Brandeis

Strum, Philippa

Published by University Press of Kansas

Strum, Philippa.
Brandeis: Beyond Progressivism.

For additional information about this book
https://muse.jhu.edu/book/84294

For content related to this chapter
https://muse.jhu.edu/related_content?type=book&id=2922645

This work is licensed under a Creative Commons Attribution 4.0 International License.
2
FROM LAISSEZ-FAIRE CAPITALISM TO WORKER-MANAGEMENT

Industrial democracy should ultimately attend political democracy.¹

In 1892 Brandeis was confronted with dramatic proof that capitalists could be less than altruistic or even humane. He was preparing to teach a course on business law at the Massachusetts Institute of Technology. The notes he had nearly finished writing for his lectures were designed to demonstrate how the common law had evolved in tandem with industry and commerce. The congruence between law and society had become part of Brandeis’s thought. He assumed that law invariably reflected all relevant aspects of the community from which it had emerged. Seen as organic, law could not but be good in responding to the needs of the people.

One morning before the semester began, he picked up his newspaper and learned of the violence that had erupted at the Carnegie steel works in Homestead, Pennsylvania, when the company decided not to renew its contract with the steelworkers and refused to deal with a union. Brandeis had been friendly for some years with Mary Kenney, a labor organizer, and the man she eventually married, John F. O'Sullivan, a union official. A few days earlier Kenney had told Brandeis about her trip to Homestead during the contract’s last weeks. The company clearly expected violence when the contract ran out, for it had erected walls with apertures for guns around the steel-mill grounds. The violence started when the contract expired, wages were slashed, and the workers went out on strike. Henry Clay Frick, Carnegie’s
manager, hired Pinkerton guards to protect strikebreakers and sailed them up the Ohio River. The Pinkertons arrived at Homestead on boats, realized that the strikers, dug in on the bank of the river, would not permit them to land, and began to fire their Winchesters. The steelworkers suffered most of the casualties in the ensuing battle. Brandeis later remembered his reaction: "I saw at once that the common law, built up under simpler conditions of living, gave an inadequate basis for the adjustment of the complex relations of the modern factory system. I threw away my notes and approached my theme from new angles. Those talks at Tech marked an epoch in my own career." 

Brandeis realized that nothing in the formal legal institutions explained "human affairs in their manifold relations" as they existed in Homestead. He was appalled at "that battle, where organized capital hired a private army to shoot at organized labor for resisting an arbitrary cut in wages" and began to think seriously for the first time about "the relations of labor to industry." He set about revising his notes to cover the "Legal Relation of Labor and Capital," convinced that if law was both a dynamic entity that reflected changing social conditions and an embodiment of morality, the law of the twentieth century would have to keep pace with the new phenomenon of highly concentrated capital. Brandeis quickly learned that the law was neither necessarily moral nor egalitarian, there being no meaningful equality between Carnegie and his workers. 

Ten years later he faced directly the difficulties inherent in the capital-labor relationship. His client William H. McElwain, a major shoe manufacturer, called Brandeis in when the business began to experience difficulties. The employees had refused to accept the pay cut McElwain considered to be reasonable and necessary under the circumstances. Brandeis went to the plant and found that the employees were paid well when they worked, but their work was seasonal and they earned nothing out of season. He was amazed to learn that McElwain had no idea how much his workers earned each year rather than each working day. Seeking more information, Brandeis turned to John Tobin, head of the International Boot and Shoe Workers’ Union, who was acting as the striking workers’ representative, and heard the same story of high but seasonal wages. McElwain sought to end the impasse by suggesting that the workers be paid on a piecework
basis; Tobin wanted wages calculated on the basis of hours. Brandeis rejected both ideas and instead proposed a detailed system that would enable labor to be spread out during the year to prevent irregularity of employment. The two sides agreed, the system was put into effect, and it worked.⁴

Brandeis learned three major lessons from the McElwain experience. First he saw that irregularity of employment was disastrous for workers, so much so that thereafter he considered it the major problem for labor and insisted, "Unemployment is as unnecessary as disease epidemics."⁵ He saw regularization as helpful to employers as well as to employees because it would enable them to recoup their initial investment in machinery quickly by running it throughout the year, to increase volume and subsequently to lower prices with the result of increasing volume even further, and to find employees who might be willing to accept lower wages in return for guaranteed regular employment. Second, he learned that, given sufficient information about the facts of the situation, labor and capital could behave reasonably, as he believed McElwain and Tobin had done. He remained in contact with Tobin, having discovered that union leaders—or at least one of them—were as reasonable as employers and that he could speak with the former as easily as with the latter. Although he had socialized with labor-movement figures such as Kenney and O'Sullivan, this was the first time he had negotiated with a labor leader in the workplace. Brandeis was referring to the McElwain experience when he said that "many things sanctioned by expert opinion and denounced by popular opinion were wrong." In Brandeis's world, one opinion ensconced in popular belief was that unionization was an evil. The third and related lesson was, as he had earlier seen in the Homestead strike, that inequality of power resulted in human misery; in the absence of unions, employees were at the mercy of employers. The priority he placed on the dignity of individuals made that situation unacceptable, for he was not so naive as to think that employers automatically would interest themselves in the dignity of others rather than in profits.⁶

One of Brandeis's basic premises was that human beings had the right to govern themselves in the economic as well as in the political sphere. He had now learned that such self-government, or at least something as basic as a modicum of control over their wages, was
impossible for workers unless they were organized. Brandeis had become convinced that unions were a necessity. John Stuart Mill had asserted that in the public sphere, "the rights and interests of every or any person are only secure from being disregarded when the person interested is himself able, and habitually disposed, to stand up for them." Brandeis took this idea into the workplace, viewing unions as enabling workers to stand up for their interests.

Speaking to an organization of employers in 1904 he said, "Some way must be worked out by which employer and employee, each recognizing the proper sphere of the other, will each be free to work for his own and for the common good, and that the powers of the individual employee may be developed to the utmost." An implicit symmetry between the public sphere and the workplace was becoming apparent in his thinking. He equated civic virtue with a citizen's involvement in public affairs; industrial virtue consisted of employing one's powers "to the utmost" in the workplace. Neither employers nor employees ought to dominate the relationship; the "sense of unrestricted power is just as demoralizing for the employer as it is for the employee. Neither our intelligence nor our characters can long stand the strain of unrestricted power"; that is, absolute power corrupts in the economic as well as in the political sphere. For that reason, "The employer needs the union 'to stay him from the fall of vanity'," and union leaders will be "reasonable and conservative" only if they represent strong unions. Brandeis had begun to speak of "industrial democracy," which he equated with the checks and balances of the political sphere: putting employers and employee unions on an "equal" basis by balancing the financial power of employers with the power of the unions to keep businesses from functioning unless they paid fair wages. He was certain that the leaders of strong unions and the employers dealing with them would act rationally as long as they talked together. Thinking along the same lines, William James was soon to proclaim that the conflict between capital and labor could be solved through mutual understanding. James chided the two sides for being "at cross-purposes all along the line, regarding each other as they might regard a set of dangerously gesticulating automata, or, if they seek to get at the inner motivation, making the most terrible mistakes." The statement contains a quite possibly erroneous assumption of ultimate mutual interest that Brandeis
shared. Brandeis's formulation was that “nine-tenths of the serious controversies which arise in life result from misunderstanding, result from one man not knowing the facts which to the other man seem important, or otherwise failing to appreciate his point of view. A properly conducted conference involves a frank disclosure of such facts—patient, careful argument, willingness to listen and to consider.”

James did not normally enter the world of labor negotiations, but Brandeis did. It is therefore not surprising that Samuel Gompers, leader of the American Federation of Labor, and other leading union organizers as well as many employers lost patience with Brandeis when he in effect told workers who had been shot at by employers' armies and employers whose buildings had been blown up by frustrated workers that they had to “reason together” because their interest in the success of the business was the same.

There was a contradiction in Brandeis's thought of which he was seemingly unaware. He followed Madison in asserting that it was safer to rely upon self-interest than on virtue or altruism and thus argued for unionization rather than for benevolent employers. Pitting one self-interest against another, after all, assumes that the two sets of interests are in opposition to each other. Yet, simultaneously, Brandeis postulated an ultimate congruence of interest between employer and employee, having seen that it was possible to devise solutions that enhanced both the employer's profits and the circumstances under which laborers worked, including their wages; and he assumed this congruence applied to all labor-management situations. The Progressive movement, presupposing a perpetual divergence between the interests of labor and those of management, adopted the idea of balancing them by offsetting the greater power of the employers with governmental intervention and regulation. Brandeis went beyond progressivism to end the duality by merging employer with employee through worker-management, with a slight detour for the purpose of exploring scientific management. But that evolution in his thinking lay in the future.

During the first decade of the twentieth century, Brandeis's mistrust of unbridled power resulted in further postulates that exasperated labor and capital alike. He opposed the closed shop, arguing not only that it was unacceptably coercive but that the presence of nonunion workers would prevent labor from becoming as tyrannical as the employer. He
agonized much of the business community by insisting that businesses had to be small enough so that employers would be in sufficient contact with the workers to remember their humanity and needs. He maintained that labor negotiations had to be conducted by those people who actually owned or managed the business, presumably because they would best understand the relationship of the union’s demands to their own self-interest. And rationality necessitated one person or a small group of people being fully familiar with all aspects of the business: a situation attainable only if the business remained small. Another reason for opposing overly large enterprises, including the burgeoning trusts, was that they entailed such massive concentrations of power that countervailing power was impossible, and moral corruption, defined in this context as a lack of care about employees, was the inevitable result.  

The negative reaction of many employers and unionists to his ideas was of little interest to Brandeis, who interpreted the hostility as reflecting their regrettable lack of understanding about where their welfare lay. He equated rationality with a common-sense awareness of the solutions that would prove best for all concerned and believed that it eventually would triumph despite the threat presented to it by unlimited power and myopic greed. He saw great possibilities for developing “the powers of the individual employee . . . to the utmost” when rational systems finally came into existence. He urged unions to fight for reasonable hours as well as wages, for as members of a democracy, workers need leisure, “among other reasons, because with us every man is of the ruling class. Our education and condition of life must be such as become a ruler. Our great beneficent experiment in democracy will fail unless the people, our rulers, are developed in character and intelligence.” Education requires “freshness of mind . . . and to the preservation of freshness of mind a short work day is for most people essential.”

Brandeis’s concern for most individuals nonetheless was still paternalistic and his approach to unionization conservative, designed to protect small capitalism. His faith was in union leaders rather than in the rank-and-file worker. He said in 1905 that “democracy is only possible, industrial democracy, among people who think; among people who are above the average intelligence.” He mitigated his elitism slightly by insisting on the right of everyone to education and acknowledging that
“thinking is not a heaven-born thing. . . . It is a gift men and women make for themselves . . . it is earned by effort. . . . The brain is like the hand. It grows with using.” Yet he clearly did not perceive the average worker as being on the same intellectual level as most employers, nor was he ready to give such workers, rather than their presumably wiser leaders, power equal to that of employers. Could one willingly turn power over to the less favored, the less educated, the less intelligent? This question is of course central to democratic political theory, and Brandeis was far from the first or last thinker to wrestle with it. 15

For the moment, he had no answer. Nor had he come to terms with the contradiction implicit in his belief that the assumption of responsibility by workers would develop their powers of intellect and character and his acknowledgment that “in the unskilled trades and in many so-called skilled trades” within the industrial world, “the limits of development” of responsibility “are soon reached.” His unarticulated goal was a method by which the Jeffersonian imperative of economic independence could be achieved in the industrial age. He soon acknowledged that higher wages and an eight-hour workday were insufficient solutions. By 1907 he was telling the Boston Central Labor Union, “Labor unions should strive to make labor share all the earnings of a business except what is required for capital and management.” Shareholders should be given a fair return on their investment, but after that and the needs of the business itself had been taken care of, anything remaining belonged to the workers. The former advocate of laissez-faire capitalism had begun to advocate profit sharing. But this approach, however much it might increase worker income, would not result in economic independence. And yet Brandeis could not think of how to go further. 16

Then came the New York garment workers’ strike of 1910, crucial for Brandeis, which he was asked to mediate. Despite the disagreement of mainstream labor with some of his ideas, it considered Brandeis an ally, pointing to his support of unions, decent wages, an eight-hour day, regularity of employment, and pension plans and his opposition to the trusts and to judicial injunctions against strikes. In 1908, in the case of Muller v. Oregon, he had successfully argued for a state law limiting working hours for women, basing his presentation to the Supreme Court on the special social role of women, and in 1913
he was to win an Oregon court ruling legitimizing a state law setting minimum wages for women.  
Brandeis had won the trust of small businessmen by representing many of them and by disdaining the more radical labor positions. He argued, for example, that a single fixed minimum wage for women was uneconomic, believing that "the minimum wage in a department store . . . ought to be higher than the minimum wage in a factory, because the girl in the department store has to dress well all the time and that costs money." He had also demonstrated his integrity to both business and labor. An unidentified typescript in the Felix Frankfurter Papers refers to a statement allegedly made by "Big Bill" Haywood, leader of the Industrial Workers of the World (I.W.W.):

"This fellow Brandeis," he said, "is the most dangerous man in the United States." He was asked to explain. "Brandeis is the kind of man the I.W.W. has got to look out for. Brandeis knows something about capital and labor. He isn't one of these highbrow reformers who is sure to make a fool of himself. That's why I say he is in our way. The workers trust him even when he goes against them. Think of it. He tells them they're wrong here and wrong there, he defends the manufacturers more than half the time, and still they believe him. They even say he was right sometimes when he decided against them. . . . I think they'd follow Brandeis to Kingdom Come because they say nobody can buy him, that he's not in this for himself, and that he's the whitest man who ever mixed up in the class struggle. That's what makes him so damned dangerous. If he were a fool, if he didn't know all about everything, if he were in it for Brandeis, if there were only something the matter with him, he wouldn't be messing things for the I.W.W. wherever he goes."

Haywood was right: Brandeis was not "in it for Brandeis" but was genuinely concerned with the problem of industrial justice—which meant, to him, justice for both employer and employee. And justice was not an abstract conception; it had a human face. Brandeis had many facets: He was a man of the law, a master of facts, a brilliant political tactician, a gifted mediator, a concerned and involved citizen, an educator, a believer in democracy. Above all, however, he was a
humanist. He was offended by human suffering and appalled by the waste of human potential. Justice and democracy meant that people would have better lives. His humanism illuminated his approach to the world of employer and employee. He loathed irregularity of employment because it hurt people, and he fought overly long working hours and overly low wages for the same reason. He was closely tied to the world of social reform, as indicated by his relationships with people such as Jane Addams, Florence Kelley, Josephine Goldmark, Meyer Bloomfield, and Henry Moskowitz. At the same time, he viewed each of his business clients as individuals with a need as great as their workers' for economic security and personal fulfillment. His concern for all the people in any given situation, including contentious labor disputes, coupled with his insistent independence, left him free to pursue his own ideas without regard for the self-interested reactions of others. He had a reputation as a fair mediator in labor disputes. In short, both business and labor had reason to trust him. That led to his acceptance as mediator in the New York garment workers' strike by both the International Ladies' Garment Workers Union, which represented approximately 10,000 of the roughly 60,000 workers on strike, and the Cloak, Suit & Skirt Manufacturers' Protective Association, which spoke for 1,500 enterprises, in Brandeis's estimate.

The "protocol" Brandeis worked out for the garment industry contained provisions for maximum hours, minimum wages, holidays, a Joint Board of Sanitary Control to oversee and standardize working conditions, a Board of Grievances and a Board of Arbitration to resolve disputes and avert strikes, and Brandeis's cherished idea, a "preferential" rather than either an "open" or a "closed" shop, giving preference to union workers if equally skilled union and nonunion workers applied for jobs. Brandeis called it "an essay in industrial democracy," but the essay ended in 1916. It failed because it did not bridge the divergent interests of employer and employee at the heart of labor unrest. The experience nonetheless transformed Brandeis's attitude toward the average laborer.

Most of the garment workers were Jewish immigrants from Eastern Europe, as were their employers. Although Brandeis's Jewishness undoubtedly contributed to the willingness of the two sides to have him mediate, both workers and management belonged to a group of Jews totally unknown to him. His family's background lay in the
Austro-Hungarian Empire; his clients and colleagues in Boston were mainly either Jews with origins similar to his or Boston Brahmins or other non-Jews. Suddenly he found himself meeting unskilled laborers who astonished him with their intelligence, rationality, openness to democratic procedures, tolerance for each other's viewpoints, sense of equality, and knowledge. These people were his ideal citizens of a democracy, the workers who could quiet his remaining doubts about the democratic potential of the working class. He was impressed when he heard a disgruntled worker thundering at his employer the words of Isaiah,

It is you who have devoured the vineyard,  
the spoil of the poor is in your houses.  
What do you mean by crushing My people,  
by grinding the face of the poor?  
says the Lord God of hosts.

Here was no paucity of erudition, no lack of democratic precepts, no inability to grasp economic truths. Brandeis was so enchanted that he spent his evenings relaxing with the negotiating committee and, even though he had supposedly given up alcohol years before as unnecessary, drinking beer with them while he recounted stories of the Pinchot-Ballinger hearings.

Perhaps his mental picture of workers from that time on was of the literate, articulate Jews he found in the garment industry; perhaps his theories of industrial relations were postulated on the assumption that such workers would be the norm; perhaps his intellectual sympathy for the worker was reinforced by the emotional tie that he, who had placed no importance on his Jewishness, was surprised to find himself feeling for these fellow Jews. It was easy for Brandeis to envision them as participants in his ideal industrial democracy, and the theory of labor relations he began to articulate reflected his new attitude.

He had long since dismissed state socialism as an evil to be avoided in political and industrial democracies because of the large bureaucracy and concentration of power he thought it necessarily entailed. In 1913 he wrote to an attorney who thought social reform might stave off socialism, “It seems to me that the prevailing discontent is due perhaps
less to dissatisfaction with the material conditions, as to the denial of participation in management, and that the only way to avoid Socialism is to develop cooperation in its broadest sense. "Cooperation," or worker-management, would be adopted by him both as a liberating mechanism and as a way of preventing socialism. Oligopolistic and monopolistic capitalism were equally to be avoided because they were too big to be efficient and because the power implicit in their size permitted them to ignore the best interests of both workers and consumers.

Brandeis gradually had altered his definition of democracy in the economic sphere, changing it from small-scale laissez-faire capitalism to a balancing of power between employer and employees and then adding profit sharing to the formula. Because his interest lay in individual autonomy as well as in justice for employees, however, he had to grapple with the fact that getting more money for their work did not necessarily ensure workers' autonomy in the workplace. Shorter hours and more money would bring them the leisure for involvement in public affairs and self-fulfillment that he considered necessary to a democratic state and to the individuals within it, but such working conditions, although desirable, would not bring democracy to the workplace. In 1911, testifying before a congressional committee chaired by Sen. Moses Clapp, he expressed his approval of profit sharing. In 1912 he wrote a letter to the editor of Human Engineering, saying that there had to be "two lines of development consistent with industrial democracy." One was unionism; the other, cooperation, by which he did not mean "mere profit sharing" but "a share of the responsibilities and management, and a utilization of the latent powers" in the worker. At that point, unable to follow the logic of his own thinking, he backed away from any discussion of "cooperation." The following year, however, he was writing that profit sharing was bound to be a disappointment "unless it [could] be combined with a real labor co-partnership." Industrial democracy would not be achieved unless "we . . . overcome the sense of injustice; and I doubt whether a sharing of profit, without a sharing of responsibilities, — in other words, without real cooperation, — will accomplish what we long for." 

Brandeis had begun thinking in ways that would differentiate him from most Progressives. He agreed with them that there was too great a disparity between the incomes of the wealthy, particularly corporation
executives, and the wages of the workers. The Progressive goal, and that of the New Deal, was to divide the economic pie into a far greater number of slices even if that meant reducing the size of some of the larger pieces. The emphasis was on raising the workers' standard of living; the assumption was that having done that, maintaining a regulatory system would preclude a return to the earlier level of inequality and exploitation. Brandeis, though agreeing with the absolute necessity to ensure workers an adequate standard of living, was equally concerned about the quality of their lives and their role as citizens of a democratic state. That was his reason for emphasizing sufficient leisure for workers to develop their talents and to engage in the pastimes they considered to be fulfilling while continuing to educate themselves for intelligent participation in the political sphere. He may best have summarized the differences he would have with other Progressives and New Dealers years before he became identified with either movement. "Mr. Gompers quoted some time ago the saying of Heine that 'Bread is Freedom,'" Brandeis stated, referring to labor leader Samuel Gompers. "The ancient Greeks, recognizing that 'Man cannot live by bread alone,' declared that 'Leisure is Freedom.'" He added, again highlighting emphases that would be widely divergent, "The American standard of living demands not only a high minimum wage, but a high minimum of leisure, because we must meet also needs other than material ones." 30

A number of goals converged in Brandeis's thinking about how to reorganize the workplace: equitable distribution of earnings, the need for a decent income level, provision of leisure time. Two additional factors included the question of fairness, of who should benefit from the toil of the workers, and the issue he referred to as responsibility; a later generation would call it empowerment.

John Locke had insisted that land “belonged” to those people who worked it. 31 Brandeis's ideas about profit sharing suggested that in 1911 and 1912 he felt the fruits of industry “belonged” in part to shareholders and in part to the workers. He obviously continued to ponder the question of responsibility as well as profit, however, and three years later, in January 1915, his testimony before the Senate Commission on Industrial Relations indicated that his ideas were beginning to solidify. He lambasted large corporations as inefficient, unable to deal with their problems intelligently, interfering with the
growth of unions, permitting themselves to be dominated by financial interests that had no personal involvement in their work, and relying on wide-scale stockholding that constituted a form of irresponsible absentee ownership. In the course of his testimony, he also sketched his emerging vision of industrial democracy.32

One of the commission’s concerns was industrial unrest. Brandeis was opposed to solutions that did no more than “improve . . . the physical and material condition of the workingman” because they would also “reduc[e]” the “manhood” of the workers. This was undesirable since a democracy required whole human beings: “Their mental condition is certainly equally important.”33 The paternalism implied in progressivism, which assumed workers’ concerns would be satisfied if a governmental elite assured them of a decent wage, might put more food on the workers’ tables but would do nothing for their sense of self or for their participation in the democratic process. The goal of the United States’ polity, as he saw it, was not merely material improvement per se, but a democracy that would enable its citizens to take control of their material conditions. Here economic and political democracy came together:

The social justice for which we are striving is an incident of our democracy, not the main end. It is rather the result of democracy — perhaps its finest expression — but it rests upon democracy, which implies the rule by the people. And therefore the end for which we must strive is the attainment of rule by the people, and that involves industrial democracy as well as political democracy.34

He had said elsewhere that “we cannot successfully grapple with the problem of democracy if we confine our efforts to political democracy . . . the ideals which we have can be attained, only if side by side with political democracy comes industrial democracy.”35 Industrial democracy meant involvement of workers in the problems of the enterprises that employed them. “The problems of his [the employer’s] business, and it is not the employer’s business alone, are the problems of all in it,” he told the commission. This was more than profit sharing, although Brandeis still favored it:
There must be a division not only of profits, but a division also of responsibilities. The employees must have the opportunity of participating in the decisions as to what shall be their condition and how the business shall be run. They must learn also in sharing that responsibility that they must bear the suffering arising from grave mistakes, just as the employer must. But the right to assist in making the decisions, the right of making their own mistakes, if mistakes there must be, is a privilege which should not be denied to labor. We must insist upon labor sharing the responsibilities for the result of the business.

His remarks reflected an element of confusion. Brandeis spoke about “a division of responsibilities” and workers “participating in the decisions,” which he specifically said meant not only wages and hours but “how the business shall be run,” and yet he also referred to “the right to assist” in the decisionmaking process. It was no wonder that one of the commissioners sought clarification by asking if Brandeis defined industrial democracy as “a condition whereby the worker has a voice in the management of the industry,” and Brandeis replied that it did: “not only a voice but a vote; not merely a right to be heard, but a position through which labor may participate in management.”

Conceivably, participation could consist of little more than one representative of labor sitting in on management decisions. This was quite valid as an argument against paternalism but far less so as a description of democracy, which presumably implies the right to effective participation by all rather than token representation. At another point, he implied greater employee-participation, describing the protocol in the garment industry as creating a system in which employers and employees “come together to determine the problems of the trade in precisely the same way that members of the legislatures and the judges of the courts come together to decide the matters for the Nation or of the State or of the city.” He was asked if he had found that the protocol resulted in “an earnest and sincere effort on both sides to find equity.” They had “gotten past the point” of merely seeking equity, he replied. They had reached “a desire to solve industrial problems, and the recognition that the problems of the employer can not be solved by shifting them onto the employee, and that the problems of the employee can not be solved by shifting onto the
employers; that some way must be found to arrive at the cause of the difficulty, to remove that cause." The picture he painted had begun to look like a collaborative effort rather than the stereotypical labor-management relationship. The advocate of clashing ideas as necessary to the healthy body politic viewed a peaceful sharing of perceptions as more appropriate to the industrial sector. Truth might be achieved when ideas were tested against each other, but industrial strife was a wasteful indication that business and labor had misunderstood each other.

He added, referring to his belief that if employees understood an employer's problems there would be fewer labor disputes, "Put a competent representative of labor on your board of directors, make him grapple with the problems whether to do or not to do a specific thing, and undertake to balance the advantages and disadvantages presented, and he will get a realizing sense of how difficult it is to operate a business successfully, and what the dangers are of the destruction of the capital in the business." His language was misleading. Although he appeared to be saying that the process would be complete if a competent worker representative was put on the board of directors, closer scrutiny suggests that he meant that any competent worker put on the board would understand the business' problems; i.e., workers—or at least those whom their colleagues considered sufficiently competent to represent them—could match the employers' understanding of the business.

His language was misleading, however, because his ideas were not yet fully formed, although he was certain of the goal. This became evident as he continued, extolling the unions' success in exercising some control over wages, hours, and conditions and in eliminating child labor from the coal industry. These achievements, Brandeis said, "are all gains for manhood; and we recognize that manhood is what we are striving for in America. We are striving for democracy; we are striving for the development of men. It is absolutely essential in order that men may develop that they be properly fed and properly housed, and that they have proper opportunities of education and recreation. We can not reach our goal without those things. But we may have all those things and have a nation of slaves." By speaking of the inclusion of workers in profit sharing and the participation of some in policy-making, Brandeis was in effect beginning to break down
the differentiation between the role and status of employers and that of employees. But if he was to move beyond progressivism, which was in many ways a conservative movement aimed at protecting the world of small business by such measures as trust-busting and reinvigorating small-scale competition, he had to go further in eliminating the differentiation. 41

Brandeis's thinking had not solidified in part because of the paucity of examples in the United States. Despite his constant and eclectic reading, most—but not all—of his ideas were derived primarily from experience, which was in keeping with his belief that experimentation was the key to progress. One example he did have was the Filene Co-operative Association, whose constitution he had helped write in 1903. The Filene brothers had decided to experiment with greater worker involvement in their Boston department store. The 1903 constitution declared that all Filene employees were automatically members of the association and that the association's goal was "to give its members a voice in their government, to increase their efficiency and add to their social opportunities, to create and sustain a just and equitable relation between employer and employee." The plan contemplated profit sharing, but this aspect was dropped in 1913 in favor of an annual bonus. Another feature that failed was the provision of the 1912 bylaws for the association's acquisition of the Filenes' common stock, amounting to 48 percent of all stock, upon the brothers' retirement. A major reason the provision was dropped in practice was the discouragement of the brothers over the unwillingness of the workers to be actively involved in management. In 1930 a Russell Sage Foundation study concluded that the plan had been unworkable because the idea of worker-management had been instituted from above. It might also have noted that although the employees had the right to decide all aspects of employment, their power did not extend to store policy, merchandising techniques, selection of products to be sold, and so on, and so the plan never called for complete worker-management. While the experiment was still young, however, and again because of his emphasis on experience as a major source of knowledge, Brandeis urged Edward Filene to publicize it, arguing that "the best results of any form of industrial co-operation cannot be attained by working out the problem in a single establishment." This goal would be accomplished only "by having your work and ideas supplemented
by the independent work and ideas of others that may be started under different conditions and in different places on the same general lines.”

At the time of his testimony before the commission in 1915, Brandeis had just begun to learn about workers’ cooperatives, particularly from Beatrice Potter’s *Cooperative Movement in Great Britain*. Potter described factories and workshops that had “a brotherhood of workers controlling the organization and retaining the profits of their own labour,” mills “owned and governed by the men and women who actually worked” there, and fifty-four manufacturing associations and five agricultural associations in existence when her book was written. She argued that the worker-run enterprises that had failed had done so because of insufficient democracy within the enterprise, lack of support from without, too little understanding of economics and market forces, and the absence of a cooperative union that would not only constitute a network of worker-managed enterprises but would also include consumer cooperatives.

This book occasioned one of the relatively few times that Brandeis’s basic ideas were affected by something he read. Potter’s impression on him was clear in the interview Brandeis gave to the Sunday *Boston Post* shortly after his appearance before the commission. Perhaps he had been thinking about the inconsistencies in his testimony, for in the interview he described the protocol system as “a large step toward industrial democracy, but of course only a step.” And, at last, he spoke of the end of the employer-employee distinction, saying that “in a democratic community we naturally long for that condition where labor will hire capital, instead of capital hiring labor.”

One way this could be accomplished, Brandeis told the interviewer, was through “co-operative enterprises, private or public, by which the community undertakes to provide itself with necessaries.” He referred at length to England’s Co-operative Wholesale Society, the worldwide parts of which included flour mills, England’s largest shoe factory, apparel factories, manufacturers of prepared food and household articles, creameries, printing plants, coalfields, a Danish bacon factory, an Australian tallow and oil factory, and a Ceylon tea plantation. The society’s annual gross of $150 million made it bigger than most American industries. And it not only sold for low prices but operated democratically. Its leaders were selected not by “England’s leading bankers or other notables supposed to possess unusual wisdom,
but . . . by all the people interested in the operations of the society, and the number of such persons who have directly or indirectly a voice in the selection of the directors of the English Co-operative Wholesale Society is 2,750,000, for the directors of the wholesale society are elected by vote of the delegates of the 1,899 retail societies, and the delegates of the retail societies are in turn selected by the members of the local societies, that is, by the consumers, on the principle of one man, one vote, regardless of the amount of capital contributed."

Each of the thirty-two full-time directors elected in this manner was paid about $1,500 in 1915, making their combined salaries less than that of many individual American executives. And that, commented Brandeis proudly, "shows what industrial democracy can do."

Brandeis went on to read The Consumer's Cooperative Movement and The Decay of Capitalist Civilization by Potter and her husband Sidney Webb and recommended them and their ideas to his economist daughter Elizabeth and to his protégé Felix Frankfurter. He became an admirer of the consumers' cooperatives not only of England but also of Sweden, Denmark, and Switzerland and an advocate of producers' cooperatives, cooperative banks, and credit unions. Producers' cooperatives would tend to merge into consumers' cooperatives, he thought, and the creation of such institutions would distribute responsibility and thereby serve as a force for democracy and individual development. His interest in Denmark's cooperative factories and consumers' cooperatives led him to encourage his wife and one of her sisters to publish a volume entitled Democracy in Denmark.

Brandeis had been pleased to learn that the directors chosen by the Co-operative Wholesale Society frequently were "men who have risen from the ranks." He insisted that "we in America must come to the co-operative idea" in both production and consumption. The profit sharing that Brandeis had been advocating for years, enabling workers to own stock in the companies for which they worked, could now be combined with the society's democratic election procedure to result in worker-management. He also had before him another example of worker-ownership. In 1914 he had become head of the American Zionist movement, and he was delighted to discover the Jewish kibbutzim in Palestine. All kibbutz land, equipment, and possessions were owned jointly; all decisions were made in meetings of kibbutz members; the kibbutz bore responsibility for filling its members' needs.
Obviously, these small agricultural settlements in which the workers lived communally, ate their meals together, put their children to sleep in the children’s quarters, and had no need of money could not become direct models for industry in the United States. They did, however, give Brandeis a concrete example of communal, nonbureaucratized, democratic living, in which the distinction between management and labor had disappeared.

Brandeis saw the future economy as based on some kind of worker-management or worker-participation: workers owning a business and voting democratically to elect management. He was not entirely clear about ownership. Whether stock would be held by workers alone, or by both workers and consumers, or even by the public in its collective capacity, as suggested in his reference to public as opposed to private cooperatives (and in keeping with his belief that utilities and land should be owned by the public), was not specified. In this connection it must be noted that his comments about absentee ownership, made before the 1911 Clapp hearings, appear to have reflected his discomfort at the idea of receiving money that had been generated by the toil of others. Both an echo of Puritanism and of Brandeis’s growing concern for equality can be heard here. Nonetheless, although he would not own stocks, much of the three-million-dollar fortune he amassed came from his investing the money he earned in corporate bonds. He had written to his brother, early in the century, “I feel very sure that unser eins [‘people like us’] ought not to buy and sell stocks . . . treat investments as a necessary Evil, indulging in the operation as rarely as possible. . . . And when you buy, buy the thing which you think is safe, and will give you a fair return; but don’t try to make your money out of investments.” This advice initially may have been a matter of safe investments rather than of virtue. He later said that he invested money in bonds “where it will be so safe that I will not have to take time off thinking about it.” His letter to his brother indicates that “unser eins” refers to people who “don’t know much about the business” and that he advised, “Don’t try to make your money out of investments . . . make it out of your business” because “you understand [your business] as much as anybody.” He later fulminated against stock ownership because businesses declared large dividends in order to fool stock buyers “for the power conferred to use other people’s money.”
Brandeis took an initially puzzling bypath in his enthusiasm for scientific management, which he learned about through a 1903 article by Frederick W. Taylor, the movement's progenitor. Brandeis began to read works by efficiency engineers Henry L. Gantt, Frank B. Gilbreth, and Harrington Emerson. Soon he was corresponding and meeting with them and with executives of businesses that had successfully introduced scientific management into their firms. The oddity, as Richard P. Adelstein has argued, is that scientific management might well be understood as diverging from the individual-centered philosophy Brandeis espoused.

Scientific management, as Brandeis explained it, was based on the assumption that the labor performed in modern businesses could be analyzed and rationalized so as to maximize efficiency. "Efficiency engineers" determined the maximum time needed to perform each step of a business' work process; the business then trained employees so that they could complete their jobs in the time allotted. The results included the ability of a business to plan ahead, as it would know how long specific jobs would take and what the costs would be; reduction of inventory, as it would be able to identify the materials needed on precise dates; the end of irregularity of employment, for the plans would include continual and efficient use of machinery and labor; and greater productivity and reduced costs, which benefited management, labor, and consumers.

Brandeis described scientific management as "a revolution in industry comparable only to that effected in the transition from hand labor to machinery." The system would encompass the labor "of the managers and high-salaried officials" as well as that of the workers: "Increased efficiency must begin with those higher up." It would alter the relationship between employer and employee because an employer, having invested in an employee's training, would have "a special incentive . . . to retain his employee and to conserve his powers."

Brandeis used the examples of the Brighton Mills, which had cut costs dramatically as a result of scientific management and had raised wages by 45 to 75 percent; the Tabor Manufacturing Company, which had reduced prices by 10 to 15 percent while raising wages by 25 to 30 percent; the Link Belt Company, where wages had gone up by 25 to 35 percent; and the Manhattan Press, which handed out bonuses (for work performed faster than the norm) on nonpaydays so as to
spread income throughout the week. The workers at the Tabor Manufacturing Company’s Philadelphia plant liked the system so much that they refused to join other workers in a general strike.57

Organized labor was outraged. When Brandeis told a union group that a “great opportunity is offered us” by scientific management and asked, “Shall we seize it? . . . Will organized labor seize it?” the answer was a resounding no.58 Unions were certain that greater production per worker would result in a loss of jobs. Of equal importance, however, was labor’s view of the automatic “speed-up” inherent in scientific management: The pace set by the fastest workers would become the standard, those who did piecework would find their wages reduced, and slower day laborers would be fired. Brandeis replied that once the amount of time spent on a job was established, it would remain fixed; laborers able to work faster would receive bonuses. The unions were understandably skeptical. Having dealt with hostile employers, they saw no reason to assume that introduction of scientific management or anything else would transform management into bastions of beneficence. Here Brandeis’s sense of reasonable people deliberating together to develop a system that would work in the best interests of all was confronted by the unions’ more realistic assessment of management’s mentality. Brandeis and the unions were speaking different languages. If rationality prevailed, there was every reason to believe that scientific management would indeed better the workers’ lot; and Brandeis was a devotee of rationality. The workers, however, had more experience of the workplace. Their reaction was summarized by a union woman who shouted at him, “You can call it scientific management if you want to, but I call it scientific driving.”59

Upon closer examination Brandeis’s adherence to scientific management reflects a lack of realism rather than theoretical inconsistency. He truly believed that scientific management was based on “conserving human effort” and would result in “removing the obstacles which annoy and exhaust the workman. . . . Relieved of every unnecessary effort, of every unnecessary interruption and annoyance, the worker is enabled without greater strain to furnish much more in production. And under the exhilaration of achievement he develops his capacity. . . . He secures the development and rise in self-respect, the satisfaction with his work, which in almost every line of human activity accompany great accomplishment by the individual.”60
In addition, Brandeis assumed that the profits gained by increased productivity would go in large part to the workers. Scientific management, as he saw it, would improve the lot of the worker. Individual fulfillment was still his goal, however unrealistic this particular method of achieving it may have been. His romance with scientific management constituted one of the few times he ignored the advice he gave to others: "The logic of words should yield to the logic of realities." 61

When Brandeis was appointed to the Supreme Court in 1916, he gained a national platform for the dissemination of many of his ideas but lost both the time and the forums in which to continue developing his theory of worker-participation. His general method, however, was not to opt for any one possibility until experiments in all had been made and data collected. He believed in evolution, not revolution, and much as he might look forward to the disintegration of the dividing line between labor and management, he would not give up the vocabulary of "labor," "capital," and "management" until experimentation validated his ideas. But he quietly told Felix Frankfurter in the 1920s that the "wage system is doomed" and that consumers ought to go without goods if they could not buy them through cooperatives. 62

By then he may have seen a source of hope in the experiment undertaken by his friend Norman Hapgood and Hapgood's two brothers in their Indianapolis manufacturing plant. A year after Brandeis joined the Court, Hutchins Hapgood, who bore the major responsibility for the brothers' Columbia Conserve Company, decided to give labor a role in management and found the workers not only enthusiastic but more conservative in their policies than he might have been. When the cost of living rose one year, for example, he asked if they might not like to give themselves a raise. They responded that they still did not know whether the business could afford it; six months later, convinced that it could, they voted themselves the suggested increase. Hutchins, certain that efficiency grew along with the workers' participation in management, started meeting with them to see if the process could not be taken further by selling the business to them outright. A price was set on each share of stock. It was agreed that 7 percent was a fair return for the Hapgoods and that profits beyond that would be used to buy stock for the workers. The system worked; by 1930 a trust established by the workers owned a majority of the stock, dividing the proceeds among them. The initial hostility experienced
by the brothers from other business people had faded, and although many were still skeptical, the company's enlarged earnings resulted in Hutchins being asked to give more talks about the experiment than he could manage. ⁶³

In 1922 Brandeis spoke informally to a group connected with the Department of Research and Education of the Federal Council of Churches in America. The most concise statement of his thinking about worker-participation is in the letter summarizing his remarks that he sent to the meeting's organizer, Robert Bruere. The letter reflects his emphasis on democracy, individual responsibility, human dignity, experimentation, and the collection of facts:

Do not believe that you can find a universal remedy for evil conditions or immoral practices in effecting a fundamental change in society (as by State Socialism). . . . And do not pin too much faith in legislation. Remedial institutions are apt to fall under the control of the enemy and to become instruments of oppression. . . . Seek for betterment within the broad lines of existing institutions. Do so by attacking evil in situ; and proceed from the individual to the general. Remember that progress is necessarily slow; that remedies are necessarily tentative; that, because of varying conditions, there must be much and constant enquiry into facts . . . and much experimentation; and that always and everywhere the intellectual, moral and spiritual development of those concerned will remain an essential—and the main factor—in real betterment.

Having stated his belief in empiricism as a key element in the search for truth, he went on to discuss the goal:

The development of the individual is, thus, both a necessary means and the end sought. For our objective is the making of men and women who shall be free—self-respecting members of a democracy—and who shall be worthy of respect.

The great developer is responsibility. Hence, no remedy can be hopeful which does not devolve upon the workers' participation in, responsibility for the conduct of business; and their aim should be the eventual assumption of full responsibility—as in cooperative
enterprises. This participation in and eventual control of industry is likewise an essential of obtaining justice in distributing the fruits of industry.

“Democracy in any sphere is a serious undertaking,” Brandeis continued. “It substitutes self-restraint for external restraint. It is more difficult to maintain than to achieve.” Democracy is difficult to sustain because it “demands continuous sacrifice by the individual and more exigent obedience to the moral law than any other form of government.” Again, the emphasis is on the individual; democracy “is possible only where the process of perfecting the individual is pursued.” But individualism went hand in hand with community, for the development of the individual “is attained mainly in the processes of common living.”64 John Dewey commented upon the letter approvingly; he saw its ideal as having to do “with the development, the making, of individuals” and agreed that “workers must assume responsibility for the conduct of business if they are to be free to develop.”65

Although Brandeis supported minimum-wage and maximum-hour laws, he hoped such laws ultimately would be unnecessary, for the employers would be the workers themselves. That was his answer to the question of how Jeffersonianism could be brought into the industrial era, and it was one of the few serious efforts at a response. True liberty necessarily included economic independence, but participation in the twentieth-century American economy meant factory work for great masses of citizens. A formula that would encompass both liberty and the factory therefore had to be found. Brandeis thought he had identified it in the liberty to participate in industrial decision-making.

Seen from the vantage point of the 1990s, it appears that one of the failures of the New Deal was the lack of consideration it gave to the problem of protecting economic liberty and independence as opposed to increasing the economic well-being of workers. Whether even such a charismatic leader as Franklin Roosevelt could have convinced the American public that individual liberty necessitated scaling down the size of businesses and beginning the introduction of worker-management and whether, if he had done so, the political influence of the giant corporations would have prevented Congress from enacting the necessary legislation are yet other unanswerable
questions. But no such attempt was made, and the possible solution to the problem of protecting economic liberty and independence in an industrial society received neither full-scale discussion nor meaningful experimentation during the period that may have been the one "window of opportunity" for that attempt in American history.