

May 2014

Brandeis, The Personal History of an American Ideal (Book Review)

Nathan Probst Jr.

Follow this and additional works at: <http://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

Probst, Nathan Jr. (2014) "Brandeis, The Personal History of an American Ideal (Book Review)," *St. John's Law Review*: Vol. 11: Iss. 2, Article 30.

Available at: <http://scholarship.law.stjohns.edu/lawreview/vol11/iss2/30>

This Book Review is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized administrator of St. John's Law Scholarship Repository. For more information, please contact cerjanm@stjohns.edu.

city against its own domestic foes * * *. It forces us to consider if there is in all republics this inherent and fatal weakness."

And so, in struggling with all these great constitutional questions and international problems, Lincoln surpassed all his great contemporaries (Chase, a future Chief Justice, Bates, Reverdy Johnson, Lyman Trumbull, Edwin M. Stanton, Montgomery Blair, who appeared for Dred Scott, and Judge Curtis, who wrote the great dissenting opinion, David Davis, a future Justice of the Supreme Court and Roger B. Taney) in the solution of such human legal problems as few other men, before or after him, had ever been called upon to solve.

What he said in 1858 was realized while in the White House. "Let us discard all this quibbling about this man and the other man, this race and that race and the other race being inferior, and therefore they must be placed in an inferior position. Let us discard all these things and unite as one people throughout this land, until we shall once more stand up declaring that all men are created equal. I leave you, hoping that the lamp of liberty will burn in your bosoms until there shall no longer be a doubt that all men are created free and equal."

The colossus in the White House won the greatest diplomatic victory in our history—"The Trent Affair"—at a time when the collapse of our Democracy was not only hoped for but was predicted by all the foreign leaders of the world from Palmerston to Napoleon the Third, and who were attempting to call into being another Holy Alliance to bring about the destruction of the last great experiment of a free government.

It was then only that John Bright in England, Victor Hugo in France, Bismarck in Germany and Gorchakof in Russia began to see the great silhouette of a statesman loom on the other side of the Atlantic—and for the first time they beheld the man who had determined that our nation was perpetual—"*esto perpetua*".

EMANUEL HERTZ.

BRANDEIS, *THE PERSONAL HISTORY OF AN AMERICAN IDEAL*. By Alfred Lief. New York: Stackpole Sons, 1936, pp. 508.

A liberal mind is a fascinating mind; it knows all things, sees all things, and believes all things to be true in part. It never gives intellectual offense, for it holds that no view is of permanent worth. Its functioning is bloodless, the personification of perfect manners, and it interprets public affairs with the nonchalance of a host in a drawing room. Such is the popular conception.

I

America was in its teens in economic growth during the closing part of the nineteenth century, while England by that time had probably completed its full development under an expanding capitalism.

Beginning with that period in English life and continuing to the present there has been a constant decline in its economic vitality. At first, economic misfortune came slowly, but at all times a vast majority of the population was suffering privation. The limited percentage of those who had and the vast percentage of those who had not, the tremendous affluence of the inheritors and the shameful poverty of the disinherited, the absence of a substantial middle class as a safety zone between the landed and the poor, all created a situation which prompted liberal-minded and socially conscious Englishmen to take upon themselves the role of critics of their social order. In consequence, a literature developed which took inventory of the resources of England, and outlined plans for a new economic order. Through it, and through the activity of the liberal leaders, commoner and nobleman, laborite, liberal and conservative alike, became conscious of the need of remedial legislation.

America, on the other hand, at this period, was taking giant strides in its economic development. It had come into its own as a world power. In finance it was entering upon the era of great personal fortunes. And with that came an orientation that made even the less fortunate persons hopeful and optimistic. True enough during that period, slums were a commonplace, and poverty gnawed at a substantial part of the population. The attitude nevertheless prevailed, "though I am poor today, there is still hope for tomorrow". The humble beginnings of the great industrial leaders acted as a strong stimulant in arousing the imagination of the young to the great possibilities before them, and views critical of the economic and social arrangement were received with disapproval; it was fashionable to speak in an ever-rising crescendo of hope concerning the future of the country.

The decades of prosperity gave birth to an ideology which required every good American to accept certain propositions as though they were absolute truths: "We must not tax the rich because they will pass it on to the poor; we must not tax business because we will raise the price of commodities; we must not tax corporations because we hurt business; we must get government out of business, and put business methods into government; there must be tax exempt government bonds to enable the government to borrow at a low rate of interest; business cannot function properly so long as Congress is in session." With these tenets ingrained in the popular mind, an attitude that property must have militant powers crystallized. It was further held as axiomatic that property must be subject only to individual initiative unrestrained by laws; rugged individualism became the philosophy of the average mind, and specially favorable legislation was passed for the leviathans of corporate wealth.

Thus, during that time, a good American male was interested in his automobile or in buying a football field for his *alma mater*, while an American lady joined her woman's club. We, unlike England, produced no Fabian society with its penny tracts; no Keir Hardie or Hodges appeared among the miners. Jefferson, Emerson and Hawthorne ceased to be the American ideals; Carnegie, Morgan and George Baker displaced them in the American mind. America worshipped the Golden Calf.

When the depression of 1929 came it was painfully evident, that during the four preceding decades, men of capacity and intelligence had been in the main absorbed in the single task of making America more and more a great indus-

trial provider, and that few of them had concerned themselves with the social and economic order demanded by the great productive capacity of the country. It was also discovered that America's writers and journalists—a country's real educators—were men with a flair for writing human interest values, but that their knowledge of economic and political philosophy was limited to an ability to give in dignified clichés the results of the specious teachings of the market place. The generating source and power of America's economic life remained with us as our possible salvation but the country was without political and social leadership.

II

It is against this background of four decades that the figure of Mr. Justice Brandeis is to be drawn; the color and shades used by the painter must delineate America's romantic glamour and futile self-satisfaction, as the battle-ground of Brandeis' life and labor. In a community that was hostile to any view that failed to give support to the existing political economy, Brandeis courageously and tirelessly wrote and lectured. Among others, came his famous works on "Other People's Money and How the Bankers Use It", and the "Curse of Bigness". For more than twenty years, practically single-handed, as people's counsel, he held forth in the law forums against the most powerful financial interests. His work in the New Haven case, the life insurance investigation and in the Ballinger probe, represents the highlight of his public service as an advocate. All of these investigations established the devious and insidious ramifications of the banker's power and control.

In the New Haven case the probe revealed the banker's practice of using in his sole interest a corporate body as a pawn in the game of procuring dominant power over commerce and industry. And through this investigation was shown the insecurity of private interests; for the corporate body so seized is as often as not subjected to spoliation by what is supposedly the guiding hand of its trusted banker. In Brandeis' investigation of the Equitable Life Insurance Company, it was found that the directors took vast sums of treasury money to buy securities for their private profit; that others had diverted millions from the New York Life Insurance Company fund to private bankers. In the Ballinger probe carried on before a Congressional Committee, it was charged that a high-minded minor official of the Interior Department had been ousted by the cabinet officer because of his unwillingness to assent to the filing, with the United States Land Office, of fraudulent claims to thousands of acres of valuable coal lands in Alaska. The probe established that the resources of government are not spared by the powerful economic groups, and that even our political government in its highest offices, was subject to their domination.

It is difficult to say what will be considered his most important contribution. Some believe that Brandeis will be remembered as the father of the scientific method in the law, the substitution of legal economics for the intuitive approach. Illustrative of that ability is his dissenting opinion in *Southwestern Bell Telephone Company v. Public Service Commission*.¹ No treatise on the analysis of

¹ 262 U. S. 276, 43 Sup. Ct. 544 (1923).

prices and price movements is now recognized by economists as possessing the comprehensive applicability of the pronouncements of Brandeis in that case.

Brandeis' view in the field of business management made big business suspicious of his work, and finally caused the whispered accusation that he was a Socialist. It was clear to him that the constitutional provision that property shall not be taken without due process coupled with the ancillary rule that a confiscatory rate is such a deprivation, did not provide shelter for the managers of a business or give implied approval to the management. It was his philosophy that the competence of the officers and directors carrying on a business might be questioned and condemned without violating the letter or the spirit of this constitutional prohibition. To him property, especially of a public nature, put into the hands of operators, imposes a duty upon them for the benefit of the owners or the absentee owners; but the public might exact an administration that would not waste through lack of wisdom or ability. A low return resulting from managerial incompetence is not a confiscatory return, and the injury flowing from such incompetence is not limited in its effects to the property owners; it affects the general public as well. The important distinction drawn between the integrity of property and the problem concerning the ability of the managers of a business to carry on effectively, was not recognized in case law until the decision of the Supreme Court of the United States in *Hegeman's Farm Corporation v. Baldwin*.²

While this decision was rendered in 1934, Judge Brandeis' service to enforce this distinction in legal and economic thinking, antedates this case by more than a score of years. Despite the charges of his detractors, he had never during his days as public counsel sought to establish the thesis that capital was receiving the lion's share of the earnings of a business. His constant effort, during his strenuous life as advocate, was to educate the owners of business to the realization that greater efficiency would provide them with greater returns and the public with greater service. Small men disliked the very canniness of this lawyer-economist who could provide them with plans for operating their own businesses with greater economic success.

Barons of wealth usually become more jealous of control than of farthings and of peace. The power by them assigned to property includes in their minds an unrestrained freedom for the masters of the hunt; the choosing of the grooms they regard as their unquestioned right.

The emphasis that Mr. Justice Brandeis laid on the importance of management and on its usual insufficiency in quality has been definitely established by the depression as a sound criticism of business practice. In the field of business, moreover, Brandeis' work has other implications. Presently, it may become an impelling force in the conflict between labor and capital. Owners now deem themselves properly acquitted of their obligations when they establish that the net return of the business does not justify a higher wage. Our social thinking still does not embrace the view that the ability to pay higher wages might well exist under an efficient management.

² 293 U. S. 163, 55 Sup. Ct. 7 (1934).

III

Do the years relent? Brandeis, at eighty, has not surrendered in his struggle against "bigness" when it cannot justify its existence by carrying a greater tax burden or by producing at a smaller unit cost. Nor has his interest in the "small man" diminished. In his dissenting opinion in *Liggett Co. v. Lee*,³ he again sets forth his articles of faith:

"Able, discerning scholars have pictured for us the economic and social results of thus removing all limitations upon the size and activities of business corporations and of vesting in their managers vast powers once exercised by stockholders—results not designed by the States and long unsuspected. They show that size alone gives to giant corporations a social significance not attached ordinarily to smaller units of private enterprise. Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business, have become an institution—an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the State * * *. The changes thereby wrought in the lives of the workers, of the owners and of the general public, are so fundamental and far-reaching as to lead these scholars to compare the evolving 'corporate system' with the feudal system; and to lead other men of insight and experience to assert that this 'master institution of civilised life' is committing it to the rule of a plutocracy."

All these matters have been chronicled by Mr. Lief fully and faithfully. The subject, however, seems treated in a "Who's Who" biographic manner. There is no real attempt at critical incisiveness, nor is there an appraisal of the contributions of the great liberal leader. Perhaps time only can unfold what Brandeis really contributed to the weave of permanence.

NATHAN PROBST, JR.*

THE INSTITUTION OF PROPERTY. By C. Reynold Noyes. New York: Longmans, Green & Co., 1936, pp. xiv, 645.

We have heard and read much in recent years of the functional approach to the study of law,—that economics, for example, should be studied in connection with the study of law, more particularly the study of the law applying to industry and commerce. In this work, a leading economist who is not a lawyer finds that the study of the law of property as it has developed historically, as well as an analytical understanding of its principles, are both essential as an approach to the study of economics. Every student of the law of property should read this book. Nowhere else in anything like the same compass can

³288 U. S. 517, 564-565, 53 Sup. Ct. 481 (1933).

* Professor of Law, St. John's University School of Law.