THE JEFFERSONIAN JURIST? A RECONSIDERATION OF JUSTICE LOUIS BRANDEIS AND THE LIBERTARIAN LEGAL TRADITION IN THE UNITED STATES

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The prevailing consensus seems to be that Justice Louis D. Brandeis was not a libertarian even though he has long been designated a "civil libertarian."[1] A more hardline position maintains that Brandeis was not just non-libertarian, but an outright opponent of "laissez-faire jurisprudence."[2] Jeffrey Rosen's new biography, *Louis D. Brandeis: American Prophet*, challenges these common understandings by portraying Brandeis as "the most important American critic of what he called 'the curse of bigness' in government and business since Thomas Jefferson,"[3] who was a "liberty-loving" man preaching "vigilance against

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[1] E.g., KEN L. KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW 112 (Cambridge Univ. Press 2004); LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA 66 (Farrar, Straus & Giroux 2001); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1212 (1983); Howard Gillman, *Regime Politics, Jurisprudential Regimes, and Unenumerated Rights*, 9 U. PA. J. CONST. L. 107, 117 (2006); Brad Snyder, *The House That Built Holmes*, 30 L. & HIST. REV. 661, 710 (2012).

[2] Richard A. Epstein, *Lest We Forget: Buchanan v. Warley and Constitutional Jurisprudence of the "Progressive Era,"* 51 VAND. L. REV. 787, 790-91 (1998) [hereinafter Epstein, *Lest We Forget*].

[3] JEFFREY ROSEN, LOUIS D. BRANDEIS: AMERICAN PROPHET 1 (Yale Univ. Press 2016).

assaults on independence."[4] Jefferson, of course, has long been associated with libertarianism;[5] therefore, tying Brandeis to Jefferson ties him, as well, to libertarianism.

My objective is to explore Rosen's depiction of Brandeis as a "Jeffersonian prophet,"[6] "the leader of a Jeffersonian tradition,"[7] and "the Jewish Jefferson"[8] to examine the meaning of the term "libertarian" in the context of American constitutional jurisprudence. I will argue that Rosen unsettles the characterization of Brandeis as non-libertarian or anti-libertarian and, consequently, destabilizes the very meaning of "libertarianism" as that term is used by self-described libertarians in current scholarship about American constitutionalism.[9]

Whether Brandeis was a pure or true libertarian does not concern me.[10] Brandeis may be libertarian if that term is defined and employed in one manner, but not if it is defined and employed in another manner.

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[4] ANNETTE GORDON-REED & PETER S. ONUF, MOST BLESSED OF PATRIARCHS: THOMAS JEFFERSON AND THE EMPIRE OF THE IMAGINATION 173 (Liveright Publ'g Corp. 2016).

[5] DAVID BOAZ, THE LIBERTARIAN MIND: A MANIFESTO FOR FREEDOM 58 (Simon & Schuster, 2015); FORREST CHURCH, SO HELP ME GOD: THE FOUNDING FATHERS AND THE FIST GREAT BATTLE OVER CHURCH AND STATE 283 (Harcourt, 2007); RONALD L. HATZENBUEHLER, *Thomas Jefferson*, in POPULAR IMAGES OF AMERICAN PRESIDENTS 34 (William C. Spragens, ed., Greenwood Press, 1998); J. DAVID HOEVELER, THE POSTMODERNIST TURN: AMERICAN THOUGHT AND CULTURE IN THE 1970'S 168 (Rowman & Littlefield, 1996); PAUL ARON, WE HOLD THESE TRUTHS…:AND OTHER WORDS THAT MADE AMERICA 100 (Rowman & Littlefield, 2008); PETER S. ONUF, JEFFERSON'S EMPIRE: THE LANGUAGE OF AMERICAN NATIONHOOD 85 (Univ. Press of Va., 2000); MERRILL D. PETERSON, THE JEFFERSONIAN IMAGE IN THE AMERICAN MIND 437 (Univ. Press of Virginia, 1998); JAMES F. SIMON, WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES 143 (Simon & Schuster, 2002); "Thomas Jefferson," in THE LIBERTARIAN READER: CLASSIC AND CONTEMPORARY WRITINGS FROM LAO-TZU TO MILTON FRIEDMAN 178 (David Boaz, ed., Simon & Schuster, 1997) ("Perhaps the most eloquent and the most influential piece of libertarian writing in history is the Declaration of Independence, written by Thomas Jefferson"); William Cohen, *Thomas Jefferson and the Problem of Slavery*, J. AM. HIST. 503, 506 (1969).

[6] ROSEN, *supra* note 3, at 5.

[7] *Id.*

[8] *Id.* at 9.

[9] I doubt that a systematized, check-the-box schemata of libertarian jurisprudence exists.

[10] I wish to express, at least in a note, my personal belief that Brandeis was not a libertarian or a classical liberal. I think Rosen's second chapter, titled "Other People's Money," supports my view and creates problems for Rosen's argument that Brandeis was, at least in some respects, libertarian.

Michael Greve, for instance, portrays Brandeis negatively[11] while promoting a robust federal judiciary as indispensable to competitive federalism.[12] He believes that "libertarians have to be Hamiltonians"[13] and encourages readers to reject Jefferson, who presumably is comparable to Brandeis, and "turn to Abraham Lincoln," who presumably is comparable to Hamilton.[14] Other libertarians consider Hamilton and Lincoln to be enemies of libertarianism, not models of it.[15] Describing Brandeis as a libertarian thus reveals as much about the describer's notion of libertarianism as it does about Brandeis' jurisprudence. Rather than adjudicating which usage of "libertarian" is correct in light of differing representations of Brandeis, I will explore the tensions and conflicts between rivaling ideas about his relationship to libertarianism, using Rosen's book as my central reference point.

I believe the meaning of "libertarianism" in American constitutional jurisprudence is situational and relational rather than fixed or certain; to call an opinion or a jurist "libertarian" is to prompt demands for clarification because the referent for that adjective is rarely, if ever, self-evident. Having acknowledged this assumption on my part, I submit that Brandeis's purported libertarianism or non-libertarianism is contingent upon, not just Brandeis's decisions and writings, but on the interpretive communities and unacknowledged auxiliary assumptions of the one conferring the libertarian label on him.[16]

What interests me, then, is the way in which scholars have invoked Brandeis to delimit the nature of libertarian jurisprudence in the

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[11] MICHAEL GREVE, THE UPSIDE-DOWN CONSTITUTION 194–95 (Harvard Univ. Press 2012).

[12] *See generally id.* at 1–13, 23–28, 63–89, 170–74, 177–99, 259–63, and 380–97 (describing the type of judiciary Greve envisioned as compared to Brandeis's federalism).

[13] *Id.* at 78.

[14] *Id.* at 396.

[15] *See, e.g.*, THOMAS J. DILORENZO, HAMILTON'S CURSE: HOW JEFFERSON'S ARCH ENEMY BETRAYED THE AMERICAN REVOLUTION (Random House 2009); THOMAS J. DILORENZO, LINCOLN UNMASKED: WHAT YOU'RE NOT SUPPOSED TO KNOW ABOUT DISHONEST ABE (2006); THOMAS J. DILORENZO, THE REAL LINCOLN: A NEW LOOK AT ABRAHAM LINCOLN, HIS AGENDA, AND AN UNNECESSARY WAR (Random House 2003). It bears noting that Rosen mentions Brandeis's praise for Hamilton but dismisses its significance by stating that "Brandeis would become more self-consciously Jeffersonian in the following decade." ROSEN, *supra* note 3, at 90.

[16] I use the term "interpretive community" in the sense in which Stanley Fish developed it. *See* STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (Harvard Univ. Press 1980).

American constitutional context. Brandeis simultaneously illuminates and problematizes the designation "libertarian." His formative influence on American constitutional law elicits dogged attempts to categorize or classify him. As we will see, he continues to attract admirers and provoke antagonists, both of whom express firm opinions about his association with libertarianism. Legal scholars have analyzed Brandeis's writings to demarcate the boundaries of libertarian jurisprudence, i.e., to clarify what libertarian jurisprudence is or is not.[17] At stake in the debate over Brandeis's association with libertarianism is the meaning and import of "libertarian" jurisprudence in our constitutional tradition.

Disturbing any consensus regarding the term "libertarian" in the context of American constitutional jurisprudence is significant because it necessitates two questions: what, exactly, is "libertarian" jurisprudence, and who decides? Answers to these questions may disrupt the momentum that self-identified libertarian legal scholars have enjoyed over the last decade[18] and underscore claims to libertarianism that are at odds with that consensus.[19]

Part I of this article shows that certain prominent libertarian legal scholars reject the notion that Brandeis was a libertarian. It then analyzes Rosen's depiction and classification of Brandeis as a libertarian to highlight the differences between his views and those of the libertarian legal scholars. I disclaim at the outset any effort to ascertain empirically the principal libertarian position on Brandeis; my goal is simply to map what others have said about Brandeis in their endeavor to elucidate and exposit libertarian jurisprudence.

Part II speculates about the significance of these competing ideas about Brandeis and seeks to answer a simple yet weighty question: why

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[17] *See* discussion *infra* Part I.

[18] A *New Republic* piece highlights the growing popularity of this proliferating libertarian legal movement. *See* Brian Beutler, *The Rehabilitationists: The Liberterian Movement to Undo the New Deal*, NEW REPUBLIC (Aug. 30, 2015), https://newrepublic.com/article/122645/rehabilitationists-libertarian-movement-undo-new-deal. The article states, "Back then [ten years ago], [Randy] Barnett was one of a handful of academics on the fringes of conservative legal thought. Today, their views are taking hold within the mainstream of our politics. Barnett and his compatriots represent the vanguard of a lasting shift toward greater libertarian influence over our law schools and, increasingly, throughout our legal system. They're building networks for students and young lawyers and laying the foundation for a more free-market cast of federal judges in the next presidential administration. Their goal is to fundamentally reshape the courts in ways that will have profound effects on society." *Id.*

[19] *See* discussion *infra* Part II.

does it matter that scholars disagree about the libertarian character of Brandeis's jurisprudence?

I conclude in Part III by critiquing attempts to pigeonhole Brandeis as representative of any narrow, homogenous, or closed school of thought, libertarian or otherwise. We simplify Brandeis's multifaceted jurisprudence at our own peril, risking opportunities to learn about his distinct approach to judging as well as his unique historical moment. Reducing a complicated man to suggestive caricatures to score ideological points is wrong and imprudent; therefore, this article seeks to restore some nuance to our ongoing conversations about Brandeis's thought and influence. Only by appreciating his variety and complexity may we begin to see his continued relevance to our own time and constitutional order.

I. BRANDEIS AND LIBERTARIANISM

Libertarian legal scholars have critiqued Brandeis, treating his jurisprudence as antithetical to libertarianism. David Bernstein has argued that "Brandeis was far from a consistent civil libertarian."[20] Bernstein suggests that "historiography with roots in partisan Progressive preferences" has both celebrated and cultivated the idea of a virtuous Brandeis.[21] Bernstein and Ilya Somin claim that Brandeis was not a libertarian but a Progressive who was "skeptical of—even hostile to—review of constitutional rights claims by an appointed judiciary with little expertise on the underlying policy issues."[22]

"Brandeis grew so disgusted with what he considered to be 'conservative' abuse of judicial review," argue Bernstein and Somin, "that he wanted to repeal the Due Process and Equal Protection Clauses of the Fourteenth Amendment, leaving no clear avenue for the protection of constitutional rights against the states."[23] This depiction of Brandeis does not square with Rosen's account of a rights-conscious jurist who sought "to protect individual liberty and economic opportunity for the

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[20] David E. Bernstein, *From Progressivism to Modern Liberalism: Louis D. Brandeis as a Transitional Figure in Constitutional Law*, 89 NOTRE DAME L. REV. 2029, 2033 (2014).

[21] David E. Bernstein, *Brandeis Brief Myths*, 15 GREEN BAG 2d 9, 15 (2011).

[22] David E. Bernstein & Ilya Somin, *The Mainstreaming of Libertarian Constitutionalism*, 77 L. & CONTEMP. PROBS. 43, 45 (2014). Bernstein and Somin call Brandeis a "Progressive" elsewhere in this article as well. *Id.* at 57.

[23] *Id.* at 45.

'small man,'"[24] translate "the constitutional values of privacy and free speech in an age of technological change,"[25] and criticize "economic and political consolidation in an age of 'too big to fail.'"[26]

Greve and Richard Epstein take issue with Brandeis's position on the common law and federalism as reflected in *Erie Railroad v. Tompkins*.[27] Epstein calls Brandeis's *Erie* opinion ill-considered, deeply flawed, and an abject failure.[28] He characterizes Brandeis as a "progressive,"[29] a member of the "American left wing,"[30] and a proponent of the police power of the states and sociological jurisprudence as against laissez faire jurisprudence.[31] He rejects what he casts as Brandeis's "misguided argument to the effect that the state has a legitimate interest in protecting producers against the 'ruinous competition' of new entrants" because, he says, "the very survival of a market economy depends on the ability of new firms to win customers away from their established rivals by offering a mix of lower prices and superior quality."[32]

Timothy Sandefur, Vice President of Litigation at the Goldwater Institute, accuses Brandeis of fashioning a "new collectivist theory of free speech"[33] rather than grounding such freedom in individual rights.[34]

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[24] ROSEN, *supra* note 3, at 4.

[25] *Id.* at 5.

[26] *Id.*

[27] 304 U.S. 64 (1938). *See* Michael S. Greve & Richard Epstein, *Introduction: Erie Railroad at Seventy-Five*, 10 J. L. ECON. & POL'Y 1, 10–11 (2013) ("Erie's dogmatic positivist premise upended that world [in which classical liberal theories of limited government flourished]. Domestically, it unleashed state courts; and that world may practically demand a backstop in the form of a preemptive foreign affairs doctrine. In a funny way, Erie also opened the door for the reimportation of international law—provided it is not the 'old' law of nations but a kind of international regulatory enterprise, even if the identity of the 'sovereign' from whom that enterprise emanates is a bit of a mystery.").

[28] Richard Epstein, *In Praise of Suzanna Sherry and Judicial Activism*, 16 GREEN BAG 443, 444 (2013).

[29] Richard Epstein, Coniston Corp. v. Village of Hoffman Hills*: How To Make Due Process Disappear*, 74 U. CHI. L. REV. 1689, 1691 (2007); Richard Epstein, *Standing and Spending—The Role of Legal and Equitable Principles*, 4 CHAP. L. REV. 1, 4 (2001).

[30] Richard Epstein, *The Federalism Decisions of Justices Rehnquist and O'Connor: Is Half a Loaf Enough?*, 58 STAN. L. REV. 1793, 1794 (2006).

[31] Epstein, *Lest We Forget*, *supra* note 2, at 790–91.

[32] Richard Epstein, *The Monopolistic Vices of Progressive Constitutionalism*, 2005 CATO SUP. CT. REV. 11, 26 (2004–05).

[33] TIMOTHY SANDEFUR, THE PERMISSION SOCIETY 84 (2016).

[34] *Id.* at 58–59, 62–63.

Sandefur's stated goal is to undermine the notion that Brandeis was "an eloquent champion of free speech,"[35] of which libertarians as a class are protective.[36]

Damon Root, a senior editor at *Reason*,[37] criticizes Brandeis, whom he labels a "Progressive"[38] and a "liberal,"[39] for deferring to state lawmakers.[40] Root dislikes Brandeis's dissent in *New State Ice Co. v. Liebmann*[41] for its treatment of the states as laboratories for economic experimentation.[42] Despite associating Brandeis with progressivism and Woodrow Wilson,[43] Root is forced to acknowledge Brandeis's opposition to Franklin D. Roosevelt's New Deal programs in *Louisville Bank v. Radford*,[44] *Schechter Poultry Corp. v. United States*,[45] and *Humphrey's Executor v. United States*.[46]

Randy Barnett criticizes Brandeis as the catalyst for the presumption that legislation is constitutional and for the demise of *Lochner*-era jurisprudence.[47] He claims that Brandeis was a "progressive

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[35] *Id.* at 63.

[36] *See* JASON BRENNAN, LIBERTARIANISM: WHAT EVERYONE NEEDS TO KNOW 84–85 (Oxford Univ. Press 2012).

[37] *See generally Damon Root*, REASON, https://reason.com/people/damon-w-root/all (last visited Apr. 25, 2017) (providing a monthly print magazine of "free mind and free markets").

[38] DAMON ROOT, OVERRULED: THE LONG WAR FOR CONTROL OF THE U.S. SUPREME COURT 53, 63 (Palgrave Macmillan 2014).

[39] *Id.* at 74.

[40] *Id.* at 53, 63.

[41] 258 U.S. 262 (1932).

[42] ROOT, *supra* note 38, at 63–64.

[43] *Id.* at 53, 63–64.

[44] 295 U.S. 555 (1935).

[45] 295 U.S. 495 (1935).

[46] 295 U.S. 602 (1935); *see* ROOT, *supra* note 38, at 67–70.

[47] RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION 149–151 (Broadside Books 2016) [hereinafter BARNETT, OUR REPUBLICAN CONSTITUTION]; Randy E. Barnett, *Foreword: The Power of Presumptions*, 17 HARV. J.L. & PUB. POL'Y 613, 614–15 (1994) [hereinafter Barnett, *Foreword: The Power of Presumptions*]; Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2003 CATO SUP. CT. REV. 21, 24-25 (2003) [hereinafter Barnett, *Justice Kennedy's Libertarian Revolution*]; Randy E. Barnett, *Keynote Remarks: Judicial Engagement Through the Lens of* Lee Optical, 19 GEO. MASON L. REV. 845, 849 (2012) [hereinafter Barnett, *Keynote Remarks*]; Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. Rev. 745, 766–67 (1997) [hereinafter Barnett, *Necessary and Proper]*; Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1481–82 (2008) [hereinafter Barnett, *Scrutiny Land*].

attorney and political activist" before joining the Supreme Court[48] and, once on the Court, "pursued the progressive agenda of advancing the Democratic Constitution."[49] According to Barnett, those who embrace collectivism over individualism and believe that popular sovereignty resides in groups, not persons, adhere to Democratic Constitutionalism.[50] Democratic Constitutionalism involves, in his view, support for state experimentation with economic regulations and opposes federal judicial intervention in state legislation.[51] Republican Constitutionalism stands in contradistinction to Democratic Constitutionalism by locating sovereignty in individuals, not groups,[52] and avowing that "the first duty of government is to equally protect . . . personal and individual rights from being violated by both domestic and foreign transgressors."[53] Republican Constitutionalism advocates federal judicial intervention into state affairs to protect the rights of individuals and guard against majoritarianism.[54]

Barnett takes issue with Brandeis's brief in *Muller v. Oregon*[55] that defended a state restriction on women's working hours,[56] and with Brandeis's state-deferential writings in *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*[57] and *New State Ice Co. v. Liebmann*.[58] For Barnett, the "progressive Brandeis Brief,"[59] which became a model briefing strategy,[60] involves "unconventional compilations of quotes

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[48] BARNETT, OUR REPUBLICAN CONSTITUTION, *supra* note 47, at 136, 144.

[49] *Id.* at 149.

[50] *Id.* at 19–20.

[51] *Id.* at 173–75 (criticizing Brandeis's "laboratory of experimentation" trope supporting deference to state legislatures).

[52] *Id.* at 22.

[53] *Id.* at 23.

[54] *Id.* at 24–26.

[55] 208 U.S. 412 (1908).

[56] BARNETT, OUR REPUBLICAN CONSTITUTION, *supra* note 47, at 144–49.

[57] 282 U.S. 251 (1931); *see* BARNETT, OUR REPUBLICAN CONSTITUTION, *supra* note 47, at 149–50.

[58] 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see* BARNETT, OUR REPUBLICAN CONSTITUTION, *supra* note 47, at 173–75.

[59] BARNETT, OUR REPUBLICAN CONSTITUTION, *supra* note 47, at 148; *see also id.* at 147 (referring to the Brandeis brief as "a great progressive and legal realist triumph over formalism"); *see also id.* at 174 (calling Brandeis "a leading progressive activist").

[60] ROSEN, *supra* note 3, at 54.

from social science research offered to show the reasonableness of legislation."[61]

Taken together, the criticisms of Bernstein, Somin, Greve, Epstein, Sandefur, Root, and Barnett work against any classification of Brandeis as libertarian. They suggest that Brandeis was a left-wing progressive rather than a champion of individual rights or liberty.[62]

Rosen, however, presents a libertarian version of Brandeis that challenges the non-libertarian version of Brandeis fashioned by these libertarian legal scholars.[63] He claims, without citing any evidence, that the "libertarian Right . . . once lionized Brandeis."[64] "The progressive ambivalence about Brandeis today," he says, "may reflect his dedication to small government and deference to the states."[65] He suggests that Brandeis, who "endorsed Jeffersonian ideals of small government and local democracy,"[66] should appeal to both "Tea Party libertarians" and "progressive civil libertarians."[67] He does not define either group but presupposes a general awareness of their qualities and composition.[68] His Brandeis "was increasingly alarmed about the centralizing tendencies of Franklin D. Roosevelt's New Deal"[69] and "assumed the mantle of Jefferson."[70] His Brandeis spent "a lifetime of intensely disciplined

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[61] BARNETT, OUR REPUBLICAN CONSTITUTION, *supra* note 47, at 145; *see also id.* at 153 (describing how the Brandeis brief changed the judicial system).

[62] *See supra* text accompanying notes 20–22, 28–29, 31, 33, 38, 47.

[63] ROSEN, *supra* note 3, at 44 (Rosen acknowledges that "Brandeis came to be a leader of the Progressive movement," so to maintain his thesis that Brandeis was a Jeffersonian who should appeal to libertarians, he dismisses this aspect of Brandeis's biography with the qualification that Brandeis fought for "the traditional view of the relationship between the commonwealth and private businesses, in which the state defended the public interest, financial probity, and the accurate valuation of corporate property"); *Id.* (to this end, he calls Brandeis "a kind of Jeffersonian McKinsey consultant, representing the interests of both labor and management").

[64] *Id.* at 194. Rosen states that Albert Jay Nock's biography of Jefferson demonstrates that the libertarian Right once lionized Brandeis, but if anything Nock's book shows, rather, that the libertarian Right, as represented by Nock, lionized Jeffersonian views and principles that may be compatible with those of Brandeis.

[65] *Id.* at 193.

[66] *Id.* at 6.

[67] *Id.* at 5.

[68] *See generally id.* (describing Barnett's presupposition of the general awareness).

[69] *Id.* at 1.

[70] *Id.* at 208.

reading and writing on behalf of personal and economic liberty."[71] His Brandeis was a "spiritual descendent"[72] of Jefferson who was "content to be called a Jeffersonian" and, of all Jeffersonians to date, has the "most to teach us about our contemporary vexations involving political economy, civil liberties, and Zionism."[73] His Brandeis, moreover, read the libertarian journalist Albert Jay Nock and adopted "a particular vision of Jefferson" in which "the sage of Monticello" was "the scourge of corporations, monopolies, and financiers, the defender of farmers and producers."[74] Finally, his Brandeis traveled to Monticello to pay homage to Jefferson[75] and wrote to an advisor of Franklin D. Roosevelt, "I want you to go back and tell the President that we're not going to let this government centralize everything. It's come to an end."[76]

"Brandeis was so captivated by Nock's Jefferson," Rosen avers, "that he persuaded the National Home Library Foundation to issue a reprint edition, which was published on his eighty-fourth birthday."[77] Rosen believes that "Nock's vision of Jefferson" and "American constitutionalism" can serve as "a window onto Brandeis's philosophy."[78] He says that Brandeis was not only "sympathetic to Jefferson's views on political economy," but also "developed Jefferson's distinction between merchant bankers, who lent their own capital for productive enterprises, and monopolists, who underwrote risky instruments with what Brandeis unforgettably called 'other people's money.'"[79]

In what other ways does Rosen's Brandeis signal Jeffersonian libertarianism?[80] For one, he feared "the curse of bigness"[81] and

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[71] *Id.* at 3.

[72] *Id.* at 4.

[73] *Id.* at 8–9.

[74] *Id.* at 9.

[75] *Id.*

[76] *Id.* at 2; *see also* MELVIN UROFSKY, LOUIS D. BRANDEIS: A LIFE 661 (New York: Schocken Books 2012).

[77] ROSEN, *supra* note 3, at 9.

[78] *Id.*

[79] *Id.* at 15.

[80] *Id.* at 10. Rosen draws heavily from Nock's views of Jeffersonian libertarianism. "Nock views Jefferson," he writes, "whom he calls 'the great libertarian,' as a defender of the small producers and farmers against the predations of the large capitalists, monopolists, and financiers"). *Id.* "When he called Jefferson the 'libertarian practitioner of taste and manners,' Nock was also describing himself." *Id.* "Nock's Jefferson . . . exemplifies the same libertarian, classical, and agrarian values [as Nock does.]" *Id.* Nevertheless, Rosen maintains

championed federalism and state autonomy,[82] calling the states laboratories of democracy, "a phrase that has become the touchstone of libertarian and conservative defenders of federalism today."[83] Accordingly, he emphasized "the need for courts to defer to state legislatures."[84] He opposed the National Recovery Administration and the Agricultural Adjustment Administration as frivolous federal agencies.[85]

One of Brandeis's former clerks claims that Brandeis's "political aim was to sustain states' rights as against the federal government."[86] Brandeis was deferential to the states unless an expressly enumerated power enshrined in the Constitution prohibited the state's legislative actions.[87] This judicial philosophy of restraint and adherence to the express words of the Constitution led him to become "the most prescient defender of civil liberties of the twentieth century" after he stood up for the freedom of speech and expression under the First Amendment and the freedom from unreasonable searches and seizures guaranteed by the Fourth Amendment.[88] Brandeis channeled Jefferson and the Declaration of Independence, according to Rosen, as he formulated his theory about the right to be free from government intrusion or state surveillance—i.e., the right to be "left alone"—that he believed the Fourth and Fifth Amendments protected.[89]

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that Brandeis and Jefferson were similar on issues such as education where their views may diverge from libertarianism. *See, e.g.*, *id.* at 21–22; *id.* at 24 ("Brandeis shared Jefferson's belief that a democracy could not remain free without educated citizens who were capable of understanding and defending their liberties." Brandeis was, Rosen says, "even more Jeffersonian than Jefferson in his insistence that the University of Louisville should be entirely local in focus").

[81] *Id.* at 4–5, 13, 115–16.

[82] *Id.* at 5.

[83] *Id.*

[84] *Id.* at 103.

[85] *Id.* at 117.

[86] *Id.* at 57 (quoting Brandeis's former clerk David Riesman).

[87] *Id.* at 6; *see also id.* at 101 ("Brandeis insisted that judges should hesitate to strike down state and federal laws unless they clearly violated rights and limitations enumerated in the text of the Constitution, and he insisted that decisions should be written as narrowly as possible to avoid broad constitutional rulings.").

[88] *Id.* at 6.

[89] *Id.* at 142–43.

Brandeis was impressed with Nock's "depictions of Jefferson's aesthetic refinement"[90] and admired paintings of Jefferson that portrayed him as cultured and distinguished.[91] By contrast, he thought that Abraham Lincoln—who is dubbed "the Great Centralizer"[92] by one prominent libertarian—was untutored.[93] Just as Jefferson "viewed American history as a battle between the forces of consolidation and decentralization, between agrarian producers and monopolistic financiers," so Brandeis "insisted that decentralization in government and economics was the only way to protect the liberty of farmers, industrial workers, and small producers."[94]

Brandeis once warned a correspondent, "beware of centralization; and beware also of the mania of consolidating bureaus."[95] Jefferson and Brandeis both feared that a powerful federal judiciary would lead to government centralization and consolidation, and even to monopoly privileges.[96] Brandeis adopted a Jeffersonian vision of limited government[97] and expanded Jefferson's agrarian understanding of the yeomen farmer to include small businesspersons and businesses that government and big business could victimize.[98] Rosen claims that Brandeis organized "both his personal life and his political philosophy to maximize individual liberty and to emphasize the collective responsibility of all citizens to protect freedom against incursions by big government and big corporations."[99] "History teaches, I believe," Brandeis wrote, "that the present tendency toward centralization must be arrested if we are to attain the American ideals, and that for it must be

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[90] *Id.* at 10.

[91] *Id.*

[92] Thomas J. DiLorenzo, *The Great Centralizer: Abraham Lincoln and the War Between the States*, 3 INDEP. REV. 243 (1998).

[93] ROSEN, *supra* note 3, at 18.

[94] *Id.* at 13.

[95] *Id.* at 13.

[96] *Id.* at 16.

[97] *Id.* at 17.

[98] *Id.* at 15; *id.* at 29 ("From his father, Brandeis absorbed the inspiring example of a small businessman who, through hard work on a human scale, could develop his intellectual faculties and dedicate himself to personal and economic freedom while providing for the needs of his family and his community."); *id.* at 30 ("In the same Jeffersonian spirit, Louis Brandeis throughout his life viewed yeoman farming . . . as the path to freedom and the ideal of democratic self-government."); *see also* Urofsky, *supra* note 76, at 309.

[99] ROSEN, *supra* note 3, at 26.

substituted intense development of life through activities in the several states and localities."[100]

Rosen glorifies Brandeis as a "prophet" of free speech.[101] Brandeis joined Justice Oliver Wendell Holmes Jr.'s "libertarian defense of free speech" in *Abrams v. U.S.*,[102] and his writing in *Whitney v. California*[103] extended the plea for free speech that he voiced in *Pierce v. U.S.*[104] Rosen considers Brandeis's *Whitney* concurrence "the most important defense of freedom of thought and opinion since Jefferson's First Inaugural, on which it relies."[105] That case confirms, for him, "Brandeis's status as Jefferson's philosophical successor"[106] because it was "the perfect expression of Brandeis's Jeffersonian creed."[107] Brandeis, like Jefferson, also worried about the use of property law to justify copyright protections because of his concerns about state-granted monopoly powers.[108] Such concerns anticipated the libertarian criticisms of copyright and intellectual property law articulated by, among others, Stephan Kinsella.[109]

So who is right about Brandeis, the libertarian legal theorists or Rosen? Does libertarian jurisprudence advocate "Bigness" or "Smallness" for the federal judiciary? Was Brandeis the libertarian "Jewish Jefferson" or a leading progressive activist? The answer, in short, is neither and both—or "it depends."

II. IMPLICATIONS AND EFFECTS OF CLASSIFYING BRANDEIS AS A LIBERTARIAN

Terminological expediency and conceptual classification require us to assign labels and categories to prominent jurists and the discernable patterns that emerge from their opinions. Without heuristic names and classes, we struggle to agree on shared perceptions and vocabularies for

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[100] *Id.* at 24.

[101] *Id.* at 121.

[102] 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

[103] 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

[104] 252 U.S. 239 (1920) (Brandeis, J., dissenting).

[105] ROSEN, *supra* note 3, at 123.

[106] *Id.* at 129.

[107] *Id.* at 132.

[108] *Id.* at 135–36.

[109] *See generally* STEPHAN KINSELLA, AGAINST INTELLECTUAL PROPERTY (Ludwig von Mises Inst. 2008) (describing libertarian criticisms of copyright and intellectual property).

similar opinions and modes of judging. Without shared perceptions and vocabularies, moreover, we could not assess discursively the normative validity of our most cherished ideas and beliefs. Yet labeling can go too far. It can reduce complex individuals and methods to prejudicially simplistic categories under some general head. Thus, it can lead to misunderstanding and lack of reflection.

Rosen offers a balanced account of Brandeis's relationship to progressives and Progressivism:

> Although Brandeis worked with the Progressives, and although he voted enthusiastically to uphold progressive legislation, he did not share the Progressive faith in government by experts who would evaluate facts on the people's behalf and could spare workers the need to think for themselves. Instead, like Jefferson, he believed passionately that citizens have a duty to educate themselves so that they are capable of self-government, both personal and political, and of defending their liberties against overreaching corporate and federal power.[110]

By highlighting Brandeis's preference for decentralization and devolution, Rosen awakens us from the sleepy neglect of paradigms of judicial review and restraint, federalism, representative government, and the separation-of-powers doctrine that are beyond the core of modern libertarian jurisprudence.[111] "[T]he core of modern libertarian thought," explains two libertarian legal theorists, "as exemplified by leading scholars such as Richard Epstein and Randy Barnett," involves "strong judicial enforcement of federalism and separation of powers limits on government power" to "provide important indirect protection for individual freedom."[112] Leading libertarians reject the doctrine of states' rights in favor of the supremacy of the federal judiciary.[113] They

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[110] ROSEN, *supra* note 3, at 17.

[111] *Id.*

[112] Bernstein & Somin, *supra* note 22, at 44.

[113] John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89 (2004) ("Federalism is the cornerstone of the Constitution. Yet, federalism is too often confused by both admirers and detractors with state autonomy, popularly known as 'states' rights.' The constitutional system of federalism assigns powers to state and federal government officials not for their own benefit, but for that of the people. These benefits are many, including the satisfaction of diverse preferences and competition both among the states themselves and between the states and federal government. While state autonomy plays a large role in sustaining the benefits of federalism, the federal government also has an important role to play in creating a framework of open trade and investment that assures that states will deliver these benefits. Sometimes federalism can be protected by only restricting the power of state governments, rather than strengthening it."); *see also* GREVE, *supra* note 11.

maintain that a robust federal judiciary should review or intervene in state matters to ensure competitive federalism and horizontal competition between states, rather than vertical competition between the state and federal government.[114] This structural design contrasts with Brandeis's "devotion to states' rights."[115]

A critical mass of libertarian legal theorists today endorse a strong federal judiciary that exercises expansive review powers to overturn legislation that judges deem to be unconstitutional, even if the alleged unconstitutionality is based on unenumerated rights, i.e., rights that are not named in the United States Constitution.[116] Root summarizes their vision as follows:

> Revived over the past four decades by a growing camp of libertarians and free-market conservatives, the aggressive legal approach once associated with Justice Field and his successors has come roaring back to life in the early twenty-first century. Its modern followers have no patience with judicial restraint and little use of majority rule. They want the courts to police the other branches of government, striking down any state or federal law that infringes on their broad constitutional vision of personal and economic freedom[.] . . . We'll call them the libertarian legal movement.[117]

Modern libertarian legal theory, accordingly, seeks to tip the balance of power in favor of the federal judiciary over state governments.

Barnett, for example, believes that the Ninth Amendment contemplates unenumerated rights and that the failure or refusal of judges to protect those rights disregards legitimate restraints on government power.[118] He suggests that the present generation is

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[114] McGinnis & Somin, *supra* note 113, at 107–12; *see also* GREVE, *supra* note 11.

[115] ROSEN, *supra* note 3, at 56.

[116] *See, e.g.*, Bernstein & Somin, *supra* note 22 (characterizing Barnett and Esptein as libertarians supporting a strong federal judiciary).

[117] ROOT, *supra* note 38, at 7–8.

[118] BARNETT, RESTORING THE LOST CONSTITUTION, at xi, 251–53 [hereinafter BARNETT, RESTORING THE LOST CONSTITUTION]; *see also*, Randy Barnett, *"Judicial Engagement" Is Not the Same As "Judicial Activism,"* WASH. POST (Jan. 28, 2014), https://www.washington post.com/news/volokh-conspiracy/wp/2014/01/28/judicial-engagement-is-not-the-same-as-judicial-activism/?utm_term=.e76e22267702 [hereinafter Barnett, *"Judicial Engagement"*] ("The real dispute between some judicial conservatives and us is over the proper scope of the enumerated powers of Congress and, especially, the unenumerated police powers of states. Also in dispute is the original meaning of such 'lost' clauses as the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment, which were written in general terms precisely because the rightful liberties of the people are so capacious they cannot all be enumerated or listed. We believe that both of these lost clauses are expressions of popular sovereignty in which the 'rights . . . retained by the people' are to be protected against

equipped to determine which rights the Founders accepted as natural or inherent.[119] His proposed rule of construction to safeguard individual liberty is "the presumption of liberty,"[120] which, in his words, "places the burden on the government to establish the necessity and propriety of any infringement on individual freedom."[121]

To those who fear that the presumption of liberty over-empowers judges, Barnett rejoins that "a reliance on judges . . . is unavoidable in a constitutional system in which only courts are available to stand between individual citizens and majority and minority factions operating through representative government."[122] The scope of judicial review according to his rule of construction enables federal judges to exert extensive power over state governments.[123] His interpretation of the Fourteenth Amendment holds that "*any* state abridgment of the privileges or immunities"—terms that courts must define—"should be subject to challenge in federal court."[124] Barnett acknowledges, however, that "nothing in the Constitution . . . speaks to the issue of the proper scope of state powers"[125] and that "the original Constitution placed very few limits on the scope of the legislative or 'internal police' of the states."[126] He sees the Ninth Amendment and the Fourteenth Amendment as vehicles for federal judicial intervention into state law.[127]

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unreasonable restrictions from the federal government, just as the 'privileges or immunities' of citizens are to be protected against the states, by adopting implementing doctrines like those that courts today use to protect the natural right of freedom of speech. Those who reject implementing these provisions because these clauses don't meet their standards of specificity would disregard the written Constitution in the name of their own conception of 'the rule of law,' just as surely as others reject the written Constitution because it does not comport with their own conception of 'social justice.' Both positions should be rejected by constitutional conservatives.").

[119] BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 118, at 255–56.

[120] *See generally id.* at 259–69 (arguing his proposed rule to construe liberty).

[121] *Id.* at 259–60.

[122] *Id.* at 266.

[123] *See generally id.* (explaining the scope of judicial review under his proposed rule).

[124] *Id.* at 321.

[125] *Id.* at 324.

[126] Randy E. Barnett, *Foreword: Why Popular Sovereignty Requires the Due Process of Law to Challenge "Irrational of Arbitrary" Statutes*, GEO. J.L. PUB. POL'Y, (forthcoming 2016) [hereinafter Barnett, *Foreword: Why Popular Sovereignty*].

[127] *See generally* BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 118, at 226–95 (positing his view of Amendments as a means to intervene into state law).

Clark Neily, a senior attorney at the Institute for Justice, argues that the Constitution—more specifically the Bill of Rights, in particular the Ninth Amendment—protects unenumerated rights that the judiciary must recognize.[128] Accordingly, he attacks the judicial practice of deferring to other government branches even when judges have no express provisions in the Constitution to guide or restrain them.[129] He calls this practice "abdication,"[130] thereby implying that judges who believe in judicial restraint are derelict in their duties. The opposite of judicial abdication is, in his paradigm, "judicial engagement," which he defines as "consistent, conscientious judging in all cases."[131] Neily distinguishes judicial engagement from judicial activism by suggesting that the former involves principled adherence to constitutional requirements whereas the latter entails the rewriting or invention of rights that the Constitution does not contemplate.[132]

Neily suggests that federalism requires not that the states push back against federal overreach under the authority of the Tenth Amendment, but that the federal judiciary use its power to push back against the abuses of power by other federal political branches.[133] This approach, however, implicates separation-of-powers concerns, not federalism, at least inasmuch as the conflict under consideration is not between the states and the federal government but between competing branches of the federal government.[134]

Richard Epstein argues that the doctrine of judicial supremacy emanating from *Marbury v. Madison*[135] is a "clear victory for the theory of limited government."[136] Although he favors strong judicial review, he concedes that this supervisory mechanism generates a "concentration of power."[137] Furthermore, he conditions the goodness or effectiveness of strong judicial review on the existence of judges who "remember that it

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[128] CLARK M. NEILY III, TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT 24–25, 65, 154–55 (2013).

[129] *Id.* at 83.

[130] *Id.* at 3.

[131] *Id.*

[132] *Id.* at 10–11.

[133] *Id.* at 77.

[134] Of course, any actions of any branch of the federal government could affect the powers, laws, and activities of the several states.

[135] 5 U.S. (1 Cranch) 137, 177 (1803).

[136] RICHARD EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION 77 (2014).

[137] *Id.* at 98.

is a classical liberal constitution" they are enforcing, "with strong property rights and limited government."[138] The inverse proposition, however, is that a judiciary lacking jurists who adhere to Epstein's notion of a classical liberal constitution, or who reject the principles of strong property rights or limited government, is neither good nor effective.[139] The lack of federal judges who self-identify as libertarians thus undercuts Epstein's case for strong judicial review.

If these putatively libertarian accounts of federalism and judicial review are representative of modern libertarian jurisprudence, then Brandeis's judicial restraint and "deference to state experimentation"[140] would be adverse to libertarianism. Rosen, however, contests the notion that libertarian jurisprudence necessarily entails strong federal judicial enforcement powers by highlighting "Brandeis's teachings about the importance of protecting economic liberty by restoring competition rather than increasing government centralization."[141] Brandeis believed that the states, not the federal government, carried out American ideals.[142] He was "alarmed" by the concentration of power brought on by Franklin D. Roosevelt's New Deal.[143] "Centralization," he wrote, "will kill—decentralization of social functions can help."[144]

Rosen presents Brandeis as both "a defender of personal and economic liberty and a foe of centralization in government or business."[145] Whereas Bernstein and Somin's libertarian jurisprudence requires a powerful and centralized federal judiciary that actively intervenes in matters of state and local law, Rosen celebrates Brandeis's "Jeffersonian belief that small-scale communities were most likely to satisfy human needs and to allow citizens to develop their faculties of reason through the rigorous self-education that Brandeis believed was necessary for full participation in American democracy."[146]

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[138] *Id.* at 79.
[139] *Id.*
[140] ROSEN, *supra* note 3, at 109.
[141] *Id.* at 2–3.
[142] *Id.* at 5, 114.
[143] *Id.* at 114.
[144] *Id.*
[145] *Id.* at 5.
[146] *Id.* at 5–6.

Murray Rothbard, who has been denominated "the creator of modern libertarianism"[147] and "the chief theorist and spokesman for the new libertarian philosophy,"[148] criticized big business and its partnerships with government.[149] Brandeis, too, opposed "bigness . . . in business and government."[150] According to Rosen, Brandeis "believed that only in small-scale businesses and communities could individuals master the facts that were necessary for personal and political self-government."[151] Brandeis's hostility to big business had little to do with capitalism; it had to do, rather, with monopoly powers, a fact that aligned him again with Jefferson.[152]

Rothbard would seem to disagree with the premise that a robust and active federal judiciary accords with libertarian principles and paradigms. Adumbrating the manner in which the State transforms "concepts designed to check and limit the exercise of State rule" into "intellectual rubber stamps of legitimacy and virtue to attach to its decrees and actions,"[153] Rothbard focused on "the most ambitious attempt to impose limits on the State," namely, "the Bill of Rights and other restrictive parts of the American Constitution, in which written limits on government became the fundamental law to be interpreted by a judiciary supposedly independent of the other branches of government."[154] Against the modern consensus of libertarian legal theorists, Rothbard posited that the State has "transformed judicial review itself from a limiting device to yet another instrument for furnishing ideological legitimacy to the government's actions."[155]

Rothbard thus underscored a difficulty for libertarians who advocate for broadened judicial enforcement powers. "[I]f a judicial decree of 'unconstitutional' is a mighty check to government power," he

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[147] Llewellyn H. Rockwell Jr., *Introduction*, to 2 MURRAY N. ROTHBARD, FOR A NEW LIBERTY: THE LIBERTARIAN MANIFESTO ix (Ludwig von Mises Inst. 2006) (1973).

[148] THE ROTHBARD READER 13 (Joseph T. Salerno & Matthew McCaffrey eds., Ludwig von Mises Inst. 2016).

[149] 2 MURRAY N. ROTHBARD, MAKING ECONOMIC SENSE 189–92 (Ludwig von Mises Inst. 2006) [hereinafter ROTHBARD, MAKING ECONOMIC SENSE].

[150] ROSEN, *supra* note 3, at 15.

[151] *Id.* at 6.

[152] *Id.* at 13–14.

[153] MURRAY N. ROTHBARD, ANATOMY OF THE STATE 30 (Ludwig von Mises Inst. 2009) (1974) [hereinafter ROTHBARD, ANATOMY OF THE STATE].

[154] *Id.* at 31.

[155] *Id.* at 31–32.

reasons, then "an implicit or explicit verdict of 'constitutional' is a mighty weapon for fostering public acceptance of ever-greater government power."[156] In other words, an empowered federal judiciary does not necessarily exercise its authority toward libertarian ends; it may, instead, use its broad powers to validate the enlargement of other federal powers, thereby subverting any libertarian justification for judicial muscle.

Rothbard rejected the notion that the federal judiciary is an external check on the legislative and executive branches of the federal government. In his view, each branch of the federal government works in concert to amass federal power. Thus, the United States Supreme Court represents, to him, "one agency" that has "the ultimate decision on constitutionality and that . . . in the last analysis, must be *part* of the federal government."[157] He maintained that "the judiciary is part and parcel of the government apparatus and appointed by the executive and legislative branches."[158] The State, accordingly, sits in judgment of its own actions.[159] If the State possesses an "inherent tendency . . . to break through the limits of . . . a constitution,"[160] then how, he wondered, can the constitution restrain the State? He framed the question even more broadly: "If the Federal Government was created to check invasions of individual liberty by the separate states, who was to check the Federal power?"[161]

Rothbard's position should not be conflated with the states' rights doctrine because he questioned the scope and legitimacy of even state judicial enforcement of the law.[162] Although he prized elements of John C. Calhoun's "A Disquisition on Government"[163] as superior to alternative theories of constitutionalism, he ultimately rejected Calhoun's model.[164] "Let us not forget," he intoned, "that federal and state

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[156] *Id.* at 32.

[157] *Id.* at 33–34.

[158] *Id.* at 34.

[159] *Id.*

[160] *Id.* at 37.

[161] *Id.* at 38.

[162] *See generally id.* at 40–43 ("[I]n a sense, [Rothbard's] position is the reverse of the Marxist dictum that the State is the 'executive committee' of the ruling class in the present day.").

[163] *See generally id.* at 37–43 (citing JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT 25–27 (1953)).

[164] *Id.* at 40.

governments, and their respective branches, are still states, are still guided by their own state interests rather than by the interests of the private citizens."[165] He pushed back against the states' rights doctrine by asking what would "prevent the Calhoun system from working in reverse, with states tyrannizing *over* their citizens and only vetoing the federal government when it tries to intervene to *stop* that state tyranny?"[166]

A methodological individualist and an anarchocapitalist,[167] Rothbard championed the radical decentralization of power down to the level of particular persons. Despite his principled anti-statism, he proclaimed that "the 'internal' or 'domestic' attempt to limit the State, in the seventeenth through nineteenth centuries, reached its most notable form in constitutionalism."[168] Rothbard thus acknowledged that constitutional restraints, however imperfect or flawed in practice, were good-faith attempts to constrain state power, even if, in his view, they ultimately failed. He supported, not constitutionalism, but a generally accepted legal "code" that bound judges and looked something like the common-law system or the law merchant, with no legislature or appointed judges behind it.[169] Rothbard's anarchocapitalist jurisprudence is incompatible with the powerful federal judiciary and mode of judicial review that are indispensable to the system of federalism advanced by Barnett and Root, whose arguments about judicial restraint rely on historical inaccuracies.[170]

Barnett and Root erroneously claim, for example, that conservatives inherited the doctrine of judicial restraint from the progressive and New Deal eras[171] when, in fact, it dates back at least to Jefferson if not much

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[165] *Id.*

[166] *Id.*

[167] "It was Murray N. Rothbard who developed the coherent, consistent, and rigorous system of thought—out of classical liberalism, American individualist anarchism, and Austrian economics—that he called anarcho-capitalism." Llewellyn H. Rockwell Jr., *Can Anarcho-Capitalism Work?*, MISES INST.: MISES DAILY ARTICLES (Nov. 14, 2014), https://mises.org/library/can-anarcho-capitalism-work.

[168] ROTHBARD, ANATOMY OF THE STATE, *supra* note 153, at 48.

[169] 2 MURRAY N. ROTHBARD, FOR A NEW LIBERTY: THE LIBERTARIAN MANIFESTO 282–83 (Ludwig von Mises Inst. 2006) (1973) [hereinafter ROTHBARD, FOR A NEW LIBERTY].

[170] *See* ROCKWELL, *supra* note 167 ("The utopian dream of 'limited government' cannot be realized, since government has no interest in remaining limited. A smaller version of what we have now, while preferable, cannot be a stable, long-term solution.").

[171] *See* BARNETT, OUR REPUBLICAN CONSTITUTION, *supra* note 47, at 17; ROOT, *supra* note 38, at 5.

earlier.[172] Their narrative of robust judicial power assumes away the influence and importance of the separation-of-powers doctrine in libertarian or classical liberal theory.[173] It ignores the Hayekian themes inherent in models of federalism that favor decentralization and diffusion of authority in the form of state or local control as against federal power.[174] It also ignores the manner in which James Bradley Thayer's model of judicial restraint diverged from the progressive expression of that doctrine.[175]

Like F. A. Hayek, Brandeis opposed big government because "the limitations of human knowledge"[176] meant that individual judges should not design or plan for local communities. Brandeis and Hayek possessed "a pragmatic sense of human limitations."[177] Rosen emphasizes Brandeis's influence on Hayek as reflected in the latter's famous essay, "The Use of Knowledge in Society."[178] Interestingly, the concept of

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[172] *See* Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CALIF. L. REV. 621, 622 (2012) ("[I]f we want properly to understand the rise and fall of restraint in the sense Judge Posner means—as a doctrine of deference to other, political decision makers—we must go back further . . . to the time of the Founding and the origins of judicial review.").

[173] *See* Ellen Frankel Paul, *Freedom of Contract and the 'Political Economy' of* Lochner v. New York, 1 N.Y.U. J.L. & LIBERTY 515, 535 (2005) ("Separation of powers between the executive, legislative, and judiciary, with checks and balances built into the system to prevent overweening government or, in the worst case, tyranny, is straight from the classical liberal, Lockean playbook"); *see also* THE FEDERALIST No. 51 (James Madison) ("In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own"); BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 151–52 (Thomas Nugent trans., Hafner Pub. Co. rev. ed. 1949) (articulating separation-of-powers theory).

[174] *See, e.g.*, Michael Stachiw, *The Classically Liberal Roberts Court*, 10 N.Y.U. J.L. & LIBERTY 429, 459 (2016) ("In almost Hayekian fashion, the Court has endorsed the view first espoused by Justice Brandeis that the various states serve as fifty 'laboratories of democracy.'").

[175] *See* Edward A. Purcell, Jr., *Learned Hand: The Jurisprudential Trajectory of an Old Progressive*, 43 BUFF. L. REV. 873, 889–96 (1995) (detailing how Thayer's notion of judicial restraint differed from progressive notions of judicial restraint).

[176] *See* ROSEN, *supra* note 3, at 15; *see generally* F. A. HAYEK, THE CONSTITUTION OF LIBERTY 73–74 (Univ. of Chicago Press 2011) (1960); 1 F. A. HAYEK, LAW, LEGISLATION, AND LIBERTY 13–17 (1973); F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945) (explaining the limitations of human knowledge).

[177] *See* ROSEN, *supra* note 3, at 6; *see* HAYEK, THE CONSTITUTION OF LIBERTY, *supra* note 176, at 73–74; HAYEK, LAW, LEGISLATION, AND LIBERTY *supra* note 176, at 13–17; Hayek, *The Use of Knowledge in Society*, *supra* note 176.

[178] *See* ROSEN, *supra* note 3, at 195.

polycentric law that Barnett adapts from Hayek and Michael Polanyi[179] appears incompatible with a monocentric model of a strong federal judiciary that superintends state legislatures. Barnett himself has advocated decentralization and localized control in a polycentric system,[180] a position that seemingly weakens his case for federal judicial powers.

Brandeis's jurisprudence is often consistent with Jeffersonian anti-federalism, whereas libertarian legal scholars have taken up the mantle of the Federalists.[181] Larry D. Kramer has succinctly distinguished anti-Federalist (which he associates with Jeffersonian Republicans) and federalist views on judicial review.[182] Under the antifederalist or Republican view,

> [C]ourts were acting as agents of the people. When they declared legislation void for being unconstitutional, they were acting in a manner they presumed their principal had commanded. Such presumptuousness was not to be indulged lightly, however, and should await conditions of near certainty—because the principal was capable of acting on its own and retained primary responsibility for doing so at all times.[183]

By contrast, the Federalists "emphatically rejected the idea that the people had primary—or, indeed, any—authority when it came to interpreting the Constitution."[184] Rather, they believed that the judiciary possessed "final interpretive authority" and prevented the people, through their legislatures, from enacting foolish laws.[185] On this view, the courts enjoyed "special authority to interpret the Constitution, superior to that of the people and the other branches."[186] During the Reconstruction and Progressive eras, this Federalist account of judicial review—which previously had been discredited—gained ascendency as an anti-majoritarian doctrine with libertarian consequences.[187]

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[179] *See, e.g.*, RANDY BARNETT, THE STRUCTURE OF LIBERTY 257 (1998) [hereinafter BARNETT, THE STRUCTURE OF LIBERTY].

[180] *Id.* at 46–48.

[181] *See generally* KRAMER, *supra* note 172 (comparing Brandeis's jurisprudence with Jeffersonian anti-federalism).

[182] *Id.* at 622.

[183] *Id.* at 625–26.

[184] *Id.* at 626.

[185] *Id.*

[186] *Id.* at 626–27.

[187] *Id.* at 627–28.

Libertarian legal scholars today tend to embrace the federalist version of judicial review and reject the Jeffersonian view.[188]

James Bradley Thayer—who was not only the foremost legal theorist known for the teachings of judicial deference and restraint but also, at one point, Brandeis's closest friend on the faculty of Harvard Law School[189]—attempted to "reassert and so restore the primacy of the Jeffersonian view of judicial authority" during the late nineteenth century.[190] "Thayer," Kramer writes, "sought to restore the older, historically preeminent Republican idea of judicial authority—including its notions of self-restraint and deference—and to reject the Gilded Age Court's pretentions to constitutional supremacy."[191] Brandeis was Thayer's "personal and intellectual ally" from whom he derived his methodology of judicial deference and restraint.[192] Linking Thayer to Jefferson and Brandeis to Thayer, as Kramer does, provides additional support for Rosen's rendering of a Jeffersonian Brandeis.[193]

There is a libertarian case for allowing citizens of different governments to experiment with bad economic policies without interference by outside actors, whether individuals or governments. If another country wishes to adopt socialism, for instance, they may do so to their own detriment; it is not the role of capitalist countries to coerce socialist countries into compliance with free-market economics. On a smaller scale, Brandeis's jurisprudence reflects this kind of thinking:

> [E]ven if state legislators pass laws for protectionist motives that sometimes clash with their stated objectives, judicial deference to state economic experiments is such an overriding value that judges should uphold them unless the legislators "are absolutely and inexcusably" mistaken in their beliefs and the laws "have no relation to the ends sought to be accomplished."[194]

The disjuncture between the notions of federalism and judicial engagement promoted by modern libertarian legal theorists and those embraced by Brandeis is important because it highlights a longstanding

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[188] Mark Pulliam, *The Quandary of Judicial Review*, NAT'L REV. (Apr. 8, 2015, 4:00 AM), http://www.nationalreview.com/article/416590/quandary-judicial-review-mark-pulliam.

[189] *See* ROSEN, *supra* note 3, at 35.

[190] *See* KRAMER, *supra* note 172, at 628.

[191] *Id.*

[192] *See* Brian C. Murchison, *Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases*, 30 GA. L. REV. 85, 102 (1995).

[193] *See* KRAMER, *supra* note 172, at 628.

[194] *See* ROSEN, *supra* note 3, at 57 (quoting from Brandeis's former clerk David Riesman).

tension within libertarianism—one that libertarian legal theorists must resolve if they wish to sell the idea that a cogent, systematic libertarian jurisprudence exists. Libertarians who favor a strong federal judiciary that exercises review power over states and local legislatures necessarily support a centralized, rather than a decentralized, government insofar as they promote a schemata whereby one federal judiciary consisting of 11 circuits supervises and superintends the governments of 50 states.[195] They also necessarily reject the compact theory of federalism that subordinates the federal government to the states—a theory that enjoyed the support of Jefferson,[196] St. George Tucker,[197] John Taylor of Caroline,[198] and Abel Upshur[199] and continues to attract libertarian interest.[200] If his book receives wide attention, Rosen may cause libertarians outside the legal community to consider whether increasing federal judicial power is truly consistent with libertarian principles.

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[195] *See generally* Kevin McLeod, *The Difference Between and Uncentralized & Centralized Political System*, CLASSROOM, http://classroom.synonym.com/difference-between-uncentralized-centralized-political-system-5378.html (last visited Mar. 13, 2017).

[196] *See* Jean M. Yarbrough, *Thomas Jefferson and the Social Compact*, in THE AMERICAN FOUNDING AND THE SOCIAL COMPACT 147 (Ronald J. Pestritto & Thomas G. West eds., 2005) (2003) ("By virtue of his authorship of the Declaration of Independence, Thomas Jefferson is perhaps the best-known exponent of the social compact theory in America."). The compact theory is embodied in the Virginia and Kentucky Resolutions, which Jefferson coauthored with James Madison. *Id.*

[197] *See* ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS (1803).

[198] SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM & THE DISSENTING TRADITION IN AMERICA, 1788-1828, at 239 (Univ. of North Carolina Press 1999) ("Taylor took an important step toward the creation of a compact theory of federalism[.] . . . Taylor moved from a fairly abstract theory of states' rights federalism to a concrete assertion of what would become the core doctrine of the compact theory of states' rights."); *see also* JOHN TAYLOR, CONSTRUCTION CONSTRUED, AND CONSTITUTIONS VINDICATED (1820); JOHN TAYLOR, TYRANNY UNMASKED (1822); *see also* Andrew C. Lenner, *John Taylor and the Origins of American Federalism*, 17 J. EARLY REPUBLIC 399 (1997).

[199] *See* ABEL UPSHUR, A BRIEF ENQUIRY INTO THE TRUE NATURE AND CHARACTER OF OUR FEDERAL GOVERNMENT (1840); ABEL UPSHUR, AN EXPOSITION OF THE VIRGINIA RESOLUTIONS OF 1798 (1833).

[200] *See* THOMAS E. WOODS, NULLIFICATION: HOW TO RESIST FEDERAL TYRANNY IN THE 21ST CENTURY 55, 84, 88–89, 94, 102, 113, 133 (Regnery Publ'g, 2010); Donald Livingston, *The Secession Tradition in America*, *in* SECESSION, STATE & LIBERTY 19 (David Gordon, ed.) (Transaction Publishers 1998); Donald Livingston, *The Very Idea of Secession*, 35 SOC'Y 38, 40–48 (1998); Joseph R. Stromberg, *Republicanism, Federalism, and Secession in the South, 1790-1865*, *in* SECESSION, STATE & LIBERTY 110–11 (David Gordon, ed.) (Transaction Publishers 1998).

III. CONCLUSION

Contrasting portraits of Brandeis suggest by their very difference that he is neither the apotheosis nor the nemesis of libertarianism. Although I remain skeptical of claims that Brandeis was a libertarian, I hope that Rosen is at least partially correct that, "[a]t a time of intense polarization between conservatives and libertarians, who prefer small government and free enterprise, and liberals and progressives, who advocate a more energetic welfare state, Brandeis is the historical figure who represents and blends the ideals of both sides of this crucial debate."[201] Rosen's portrayal of Brandeis will force libertarian legal theorists to, in the words of Ayn Rand, check their premises.[202] At least, given the popular nature of his book, which will likely reach a wide audience, those who disagree with Rosen must respond to his characterizations or risk yielding ground.

Even if it was published by a prominent university press, Rosen's book is not a work of scholarship. It does not contain an index, for instance, for ease of reference. It quotes primary sources, such as letters, and relies on general histories and prior biographies of Brandeis, but does not reference a single peer-reviewed article about Brandeis.[203] Rosen does not contextualize his portrayal of Brandeis alongside other depictions of Brandeis by prior scholars, nor does he provide anything like a bibliographical essay or genealogy of existing scholarship to demonstrate where his book falls on the spectrum of works about Brandeis. Finally, his closing sequence of counterfactuals ("what would Brandeis do today?") is unlikely to impress professional historians.[204] Therefore, it is not clear that Rosen's reconsideration of Brandeis—his revisionism, as it were—will have much scholarly impact or change the way that libertarian legal theorists think about Brandeis.

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[201] ROSEN, *supra* note 3, at 6.

[202] AYN RAND, ATLAS SHRUGGED 199, 618 (1957).

[203] The notes contain articles on Brandeis (or pertaining to Brandeis) published in *Alabama Law Review*, see ROSEN, *supra* note 3, at 213. For an article from *Yale Law Journal*, see ROSEN, *supra* note 3, at 215. For an article from *Fordham Law Review,* see ROSEN, *supra* note 3, at 222. For an article from *Mississippi Law Journal*, see ROSEN, *supra* note 3, at 229. For an article from the *Tennessee Law Review*, see ROSEN, *supra* note 3, at 238. The peer-reviewed articles referenced in the final pages of the book pertain not to Brandeis but to general matters of economics.

[204] *See* ROSEN, *supra* note 3, at 184–208.

What Rosen accomplishes, however, is the initial unsettling of crude representations of Brandeis. Brandeis was a complicated man who should not be caricatured or reduced to tendentious, one-dimensional descriptions. It is not enough to simply dismiss him as a "Progressive" and be done with the matter. Affixing blanket labels to him, in other words, is no substitute for rigorous argument. "Progressive" and "libertarian" seem to be mutually exclusive labels, yet they have both been employed to characterize Brandeis.

Rosen may try too hard to reconcile irreconcilable positions to make Brandeis appear more attractive to disparate groups, such as when he depicts Brandeis's support for unions as appealing to both anti-capitalists and opponents of government regulation.[205] Moreover, Brandeis's faith in "regulated competition"[206] is tough to square with libertarianism,[207] the philosophy with which, above others, Rosen tries to associate Brandeis.[208] In fact, the phrase "regulated competition" seemed oxymoronic while Brandeis was alive.[209] Finally, is it not straining to invoke Jefferson to support Brandeis's endorsement of "cooperative ownership" as a check against "capitalistic exploitation," an association that undermines Rosen's thesis about Brandeis's purported libertarianism?[210]

Unable to harmonize Brandeis's puzzling economics with any stripe of libertarian or free-market economics, Rosen simply dismisses it as a suspect, anachronistic product of nineteenth and early twentieth century consensus.[211] Yet perhaps it is best to treat Brandeis on his own

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[205] *Id.* at 43.

[206] *Id.* at 47. Brandeis "insisted that the state might have to break up large corporations . . . in order to guarantee industrial democracy." *Id.* at 51.

[207] *See id.* at 62–77. Rosen attempts to smooth out this tension in Brandeis's thought, or at least in his portrayal of Brandeis's thought, by suggesting that "Brandeis's most important contribution as a political economist, like Jefferson, was to view economics in democratic and ultimately constitutional terms." *Id.* at 77. He adds that "Brandeis, like the framers of the Constitution, understood that a relentless focus on efficiency is the surest way to destroy liberty. And like Madison and Jefferson, he wanted to maximize the number of independent citizens in society—citizens, that is, in control of their economic destiny." *Id.*

[208] *See, e.g.*, *id.* at 194–95.

[209] *Id.* at 106.

[210] *Id.* at 166–67. Rosen later emphasizes that Brandeis's notion of cooperative ownership does not include a social safety net, *see id.* at 172, but the difficulty of synthesizing cooperative ownership with libertarianism remains.

[211] *Id.* at 86. The context for this dismissal involves Brandeis's views on government price controls.

terms and in light of his intellectual complexities. He embraced competing ideas; the tensions in his thought are fascinating and confounding. His notion of the right to privacy—to be "left alone"—undercut his commitment to freedom of speech and debate.[212] He is described as "the most far-seeing progressive justice of the twentieth century"[213] by the very man who claims that "civil libertarian liberals and libertarian conservatives" are Brandeis's "natural heirs."[214] It does not follow that Brandeis's "Jeffersonian idealization of the farmer and agrarian democracy" entails environmentalism as that term is understood in our current political lexicon,[215] nor do Brandeis's votes against portions of the New Deal involve principled adherence to market-based solutions to poverty and economic depression.[216] His confidence in the ability of the state to break up monopolies[217] does not comport with his alleged "antistatism,"[218] nor does his particular permutation of "cooperative ownership"[219] match his "fiscal responsibility and frugality" in personal matters.[220] In short, the man who was simultaneously "an individualist *and* a communalist"[221] does not make for a simple sketch; his complexity and difficulty demand equally complex and difficult evaluations of his work.

Rosen's book has supplied rich material for libertarians who believe that the federal judiciary is a cause of, not the solution to, the ever-expanding reach of the federal government, or who believe that representative government, and the electoral accountability it entails, is a constructive mechanism for restraining legislative power. Libertarians who doubt that federal judges as a group will embrace libertarian principles and use the power of their office to restrain federal overreach may find Rosen's depiction of Brandeis attractive. They may wonder whether a robust federal judiciary results in the centralization rather than the dispersal or diffusion of government power—and thus may question

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[212] *Id.* at 41–42.
[213] *Id.* at 100.
[214] *Id.* at 193.
[215] *Id.* at 58.
[216] *Id.* at 120.
[217] *Id.* at 51.
[218] *Id.* at 195.
[219] *Id.* at 166–67.
[220] *Id.* at 12.
[221] *Id.* at 182.

the tenets of modern libertarian legal theory. They may, at last, have more in common with Brandeis than they realize.