³ A remarkable thing about Brandeis is that he did *all* of these things. If one looks at the *American Lawyer's* list of the one hundred great lawyers, perhaps the closest to Brandeis, as a Renaissance lawyer, is Thurman Arnold, founder of the great firm of Arnold & Porter, advisor to presidents, and a fine judge. But Thurman Arnold never made it to the Supreme Court.

Let me explain in another way what it is that to me makes Brandeis greater than the other greats. Today's law students are taught, or otherwise receive from the legal environment of today's law schools and law firms, that when they become lawyers, they will have to make a choice. They can serve the public interest or they can get rich. They cannot do both. Brandeis did both. He got rich working for millionaires so that he could spend his time pursuing the legal issues that affect people's lives. It was not a mere personality quirk that drove him never to take on a corporation as a permanent client. That was the secret of his ability to maintain his integrity. He never sold out to the devil by creating a permanent conflict of interest between the public interest and the interest of a single corporation or industry that was his client. It is doubtful that anyone would or could do that today, with the ascendancy of the curse of bigness Brandeis fought.

Here I want to make a kind of modest assessment of how some of Brandeis's most noble crusades fared over the course of the century—to cut through the aura of haze that surrounds legends and assess the Brandeis legacy in practical terms. I am going to try to do that by taking two areas of legal development that were nascent in Brandeis's day and to which he greatly contributed as lawyer and judge: the law of antitrust and the law of privacy. First, what did Brandeis see as the social

12. See MASON, *supra* note 1, at 434.

13. See Aric Press, *The Lawyers of the Century*, AM. LAW., Dec. 1999, at 31.

problem the law should address in each area? Second, how does the law of today envision and address the same problem? Finally, I will look at what we generally consider to be Brandeis's greatest gift to legal method—the art of persuasion through facts and data, instead of dogma and doctrine—and consider to what extent it has remained alive and well.

I turn first to antitrust law. Brandeis helped pass the Sherman Act and the Clayton Act, which today remain the principal embodiments of national antitrust policy. These acts are very vague statutes, and they have expanded and contracted over the years much like doctrines of constitutional law. Brandeis believed that the antitrust laws were more about ethics and equality than efficiency. He was greatly concerned about small competitors and the way they were treated in the marketplace. He saw the concentration of power in the hands of the few as unfairly choking off opportunity for the many. He was also concerned with social and political effects because he considered the concentration of power to be anti-democratic.

Brandeis's view was that corporations needed to be regulated to prevent them from becoming too large. The best expression of this view is Brandeis's dissenting opinion in *Louis K. Liggett Co. v. Lee*.¹⁴ In *Liggett*, the Supreme Court held that Florida's graduated tax on corporations, which increased according to the number of stores a particular corporation operated, failed the rational basis test and thus violated the Equal Protection Clause of the Fourteenth Amendment.¹⁵ Justice Brandeis dissented, arguing that the law did not create an arbitrary distinction, but rather discriminated on the reasonable basis that larger corporations constitute a greater social and political menace than smaller ones.¹⁶

Brandeis compared large corporations to a "Frankenstein monster"¹⁷ and commented on large corporations' anti-democratic nature.¹⁸ He wrote:

The changes thereby wrought [by increases in corporate size] in the lives of the workers, of the owners and of the general public, are so fundamental and far-reaching as to lead . . . scholars to compare the evolving "corporate system" with the feudal system; and to lead other men of insight and experience to assert

14. 288 U.S. 517 (1933).

15. *See id.* at 533-38.

16. *See id.* at 541-80 (Brandeis, J., dissenting).

17. *Id.* at 567.

18. *See id.* at 565.

that this “master institution of civilised [sic] life” is committing it to the rule of a plutocracy.¹⁹

Brandeis endorsed what he believed to be the chief aim of the Florida statute: the protection of mom-and-pop stores. Florida’s citizens

may have believed that the chain store, by furthering the concentration of wealth and of power and by promoting absentee ownership, is thwarting American ideals; that it is making impossible equality of opportunity; that it is converting independent tradesmen into clerks; and that it is sapping the resources, the vigor and the hope of the smaller cities and towns.²⁰

His concluding paragraph is a particularly strident rallying cry against the danger of permitting large corporations to choke off economic opportunity for the masses. Note the Brandeis style of contrasting the big corporations with the small individual over and over again in one lengthy sentence to link the preservation of small competitors with the maintenance of liberty.

There is a widespread belief that the existing unemployment is the result, in large part, of the gross inequality in the distribution of wealth and income which giant corporations have fostered; that by the control which the few have exerted through giant corporations, individual initiative and effort are being paralyzed, creative power impaired and human happiness lessened; that the true prosperity of our past came not from big business, but through the courage, the energy and the resourcefulness of small men; that only by releasing from corporate control the faculties of the unknown many, only by reopening to them the opportunities for leadership, can confidence in our future be restored and the existing misery be overcome; and that only through participation by the many in the responsibilities and determinations of business, can Americans secure the moral and intellectual development which is essential to the maintenance of liberty.²¹

In *Liggett*, Brandeis also recognized the growing laissez-faire attitude that has shaped our contemporary antitrust view. He saw what was coming—the notion that bigness is the price to be paid for corporate efficiency.

Today our antitrust debate is fueled by the views of Chicago school theorists like Robert Bork, author of *The Antitrust Paradox*.²² Bork’s book rails against “activist” judges like Brandeis who believed that the Sherman, Clayton, and Federal Trade Commission Acts were intended to guarantee a balance of economic power even when such a balance would be inefficient.²³ For Bork, efficiency and its attendant cost and price reductions are the only goals of the antitrust laws. If a practice

19. *Id.*

20. *Id.* at 568-69.

21. *Id.* at 580.

22. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1993).

23. *See id.* at 41-49.

does not increase price or create inefficiencies, it should not be condemned.

This efficiency theory is the dominant understanding in antitrust law today, as evidenced by the now-familiar mantra that the antitrust laws protect “*competition, not competitors*.”²⁴ In *Brooke Group v. Brown & Williamson Tobacco Corp.*, Bork himself successfully defended a cigarette company against an antitrust action brought by a competitor.²⁵ The competitor argued that below-cost pricing hurt smaller competitors.²⁶ The Supreme Court firmly rejected that position, stating that the fact that “below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured.”²⁷ Brandeis would have strongly disagreed.

Brandeis thought that the antitrust laws were motivated by society’s belief “that the great trusts had acquired their power, in the main, through destroying or overreaching their weaker rivals by resort to unfair practices.”²⁸ Brandeis focused not on members of society as consumers, but on members of society as market participants. Professor Zacharias has observed that this view of the antitrust laws stemmed from Brandeis’s desire “to infuse corporate activity with the same values that the market had represented in the writing of nineteenth century social theorists, emphasizing goals not only of competition, efficiency and growth, but also of equality, fairness and individual autonomy.”²⁹ In his article, Professor Zacharias responds to the contention made by theorists, such as Bork, that Brandeis somehow just did not get it when it came to economics.³⁰ Professor Zacharias explains that Brandeis in fact understood that combination and concentration could sometimes create economic utility.³¹ It was social utility—social efficiency, as Brandeis called it—with which Brandeis was most concerned.³² Brandeis felt that there is a “law of ethics that man shall not advance his own interests by exploiting his weaker fellows or through casting burdens upon the

24. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

25. *See id.* at 211 (noting Robert H. Bork, Washington, D.C., for respondent).

26. *See id.* at 223.

27. *Id.* at 224.

28. *FTC v. Gratz*, 253 U.S. 421, 434 (1920) (Brandeis & Clarke, JJ., dissenting).

29. L.S. Zacharias, *Repaving the Brandeis Way: The Decline of Developmental Property*, 82 *Nw. U. L. Rev.* 596, 603 (1988).

30. *See id.* at 598-99.

31. *See id.* at 626.

32. *See id.* at 630.

community.”³³

Scholars agree that this concern with the social effects of wealth concentration and the “fair play” aspect of the antitrust law has largely died out. The FTC, the agency that Brandeis helped to create in order to police “unfair competition,” now rarely targets immoral or unethical conduct between competitors, as Professor Robert Lande has observed in an article questioning the efficiency theory.³⁴ Professor David Millon has written that “[t]he normative assumptions of the Sherman Act, grounded ultimately in eighteenth century ideas about the importance of balanced economic power in a democratic society, seem to have collapsed.”³⁵

If the question is whether Brandeis’s view of antitrust ought to be revived today, and for what purpose, the answer might have something to do with the role of regulation. Brandeis’s emphasis on fair play led him to view agencies, the FTC in particular, as referees rather than enforcers. In this period of deregulatory fervor, perhaps agencies might still retain this general element of oversight. Rather than letting the Microsofts of the world run wild before stepping in and taking them apart, an agency in the Brandeis model would be, as Brandeis said in his dissent in *Gratz*, “ever vigilant,”³⁶ and would prevent unfair practices rather than waiting for an effect on price or output. That is the legacy Brandeis would have wanted.

Let us turn to the right of privacy. Brandeis’s legendary prescience in this area extends from his very early grasp of the discomfort and embarrassment the then-nascent technology of communications could bring to people whose lives came to the attention of the press, whether they were persons of talent or social position, or victims of tragedy. It all began, of course, with the 1890 *Harvard Law Review* article entitled “The Right to Privacy” that Brandeis wrote with his friend Samuel Warren, encapsulating the concept in the phrase the right “to be let alone.”³⁷ Ironically, Brandeis did not invent that phrase. But Brandeis was able to use it memorably, first in the article, and then in his famous dissenting opinion in *Olmstead v. United States*.³⁸

For Warren and Brandeis, writing in 1890, the enemy was the press.

33. BRANDEIS, *supra* note 7, at 56.

34. See Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 117 (1982-1983).

35. David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1291 (1988).

36. *FTC v. Gratz*, 253 U.S.421, 435 (1920) (Brandeis & Clarke, JJ., dissenting).

37. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890-1891).

38. 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

They said:

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.³⁹

Early on, as the protector of this right to privacy, Brandeis looked to the common law: the development in state courts of the laws of nuisance, defamation, and property. Warren and Brandeis both looked to the English common law for their seminal case, the case of *Prince Albert v. Strange*.⁴⁰ The English court held that a common law of property and copyright protected the privacy interests of Queen Victoria and Prince Albert in their artistic hobbies.⁴¹ The court barred a writer from even describing the etchings created by the royal pair.⁴² Warren and Brandeis both wanted to protect everyone from the public dissemination of essentially private information.

The notion has great appeal and great moral force. No one likes peeping toms or gossip mongers. What happened? The Warren and Brandeis right to privacy collided with the First Amendment. The problem for the courts—and here I greatly oversimplify so please bear with me—was how to distinguish between what was genuinely newsworthy information and information that should remain private. The courts have never been able to distinguish between the two. In the landmark case of *New York Times Co. v. Sullivan*,⁴³ the Supreme Court enunciated the famous principle that the First Amendment freedom of the press means that information about a public figure, even if it is false or libelous, is not actionable in tort, absent a showing of actual malice. Commentators in discussing the ascendancy of the First Amendment

39. Warren & Brandeis, *supra* note 37, at 196.

40. 41 Eng. Rep. 1171 (Ch. 1849).

41. *See id.* at 1178.

42. *See id.*

43. 376 U.S. 254 (1964).

over the Brandeis vision are mournful, adopting titles such as Diane Zimmerman's "Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort,"⁴⁴ and an article by my own much-loved First Amendment Professor, Harry Kalven, entitled "Privacy in Tort Law—Were Warren and Brandeis Wrong?"⁴⁵

When Brandeis penned his dissent in *Olmstead*,⁴⁶ the enemy for Brandeis was no longer the press, but the government. In *Olmstead*, Brandeis described "the right to be let alone" as "the right most valued by civilized men."⁴⁷ These words, or a citation to them, have managed to find their way into all the important privacy cases of the twentieth century.

Olmstead involved wiretapping and whether it violated the Fourth Amendment prohibition against unreasonable searches and seizures or the Fifth Amendment's protection against self-incrimination.⁴⁸ The majority held that wiretapping was constitutional.⁴⁹ It said that there could be no Fourth Amendment violation because there was no search and no seizure of anything.⁵⁰ There was hearing and only hearing.⁵¹ Thus, there could be no violation of self-incrimination either.⁵² The statements were all voluntarily made without force, violence, or threat, so there was no constitutional violation.⁵³

Brandeis's dissent said, in essence, that times have changed.⁵⁴ The Constitution must protect from today's threats. He pointed out that when the Fourth and Fifth Amendments were enacted, force and violence were the only means by which the government could compel self-incrimination or secure private papers.⁵⁵ Now "[s]ubtler and more far-reaching means of invading privacy have become available to the Government."⁵⁶ In almost prophetic language, Brandeis foresaw the technological advances we have today when he commented that "[t]he progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day

44. Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291 (1983).

45. Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROBS. 326 (1966).

46. 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

47. *Id.* at 478.

48. *See id.* at 455.

49. *See id.* at 462, 466.

50. *See id.* at 464.

51. *See id.*

52. *See id.* at 462.

53. *See id.*

54. *See id.* at 472-74 (Brandeis, J., dissenting).

55. *See id.* at 473.

56. *Id.*

be developed by which the Government . . . will be enabled to expose to a jury the most intimate occurrences of the home."⁵⁷

The dissent's style is important. Brandeis did not directly criticize the majority. Rather, the criticism indirectly suggested that the weight of authority supported his view and that the language of the amendments should be construed in light of their purpose, not their literal meaning. Quoting an earlier Supreme Court case, he said, "[t]he narrow language of the Amendment has been consistently construed in the light of its object The privilege . . . is as broad as the mischief against which it seeks to guard."⁵⁸ Here again, as with his view of the antitrust laws, Brandeis is looking to the law to provide general principles that must adapt to the social and technological changes of the time. Again, as with the antitrust laws and every other field, experience and facts should triumph over outmoded doctrine. That is the key to Brandeis's intellectual legacy.

Brandeis's dissent in *Olmstead* is significant to yet another part of his legacy. He picked his battles carefully. He knew which issues mattered. The dissent is so evocative of danger, so filled with references to principles long established, yet so accurate in its forecast of scientific advancement, that it has been enormously influential. Even though many appellate judges today disagree with Brandeis's conclusion in *Olmstead*, and though I speak today only for myself, I know nearly all of us would like to make a statement that is so important.

Finally, what about Brandeis's method of advocacy and elucidation symbolized by the so-called Brandeis brief? It supported contentions by relying not on traditional legal arguments, case law or legal writings, but on empirical data and legislative findings. The technique worked well in the *Muller* case itself, upholding an Oregon statute regulating hours worked by women.⁵⁹ Not only did Brandeis's side prevail, but the court in its opinion both discussed the brief and approved its method, stating "[w]e take judicial cognizance of all matters of general knowledge."⁶⁰

There are many high-profile examples of Supreme Court opinions written in the tradition of Brandeis's brief in *Muller*. Two of the most significant decisions, of course, are *Brown v. Board of Education*⁶¹ and

57. *Id.* at 474 (Brandeis, J., dissenting).

58. *Id.* at 477 (quoting *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892)).

59. *See Muller*, 208 U.S. at 416 (1908).

60. *Id.* at 421.

61. 347 U.S. 483 (1954).

Roe v. Wade.⁶² In *Brown*, the Court supported its conclusion that segregation generates a feeling of inferiority among African-Americans by citing several social science publications.⁶³ And in *Roe*, the Court relied on several medical, religious, and scholarly sources while discussing the safety of abortions at different stages of pregnancy, fetal viability, and religious and medical beliefs regarding the beginning of life.⁶⁴ Yet the use of data in those opinions has been questioned, and many jurists frown on use of such data today. Justice Scalia has stated that “socioscientific, ethicoscientific, or even purely scientific evidence is not an available weapon.”⁶⁵ Justice Thomas has also made clear his dislike of judicial reliance on social science or empirical data, stating “[t]he lower courts should not be swayed by the easy answers of social science, nor should they accept the findings, and the assumptions, of sociology and psychology at the price of constitutional principle.”⁶⁶

There are, however, examples of fairly recent Supreme Court opinions that seem to follow in the Brandeis tradition. During the late 1980s, the Court acknowledged the role of empirical research in judicial decision making in death penalty cases. The Court’s opinion in *Thompson v. Oklahoma*⁶⁷ is a good example. In holding that executing a defendant who was fifteen years old at the time he committed a murder violated the Eighth Amendment, Justice Stevens relied exhaustively on data very similar to that set forth in Brandeis’s *Muller* brief—statutory schemes from various states, foreign death penalty laws, and learned treatises that discussed our experience with the death penalty.⁶⁸ Interestingly, even the concurring and dissenting justices recognized the significance of those data on the outcome of the case, differing primarily in how they viewed the data.

In *Lee v. Weisman*,⁶⁹ a fragmented Court held that religious prayers conducted at public school graduations, in which even objecting students were induced to participate, violated the Establishment Clause.⁷⁰ Writing for the majority, Justice Kennedy relied upon three articles from psychological journals for the proposition that “adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.”⁷¹ Justice Scalia,

62. 410 U.S. 113 (1973).

63. See *Roe*, 347 U.S. at 494 n.11.

64. See *Brown*, 410 U.S. at 149, 160-61.

65. *Stanford v. Kentucky*, 492 U.S. 361, 378 (1989) (Scalia, J., separate opinion).

66. *Missouri v. Jenkins*, 515 U.S. 70, 122-23 (1995) (Thomas, J., concurring).

67. 487 U.S. 815 (1988).

68. See *id.* at 824-38.

69. 505 U.S. 577 (1992).

70. See *id.* at 599.

71. *Id.* at 593-94.

in his dissent, criticized the majority's reliance on such authority, seeming even to mock it at times.⁷² In sum, he called the decision a "jurisprudential disaster."⁷³ The battle is thus being fought today in the Supreme Court over what is, in essence, Brandeis's legacy: judicial adaptation of the law to technological and intellectual change.

Finally, a word about the Brandeis method as it relates to judicial style and relations. Because Justice Brandeis believed very much in persuading his audience of the correctness of his position, he did not spend much time in his opinions tearing down the position of the other side. He did not attack the conduct of his colleagues or adversaries. He believed all people are worthy of respect as human beings. Let us hope that this legacy will not die out in the courts of this great nation.

72. *See id.* at 637-39 (Scalia, J., dissenting).

73. *Id.* at 644 (Scalia, J., dissenting).

