

THE DISAPPEARING JURISPRUDENCE OF LOUIS BRANDEIS

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Louis Brandeis is surely one of the most respected Supreme Court justices to have served; yet his jurisprudence is conspicuously absent from the modern curricula of American law schools. Only seven of the more than 500 opinions that Justice Brandeis authored may be found in the major constitutional law textbooks, behind justices best known for their mediocrity. A number of factors contribute to this outcome – firstly, that many of Brandeis' most significant opinions were "mere" concurrences or dissents, and secondly, that most textbooks place a disproportionate emphasis on cases traditionally considered groundbreaking. Nevertheless, it is worth considering whether more thorough coverage of Brandeis' purposive, methodical approach to meaningful legal scholarship might benefit the budding law student.

I. INTRODUCTION

There may not be a more revered Supreme Court Justice in American history than Louis Brandeis. Studies assessing the greatness of Supreme Court Justices invariably place Brandeis or near the top of the list, with one recent survey ranking Brandeis highest among all 20th century Justices.¹ He is one of only three Supreme Court Justices to have an American university name

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¹ See MICHAEL COMSKEY, *SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES* (Lawrence: University of Kansas Press, 2004). Two decades earlier, a study by Albert Blaustein & Roy Mersky asking scholars to rank justices on a continuum from "great" to "failure" ended up with Brandeis being one of only a handful of justices to achieve the rank of "great." See "Rating Supreme Court Justices," 58 *AMERICAN BAR ASSOCIATION JOURNAL* 1183 (1972). In 1993, William R. conducted an update of the Blaustein-Mersky study; his study had Brandeis ranked third, behind only John Marshall and Oliver Wendell Holmes. See Ross, *The Ratings Game: Ranking Supreme Court Justices*, 79 *MARQUETTE LAW REVIEW* 401 (1996).

after him and the only such Justice from outside the immediate post-Revolutionary period.²

Brandeis is also the intellectual godfather of some of the most important and renowned principles in American law. The “right to privacy” which the Supreme Court recognized and enshrined in the Constitution in the 1960s was grounded in a legendary law review article Brandeis wrote with his law partner in 1890.³ It is Brandeis, along with Oliver Wendell Holmes, who developed an expansive vision of freedom of speech in a series of dissenting and concurring opinions in the 1920s and 1930s, a vision which the Court eventually adopted as the cornerstone of the First Amendment.⁴

Civil libertarians are not the only group who invoke Brandeisian principles. Modern advocates of limited federal power call on Brandeis’ exhortation that “[i]t 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.”⁵ They may also appeal to his landmark declaration that there is no such thing as a federal “common law,” a declaration which requires federal courts to respect state laws in diversity cases.⁶

Louis Brandeis, then, is the rare Justice who appeals to both the political left and the political right. The sweep of his work as a Justice is both practical and theoretical, with landmark decisions on key substantive principles as well as the rules of civil procedure. He is influential, distinctive, and legendary.

² The other two are William Paterson (William Paterson University, in New Jersey) and John Marshall (Marshall University, in West Virginia; and Franklin & Marshall College, in Pennsylvania). This list does not include law schools names after Supreme Court Justices, which are numerous (including the Louis D. Brandeis School of Law at the University of Louisville, city of the Justice’s birth).

³ Samuel Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARVARD LAW REVIEW 193 (1890).

⁴ See *Schaefer v. United States*, 251 U.S. 466 (1920) (Brandeis, dissenting); *Pierce v. United States*, 252 U.S. 239 (1920) (Brandeis, dissenting); *Gilbert v. Minnesota*, 254 U.S. 325 (1920) (Brandeis, dissenting); *U.S. ex rel. Milwaukee Social Democratic Publishing Company v. Burleson*, 255 U.S. 407 (1921) (Brandeis, dissenting); *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, concurring).

⁵ *New State Ice Company v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, dissenting).

⁶ *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

And he is missing.

While the core of Brandeis’ legal philosophy and progress outlook remains salient in American life, Brandeis’ act jurisprudence has been gradually disappearing from constitutional law curricula of American colleges and law schools. Today, only a tiny handful of the opinions that he wrote in Supreme Court career are reproduced in law textbooks. Other Justices, both great and mediocre, feature in casebooks much more than Brandeis does. To the extent that Brandeis’ influence is still felt in legal education at both the law school and undergraduate level, that influence is conveyed without reference to his output as a Justice.

II. THE DATA

The following data and analysis is part of a larger study of the reputational dimensions of judicial greatness and is culled from a review of eighteen leading constitutional law textbooks: two geared for use predominantly in law schools and six more aimed at undergraduate constitutional law courses. The textbooks reviewed in the study are all current editions, dated between 2006 and 2010. A full list of the textbooks is available in the Appendix to this article.

The study records every opinion that is excerpted in each of the textbooks – main Opinions of the Court, along with concurring opinions and dissenting opinions. The aims of the study were to determine which cases were excerpted most often and also to track how often each individual Supreme Court Justice was excerpted. The data generated in this study paints a stark empirical picture of the dearth of Brandeis opinions in modern American legal pedagogy.

In a twenty-three year tenure on the United States Supreme Court, Justice Louis Brandeis wrote more than five hundred

⁷ For more information, see Steven Lichtman, *The Canon of Constitutional Law in 2010*, AMERICAN POLITICAL SCIENCE ASSOCIATION LAW AND POLITICS SECTION NEWSLETTER, vol. 1, no. 3, Summer 2010.

opinions. Only seven of them are excerpted in today's leading constitutional law casebooks.

TABLE 1: EXCERPTED BRANDEIS OPINIONS

CASE NAME AND DATE	OPINION TYPE	# OF BOOKS
<u>Ashwander v. Tennessee Valley Authority</u> (1936) ⁸	Concurrence	2
<u>Erie Railroad Co. v. Tompkins</u> (1938)	Opinion of the Court	1
<u>Myers v. United States</u> (1926) ⁹	Dissent	6
<u>O'Gorman & Young v. Hartford Fire Insurance Co.</u> (1930) ¹⁰	Opinion of the Court	1
<u>Olmstead v. United States</u> (1928) ¹¹	Dissent	5
<u>Pennsylvania Coal v. Mahon</u> (1922) ¹²	Dissent	6
<u>Whitney v. California</u> (1927)	Concurrence	8
	TOTAL EXCERPTS	29

On one level, the paucity of Brandeis opinions in today's law textbooks is not a surprise. The study shows that there is a significant presentist tack in today's law textbooks, and this is especially apparent in the list of most-excerpted individual Justices.¹³

There are a number of ways to define "most-excerpted." One way is to count the number of cases that are reproduced in the

⁸ 297 U.S. 288.

⁹ 272 U.S. 52.

¹⁰ 282 U.S. 251.

¹¹ 277 U.S. 438.

¹² 260 U.S. 393.

¹³ See Steven Lichtman, *A Textbook Case of Unimportance*, AMERICAN POLITICAL SCIENCE ASSOCIATION LAW AND POLITICS SECTION NEWSLETTER, vol. 20, no. 1, Winter 2011.

textbooks. In other words, Earl Warren gets credit for one excerpt for his main opinion in *Brown v. Board of Education*,¹⁴ and he gets credit for one excerpt for his dissenting opinion in *Shapiro v. Thompson*.¹⁵ When the "most-excerpted" list is configured this way, the top Justices are John Paul Stevens (185), William Rehnquist (153), William Brennan (131), Antonin Scalia (118) and Byron White (109).

Another way to track the "most-excerpted" Justices is to count the aggregate number of times any of their opinions is excerpted in any textbook. In this formulation, Earl Warren gets credit for eighteen excerpts for *Brown*, which appears in every casebook in the study, and he gets credit for seven excerpts for his *Shapiro* dissent (an opinion which eleven of the casebooks fail to reproduce). When "most-excerpted" is counted in this manner, the top Justices are Stevens (634), Rehnquist (600), Scalia (482) Rehnquist (463), and Sandra Day O'Connor (414).

The list of most-excerpted Justices is dominated by modern figures, and this is true no matter how the list is configured. The only Justice who worked on the Court prior to 1956 who appears on either "most-excerpted" list is William O. Douglas, who is in a three-way tie for ninth on the "individual cases excerpted" list.

As a Justice who served on the Court from 1916 to 1939 therefore, Brandeis is not a likely candidate to be among the most-excerpted Justices in constitutional law textbooks. Sure enough the total of seven cases excerpted places Brandeis in a tie for 35th (tied with nine other Justices); the total of twenty-nine overall excerpts places Brandeis in a tie with Frank Murphy for 29th.¹⁶

Yet while Brandeis' absence from most-excerpted lists with a presentist bias is fundamentally unsurprising, his lack of standing among even historical Justices is infinitely surprising. Considering Brandeis' towering reputation, one would expect to see his work much more often than all but a handful of the Justices who were

¹⁴ 347 U.S. 483 (1954).

¹⁵ 394 U.S. 618 (1969).

¹⁶ Of the 110 individuals who had served on the Supreme Court of the United States in the period covered by this study (i.e., not counting recent arrivals Sonia Sotomayor and Elena Kagan), 21 of them did not have a single opinion excerpted in any of the textbooks. See Lichtman, *A Textbook Case of Unimportance*, *supra* note 14.

active prior to the Burger, Rehnquist, and Roberts Courts. But this is not the case. Instead, Brandeis' opinions are inexplicably relegated to cameo appearances, and reproduction of his output lags well behind the output of other historical Justices who are not regarded as highly as he is by Court scholars.

What is exceedingly shocking is how the rate of Brandeis opinion excerpts compares to the rates of his exact contemporaries. Such analysis controls for the presentist bias of the casebooks, effectively removing it from the equation. And yet this analysis also reveals that even among his peers, several of whom are seen as several strides short of luminary status by Supreme Court scholars, Brandeis is still coming up short.

Brandeis served with 18 different colleagues in his time on the Court. Their individual case excerpts are as follows:

TABLE 2: CASES EXCERPTED BY BRANDEIS AND HIS CONTEMPORARIES

JUSTICE	Years	Main	Concur	Dissent	Total
BRANDEIS	23	2	2	3	7
BLACK	34	20	16	29	65
BUTLER	16	1	1	5	7
CARDOZO	6	4	2	1	7
CLARKE	6	1	0	0	1
DAY	19	4	0	0	4
HOLMES	30	7	1	11	19
HUGHES ¹⁷	17	11	1	0	12
McKENNA	27	0	0	0	0
McREYNOLDS	27	3	0	4	7
PITNEY	10	1	0	0	1
REED	19	5	0	2	7
(O.) ROBERTS	15	6	1	5	12
SANFORD	7	2	0	0	2
STONE ¹⁸	21	9	1	3	13
SUTHERLAND	16	9	0	3	12
TAFT	9	6	0	1	7
VAN DEVANTER	26	1	0	2	3
(E.) WHITE ¹⁹	27	3	0	0	3

With a total of seven cases, Brandeis ranks in the middle of the pack even among the men with whom he shared the Supreme Court bench.

It should be pointed out, though, that Hugo Black arrived on the Court in 1937, and served alongside Brandeis for only two

¹⁷ Charles Evans Hughes served as an Associate Justice from 1910-1916, and then after a fourteen-year absence from the Court was installed as Chief Justice by President Herbert Hoover in 1930, remaining in that position until 1941.

¹⁸ Harlan Fiske Stone served as an Associate Justice from 1925-1941, and was then elevated to Chief Justice by President Franklin Roosevelt upon Hughes' retirement, remaining in that position until his death in 1946.

¹⁹ Edward White served as an Associate Justice from 1894-1910, and was then elevated to Chief Justice by President (and future Chief Justice) William Howard Taft upon the death of Melville Fuller, remaining in that position until his death in 1921.

years. The bulk of Black's service occurred in a more modern era for the Court, and this is reflected in his outlier high total.

Of the other four Justices excerpted more often than Brandeis, one (Oliver Wendell Holmes) is universally considered to be one of the top Justices of all time; another (Harlan Fiske Stone) is not only rated exceptionally highly but also served as Chief Justice; still another (George Sutherland), while not found in the uppermost echelon of Justices, is still regarded favorably by Court scholars.

But the fourth Brandeis contemporary excerpted more than Brandeis himself is Owen Roberts, who is charitably seen as a profoundly mediocre Justice. A leading reference work on the Supreme Court describes Roberts as "unpredictable" and reports that Court-watchers "could find no consistent jurisprudential principle in his rulings."²⁰ Additionally, a recent study of the New Deal Court similarly depicts Roberts as "the most wavering member of the Court,"²¹ which is to be expected of a Justice best known for changing his mind about the permissibility of New Deal regulation.²² Roberts himself freely acknowledged his limitations, writing in 1951, "Who am I to revile the good God that he did not

²⁰ AUGUSTUS M. BURNS III, *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 860-61 (Oxford University Press 2d ed. 2005).

²¹ NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES* 117 (New York: Twelve, 2010).

²² See *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), in which Roberts abandoned an earlier posture of hostility to New Deal economic regulations (which often positioned him as the pivotal vote in 5-4 decisions invalidating those regulations) in favor of a more indulgent approach ... resulting in Roberts standing as the decisive figure in a 5-4 vote that preserved a Washington state minimum wage law.

Commentators on Roberts have often speculated that the malleable Roberts simply caved to the political pressure applied by Franklin Roosevelt's "court-packing plan," which was revealed on February 5, 1937, several weeks before the decision in *West Coast Hotel* was announced. That speculation misses a key detail: Roberts cast his deciding vote in *West Coast Hotel* in December of 1936, before the court-packing plan had been devised. Then again, Roberts' vote was also thus cast not long after Roosevelt secured a spectacular electoral mandate for his program from the voters by defeating Alf Landon with 523 electoral votes (to Landon's 8) in the November presidential election. Speculation about Roberts' pliability was so powerful that it may have induced Justice Felix Frankfurter to concoct evidence (in the form of a memorandum to him from Roberts, which Frankfurter described but never actually produced) showing that Roberts had changed his mind on the New Deal, independent of any external political pressures. See Michael Arntes, "A Thrice-Told Tale, or Felix The Cat," 107 *HARVARD LAW REVIEW* 620 (January 1994). Frankfurter's motivation was to preserve his favored image of the Court as a body totally insulated from any sort of political pressure. And yet Frankfurter's actions only served to underscore the unsteady nature of Roberts' jurisprudence and judicial temperament.

make me a Marshall, a Taney, a Bradley, a Holmes, a Brandeis, or a Cardozo?"²³

Moreover, Roberts' erratic judicial philosophy was often manifested in the quality of his opinions. Brandeis' leading biographer notes that Roberts' main opinion in *United States v. Butler*²⁴ "is one of the most tortured and confusing of all the New Deal decisions."²⁵ And yet *Butler* is excerpted nine times in books in this study, more than any Brandeis opinion.

The data does not change much when Brandeis and his peers are ranked by the total number of times any of their opinions are excerpted in any casebook.

TABLE 3: OPINIONS EXCERPTED BY BRANDEIS AND HIS CONTEMPORARIES

JUSTICE	Years	Main	Concur	Dissent	Total
BRANDEIS	23	2	10	17	29
BLACK	34	81	63	107	251
BUTLER	16	1	1	14	16
CARDOZO	6	21	8	4	33
CLARKE	6	6	0	0	0
DAY	19	20	0	0	20
HOLMES	30	38	1	69	108
HUGHES	17	62	1	0	63
McKENNA	27	0	0	0	0
McREYNOLDS	27	11	0	24	35
PITNEY	10	1	0	0	1
REED	19	14	0	6	20
(O.) ROBERTS	15	26	2	12	40
SANFORD	7	19	0	0	19
STONE	21	43	5	13	61
SUTHERLAND	16	44	0	25	69
TAFT	9	25	0	5	30

²³ Quoted by Felix Frankfurter, "Mr. Justice Roberts," 104 *UNIVERSITY OF PENNSYLVANIA LAW REVIEW* 311, 312 (1955); see also OWEN ROBERTS, *THE COURT AND THE CONSTITUTION* (Cambridge: Harvard University Press, 1951).

²⁴ 297 U.S. 1 (1936).

²⁵ MELVIN UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 706 (New York: Pantheon, 2009).

VAN DEVANTER	26	4	0	2	6
(E.) WHITE	27	5	0	0	5

On this list, Brandeis ranks dead in the center of the pack: his total of 29 opinion excerpts ranks him tenth out of nineteen. It is here that the data is truly astonishing. Brandeis is quoted in the textbooks not only less often than Owen Roberts, but also less often than James McReynolds, who is universally seen as a poor Justice.²⁶ McReynolds' fellow "Four Horsemen" conservative George Sutherland, in contrast, is usually seen as an excellent Justice; whether that justifies the textbooks quoting Sutherland more than twice as much as they quote Brandeis – and in a Court career that was seven years shorter – is a debatable proposition.

Even the fact that Brandeis is quoted just slightly less than his colleague Benjamin Cardozo is in its own way startling. Cardozo is always ranked highly in the various reputational surveys, although he is never quite on Brandeis' level. For Cardozo to be quoted even a little more than Brandeis is thus at least somewhat inconsistent with the fact that Brandeis is generally seen as the "better" Justice.

That inconsistency is compounded exponentially, however, by the fact that Brandeis served on the Court *for almost four times as long* as Cardozo. Cardozo's record of excerpts is culled from a Supreme Court career which was only six years long; as admired as Cardozo is, Brandeis is by acclamation considered to be the greater Justice, and Brandeis was on the Court for seventeen years more than Cardozo. However, Cardozo is excerpted more often.

Perhaps the most stunning Brandeis-related finding in this textbook study is the discovery that even Brandeis' most famous

²⁶ McReynolds ranked seventh from the bottom in the 1970 Bleustein-Mersky study, was classified as a "failure," and then came in dead last in William Ross' 1993 update of that study. See Ross, *The Ratings Game*, 79 MARQUETTE LAW REVIEW 449. Michael Comiskey's study had McReynolds ranked second from the bottom of all 20th century Justices, see COMISKEY, *SPEAKING JUSTICES*, 91.

This fact almost seems to be a particularly cruel continuation of the unrelenting hostility that the virulently anti-Semitic McReynolds directed towards Brandeis. Infamously, McReynolds refused to even talk to Brandeis for several years solely because Brandeis was Jewish, and he made a point of swiveling his chair so that his back was turned whenever Brandeis asked a question during oral argument.

opinions are given short shrift. His concurrence in *Whitney v. California* is one of the most elegant and well-known disquisitions on the meaning of freedom of speech:

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, without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty, and that this should be a fundamental principle of the American government.²⁷

Whitney is the most-excerpted Brandeis opinion, and yet it appears in less than half of the casebooks in this study. Furthermore, it is the only Brandeis free speech opinion that ever appears; his opinions in cases like *Gilbert v. United States* are completely ignored.

American free speech principles are often depicted as the product of the intellectual partnership between Brandeis and Oliver Wendell Holmes. While Brandeis' work on free speech merits only brief quotation in the books in this study, his running mate on the subject is excerpted more frequently. Holmes' dissent in *Abrams v. United States*,²⁸ in which Holmes repudiated the majority's use of the "clear and present danger test" he had previously announced in *Schenck v. United States*,²⁹ appears in nine books. His dissent in *Gitlow v. New York*,³⁰ appears in twelve.³¹

²⁷ 274 U.S. 375.

²⁸ 250 U.S. 616 (1919).

²⁹ 249 U.S. 47 (1919); *Schenck* is excerpted in eleven books.

³⁰ 268 U.S. 652 (1925). Brandeis joined Holmes' dissents in both *Abrams* and *Gitlow*.

³¹ It is also worth noting that Holmes' majority opinion in *Debs v. United States*, 249 U.S. 211 (1919), which upheld the Espionage Act conviction of labor leader Eugene Debs by rejecting his free speech arguments, appears in two of the books in this study; his similarly speech-restrictive opinion

III. EXPLANATIONS

The fact that Brandeis has evolved into a lost figure in American legal pedagogy – at least insofar as how that pedagogy is reflected in the textbooks used to communicate its lessons – is beyond question. The question that remains, though, is why? Why is such a universally revered Justice mystifyingly absent from contemporary constitutional law instruction? Why is Brandeis' work being deemphasized in constitutional law texts to the point of near-extinction?

There are a number of possible "technical" explanations for the relative scarcity of Brandeis' opinions in constitutional law textbooks. One is that many of his most famous opinions were concurrences and dissents: *Whitney, Olmstead, New State Ice Co. v. Liebmann* (the source of his "laboratories" observation about federalism), and *Myers v. United States* (a separation-of-powers case about the president's authority to fire executive branch officials) are but four examples. Textbook authors and publishers may well be reasonable in their reluctance to spotlight the work of a Justice who was arguably at his best when he was venting in comparative isolation.

Then again, the occasions in which Brandeis was commanding a majority are hardly prominent in the textbooks. With only two main opinions excerpted, Brandeis is spotlighted as the voice of the Court exactly as often as other less-than-stellar Justices such as David Brewer, Arthur Goldberg, and Robert Grier. His total of two main opinions even trails two of the Justices reported as "failures" in a seminal 1970 study, Fred Vinson (six) and James McReynolds (three).³²

More importantly, some of the most prominent core principles in American constitutional law were first forged in concurring or dissenting opinions. The ultimate rejection of the ill-conceived doctrine of "separate but equal" in *Brown v. Board of Education*

in the companion case of *Frohwerk v. United States*, 249 U.S. 204 (1919), appears in one book. Holmes, unlike Brandeis, is responsible for free speech opinions which did not truly respect the concept of free speech ... and yet those misguided opinions are themselves excerpted.

³² See Blaustein and Mersky, *supra* note 2.

was essentially an adoption of the view promulgated by John Harlan "The Elder" in his solo dissent in *Plessy v. Ferguson*. The *laissez faire* economic theory that undergirded *Lochner v. New York* and *Adkins v. Children's Hospital*³³ was later discarded in the New Deal linchpin case *West Coast Hotel v. Parrish*, which pointedly quoted from the *Adkins* dissents of Oliver Wendell Holmes and Chief Justice William Howard Taft.³⁴ The fact that Louis Brandeis arguably did his best work outside of Supreme Court majority opinions is thus not inconsistent with the Court's institutional traditions, and should not be a reason for his underemphasis in today's constitutional law textbooks.³⁵

A second possible explanation is rooted in what might be the most well-known snippet of Brandeisian phraseology. If those stirring words in his *Whitney* concurrence represent Brandeis' most lionized extended passage, his invocation of "the right to be let alone" in his dissent in *Olmstead v. United States*³⁶ is probably his most famous single line.³⁷ And yet his *Olmstead* dissent appears in only five textbooks.

On the surface, this makes it seem as though *Olmstead* is just another example of Brandeis' jurisprudence fading into oblivion. This finding, though, requires context. The key fact here is that the five textbooks which reproduce Brandeis' *Olmstead* dissent are all geared for undergraduates. At the undergraduate level, Brandeis' *Olmstead* dissent is almost a constant: only one of the six undergraduate constitutional law textbooks omits it.³⁸

This does mean, of course, that *Olmstead* is completely absent from the texts geared for law school courses in constitutional law. Yet that does not in turn mean that *Olmstead* is not being taught in law schools. Instead, it may only mean that Brandeis' admonition

³³ 261 U.S. 525 (1923).

³⁴ 300 U.S. 379, 396-397 (1937).

³⁵ By way of comparison, Harlan's *Plessy* dissent appears in each of the 17 textbooks that reproduce the main *Plessy* opinion, written by the ironically-named Henry Billings Brown.

³⁶ 277 U.S. at 478.

³⁷ That phrase originated nearly four decades earlier in his "Right to Privacy" law review article with Samuel Warren.

³⁸ The only one of the six undergraduate textbooks tracked in this study that did not excerpt *Olmstead* was Epstein and Walker's CONSTITUTIONAL LAW FOR A CHANGING AMERICA.

in *Olmstead* is being transmitted to law students in a venue different from the customary constitutional law class.

All law schools offer stand-alone courses dedicated to criminal law and also to criminal procedure; many schools in fact include one of those courses in their mandatory first-year curriculum. Since criminal procedure is covered in comprehensive fashion in a separate course with separate textbooks, the subject is customarily omitted from law school constitutional law casebooks.³⁹ Its absence from law school constitutional law textbooks, therefore, may not be evidence of its absence from the law school curriculum *in toto*. As a leading case in the development of the law on search and seizure, *Olmstead* could be reserved by authors and publishers of law school texts for their criminal law or criminal procedure books in lieu of its inclusion in constitutional law books.⁴⁰

A similar dynamic explains the near-total exclusion from constitutional law textbooks of what is perhaps Brandeis' most important opinion: *Erie Railroad Co. v. Tompkins*. That case centers on arcane notions of judicial procedure and the question of the existence of a federal common law, a subject which is never going to be covered in undergraduate constitutional law courses. Brandeis' exposition of what became the landmark "*Erie* doctrine" is thus a subject which is exclusively appropriate for law school instruction. And here, as with *Olmstead*, *Erie* is part of the regimen in a separate Civil Procedure course that is part of the standard first-year law school slate. Both *Erie* and *Olmstead* are never covered in law school constitutional law courses because each is covered elsewhere in the basic law school curriculum. Their omission from constitutional law course books, despite being seminal works from a historically important Justice, is not quite as telling as might be the case upon a cursory glance.

³⁹ Indeed, many of the Court's famous criminal law precedents from the Warren Court and beyond are similarly concentrated in the undergraduate texts: *Miranda v. Arizona*, 384 U.S. 436 (1966), appears in only seven books – the six undergraduate texts and one law school casebook; *Furman v. Georgia*, 408 U.S. 238 (1972), only appears in three undergraduate texts, and its later virtual undoing in *Gregg v. Georgia*, 428 U.S. 153 (1976), only appears in five undergraduate texts; *Mapp v. Ohio*, 367 U.S. 643 (1961) appears in eight books, but only in two designed for law school classes.

⁴⁰ However, a cursory review of leading criminal procedure textbooks indicates that *Olmstead* is not depicted here as well. It is periodically (but not often) mentioned – and the Brandeis dissent is part of that mention – but not excerpted as a leading case.

However, there is one key difference between the compartmentalized treatments of *Olmstead* and *Erie*. Outside of the civil procedure context, there is no real reason to include *Erie* in a textbook for a course in constitutional law.⁴¹ The "right to be let alone" Brandeis trumpeted in *Olmstead*, crucially, is not merely an important concept in the criminal procedure context; it is also a core component in the right to privacy context that traditionally features in law school constitutional law courses. It is one thing for law school constitutional law textbooks to strategically omit *Olmstead* because the criminal procedure cases get their own books and their own courses; it is quite another for those books to omit *Olmstead* from their discussions of privacy in particular and civil liberties in general, which are customarily situated only here.

What we have, then, is a series of editorial decisions to minimize the impact Brandeis' *Olmstead* dissent had on the evolution of the Supreme Court's privacy doctrine. Considering the stature of the author, the centrality of the doctrine to contemporary constitutional law, and the accessibility of the idea Brandeis was advancing, these editorial decisions are puzzling.

A final possible explanation for the disappearance of Brandeis' jurisprudence is the unavoidable presentism of the law school enterprise, which was referenced earlier. While some constitutional law courses may have a historical focus, they are all tasked with the responsibility of relating current doctrine. These courses are about the state of the law today and not about the place of constitutional law in American political development.

Accordingly, the textbooks for constitutional law courses must focus on recent trends in the law, and with publication space limited, they can ill afford to allocate pages to older cases. By way of illustration, there are thirty-five cases which appear in at least fifteen of the eighteen textbooks. Only six of these thirty-five cases predate 1950,⁴² and three of these six – the *Slaughter*—

⁴¹ It could be argued that *Erie* ought to be a component of a broad look at federalism which would be suitable in an undergraduate setting.

⁴² *McCulloch v. Maryland*, 17 U.S. 316 (1819) (18 books); *Lochner v. New York*, 198 U.S. 45 (1903) (18 books); *Marbury v. Madison*, 5 U.S. 137 (1803) (17 books); *Gibbons v. Ogden*, 22 U.S. 1 (1824) (17 books); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (17 books); and the *Slaughter-House Cases*, 83 U.S. 36 (1873) (16 books).

House Cases, *Plessy v. Ferguson*, and *Lochner v. New York* – are likely among them because they are among the Supreme Court's most infamous decisions.

As with the previous explanation for the shortage of Brandeis excerpts, though, this is a situation in which there is an understandable technical rationale that upon further review is still deeply unsatisfying. Just as the reasonableness of reserving of *Olmstead* for criminal procedure textbooks is undercut by its unfathomable omission from constitutional texts' coverage of the right to privacy, the sound reality that law school textbooks must concentrate on contemporary cases at the expense of historical ones is undercut by the unsound lack of prioritization for Brandeis among his historical contemporaries that was detailed above. To feature Brandeis no more often than colleagues who were either clearly inferior judicial craftsmen or who served on the Court for only a fraction of the time that Brandeis served is to deemphasize his historical jurisprudential importance and to shove him down to a reduced level that is indefensibly inaccurate.

IV. THE VIRTUES OF HISTORICISM IN CONSTITUTIONAL STUDY

The closing question of this piece is, naturally, why does this matter? Why is it important that a revered figure in American constitutional history is nevertheless being consigned to afterthought status in American legal education?

The legal academy's abnegation of Brandeis, at least in terms of what the academy transmits to its students, is troubling precisely because Brandeis transcends constitutional salience. Brandeisian ideals are not only important mileposts in the development of American law, but they are also seminal components of many of America's contemporary political debates.

Tea Party activists, wishing to limit the federal government's ability to interfere with states' policy experiments as laboratories of democracy, channel Louis Brandeis. So do gay rights advocates extolling the right of privacy which gave rise to sexual and reproductive freedom. Liberal or conservative, Democrat or

Republican or neither, the masses assembling in the public square of 2012 rely on Brandeis to backstop their principles and preferences. Whether we know it or not, we are all Brandeisian: now.

This troublesome nature of the ahistoricism of American legal pedagogy goes beyond Brandeis, even as he is its most obvious and unfortunate manifestation. In the abstract, the work of distinguished Supreme Court Justice fading into obscurity is a problem of debatable degree. American legal education may not really be any poorer for the fact that intimate knowledge of the jurisprudence of George Sutherland or Wiley Rutledge has lapsed. The fact that it is Brandeis who is vanishing – a Justice on the shortest of shortlists of giants of the Supreme Court – certainly makes the problem more visible and more glaring, but it may not necessarily make the problem more acute.

And yet, the disappearing jurisprudence of Louis Brandeis is a microcosm of a larger dynamic in legal education, especially as it is structured in law schools as opposed to undergraduate legal study. One of the many current crises buffeting law schools today is existential in nature. As current students and recent graduates face a permanently constricted job market, many of them are wondering – aloud, and highly publicly – just what “good” their law degree provides them.

In response to these pointed questions, law schools like to stress that they are not incubators for practical skills. Theirs is a richer and more intellectual enterprise, in which they provide students with analytical tools and grounding in how law works and how it develops.

Whether these assertions are worth the glossy brochure paper upon which they are printed is of course an open question. Theoretically, in an ideal world law schools would separate intellectual inquiries from practical ones exactly in the fashion that they were meant to do. But if American law schools are going to aspire to intellectualism as opposed to vocationalism, then omitting historical approaches to law in general, and to constitutional law in particular, undercuts this aspiration. In short, if legal education is going to do intellectualism, it should do it right.

But Brandeis' jurisprudence should be resonating for undergraduate legal study as well. One reason, as suggested above, is that many of the key debates in 20th and 21st century constitutionalism are rooted in Brandeisian principles; he is thus an ideal gateway into the subject of constitutional law.

Beyond jurisprudential impact, however, Brandeis matters for undergraduate legal study as an example of how law and judging can be purposive without being programmatic. The commonly told story of the Supreme Court under Earl Warren is an account of an agenda-driven Court, intent on remaking American politics and even American culture in a number of areas, such as race relations and the powers of the police.

The sloppy term "judicial activism" is often affixed to Warren Court liberalism, though as it can be affixed to the conservatism of the "Four Horsemen" or to their *Lochner*-era predecessors. In each case, "activism" is an unfriendly charge, a jurisprudence freighted with the stigma of personal political preferences.

Brandeisian jurisprudence is certainly animated by a particular philosophy: an antipathy for "bigness" and a desire for sound procedures. In this respect it shares some characteristics with Warren Court "activism." But where critics of the Warren Court decried its desire for results seemingly untethered to a reasoned elaboration of generally-applicable principles,⁴³ Brandeis' work is thematic without appearing to be aimed at case-specific outcomes. In short, for budding scholars who should be introduced to the ways in which law can be used to accomplish broad purposes, Brandeis represents a different way forward.

V. CONCLUSION

One recent series of judicial greatness surveys produced some revealing data which reflects the disappearance of Brandeis' work from legal education. Unlike other similar studies which were confined to polls of academics, Robert Bradley's study surveyed

professors, judges, attorneys and students (both law students and pre-law undergraduates). Among both the scholars and the judges, Brandeis was ranked fourth overall; among the attorneys, he was ranked third.

On the students' list, however, Brandeis was outside the top ten.⁴⁴

Given the fact that their textbooks are ignoring Brandeis' jurisprudential contributions to American law, students' refusal to assign Brandeis the level of stature he receives from older generations is hardly a bombshell revelation. If current pedagogical trends continue, however, Brandeis' importance in American law may eventually be lost to history.

APPENDIX

The eighteen textbooks used in this study are as follows:

- Barnett, Randy, *Constitutional Law* (Aspen, 2008)
 Brest, Paul; Sanford Levinson; Jack M. Balkin; Akhil Reed Amar; and Reva B. Siegel, *Processes of Constitutional Decisionmaking*, 5th ed. (Aspen, 2006)
 Chemerinsky, Erwin, *Constitutional Law*, 3rd ed. (Aspen, 2009)
 Choper, Jesse H.; Richard Fallon, Jr.; Yale Kamisar; and Steven H. Shiffrin, *Constitutional Law*, 10th ed. (West, 2006)
 Epstein, Lee; and Thomas G. Walker, *Constitutional Law for a Changing America*, 7th ed., (CQ Press, 2010)
 Farber, Daniel A.; William N. Eskridge, Jr.; and Philip P. Frickey, *Constitutional Law*, 4th ed. (West, 2009)
 Fisher, Louis; and Katy J. Harriger, *American Constitutional Law*, 8th ed., (Carolina Academic Press, 2009)
 Maggs, Gregory E.; and Peter J. Smith, *Constitutional Law: A Contemporary Approach* (West, 2009)
 Mason, Alpheus Thomas; and Donald Grier Stephenson, *American Constitutional Law*, 15th ed. (Pearson, 2007)

⁴⁴ BRADLEY, SELECTING AND RANKING GREAT JUSTICES: POLL RESULTS IN LEADERS OF THE PACK: POLLS AND CASE STUDIES OF GREAT SUPREME COURT JUSTICES (William D. Pederson & Norman W. Provizer eds, 2003).

⁴³ See generally Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARVARD LAW REVIEW 1 (1959); ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

- Murphy, Walter F.; James E. Fleming; Sotirios A. Barber; and Stephen Macedo, *American Constitutional Interpretation*, 4th ed. (Foundation Press, 2008)
- O'Brien, David M. *Constitutional Law and Politics*, 7th ed. (Norton, 2008)
- Paulsen, Michael Stokes; Steven G. Calabresi; Michael W. McConnell; and Samuel L. Bray, *The Constitution of the United States* (Foundation Press, 2010)
- Rossum, Ralph A.; and G. Tarr, *American Constitutional Law*, 8th ed. (Westview Press, 2009)
- Rotunda, Ronald D., *Modern Constitutional Law*, 9th ed. (West, 2009)
- Schultz, David; John R. Vile; and Michelle D. Deardorff, *Constitutional Law in Contemporary America*, (Oxford University Press, 2010)
- Stone, Geoffrey R; Louis Michael Seidman; Cass R. Sunstein; Mark V. Tushnet; and Pamela S. Karlan, *Constitutional Law*, 6th ed. (Aspen 2009)
- Sullivan, Kathleen M.; and Gerald Gunther, *Constitutional Law*, 17th ed. (Foundation Press, 2010)
- Varat, Jonathan D; William Cohen; and Vikram D. Amar, *Constitutional Law*, 13th ed. (Foundation Press, 2009)
- Six of these texts are designed for undergraduate constitutional law courses: Epstein/Walker, Fisher/Harriger, Mason/Stephenson, O'Brien, Rossum/Tarr, and Schultz/Vile/Deardorff. Five of these six texts are two-volume sets, geared toward the typical collegiate constitutional law regimen of separate semester classes in civil liberties and governmental powers/structure. Only the Mason/Stephenson text is a single volume designed for undergraduate courses.

The other twelve texts are law school casebooks.