LOUIS D. BRANDEIS

A Life

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PANTHEON BOOKS
NEW YORK

Louis D. Brandeis on the Mauretania, *1919*

CHAPTER SIX
TRACTION AND UTILITIES

Louis Brandeis, like many of the leading progressives of this era, began his reform career locally, in his case fighting franchise corruption in Boston. He then went on to battles at the state and regional levels before moving onto the national stage. Between 1897 and 1916, Brandeis gradually developed a coherent philosophy about the nature of American society, the relation of an industrial economy to political democracy, and the need to restrain bigness both in the private sector and in the government. Brandeis, however, brought more than ideas and ideals to his reforms.

One thread that runs through all his endeavors is the need to know the facts. Elizabeth Brandeis once told the story of how, at the height of her father's fame as a reformer, a group of college students came to his office offering to help. They expected to be put to work researching great national issues, or being assigned to some senator or congressman as a liaison, and did not expect the answer they received. "Go down to City Hall," he told them, "and see what is on the agenda for the next council meeting. Pick one of those issues—garbage collection, water supply, it does not matter which one—then go and learn everything you can about it. Read past reports, talk to people, learn the topic until you know it as well as anyone. Then when you get up to speak, or to make a suggestion for change, your voice will be heard because you are knowledgeable. That is how reform works." The students did not find garbage collection or water supply on the same par as breaking up monopolies or allocating Alaska's resources, and so went back to their own studies.

The people we identify as progressives objected to the malevolent effects of industrialization on society, on politics, and on the individual. While they all recognized problems, few of them could think through the issue to propose a workable solution, and in order to do that, Brandeis believed knowledge of "all the facts that surround" to be crucial. Just as one could not argue a case for a client without knowing the details of the business, so one could not attack an evil such as municipal corruption without first learning everything one could know about it. Armed with the facts, one could then think long and hard on devising a practical solution and, with a solid proposal in hand, organize colleagues and the public in order to effect a change. Brandeis once told his daughter to take all the time necessary when figuring out a problem, but once you had all the information and had made a decision, stick to it. While some of Brandeis's views on the great questions of the early twentieth century, and his proposed solutions, may appear ill founded in hindsight, others continue to ring true a century later.

There is, however, more than a little irony in the scope and success of Brandeis's activities during this period. In later years he would talk constantly about the "smallness" of man, about the limited abilities of a single individual, and therefore a need for men and women to take on projects or businesses limited in scope and amenable to one person's judgment and direction. Yet Louis Brandeis was a whirlwind of activity in his reform years, not only involved in major campaigns of his own, but frequently serving as a resource to others in their work. At home he supported and encouraged Alice as she dealt with her health problems and guided Susan and Elizabeth as they turned into young women and then went off to college. He continued to be the lead partner in a major law firm, and after August 1914 began the transformation of the moribund American Zionist movement into a powerful political organization.

He recalled these as the happiest years of his life.

AS BOSTON AND OTHER CITIES grew in the late nineteenth century, public transportation became an increasingly important issue in municipal affairs. Cities grew because newcomers, both from the hinterlands and from overseas, came seeking work in the mills and factories that now dotted the urban landscape. In earlier times laborers lived close to their places of employment and could walk to their jobs. Cabs and horse-drawn omnibuses provided transportation for those who had to travel farther. Boston more than doubled in population between 1870 and 1900, and grew another 20 percent in the next decade. Not just factory hands had to get to work; the banks, insurance companies, and law firms that occupied the new buildings in downtown Boston also wanted transportation for their clerical workers.

Getting into downtown Boston, however, posed a problem. The city was and is relatively narrow, surrounded on three sides by water. On the fourth side stood the upper-middle-class homes of Beacon Hill, as well as the historic Boston Common, the city's famous park that dated back to the seventeenth century. The West End Street Railway Company claimed that the only way it could get a rail line downtown would be to run it across the Common and sought permission to do so in February 1893. Brandeis, in what he later called "my first important public work," opposed the plan and spoke eloquently—and successfully—against it in the legislative hearings.

The refusal to allow the West End to lay tracks across the Common reflected the fact that franchises to build and operate trolley lines on public streets had been kept pretty much under public control in Massachusetts, with charters imposing strict limits on use of streets and the amount of the fares. Large investors, however, saw the potential for great profits in these franchises, provided they could obtain charters that did not restrict how they operated, how much they could charge, and how long they could enjoy the monopoly. In 1894, Henry M. Whitney, a shady financier who had scandalized Massachusetts a few years earlier by admitting that he had spent $50,000 to secure the passage of legislation favorable to his interests, created a syndicate that included J. P. Morgan & Company to secure a charter from the state to establish a new corporation, the Boston Elevated Railway Company, which would extend Boston's public transit system by building elevated tracks into the downtown area. The charter would run for twenty-five years, a not-unusual provision, and that fall the voters of the city approved the proposal in a referendum.

Three years later, in a bill that passed with very little public notice, the legislature authorized the Boston Elevated to lease the West End Railway for ninety-nine years, subject to approval by the state Railroad Commission. The commission, however, refused to approve, and in its investigation came to the conclusion that the West End's stock had been watered, so that the 8 percent rental that the Elevated would pay to the West End would in fact amount to an 11 or 12 percent dividend on real value. Moreover, the commission declared the ninety-nine-year lease "wholly discordant with public policy," since it ran for a term of years "quadruple the length of the longest term that the legislature has [previously] consented to sanction." After agreeing to scale back the rental and the length of the lease to twenty-five years, the Elevated secured the commission's approval.

Unlike the legislative action, however, the decision of the Railroad

Commission could not be kept secret, and the machinations of the Boston Elevated became subject to public scrutiny. Conservatives—and here one must include Louis Brandeis, who strongly believed in fiscal integrity and in a tradition where the public good outweighed private interests—objected to the fact that with the lease of the West End, the Boston Elevated controlled nearly all of the street railway lines in the Boston area. Moreover, investments in the franchise, which sought a long-term charter and guaranteed fares, would be shielded from governmental interference on behalf of the public. Charles Warren, secretary of the Massachusetts Reform Club, said that although he and other members of the club believed in minimal government interference, on occasions such as this government had to step in to protect the public. In addition, the legislature's approval of a rental to West End stockholders based on watered stock made the assembly appear part of a stock manipulation for greedy speculators. On behalf of the Municipal League, a group of civic-minded business and professional men, Brandeis wrote to the board detailing the over-inflated value that the West End put on its stock, and how a rental based on that figure was unjustified.

Even while the board looked into the West End lease, the Boston Elevated went back to its friends in the legislature and secured a charter extension on its own lines as well as protection against reductions in a five-cent fare. On 30 April, hoping to prevent final passage of the measure, Brandeis wrote a lengthy letter to the *Boston Evening Transcript* protesting the provisions of House Bill No. 784 as "opposed to the established policy of the Commonwealth, and would, if enacted, sacrifice the interests of the public to that of a single corporation." In effect, the bill abandoned the oversight function that the Massachusetts legislature had exercised for many years. While streetcar fares all over America had tended to come down in the past few years, the legislature was about to saddle Boston commuters with a five-cent fare for the next thirty years. Worst of all, once this door opened, "every railroad, street railway, gas, electric light or water company might demand like privileges."

The effort came too late, and as Brandeis recognized, he had no troops to rally. The Elevated's actions had caught people off guard, and many did not comprehend how expensive the new charter would be to Boston's residents. Although Brandeis belonged to the Municipal League, and in fact chaired the Transportation Committee, he had written the letter as a private citizen. Nonetheless, the Elevated spread the rumor that the league had hired the high-priced corporate attorney to attack it. Brandeis deeply resented this charge, and he wrote to William A. Bancroft, the Elevated's president, declaring its falsity. "I have been retained by no person, association or corporation, directly or indirectly in this matter, and I have opposed it solely because I believe that the bill, if passed, would result in great injustice to the people of Massachusetts, and eventually great injustice to the capitalist classes whom you are now representing, and with whom I, as well as you, are in close connection."

This last sentence was not empty rhetoric. Throughout his life Brandeis believed in a system of private enterprise in which entrepreneurs could wager their talents to build up successful businesses in which investors could put their money in the hope of making more money. But there had to be a level playing field, and all groups—investors, businessmen, and workers—had to recognize that the interest of the public took precedence over their own. Even as he grew more hostile to big business, he did not want to tear down the system, but only ensure that all companies, no matter how big or small, played by the same set of rules and did nothing to harm the public.

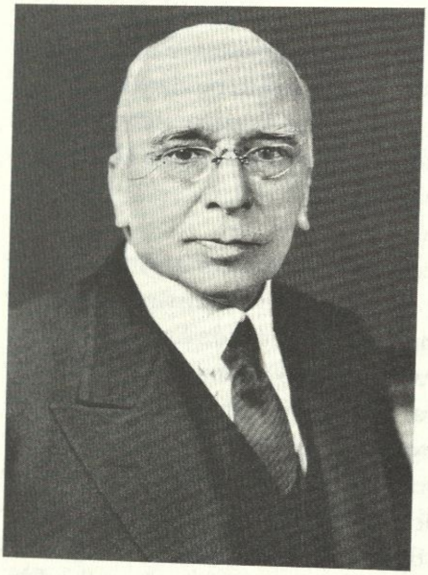
Brandeis did not manufacture this philosophy out of whole cloth; rather, he had imbibed what had, until then, been the predominant ethos in Massachusetts. Brandeis and the people he worked with did not, as they saw it at the time, vie for reform; instead, they saw themselves fighting for what had been the traditional view of the proper relationship between the Commonwealth, as the defender of public interests, and private businesses and public service corporations. In this view, the state had the major responsibility for enforcing honest management and true valuation of corporate property. Stock represented a measure of the owner's interest in the enterprise as well as a guarantee fund for the corporation's creditors, and therefore strict fiscal accountability worked both for stockholders and for creditors.

By 1900, however, practically no other state in the Union shared this view of governmental responsibility. The "modern view," propagated not just by Wall Street bankers but by their allies in major financial centers such as Boston and Chicago, saw stock as a commodity that earned money and that an investor purchased at his own risk. They contended that the state had no obligation to supervise corporate management other than to prevent outright fraud, and they defined that as no more than misrepresentation. In this view, investors and not the state had the responsibility for looking after their investments, and corporate managers did whatever they had to do to make the firm profitable.

Nowhere, of course, did one find any mention of public interest or financial integrity. As Brandeis began uncovering evidence of the abandonment of fiduciary responsibility and of a "public be damned" attitude, the old-line Brahmins who bought into the modern view resented him, not just for opposing them, but for holding them up to an idealistic standard he believed they should have shared.

THE FIGHT with the Boston Elevated did not end in 1897; in some ways it had just begun. To reach the downtown without crossing the Common, one had to use either Tremont or Washington Street. Because of high real estate values, it was impracticable to widen the old narrow streets, or even to build an elevated rail line above them. The city had several years earlier constructed a subway by tunneling under Tremont Street and then ordered the surface tracks removed. The Tremont line served as a funnel by which a number of outlying lines delivered commuters downtown, and by the mid-1890s traffic had grown congested. So long as the city owned the subway, which it had leased to the Elevated on very restrictive terms, the Elevated could not gain the monopoly it sought over Boston's street railways. First the Elevated sought authority from the legislature to put back the surface tracks on Tremont Street, thus making the subway superfluous. Although the legislature agreed to the proposal, it did so with a referendum attached, and voters overwhelmingly rejected the plan. Then, in 1900, the Elevated sought the construction of a tunnel under Washington Street, which it would build at its own expense and after a thirty-year period the city would have the option of buying at cost.

This time, however, Brandeis would not stand alone in his opposition to the Elevated, but would be backed by a group of like-minded men organized in the Public Franchise League. Along with Brandeis, the roster included the retailer Edward Filene (one of Brandeis's clients); Dr. Morton Prince, a prominent physician and ex-mayor of Boston; Robert Treat Paine Jr., like his father an important philanthropist and social reformer; and Edward Warren and George Upham, whose major interest involved preserving the downtown cityscape. In the first few years, however, the driving force behind the league consisted of one man. Brandeis planned the strategy, wrote much of the publicity, marshaled the troops to lobby the legislature, and personally paid at least 20 percent of the league's operating budget. In 1905, Joseph B. Eastman became executive secretary, and for the first time Brandeis had a lieutenant who understood numbers as well as he did, believed in protecting the public interest, and who could work side by side with Brandeis

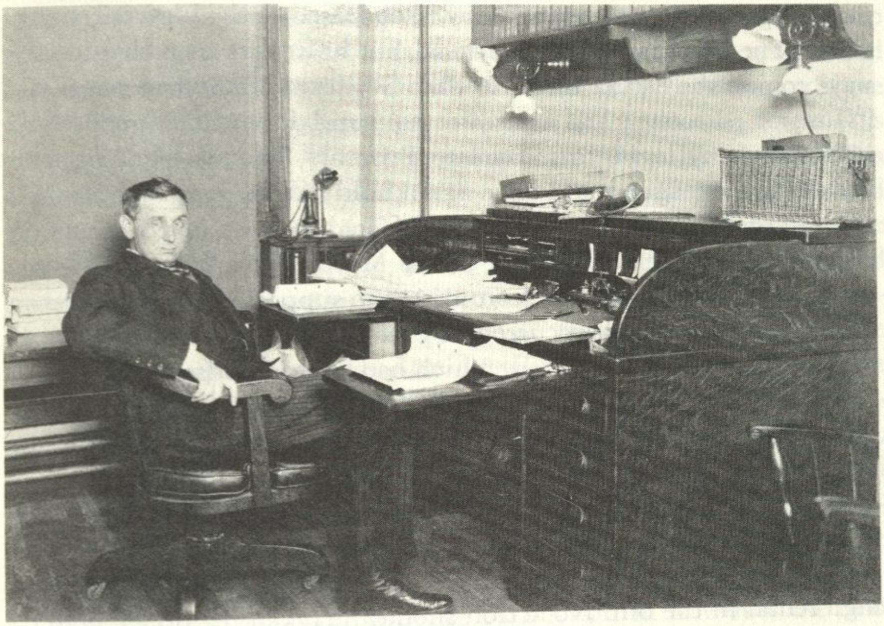


Edward A. Filene

without having to await instructions. "Joe Eastman," Brandeis later said, "has more interest in the public service and less in his own career than any man I have ever known." But even if Brandeis had to power the league, once he pointed the way, competent people like Filene and Prince could be relied on to do their jobs, especially getting the league's side of the story out to newspapers and members of the legislature.

The league managed to delay approval of the Elevated's initial bill, so the company came back with another proposal: it would build the Washington Street subway at its own expense, and on its completion the tunnel would be owned by the city, but the Elevated would have the free and sole use of it for fifty years. The proposal appealed to legislators for the simple fact that no public money would have to be expended. The Elevated, however, carried additional clout that the Public Franchise League and its ally the Board of Trade would have to work hard to overcome. The Elevated had become one of the largest employers in the city, and it carefully made sure that local political leaders, especially Democrats, had some say in who got hired. One member of the legislature privately explained that he could not vote against any measure sponsored by the Elevated, because he had three hundred constituents working for the company.

While the Elevated wanted far more than had ever been given to a municipal franchise in Boston, it only sought what its counterparts in other cities had been able to obtain—long-term favorable leases—without significant opposition. Even within Boston, members of that part of the business community associated with banks and investment houses argued for long-term franchises because the uncertainties of short, revocable leases would make it difficult to attract adequate investment capital to finance the projects. Looked at strictly in terms of business models, the fight is less a battle between the "people" and the "interests" than a contest between the newer speculative members of



Brandeis in his office

the business community who wanted to exploit modern financial methods and the traditionalists who favored conservative practices and saw the state as the protector of the public interest.

The blitz of letters and petitions to the legislature failed to stop passage, but Brandeis and the league had one more card to play. Together with other organizations that opposed the Elevated's plan, such as the Board of Trade and the Merchants' Association, they appealed to Governor Winthrop Crane, whom Brandeis had met a few months earlier in connection with another matter. Brandeis went to Crane and convinced him that signing such a bill amounted to condoning a deliberate violation of the law. Crane mirrored Brandeis's argument in his veto message. The message elated Brandeis, who told Crane that he not only had defeated a bad measure but "had done it in such a way as to teach the people what to strive for, and what to expect."

Although the league had defeated the bill, Brandeis and his colleagues understood that there would have to be a tunnel built under Washington Street to accommodate the growing need for public access into the downtown area. Rather than waiting to see what the Elevated would do, Brandeis and the league put forth a proposal in early 1902, providing for a city-owned subway to be leased to the Elevated on strict terms. The Elevated fought back with a bill of its own that in many ways copied the earlier measure that Governor Crane had vetoed, and its use of patronage and the offer to build it without public funds attracted many legislators. By late February, Brandeis had begun to wonder if the league could once again hold off the company. He urged those in the league and in the Board of Trade to step up their publicity efforts, and he personally went to see Mayor Patrick A. Collins, who appeared before a legislative committee to support the league measure.

Then, in one of those occurrences that would later become part of the Brandeis legend, the Elevated, which had appeared almost apathetic in fighting the league bill, came out in full force on the last day of hearings. Albert E. Pillsbury, the Elevated's counsel, suddenly began tossing out one set of numbers after another to show that the Elevated's income fell below expenses on many lines because of a too-liberal policy of free transfers. He asked the legislature to table the league bill, since the Elevated, in its depressed financial condition, could ill afford the high rental in the bill. No action should be taken, he urged, until the company could repair its damaged financial condition. Pillsbury deluged the committee with numbers designed to illustrate the company's poverty.

Pillsbury had deliberately waited not only until the last day of hearings but in fact until the last hour, assuming that it would take days before anyone could go through his figures to contradict him. He had not counted on Louis Brandeis and his passion to know "all the facts that surround." Brandeis had already studied the Elevated's financial reports, and even as Pillsbury reeled off his figures, Brandeis mentally analyzed them and then took the floor to rebut Pillsbury. How could the Elevated be in such bad shape when its stock had risen from 104 to 170 in less than four years? How could the situation be so desperate when, in the last year with some lines out of operation, the company still had paid $600,000 in dividends? In fact, Brandeis charged, the company had so much money on its hands that it had raised the dividend rate from 4 to 6 percent. The Elevated had the financial resources to accept the lease on the league's terms; it just did not want to do so except under arrangements that would harm the public interest. "We are here to see," he reminded the committee, "that the control rests with the community, that the Elevated Railway Company, or any company that serves us as transporters of passengers, is the servant and not the master of the public."

The committee, confused by the conflicting testimonies, decided to resume hearings a few days later, and this time Brandeis came armed with a full analysis of the Elevated's financial condition. He took the transcript of Pillsbury's statement and went over it line by line. "This statement is incorrect." "This statement is at least misleading." "This statement is grossly misleading." The analysis ran fifteen pages, and Pillsbury, when he rose to speak, could only denounce Brandeis and the league as "impractical and ignorant." While the Elevated damned Brandeis's analysis as "sophistries," the legislature agreed that the company could indeed operate the subway on the terms proposed in the league bill. There would still be some jockeying, and some last-minute attempts by the Elevated to get better terms, but the final bill authorized Boston to build and own the Washington Street subway, and to lease it to the Elevated for twenty-five years at an annual rental of 4.5 percent of the cost, the arrangement to be approved by public referendum. As Brandeis had predicted, the Elevated quickly agreed to the terms.

Brandeis and the league won the battle, and in fact over the next decade won several other skirmishes with the Elevated over the terms for new lines or extensions of existing lines into Cambridge and elsewhere. As late as 1911 the Elevated attempted to get a new long-term lease as preparation for consolidation with the West End Railway. Once again Brandeis utilized his contacts with the governor's office, then occupied by Eugene Foss, to make sure that the new franchises adhered to the Commonwealth's traditional pattern.

The Public Franchise League succeeded in its fight against the Boston Elevated and in its work on the gas schedule (see below), in large measure because of the hard work of Brandeis, Joe Eastman, and other members of the league who, if not generals in their own right, knew how to execute orders. In addition, Brandeis won over the support of influential editors and newspapers that supported the league position. They all shared a similar traditionalist philosophy about the relation of the state to private enterprise, the need to protect the public interest, and the moral necessity for fiscal integrity. They distrusted the new financial and corporate strategies, which often seemed to them little more than greedy and corrupt. In some very important ways, the battle with the Boston Elevated, indeed, much of the progressive movement itself, reflected a struggle between tradition and modernism, between older and perhaps more idealistic views of business responsibility and a concern for the public interest, on the one hand, and newer, what some might call Darwinian, ideas of the marketplace as a jungle in which only the strongest survived, with the public interest the first casualty, on the other.

In the end, market forces proved stronger than Brandeis had anticipated. Prior to 1897, investments in public utilities had been seen as practically gold plated. People needed gas, water, and transportation, and even with restrictive franchises and limited fares the stocks of these companies offered a decent and assured return on investment. After 1897, securities offered by the new industrial giants promised greater returns on investment than money put into public utility franchises with limits on the rates they could charge. Even utilities in good financial condition often had difficulty selling new stock issues because the returns could not match those of the large industrial concerns. Over the years cities and states often had to take over public utilities when they lost money and became financially untenable, or had to cut them greater slack and provide incentives to keep them operating. Here, as in many of his future battles, Brandeis spoke for the older traditions, in which morality and an idealistic concern for the public interest played a far greater role than did the realities of modern economic and financial markets.

ONE YEAR AFTER the passage of the Washington Street subway bill, Brandeis went to a conference in New York on urban reform sponsored by the National Municipal League to read a paper on the Boston Elevated fight. He played down his role and that of the Public Franchise League and instead lauded the role of the Massachusetts Board of Railroad Commissioners. In conclusion he advocated municipal ownership of the rights-of-way and a strong oversight commission to police both the conduct of the rail lines and the fares they charged. The audience response surprised him. The participants had a wider range of experience in municipal reform than he had and reflected a diverse gamut of opinions. Professor Frank Parsons in particular criticized Brandeis's paper as presenting "a too roseate account of the situation," and argued that neither of the two important commissions, those dealing with railroads and gas, had done a good job in protecting the public interest. The problem, Parsons explained, was that the commissions had very little contact with the citizenry and a great deal with the entities they supposedly regulated. As a result, the commissions soon adopted the corporation view of what constituted adequate returns on investments and the proper way to determine capitalization; in other words, the