From Progressivism to Modern Liberalism: Louis D. Brandeis as a Transitional Figure in Constitutional Law

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FROM PROGRESSIVISM TO MODERN LIBERALISM:
LOUIS D. BRANDEIS AS A TRANSITIONAL
FIGURE IN CONSTITUTIONAL LAW

David E. Bernstein*

INTRODUCTION

Many early-twentieth-century Progressives1 believed that the Constitution reflected anachronistic liberal individualism and natural rights ideology.2 Occasional judicial decisions that thwarted their favored reforms

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1 This Article refers to the post-Lochner, pre–New Deal opponents of liberty of contract, and other pre–New Deal proponents of government activism, as “Progressives,” and their ideology as “Progressivism,” with capital “Ps.” To the extent that “Progressive” is a less-than-precise descriptive term, it hopefully makes up for that lack of precision in consistency and brevity. Confusion sets in, of course, because many on the modern liberal-left choose to call themselves progressives, and refer to their preferred policies as progressive. To avoid this confusion the Article refers to those on the post–New Deal liberal left as “liberals,” and their ideology as modern “liberalism.”

provoked them further. As a result, some Progressive intellectuals, especially those associated with the pro-labor-union political left, became overtly hostile to the Constitution. 

Even those Progressives who were more favorably inclined to the Constitution typically loathed judicial review. Progressives thought that judicial review was undemocratic and that it put too much power over public policy in the hands of non-expert judges. Leading Progressive politicians, including Theodore Roosevelt, Senator William Borah, and Senator Robert LaFollette, sought in the 1910s and early 1920s to protect Progressive legislation by limiting judicial independence and the power of judicial review.

Progressive hostility to judicial review most often manifested itself in criticism of judicial opinions blocking labor and other regulations. But with the partial, post–World War I exception of freedom of expression—which was justified by Progressives not as an individual right but as a necessity for democracy to function properly in the public interest—thinkers on the Pro-
gressive left were typically as opposed to judicial intervention on behalf of what we now call civil liberties as they were to judicial intervention on behalf of economic rights.\footnote{See Ken I. Kersch, Constructing Civil Liberties 20 (2004).} For example, in his extremely influential book \textit{Progressive Democracy}, Herbert Croly criticized the Bill of Rights for turning the Constitution “into a monarchy of the Law superior in right to the monarchy of the people.”\footnote{Herbert Croly, \textit{Progressive Democracy} 55 (1914).} Morris Cohen, meanwhile, questioned the legitimacy of using judicial authority to invalidate legislation that infringed on individual liberty.\footnote{Morris R. Cohen, \textit{The Bill of Rights Theory}, \textit{New Republic}, June 17, 1925, 222, 222–23.}

Leading Progressive jurists naturally tended to be less hostile to the judiciary than were Progressives who were not attorneys. Nevertheless, these jurists strongly opposed judicial invalidation of economic legislation. They also were usually at best uninterested in judicial attention to civil libertarian concerns of the sort that helped define the liberal constitutionalism of the post–New Deal period.

Edward Corwin, anticipating the victory of Progressive constitutionalism, asserted in 1934 that the “twilight of the Supreme Court” was at hand.\footnote{See Edward S. Corwin, \textit{The Twilight of the Supreme Court} (1934).} As Corwin predicted, the New Deal ultimately triumphed over constitutional objections and the Supreme Court stopped seriously reviewing the constitutionality of economic legislation. Leading Progressive jurists such as Hugo Black and Felix Frankfurter joined the Court, and informed observers expected that the Court’s significance in American life would fade.

Contrary to expectations, however, the Supreme Court managed to retain its former significance—and then some—by gradually dispensing with Progressive hostility to judicial review and greatly expanding constitutional protections for civil liberties and civil rights.\footnote{See Kurt T. Lash, \textit{The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal}, 70 \textit{Fordham L. Rev.} 459, 460–65 (2001); see also Louis Michael Seidman, \textit{Left Out}, 67 \textit{Law & Contemp. Prosbs.} 23, 27 (2004) (“Beginning in the 1930s, and picking up momentum throughout the 1950s and 1960s, progressives abandoned scientism and anti-Lochnerism for the civil liberties position.”).} This was met with general approbation in liberal circles.\footnote{Some old Progressives, such as Learned Hand and Herbert Wechsler, objected. See generally Learned Hand, \textit{The Bill of Rights} 4 (1958) (“One cannot find among the powers granted to courts any authority to pass upon the validity of the decisions of another Department as to the scope of that Department’s powers.”); Herbert Wechsler, \textit{Toward Neutral Principles of Constitutional Law}, 73 \textit{Harv. L. Rev.} 1, 6 (1959) (“The duty, to be sure, is not that of policing or advising legislatures or executives, nor even, as the uninstructed think, of standing as an ever-open forum for the ventilation of all grievances that draw upon the Constitution for support.”). These objections, however, were met with vigorous criticism from a younger generation of liberals. See, e.g., Alexander M. Bickel, \textit{The Least Dangerous Branch} (1962); Charles L. Black, Jr., \textit{The Lawfulness of the Segregation Decisions}, 69 \textit{Yale L.J.} 421, 429 (1960); Louis H. Pollak, \textit{Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler}, 108 U. Pa. L. Rev. 1, 7–8 (1959).}
Indeed, among jurists who considered themselves to be on the non-Communist political left, the middle of the twentieth century witnessed a dramatic shift. Mainstream opinion in these circles evolved from an often statist or at least majoritarian and anti-judicial-review Progressivism to a liberal jurisprudence that supported a much broader civil libertarianism than even Progressive civil libertarians had fathomed. The Progressives’ strong aversion to a significant judicial role in American politics and government morphed into approval of strong judicial activism when it favored civil libertarianism and racial equality. This shift has received surprisingly little attention from scholars.

In *Rehabilitating Lochner*, I suggested several “externalist” reasons why New Dealers abandoned the statism of their Progressive forebears in favor of civil libertarianism:

First, judicial regard for civil liberties allowed New Dealers, within and outside the Court[,] to plausibly claim that they were committed to preserving individual rights even while vastly expanding the size and scope of the federal government. And while by the 1930s the Court’s liberty of contract decisions were very unpopular, its tentative forays into civil libertarianism . . . had received general public approbation. These decisions were especially popular among the ethnic and religious groups that formed the core of the New Deal coalition.

Second, judicial restraint always looks better when your side doesn’t control the courts. Once the “left” took over the Supreme Court, the idea that the justices should always defer to state legislatures became far less attractive. . . .

Third, the New Deal coalition included many intellectuals with a decidedly modern liberal, as opposed to old-fashioned Progressive, ideological bent. . . .

Fourth, the enthusiasm for government activism that the New Dealers inherited from the Progressives was tempered by the rise of fascism in Europe. . . .

Fifth, the elite bar received part of its prestige from the prominent role the Supreme Court played in American life. Once it became clear that the old constitutional order based on property rights and limited government was dead, elite attorneys quickly became advocates of an expanded role for the Supreme Court in protecting freedom of expression and minority rights. . . .

restraint mantra was instead taken up by conservatives. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 2 (1971).


Finally, and for many of the reasons noted above, the Roosevelt administration encouraged the Supreme Court’s emerging civil liberties jurisprudence.16

All of these factors deserve further exploration. They also need to be considered not just in light of the jurisprudence of the late 1930s and 1940s, but in light of the Warren Court’s increasingly assertive civil libertarianism in the 1950s and 1960s.

In this Article, however, I will focus on an “internalist” consideration, the role Justice Louis Brandeis played as a transitional figure in writing opinions that served as a bridge between the statist Progressives of the early twentieth-century and mid-century legal liberals.

Brandeis was known as a civil libertarian in his day because he supported freedom of speech and labor union rights, which were the rights that the nascent left-leaning civil libertarian movement held most dear.17 But Brandeis was far from a consistent civil libertarian as the term has been understood since at least the Warren Court period.

Nevertheless, Brandeis was responsible for guiding the Progressive wing of the Court away from the more consistently statist, deferential-to-democratic-majorities path charted by Justice Holmes to an agenda more accommodating to libertarian and equalitarian concerns.18 As we shall see, Brandeis refused to join a draft Holmes opinion endorsing state-imposed housing segregation.19 Brandeis also declined to join Holmes’s dissent in Meyer v. Nebraska,20 a seminal due process case. Both of these decisions by Brandeis ran contrary to general sentiment in Progressive legal circles at the time. Brandeis also famously advocated strong judicial protection for freedom of speech, likely influencing Holmes in the process. Finally, despite his general support for government action to enforce Prohibition, Brandeis wrote a famous dissent in Olmstead v. United States21 that Warren Court Justices later cited to justify a variety of liberal judicial opinions.

Part I of this Article discusses Brandeis’s many deviations from civil libertarianism as it came to be understood in the post–New Deal period. These deviations include his acquiescence to coercive eugenics, his general lack of interest in African American rights, his support for protective labor legislation for women and concomitant disregard for women’s legal equality, his toleration of government abuses attendant to Prohibition enforcement, and his desire to repeal the Fourteenth Amendment. Part II shows that despite these deviations, Brandeis had a significantly stronger record on civil liberties as a Supreme Court Justice than one would expect from someone of his Pro-

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17 See Weinrib, supra note 15, at 385.
18 Cf. Gillman, supra note 14, at 117 (noting that facing a choice between Holmesian judicial restraint and Brandeis’s willingness to protect fundamental rights, many liberals chose the Brandeisian path).
19 See infra notes 76–79 and accompanying text.
20 262 U.S. 390 (1923).
21 277 U.S. 438 (1928).
gressive outlook and background. Brandeis’s votes in favor of civil liberties created a civil libertarian corpus from the Progressive wing of the Supreme Court. This prevented judicial protection of what became core civil libertarian concerns from being associated primarily with the soon-to-be-discredited “Lochner Court.”

I. BRANDEIS WAS NOT A CONSISTENT CIVIL LIBERTARIAN

Not all early twentieth-century jurists with Progressive inclinations were identified with the political left. Among those who were, few had sensibilities similar to the liberal Earl Warrens and William Brennans of a later period. Progressive opposition to judicial interference with economic regulation combined with Progressivism’s majoritarianism, positivism, and enthusiasm for entrusting governing matters to social science experts led Progressives to be skeptical of judicial power.

Progressives interested in legal matters typically determined the merit of a Supreme Court Justice primarily by how deferential his rulings were to economic regulation. Justices Brandeis and Holmes were the most consistent and persistent supporters of judicial restraint in economic matters in the pre–New Deal period, and therefore became the most admired Justices by far among the left-leaning Progressive cohort.

The epic battle over the constitutionality of New Deal legislation cemented a Manichean understanding of the Supreme Court and its Justices. The “Four Horsemen” who opposed the New Deal were deemed evil reactionaries whose jurisprudence, including their pre–New Deal jurisprudence, must be utterly discredited. Brandeis, Holmes, and their judicial allies and successors, meanwhile, were the heroes of the story.

Brandeis’s and Holmes’s heroic status should have created some dissonance for the liberal left when strong judicial action on behalf of civil rights

22 I put *Lochner* Court in quotations because it’s anachronistic. The notion that the pre–New Deal Court should be deemed the “*Lochner* Court” or the era deemed the “*Lochner* era” did not arise until the 1970s. See Bernstein, supra note 16, at 108–09.

23 See id. at 23–24.

24 By contrast, perhaps the Justice with the most consistent pro-civil liberties and civil rights record on the Supreme Court in the pre–New Deal era was Charles Evans Hughes, who served from 1910 to 1916 and again as Chief Justice from 1930 on. Hughes, however, did not receive nearly the credit for his record on civil liberties that Holmes and Brandeis did. In part, this is likely because he missed the early free speech cases that so influenced Holmes’s and Brandeis’s reputations as civil libertarians. But it is likely also in part because he was much more tolerant of the majority’s pre–New Deal jurisprudence than were Holmes and Brandeis. See American Lawyers Welcomed in Historic Westminster Hall, 10 A.B.A. J. 565, 569 (1924) (providing speech by then-ABA President Charles Hughes defending the Supreme Court from attacks by left-leaning Progressives).

and civil liberties became a key item on the liberal political agenda. Brandeis and even more so Holmes were not consistent supporters of what post–New Deal liberals deemed crucial civil rights and civil liberties, and the “Four Horsemen” were not consistent opponents. Indeed, some of the latter Justices had an overall record more favorable to some civil liberties than did the former.26

Post-war legal scholars and commentators, however, chose to paper over the differences between the emerging liberal constitutional outlook and the views of Brandeis, Holmes, and other jurists associated with Progressivism. During the Warren Court period, Holmes and Brandeis were both widely admired on the liberal left. Indeed, despite strong evidence to the contrary, both were commonly described as consistent civil libertarians willing to use judicial power to protect individual rights. Political scientist Samuel Konefsky, for example, asserted in 1956 that “in all of the really crucial civil liberties cases, Holmes and Brandeis stood together on the side of the claimed right.”27

This understanding of Holmes became increasingly discredited as later biographers described his misanthropic, Darwinian view of the world that left little room for the notion of inherent individual rights against government oppression.28 Brandeis, however, is still commonly and without caveat described as a courageous civil libertarian.29


29 See David P. Currie, The Constitution in the Supreme Court 272 (1990) (asserting that Brandeis was “sensitive to civil rights and liberties”); John J. Guthrie, Jr., Keepers of the Spirits 46 (1998) (“[Brandeis] was a longtime champion of civil liberties . . . .”); Milton R. Konvitz, Nine American Jewish Thinkers 70 (2000) (“A major contribution of Justice Brandeis was to deepen public consciousness of the significance of civil liberties.”); Samuel Walker, Presidents and Civil Liberties from Wilson to Obama 75 (2012)
Yet Brandeis was not a consistent civil libertarian if judged by anything but the standards of the Progressive circles of his own day. Brandeis cheerfully voted to uphold some of the great abuses of government power that came before the Court. He not only joined Justice Holmes’s eight-to-one majority opinion in *Buck v. Bell* upholding coercive sterilization of women deemed unfit to have children, but apparently did so, unlike some of his colleagues, without reluctance. A year later—in his famous civil libertarian dissent in *Olmstead v. United States*, no less—Brandeis cited *Buck* favorably as an example of the Supreme Court keeping up with the times. And while opposition to coercive sterilization was not part of the mainstream “civil liberties” agenda of the Progressive left, Brandeis ignored significant opposition to such sterilization emanating from both within and without the judicial system.

During the 1920s, alcohol Prohibition and its enforcement unleashed an unprecedented wave of federal government intrusion on individual rights. Brandeis supported Prohibition and generally voted to permit enforcement even when the government engaged in dubious practices that critics argued violated citizens’ rights. Brandeis voted to allow the government to confis-

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cate a car because a passenger was carrying a small container of whiskey, rejected a Double Jeopardy Clause challenge to the federal government prosecuting a defendant separately for possessing and selling the same liquor, and affirmed that the government could close distilleries without compensation.

Brandeis wrote a famous opinion in *Olmstead* taking an expansive view of the Fourth Amendment but in other cases did not take a broad view of the Amendment’s protections. For example, in *Carroll v. United States*, the Supreme Court upheld a warrantless search of a car on suspicion of transporting alcohol. The majority, including Justice Brandeis, concluded that automobiles do not get the same protection from searches as private dwellings. Justices James McReynolds and George Sutherland dissented. More generally, the latter two Justices, along with Justice Pierce Butler, were far more likely to dissent from Fourth Amendment decisions that upheld law enforcement actions challenged as unconstitutional than was Brandeis.

Biographies of Brandeis, especially in popular sources, frequently state that he championed women’s rights. In fact, Brandeis was a late and unenthusiastic convert to the cause of women’s suffrage. His famous “Brandeis brief” in *Muller v. Oregon* is replete with outright sexism. While Brandeis supported his own daughter’s professional ambitions, he allied himself with elements of the Progressive movement that supported manifold restrictions on women’s legal rights in the workplace.

Brandeis was perhaps a product of his times, and his views were in line with those of female reform advocates such as Florence Kelley. Like Kelley, however, Brandeis was much more interested in protective labor legislation for women as a precedent for general economic reform than with the question of whether it advanced or harmed the cause of women’s rights. Brandeis therefore discounted the views of a rising generation of feminist activists.

36 See Albrecht v. United States, 273 U.S. 1, 11 (1927).
37 See Jacob Ruppert Co. v. Caffey, 251 U.S. 264, 302–03 (1920).
39 See id. at 153.
40 Id. at 163 (McReynolds & Sutherland, JJ., dissenting).
41 See Powe, supra note 26, at 193; Strum, supra note 26, at 330.
45 See id. at 12.
46 See Bernstein, supra note 16, at 59–60.
who argued that protective labor laws both harmed women workers and entrenched women’s legal inferiority.\(^{47}\)

Women’s legal equality was certainly not beyond his contemplation. Brandeis’s Supreme Court colleague George Sutherland was a strong advocate of women’s legal equality in both his pre-Court and Supreme Court careers. As a Senator, Sutherland introduced the Nineteenth Amendment in the Senate, and later helped draft the proposed Equal Rights Amendment, which Brandeis’s Progressive allies strongly opposed.\(^{48}\) Sutherland’s opinion for the Supreme Court majority in \textit{Adkins v. Children’s Hospital} contained the strongest rhetoric favoring women’s legal equality that the Court would muster for several decades.\(^{49}\) Oddly, Sutherland has generally received little credit for his support of women’s rights, perhaps because he has gone down in history as a “conservative” Justice. Meanwhile, Brandeis’s reputation as a strong supporter of women’s rights seems more a product of modern views of what an early twentieth-century Progressive should have stood for than of Brandeis’s actual record on the subject.

With regard to the rights of African Americans, meanwhile, unlike his fellow Woodrow Wilson Supreme Court appointee, James McReynolds, Brandeis does not seem to have evinced any personal hostility to African Americans. And Brandeis privately expressed support for Felix Frankfurter’s work with the NAACP. Perhaps this was because Brandeis was raised in a Jewish immigrant household by parents with liberal political views who had themselves faced ethnic discrimination in Bohemia.

Nevertheless, in general Brandeis had a “remarkable indifference to matters of race.”\(^{50}\) Brandeis does not, for example, seem to have used his considerable influence to object to Wilson’s policy of segregating the federal workforce, a policy that was devastating to the career prospects of black civil servants.\(^{51}\) Brandeis later missed his most significant chance to criticize the “separate-but-equal doctrine” when he joined the Supreme Court’s unanimous opinion in \textit{Gong Lum v. Rice}.\(^{52}\)

Brandeis also privately advocated repeal of the entire Fourteenth Amendment to prevent what he saw as the misuse of the Amendment by judges skeptical of economic regulation.\(^{53}\) He expressed no concern that such a repeal would severely diminish African Americans’ opportunity to appeal to the Constitution in pursuit of legal equality, even though the Court


\(^{48}\) See \textit{BERNSTEIN}, supra note 16, at 69.

\(^{49}\) See \textit{Adkins v. Children’s Hosp.}, 261 U.S. 525, 539–62 (1923).

\(^{50}\) UROFSKY, supra note 29, at 639 (internal quotation marks omitted).

\(^{51}\) See \textit{id.} at 640; Erie S. Yellin, \textit{Racism in the Nation’s Service} 205–06 (2013).

\(^{52}\) See \textit{Gong Lum v. Rice}, 275 U.S. 78, 87 (1927). \textit{Gong Lum} affirmed Mississippi’s policy of assigning Chinese students to “colored schools” without a hint of any discomfort by the Justices with the separate-but-equal doctrine. \textit{Id.} at 83, 87.

had started to rule in favor of African American plaintiffs pursuing civil rights claims in the 1910s.\footnote{See, e.g., Buchanan v. Warley, 245 U.S. 60, 82 (1917) (noting that racial discrimination is not a valid purpose to uphold a law); McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151, 163 (1915) (stating that a law providing for “separate but equal” but allowing trains to provide sleeping cars only to whites likely violated the Fourteenth Amendment, but dismissing a challenge to the law at issue on procedural grounds); Bailey v. Alabama, 219 U.S. 219, 244 (1911) (holding peonage laws a violation of the Thirteenth Amendment).} Felix Frankfurter, by contrast, apparently wanted to eliminate only the Due Process Clause while retaining the Equal Protection Clause.\footnote{See Urofsky, supra note 53, at 318–20. Frankfurter maintained his hostility to enforcement of the Due Process Clause for many decades. See Morton J. Horwitz, The Transformation of American Law 1870–1960, at 340 n.83 (1992).}

Biographer Philippa Strum concludes that the “precise explanation” for Brandeis’s failure to object to the separate-but-equal doctrine “remains a mystery.”\footnote{Strum, supra note 26, at 334.} Melvin Urofsky, by contrast, suggests that Brandeis “shared the attitude of most other progressive reformers, whose agenda did not include racial equality.”\footnote{Urofsky, supra note 29, at 640.} Brandeis’s indifference to racial matters becomes even less remarkable if one recalls an additional biographical detail—Brandeis, like the President who appointed him to the Supreme Court, was a Southern Democrat who moved north as an adult.\footnote{See Richard A. Posner, The Rise and Fall of Judicial Self-Restraint, 100 Cal. L. Rev. 519, 528 (2012) (describing Brandeis as “a Jeffersonian with a Southerner’s hostility to strong central government (he was from Kentucky, after all, though he was not your typical Kentuckian”). I thank Brad Snyder for raising this point.}

Even Brandeis’s renowned support for freedom of speech is subject to some caveats. First, he had evinced little interest in freedom of expression before he joined the Supreme Court. Indeed, he was co-author of a famous article on the “right to privacy” that advocated restrictions on press freedom in the name of right of publicity.\footnote{See Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890). Neil Richards suggests that Brandeis co-authored the article with Warren reluctantly, and later came to be ambivalent about the tort theory he had embraced in the article. See Neil M. Richards, The Puzzle of Brandeis, Privacy, and Speech, 63 Vand. L. Rev. 1295, 1300–02 (2010).} Second, Brandeis’s defense of free speech was mostly instrumental, resulting from “a conviction that the exercise of free expression would in time make the public politically conscious” and favor Progressive public policy.\footnote{Bernard H. Siegan, Economic Liberties and the Constitution 122 (2d ed. 2006); see G. Edward White, The Constitution and the New Deal 139–40 (2000).}

Third, and relatedly, Brandeis favored freedom of speech primarily to protect political debate. Prior generations of free speech radicals had sought broad protection for a wide range of expression.\footnote{On these free speech radicals, see Rappaport, supra note 4, at 23–87. Free speech also had its champions earlier in the nineteenth century. These advocates relied on property
non-political speech came before the Supreme Court during Brandeis’s tenure, and it’s not clear he would have supported judicial protection of such speech. Fourth, unlike Sutherland, Brandeis had little sympathy for businesses that asserted the right to express the owners’ political point of view in the face of Progressive regulation that prohibited it.  

Fifth, Brandeis had significant reservations about using the Fourteenth Amendment to limit states’ infringement on freedom of speech because he believed that the Amendment did not protect substantive rights. Brandeis ultimately became an advocate of using the Amendment to protect freedom of speech, but only because he believed that if the Court was using the Fourteenth Amendment to protect economic rights, speech rights—which he thought were of far greater importance—must also be protected. In *Gilbert v. Minnesota* he wrote, “I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property.”  

In *Whitney v. California*, Brandeis emphasized that while it was “settled” law “that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure,” he found arguments to the contrary “persuasive.” These opinions suggest that Brandeis “would have dutifully refused to protect the liberty of discussion [under the Due Process Clause] had conservative justices correctly refused to protect the liberty of contract.”

Historian G. Edward White concludes that rather than being a consistent civil libertarian, Brandeis “occasionally approximated the stance of a civil libertarian,” and then only to the extent that he believed that enforcing civil liberties would ultimately further the social policies he favored. Even if that is an unduly ungenerous assessment, Brandeis’s reputation as a consistent civil libertarian as the term has been understood in modern times is greatly exaggerated.

II. BRANDEIS AS A TRANSITIONAL FIGURE

Though Brandeis was far from a consistent civil libertarian, he had a far better record on civil rights and civil liberties than one might expect given his Progressive background. As noted previously, many Progressives, especially those on the more statist, left-wing end of Progressivism, were very skeptical of judicial intervention to protect constitutional rights. Some rights to support their claims, which was a non-starter for Progressives like Brandeis. *See Michael Kent Curtis, Free Speech, “The People’s Darling Privilege” 205–40, 250–55, 393–95 (2000).*

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63 *254 U.S. 325, 343 (1920) (Brandeis, J., dissenting).*


65 *Mark A. Graber, Transforming Free Speech 78 (1991).*

66 *G. Edward White, The American Judicial Tradition 139 (3d ed. 2006).*
Progressives were hostile to the very notion of individual rights against government. Justice Holmes, though not at heart a Progressive himself, was these Progressives’ judicial hero. As we shall see below, Brandeis was significantly more willing than Holmes to vote to protect civil rights and civil liberties.\textsuperscript{67} Brandeis’s opinions allowed future liberal Justices to cite pre–New Deal cases he authored or endorsed as reflecting proper judicial solicitude for fundamental rights.\textsuperscript{68}

\textbf{A. The Rights of African Americans}

Justice Holmes likely had the least sympathetic record of any Justice to the rights of African Americans in the first two decades of the twentieth century, at least until James McReynolds joined the Court in 1915.\textsuperscript{69} Holmes, for example, dissented in \textit{Bailey v. Alabama} when the Court invalidated a law that effectively kept African Americans in a state of peonage.\textsuperscript{70} Holmes also declined to join the majority’s opinion in \textit{McCabe v. Atchison, Topeka & Santa Fe Railway Co.}\textsuperscript{71} \textit{McCabe} stated that the separate-but-equal principle required that African Americans be guaranteed access to the same quality of train accommodations as whites.\textsuperscript{72} Holmes wrote a memorandum to Chief Justice Hughes expressing his disagreement with the majority.\textsuperscript{73} The memo argued that requiring train companies to supply first-class cars to African Americans only when it was economically profitable to do so constituted “logically exact equality.”\textsuperscript{74} Hughes rejoined that providing whites, but not African Americans, with the opportunity to endure a long train journey in first-class accommodations was “‘a bald, wholly unjustified discrimination against a passenger solely on account of race.’”\textsuperscript{75}

Soon after Brandeis joined the Court, the Justices heard a challenge to a Louisville, Kentucky law that required residential segregation. The challenge in \textit{Buchanan v. Warley} alleged that the law violated freedom of contract and

\begin{itemize}
\item \textsuperscript{67} Cf. Stephen M. Feldman, \textit{Free Expression and Democracy in America} 284 (2008) (noting that Brandeis was more concerned about civil liberties than was Holmes). This is not to say, however, that Holmes never had his moments, even outside the free speech area. In particular, Holmes vigorously opposed convictions obtained under circumstances of mob rule. \textit{See} Moore v. Dempsey, 261 U.S. 86, 87–92 (1923) (Holmes, J.); Frank v. Mangum, 237 U.S. 309, 345–50 (1915) (Holmes & Hughes, JJ., dissenting); \textit{cf.} United States v. Shipp, 203 U.S. 563, 573–74 (1906) (Holmes, J.) (permitting the Court to take jurisdiction for a contempt hearing for a sheriff who allowed a black defendant to be lynched rather than comply with an injunction).
\item \textsuperscript{68} See Gillman, supra note 14, at 117.
\item \textsuperscript{69} See Randall Kennedy, \textit{Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt}, 86 COLUM. L. REV. 1622, 1642–44 (1986) (describing instances of the influence of race on the decisions of Justice Holmes).
\item \textsuperscript{70} See Bailey v. Alabama, 219 U.S. 219, 245 (1911).
\item \textsuperscript{71} 235 U.S. 151 (1914).
\item \textsuperscript{72} See id. at 163–70.
\item \textsuperscript{73} See Alscher, supra note 28, at 56.
\item \textsuperscript{74} Id. (internal quotation marks omitted).
\item \textsuperscript{75} Id. (quoting 1 Merlo J. Pusey, \textit{Charles Evans Hughes} 291 (1951)).
\end{itemize}
property rights. The case turned on whether the state’s claimed police power interests in promoting public health and property values, and in preventing racial violence, were sufficient to overcome the segregation law’s infringement on these rights.

Progressive sentiment, even among those who opposed residential segregation on policy grounds, overwhelmingly favored upholding the law as a social experiment well within the police power. Consistent with this sentiment, Justice Holmes drafted an opinion upholding the law as a proper police power measure. None of the other eight Justices was willing to join him. Ultimately the opinion sat in Holmes’s private papers, undelivered. What motivated Justice Brandeis to decline to join Holmes’s draft in Buchanan is unclear; as a Louisville native, Brandeis likely took a particular interest in the case.

*Buchanan* was an important case for a variety of reasons. Not least, it marked a turning point in the Court’s jurisprudence on the rights of African Americans. According to one tally, the Supreme Court heard twenty-eight cases involving African Americans and the Fourteenth Amendment between 1868 and 1910. Of these, African Americans lost twenty-two. However, between 1920 and 1943, African American Supreme Court litigants won twenty-five of twenty-seven Fourteenth Amendment cases.

While Brandeis failed to write any majority opinions dealing with racial issues, he did not try to impede the Court’s emerging civil rights jurisprudence the way Holmes did in *McCabe*. If, counterfactually, Justice Brandeis had joined a published Holmes dissent in *Buchanan*, it might have associated Progressive jurisprudence strongly with acquiescence to Jim Crow. If the two

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76 245 U.S. 60, 61 (1917).
77 For a discussion of these rationales and their sufficiency in regard to the police power, see Bernstein, supra note 16, at 68–78.
81 See Bernard H. Nelson, *The Fourteenth Amendment and the Negro Since 1920*, at 9–15 (photo. reprint 1946); see also Urofsky, supra note 29, at 639 (identifying *Buchanan* as “the first major race case” after Brandeis joined the Court, which was one of several major cases where “the Court upheld black petitioners”).
82 Nelson, supra note 81, at 13.
83 Id. at 13–14.
84 See id. at 162. Of course, numbers don’t tell the entire story, but it seems clear that the Supreme Court became a much more favorable venue for African American litigants after *Buchanan* than it had been previously.
Justices most admired by Progressives had dissented in *Buchanan*, it might also have called *Buchanan*’s precedential authority into question when a Progressive/liberal majority took over the Supreme Court. *Buchanan* was already a shaky precedent because the case was a due process liberty of contract and property rights opinion, not an equal protection opinion—and substantive protection of “economic” rights soon fell out of the Supreme Court’s favor.

But because Holmes and Brandeis ultimately joined a unanimous *Buchanan* opinion, future liberal Supreme Court Justices were able to cite *Buchanan* favorably in such notable opinions as *Shelley v. Kraemer* \(^{85}\) and *Bolling v. Sharpe*,\(^{86}\) and do so without trepidation that they were citing an opinion supported only by “conservative” Justices who favored liberty of contract and property rights opposed by the Court’s Progressives. This does not mean that *Shelley* and *Bolling* would have come out differently but for *Buchanan*. It does, however, mean that the Court in those cases had a useful precedent to rely on to proactively rebut claims that their decisions were unprecedented and therefore less legitimate.

### B. Civil Liberties Under the Due Process Clause

Chief Justice Taft assigned authorship of the Court’s seminal civil liberties opinions in *Meyer v. Nebraska*,\(^{87}\) *Pierce v. Society of Sisters*,\(^{88}\) and *Farrington v. Tokushige*\(^{89}\) to Justice James McReynolds. Unlike many of Justice Brandeis’s Progressive allies, however, Brandeis supported this jurisprudence. And unlike Justice Holmes, who dissented in *Meyer*, Brandeis voted with McReynolds in each of these cases.

*Meyer* involved a Nebraska law banning the teaching of foreign languages in school. The law, which had origins in both World War I–inspired nativism\(^{90}\) and Progressive efforts to use the educational system to homogenize the population,\(^{91}\) was a precursor to efforts to entirely ban private schooling. The Court issued a seven-to-two opinion invalidating the law, with Justice Holmes dissenting, joined by Justice Sutherland.\(^{92}\)

Justice Brandeis joined the majority even though he supported limiting the Due Process Clause to procedural matters, or even repealing it entirely. Brandeis thought that educational freedom and other personal liberties should be given at least as much weight as the economic concerns to which

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85 334 U.S. 1, 10 n.6 (1948).
87 262 U.S. 390 (1923).
88 268 U.S. 510 (1925).
89 273 U.S. 284 (1927).
91 See Kersch, supra note 8, at 257.
92 Brandeis apparently tried to persuade Holmes not to dissent in *Meyer v. Nebraska*, but was unsuccessful. See Strum, supra note 26, at 322.
the Clause had previously been applied. Since the Court’s majority insisted on applying the Clause to substantive matters at all, he insisted that what he saw as fundamental liberties should be among those protected. Biographical idiosyncrasies also may have played a role in Brandeis’s decision to join the majority; as a child, he attended a German-language elementary school co-founded by his father.

Progressives normally allied with Brandeis were critical of the majority opinion in Meyer. Felix Frankfurter, for example, wrote to Judge Learned Hand that while he regarded “such know-nothing legislation as uncivilized,” he would still have voted with Holmes rather than “lodging that power in those nine gents at Washington.” Hand agreed, and added that “I can see no reason why, if a state legislature wishes to make a jackass of itself by that form of Americanization, it should not have the responsibility for doing so rather than the Supreme Court.” Frankfurter effusively praised Holmes’s dissent in the companion case of Bartels v. Iowa, even inaccurately giving Holmes credit for voting to uphold legislation he opposed. Many years later, Frankfurter, by then a Justice himself, told a Supreme Court colleague that the Meyer dissenters were correct.

Two years after Meyer, in Pierce v. Society of Sisters, the Supreme Court unanimously invalidated an Oregon law banning private schooling. Justice Holmes this time joined the majority, perhaps because he believed that the Meyer precedent dictated that vote. Progressive jurists, however, continued to object to judicial interference in state and local education policies. In

93 See Urofsky, supra note 53, at 320. Frankfurter’s notes state that he agreed with Brandeis, contrary to his letter to Hand suggesting that he would have voted the other way in Meyer. See id. Frankfurter, of course, is notorious for currying favor with the powerful, so perhaps it is not surprising that he told both Brandeis and Hand that he agreed with their respective positions.
95 Gerald Gunther, Learned Hand 322 (2011).
96 Id. See generally Note, Constitutional Law—“Liberty” Under Fourteenth Amendment—Validity of Foreign Language Statutes, 22 Mich. L. Rev. 248, 251 (1924) (accusing the majority of reverting to an “individualism now rather generally discredited” and praising Justice Holmes’s approach to the Fourteenth Amendment).
97 262 U.S. 404, 412 (1923) (Holmes, J., dissenting).
98 See Felix Frankfurter, Mr. Justice Holmes and the Constitution: A Review of His Twenty-Five Years on the Supreme Court, 41 Harv. L. Rev. 121, 155 n.84 (1927).
100 268 U.S. 510, 530–36 (1925).
particular, Frankfurter criticized Pierce in a column in *The New Republic*.101 Two decades later, with the benefit of hindsight, and even though the Fourteenth Amendment no longer posed a threat to labor and other Progressive legislation, Frankfurter remained hostile to Pierce.102

*Meyer* and *Pierce* later became important precedents cited by liberal members of the Supreme Court to support aggressive judicial review of laws that interfered with what they saw as fundamental liberties.103 Indeed, *Meyer* and *Pierce*, along with *Buchanan v. Warley*, were among the first Supreme Court opinions to hold that fundamental rights can trump assertions of valid police power concerns by the states.104

If Brandeis had aligned himself with Holmes and Frankfurter, *Meyer* and *Pierce* would likely have been radioactive to Warren Court liberals. McReynolds, the Justice generally deemed the most reactionary of the Court’s conservatives, wrote the opinions, and they were issued during the Court’s most “conservative” period on economic issues. Instead, with Justice Brandeis in the majority in *Meyer*, and Justices Holmes and Brandeis in the majority in *Pierce*, future liberals could safely cite these cases as being within the Progressive/liberal tradition.

### C. Fourth Amendment

Despite Justice Brandeis’s mixed record on the Fourth Amendment, noted above,105 he authored a famous and very influential dissent in the five-to-four decision in *Olmstead v. United States*.106 Brandeis argued that the Fourth Amendment prohibits warrantless wiretapping.107 He also wrote *Gambino v. United States*, which reaffirmed the exclusionary rule originally adopted in *Weeks v. United States*109 in 1914.

As Ken Kersch explains, Brandeis’s Fourth Amendment opinions are extremely important because the Amendment had long been associated with restrictions on the government’s ability to regulate and investigate business.110 For example, the first important Fourth Amendment case, *Boyd v.*
United States, involved the federal government’s attempt to obtain business records pertinent to a dispute over customs duties.\textsuperscript{111} Progressives, Justice Brandeis included, strongly opposed giving businesses rights that impeded government investigations.\textsuperscript{112} Moreover, Fourth Amendment jurisprudence had been propertarian, and strong property rights were anathema to Progressive supporters of the emerging regulatory state.

In Olmstead, Brandeis reimagined the Fourth Amendment as protecting individual privacy, autonomy, and intellectual freedom against the government.\textsuperscript{113} He emphasized the “right to be let alone,” which he deemed “the most comprehensive of rights and the right most valued by civilized men.”\textsuperscript{114} This conception of the Fourth Amendment could provide robust protections for individual citizens—including suspected criminals—from the government, while offering little solace to a Fortune 500 company facing a congressional subpoena or a massive document “request” from a government agency.

It took some time for the post–New Deal Supreme Court to utilize the Fourth Amendment to broadly protect the public against “unreasonable searches and seizures.”\textsuperscript{115} The liberal members of the Warren Court only acted when the authority of government to intervene in private business was secured, and the imperatives of the civil rights movement impelled them to take a stand on behalf of African American criminal defendants facing a hostile legal system.\textsuperscript{116}

The idea of using the Fourth Amendment to protect suspected criminals was hardly original to Brandeis.\textsuperscript{117} The non-Progressive Justices who fought against Prohibition’s excesses frequently sought to use the Amendment in ways that would protect suspected bootleggers and others who ran afoul of Prohibition enforcement. But the liberal narrative that came to dominate the legal history of the pre–New Deal period failed to recognize any positive contributions by Butler, McReynolds, and other “conservatives.”\textsuperscript{118}

Instead, when the liberal Warren Court chose to revive the Fourth Amendment as a check on state criminal procedure, it sought precedent writ-

\textsuperscript{111} See \textbf{Boyd v. United States}, 116 U.S. 616, 617–18 (1886).
\textsuperscript{113} See \textbf{KERSCH, supra note 8}, at 80.
\textsuperscript{114} \textbf{Olmstead v. United States}, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
\textsuperscript{115} \textbf{U.S. Const. amend. IV}.
\textsuperscript{116} See \textbf{KERSCH, supra note 8}, at 58.
\textsuperscript{117} Justices Butler and McReynolds were strong advocates of broad Fourth Amendment protections for suspects in Prohibition cases. See \textbf{KENNETH M. MURCHISON, FEDERAL CRIMINAL LAW DOCTRINES} 74–82 (1994).
\textsuperscript{118} See \textbf{KERSCH, supra note 8}, at 33.
ten by a Progressive Justice in a non-corporate case. And that, along with Brandeis’s brilliant rhetoric, turned Olmstead into a canonical Fourth Amendment case. Meanwhile, by articulating a broad right to “be let alone,” Brandeis’s Olmstead opinion also planted the seeds of the due process right to privacy the Supreme Court recognized in Griswold v. Connecticut.119

D. Freedom of Speech

While Progressives had varying views about the scope and importance of freedom of speech, through the late 1910s, there was widespread agreement that legal protection for freedom of speech should not be pursued through the courts. Judicial protection of freedom of speech ran contrary to Progressive hostility to judicial review, to natural rights, and to the notion that the political process must be tempered lest it threaten individual liberty. Progressive political scientist Edward S. Corwin, for example, criticized the nascent “clear and present danger” doctrine in 1920.120 He wrote that “the cause of freedom of speech and press is largely in the custody of legislative majorities and of juries, which . . . is just where the framers of the Constitution intended it to be.”121

Progressive critics of judicial protection of freedom of speech often drew an analogy to the hated liberty of contract doctrine. Professor Herbert Goodrich for example, argued that “the same kind of argument and the same line of thought which upholds a law which restricts a man in the contracts he may make . . . uphold[s] a law limiting the exercise of his tongue when the majority so wills it.”122

Not surprisingly, the Progressives’ champion on the Supreme Court, Justice Holmes, initially expressed no sympathy for judicial protection for freedom of expression. As late as June 1918, Holmes told Learned Hand that free speech “stands no differently than freedom from vaccination.”123 The Court had soundly rejected a claim for freedom from vaccination in a 1905 opinion joined by Holmes.124

At least among Progressives who identified with the political left, wariness of judicial recognition of individualistic speech rights was tempered by the trauma of wartime repression of pacifists and other dissenters and the post-War “red scare.”125 With labor radicals, pacifists, socialists, and other left-wingers being jailed or deported, constitutional protection of freedom of

121 Id.
123 Bernstein, supra note 16, at 99.
speech became an important item on the left’s agenda, especially among the left’s more radical elements.

Justice Holmes, pressured by young acolytes who favored judicial protection of freedom of speech, and perhaps influenced by his colleague Justice Brandeis, began to articulate an increasingly speech-protective understanding of the First and Fourteenth Amendments. But Brandeis, not Holmes, turned out to be the Court’s strongest proponent of freedom of speech. For example, in 1920, in *Gilbert v. Minnesota*, Justice Holmes joined the majority in upholding a state law penalizing interference with or discouragement of enlistment in the military. Justice Brandeis argued in dissent that the Fourteenth Amendment protected the freedom “to teach, either in the privacy of the home or publicly, the doctrine of pacifism.” A year later, it was Brandeis who persuaded Holmes to dissent in *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*.

The rest of the Supreme Court also became increasingly supportive of freedom of speech. In 1925 in *Gitlow v. New York*, the Court recognized that speech was one of the rights protected against arbitrary state action by the Due Process Clause of the Fourteenth Amendment. The majority’s conception of the scope of freedom of speech, however, remained largely traditionalist in nature. Freedom of speech did not overcome ancient common law restrictions on speech. More generally, laws that impinged on freedom of expression were subject to the same sort of standard police power analysis that had limited liberty of contract and other rights.

Meanwhile, consistent with their opposition to constitutional individualism, leading Progressive defenses of freedom of expression, such as Zechariah Chafee’s, relied on utilitarian considerations and not on freedom of expression as a fundamental individual right. The Progressive identification of freedom of speech as a civil liberty was intended to differentiate it from what Progressives understood to be the obsolete, individualist, natural-rights based liberties of the American past. While activist government was inimical to such rights as liberty of contract and property rights, it arguably

128 Id. at 343 (Brandeis, J., dissenting).
129 255 U.S. 407 (1921); see Stephen M. Feldman, *Free Expression and Democracy in America* 284 (2008) (“In fact, Holmes admitted that he originally planned to vote to uphold the conviction in Milwaukee Social Democratic; Brandeis persuaded him to dissent.”).
130 This also caused a virtuous circle—one the Court suggested that it would protect speech, more speech cases started turning up on its docket, which in turn gave the Court opportunities to expand the scope of speech protections. The author thanks Mel Urofsky for raising this point.
buttressed a Progressive case for freedom of speech. According to Progressive advocates of constitutional protection for freedom of expression, the more active a role played by government, the more important it is to ensure that public policy is subject to vigorous and uninhibited debate. Such debate not only could bring important considerations to light, but also could serve as a check on those who would use public power for private gain.

In 1927, Justice Brandeis penned an extraordinarily influential concurrence supporting constitutional protection for freedom of speech in *Whitney v. California*.134 One scholar deems it “arguably the most important essay ever written, on or off the bench, on the meaning of the first amendment.”135 Consistent with his Progressivism, Brandeis defended freedom of speech primarily on the instrumental ground that it promoted free and rational public discussion, essential for the American people to govern themselves. By focusing on the social interest in democratic self-government, Brandeis attempted to “cleanse” freedom of speech from “any lingering overtones of the doctrine of ‘liberty of contract’” and other traditional assertions of natural rights against the government.136

By segregating speech rights from other rights protected by the so-called *Lochner* era Supreme Court, Brandeis helped ensure that constitutional protection for freedom of speech survived the sweeping constitutional changes that the New Deal and Franklin Roosevelt’s appointees to the Court put in motion. Indeed, with encouragement from the Roosevelt Administration and the elite bar,137 freedom of speech became a “preferred freedom” and the first and most important arrow in the post–New Deal Court’s civil libertarian quiver.138

**CONCLUSION**

As a Justice on the Supreme Court, Louis Brandeis had a mixed record at best on civil liberties as understood in modern times, but he served as an important transitional figure between old Progressive and modern liberal constitutional jurisprudence in several ways: (1) by refusing to join Justice

134 274 U.S. 357 (1927).
136 WHITE, supra note 60, at 140.
Holmes’s draft dissent in *Buchanan v. Warley*, he prevented Progressivism from being strongly associated with Jim Crow. In turn, this ensured that the post–World War II liberal Supreme Court could rely on *Buchanan* in *Shelley v. Kraemer* and *Bolling v. Sharpe* without concern that they were adopting an opinion supported only by the Court’s discredited “conservatives”; (2) by joining the majority opinion in *Meyer v. Nebraska* and rejecting conventional Progressive wisdom that opposed *Meyer, Pierce*, and *Tokushige*, Brandeis prevented those precedents from being associated solely with the non-Progressive wing of the Court. This allowed modern liberals to rely on these opinions in modern “substantive due process” cases while sidestepping the charge that they were “reviving *Lochner*”; (3) Brandeis’s *Olmstead* opinion interpreted the Fourth Amendment in a way that allowed it to be used by modern liberals to protect accused criminals, while giving those liberals a “Progressive” precedent to rely on when they sought to broaden Fourth Amendment protections; (4) *Olmstead* also articulated an unenumerated “right to be let alone” that modern liberals relied upon when developing the notion of a right to privacy; and (5) Brandeis’s *Whitney* opinion firmly associated freedom of speech with democratic governance instead of with limited-government ideology. This was a key factor in allowing judicial protection of freedom of speech to survive the demise of liberty of contract and to thrive when a modern liberal majority took control of the Court.

In short, in cases like *Olmstead* Brandeis created Progressive civil libertarian precedents, and by joining the majority in cases like *Buchanan* and *Meyer* he prevented restrictions on governmental abuses of power from being wholly associated with the soon-to-be discredited conservative wing of the pre–New Deal Court. This made it much easier doctrinally for later generations of liberal Justices to abandon early twentieth-century Progressivism’s blanket hostility to judicial review in favor of a jurisprudence favoring civil rights and civil liberties.