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THE SOCIAL THOUGHT OF MR. JUSTICE BRANDEIS

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IN the judicial opinions of Mr. Justice Brandeis the realities of social change confront the equally powerful realities of vested interests and vested ideas. The result is as significant a mirroring as judicial literature offers of the essence of the American national experience. With no other jurist are the issues that have emerged from our economic development so clearly drawn or so sharply presented. No other gives so immediate a sense of the heroic and, as it sometimes seems, hopeless task that the Supreme Court has wittingly or otherwise assumed—the task of directing the chance and change of the economic process. Mr. Justice Brandeis has found himself in the thick of every battle involving important issues of statecraft. His name has therefore taken on in the public mind implications in the realm of social policy as well as in that of judicial opinion. The liberals have ranged him on the side of the angels, the conservatives somewhat lower. For a surer estimate one would wish to go beyond his reputation to the solid fact of his written opinions, beyond that to the body of his social thought, and finally to that integrated personal philosophy and viewpoint which never fails to be impressive even when one disagrees with it.

But the difficulty of isolating and formulating the hard core of Mr. Justice Brandeis' social thought can scarcely be overestimated. He has nowhere mapped out his legal philosophy in the form of prologomena to all future systems of judicial decision. Nor has he, like Mr. Justice Holmes, the gift of compressing a lifetime of thought into a single gleaming sentence that lights up and integrates everything else he has said. Mr. Justice Brandeis, it must be remembered, is specialized to advocacy and judicial decision and not to philosophizing. He is himself one of the most a-philosophical of jurists—a thinker whose thought is always directed to eventual action, a judge in the great tradition of the Anglo-American case law who proceeds from the facts of the

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concrete case to a particular decision, a social theorist whose "principles" are nine-tenths submerged in the form of preconceptions and crop out on the surface only as approaches to pressing issues in contemporary affairs. He has said of his own mental processes that it is only after he has found himself confronted by a specific set of facts and has thought his way through them to a conclusion, that he has found it to coincide with some well-recognized philosophical "principle".¹ As for the received classification into schools of jurisprudence, it accommodates Mr. Justice Brandeis about as badly as it does Mr. Justice Holmes, or any other non-academic and non-imitative mind. Approaching the problem of law and society from an intensely activist standpoint, Mr. Justice Brandeis has not been interested by the *Methodenstreit* of the schools. He has preferred to fight his battles on the fronts of social legislation and judicial decision rather than in the realm of method.

While this may be worth saying, it is at best only a set of half-truths. That men vary not so much in whether or not they are philosophers but in the extent to which their philosophy is articulate is a psychological commonplace. It is, in fact, one of the attractive paradoxes that emerge from a study of Mr. Justice Brandeis that with all his distaste for philosophy he is known as the judge with the most definite and coherent social philosophy, and that with all his apathy about method his greatest importance for the future may lie in the novel elements he has added to the traditional method of adjudicating legal controversy. The quest of the inarticulate major premise that Mr. Justice Holmes has inaugurated leads in the study of Mr. Justice Brandeis to consequences of some moment for legal and social theory. There is of course the ever-present danger that the student will read his own preconceptions into Mr. Justice Brandeis' opinions.² And there is also the danger of his forgetting that the social thought of a judge cannot be estimated by the criteria that would be applied to a social theorist writing out of the plenitude of his experience and his imagination. We can scarcely expect—even if we might wish—a Supreme Court opinion to read like the *Communist Manifesto* or Sorel's *Reflexions sur la Violence*.³ The judge cannot express an untrammelled economic or social philos-

¹ Introduction by Ernest Poole to *BRANDEIS, BUSINESS—A PROFESSION* (1914) xii.

² It is significant that most of the writers in the excellent collection of tributes to Mr. Justice Holmes find in him something to confirm their own faiths. Thus Mr. Justice Cardozo finds him a philosophical jurist, Frankfurter a legal statesman, Dewey a pragmatist, Cohen a lonely thinker, and Miss Sargent a gallant gentleman whose flame is fed by subterranean fires.

³ This has, however, not kept some Supreme Court opinions from reading like Herbert Hoover's *AMERICAN INDIVIDUALISM* (1922).

ophy. The facts and the issues of the specific case, the constitutional text he is seeking to apply and the precedent he must to some degree follow all link him by a sure falconry to the solid ground from which he might seek to soar too far.⁴

II

The earliest influence in fashioning the mind of Mr. Justice Brandeis—and perhaps therefore the deepest and least eradicable—was a strain of romantic liberalism whose essence was a gallant and optimistic struggle for certain supposedly primal human rights.⁵ It was a liberalism compulsive enough in its emotional force to lead his parents to emigrate to America from Bohemia after the unsuccessful revolutions of 1848.⁶ These revolutions, aptly characterized by Trevelyan as “the turning-point at which modern history failed to turn”, were in spirit constitutional, humanitarian, idealistic. They represented a renewal on continental soil of the equalitarian ideals of the American and French revolutions. Carried back to the United States by the emigrant groups of the mid-century they imparted a new freshness and vigor to the American tradition of civil and political liberties. Freedom and justice and democracy, which as home-grown varieties had wilted a bit in the hot climate of American experience, became when transplanted hither from Europe vigorous and even beautiful growths. They were terms that still had a genuine and simple content for these naïve newcomers. Mr. Justice Brandeis grew up thus in an atmosphere of what might be called primitive Americanism.

This Americanism took the characteristic form, in the semi-frontier Kentucky society in which the Brandeises lived, of a deeply felt individualism. The complexion of such an individualism was as varied as were the sources of the sense of release from which it sprung. To be allowed finally to do what one in Europe had always dreamed of doing and what one had regarded

⁴ For an interesting exposition of these limitations on the judicial process, see Judge Hutcheson's review of LIEF, *THE SOCIAL AND ECONOMIC VIEWS OF MR. JUSTICE BRANDEIS* (1930) 40 *YALE L. J.* 1116 (1931).

⁵ For the biographical material on which the interpretation of Mr. Justice Brandeis' earlier career in this section is based, the writer has drawn chiefly upon Ernest Poole's introduction to *BRANDEIS, BUSINESS—A PROFESSION*, *supra* note 1. See also DE HAAS, *LOUIS DEMBITZ BRANDEIS* (1929), Norman Hapgood's penetrating *Justice Brandeis: Apostle of Freedom* (1927) 125 *NATION* 330 and Charles Beard's admirable introduction to LIEF, *op. cit. supra* note 4. The most valuable source material is to be found in the records of the Senate Judiciary Committee that held hearings on the appointment of Mr. Justice Brandeis in 1916.

⁶ The story of the emigration of the Goldmark and Brandeis families is recounted with considerable charm in *GOLDMARK, PILGRIMS OF '48* (1930).

as the marks of a freeman, to talk or criticize or worship as one pleased, to see an immediacy of relation between economic effort and economic reward, reenforced one's sense of the dignity and sovereign importance of the individual. There were also the slaves as intense and vivid symbols to sum up for a border-state abolitionist group what it meant to lack the liberties of an individual. Mr. Justice Brandeis recalls how violent his reaction was when, during a brief sojourn in Germany as a young man, he was reprimanded by the authorities for whistling at night. The reprimand was more than a personal reproof; it was an insult to a complete and cherished way of life.

One does not become easily disengaged from a way of life this deeply learned. The whole early career of Mr. Justice Brandeis, with its hard work and study and success, runs in the best tradition of American individualism. In fact, all the events of his first forty years had conspired to make him an idealistic yet successful liberal and civic leader, whose conspicuous ability condoned his excess of zeal, and whose mastery of the hard facts of business showed that his somewhat tiresome sermonizing was not to be taken overseriously. It is true, he showed at times a disquieting curiosity about matters into which a Boston gentleman rarely pried; as when in the 80's he began to talk with labor leaders, and to regard the labor struggle from the worker's point of view. And he showed also a somewhat unusual tendency to interpret the lawyer's function as more than mere advocacy and to set himself up now as judge and now as arbitrator. But all his offenses stayed within the limits of tolerance.

The genuinely formative years of Mr. Justice Brandeis' mind fell in the "social justice" period of American history, in the latter part of the nineties and the first decade of the twentieth century. They were years which witnessed on the one hand the rise of powerful vested interests and the expropriation of American resources by capital acting under a laissez-faire philosophy of government, and on the other hand such movements as populism, muckraking, trust-busting and the "new freedom". The vigor of individual enterprise which had opened a continent had grown barbaric and piratical in the exploiting of it; and the pure metaphysical passion which had driven successive waves of migration to America⁷ was now transferred and transformed into an intense desire for purifying the body politic. To minds educated in the dialectic of liberalism it seemed obvious that the situation could be best explained in terms of a dualism of conflicting forces. It seemed clear that the captains of industry and the masters of capital, in the exultation of success, would sweep away every landmark on the terrain of American liberty. And

⁷ This is pointed out clearly in SANTAYANA, *CHARACTER AND OPINION IN THE UNITED STATES* (1924).

it seemed clear also that the only recourse for liberals lay in a militant attack on all fronts—an attack on bankers, on corporations and on politicians corruptly allied with them, a pitiless campaign of investigation and publicity.

It was amidst this planetary crash and turmoil that Mr. Justice Brandeis' world took definite shape. It was in a sense inevitable that he should have been caught up in the swirl of these forces. For it is of the essence of his mind to be receptive to the aspirations and conflicts of the world he lives in, and to desire participation in them. Possessing little of Mr. Justice Holmes' transcendence of any specific period, it is rather his genius to be immersed in his time. After the critical struggle to establish a legal practice was won, his mind, whose Hebraic sense of righteousness had been reenforced by his background of Continental liberalism, turned more and more to issues of social justice. He found in the dominant temper of this populist-muckraking period that essential continuity with his own past without which no individual enters upon a revolution in his thinking. He found room in his new philosophy for the ideals he had learned as a boy; room also for the individualism that had dominated his youth. What this period added, in his case as in the case of other liberals, was a new perception of the changes that the coming of industrial society had wrought in the conditions of American liberty and American individualism. It was clear that the old ideals could no longer be pursued in the old way. That the ideals themselves were worth while and needed no replacement formed part of those first principles which the liberals of that day did not question.

In Louis D. Brandeis, the able Boston lawyer, the forces of liberalism gained no mean ally. I say ally, because a common unquestioning soldier he could never be: stern individualist, who cared more about the integrity of his personality than about anything else, he had to fight in his own fashion. He threw into the struggle all the resources of his mind—his amazing legal acumen, his persuasiveness, his mastery of the details and refinements of corporation finance, his unwavering sense of values, his eminently precise and constructive imagination. Equipped with every weapon of information one had reckoned one's own, he was a terrifying opponent to encounter. But if he spared no one else, he was most ruthless with himself. He worked indefatigably. He sacrificed his obvious interests. He dedicated himself with a monastic fervor to what he conceived to be the service of the public. He came to be called "the People's Counsel", and if there was a touch of asperity in the way the name was applied to him by opponents, he himself took it with a high seriousness. His ideal of citizenship was Periclean, but he pursued it with a religious intensity that was mediaeval.

He was effective. Of that there can be no doubt. The minutes of legislative hearings and investigations, the records of lawsuits in which groups of citizens, organized as a "league" of some sort or other, applied for court action against an encroaching corporation, the newspapers that reported his speeches and activities and the journalists who commented on them, all attest to his effectiveness. There was room in that struggle for every sort of talent—for a Bryan, a LaFollette, a Roosevelt, a Steffens, a Hapgood, a Wilson. But when most of the brilliant legal ability of the country was being enrolled in the service of the corporations, the talents of a first-rate legal and statistical mind were worth more than the talents of all the politicians and journalists. Mr. Brandeis found himself at home with the sort of problems that had now to be mastered. His career, winding its way from one set of financial and political intricacies to another, takes on something of the fibre of the period.

In two important respects he stands out from the group of turn-of-the-century liberals with whom his name is associated. He had a passion for detail and concreteness where most of them dealt in invective and generalities. And he had a capacity for constructive achievement in the field of social legislation and social invention. An exposure of insurance companies was accompanied by a plan for reorganizing the industry and by a new form of savings-bank insurance; an attack on the railroads gave him a chance to launch on its career the principle of scientific management; a call to arbitrate a labor dispute resulted in the "protocol" and the "preferential open shop". And he knew not only how to create and state these ideas and plans; he knew also the technique of publicity and persuasion without which in the apathy of modern life they would have been ignored. But perhaps most important of all was the will to "follow through" an idea until it was functioning, and the infinite capacity for pains which saw to the details of organization. In the stress he laid upon social invention he was closely related to the Jeremy Bentham whom Mr. Wallas interprets;⁸ more closely even than was the administrative constructiveness which the Webbs were seeking to effect in London.

Yet even twenty years of unremitting effort in this direction would probably not have sufficed to rescue his name from the comparative oblivion of those who fight heroically in a hopeless cause. To say this is not to do injustice to either the seriousness or the effectiveness of Mr. Brandeis' public career before 1916. Whatever else happened, his place in the amazing history of those two decades of American life would have been distinctive and secure. Nor is this the place to enter upon an extended critique

⁸ Wallas, *Bentham as Political Inventor* 129 CONTEMPORARY REVIEW 308. (1926).

of the cause with which he was allied. From the vantage-ground of the present it seems clear that the cards were stacked against them. The forces they were fighting were too integrally part of a capitalist-industrialist society—part of the logic of its development and part of its psychological context—to be severed from it for separate destruction. None of them was either willing or ready to attack the foundations of the society itself. And to save the body while striking at the excrescences required a more subtle diagnosis of historic and economic forces and a more mature grappling with the complexities of the problem than the resources of those decades could command. If Mr. Brandeis stands out as a unique and heroic figure in the populist thought of that period, it is not for the raking fire of his cross-examinations, nor for the brave assurance of his analysis of the Money Trust;⁹ not even for that stubborn command of facts and figures which made men call him the mathematician of the movement.¹⁰ It is rather because of the stress we find him laying, even in those days, upon the necessity for the continuous application of social intelligence to social problems, and upon the inadequacy of any solution which did not have behind it the creative will of the people.

But it was Mr. Brandeis' misfortune to try to fashion a social philosophy in the midst of a crusade. The pennons wavered for a moment, fluttered anxiously, but were immediately carried forward. He was himself caught up in their contagion, and since crusades never reach their goal, he might have remained merely one of the adherents of a "fighting faith" which had had its day and given way to another. But the fervor of the crusade had reached to the White House and when, on the death of Mr. Justice Lamar in 1916, President Wilson looked about for a successor his choice fell upon the Boston lawyer who had displayed such ability and courage and who, without holding public office, had already had a crowded public life. Whatever the merit of the appointment, for us it changes the whole perspective of Mr. Justice Brandeis' work. It transformed him from a free lance into one of the ruling powers. It gave direction to his energies and meaning to the wide scattering of activities that had constituted his career. There is no need to underestimate the dramatic quality and the importance of that early career in order to see that as a result of the appointment its chief interest now lies less in its intrinsic qualities than in its having been an apprenticeship for an opportunity. We can see with some degree of clarity, with the detachment that the intervening years give, what that oppor-

⁹ *OTHER PEOPLE'S MONEY* (1914). This originally appeared as a series of articles in *HARPER'S WEEKLY* (1913-1914).

¹⁰ See the reprint in Hapgood's introduction to *OTHER PEOPLE'S MONEY*, *supra* note 9, of Hapgood's editorial for *HARPER'S WEEKLY* entitled *Arithmetic*.

tunity was and how effective was the apprenticeship. The entire focus of those two crowded decades changes, and they become preeminently a record of the education of Mr. Justice Brandeis.

Like any worthwhile education it consisted both of learning and unlearning. It was comparatively easy for an energetic and responsive person amidst the social intensities of the period to unlearn the genteel tradition of restraint which tended to envelop one at Harvard¹¹ and the tradition of quietism in which the legal mind everywhere was wrapped. But it was harder to unlearn what had lingered over from one's liberal-romantic background—the faith that in a democratic society there was equality of liberty and opportunity, or some immediate relation between the functioning of government and the needs of the people. From one point of view, Mr. Justice Brandeis' contacts with labor unions, corporations and bankers, with the sweated workers and the vested interests, constituted an exploration of modern industrial society unique in the education of justices of the Supreme Court. He gained an understanding of the cleavage that lay between the haves and the have-nots,¹² and some notions of the implications of that cleavage for both. He grasped with some degree of realism the meagre content of life for the vast armies of labor. He sought the answer to the riddle of how a society that gave its masses no leisure from the grinding hours of labor and no protection from exploitation in the barbaric competition for profits, that took no measures to control how much they would be paid for their work or how much they would be charged for what they bought, and that made no provisions for them when they grew too old or sick to be profitable—how such a society could expect them to form the vital and intelligent units predicated in a theory of democracy. He saw the growing institutionalization of life as it was embodied in the corporation, the trade-union and the centralization of government, and the danger that amidst it the individual might be lost. But, amazingly, his education taught him also that there was invested in the American economic system more hard work and experience than any novel scheme of control could command, and that it was dangerous to drive beyond the bounds within which initiative and skill could be continuously exerted.

So balanced and mature an education could not have been acquired in a vacuum. Whatever Mr. Justice Brandeis learned or unlearned proceeded from that direct pragmatic context of exi-

¹¹ For an account of this genteel tradition that can be set up in illuminating contrast to the turmoil of the "social justice" period, see Santayana's essay on *The Genteel Tradition in American Philosophy* in his *WINDS OF DOCTRINE* (1913).

¹² "We are sure to have for the next generation an ever-increasing contest between those who have and those who have not—." *BUSINESS—A PROFESSION*, *supra* note 1, at li-iii. This book is a collection of articles and occasional speeches by Mr. Brandeis.

gency and action that seems always to have been so congenial to his mind. The fight he waged from 1896 to 1911 to keep the control of the Boston transportation system in the hands of the city, gave him a notion of the political intrigue through which franchises are obtained. He delved deeper into public utility economics in the struggle that he waged from 1903-5 for cheaper gas rates in Boston. His fight against the New England transportation monopoly of the New Haven railroad (1906-12) confronted him with the problem of the relation between inflated capitalization and railway rates, and between monopoly and service to the community; and his appearance before the Interstate Commerce Commission in the series of railroad rate cases (1910-1913) made him think through the connection between the management of a railroad and its expenses of operation. His conception of the place of trade-unions in American life came from direct experience in labor disputes. He waged a bitter fight in 1904 against the Boston Typographical Union, in which he discovered that unions no less than employers might be unscrupulous and irresponsible. But, although this caused him to think a good deal about the principles of trade-union organization, it did not make him an anti-unionist. He had found out at least as early as 1902 what despairs lay behind the heroism of protracted strikes;¹³ and he not only favored the legislative objectives of the union in obtaining better wages and more humane working days, but he regarded them as an insurance against the irresponsibility of employers. The year 1907 even found him at the strangely unjust task of tracing the possible consequences that a more-than-ten-hour day for women workers in an Oregon laundry might have on their physical condition, their moral life, or the character of the future citizenry they gave birth to.¹⁴ Perhaps the most impressive item that his labor contacts added to his education came from his experience in arbitrating the strike of the International Ladies Garment Workers in 1910.¹⁵ Here he was brought face to face with a strange group— intelligent, idealistic, bickering, embittered, exploited in the "sweating" system, yet charged with tremendous vitality, through whom a rich and alien culture imbued with European radical ideas was being transplanted to America. His studies in connection with the Ballinger investigation of 1909, in which he had played so prominent and dramatic a rôle, presumably as counsel for Glavis but

¹³ "If you search for the heroes of peace, you will find many of them among those obscure and humble workmen who have braved idleness and poverty in devotion to the principle for which their union stands." *BUSINESS—A PROFESSION*, *supra* note 1, at 84.

¹⁴ *Muller v. Oregon*, 208 U. S. 412, 28 Sup. Ct. 324 (1908).

¹⁵ See the account of this arbitration, its difficulties and consequences, in LORWIN, *THE WOMEN'S GARMENT WORKERS* (1924).

in reality as inquisitor for the public, had given him some notion of how the natural resources of the country were disposed of. But here, among the Jewish garment workers in New York, he found human resources that called equally for conservation. He was successful enough, tentatively, in evolving a technique for settling their disputes with their employers, just as he had been successful in 1905-08 in evolving a technique whereby, through savings-bank insurance, the workers of Massachusetts could get protection at rates that were not excessive.¹⁶ But the thing that troubled him was that ultimately these individuals—and all individuals—were at the mercy of those in whom economic power resided, and that this economic power went with the control of the fluid capital of the country. His experience in the life insurance fight had shown him the degree to which the capital of the industry was concentrated in the "Big Three" companies; and in his series of Harper's Weekly articles in 1913-14 on the Money Trust he carried the analysis farther, making it embrace the entire financial structure of the country.¹⁷

There was much, it is to be conjectured, that Mr. Justice Brandeis did not learn during those years of his crowded career. But considering the blind chance that fits or misfits our haphazard educations to the crucial tasks that somehow fall to us, the education of Mr. Justice Brandeis appears now as having been amazingly apposite. The social context within which, as a justice of the Supreme Court, his thinking would have to proceed was more complex than that in which either the Constitution or the body of judicial precedent had been formed. A system of industrial organization so much more developed than that of the nineteenth century as to take on the aspects of a second industrial revolution, had created also a "great society" that was unique in its problems and temper. There were deep cleavages in social stratification and obvious injustices in distribution. Above all else, American capitalism was going through a remarkable phase of concentration. Power and control were being shifted and pyramided. The old dichotomies between political power and economic activity were rapidly becoming a matter of rhetoric rather than actuality. Here was a man who, beyond most others that might have been chosen, was qualified by his experience to understand the processes of change and the instruments of control.

Enough opposition was raised to Mr. Justice Brandeis' appointment to make it something of a *cause célèbre*. Among those who joined in the protest were leaders in American financial, legal

¹⁶ BUSINESS—A PROFESSION, *supra* note 1, at 109-97.

¹⁷ These articles, especially those on the size of the corporate unit and on the failure of banker-management, are brilliant economic analyses that have scarcely been surpassed in the literature. See note 9, *supra*.

and political life whose names carried great weight. The grounds advanced included infringements of legal ethics, unjudicial temperament and even chicanery and dishonesty. There was an investigation by the Senate Judiciary Committee, in which some 1500 pages of testimony were taken, there were accusations and defenses and recriminations, and there was finally an acquittal in the form of a ratification of the appointment.¹⁸ At the time and since then the protest against Mr. Justice Brandeis has been sufficiently protested against. What was its significance? Can it be dismissed as the malevolent gesture of men whose hostility Mr. Brandeis had incurred? It is clear that such a judgment would be superficial. There was much more in the struggle about the appointment than a matter of personal justice. There was a historical rationale in the utterances of the seven ex-Presidents of the American Bar Association, the petition of the Boston men of affairs, and the editorials in the financial papers. The protest against the appointment of Mr. Justice Brandeis was a crucial recognition by the old order that the new order was threatening. There was a stiffening of the ranks, a closing of the gaps in the phalanx, a call for a united front. For half a century the possessing class in America had known the conditions under which they could operate and expand. The rules of the game, however advantageous they may have been, had been fixed. Surely, they could not now be revoked. A man who had formed and had expressed opinions on most of the great issues of national policy that were likely to come before the court was dangerous, especially when those opinions were original, unconventional and held with moral fervor.

The appointment was thus more than the filling of a vacancy. It represented a possible turning-point in the American judicial process. For whatever Mr. Justice Brandeis might or might not be expected to do, he could not be expected to cleave to the tradition that the whole duty of a Supreme Court justice was to maintain a decent ignorance of the world outside the court.

III

In the fifteen years that have elapsed since the appointment of Mr. Justice Brandeis, he has become firmly entrenched in the public minds as a "liberal" jurist and one whose method of decision is "sociological". There is an essential soundness in this judgment, although both terms are shopworn to the point of vagueness and are more useful in embracing once significant similarities between jurists than in suggesting currently signifi-

¹⁸ U. S. CONGRESS, SENATE COMMITTEE ON THE JUDICIARY, TESTIMONY RELATING TO THE APPOINTMENT OF HON. LOUIS D. BRANDEIS (1916).

cant differences. Mr. Justice Brandeis has in common with other liberal jurists the fact that he has reacted against the rigor of a narrow mechanical jurisprudence which, containing within itself no principle of growth, applied old rules to new situations and ignored changing economic set-ups. But his unique importance is not summed up in this critical attitude but must be sought also in the positive logic of relationships between law and society that is implicit in his day-to-day opinions and dissents. In his case, as with other activists, it is the idea in action that pushes forward ideological advance.

On the Supreme Court bench it is Mr. Justice Brandeis who has made the sharpest break with the classical tradition. Whether it passed through a tory or a liberal mind, the classical tradition was concerned with the interpretation of the Constitution as an instrument of government. In the hands of Marshall and Story, Taney and Field,¹⁹ it produced widely variant results, but it seems fair to say that the differences they revolved about were differences in political theory—the “narrow” or the “strict” construction of the Constitution, centralization or states rights, the clash of sections. Fortifying each of these positions there was, to be sure, a social philosophy and the pressure of new or old economic forces.²⁰ But these remained in the rear. On the fighting line were the competing political and constitutional theories. It is Mr. Justice Brandeis’ achievement to have appreciably altered the basis and the terms of the conflict. He has been the first to face squarely and consistently the problem of the relation between social change and judicial action.

He is thus preeminently the jurist of a transitional society, in which change is the dominant, the obtrusive fact. His thought is geared to social change. Not that Marshall and Taney lived in a static world. But the realities they and their colleagues wrestled with were the realities of constructing, consolidating and reconstructing the foundations of the American polity.

¹⁹ Mr. Justice Holmes has also in a sense broken with the classical tradition. But while he rejects the rhetoric of constitutional law as “a fiction intended to beautify what is disagreeable to the sufferers” (*Tyson v. Banton*, 273 U. S. 418, 446, 47 Sup. Ct. 426, 434 (1927)), and has few if any “fighting faiths” of his own for time to destroy, his deepest attitude is still one of social skepticism. “I think that the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.” *Ibid.* Few would accuse Mr. Justice Brandeis of making too ascetic a dissociation between his views of public policy and his opinions.

²⁰ See T. R. Powell, “*The Logic and Rhetoric of Constitutional Law*” (1918) 15 JOURNAL OF PHILOSOPHY, PSYCHOLOGY AND SCIENTIFIC METHOD 645-58.

Where the principles of constitutional interpretation had themselves to be outlined, they occupied the foreground despite the social changes that accompanied the beginnings of industrialism in America. But the maturity of industrialism brought an unparalleled pace of change, opened new gaps between need and aspiration, revealed in startling outlines the logic of social institutions implicit in our system of economic organization. As the task of adjusting legal thought and institutions to economic development grew more difficult, it grew also more imperative.

It is this absorption with social change that chiefly differentiates the thought of Mr. Justice Brandeis from that of Mr. Justice Holmes. While the former has his eye fixed on the mutations in the life of society, the latter delights to observe the essential identities behind them. The curious uniformity with which the human animal behaves, whatever the century, runs like the hint of a theme through the entire body of Mr. Justice Holmes' opinions. But Mr. Justice Brandeis is concerned with the more immediate consequences of changes in social institutions and the traumata they reveal in our life.²¹

To adjust the body of legal rules to a world of bewildering change requires, to start with, the fixed sense of social value and social need that accompanies a strongly functionalist way of thought. Institutions often develop their own principle of growth, not necessarily related to the need that brought them into existence, and the original need has commonly to be rediscovered and redefined. Mr. Justice Brandeis, with his Thoreau-like fervor for whittling life down to its essentials, is peculiarly qualified for such a task. Amidst the variety of conflicting practises regarding depreciation, he seeks the underlying function that a depreciation account serves;²² in a case involving the abolition of private employment agencies he seeks to get at the functional purpose of all labor exchanges;²³ in an investigation, before he came to the bench, of the insurance business, he analyzes aptly the social function of insurance.²⁴

²¹ This is not intended to exclude other bases for comparison. For an admirable treatment of these two liberal figures, see Hamilton, "*Mr. Justice Holmes and Mr. Justice Brandeis Dissenting*" (1931) 33 CURRENT HISTORY, 654.

²² *United Railways and Electric Co. v. West*, 280 U. S. 234, 266, 50 Sup. Ct. 123, 130 (1930).

²³ *Adams v. Tanner*, 244 U. S. 590, 597, 613, 37 Sup. Ct. 662, 665, 671, (1916): "The problem which confronted the people of Washington was far more comprehensive and fundamental than that of protecting workers applying to the private agencies. It was the chronic problem of unemployment,—perhaps the gravest and most difficult problem of modern industry. . . ."

²⁴ Among the changes that Mr. Brandeis recommended was "the recognition of the true nature of the life insurance business; namely, that its sole province is to manage temporarily with absolute safety and at a minimum

But a jurisprudence built around social change requires even more an intimate and realistic knowledge of economic organization. Without subscribing to the economic interpretation of the social process, Mr. Justice Brandeis believes that the forces that create new tasks for law are mainly economic. This belief and the insight of economic processes that he gained from his active career in handling business relationships, give his thought its characteristic realism. Mr. Chief Justice Marshall also had a strong realistic sense, but it was of American political problems and processes; and Mr. Justice Holmes, with his mordant insight into human motives, is a consummate psychological realist. All realistic thought joins in the pursuit of the *élan* of the actual. It brushes aside form and fancy, and seeks the determining facts. Mr. Justice Brandeis' realism is chiefly economic: his thought evinces a mastery of the facts and processes of economic life hitherto unsurpassed on the Court.

It is chiefly concerned with effecting a *rapprochement* between law and the institutional life to which it is directed. Viewed typically and schematically Mr. Justice Brandeis' thought premises the process of public law as an interplay of relationships among three entities: the experience of society, out of which disputes and problems arise; some legislative body, acting alone or through administrative commissions it has created, which purports to crystallize social experience in its enactments; and the courts, which interpret the application of constitutional and common-law principles to the specific case.²⁵ His eye goes always beyond the superficial facts of the case to the matrix of need, maladjustment or agitation out of which it arose; it moves from the object itself to the social landscape that gives it perspective. Such a method has a tendency to shift the venue of discussion and reorient the preoccupation of the Court. Anxiety about freedom of contract gives way to an analysis of wages and the conditions of labor, due process to waste and scientific management, discussion of principle to recital of fact. This shift of emphasis was marked dramatically by the "Brandeis brief" in *Muller v. Oregon*²⁶ but it runs through the body of Mr. Justice Brandeis' deci-

cost the savings of the people deposited to make appropriate provision in case of death. . . ." BUSINESS—A PROFESSION, *supra* note 1, at 139.

²⁵ There is of course no intent to convey the idea that such a scheme is either explicit or unique in Mr. Justice Brandeis' thought.

²⁶ *Supra* note 14. This case involved an Oregon statute which limited the working day for women to ten hours. It is interesting to note that the mass of material which the brief presented as "the world's experience upon which the legislation limiting the hours of labor for women is based" was offered to the Court as "facts of common knowledge of which the Court may take judicial notice." Mr. Justice Brewer, for the Court, said "We take judicial cognizance of all matters of general knowledge." The "economic briefs" were thus admitted into the mansions of the law through a side entrance.

sions as well as of his advocacy.

One of the consequences of such a conception of judicial interpretation is to allow greater latitude to the enactments of state legislatures and the rulings of administrative commissions than the characteristic trend of Mr. Justice Brandeis' thinking would have seemed to require. There is no inherent apotheosis of either the legislative or the bureaucratic process to be found in his philosophy. If anything, his experience with state legislatures in the years when he was fighting insurance companies, railroad companies and trusts must have cast some doubt upon the disinterestedness of the ordinary legislator and the extent to which he represented the wishes of the "people". Nor does the broad tolerance, not unmixed with respect for the sovereignty of a morally self-sufficient group, with which Mr. Justice Holmes regards state legislative acts, occupy a central place in Mr. Justice Brandeis' thought. He is not a state-rights advocate, nor, with his distinctly humanitarian and reformist trend, does he have that skepticism about the superiority of one form of social action over another which might dictate a laissez-faire attitude toward legislatures. In him the tendency to relax the rigor of the constitutional limitations on state legislative action as hitherto interpreted seems to proceed from another source. The recent trend of legislative action, especially in the western states affected by the populist movements, has represented the pressure of social change and social experience much more adequately than have the legal concepts handed down in the common law. Forced to choose between the two Mr. Justice Brandeis could have no hesitancy. In the test of reasonableness as applied to state legislation he has found an effective instrument ready at hand for some approximation toward a realistic jurisprudence.

The emphasis on the institutional context of a case is so characteristic an item in Mr. Justice Brandeis' method that "institutionalism" or "contextualism" might serve as readily as "realism" to describe the method. The context of a felt necessity for the particular legislative enactment is represented in a large number of his opinions—for example, the felt necessity of suppressing private employment agencies,²⁷ or of regulating unscrupulous steamship ticket agents,²⁸ or of discouraging corporate business organizations by levying a state tax upon corporations.²⁹ The

²⁷ *Adams v. Tanner*, *supra* note 23, at 615, 37 Sup. Ct. at 672: "There is reason to believe that the people of Washington not only considered the collection by the private employment offices of fees from employees a social injustice; but that they considered the elimination of the practice a necessary preliminary to the establishment of a constructive policy for dealing with the subject of unemployment."

²⁸ *Di Santo v. Pennsylvania*, 273 U. S. 34, 37, 47 Sup. Ct. 267, 268 (1926).

²⁹ *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 403, 410, 48 Sup. Ct. 553, 555, 558 (1928): "There are still intelligent, informed, just-minded

context of the case may even involve a prolonged agitation by interested groups to secure the enactment of the law, as in the account Mr. Justice Brandeis gives in *Duplex Printing Press Co. v. Deering*³⁰ of the legislative history of the Clayton Act. If the experience of a state in the administration of its weights and measures laws points to the advisability of legislating against excessive weights as well as against short weights,³¹ if the excesses of cut-throat competition and the normal disorder that planless competition produces in the economic order suggest the pooling of trade information by a manufacturers' association in the lumber business,³² if a state wishing to protect its workers from the arbitrary effects of the labor injunction limits the use of the injunction in labor cases, except against acts of violence,³³ or if wishing to protect its cotton growers from exploitation by the owners of private gins it grants special privileges to gins owned by coöperatives,³⁴ it is the context of the case that most seriously attracts Mr. Justice Brandeis' attention, and he presents it with sympathy and with an engaging and sometimes passionate persuasiveness.³⁵

The elements in the social setting of a case that Mr. Justice Brandeis inquires into in order to determine whether the legislation in question had reasonably weighed conflicting social values are invariably significant ones. Half the task of realism is to ask the right questions about which to seek adequate information. Mr. Justice Brandeis' questions revolve about the ends sought to be remedied by the legislation, the social need for it, the character and extent of the public opinion behind it, the psychological milieu in which it was passed, its possible consequences. "Nearly all legislation," he says, "involves a weighing of public needs as against private desires. . . . What at any particular time is the paramount public need, is necessarily largely a matter of judg-

and civilized persons who believe that the rapidly growing aggregation of capital through corporations constitutes an insidious menace to the liberty of the citizen; that it tends to increase the subjection of labor to capital; that, because of the guidance and control necessarily exercised by great corporations upon those engaged in business, individual initiative is being impaired and creative power will be lessened; that the absorption of capital by corporations, and their perpetual life, may bring evils similar to those which attended mortmain. . . ."

³⁰ 254 U. S. 443, 479, 41 Sup. Ct. 172, 181 (1920).

³¹ *Jay Burns Baking Co. v. Bryan*, 264 U. S. 504, 517, 44 Sup. Ct. 412, 415 (1923).

³² *American Column and Lumber Co. v. United States*, 257 U. S. 377, 413, 42 Sup. Ct. 114, 121 (1921).

³³ *Truax v. Corrigan*, 257 U. S. 312, 354, 42 Sup. Ct. 124, 137 (1921).

³⁴ *Frost v. Corporation Commission*, 278 U. S. 515, 528, 49 Sup. Ct. 235, 240 (1928).

³⁵ The opinion in *American Column and Lumber Co. v. United States*, *supra* note 32, is an example of Mr. Justice Brandeis' style at its best.

ment.”³⁶ Where the judgment is not demonstrably clear he appeals to the experience in other states or countries, to the consensus of practise within relevant groups, or to the consensus of enlightened opinion.

The study of the context and the appeal to consensus, for which Mr. Justice Brandeis is to a great extent responsible, are intellectual techniques holding out such great possibilities for the judicial process that it is important to note their ultimate subservience to the social philosophy of the judge. They aid him in arriving at an opinion, but they are also almost inevitably themselves conditioned by an opinion already tentatively arrived at. For the detached political psychologist there is little difference between the pressures applied in an agricultural community in a time of low agricultural profits to obtain privileged legislation for coöperative associations, and the hysterias that in time of war result in criminal syndicalism legislation or the suppression of radical agitation. Various individuals will sympathize with one type of legislation or the other depending upon their intellectual temper; a respectable array of social experience and a consensus of judgment could with discretion be marshalled for both. Yet Mr. Justice Brandeis has consistently upheld the reasonableness of legislation in the former type of case and consistently rejected it in the latter.³⁷ He finds it difficult to reconcile the deviation from sound judgment involved in what he considers an encroachment of fundamental civil liberties, with any possible reasonableness in the legislation.

IV

A significant social philosophy in the realm of law today must do more than eat away the lag between institutional change and legal development. That is, to be sure, of inestimable importance, especially in cases involving submerged groups such as labor whose interests have not been incorporated in the fashioning of legal rules. But it does not offer a technique for dealing with the problems emerging from the active development of business enterprise. The world that the Court operates in is a world of accomplished fact, with which one must come to the best terms possible. But it is also a world continually in the making, with many potential lines of development. To drive a wedge of direction through the flux of economic life and to turn it into socially

³⁶ *Truax v. Corrigan*, *supra* note 33, at 357, 42 Sup. Ct. at 138.

³⁷ See, for example, *Gilbert v. Minnesota*, 254 U. S. 325, 338, 41 Sup. Ct. 125, 129 (1920); *Whitney v. California*, 274 U. S. 357, 373, 47 Sup. Ct. 641, 647 (1926); *Schaefer v. United States* 251 U. S. 466, 483, 40 Sup. Ct. 259, 264 (1919); *Pierce v. United States*, 252 U. S. 239, 273, 40 Sup. Ct. 205, 217 (1919).

accredited channels becomes the task of the modern state, and under our constitutional system preeminently the task of the Supreme Court.

In this sphere Mr. Justice Brandeis is easily our outstanding figure. He has stood firmly for holding business enterprise rigorously to its social responsibilities. He has kept himself sensitive to current trends in economic organization and has exercised the imagination of genuine statesmanship in envisaging their meaning for the future. He has applied on the judicial front the ideas developed in economic thought and has built up a technique of control that has appreciably added to the resources of our administrative law.

There would seem at first sight to be a contradiction between such an instrumental conception of legal function and Mr. Justice Brandeis' well-known and fervent individualism. But the contradiction is resolved when it is recalled how far his individualism is from the quietistic attitude of laissez-faire economics. While he still borrows heavily from classical economic thought,³³ he has discarded completely the Ricardian faith in the unassisted working of the economic order. He believes in competition as being good for the competitors, good for the consumer and good for the industrial process. But he does not fall into the nineteenth century error of believing that with competition as motive power the economic mechanism can be left to itself. He believes instead that only through the judicious intervention of the state under the proper circumstances can it function with its necessary smoothness.

It is clear that Mr. Justice Brandeis' philosophy of control could look to no comprehensive and continuous organization of economic life in terms of state power, no system of either planning or paternalism. He is entirely in accord with what he conceives to be the normal functioning of the present economic set-up; his animus is directed only against its pathology. The huge and unwieldy corporation, the industrial monopoly, the unfair competitor, the over-capitalized public utility company, the pyramided money trust—these are the forces to be tamed. They represent unbridled economic aggrandizement and anti-social economic power. To Mr. Justice Brandeis they are not what they are to critics of capitalism—natural growths from capitalistic organization, and its characteristic products. They are rather excrescences—sinister growths in a world where no formula and no system can ensure perfection.

³³ A discussion of Mr. Justice Brandeis' economic thought in terms of the orthodox categories would be unfruitful. It is interesting to note however that he speaks of "the operation of the law of supply and demand." *American Column and Lumber Co.*, *supra* note 32, at 417, 42 Sup. Ct. at 123.

Mr. Justice Brandeis has had to work out his theory and technique of control in the course of interpreting the application of constitutional principles to the operations under the Sherman Law and the rulings of the federal and state administrative commissions. He has had to determine what the scope and the powers of the commissions were under the laws creating them, and in passing upon the validity of their rulings he has had to crystallize in his thinking the principles to be applied in the regulation of business.

At the basis of Mr. Justice Brandeis' attitude toward the problem of regulation is his conviction that no rights are absolute.³⁹ In the pitting of public welfare against property rights he insists that there is no absolute right to make profits, just as there is no absolute right to do anything else within the state. The state grants qualified rights in certain property, in return for which the corporation assumes corresponding obligations of charging fair prices, engaging in no discriminations or unfair practises, and allowing a free field for all competitors. The resulting system is one of individualism, in the sense that it premises a régime of profits, competition and private enterprise. But it is an ethical individualism—one that emphasizes responsibilities and duties. When the conditions for vesting property rights are unsatisfactory in any situation, the courts must await legislative action by which a system of regulation can be imposed.⁴⁰

Viewed from another angle, the rationale of Mr. Justice Brandeis' attitude toward control is furnished by his adherence to the idea of competition. Wherever monopoly has taken the place of former competitive units he wishes to restore and maintain competition; where, in a competitive situation, unfair practises threaten the competitive equilibrium he wishes to curb them and so maintain the plane of competition; where competition is impossible or undesirable due to the nature of the industry he wishes to pattern the system of control as closely as possible upon the model of a putative competition. The first of these three spheres of action for government control roughly parallels the operation of the Sherman Act, the second the Federal Trade Commission, and the last the Interstate Commerce Commission and the various state public service commissions. In all of them he projects the competitive ideal into situations where it functions with difficulty, even to the extent of introducing competition

³⁹ The remainder of this paragraph is partly based on the able and subtle reasoning of Mr. Justice Brandeis in *International News Service v. Associated Press*, 248 U. S. 215, 248, 39 Sup. Ct. 68, 75 (1918).

⁴⁰ The *International News Service* case, *supra* note 39, involved the copying of Associated Press bulletins by the International News Service. Because the Associated Press had unusual and even exclusive advantages in the gathering of foreign news, Justice Brandeis felt that in the absence of legislative regulation, no new property right should be vested in news.

as a fiction, very much as the social contract was a fiction, to rationalize regulatory practises in the field of public utilities where in most cases it would be drastic or impossible to maintain competition.

The adherence to the competitive ideal rests, in Mr. Justice Brandeis' thought, not on an arid traditionalism but on a belief that competition best serves certain more fundamental social ideals. It keeps prices low and fair. It represents a phase of equality in that it gives the "little fellows" a chance. It advances the process of invention and fosters progress in the industrial and business arts. It keeps the business unit small enough to be manageable and creative. It prevents any concentration of economic power which might dwarf the individual and threaten liberty.⁴¹ But while all these aims would be generally regarded as "idealistic" there is nothing of the doctrinaire in Mr. Justice Brandeis. Although he is always willing to see a "trust" smashed he is keenly aware that a problem so complex and elusive as that of the control of economic development cannot be dealt with merely by militant and repressive measures. In interpreting the "restraint of trade" provision of the Sherman Act he points out the danger of an absolutistic approach to the problem.⁴² He argues forcefully that "the Sherman Law does not prohibit every lessening of competition" nor does it "demand that competition shall be pursued blindly".⁴³ Whether a particular agreement is illegally in restraint can be determined only by reference to its context.⁴⁴ Thus, a "call rule" on the floor of a commodity exchange does not restrain trade illegally;⁴⁵ price-fixing by the producer for the retail reselling of graphophones need not;⁴⁶

⁴¹ For an enumeration of the dangers of corporate control, see the eloquent passage in *Quaker City Cab Co. v. Pennsylvania*, *supra*, partially quoted above in note 29. The setting of the Sherman, Clayton and Federal Trade Commission Acts in the history of American economic opinion is well presented in *Federal Trade Commission v. Gratz*, 253 U. S. 421, 429, 40 Sup. Ct. 572, 575 (1919).

⁴² *Chicago Board of Trade v. United States*, 246 U. S. 231, 238, 38 Sup. Ct. 242, 244 (1917). See also *Federal Trade Commission v. Gratz*, *supra* note 41, at 438, 40 Sup. Ct. at 578: "A method of competition fair among equals may be very unfair if applied where there is inequality of resources."

⁴³ *American Column and Lumber Co. v. United States*, *supra* note 32, at 415, 42 Sup. Ct. at 122.

⁴⁴ *Chicago Board of Trade v. United States*, *supra* note 42; *Boston Store v. American Graphophone Co.*, 246 U. S. 8, 27, 38 Sup. Ct. 257, 261 (1917).

⁴⁵ *Chicago Board of Trade v. United States*, *supra* note 42.

⁴⁶ *Boston Store v. American Graphophone Co.*, *supra* note 44. See also Mr. Justice Brandeis' utterances on this question before his appointment; his statement before the House Committee on Patents, May, 15, 1912 (excerpt in LIEF, *op. cit. supra* note 4, at 400-403); his article in *HARPER'S WEEKLY*, Nov. 15, 1913, at 10, attacking the opinion of the Court in *Dr. Miles Medical Co. v. Park and Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376 (1910), and *Bauer v. O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616 (1912) (ex-

and even a manufacturers' association among hardwood lumber mills organized to pool and distribute trade information regarding prices and business policy does not.⁴⁷ On the other hand, a tying clause, linking the purchase of jute bagging to that of steel cotton ties, does under the particular circumstances restrain competition.⁴⁸

Mr. Justice Brandeis' opinions in the cases involving interstate commerce and public utility regulation represent in consummate form a combination of realistic knowledge of business, subtle and difficult economic analysis, skillful legal reasoning and creative public policy. In the opinions bearing on the crucial question of the valuation of the rate base, he has pitted his mind against the most complex technical problem that has yet been encountered in regulation, and come away with distinguished success. The right and the wrong of the conflicting theories of valuation, while no doubt of great consequence to the nation, are less important to the present discussion than the method by which Mr. Justice Brandeis has arrived at his theories. He has passed first principles in review, inquiring into the grounds for rate regulation;⁴⁹ he has studied the intellectual history that lies behind the agitation for one rate theory or another;⁵⁰ he has assiduously sought guidance from economic thought⁵¹ and business practise;⁵² he has seen the process of valuation for what it is—not a single certitude, but a chain whose every link is a guess, an opinion or an estimate;⁵³ he has finally sought to measure the

cerpt in LIEF, *op. cit. supra*, at 403-408); and his statement before the House Committee on Interstate Commerce, Jan. 9, 1915, attacking Bauer v. O'Donnell, *supra* (excerpt in LIEF, *op. cit. supra*, at 398-399).

⁴⁷ American Column and Lumber Co. v. United States, *supra* note 32. For Mr. Justice Brandeis' views on this question before his appointment, see his statement before the Federal Trade Commission, April 30, 1915, (excerpt in LIEF, *op. cit. supra* note 4, at 411-415) urging it to take upon itself the function of spreading trade information.

⁴⁸ Federal Trade Commission v. Gratz, *supra* note 41.

⁴⁹ "The investor agrees, by embarking capital in a utility, that its charges to the public shall be reasonable. His company is the substitute for the State in the performance of the public service, thus becoming a public servant." *Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U. S. 276, 290, 43 Sup. Ct. 544, 547 (1922). It will be noted that this rationalization differs from that given above in which regulation is based on the competitionless character of public utilities.

⁵⁰ See the brilliant historical analysis in *Southwestern Bell Telephone Co. v. Public Service Commission*, *supra* note 49.

⁵¹ Especially in his attempts to find in economic theory a satisfactory definition of value. *Southwestern Bell Telephone Co. v. Public Service Commission*, *supra* note 49, at 292, 43 Sup. Ct. at 548.

⁵² Especially in his discussion of functional depreciation in *United Railways v. West*, 280 U. S. 234, 255, 50 Sup. Ct. 123, 127 (1929).

⁵³ *Southwestern Bell Telephone case*, *supra* note 49, at 291, 43 Sup. Ct. at 547.

consequences of the adoption of one rate base or another upon economic development. We are impressed by the erudition, technical grasp and fine historical sense displayed in these amazing opinions; we cannot but admire the strategy with which, after having unsuccessfully defended historical cost against present value,⁵⁴ he retreats and takes up a new position with the theory of functional as against reproduction cost in the determination of present value.⁵⁵ But the significant fact here is not Mr. Justice Brandeis' strategy but the courage and resourcefulness with which he operates in a realm—that of economic statecraft—which must in the future increasingly absorb the energies of the Court.

In a real sense Mr. Justice Brandeis' conception of his task with respect to the control of industrial development has had as much in it of economic statesmanship as it has of judicial interpretation. In his scheme *stare decisis* has played a less important part than the effect of the decisions on industrial development and business initiative; and so far from hesitating to read his notions of public policy into the Constitution, he has deemed it his first duty to formulate a just and statesmanlike policy. To a degree there is an admixture of economic romanticism in his gallant wrestling with "these great issues of government".⁵⁶ A less vigorous mind might have flinched from them and taken refuge in a safe judicial "objectivity". A more sardonic mind might have concluded that amidst an economic welter such as ours government can at best create an illusion for us and clothe with some semblance of order what are really the workings of chance and chaos. But Mr. Justice Brandeis, with his sense of the need of man's mastering economic circumstance, is interested even as a judge in the gigantic struggle we are waging here to subjugate every natural and human resource and turn it to the uses of the nation. And it is that which makes him our most important contemporary statesman.

V

Capitalism, itself a system of economic organization, reaches out beyond its economic confines. It entrenches itself in a system of legal rules and ideas that may be called capitalist jurisprudence.⁵⁷

⁵⁴ Southwestern Bell Telephone case, *supra* note 49 at 292, 43 Sup. Ct. at 548.

⁵⁵ In *St. Louis and O'Fallon Ry. Co. v. United States*, 279 U. S. 461, 488, 494, 49 Sup. Ct. 384, 389, 391 (1928).

⁵⁶ *Railroad Commission v. Los Angeles Railway*, 280 U. S. 145, 158, 50 Sup. Ct. 71, 74 (1929).

⁵⁷ For an interesting study of the relation between legal rules and capitalistic organization see COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM*

It creates a social system and a way of life. This way of life has written itself into the history of constitutional interpretation as it has written itself into the history of the Common Law.⁵⁸ The opinions of the Supreme Court are composed in its shadow. It furnishes a body of first principles that remain unquestioned amidst the intricacies and the fierce battles of legal discussion. It constitutes the abiding set of preconceptions that demark the limits of judicial decision.

Mr. Justice Brandeis has not completely escaped the necessity of having to do his social thinking within the context of capitalist jurisprudence. To say that is not to set down the essential meaning of his career; one does not thereby, to use a phrase of Mr. Justice Holmes, "strike at the jugular vein" of his thought. Its real meaning lies elsewhere: away from rather than reenforcing the capitalist norms. Yet to understand his relation to capitalist jurisprudence is essential to perspective, for the charge of radicalism—shadowy word—has often been levelled at Mr. Justice Brandeis. Whatever his heresies may be they are not economic radicalism. Using that term in the only sense in which it has meaning for modern economic society—adherence to proletarian theory—one may say that it is incompatible with the task of judicial interpretation in a society whose legal foundations are capitalistic. "We must never forget," Chief Justice Marshall once admonished—and here we may give his remark a meaning he never intended—"that it is *a constitution* we are expounding."⁵⁹

Justice Brandeis' animus, as has been noted above, is directed not at the normal functioning of a capitalistic society but at its pathology. He has so much respect for private property that he wishes it more equitably distributed, so much respect for capital that he wishes it to flow freely instead of being concentrated in a Money Trust, so much respect for competition that he wishes the conditions created under which it will be possible, so much respect for profits as an incentive that he wishes it to operate unobstructed by the monstrous weight and the artificial power of corporations, so much respect for business enterprise that he wishes to make of it a responsible creative force. There is an almost idyllic freshness about the way in which he clings to the original content of economic institutions whose current form most of the rest of us accept in a somewhat jaded fashion. It is a freshness reminiscent of the manner in which the emigrant groups of '48 approached political democracy. He has thrown

(1924). See also the chapter on law and politics in VEBLEN, *THE THEORY OF BUSINESS ENTERPRISE* (1904).

⁵⁸ The way of life that informs the common law is that of a rural and bourgeois society. But the ideas evolved in such a society have adapted themselves tolerably to the purposes of the successive stages of capitalist development.

⁵⁹ *McCulloch v. Maryland*, 4 Wheat. 316, 407 (U. S. 1819).

all his powers and all his passion into the problem of attaining freedom and justice and a fair chance for every individual to make a life within the framework of a capitalist society. To this end he uses law instrumentally, as a living organism of adjustment to a changing society, as a method for distributing power and control within that society.

Accordingly, within the framework of the present economic system Mr. Justice Brandeis' stand is for a courageous and enlightened meliorism strange and new to the traditions and convictions of the Supreme Court. He would soften the asperities of capitalism, humanize its rough competitive struggle, endow it with responsibility as well as with vigor. Mastering the field of social legislation he has made it practically his own. He has fought, off the bench and on, for hours-of-labor legislation, a minimum wage, social insurance—all the points of contact at which the state intervenes to palliate the rigor of the economic process. He has championed the interests and defended the functions of the trade union movement; but the support he has lent it has been far from unquestioning and uncritical enthusiasm. A trade-unionism that had no sense of responsibility, that developed a sterile bureaucracy or that used its power to advance petty interests received as little sympathy from him as a tyrannical and uncreative business aggregation.⁶⁰ He urged the merits of scientific management even against the opposition of labor.⁶¹ He saw in it its possibilities for the cutting down of waste; and his was the broad humanism that added the cold precision of an engineer's standpoint to the social passion of the liberal.⁶² Almost his principal concern has been the creation of sound conditions for the maintenance of a healthy system of business enterprise, composed of small, independent individual units, and achieving continuous advance in the industrial and management arts through the incentive of profits and the mechanics of competition. To this end he has favored the introduction of every device that made for efficiency, the dissemination of trade and market information, and the toleration of price mainte-

⁶⁰ *Dorchy v. Kansas*, 272 U. S. 306, 311, 47 Sup. Ct. 86, 87 (1926), where a strike was called "to collect a stale claim due to a fellow member of the union who was formerly employed in the business."

⁶¹ *Organized Labor and Efficiency in BUSINESS—A PROFESSION*, *supra* note 1, at 37-50.

⁶² At hearings before the Interstate Commerce Commission on a proposed advance in railroad rates in 1911 Mr. Brandeis as counsel for shippers introduced evidence indicating that the railroads could save \$1,000,000 a day by "scientific management". This represented the first use of the term. For Mr. Justice Brandeis' views on the subject see his brief and argument at this hearing, January 3, 1911, and his foreword to *GILBRETH, PRIMER OF SCIENTIFIC MANAGEMENT* (1912). See also *DRURY, SCIENTIFIC MANAGEMENT: A HISTORY AND CRITICISM* (1915).

nance.⁶³ Just as he has seen in Big Business a dangerous and irresponsible force, he has looked to a business kept at its legitimate functions and proportions to take on the attitudes and the ethics of a profession.⁶⁴

All his efforts have been directed thus to the creation of a socialized, regulated welfare-capitalism. One may discern that to achieve this ideal he has thrown his energies into two streams of direction: he has sought to socialize and ethicize business, and he has sought to gain for labor an equality of position at a bargaining level at which it could develop creatively its own contribution to the economic process. To do this he has had to work in two camps at once. Through his opinions there has crept into the body of judicial decision, to confront the philosophy of the entrepreneur and the stockholder, a new philosophy representing the aspirations and outlook of labor.⁶⁵ But running alongside of this there is a stream of thought in which the center of gravity of the economic system is not a militant and dominant labor group but a self-reliant body of independent business-men. That these two streams meet and flow strongly together in Mr. Justice Brandeis' own thinking is indisputable. But it may be doubted whether an economic philosophy that involves the balancing and synthesizing of such diverse tendencies will have any evocative power in a world that must take sides or grow apathetic. Above partisanship himself, Mr. Justice Brandeis runs the risk of appearing partisan to both extremes. He is little short of an Antichrist to the big corporations. And to many in radical circles his refusal, on ethical grounds, to intervene in the Sacco-Vanzetti case seemed equivocal.

Such contemporary opinion may be of small importance for what must be a long-run appraisal of the validity of Mr. Justice Brandeis' economic philosophy. And any point of view that has been forged in a lifetime of active thought and is the product of mature experience must seem equivocal viewed from the anxious passions at both the left and the right. But there is a significance in such disesteem, and it lies in its indication that the object of it, in pursuing the integrity of his own thinking, may have lost touch with the new emotional trend of his time; and

⁶³ See notes 46 and 47, *supra*.

⁶⁴ See the title essay in *BUSINESS—A PROFESSION*, *supra* note 1.

⁶⁵ For a tantalizingly brief suggestion of the relation of legal status to class structure and philosophy see Alvin Johnson's review of *HONIE, TRADE UNIONISM IN THE UNITED STATES* (1919) in 13 *NEW REPUBLIC* 319 (1917): "Existing law is the embodiment of one philosophy of life, a middle class philosophy. Labor is working out another philosophy of life. The laborer's conception of right locks horns with yours: labor is therefore the lawbreaker. Labor is the lawbreaker, for the present: as to the future, who knows what philosophies will prevail?" See also BLUM, *LABOR ECONOMICS* (1925) and Pound, *Liberty of Contract* (1909) 18 *YALE L. J.* 454.

the emotional trend of a period often comes close to being a reflection of its deeper institutional trends. A very large body of American liberal opinion has made almost an idol of Mr. Justice Brandeis and acknowledges the leadership of his thought. But there are evidences that widening cleavages in American life may ultimately leave this body of opinion islanded and powerless.⁶⁶ The crucial premise in Mr. Justice Brandeis' economic thought—that the things he is fighting are excrescences to be lopped off, pathological diversions of energy to be brought back to their normal channels—finds less and less confirmation in the *Spätkapitalismus* stage of American economic organization. Agglomerations of capital grow more monstrous, mergers have become the order of the day, the pyramiding of economic power goes on, the individual finds himself increasingly shut out.⁶⁷ In the face of such tendencies Mr. Justice Brandeis' attempt to hold the balance scrupulously between what is legitimate in business enterprise and what is an encroachment upon the liberties of the individual seems somewhat indecisive; and his denial to capitalism of further increments of that power of which, as an interpreter of the Constitution, he could not divest them, seems a gallant but hopeless attempt to bridge two worlds.

This points to a deep strain of optimism to be found in the entire body of Mr. Justice Brandeis' social thought. Keenly sensitive to discords in the social system, his mind inevitably seeks to harmonize the jarring elements. From the enriching experience of his long career he has learned to approach every problem with a view to a constructive solution, and he falls thus easily into the constructivist's belief that no differences can defy the efforts of the human spirit to resolve them. Although he has at times pointed to the deepening cleavage between the "haves" and the "have-nots" it was essentially a note of warning that preceded a constructive and not a revolutionary program. With the contempt of a free and flexible mind for ideology and dogma he has steadily refused to see the social process in terms of the class struggle. There was no essential conflict, he felt, between capital and labor. It was at the worst a feud which could be settled by making each side see the stake it had in peace and the mutuality of benefit that lay at the basis of

⁶⁶ See Seagle, *The Martyrdom of Mr. Justice Brandeis* (1931) 132 NATION 156, for the view that Mr. Justice Brandeis' position on the Court is more helpless than the liberals suspect.

⁶⁷ For a recent statement of the extent of the development see LAIDLER, *CONCENTRATION OF CONTROL IN AMERICAN INDUSTRY* (1931). The review of this book by Stuart Chase in 68 NEW REPUBLIC 238 (1931) supports the view that the almost complete control of American industry by the large mergers is a matter of common knowledge and acceptance.

their relationship.⁶⁸ Although himself a hardened veteran in the wars against encroaching business interests there is nothing *kampflustig* about Mr. Justice Brandeis. He has always been willing to sue for peace on fair terms, just as he has always been ready to fight in default of them. His technique has been to act as interpreter of one side to the other, and while urging each to resist the extreme claims of the other, to base a final solution only on that genuine meeting of the minds that proceeds from a recognition of common interests. It has been essentially the technique of conciliation. In fact, it is characteristic of Mr. Justice Brandeis' thought that his conception of the economic process is a judicial one.

Or perhaps it would be truer to say it is political, as the Greeks conceived the nature and the interests of the *polis*. Amidst the chaos of economic conflict and the pull of contending loyalties Mr. Justice Brandeis' final concern has been the quality and vitality of the state. Not the state as force has engaged his allegiance and his imagination, nor the state as abstract idea, nor even the state as justice. It is rather the state as summarizing and fostering the creative possibilities resident in every individual.

It is in the living context of this faith that the political ideals which have become stereotypes with most of us still keep for Mr. Justice Brandeis their original meaning and warmth. Much of his political thinking is polarized about democracy and freedom. But in the case of both concepts the original spirit is reinterpreted in terms of our changed society. His democracy is an apotheosis of the common man, but only of the common man viewed as a bundle of potentialities. And it is the sum of the conditions that enables him to develop these potentialities that constitutes Mr. Justice Brandeis' conception of freedom. These conditions are in our society mainly economic, just as the forces that threaten and dwarf our freedom are the outcome of our recent economic development.⁶⁹ Neither is his conception of democracy the traditional one—a principle set apart in government; it is part of every activity in the state, just as freedom is part of every activity. The greatest field for democracy today lies for him in the person-to-person working out of those daily economic relationships that we call "industrial democracy". It

⁶⁸ His psychological thought comes close to that expressed in FOLLETT, *CREATIVE EXPERIENCE* (1924).

⁶⁹ "The old method of distribution and developing of the great resources of the country is creating a huge privileged class that is endangering liberty. There cannot be liberty without financial independence, and the greatest danger to the people of the United States today is in becoming, as they are gradually more and more, a class of employees"—from Mr. Brandeis' argument at the Ballinger investigation, May 27, 1910.

is in such workshops that the truly political attitudes are fashioned that go into the making of the state.

VI

What ties this bundle of ideas together? More than anything else, Mr. Justice Brandeis' belief in the basic importance of experience. The experience of individuals is, for him, the great source out of which society draws its strength and its growth. Social institutions are the product and distillation of experience; laws are its expression; the judicial function builds from it. It is this absorption with the theme of experience that stamps the body of Mr. Justice Brandeis' judicial opinions as pragmatic jurisprudence.

Pragmatism is not new in law. In one sense, as hard-headed militant preferment of fact to theory, as a steadfast clinging to accumulated experience, it informs the whole history of the Common Law. By its very nature a system of case law is unsystematic, anti-absolutist, capable of growth.⁷⁰ That same use of fictions which marks the reluctance of its changes to new conditions marks also the fact of them. But what gives Mr. Justice Brandeis' pragmatism its character as innovation is the fact that the experience on which it bases itself is the changing experience of the present, not the accumulated experience of the past. A tory jurisprudence has always the advantage of being evidently buttressed by past realities; a liberal jurist, since he is advancing "new ideas", must always face the charge that he is making the situation conform to his idea of it. The body of pragmatic jurisprudence which, under Mr. Justice Brandeis' leadership, is forming in America has given a new prestige to the scanning of the contemporary horizon for light on ancient legal principles.

The pragmatism of Mr. Justice Brandeis is in essence experimental.⁷¹ It sees two experimental processes going on at the same time: the attempt of society to work out its problems, and the attempt of the courts to find the right rule of law. The experimental process going on in society is to Mr. Justice Brandeis generally a blind one and often ignorant; the formulations that it presents at any given time are tentative and imperfect. But they embrace the energies and aspirations of men, and a "living law" cannot ignore them.⁷² The law is itself therefore in experimental flux, changing with the changing configurations that

⁷⁰ See Llewellyn, *Case Law*, (1930), 3 *ENCYCLOPEDIA SOCIAL SCIENCES* 249.

⁷¹ For Mr. Justice Holmes' experimentalism, a comparison with which is of interest, see John Dewey's contribution to the symposium on MR. JUSTICE HOLMES, edited by Felix Frankfurter, (1927).

⁷² Brandeis, *The Living Law* (1916) 10 *ILL. L. REV.* 461.

society presents. Of the "search by the court of last resort for the true rule", Mr. Justice Brandeis has said—"The process of inclusion and exclusion, so often applied in developing a rule, cannot end with its first enunciation. The rule as announced must be deemed tentative. For the many and varying facts to which it will be applied cannot be foreseen. Modification implies growth. It is the life of the law."⁷³

In this philosophy of experiment and experience the individual is the unit. Mr. Justice Brandeis believes, as Emerson did, in the sovereign reality of individual experience. In common with more recent psychological thought he believes that one can learn nothing except as it passes through one's own experience; every attempt to impose artificial mechanisms results in failure.⁷⁴ Whatever social programmes or techniques fall outside the ambit of the individual mind are therefore sterile; the unit of organization should never be made so large that the individual experience cannot compass it. Mr. Justice Brandeis applies this principle to government, and emerges with a belief in decentralization. When he applies it to business organization it leads him to his well-known position that an overgrown corporate unit is wasteful and unwieldy, and that the men at the top of it are incapable of having that direct mastery and comprehension of its affairs that makes business enterprise a creative activity. A group of small units, each psychologically autonomous and self-contained, represents for Mr. Justice Brandeis the most satisfactory organization of any sphere of action.

Although Mr. Justice Brandeis' individualism is reminiscent, in its fire and conviction, of the fine nineteenth century libertarianism of John Stuart Mill, it is far from being imitative of it. Where the English liberals feared the tyranny of political power, Mr. Justice Brandeis is solicitous for the liberty of the individual when confronted with the huge engines of economic power and large aggregations of capital. Where they wished to protect the individual from the state, Mr. Justice Brandeis invokes the state to protect him from menacing forces within it. "It was urged," he says in his opinion in *Truax v. Corrigan*, "that the real motive in seeking the injunction was not ordinarily to prevent property from being injured nor to protect its owner in its use, but to endow property with active militant power which would make it dominant over men."⁷⁵ It is against this dominance of things over men that the whole force of Mr. Justice Brandeis' humanism is directed. Beyond the intent that this humanism embraces of protecting the individual from being hurt

⁷³ *Washington v. Dawson*, 264 U. S. 219, 228, 236, 44 Sup. Ct. 302, 305, 308, (1923).

⁷⁴ See FOLLETT, *op. cit. supra* note 68.

⁷⁵ *Truax v. Corrigan*, *supra* note 33, at 368, 42 Sup. Ct. at 143.

is its fear that he will be lost; that in a society in which things in themselves are invested with active power the initiative and creativeness of men will find no room for expression.

There is throughout Mr. Justice Brandeis' thinking an unmistakable ethical note. It keeps him, on the one hand, from a rule-of-thumb method of judicial decision; he does not decide cases atomistically but by reference to a deeply held code of valuations. On the other hand it keeps him from the doctrinaire mistake of dealing with concepts as undifferentiated counters. To him the autonomy of the individual is eminently desirable; but economic individualism as the nineteenth century conceived it, since it brings disastrous consequences in the modern situation, is a thing to be fought. It is not to be confused with ethical and psychological individualism, which involves responsibilities as well as liberties. In this spirit Mr. Justice Brandeis refuses also to accept the validity of the issue between individualism and collectivism. Here again an ethical differentiation is necessary. The collective action involved in control of economic development is quite different in value from that involved in government ownership. Some collectivities are desirable, like trade unions and coöperatives; others, like large corporations, are undesirable. But Mr. Justice Brandeis carries his differentiation even further. Corporations and trade unions may both be, in the specific instance, good or bad. What determines that is not an *a priori* ethical theory but an ethical judgment of their motivation and their consequences.

Amidst the difficult and technical legal reasoning in his opinions this ethical fervor might appear a gratuitous and harmless addition. But actually his moral earnestness does not merely run parallel to his legal reasoning. It interpenetrates it. It determines its course. It saves his amazing legal competence from becoming virtuosity.

VII

Behind the uniform array of United States Reports reposing on the shelves of the law libraries a battle is being fought and constitutional history made. The dramatic quality of Mr. Justice Brandeis' career of advocacy has followed him to the bench, and as one of a militant liberal minority on the court he has focussed the attention of the nation. He has had to introduce his social philosophy into a milieu for the most part alien to its spirit and formulations, among justices whom the intellectual traditions of their class and period had educated to a conception of their tasks radically different from his own. Dealing with cases involving the gravest problems the Court has had to face since the initial period of constitutional interpretation, and in an atmos-

phere in which every legal doctrine has been charged with the emotional tensions of social struggles outside the Court, he has had to devote himself to a laborious exposition of the fundamental economic facts that determine the issues. He has had finally to contend with a conception of legal precedent that regarded the body of past decisions as something very like the *traditio divina* of the canon law.

In the face of a task of such proportions Mr. Justice Brandeis has been remarkably successful. He has not altogether kept the Supreme Court from appearing to liberal opinion as something of a Heartbreak House. But he has drawn the issues clearly, taken a positive and constructive stand, and polarized every liberal tendency in the Court.⁷⁶ A more radical philosophy, a less statesmanlike attitude than his might have failed utterly. But Mr. Justice Brandeis' intellectual creed, although always clear-cut and decisive, contains that admirable balancing of tradition and innovation which represents the greatest assurance of eventual success. There has been no intent in it to break with the essential Supreme Court traditions. Mr. Justice Brandeis' doctrine of *stare decisis* is mature as well as flexible.⁷⁷ He has adhered to the American tradition of individualism, redefining it to suit the realities of the age. In his emphasis on democracy and freedom he has insisted that as a nation we bid fair to alienate ourselves from the psychological drives that have conditioned our history. The pragmatic cast of his thought, its ethical strain, have set up responses in the American mind. His method—factual, experimental, inductive—strives only to assimilate law to those other procedures that already have those characteristics. He has advocated not the creation of new institutions but the instrumentalism that will use law to bring out the best implications of existing institutions.

It would be strange indeed if twentieth century America which has in almost every field of thought and art produced its characteristic expression should fail to do so in jurisprudence. Mr. Justice Brandeis has admirably evoked and summed up contemporary tendencies in legal thought. It seems likely that the future of judicial decision lies with these tendencies rather than with those that have opposed them. But if that should prove true will Mr. Justice Brandeis' work, in the phrase Fitz James Stephen used of Bentham, "be buried in the ruins it has made"?

⁷⁶ For the view that the liberal minority is at present threatening to grow into a majority, see Pollard, *Four New Dissenters* (1931) 68 NEW REPUBLIC 61.

⁷⁷ For Mr. Justice Brandeis' theory of *stare decisis* see *Washington v. Dawson*, *supra* note 73; *Jaybird Mining Co. v. Weir*, 271 U. S. 609, 619, 46 Sup. Ct. 592, 595 (1925); *Di Santo v. Pennsylvania*, *supra* note 28. "*Stare decisis* is ordinarily a wise rule of action. But it is not a universal, inexorable command." *Washington v. Dawson*, *supra*, at 238, 44 Sup. Ct. at 309.

To the extent that his thought merely merges with contemporary trends, that is likely. But there is permanence and distinctiveness in Mr. Justice Brandeis' conception of the "living law". His realistic method of shifting the battle from the barren ground of precedent and logic to the higher ground of social function and social situation must prove an enduring contribution to the process of constitutional interpretation. Even the *epigoni* when they come will find it a technique which they can use.