Brandeis on Democracy

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“You were talking to Brandeis in your sleep again,” my husband said. That was not exactly a surprise. It was the early 1980s, and I was deep into writing a biography of Louis Dembitz Brandeis. Any biographer will tell you it is impossible not to become completely enmeshed in the life and thought of a subject.

As a professor of American government and constitutional law at the City University of New York, I had arrived at the point in my career where I thought I should undertake a biography of a U.S. Supreme Court justice. Brandeis died in 1941, and the last full biography of him had been written in the 1940s. Surely it was time for another generation’s take on the man.

What an extraordinary man I encountered once I began my research. He pioneered savings-bank life insurance, fought the huge trusts that were rapidly taking over much of the American economy, and virtually invented the position of public-interest attorneys who provide free legal services for important social causes.

He negotiated settlements in major labor disputes, taught capitalists how to treat workers fairly while making profits, and fought to protect the environment. He also fashioned Woodrow Wilson’s first presidential campaign, created Wilson’s approach to regulating the economy, forged a new approach to law and constitutional interpretation that was based on societal facts rather than theories, articulated the right to privacy, and led the American Zionist movement.

And that was all **before 1916**, the year President Woodrow Wilson appointed Brandeis to the Supreme Court. What Brandeis did in his pre–Supreme Court life and during his subsequent twenty-three years on the Court left a lasting impact on American ideas and law.

The principles he laid down remain extraordinarily useful as the United States grapples with twenty-first-century challenges such as income inequality, speech on the internet, corrupt politicians, large-scale immigration, gender identity, the impact of globalization and technol-
ogy on the workforce, and an ideological divide so wide that it seems unbridgeable. Above all, the nation is asking exactly what democracy means. That’s where Brandeis comes in.

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Louis Dembitz Brandeis was born on November 13, 1856, and died on October 5, 1941, after having been a public-interest attorney for most of his career and a Supreme Court justice from 1916 to 1938. The essays, letters, and decisions he wrote, and the speeches he gave, fill volumes. This book is not the biography I eventually wrote. It is instead a sampling of Brandeis in his own words, with some commentary putting it all in context. His concerns are as relevant today as they were when he was alive, and that is reflected in the pages that follow.

Take, for example, current issues around income inequality and the modern workplace. Check out what Brandeis said about “Justice for the Workers,” focusing not only on how to make capitalism fair for the average worker but on why enormous economic disparities are bad for democracy.

Does it seem that Facebook and big pharmaceutical companies are getting so big that they appear to be out of control? Brandeis wrote about “Business and ‘The Curse of Bigness,’” and what happens to the economy when institutions become so large that no one seems able to get a handle on them or make them work properly.

Should we be worried about technology and privacy? Brandeis and a colleague were the first to write about “The Right to Be Let Alone,” and why democracy is threatened when government becomes overly intrusive.

What should the role of government be in areas such as poverty, health care, and education? “Government in a Democracy” explains how a democratic government can respond to the needs of the citizens without intruding into places where it does not belong.

How should we think about the internet and hate speech? “The Right to Free Speech” explains the American approach to speech and the circumstances under which speech can or should be limited.

Democracy is a goal, Brandeis believed, but it is also a process. It is not an end result but, instead, something that must constantly be worked at. Democracy has everything to do with the way the citizens of a democracy go about solving the old problems that continue to face them and the new ones that arrive as circumstances change.

That means that Brandeis would be the last to suggest that the policies he proposed for the late nineteenth and early twentieth centuries
are necessarily the right ones for today. When he tackled the issues of speech and privacy, for instance, there was no internet, social media, facial recognition technology, or DNA testing. When he worked out a system for protecting workers’ rights, unions were illegal and robots in the workplace was a far-fetched idea. What he believed and would no doubt say today, however, is that the principles underlying his proposals are timeless.

A great admirer of the ancient Greeks, Brandeis regarded the Periclean Age as a model democracy that held important lessons for Americans. A journalist who interviewed him in 1916 reported wryly, “Euripides, I now judge, after having interviewed Brandeis on many subjects, said the last word on most of them.”

I mentioned this at the dinner table one evening in 1980 when I was still working on the biography. My twelve-year-old daughter promptly piped up, “Well, Mom, to hear you, Brandeis had the answers to everything.”

Not quite. But he did write persuasively about the challenges facing any democracy. Whether and how his responses to those challenges can illuminate the problems of today is something for each citizen in a democracy, and for each reader of this book, to decide.

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