Book Review

Melvin I. Urofsky, *Louis D. Brandeis: A Life*. New York: Pantheon Books, 2009, pp. 955, $40.00.

Robert W. Gordon

The appearance of a major new biography is a sign that the career and example of Louis D. Brandeis are a continued source of fascination. And that's as it should be. For lawyers especially, Brandeis is a progenitor and symbol of modes of law practice still worth study and emulation. Celebrated in his pre-Court years as "the People's Attorney," he is one of the founders of modern "public-interest" law, or lawyering in the service of reform causes, on behalf of relatively powerless and unorganized constituencies. His name has also come to stand for a distinctive style of practice, known in shorthand as acting as "counsel for the situation," which is undergoing something of a revival in popularity as many lawyers and their clients become disenchanted with what they perceive to be excessive adversariness. As a judge, Brandeis represents a rather different constellation of qualities, sounding in a conservative key, as a counselor of "judicial restraint," the doctrines that courts should avoid reaching Constitutional questions, decide cases on narrower grounds if possible, be hesitant (if federal) to assert federal jurisdiction, and above all, with exceptions only in egregious cases, give as wide a scope as possible to the exercise of legislative power and properly delegated administrative discretion. These prudential doctrines have some understandable attraction for liberals in a time when activist conservative judges have come once again to dominate the federal courts as they did in Justice Brandeis's day. And finally, Brandeis as Progressive critic and reformer of the evils posed to republican politics and democratic society by concentrated business and financial interests may well seem—in the wake of the recent financial collapse and evidence of the wholesale corruption and capture of legislators and regulators by concentrated business interests—to have acquired fresh relevance.

Brandeis was born in 1856, the child of cultivated immigrant Jews from Prague, liberal refugees from the failed European revolutions of 1848 who settled in Louisville. His father Adolph founded a successful grain business; his mother Frederika and her brother Lewis Dembitz, a lawyer and Jewish law scholar, were the intellectuals of the family, who gave young Louis a cosmopolitan and secular upbringing. Following a year's study in Germany,

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Louis was admitted to Harvard Law School, where he achieved the highest GPA ever recorded, and was graduated before the age of twenty. After a brief false start in St. Louis, Louis returned to Boston to practice law with a well-connected friend and classmate, Sam Warren (with whom he wrote the famous article on "The Right to Privacy"). He rapidly became one of Boston's most successful lawyers, mixing business and individual practice. Many of his clients were small to middle-sized businesses, some of them Jewish businesses, though he also did work for some of Boston's prominent families and their business enterprises. As a Jew and as an outsider from Kentucky, he was never accepted into the highest circles of Boston but was well-known and respected as a lawyer (Chs. 1–3).

Boston in the 1880s was a center of genteel reform movements for causes such as good government and civil service reform. The pattern was for elites to organize civic groups of "The Best Men" to expose and reform corrupt alliances between businesses who needed favors from government—public franchises, leases, favorable rate regulation, rights of way, public financing, and so forth—and corruptible state and local politicians. The interests of upper-class Bostonians were often split between investors in these enterprises and the reformers, who themselves sometimes had interests in rival enterprises. Brandeis always had extraordinary capacity for work, mastery of statistical and financial information, and ability to follow through in matters of detail, and so was often the spearhead of these reform movements. He exposed backroom deals of the Boston Gas Company and Boston Elevated Railroad among others (135–54). He devoted years to the reform of the insurance industry, eventually persuading the legislature to institute low-cost term life insurance for working families administered through savings banks (155–180).

In the 1890s, Brandeis began to develop the intellectual and political commitments that would eventually dominate his public career—including his continued supply of financing, support, and advice to reform movements after his appointment to the U.S. Supreme Court in 1916. Those commitments are difficult to assign to conventional political categories. He started out like most business lawyers as a Republican, joined the "mugwump" defection to Cleveland in the 1880s, and broke with the Democrats again after they nominated the populist William Jennings Bryan. He strongly supported the La Follette wing of the Progressive Party, but migrated back to the Democrats when they nominated Woodrow Wilson in 1912, and became one of Wilson's closest advisors on antitrust and regulatory policy. At the same time he remained one of the most successful corporate lawyers in Boston—the firm he and Warren founded still exists as Nutter McClennan & Fish—and eventually became a multi-millionaire. These would seem safely centrist credentials, but Brandeis acquired the reputation of a radical in more conservative political, business and legal circles—many of whose representatives, including seven past presidents of the American Bar Association, showed up en masse in 1916 to oppose his nomination to the Supreme Court.

Brandeis's "radicalism" was the ironic product of his attempt to preserve and revivify very traditional American values of self-reliant individualism in the twentieth century. Like fellow Progressives such as John Dewey, he believed that individuals could best develop their capacities through the responsible exercise of control over work and participation in civic life. His lifelong project was to try to figure out how this "free labor" or "small producers" ideal of a democratic republic of freethinking independent citizens could be realized in the conditions of industrial society, where, clearly, not everyone could become a sole proprietor, a small farmer or entrepreneur or shopkeeper or artisan, and indeed where wage labor was the likely lifetime condition for most of the workforce. His solutions, generally speaking, were to promote policies favoring small-scale enterprise—such as vigorous use of the taxing power and antitrust policy to dissolve big corporations, and countervailing policies encouraging the formation of cooperatives; to prefer local and state government over federal in order to facilitate social experiment and citizen access; to promote worker participation in management; and to favor conservative labor unions as vehicles for workplace democracy (300–309). He devoted nine of his Boston years to a campaign against the New Haven Railroad's proposed merger with the Boston & Maine Railroad, on the ground that an enterprise of the New Haven's size and monopolistic market power could not possibly be well managed (as indeed the New Haven was not) (181–200). To reduce employment insecurity, which he thought evil both because it made workers fearful and dependent vassals of employers, or led to militant socialism, he promoted state-funded employment insurance, worker savings and insurance schemes in savings banks, and employment policies directed at evening out the working year and reducing seasonal unemployment. During the New Deal, he supported large-scale programs of public works to relieve unemployment, a highly progressive national income tax, the TVA legislation, Social Security, and (perhaps most fervently) the Public Utility Holding Company Act that broke up utility combinations. But he strongly disapproved of the national corporatist experiment of the National Industrial Relations Act and as a justice joined in the decision holding it unconstitutional (691–720). In an age in which most Progressives, certainly most Progressive lawyers, were coming to see both large-scale corporate enterprise, and large-scale bureaucratic government to regulate it, as both inevitable and desirable, Brandeis spent his career crusading against concentrations of both private and public power; and against doctrines of inevitability. He liked to quote Machiavelli: "Fate is inevitable only when it is not resisted."[1]

1. Letter of Louis D. Brandeis to Frank Albert Fetter, Nov. 26, 1940, *in* 5 Letters of Louis D. Brandeis 648 (Melvin I. Urofsky & David Levy eds., State Univ. of New York Press 1978).

Brandeis's Private and Public Law Practices

Among the reasons for Brandeis's continuing appeal, as I suggested earlier, is the way he conducted his law practice, both his practice on behalf of private clients and his public interest practice.[2] Brandeis to a remarkable extent lived out his life according to an evolving, but thought-out plan—he was a man of high principle, and like most people of high principle, impressive but often rather hard to take—and several themes emerge very consistently from the practice model he developed.

1. First and foremost is the theme of independence. Brandeis believed that only the independent person can be truly free, and he carried out the principle fairly rigorously in his practices. In his famous speech on "The Opportunity in the Law," Brandeis said:

> It is true that at the present time the lawyer does not hold as high a position with the people as he held seventy-five or indeed fifty years ago; but the reason is not lack of opportunity. It is this: Instead of holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either, able lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people. We hear much of the "corporation lawyer," and far too little of the "people's lawyer." The great opportunity of the American Bar is and will be to stand again as it did in the past, ready to protect also the interests of the people.[3]

In other words as a citizen, and as a member of an important policymaking elite, the lawyer should not always act as the mouthpiece of his business clients, but should advocate an "independent" view. Did Brandeis mean the lawyer's own view as a citizen? Not quite: what he said was, the "public's" view, which he thought lawyers should represent, as lawyers. Modern public-interest lawyers assume there is no such thing as an undifferentiated or homogeneous public interest. Mostly, when they use the Brandeisian rhetoric, they use it to mean representation of unrepresented or underrepresented groups. Brandeis's view of public advocacy was very much tied into the common Progressive conviction that a genuinely "disinterested" view could be arrived at by a combination of impartiality—the freedom from bias that comes from not having one's cognition warped by partisan loyalty and self-interest—and thorough knowledge of "the facts." In the passage I've just quoted, there's an interesting ambiguity which Brandeis always tried to straddle: he describes the ideal lawyer-statesman both as an independent and as an advocate, both mediating between corporations and the people, and representing the people as an interest.

2. Many modern legal ethics scholars, including William Simon, David Luban, David Wilkins, and myself among others, have been impressed by the Brandeisian model of practice.

3. Louis D. Brandeis, The Opportunity in the Law (May 4, 1905), *in* Brandeis, Business—A Profession 315 (Small, Maynard & Co. 1914) [hereinafter Brandeis, Business].

When crusading for his public causes, Brandeis usually appeared in the character of "counsel" or "attorney" for a citizen's association or "league" which in turn described itself as representing "the public interest"—like the Good Government Association, or, as in the famous *Muller v. Oregon* case in which he filed the Brandeis Brief, for the National Consumers League, a Progressive organization advocating maximum-hours and minimum-wage regulation. Even representing very abstract clients such as these, however, he built in an additional layer of independence, by insisting (sometimes against their wishes) that he represent them without fee, so that he could conduct the cases as he pleased. This role was not a familiar one in the legal profession of Brandeis's time, even in the context of Progressive politics. For example, when Brandeis was appointed intervenor for "the public" in an Interstate Commerce Commission railroad rate hearing, Progressive allies assumed the "public's" interest where a railroad was concerned was always antithetical to the railroad's, so when Brandeis ended up supporting a small rate increase, they felt betrayed (288–97).

His private practice was not in his view a distraction from the public causes that increasingly took up his time and attention but provided the preconditions for engagement in those causes: experiential, reputational, and financial. Representing private business clients imparted the knowledge of business organizations and financial structures, and above all of human nature and behavior, needed to be effective in public practice; it built up reputational capital—signaling that a lawyer needed to be taken seriously; and above all it gave one financial independence. Brandeis, like many late 19th century professionals, believed that in professional knowledge, status, and financial security, there could be found a democratic substitute for the independent property that 18th century gentlemen believed necessary to guarantee independent action in political life. His success in practice gave him the financial freedom to take on causes without fee. He actually went further than that: when he took on a public client without fee, he paid his firm the fee he would have earned out of his own pocket, so that the firm's finances and other partners' draw would not suffer from his public engagements (354). He also lived austerely—much too austerely, thought many of his guests: people invited to the Brandeis's were advised to eat before and afterwards and keep their overcoats on in his spare unheated house.[4]

He also extended the ideal of independence to some of his private practice representations. Ironically, it was a principal complaint against Brandeis in his confirmation hearings that he lacked judicial temperament because he took an unduly judicial view of his clients' problems. Exhibit 1 in this indictment was Brandeis's conduct during the representation of one Lennox, who was about to declare bankruptcy: Brandeis agreed to represent the bankrupt estate,

4. Urofsky is at pains to point out that austerely does not mean ascetically. The Brandeises, like most white middle-class families of the time, had servants, rented summerhouses, and dressed well though not expensively. They gave away more money to charity and their children than they spent on themselves (354–6).

adopting what with technical propriety he believed was the role of trustee, whose job was to distribute the estate fairly and equitably to the creditors. Lennox thought Brandeis was representing his interests personally (and it may be that Brandeis had not made clear enough in what capacity he was acting) and conflict ensued. In was in this context that Brandeis used the phrase (for the only recorded occasion), when asked for whom he was acting, "I should say I was counsel to the situation" (66–68). On other occasions, such as when an agent of the Harriman railroad interests sought to retain Brandeis's firm for their side in a proxy fight for control of the Illinois Central, Brandeis would not allow the firm to take the case until persuaded of the merits of the cause (72–3).

2. The second distinctive feature of Brandeis's approach to practice is intimately related to the independence ideal. Like other Progressives, Brandeis tended to believe most social conflict was inefficient, the result of people misunderstanding their true interests, and that over every dispute there hovered in the air a structural long-term solution that would be in the parties' best long-term interests. He believed that his job as a lawyer was to search for such optimal solutions and recommend them to his clients.

Now in some ways this is the mindset of every good transactional lawyer, and many would argue, of a good litigation lawyer as well.[5] Where Brandeis was unusual was in the scope and creativity of his proposed solutions. A few examples:

- Representing gas consumers and rate payers against a public utility that was watering its stock so it could declare inordinately high dividends, Brandeis proposed (and through backdoor negotiations with the utility's chairman) got adopted, a sliding-scale formula that allowed dividends to rise if rates were lowered, thus providing incentives for efficient operation (146–54).
- As an arbitrator in a bitter strike of New York garment workers, confronted with worker demands for a closed union shop and employers' bitter resistance, Brandeis recommended a protocol that compromised on a preferential union shop—that is, employers would prefer a union to a nonunion employee of equal qualifications (243–52).
- As counsel for public-interest intervenors in the ICC's hearings in the *Eastern Rate Case* of 1910, he persuaded the ICC to approve raising rates conditional on the railroad's adoption of scientific management techniques (one of Brandeis's enthusiasms in the early 1900s) (289–299).
- As counsel for an association formed to expose and reform the "industrial insurance" issued to working-class families by big life insurance companies, Brandeis invented, and got business and legislative backing for, the alternative of savings bank life insurance—low-cost insurance accounts that could be converted to ordinary savings accounts and would not be forfeited if premiums lapsed (155–180).

5. *See* Geoffrey Hazard, Jr., Ethics in the Practice of Law 58–68 (Yale Univ. Press 1978).

Some of his most creative and interesting structural-solution proposals were in the context of his private practice. A large shoe manufacturer, William H. McElwaine, asked Brandeis to help him to persuade his workers to accept a wage cut without a strike. Brandeis investigated both McElwaine's plant and the shoe industry generally and found that employment was sporadic and seasonal. He recommended evening out the work so that wages would be regular (63–65). As advisor to the Filene brothers of the department store chain and other employers, Brandeis advocated limited forms of industrial democracy, for example, admitting unions to a consultative role in determining work conditions and to a share of company profits (237–40). Some measure of workplace democracy, he believed, was critical to offset industrial absolutism, a concentration of powers that rendered workers servile and dependent and unable to achieve mastery over the conditions of their lives.

Brandeis's success, however, wasn't by any means owed solely to his creative structural-social-engineering skills. He had to persuade clients and parties and governments that they would work. In this realm he proved a consummate negotiator, rhetorician, and publicity artist. His public face was generally that of the austere man of principle though he was also a first-rate advocate. He knew his audiences and the rhetorics they found persuasive and by all accounts he had extraordinary charm in negotiation. In the garment-workers strikes, for example, with all the parties screaming at each other across the table, Brandeis would listen intently to all the parties, beaming and nodding as each scored a point, and then would come in at the end with a summary of what seemed underlying points of agreement. He was a master at handling the media, networking with influential notables to line up political support, and legislative arm-twisting. His greatest asset was his command of statistical and financial information—"the facts."

Now comes the question: Is the Brandeis model of practice still a useful one? Or is it not, either because it is inherently defective or because changing circumstances have rendered it obsolete? Certainly his practices have had their critics, among whom the most interesting and penetrating is Clyde Spillenger.[6] Spillenger (to simplify considerably) argues that Brandeis purchased his independence and his image of a man unaffiliated with party or faction at the price of engagement with clienteles and organic social movements. If you think you are in possession of the "facts" and the correct structural solutions to all conflicts, you may be tempted to try to impose these obviously correct solutions without paying too close attention to the clients' own, and sometimes irrational and selfish, ends and desires. We all know this is a habitual problem with lawyers for relatively poor and uneducated clients—the disposition to patronize clients and get them to accept what the lawyer thinks are the obviously "reasonable" solutions to their problems. You may also be tempted—and Spillenger thinks Brandeis sometimes was—to overlook real conflicts of interests (for example, between the clients' desires and interests and your

6. Clyde Spillenger, Elusive Advocate: Reconsidering Brandeis as People's Lawyer, 105 Yale L. J. 1445 (1996).

preferred socially optimal solutions) because you are overconfident in your ability to bridge them. Finally, there's something arrogant about always being above the clash of real interests, instead remaining socially isolated from the solidarity of organic groups.

Spillenger is surely onto something here. There is in Brandeis's personality and career a strain of slightly fanatic or at least stiff-necked self-righteousness.[7] His friends and colleagues called him, though affectionately, "Isaiah"—and he tended to regard the conclusions about society, human nature, politics, and reform to which he had arrived as "the truth," since they were grounded in "the facts," though to give him credit, he had a scientific notion of social truth as arrived at by experiment and open to continual revision. And there is an abiding tension between Brandeis's scientific-Progressive and democratic sides, since ordinary people so frequently refused to behave as he thought they should and were repeatedly willing to sacrifice their independence for the sake of immediate comforts or benefits. Small businesses were easily bought off by trusts; big business put the search for short-term monopoly profits above long-term efficiency; employers and unions put class solidarity above mutually beneficial cooperation; consumers were "servile, self-indulgent, indolent, ignorant" (397).

Yet I'm far from convinced by the critique, either as it applies to Brandeis himself or the viability of his vision of practice. Brandeis didn't develop his social views in isolation and then try to impose them on clients; he developed them in prolonged processes of consultation and negotiation and by shuttling back and forth among competing interests to see what they might have in common. In many of his public-interest causes he had no real clients to be accountable to, because the interests were too diffuse and unorganized to be embodied in group or institutional form. (He could also be a ferocious partisan advocate if the situation seemed to call for it.) A public-interest lawyer is an entrepreneur or vanguard leader who hopes to create a durable institutionalized constituency for his cause and if he is successful will do so—as Brandeis did, for example, with his campaign for savings bank life insurance and as the modern environmental movement has done. Yes, there is danger in assuming you know what's best for your clients. But there is also danger in being so anxious not to impose on clients that you withhold from them the benefit of your own experience or views about potentially beneficial solutions to their problems.

Consider the main alternative to the Brandeisian model of representation that seeks to find common ground and incorporate public values. That alternative is the orthodox model of all-out, no-holds barred partisan advocacy. The

7. His friend Oliver Wendell Holmes alluded to this when he confessed to Harold Laski:

> Brandeis, whom many dislike, seems to me to have this quality [of "loveableness," which Holmes was attributing to "the better class of Jews,"] and always gives me a glow, even though I am not sure that he wouldn't burn me at a slow fire if it were in the interest of some very possibly disinterested aim. Letter from O.W. Holmes, Jr. to Harold Laski, Jan. 12, 1921, *in* 1 Holmes-Laski Letters 304 (Mark deWolfe Howe ed., Harvard Univ. Press 1953).

lawyer in this model takes as given the clients' views of their own interests and is "ethically bound to ignore the illegitimacy of their claims," and is indifferent to effects on adversaries, third parties, or social welfare.[8] That lawyer keeps his skirts clean and ethics pure by refusing to adopt any view of the merits of the controversy or to take responsibility for conveying that position to clients. Among its many other vices, the model enhances the advantages that fee-based legal services give to wealthy and repeat players. By comparison, the Brandeisian model starts to look pretty attractive!

The real issue seems not whether the Brandeisian model is desirable in the modern world but whether it is practical, especially as a model for counseling corporate clients. Brandeis's legal advice was sought out by Progressive businessmen like McElwain and the Filenes, already disposed to be receptive to his ideas about business-labor cooperation and to his warnings that the alternative to constructive social solutions was likely to be class warfare leading to socialism. For the most part, modern corporate clients do not look to their lawyers to lead them to positions that are socially responsible and promote social welfare. The corporate lawyer's function is to reduce risks of legal liability and to game taxing and regulatory regimes that reduce short-term profits (or at least the quarterly illusion of profits). A Brandeisian lawyer who might undertake, for example, to advise his or her clients to lobby for national health insurance to help reduce health care costs and eliminate the labor market-distorting effects of employer-based health care—something that would be in the interests both of the business and society at large—would probably be met with incredulity or stony indifference.

Brandeis as a Judge

Brandeis the Supreme Court justice is less controversial than Brandeis the lawyer. By general consensus he was a great judge. The interesting points of contention among analysts of his Supreme Court career are whether he should be seen primarily as a political actor, cannily using his position on the Court to promote his Progressive social and economic views, or as a largely neutral and nonpartisan professional, vindicating the autonomous nonpartisan values of technical craftsmanship and prudent self-restraint designed to conserve the prestige and legitimacy of the federal courts. The latter view is largely the creation of Brandeis's sometime acolyte Felix Frankfurter and Frankfurter's own disciples such as Alexander Bickel and the Legal Process School centered at Harvard Law School. Frankfurter, Brandeis's most ardent and effective lieutenant in his reform crusades, was ironically the chief influence in the campaign to bleach the politics out of his hero's Supreme Court tenure.[9]

8. I take this point and the quote from David Luban, Heroic Judging in an Anti-Heroic Age, 97 Colum. L. Rev. 2064, 2078 (1997).

9. For a brilliant account of the bleaching process, see Edward A. Purcell, Jr., Brandeis and the Progressive Constitution 222–257 (Yale Univ. Press 2000).

For the most part, of course, Brandeis's cultivation of judicial restraint and what Bickel was later to call the "passive virtues" served both the political and professional agenda. Before going on the Court he litigated cases for the National Consumers' League, arguing that the federal courts should defer to legislative regulatory policies such as maximum-hour and minimum-wage laws; and supported the argument with famously fact-laden briefs ("Brandeis Briefs") demonstrating that expert opinion and the practices of other countries provided a rational basis for such legislation (212-227). Once on the Court he played much the same role. In cases where the Court's majority struck down state legislation under the due process clause of the Fourteenth Amendment, he wrote dissents loaded with data from social context explaining the problem that the legislature was responding to and why its response was reasonable (483-89; 593-601; 678-82). Some of those dissents were passionate arguments in favor of his lifelong project of promoting experimental federalism;[10] as well as passionate arguments—only barely disguised in his opinions as arguments legislatures could reasonably believe—for the policy merits of the regulations. He also labored to protect state legislative capacity against the conservative majority's aggressive uses of the dormant commerce clause to pre-empt any state action in fields where the national Congress had acted, arguing for the presumption that unless Congress explicitly chose to occupy the whole field, the states should be free to act (482). Perhaps his most eloquent and powerful dissents came in labor cases, in which the Court's majority generally sustained injunctions against picketing or striking workers, notwithstanding national and state legislation intended to preclude such injunctions. By alchemizing employer prerogatives into absolute "property" rights, Brandeis argued, the courts were throwing their weight into one side of capital-labor struggles and usurping reasonable legislative attempts to regulate them (601-610). His general prudential theories—that courts should where possible avoid reaching constitutional questions, should defer to legislative and administrative determinations, and should respect constraints on federal jurisdiction—thus dovetailed fairly neatly in most cases with his political priorities.

But not invariably. One of the big exceptions, notoriously, is Brandeis's opinion for the Court in *Erie R.R. v. Tompkins*.[11] *Erie* held that the doctrine of *Swift v. Tyson*—that in deciding cases where federal jurisdiction was based on diversity of citizenship, the federal courts were free to create a general common law independent of state rules of decision—was unconstitutional from the day it was decided. The unconstitutionality was in the judiciary's having acted as lawmaker in areas where Congress had not exercised (and in some cases indeed could not constitutionally exercise) lawmaking authority; and thus having

10. "It is one of the happy incidents of the federal system that a single courageous state may… serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 62, 311 (Brandeis, J., dissenting) (1932).

11. 304 U.S. 64 (1938).

intruded upon the lawmaking authority of the states.[12] Progressives had long despised the *Swift* doctrine because interstate businesses, especially railroads, had for seventy years used the diversity jurisdiction to remove cases from relatively plaintiff-friendly state courts to federal courts that had developed an autonomous defendant-friendly body of a "general common law" of torts. By 1938, Brandeis saw the chance to gather enough votes on his side to kill off the dragon for good, and he took it. In this case, Brandeis's Progressive politics overrode all his prudential scruples, as he went out of his way to base the decision on the broadest and most abstract possible Constitutional grounds, dismaying as he did so many of the legal-realist critics who were usually his allies (743–47).

Advocates for the professional as opposed to the political Brandeis point to his heroic role as a conciliator on a Court with sharp ideological differences among its members. He was invariably diplomatic and civil with his colleagues, even those like Joseph McKenna, for whom he had no respect, and the appalling James Clark McReynolds, who was violently anti-Semitic and refused to shake his hand. He saved his ammunition, refrained from dissenting except where he thought some important constitutional principle was involved, and narrowed his opinions to attract other justices' votes. He dealt with William Howard Taft, chief justice for most of his tenure, with exquisite tact. Brandeis had seriously embarrassed Taft in Congressional hearings on the Interior Department while Taft was president (this was the "Pinchot-Ballinger Affair," (254–76)) and Taft had publicly opposed Brandeis's confirmation. But Taft came to value Brandeis for his reliable professionalism, his enormous technical ability, and his understanding of valuation issues in public utility rate cases. The cordiality did not last; Brandeis opposed, at least initially, Taft's efforts to control the Court's docket; dissented in the labor cases that Taft felt to be at the core of constitutionally protected liberty and property; and—most unforgivably—dissented at length in *Myers v. U.S.*, the case in which Taft spoke for the Court in holding unconstitutional Congressional attempts to limit the president's absolute authority to remove his appointees (571–91).[13] Brandeis was, indeed, consummately professional in his dealings with colleagues. But he was partly so for instrumental purposes, to accumulate authority and good will to persuade, and if necessary to dissent, in the cases he really cared about.

12. *See* Edward A. Purcell, Jr., Brandeis and the Progressive Constitution 172–3 (Yale Univ. Press 2000).

13. In an almost charmingly incoherent fit of temper, Taft said of Brandeis's dissent in Myers:
> He loves the veto of the group upon effective legislation or effective administration. He loves the kicker, and is therefore in sympathy with the power of the Senate to prevent the Executive from removing obnoxious persons, because he always sympathizes with the obnoxious person. His ideals do not include effective and uniform administration unless he is the head. That of course is the attitude of the socialists till he and his fellow socialists of small number acquire absolute power, and then he believes in unit administration with a vengeance (590).

The general formula of "judicial restraint" is now not quite so serviceable for progressive-minded lawyers as it was in Brandeis's time. Progressives still like to invoke it to rein in what they see as the excessive zeal of conservative judges on the Rehnquist and Roberts Courts in striking down both Congressional and state legislation in quantities unmatched even at the height of the classical era of 1870–1937, and in interpreting statutes meant to protect weaker parties so narrowly as to effectively protect stronger ones. But one cannot of course object to "activism" per se and still defend the legacy of the Warren Court—or, for that matter, Brandeis's own decisions in free-speech cases. Brandeis the judge is perhaps of greatest continuing relevance to progressives for his pioneering opinions in those free speech cases:[14] his insistence that in a government of laws, the government cannot be a lawbreaker; and his doctrine that courts construe the purposes of statutes sympathetically with regard to their public-values-promoting purposes.

Brandeis as Social and Economic Theorist

This subject opens up themes far too large for treatment in a short book review. Many of Brandeis's liberal contemporaries in the Progressive and New Deal movements found many of his beliefs naïve and nostalgically reactionary, specifically his critique of "bigness" in corporate firms; his belief that the virtues of individual self-development and independence could best be realized through management and work in units of small-scale enterprise; his strong antipathy to economic concentration as a corrupting force in politics; and his general preference for local rather than national government as a countervailing power to business. At its core, as Urofsky points out, this was a moral and political critique, one that could not be wholly answered by pointing out to consumers the productive efficiencies and economies of scale and scope attending to large business enterprises (308–9, 322–3). (Even on its own terms, of course, the critique raises questions: Are small-scale enterprises really better developers of character in their managers and workers than large ones? How would one go about trying to establish that?) In recent years some economic historians have come to question the generally accepted view of the inevitability of the rise of large concentrated enterprises and their superior efficiency. Most prominently Gerald Berk has suggested that the alternative model promoted by Brandeis and others of "regulated" or "cooperative" competition among many small firms, could be just as economically efficient, if not more so, than an economy dominated by a few giant firms using "Fordist" manufacturing techniques. The Brandeisians' alternative relied on trade associations and cooperatives that would be capable of realizing economies of scale by cooperating in some ways while competing in others. On this

14. He would surely have been particularly disturbed by the Court's decision in Citizens United v. Federal Election Commission, 558 U.S. 50 (2010) (corporations have First Amendment rights equal to those of individual persons to express political views), since much of his career was devoted to arguing that corporate money and influence distorted civic discourse and corrupted democratic politics.

view Brandeis was not an anachronism but an inspired analyst and prophet.[15] Moreover, his critiques of the corrupting effects of the domination of business by a concentrated financial sector, and of politics by concentrated business interests, seem practically as fresh today as when they were written.

Brandeis and his Biographers

Brandeis has been fortunate in his biographers, in several respects. The major biographies—the pioneering and now classic work of Alpheus Thomas Mason and later works of Philippa Strum, Lewis Paper, and Melvin Urofsky himself (in both an earlier book and the present volume)—are first-rate pieces of scholarship: comprehensive, careful, and well written.[16] They are also very favorable to their subject—not so uncritical as to be hagiographic, perhaps, but strongly admiring. Brandeis has had a seductive influence over almost everyone who writes about him. The main exceptions that I know of are few but notable: a chapter in Thomas McGraw's *Prophets of Regulation*, which castigates Brandeis's economic views, especially his critique of the inefficiency of big business, as propagandist rather than analytic, based on the false premise that the entire American economy of his time was coming to be dominated by very large firms and his preference for protecting reactionary small producers against larger more efficient ones; the article referred to earlier by Clyde Spillenger critiquing Brandeis's practice ethics; a polemic by Bruce Allen Murphy alleging that Justice Brandeis unethically engaged in covert partisan politics from the bench by financing and (Murphy charged) directing the reform activities, policy advice, and occasional journalism of Felix Frankfurter and others; and finally an article by Christopher Bracey pointing out that despite Brandeis's deserved general reputation as a liberal, he never took much interest either as a reformer or a judge in the cause of justice for African-Americans.[17]

15. *See* Gerald Berk, Louis D. Brandeis and the Making of Regulated Competition, 1900–1932 (Cambridge Univ. Press 2009).

16. Alpheus Thomas Mason, Brandeis—A Free Man's Life (Viking Press 1946); Philippa Strum, Louis D. Brandeis: Justice for the People (Harvard Univ. Press 1984); Lewis J. Paper, Brandeis (Prentice-Hall Inc. 1983); Melvin I. Urofsky, Louis D. Brandeis and the Progressive Tradition (Little, Brown and Co. 1981). Two additional, more specialized works, both superb, deal with Brandeis's work on the Supreme Court: Alexander M. Bickel, The Unpublished Opinions of Mr. Justice Brandeis (Harv. Univ. Press 1957) and Edward A. Purcell, Jr., Brandeis and the Progressive Constitution (Yale Univ. Press 2000). Other specialized works cover Brandeis's years in Boston, Allon Gal, Brandeis of Boston (Harv. Univ. Press 1980); the hearings on his confirmation to the Supreme Court, A.L. Todd, Justice on Trial: The Case of Louis D. Brandeis (McGraw-Hill 1964); his views and work on economic policy, Berk, *supra* note 15; and a comparative exploration of the effect of Brandeis's Jewish identity on his work and thought with that of Felix Frankfurter, Robert A. Burt, Two Jewish Justices: Outcasts in the Promised Land (Univ. of Calif. Press 1988).

17. Thomas K. McCraw, Prophets of Regulation 80–142 (Cambridge Univ. Press 1984); Spillenger, *supra* note 6; Bruce Allen Murphy, The Brandeis/Frankfurter Connection (Oxford Univ. Press 1982); Christopher Bracey, Louis Brandeis and the Race Question, 52 Ala. L. Rev. 859 (2001). Bracey's critique in particular invites speculation: Why was Brandeis

Melvin Urofsky's *Louis D. Brandeis* is certainly among the best of the biographies, probably the best of all. It is comprehensive in scope and unbelievably thorough in research. Urofsky seems to have found every scrap of evidence that could cast any light on Brandeis's public or personal life. He is himself one of the editors of Brandeis's copious correspondence. His book is particularly revealing of Brandeis's family life, and goes some way toward softening the usual picture of Brandeis as "Isaiah"—remote, cold, judgmental, controlling. His wife Alice was for many years afflicted with an unexplained physical and mental fragility, which prevented her from traveling with her husband on his many business and camping trips, but their marriage seems to have been a tender and companionate one (117–26). The Brandeises had two children: the good daughter Elizabeth, brilliant, dutiful, and later very much her father's disciple as the creator of a model unemployment-insurance reform in Wisconsin; and the rebellious daughter Susan, who seems to have put her puzzled and dismayed parents through a very hard time, though it's difficult to tell exactly why except that she had problems managing money, dressed "carelessly," and often resented her parents' guidance (508–514). (Eventually she straightened out, became a lawyer, and married a man her parents liked.) He also has more extensive treatments of Brandeis's work with the Wilson Administration and of his extra-judicial activities, especially his involvement with the Zionist movement, than any other source. This is not the book for readers who want detailed exposition and analysis of Brandeis's legal and

so passive on race issues? He was raised in a liberal non-racist family and cultural milieu. He was friendly to and actively engaged in other liberal causes—industrial democracy and the rights of labor, the equality of women, economic security, the Zionist movement, and the fight against monopoly and systemic unemployment. Why then so little attention to the biggest and most intractable American Dilemma, the denial of basic rights to an entire class of citizens? Although Brandeis generally seemed sympathetic both to blacks and to the cause of racial equality as an abstract matter, he undertook no activities in pursuit of the cause as a public-interest lawyer; and as a judge he joined, without writing any of them, majority opinions in all the major race-related cases of his tenure, regardless of whether the decisions promoted or retarded black rights. On race issues, many Progressives subordinated their liberalism—if they had any at all—to their pragmatic realism. Progressives were prone to analyzing race as a potentially divisive and explosive matter requiring delicate political management and "social control." Many of them would have accepted the rationales Southern states offered for compulsory segregation of the races, that it avoided friction, sheltered black minorities from the worst of white violence, even that it protected the genetic purity of both races. I don't know how much of this Brandeis would have accepted, though it seems quite plausible to me that he would have some of the same views as his chief disciple Felix Frankfurter, who deplored racial inequality but, as is well known, also thought that coercive federal efforts to attack it would ignite a counterproductive political backlash. Brandeis's "federalism" is probably a factor here also: Brandeis believed that states and regions had distinctive problems and characteristics, which were best solved locally because locals were most likely to be close to and understand them. He might well have been among the many liberals who thought that Southern whites, in the interests of modernizing their region, would find their own gradual way to getting rid of their backward institutions and prejudices; and that of all forms of intervention, actions of federal courts were least likely to be effective. Whether such views are best diagnosed as cowardice, complacent rationalizations for inaction, self-deception, or shrewd political insight given the realities and constraints of the time, is still being debated.

economic views—those should consult the works by Bickel, Purcell, Spillenger, McCraw, and Berk cited above—but Urofksy deals accurately and lucidly with the technical aspects of Brandeis's work in practice and on the Court.

Besides being exhaustively researched, Urofsky's book is remarkably measured and judicious. He takes on almost all the controversies that Brandeis's career has provoked and brings to them a careful and generally fair-minded assessment. He seems to me particularly effective in assessing how far Brandeis's Jewishness affected his views and public involvements. Was he propelled into social reform causes, and eventually into Zionism, by his feelings of marginality, or as a response to anti-Semitism that made him feel the burden of his Jewishness? Urofsky thinks mostly not (407). Brandeis never either concealed or emphasized his Jewishness. Although anti-Semitism sharply increased in his adopted city of Boston after 1900, it did not result in any loss of business or social exclusion until Brandeis challenged much of the elite establishment by fighting against the merger of the New Haven and Boston & Maine railroads. (That establishment turned out in force to oppose his nomination to the Supreme Court in 1916.) Like many secular cosmopolitan Jews, Brandeis was not particularly interested in the Zionist cause in his early years, thinking it was more important for Jewish immigrants to assimilate to American culture and values. Horace Kallen helped to persuade him that one could be a cultural pluralist, an American and a Jew both, and he came to see Zionism as a cause that could help to realize *American* ideals, in an improved and purified form, in an experimental society in a new setting (410–12). Brandeis really kept the American Zionist movement alive for much of its early existence by helping to stabilize its finances, provide it with a staff, and supply organization to its work. In 1921, however, Brandeis's leadership of the American Zionist movement came to an end, as the membership broke away to follow the faction led by Chaim Weizmann. In keeping with his primary interest in Palestine as a model society, Brandeis wished to stress the practical project of economic development. Zionists wanted a leader who identified with Zionism as a nationalist and religious project, for which Brandeis had little enthusiasm. In the views of his critics, he lacked emotional commitment to the cause, *yiddishkeit* (515–44).

For all his close knowledge of Brandeis's work and life, even of his family life, however, even Urofsky cannot help us much to understand the interior man. Brandeis's was a public performative life.[18] Even as a very young man he exercised an iron discipline over his speech, his actions, and even the utterances of his views to intimates. The Brandeis of private thoughts and doubts, to the extent he had any, remains a mystery.

18. I owe this insight to Steven Wilf in conversation.