

ESSAY

DIFFERENT STYLES AND SIMILAR VALUES: THE REFORMER ROLES OF CHARLES EVANS HUGHES AND LOUIS DEMBITZ BRANDEIS IN GAS, ELECTRIC, AND INSURANCE REGULATION

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INTRODUCTION

Louis Dembitz Brandeis, who served as an Associate Justice of the U.S. Supreme Court, and Charles Evans Hughes, who served as an Associate Justice of the Supreme Court (1910-1916) and as the eleventh Chief Justice of the United States (1939-1941), are rated consistently among the greatest American jurists.¹ Their lives portray both points of similarities and differences. Their career paths crossed not only during years they served together on the High Court, but also, indirectly, during the presidential election year of 1916. Brandeis had been an important advisor to Woodrow Wilson on economic and social matters during his successful 1912 campaign for the Presidency and during his first term in office.² Brandeis' thinking on various issues had an ongoing influence on Wilson's 1916 re-election campaign, even though Brandeis' elevation to the Court on June 5, 1916³ effectively removed him from active involvement in politics. Hughes became the Republican candidate on June 10

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1. See James E. Hambleton, *The All-Time, All-Star, All-Era Supreme Court*, 69 A.B.A. J. 462 (1983). In the team caricature Hambleton shows Brandeis playing center field, Hughes at short stop and, of course, Chief Justice Earl Warren at left field; see also HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS* 412 (3d ed. 1992).

2. See ABRAHAM, *supra* note 1, at 182.

3. See A. L. TODD, *JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS* 247-50 (1964).

and resigned immediately from the Court.⁴ Hughes narrowly lost to Wilson. Had Hughes won California and its thirteen electoral votes, instead of losing there by 3806 votes, he would have become President. Wilson so feared he might lose his bid for re-election that he wrote his Secretary of State Robert Lansing a proposal that if he lost the election, Lansing might resign allowing Wilson to appoint the President-elect as Secretary of State.⁵ The President and Vice-President would resign, allowing Hughes to assume the Presidency a few months early and the nation to have a foreign policy that had the backing of the electorate.⁶

Hughes and Brandeis were known for their outstanding academic records.⁷ They were meticulous, fastidious and studious in preparing for their regulatory undertakings by mastering the vast factual data involved in each industry.⁸

Both Brandeis and Hughes were middle of the road politically, although Brandeis, a Democrat, was more liberal and Hughes, a Republican, was more conservative. Their activities in their home states, in terms of regulation of the gas and insurance industries came at a time of important currents in American civilization. Socialism, viewed as a threat to many, was seen as an opportunity for some. Neither Brandeis nor Hughes considered public ownership of utilities and insurance companies as a desirable option, even though there was a widespread movement toward municipal ownership of public utilities.⁹ For example, in 1905, the visit of Chicago's mayor-elect to New York City to speak

4. *See id.* at 250. Warren G. Harding (Chairman, Republican National Convention, Chicago) Telegram to Hughes, June 10, 1916, Hughes MSS (Library of Congress) Reel 3, container 4. Brandeis paid a courtesy call upon each member of the Court. When he reached the Hughes residence, the presidential nominee had already departed. "In the fall of 1910, I went on the bench and had nothing to do with politics." In 1915, William Noble of Oklahoma, told Hughes that Roosevelt wished him to run for President in 1916. "I told Noble that while I appreciated Roosevelt's friendship, I was entirely out of politics and intended to stay out; that I was on the Bench and could not permit my name to be used." Charles Evans Hughes, Washington, D.C., to Mark Sullivan, October 22, 1929. Hughes MSS (Library of Congress) Reel 1-3.

5. *See* Woodrow W. Wilson, Shadow Lawn, New Jersey, to Robert Lansing, Washington, D.C., November 5, 1916. Hughes MSS (Library of Congress) Reel 5, container 8. This three-page letter, although striking, may be thought of as an unimportant fruit of Wilson's pre-election jitters or anxiety, rather than the product of careful and prolonged deliberation.

6. *See id.*

7. *See* ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN'S LIFE* 47 (1946).

8. *See* LEWIS PAPER, *BRANDEIS* 79 (1983); ROBERT F. WESSER, *CHARLES EVANS HUGHES: POLITICS AND REFORM IN NEW YORK, 1905-1910*, at 29 (1967).

9. *See City Ownership*, N.Y. TIMES, Dec. 21, 1904, at 8. After noting that the "City Committee of the Citizens' Union . . . is not the Citizens' Union itself," the editorial stated, "[T]his committee . . . is upon safe and firm ground in favoring the establishment of a municipal lighting plant for the lighting of streets and public buildings. It cannot yet be affirmed that the city ought to go into the gas and electric light business, but beyond doubt it is time to begin the necessary inquiry as to cost and relative advantages.

Id. *See also* ALPHEUS T. MASON, *BRANDEIS AND THE MODERN STATE* 35 (Sherman F. Mittell ed., 1936).

in support of municipal ownership of utilities was the subject of the lead story in the *New York Times*.¹⁰ New York's Mayor George B. McClellan, Jr., was reported to support municipal ownership of a city light plant, but he was also quoted as providing a more qualified statement. "Only when private concerns cannot conduct a business to better advantage or with better results than the public is municipal ownership or Federal ownership practicable or advisable . . ." ¹¹ Perhaps, Mayor McClellan's support of public ownership was not a matter of conviction, but merely posturing or threatening to gain an edge in the ensuing battles with the utilities over prices charged to the city.

Brandeis and Hughes could have selected several different ways to address the problems in the gas and insurance industries. Their choices, no doubt tempered by the political, economic and social realities of what could be accomplished, were dependent also on their own personal and philosophical inclinations. Both men were brilliant legal scholars, with years of experience in commercial practice. Both were skillful and persuasive writers. Both excelled at oral communication and the art of cross examination. In our adversarial system of justice, litigation is another form of sublimated human aggression. Lawyers, in general, like to fight. Both Brandeis and Hughes were classic examples of the fighting spirit of the legal profession. They were formidable advocates.¹² Human aggression has an obvious place on the athletic field, where subject to the rules of the game, competing teams battle for victory. The concept of sublimated human aggression in the practice of surgery has crept out into public awareness through television programs such as "Mash," where the profane expressions in the operating room are portrayed.

10. See *Big Audience Cheers Chicago's Mayor-Elect; Judge Dunne Tells Mass Meeting of Municipal Ownership Fight; Thinks New York Is Ready*, N.Y. TIMES, Apr. 8, 1905, at 8. The meeting was sponsored by William Randolph Hearst, who supported public ownership of utilities and who was later defeated by Charles Evans Hughes in the gubernatorial election of 1906. See *id.*; see also *Municipal Ownership Wins in Chicago, Judge Dunne Elected Mayor on That Platform, His Plurality Is 24,248, Say Expert Engineers Will Survey All City's Railways—Factors That Worked Against Harlan*, N.Y. TIMES, Apr. 5, 1905, at 1. The *New York Times* carried other stories and editorials relating to municipal ownership of utilities commenting,

Quite likely a majority of the thinking voters of this town may have serious misgivings about the wisdom of committing the city very far to the principle of municipal ownership and operation of the plants and companies that serve the public. But a mere doubt will not long weigh in the balance against the known fact that the city is being "held up."

The Gas Fight, N.Y. TIMES, Dec. 11, 1904, at 6. See also *The Lighting Contracts*, N.Y. TIMES, Dec. 29, 1904, at 6 (mentioning "the relative costs of electric lighting in this and other cities"); *Mayor In Favor Of Municipal Light Plant, His Message Declares Present Prices Extortionate*, N.Y. TIMES, Jan. 3, 1905, at 6; *Municipal and Corporate Lighting*, N.Y. TIMES, Jan. 15, 1905, at 8; *Municipal Ownership Bookkeeping*, N.Y. TIMES, Jan. 16, 1905, at 8; *The Chicago Experiment*, N.Y. TIMES, Apr. 10, 1905, at 8.

11. *Mayor M'Clellan*, N.Y. TIMES, Jan. 2, 1905, at 8.

12. See *Mr. Justice Brandeis, at 75, Still the Fighter*, N.Y. TIMES, Nov. 8, 1931, at 1.

When they mapped out their proposed solutions to the problems found in public service industries, Hughes, who had to be persuaded to accept his leadership role in the investigative undertaking, followed his moderate Republican inclinations, while Brandeis, who sought out investigative challenges, was driven by his obsession with "the curse of bigness."¹³ Each deserves high marks for his accomplishments. Brandeis was not an extremist. While he opposed businesses that he thought were too big, he supported the profit motive, free enterprise and, in particular, entrepreneurs and small businesses.¹⁴ Moderate Republicanism, although unheralded, has spared us from the scourges of the extremes of right and left. Hughes can serve as an exemplar of this pragmatic outlook or approach that has served our country well by providing, as needed, an even keel and a balanced perspective.

While the lives and achievements, particularly the judicial careers, of these two men have been the subject of extensive scholarly attention, their endeavors in gas, electric and insurance regulation have not been closely examined.¹⁵ Their efforts, both theoretical and practical, in these areas have endured and become models of modern-day administrative law. In a real sense, Brandeis and Hughes, were pioneers in the practical application of the principles of checks and balances to the modern American industrial economy.

I. BRANDEIS IN A NUTSHELL (1856-1941)

Born in 1856 in Louisville, Kentucky, to cultured German speaking emigrants from Bohemia, Brandeis excelled at the German and English Academy in his home town.¹⁶ Brandeis' father, Adolph, had visited America during 1848 and 1849, before deciding to relocate his family.¹⁷ They were part of the wave of immigrants who settled in America following the failure of the 1848 liberal revolutions in Europe. Although some, like Adolph Brandeis, had not participated in those revolutions, they chose to emigrate to America, because

13. Joseph L. Rauh, Jr. et al., *A Personal View of Justice Benjamin N. Cardozo: Recollections of Four Cardozo Law Clerks*, 1 *CARDOZO L. REV.* 5, 18 (1979). According to one author, it was Brandeis' "favorite subject."

14. Brandeis advised labor that socialism was no solution for their problems. See MASON, *supra* note 9, at 141. In an address delivered in 1905 before the Commercial Club of Boston, Brandeis stated, "But whatever and however strong our conviction against the extension of governmental functions may be, we shall inevitably be swept farther toward socialism unless we can curb the excesses of our financial magnates." *LIFE INSURANCE: THE ABUSES AND THE REMEDIES* 27 (1905).

15. See generally 1 *LETTERS OF LOUIS D. BRANDEIS: (1870-1907) URBAN REFORMER* (Melvin Urofsky & David W. Levy eds., 1971). A comment from the editors suggests that a description of Charles Evans Hughes in these early regulatory matters "could have been written about [Louis Dembitz Brandeis]." *Id.* at 320-21. (Brandeis letter of May 8, 1905 to Hughes thanks him for sending Brandeis a copy of the gas and electric report.)

16. See *id.* at xxvii.

17. See MASON, *supra* note 7, at 15-18.

of the reactionary political climate which was expected to follow in the wake of the failed revolutions, a climate which might be more uncomfortable for Jews than for others, and because of perceptions of better economic prospects in America as compared to depressed economic conditions in Europe, conditions which were unlikely to improve.¹⁸ Adolph and Frederika settled briefly in Cincinnati and then in Madison, Indiana, where he and Frederika were married, before making Louisville their permanent home in 1851.¹⁹ The family grain and produce business became a successful enterprise that both prospered and diversified.²⁰ But Brandeis' father anticipated the depth of the economic downturn that became the depression of 1873 and sold the business for that reason in July 1872.²¹ The Brandeis family then traveled to Europe for what became an extended vacation, lasting three years.²² Louis applied for admission to a school in Austria, but was rejected.²³ He applied in person to the Annen-Realschule in Dresden, Germany and was accepted, after quick responses to questions about his birth certificate and vaccination.²⁴ The fact that he was there, he said, proved that he had been born and the scar on his arm was proof of his vaccination.²⁵ Brandeis claimed that he had learned to think, or to create with his mind, at this school.²⁶ However, his facile answers to his interviewer in Dresden prove that he had acquired solid thinking habits before he had enrolled.

Years later, Brandeis recalled an incident involving a lost dormitory room key. He whistled to his roommate to let him into the building. The whistle brought a scolding from a policeman. Brandeis recalled, "This made me homesick. In Kentucky you could whistle! I wanted to go back to America and I wanted to study law. My uncle, the abolitionist, was a lawyer; and to me nothing else seemed really worth while."²⁷ Louis returned to America with his family in the spring of 1875,²⁸ even though his father thought he should remain in Europe to pursue an academic career.

Without having any college education, Brandeis enrolled at Harvard Law School in 1875.²⁹ To this day, his grade point average remains the highest ever recorded at that school.³⁰ His brilliance quickly became the subject of hagiographic legend. Another Harvard law student, William Cushing, wrote to his mother:

18. *See id.* at 14.

19. *See id.* at 18-22.

20. *See id.*

21. *See id.* at 28.

22. *See id.*

23. *See id.* at 29.

24. *See id.* at 30.

25. *See id.*

26. *See MASON, supra* note 7, at 31.

27. *Id.*

28. *See id.* at 31-32.

29. *See id.* at 33.

30. *See* ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD* 198 (1967).

My friend Brandeis is a character in his way—one of the most brilliant legal minds they have ever had here. . . . Hails from Louisville, is not a college graduate, but has spent some years in Europe, has a rather foreign look and is currently believed to have some Jew blood in him, though you would not suppose it from his appearance—tall, well-made, dark, beardless, and with the brightest eyes I ever saw. Is supposed to know everything and to have it always in mind. The professors listen to his opinions with the greatest deference. And it is generally correct. There are traditions of his omniscience floating through the school. One I heard yesterday. A man last year lost his notebook of Agency lectures. He hunted long and found nothing. His friends said: "Go and ask Brandeis—he knows everything—perhaps he will know where your notebook is." He went and asked. Said Brandeis, "Yes, go into the auditors' room, and look on the west side of the room, on the sill of the second window, and you will find your book." And it was so.³¹

Brandeis practiced law with his brother-in-law for a brief period of time in St. Louis, about 270 miles west of Louisville, where his sister and brother-in-law had settled.³² He then returned to Boston to practice with his friend Samuel D. Warren, Jr., who ranked second in their law school class and whose prominent family operated a paper manufacturing business.³³ In 1890, Warren and Brandeis published in the *Harvard Law Review*, *The Right to Privacy*,³⁴ the most famous article ever published in an American law journal. Brandeis' law practice flourished. In time he became a millionaire from investments and the practice of law.³⁵

Brandeis wrote to his father of his professional preference for litigation, "What I should prefer is some position that would give me practice in trying cases. I feel I am weak in this experience and think that with practice I could do well at it."³⁶ Brandeis was offered a teaching position at Harvard Law School, but he declined the opportunity to teach full-time.³⁷ Not long afterwards, he wrote to his brother Alfred, "and I really long for the excitement of the contest—that is a good prolonged one covering days or weeks. There is a certain joy in the draining exhaustion and backache of a long trial, which shorter

31. MASON, *supra* note 7, at 3.

32. *See id.* at 50.

33. *See id.* at 54.

34. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Interestingly, a volume reprinting this article and others was printed on paper manufactured by the S.D. Warren Company, a division of Scott Paper. The company was founded by the father of Brandeis' co-author and law partner. *See* Paul Brickner, *Great American Law Reviews*, 16 CAP. U. L. REV. 147, 150 (1986) (book review by Brickner of the 50 greatest American law review articles 1890-1968).

35. *See* MASON, *supra* note 7, at 3.

36. LETTERS OF LOUIS D. BRANDEIS, *supra* note 15, at 65.

37. *See* MASON, *supra* note 7, at 66-67.

skirmishes cannot afford."³⁸

His values and orientation shifted from those one would expect of a successful Harvard Law School graduate as a result of the 1892 Homestead strike in Pennsylvania.³⁹ Thereafter, Brandeis became more of a reformer and an advocate of the progressive movement. He engaged in what today would be called "pro bono" or public service work involving consumer and public interest cases. Ethical scruples caused him to reimburse his law firm for the time he spent on his additional undertakings, time that took him away from law firm business.⁴⁰ These "outside" activities made him famous as "the people's lawyer,"⁴¹ but like the consumerism of Ralph Nader of recent times, won him many enemies. In 1916, when Woodrow Wilson nominated Brandeis for a seat on the U. S. Supreme Court, those enemies nearly succeeded in blocking his appointment. Only the extraordinary loyalty and support of the President kept the nomination alive and led to a majority vote in the Senate, after a six-month struggle.⁴²

As "the people's attorney," he did battle against powerful railroad, insurance, utility and savings interests. He fought for the constitutionality of legislation establishing maximum hours of employment for women and minimum wages for workers.⁴³ He was successful in one case, *Muller v. Oregon* (1908), before the Supreme Court of the United States, where he used what became known as the "Brandeis brief," which included arguments based on sociology, economics, medicine and psychology, as well as law.⁴⁴

His appointment to the Supreme Court stemmed directly from his support of

38. LETTERS OF LOUIS D. BRANDEIS, *supra* note 15, at 73.

39. See MASON, *supra* note 7, at 87.

40. See William O. Douglas, Book Review, N.Y. TIMES, July 5, 1964, at 3 (reviewing A. L. TODD, JUSTICE ON TRIAL (1964)).

41. THOMAS K. MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN 82 (1984).

42. See TODD, *supra* note 3. Todd reports that Wilson had Henry Morgenthau, a prominent and wealthy Jewish leader who had recently resigned as Ambassador to Turkey, speak with Senator Hoke Smith of Georgia, a members of the Senate Judiciary Committee. See *id.* at 229-31. Secretary of the Navy Josephus Daniels spoke to Senator Lee Slater Overman of North Carolina. See *id.* at 232-34. Wilson's son-in-law, Secretary of the Treasury William G. McAdoo exerted influence upon Senator John Knight Shields of Tennessee through other individuals. See *id.* at 238-41. The President personally spoke with Shields. See MASON, *supra* note 7, at 504.. In addition, President Wilson did a major political favor for New York's Senator James A. O'Gorman by having the American Ambassador in London intercede to stop the execution in Ireland of one of O'Gorman's constituents. See TODD, *supra* note 3, at 231. The nominee's brother, Alfred Brandeis, helped also by approaching Senator Shields indirectly through the junior Senator-elect of Tennessee. See PAPER, *supra* note 8, at 237-38. Charles W. Eliot, former President of Harvard University, weighed in with a letter in support of Brandeis. See TODD, *supra* note 3, at 235. The committee vote was 10 to 8, strictly along party lines. See PAPER, *supra* note 8, at 238.

43. TODD, *supra* note 3, at 56, 63-64.

44. *Id.* at 56-57.

Woodrow Wilson's presidential campaign and his continuing allegiance to the President during his first term.⁴⁵ The political payback was also based on merit. Wilson, himself a lawyer, held Brandeis in the highest esteem and fought vigorously against strong opposition to his nomination.⁴⁶ As an Associate Justice, Brandeis is most famous for his dissents with Justice Oliver Wendell Holmes, particularly in the free speech cases of the World War I era. His knowledge of regulatory matters was so great that he conducted a "class" one Saturday for the other justices to help them with a pending case. While his obsession with the "curse of bigness" was a driving force in his reformist activities, it also clouded his thinking. He opposed big banks, big railroads, big unions and even Dean Roscoe Pound's proposal to increase the size of Harvard Law School.⁴⁷

Brandeis was a nonbeliever and thus did not observe any of his extended family's Jewish traditions. His parents were not observant and did not belong to a synagogue. Young Louis did not receive a Jewish education and did not have a bar mitzvah ceremony. When he married his cousin, Alice Goldmark, who was Jewish, the ceremony was performed by Dr. Felix Adler, a clergyman and the founder of the Ethical Culture Society denomination.⁴⁸ Brandeis and his wife had two daughters. Brandeis' maternal uncle, Lewis Dembitz, was a deeply religious and observant Jew and an ardent Zionist who authored a book on Jewish family religious observance, *Jewish Service in Synagogue and Home* (1898).⁴⁹ Louis called his uncle a "walking encyclopedia" and a "university," and was so devoted to him that he changed his middle name from David to Dembitz in his honor.⁵⁰ Dembitz, the abolitionist lawyer noted earlier as the object of young Brandeis' emulation, was a member of the Louisville bar, authored several important legal works, including *Dembitz on Land Titles* (1885) and *Kentucky Jurisprudence* (1890), and was a delegate to the Republican convention that nominated Lincoln.⁵¹ Brandeis remembered with affection his uncle's observance of the Sabbath, but did not follow his uncle's religious example because he never felt the spark of religion in his heart.⁵²

Brandeis became deeply involved in Zionism, after representing New York City garment workers, most of whom were Jewish, in a 1910 strike.⁵³ He continued his Zionist activities even after joining the Supreme Court. A direct influence on Brandeis' "conversion" to Zionism was a meeting with a Dutch

45. See *id.* at 66-67.

46. See *id.* at 134-35.

47. See MELVIN I. UROFSKY, *LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION* 150 (1981).

48. See RICHARD POLENBERG, *THE WORLD OF BENJAMIN CARDOZO: PERSONAL VALUES AND THE JUDICIAL PROCESS* 174-75 (1997).

49. See PHILIPPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* 230-31 (1984).

50. *Id.* at 230.

51. See *id.*

52. See *id.*

53. See *id.* at 232-33.

Zionist, Jacob DeHaas.⁵⁴ But Lewis Naftali Dembitz may have planted the seed of Zionism in his nephew's mind many years earlier.⁵⁵

The influence of religion on the lives and achievements of individual justices is often difficult to discern. The values of Western religions are so similar that whether a person is raised in one denomination or another makes little difference. Indeed, a non-believer such as Brandeis will have acquired these same values, say of right and wrong, because they permeate our society and culture. Religion was not Brandeis' motivating force. His primary motivation came from his fighting spirit, a spirit shared by the bar generally.

Both Brandeis and Hughes have been described as having cold personalities. The description seems to have been accurate in regard to Brandeis. One of his law clerks reported delivering a memorandum to Brandeis early in the morning and sliding it under his apartment door.⁵⁶ A hand would be there, on the other side of the door, easing the paper into the apartment.⁵⁷ Would not a warmer justice have invited the law clerk in for an early morning cup of coffee and suggest he wait until the justice had read the memo so they could talk about it?

Brandeis' closest friend on the Court, Justice Oliver Wendell Holmes, noted in a letter to Harold Laski, the British political scientist that "Brandeis, whom many dislike, seems to me to have this quality and always gives me a glow, even though I am not sure that he wouldn't burn me at a slow fire if it were in the interest of some very possibly disinterested aim."⁵⁸ Professor McCraw, an historian at Harvard Business School, wrote in his Pulitzer Prize winning history on regulation, "Brandeis held himself aloof from other men."⁵⁹

The absence of a warm and endearing personality has not deterred scholars from turning their attention to Brandeis and his ideas. Professor Alpheus T. Mason of Princeton published several works about Brandeis.⁶⁰ Brandeis' letters have appeared in five volumes, with an additional volume of his letters to Felix Frankfurter, a close associate who became a famous Harvard Law School professor and a Supreme Court justice.⁶¹ Lewis Paper's study of Brandeis was reviewed in the Sunday "New York Times Book Review" section. Thomas K. McCraw, a history professor at the Harvard Business School, won the 1985 Pulitzer Prize for a history of the development of regulation of American industry

54. *Id.* at 231-34.

55. *See id.*

56. *See* Paul A. Freund, *Mr. Justice Brandeis*, in *MR. JUSTICE 97*, 107-08 (Allison Dunham & Philip B. Kurland eds., 1956).

57. *See id.*

58. Letter from Justice Holmes to Harold J. Laski (Jan. 12, 1921), in *HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916-1935*, at 304 (Mark DeWolfe Howe ed., 1953).

59. MCCRAW, *supra* note 41, at 84.

60. *See* MASON, *supra* note 7; *BRANDEIS AND THE MODERN STATE* (1933); *THE BRANDEIS WAY* (1938).

61. *See* 5 *LETTERS OF LOUIS D. BRANDEIS (1921-1941): ELDER STATESMAN* (Melvin I. Urofsky & David W. Levy eds., 1978).

that centered on Brandeis and three other “prophets.”⁶² The Brandeisian bookshelf is enormous.

II. BRANDEIS’ OBSESSION WITH “THE CURSE OF BIGNESS” OR “THE FRANKENSTEIN MONSTER”

Professor McCraw addressed Brandeis’ obsession with bigness and demonstrated that the Justice was wrong. Bigness is inevitable in our economic system. But its inevitability might not have been apparent at the turn of the century, when “trusts” controlled but a few industries, such as petroleum or oil. Many of our industries are now controlled by a few corporate giants, whereas in the past there had been a multitude of competitors. The automobile industry is a prime example. Once there were many manufacturers of automobiles.⁶³ Then there were the “big three”: Ford, Chrysler and General Motors, three giant American manufacturers competing fiercely with their European and Asian counterparts. Now there are two, since Chrysler Corporation was subsumed into the German multi-national as Daimler-Benz-Chrysler. Brandeis would be appalled at the speed with which the banking industry is being centralized in the hands of fewer and fewer competitors. Nevertheless, McCraw writes that Brandeis’ arguments remain compelling generations after he expressed them.

If we consider Brandeis’ statements about the legal profession quoted earlier, we can see the tie between Brandeis’ fighting spirit and his opposition to bigness. In our culture, fighting is limited by social constraints. The biblical tale of David and Goliath teaches that fighting someone larger than your self is acceptable. The expressions “big bully” and “pick on someone your own size” reinforce the concept that it is unacceptable for big boys to fight with smaller boys. The idea of a little bully makes no sense to us. At six feet in height, tall for his day, Brandeis’ subconscious must have been infused with these concepts.

Brandeis saw the legal profession as a socially acceptable outlet for his fighting spirit. He wanted to be a lawyer like his uncle, the abolitionist. Surely abolitionists were fighters. He longed for the prolonged struggle of intensive litigation, not briefer skirmishes. Indeed, Brandeis is quoted as having said, “I would rather fight than eat.”⁶⁴ When he selected which “pro bono” causes to espouse, he chose to take on the “big boys,” big railroads, big utilities, big insurance companies and others. Always looking for a fight, Brandeis sought out a new cause even before the ashes had cooled on his last battleground. Indeed, his involvement in the Zionist movement might have been a variation on the

62. MCCRAW, *supra* note 41.

63. See *Automotive Industry*, in THE ENCYCLOPEDIA OF CLEVELAND HISTORY 57 (David D. Van Tassel & John J. Grabowski eds., 2d ed. 1996) [hereinafter CLEVELAND HISTORY]. The 1909 census listed 32 automotive factories in Cleveland, employing 7000 workers, whereas the industry was not even listed as a category in 1899. See *id.* at 58. Over 80 different makes of automobiles were manufactured in Cleveland through 1931. See *id.* Cleveland was surpassed by Detroit as the premier automotive manufacturing center. See *id.*

64. LEONARD BAKER, BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY 91 (1984).

same theme. He referred to Zionism as “tribal warfare.”⁶⁵ He fought bitterly with Chaim Weizmann, who later became the first President of the State of Israel.⁶⁶

In his 1905 speech on insurance before the Commercial Club of Boston,⁶⁷ Brandeis focused on size. His talk was peppered with words such as “huge,” “great,” “powerful,” and “menace.” He emphasized the enormity of the country’s largest insurance companies, described it in disparaging terms and ignored the economic advantages that size could bring to a business. He said the “irresponsible power” of the large insurance companies had been exercised “selfishly, dishonestly and in the long run inefficiently.” He added,

“The causes which produce these rank abuses are general in their operation. The flagrant dishonesty and selfishness of the managers of the three leading New York companies are the result, not the cause, of the abuses. Men of character may, for a time, protect other companies in large part from like abuses, but the main cause of the evils disclosed lies in the system, rather than in the men.”⁶⁸

By “the system,” Brandeis seemed to mean size. He seemed to feel that “the system” would compel even men of character to succumb in time to perpetuating the abuses.

His obsession with bigness interfered with his judgment on the Court. One case reveals for us how deeply Brandeis feared bigness and how this concern followed him into his advanced years. He never outgrew it. Florida imposed a higher tax on large chain stores than they did on individual stores. A drug store chain sued, claiming the tax law was unconstitutional, and the court agreed and struck down the tax on the basis of equal protection.⁶⁹ But Brandeis, in an impassioned dissent, said it was proper for Florida to impose greater taxes on chains, which he compared to “the Frankenstein monster”—a remarkable literary allusion,⁷⁰ and one that reveals the striking emotional depth the issue held for Brandeis, even in his senior years.

III. HUGHES IN A NUTSHELL (1862-1948)

Charles Evans Hughes was born in 1862 in the upstate New York town of

65. Letter from Louis D. Brandeis to Felix Frankfurter (Jan. 1, 1921), in 5 LETTERS, *supra* note 61, at 258. Brandeis cautioned that Justice Cardozo, who was being recruited to join the Zionist movement, would not understand its “tribal warfare.” *Id.*

66. See PAPER, *supra* note 8; TRIAL AND ERROR: THE AUTOBIOGRAPHY OF CHAIM WEIZMANN (1949).

67. LIFE INSURANCE, *supra* note 14.

68. *Id.*

69. See *Leggett Co. v. Lee*, 288 U.S. 517 (1932).

70. *Id.* at 566-67 (Brandeis, J., dissenting in part). Philippa Strum chose to edit out Brandeis’ reference to “the Frankenstein monster” in her book collecting some of Brandeis’ writings. See BRANDEIS ON DEMOCRACY 148 (Phillippa Strum ed., 1995).

Glens Falls, located north of Albany on the Hudson River.⁷¹ His father, a Methodist minister, had emigrated from England.⁷² His mother was largely of Dutch, English and Scotch-Irish ancestry, and her family was Baptist.⁷³ Hughes' father became a Baptist to accommodate the wishes of his wife and her family.⁷⁴ As a minister's son, Charles Evans Hughes acquired strong religious beliefs and values. His familial values were sometimes higher than those of the community at large. While he was in college, he wrote a paper for another student and used the money he received to purchase a pair of ice skates. Although this practice was less frowned upon then than it is today, apparently the Minister and his wife looked upon it with disfavor. On February 27, 1880, young Charles wrote to his parents from college attempting to justify his conduct.⁷⁵ As an adult, Hughes acquired a reputation for the highest integrity and unblemished honesty.⁷⁶ At the same time, he seemed not to have acquired the self-righteous attitude of a true believer. Perhaps the flexibility of his clergyman father, who changed denominations for love, helped him by example to be more result oriented and less of a doctrinaire ideologue.

Charles Evans Hughes attended Madison College, a Baptist school, which is now Colgate University.⁷⁷ He planned to enter the ministry, but, during his college years, decided to pursue a career in law.⁷⁸ He completed his undergraduate studies at another Baptist school, Brown University, where he was elected to Phi Beta Kappa in his junior year.⁷⁹ He graduated in 1881 at nineteen.⁸⁰ After college, he taught Latin, Greek, algebra and plane geometry at the Delaware Academy in Delphi in upstate New York.⁸¹

He then enrolled in law school at Columbia University, where he compiled a distinguished academic record.⁸² Hughes graduated in 1884 and was admitted

71. See THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 6 (David J. Danelski & Joseph S. Tulchin eds., 1973) [hereinafter AUTOBIOGRAPHICAL NOTES].

72. See *id.* at 3-4.

73. See *id.* at 6.

74. See *id.*

75. Charles Evans Hughes, Providence, R.I., letter to mother, Feb. 27, 1880. Hughes MSS (Library of Congress) Reel 1-3.

76. Charles Evans Hughes, Washington, D.C., to Mark Sullivan, October 22, 1922. Hughes MSS (Library of Congress) Reel 1-3. Upon his nomination for President by the Republican party in June 1908, William Howard Taft approached Hughes to be his vice-presidential candidate. Hughes received a telegram from Elbert F. Baldwin, speaking for the President and Taft, which read in part, that Taft, "the party, and thousands irrespective of politics call for you, as he and the President said to me tonight, no other candidate could add such moral strength to the ticket." Hughes declined.

77. See AUTOBIOGRAPHICAL NOTES, *supra* note 71, at 29.

78. See *id.* at 49.

79. See *id.* at 43.

80. See *id.* at 47.

81. See *id.* at 49 ff.

82. See *id.* at 55.

to practice that same year, after achieving a near perfect score on the bar examination.⁸³

Hughes then went to New York City to engage in the private practice of law and soon earned a reputation as an outstanding younger lawyer. He left the stress of private practice to teach law school for two years at Cornell University (1891-93).⁸⁴ Except for those two years, he practiced law from the time he passed the bar, until he became Governor of New York in 1907.

In 1888, Hughes married Antoinette Carter, the daughter of a senior partner in the law firm where he was employed.⁸⁵ Their marriage was a happy one, as evidenced by little rhymes he wrote to his wife on birthdays and anniversaries.⁸⁶ They had one son and three daughters. His son became a lawyer and was a law clerk to Benjamin N. Cardozo. Hughes wrote letters to his son in their professional capacities that demonstrated genuine warmth and affection.⁸⁷ These warm family references belie any suggestion of coldness. Perhaps his unwillingness to "play ball" with and be clubby with the politicians and to engage in political dealmaking was interpreted as a sign of coldness.⁸⁸

Charles Evans Hughes earned a reputation as an excellent attorney. In a 1910 congratulatory letter, Judge Cuthbert W. Pound of the New York Court of Appeals wrote, "Judge Alton B. Parker told me long before the days of the gas investigation, that no abler lawyer than yourself appeared before the Court of Appeals."⁸⁹ He added, "I remember the traditions of your encyclopedic memory at Cornell, which put us all to shame . . ."⁹⁰

Attorney Hughes was so well regarded that he was approached in 1905 to serve as counsel for the Stevens Gas Committee, a state legislative committee investigating the gas industry. His successes there led to his appointment, almost immediately, as counsel during 1905 and 1906 for the Armstrong Insurance Committee, another New York state legislative committee.

Hughes became a famous public figure as a result of the superb job he performed as counsel for those two legislative investigations. His fame was based on his successful fights against the giants of the gas, electric and insurance industries, whose greed got the public's attention by hitting where it hurts—in the pocketbook. Hughes was perceived as fighting for the little man's hard

83. *See id.* at xiv.

84. *See id.* at 88.

85. *See id.* at 81.

86. *See* Hughes MSS (Library of Congress) Reel 1-3.

87. *See* Charles Evans Hughes, Washington, D.C., to Charles Evans Hughes, Jr., New York, N.Y., November 19, 1925. Hughes MSS (Library of Congress) Reel 1-3.

88. Charles Evans Hughes, Washington, D.C., to Mark Sullivan, October 22, 1929. Hughes MSS (Library of Congress) Reel 1-3. "I had announced that I would not use patronage to get my bill through, but I would deal with legislation and appointments on their merits." Hughes was referring to a campaign promise he had made as a candidate for Governor of New York State.

89. Cuthbert W. Pound, Lockport, N. Y., to Charles Evans Hughes, Albany, N. Y., April 27, 1910. Hughes MSS (Library of Congress) Reel 1-3.

90. *Id.*

earned income. His reputation as a vigorous fighter for the people, and as a man of integrity and honesty, led to his nomination and election as Governor. Hughes was viewed by the public as an exceptional politician who was unlike the political bosses who often dominated the tarnished political arena. He served from 1907 to 1910, when President William Howard Taft persuaded Hughes to accept an appointment to the Supreme Court.⁹¹ Taft mentioned the possibility that he might name Hughes Chief Justice, when an opening occurred.⁹² However, Taft coveted that post for himself and he elevated the elderly Justice Edward D. White to that office, when an opening occurred just a few months afterwards.⁹³

Hughes was drafted off the Supreme Court to be a candidate for President in 1916.⁹⁴ After narrowly losing that election, he returned to the practice of law in New York City (1917-1921), served as U. S. Secretary of State (1921-25), and served on international tribunals and commissions, including a period as Judge of the Permanent Court of International Justice (1928-30).⁹⁵ Later, Taft achieved his ambition and became Chief Justice and Hughes, in turn, succeeded him in that office in 1930.⁹⁶ Hughes served as Chief Justice until he retired in 1941.⁹⁷ He presided over the High Court during a period of divisiveness, marked by competing camps of "conservative" and "liberal" justices, and by F.D.R.'s "court packing plan."⁹⁸

IV. PROGRESSIVISM AND GOVERNMENT REGULATION

Progressivism was a reform movement in American history that sought to check the imbalance in our economy between the desire for growth and progress and the need to protect the health, safety and standard of living of the public and workers. The insight of the great jurist Oliver Wendell Holmes, Jr., is helpful here. Holmes spoke of the law as being guided by, "the felt necessities of the times."⁹⁹ In much of the Nineteenth Century there was a great emphasis on growth, expansion and industrialization. These were felt to be more important than the safety of workers and passengers, which took second place in the race to build faster railroads and steamships. The tide would turn in a given industry, prompted often by a catastrophe or series of catastrophes. Professor McCraw has described how Charles Francis Adams developed the Massachusetts Railroad Commission in response, to a large extent, to a tragic railroad accident in that

91. See Letter from William Howard Taft to Charles Evans Hughes (Apr. 27, 1910), in AUTOBIOGRAPHICAL NOTES, *supra* note 71, at 158.

92. See *id.* at 159-60.

93. See *id.* at 169.

94. See *id.* at 180.

95. See *id.* at 185, 186, 200, 286.

96. See *id.* at 291.

97. See *id.* at 324.

98. *Id.* at 303-05.

99. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1938).

state.¹⁰⁰ Historian and Congressional librarian, Daniel J. Boorstin, has written of the massive loss of life and maiming of crew and passengers of steamships racing at ever increasing speeds on our rivers and lakes.¹⁰¹ In the early years of the Twentieth Century tragic fires took an awful toll. In 1908, 170 children and two teachers died in a school fire in Cleveland, in what was then the small community of Collinwood.¹⁰² The Memorial Branch of the Cleveland Public Library provides an important remembrance of that tragedy. In 1911, 141 young working women died in the famous Triangle Shirtwaist factory fire in New York City.¹⁰³ "Panic bars" and other safety devices became common place afterwards and might have prevented many or all of the deaths in these two tragedies.

Capitalism too often found expression during rapid periods of industrialization in a frontier or boom town mentality. The quest for wealth saw persons with anti-social personality traits trying to climb to the top at any cost and caring little or not at all for the rest of society, particularly those in the lower levels. Industrialization, the development of canals and railroad, gas, oil production, mining, the growth of cities, the spread of the factory system of manufacturing and other types of "progress" brought with them serious social problems. Unsanitary conditions in food and water supplies created health problems. Overcrowding in residential areas and in factories facilitated the spread of contagious diseases and multiplied the potential number of victims at risk due to fires and explosions. Excessive hours of employment were deleterious to workers, particularly children.

The progressive movement attacked these problems at several levels. Settlement houses sought to alleviate slum conditions. Reform mayors and others sought to replace political bosses with more responsive government.¹⁰⁴ Workers' compensation and other reform legislation was passed to protect employees from injury and to compensate them for injuries incurred on the job. Governors and other political figures sought to alleviate unsatisfactory living and working conditions. The published works of Jacob Riis and Upton Sinclair led the way to reform.¹⁰⁵ The heroic efforts of Jane Addams and others to alleviate suffering and poverty are remembered as important chapters in our national history.

At the national level, Theodore Roosevelt, Woodrow Wilson and Charles Evans Hughes campaigned for reform. Wilson's campaign slogan, "the new freedom," represented a classic expression of much of what progressivism meant. Louis Brandeis played a major role in drafting the economic policy proposals of

100. See MCCRAW, *supra* note 41, at 25-31.

101. See DANIEL J. BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* 97-107 (1965).

102. See *Collinwood School Fire*, in *CLEVELAND HISTORY*, *supra* note 63, at 289; see also Fred McGunagle, *Horror in Collinwood; 172 Students Die in City's Worst Disaster*, *PLAIN DEALER*, Mar. 29, 1998, at 5D.

103. See *141 Men and Girls Die in Waist Factory Fire*, *N.Y. TIMES*, Mar. 26, 1911, at 1.

104. See TOM L. JOHNSON, *MY STORY* xvi-xix (1911).

105. See UPTON SINCLAIR, *THE JUNGLE* (1906); JACOB RIIS, *THE BATTLE WITH THE SLUM* (1902).

Wilson's campaign.

Some of Wilson's ideas were so simple that they hardly seemed worthy of mention in a Presidential campaign.¹⁰⁶ For example, Wilson proposed opening school houses for public discussion during summers and evenings, when not otherwise in use.¹⁰⁷ He spoke of the need to regulate public service corporations that provided transportation, light and other important functions.¹⁰⁸ They cannot, he said, be treated by traditional standards that would preclude regulation simply because they are private property.¹⁰⁹ He spoke out against fine points and obscure details in tariffs that cost the public millions of dollars.¹¹⁰ Wilson proposed a federal Industrial Commission to check the power of monopolies and trusts and require them to "be made good."¹¹¹ Trusts, he contended, care more about their machinery than their employees; they do not care about clean working conditions or about working women and children.¹¹²

Wilson contended that the people wanted a free and just government, not a benevolent government.¹¹³ He felt that the power of the great corporations was not inevitable and could be checked.¹¹⁴ Big business was useful in some ways and could be more efficient, but business could become too big.¹¹⁵

Hughes had a difficult time countering the 1916 progressive campaign philosophy of Wilson and the highly effective slogan, "He kept us out of war."¹¹⁶ Hughes sometimes came across as being anti-labor. In California, he spoke at an elite San Francisco club where the failure to remove anti-union signs from windows before Hughes' arrival resulted in adverse publicity.¹¹⁷

Hughes, however, was a part of the progressive or reform establishment. He had been drafted to run for governor, because his role as special counsel for two legislative investigative committees in the gas and insurance battles had made him a certified reformer, as well as a famous personality. He narrowly defeated William Randolph Hearst, the newspaper tycoon, who was something of a reformer and an anti-business spokesman. Hughes was the only Republican to win statewide office in that election.¹¹⁸

Hughes was influenced greatly by his religious upbringing and faith. Even

106. See WOODROW WILSON, *THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE* (1913); see also MCCRAW, *supra* note 41, at 112.

107. See WILSON, *supra* note 106.

108. See *id.*

109. See *id.*

110. See *id.*

111. See *id.*

112. See *id.*

113. See *id.*

114. See *id.*

115. See *id.*

116. AUTOBIOGRAPHICAL NOTES, *supra* note 71, at 184.

117. See *id.*

118. See *id.* at 132.

as an adult he taught Sunday school.¹¹⁹ The age old religious messages of love thy neighbor and help the poor and suffering were fundamental to Hughes' thinking.¹²⁰ Hughes was flexible enough to take different approaches to different problems. For the regulation of utilities he supported a Public Service Commission, that would have broad powers to investigate, regulate and coerce utilities and, if necessary, to compel them to comply with regulations and the law. This seems to be a middle of the road or moderate approach, which carries with it an unstated premise that people can change their ways. He did not view the gas and electric companies as a "Frankenstein monster" lacking the ability to change or be redeemed. He saw the utility situations in New York City and upstate New York as being different enough to warrant separate treatment by the Public Service Commission. The insurance industry, however, had so scandalous a record that Hughes supported detailed legislative measures. Just as Wilson wanted to require that the trusts "be made good," so Hughes felt that the insurance industry had to "be made good." Insurance, in some respects, is a precise form of business that is more amenable to detailed control.

After conducting the gas and electric industry investigations, Hughes did not propose new regulations that were directly regulatory or designed to break up or "de-consolidate" the industry into smaller units. He did not propose new legislation, noting in the "Report" that he drafted for the committee that there was "no effective remedy in general legislation."¹²¹ Instead, relying on the experience of other states, he proposed a strong regulatory commission for the protection of the public through "constant and effective supervision" of the industry to "prevent a recurrence of the mischiefs revealed in this investigation."¹²² Competent and expert personnel acting within a strong new regulatory agency would be the key.

The development of administrative agencies and administrative law was an outgrowth of the reformist need to regulate and control business and industry. Indeed, Professor Felix Frankfurter writing to Chief Justice Hughes in 1931 said, "Your address to the New York State Bar Association, in 1916, laid down the basic lines for the development of administrative law in this country, which we shall be in process of building for a good many years to come."¹²³ Hughes, Brandeis and Wilson were pioneers in regulation and administrative law. Dean Harlan F. Stone of Columbia Law School, who later became Associate Justice and Chief Justice of the Supreme Court, writing about the time of Hughes' speech referenced by Frankfurter, said,

[r]easonable legislative control of business affected with a public

119. See MERLO J. PUSEY, 1 CHARLES EVANS HUGHES 110 (1951).

120. See *id.* at 111.

121. CHARLES E. HUGHES, REPORT OF THE JOINT COMMITTEE OF THE SENATE AND ASSEMBLY OF THE STATE OF NEW YORK 95 (Apr. 1905).

122. *Id.* at 94.

123. Felix Frankfurter, Cambridge, Massachusetts to Charles Evans Hughes, TLS, March 6, 1931, Hughes MSS (Library of Congress), Reel 5, container 8.

interest, that is to say, business essentially government in character or requiring public franchises, or which constitutes a natural monopoly, has been upheld. Thus, the constitutional power to regulate all so-called public service corporations, as public carriers, public grain elevators, telephone companies, gas and electric companies, has been definitely established.¹²⁴

Brandeis lacked the marked flexibility possessed by Hughes, but he was a realist and was not inflexible. Both shared more toughness than needed to succeed in law practice and in the adversarial arena of the courtroom and legislative hearings.

In 1906, Brandeis asked Hughes to comment on an article he had written on "Wage-Earners' Life Insurance."¹²⁵ Hughes responded by stating that the article demonstrated the evils of industrial insurance but asked for a more detailed analysis of the feasibility of Brandeis' corrective plan, because "even with such a showing I fear that conservatism would refuse to be convinced."¹²⁶ There appears in the published letters no other reference to their exchange of ideas. Hughes was one of a number of reformers whose opinions Brandeis solicited.¹²⁷ Brandeis may have learned to create with his mind in school in Germany, but Hughes had learned in America that experience is the best teacher. He was always the pragmatist who wanted to be sure that a good idea would be acceptable to the people.

V. CHARLES EVANS HUGHES AS COUNSEL FOR GAS AND INSURANCE INVESTIGATIVE COMMITTEES

Charles Evans Hughes was tapped to serve as counsel for the Stevens Committee to investigate the gas and electric industries in New York City for the purpose of determining whether a problem existed that needed corrective legislation.¹²⁸ The answers were a foregone conclusion, or almost so. The newspapers had carried stories that the gas and electric utilities in New York City were overcharging their customers, including the city itself.¹²⁹ Indeed, reports to that effect were the very reason the legislature began a formal inquiry.¹³⁰

Tammany Hall, the powerful political establishment in New York City, had

124. HARLAN F. STONE, *LAW AND ITS ADMINISTRATION* 140-50 (1915).

125. *Id.*

126. MASON, *supra* note 7, at 158; *see also* WESSER, *supra* note 8, at 308.

127. *See* MASON, *supra* note 7, at 158. Brandeis also sent the manuscript to William Whitman, Charles H. Jones, Robert F. Harick, George L. Barnes, Edwin H. Abbot, Judge Warren A. Reed, E.A. Filene, George S. Baldwin, and Georgia Wigglesworth. *See id.*

128. *See* PUSEY, *supra* note 119, at 133.

129. *See Gas Bills Introduced*, N.Y. TIMES, Jan. 5, 1905, at 2; *Bill for 70-cent Gas*, N.Y. TIMES, Jan. 12, 1905, at 1; *Gas Probers Chosen; Hitch Over Chairman*, N.Y. TIMES, Mar. 17, 1905, at 1; *Municipal and Corporate Lighting*, N.Y. TIMES, Jan. 15, 1905, at 8; *Odell on Cheap Gas, Controller Joins in Agitation for a 75-Cent Legal Rate*, Jan. 18, 1905, at 2.

130. *See* PUSEY, *supra* note 119, at 132.

previously blocked a municipal inquiry through its leader, Charles Murphy. The vote in the state Senate in favor of the gas inquiry was thirty-six to eighteen.¹³¹ Among the minority voting nay was Senator Henry J. Coggeshall of Waterville, who complained that the state had spent more than \$300,000 on investigations during the preceding twenty years and who predicted that this inquiry, like the others, would be a failure.¹³² Coggeshall was wrong, because both Senator Stevens, who led the committee, and Charles Evans Hughes, counsel for the committee, were men of integrity and ability. In addition, Senator Stevens was the past president of a Washington D.C. electric company.¹³³ As a result, he was knowledgeable of the industry, although in today's climate his prior experience might have been used to preclude him from the chairmanship. Hughes checked out Stevens before he accepted the appointment to see if he was the kind of person under whom he wanted to serve.¹³⁴ The committee's investigation was successful, because Hughes did a superb job. He had a photographic memory and put it to use in mastering the detail of the industries.¹³⁵ He was a well respected member of the bar but was little known outside of legal circles. His diligence and skillful performance brought him instant recognition and propelled him into the Governor's mansion in short order.

The gas and electric industries were interrelated. While some newspaper accounts and headlines spoke only of gas, the committee investigated both. Its formal title was the Joint Committee of the Senate and Assembly of the State of New York to Investigate the Gas and Electric Light Situation in the City of New York.¹³⁶ The testimony, published in three volumes totaling 2598 pages, included verbatim question and answers from thirty-seven witnesses.¹³⁷ More than 400 exhibits were received in evidence. In the days before radio and television, newspapers were more important than they are today. One front page headline of "The New York Times," April 1, 1905, read: "\$12,600,000 Discrepancy in Gas Company's Books, Difference Between Book and Taxable Value of Plants, Whiteley Can't Explain It."¹³⁸ Headlines like that brought the gas and electric investigation to the public's attention. Another headline reported seventeen percent earnings by the gas company, whereas a two percent market interest rate prevailed in 1904.¹³⁹

131. See *Vote A Gas Inquiry; Grady Accuses Hearst*, N.Y. TIMES, Mar. 15, 1905, at 1.

132. See *id.*

133. See PUSEY, *supra* note 119, at 133.

134. See *id.*

135. See AUTOBIOGRAPHICAL NOTES, *supra* note 71, at xv.

136. See TESTIMONY TAKEN BEFORE THE JOINT COMMITTEE OF THE SENATE AND ASSEMBLY OF THE STATE OF NEW YORK TO INVESTIGATE THE GAS AND ELECTRIC LIGHT SITUATION IN THE CITY OF NEW YORK (1905) [hereinafter COMMITTEE TESTIMONY].

137. See *id.*

138. *\$12,600,000 Discrepancy in Gas Company's Books*, N.Y. TIMES, Apr. 1, 1905, at 1.

139. See *Gas Company Earns 17 Per Cent on Plant*, N.Y. TIMES, Apr. 2, 1905, at 3; *Reasons Underlying Low Interest Rates, New York's Improving Position as Financial Centre, Velocity of Circulation*, N.Y. TIMES, Apr. 9, 1905, at 16.

Hughes began his responsibilities only after insuring that he would be independent of political pressure and that he could follow the evidence wherever it led.¹⁴⁰ Senator Frederick C. Stevens, a man believed to be independent because of his great wealth, put Hughes' concerns to rest. "So I went ahead with what I found to be a task even more difficult than I had anticipated. But Senator Steven was true to his promise and I was not hindered by political interference."¹⁴¹

The hearings commenced on March 30, 1905 in the Aldermanic Chamber in New York's City Hall. They concluded April 27, 1905. Charles Evans Hughes, counsel for the Committee, prepared and personally delivered the recommendation to the legislature in Albany.¹⁴²

Chairman Stevens opened the hearings with instructions against smoking and then read the resolution establishing the committee. The resolution began,

Whereas, There is general and widespread complaint in the city of New York of the prices maintained by the gas and electric lighting companies operating therein, and of the quality of the services, and;

Whereas, The Board of Estimate and Apportionment in December, 1902, adopted a report declaring the prices of said companies for public lighting to be unreasonable and excessive, and that the interests of the companies had been so combined as to eliminate competition, and rejected their bids for public lighting; and

Whereas, The same prices for electric lighting in all the boroughs and for gas lighting in all the boroughs except Manhattan and the Bronx, having been again bid for 1904, and the Commission of Water Supply, Gas and Electricity having, notwithstanding a report of the Engineer of Surface Construction that said bids were exorbitant and should be rejected, entered into contracts with said companies for services between March, 1904, and March, 1905, at the prices named in said bids; and

Whereas, An excessive price for lighting service in said city involves a great waste of city funds, and imposes a wrongful burden upon the taxpayers and inhabitants of the city,

Resolved, (if the Assembly concur), that a joint committee be appointed, consisting of three members of the Senate and four members of the Assembly, which committee shall as speedily as may be, proceed to investigate and examine into the organization and operation of the gas and electric lighting companies; the reasonableness of the charges maintained by the gas and electric lighting companies in the city of New York for services rendered the city and its inhabitants, with reference to

140. See PUSEY, *supra* note 119, at 133-34.

141. AUTOBIOGRAPHICAL NOTES, *supra* note 71, at 120.

142. See PUSEY, *supra* note 119, at 138.

the cost of the service and the capital actually employed therein; the conditions under which the business of the companies is conducted, with reference to competition; the quality of the service; the circumstances connected with the negotiations and execution of the city light contracts of 1904; and any other phase of the gas and electric lighting business as conducted in the city of New York deemed by the company [sic] to be germane to the purpose of such investigation; that the committee report to the Legislature as soon as possible the result of their investigation with such remedial measures as it may deem proper."¹⁴³

The resolution continued by granting the committee subpoena power and support staff and funding in the amount of \$25,000.¹⁴⁴

Senator Stevens recognized Counsel for the committee who made the briefest possible opening comment:

"Mr. Chairman, I shall not detain the committee with a preliminary statement further than to say that the first object of the inquiry will be to ascertain the organization, capitalization and the relations that exist between the companies producing and distributing gas and electric current in the city of New York. This will naturally lead to other inquiries which are within the scope of the resolution."¹⁴⁵

The desire of Chairman Stevens to secure the services of an outstanding attorney to serve as the committee's counsel was understandable, when one considers that the names of several of the attorneys who represented the utility companies more than ninety years ago are recognizable even today as prominent in the legal profession: Shearman and Sterling for the Consolidated Gas Company, Paul D. Cravath for the Mutual Gas Company and John G. Milburn for the Empire Subway Company.¹⁴⁶ The gas and electric companies were represented by heavy hitters, whose names still echo with power through the canyons of Wall Street.

Hughes was probably wise not to make a flamboyant opening statement. There was no jury in these proceedings, except the jury of public opinion. The end result would not be a finding of guilt or innocence or a judgment for money damages. Possible remedial legislation was all that could be expected. The newspapers and public opinion were already on his side. Had he said what he

143. COMMITTEE TESTIMONY, *supra* note 136, at 2-4. The signing of the new contract by the city had been the subject of newspaper accounts and editorial comment. *See Grout Changes Front on Light Contracts; Existence of Monopoly Admitted by Corporation Counsel*, N.Y. TIMES, Dec. 12, 1904, at 1. Under the heading, "Oakley Upholds Contracts," Oakley maintained that he was correct in entering into the contract. *The Lighting Contract*, N.Y. TIMES, Dec. 29, 1904, at 8. The editorial began, "Commissioner Oakley is making the very usual mistake of those in the wrong who realize that they have been found out, of doing too much explaining."

144. *See* COMMITTEE TESTIMONY, *supra* note 136, at 4.

145. *Id.*

146. *See id.* at 2.

expected to prove, he would have tipped off his opponents about where he was heading and would have left himself open to accusations that he had not proven all that he said the evidence would establish.

He proceeded to introduce into evidence the laws incorporating and providing for capitalization and stock of one illuminating company after another, along with increases of capitalization and articles of consolidation. Hughes was laying the foundation to hold the gas and electric companies responsible as public service corporations and to show that they had over-stated their capitalization in order to claim that their enlarged capitalization warranted greater earnings and dividends.¹⁴⁷ In the telling, it was dull, but it was necessary to establish the legal grounds for any proposed legislation. Attorney Mathewson asked to be permitted to represent Consolidated Gas in the proceeding, noting that such representation had been allowed in a 1900 investigation in Boston.¹⁴⁸

Hughes called as his first witness Benjamin Whiteley, assistant treasurer of the Consolidated Gas Company. Mr. Whiteley was also affiliated with another gas company and three electric companies.¹⁴⁹ The interrelationship of the companies in the gas and electric business in New York City had been established at the outset. Further factual development took place.

Some of the testimony was dramatic and newsworthy. Consolidated Gas carried its plants as having a value of approximately \$40 million on its books, but reported to the tax authorities that those plants had a value of approximately \$27.3 million.¹⁵⁰ The company official on the witness stand could not explain the discrepancy.¹⁵¹ Obviously the lesser value reported to the taxing authorities meant a smaller tax bill for the authorities.

Hughes was firm in dealing with matters during the hearing. When a witness was said to be sick, Hughes wanted a physician there to testify to his illness, not a doctor's note. He was tenacious in following up with his questioning. Despite evasive answers, he established that the city was paying \$80,000 for an electric bill that would have cost a private company only \$25,000.¹⁵²

Hughes wrapped up his work with a recommendation that the legislature reduce the price of gas by law and that utilities be put under the authority of a Public Service Commission.¹⁵³ The commission would have broad regulatory powers and could act on complaints or of its own initiative. The commission that he envisioned would have power to examine books and records, require reports,

147. *See id.* at 4.

148. *See id.* at 23-24.

149. *See id.* at 24-25.

150. *See id.* at.

151. *See id.* at 132-33; *see also* \$12,600,000 Discrepancy In Gas Company's Books, *supra* note 138, at 1.

152. *See id.* at 782-83.

153. *See* 75-Cent Gas Is Urged By Stevens Committee, N.Y. TIMES, Apr. 29, 1905, at 1; *Gas Report Held Up by Tammany Panic* N.Y. Times, Apr. 29, 1905, at 3. The article also reported, "The price quoted for votes in the Senate by those who usually have to do with lobby funds in Albany is \$25,000 a vote, This is the highest ever quoted since Tweed's time." *Id.*

require reasonable rates, provide for the safety of employees, and even have power over the issuance and sale of securities.¹⁵⁴ This seems unusual today, because since that time most states have developed securities agencies for the regulation of the registration and sale of various types of stocks.

Hughes then departed for Europe to join his family who earlier had left for vacation. But he had another investigative committee related to the insurance industry waiting for him when he returned home. The senator in the role of Chairman was William W. Armstrong. The Joint Committee of the Senate and Assembly of the State of New York To Investigate and Examine into the Business and Affairs of Life Insurance Companies Doing Business in the State of New York conducted public hearings from September 6, 1905 through December 30, 1905.¹⁵⁵ Its testimony and recommendations filled ten volumes.¹⁵⁶ The investigation was somewhat different from Hughes' work in the gas and electric industry. Those companies provided necessities, while, as important as insurance companies are, they do not provide necessities. The nature of the insurance business makes it more amenable to predetermined rules and regulations.

The Armstrong Committee proposed remedial legislation in sixteen areas. One was lobbying and another was political contributions. One insurance company maintained a residence in Albany, the state capitol, manned by its key lobbyist. Found among the papers there were numerous notes and directions to kill or to support legislation. Other recommendations from the committee related to limitation of expenses, limitations on new business (according to the size of the company), and remedies of policy holders, including a right to resort to the courts, and the state insurance department.

VI. BRANDEIS' THINKING IN GAS AND INSURANCE REGULATION

Brandeis' efforts in gas and insurance regulation and reform in Boston and Massachusetts lacked the official authority held by Hughes, who occupied an important position of state government. Brandeis worked with reform groups and organization. He seemed to want to make the giant corporations "be good" by compulsion or enticement. The gas companies could increase their dividends if they lowered their gas prices. He adopted that concept from London, England.

He was deeply concerned about the cost to ordinary individuals and about wasted premiums paid on policies they could not afford and had to let lapse. He proposed savings bank insurance as an alternative. In addition, he fought against over capitalization in both industries. Brandeis was less willing than Hughes to

154. See ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES, GOVERNOR OF NEW YORK, 1906-1908, at 93, 133 (intro. by Jacob G. Schurman 1908); MANUAL PRODUCED FOR THE LEGISLATURE OF THE STATE OF NEW YORK, 1916, at 547-49 (1915).

155. See TESTIMONY TAKEN BEFORE THE JOINT COMMITTEE OF THE SENATE AND ASSEMBLY OF THE STATE OF NEW YORK TO INVESTIGATE AND EXAMINE INTO THE BUSINESS AND AFFAIRS OF LIFE INSURANCE COMPANIES DOING BUSINESS IN THE STATE OF NEW YORK 6 (1905).

156. See *id.*

give people a chance to correct problems through regulatory agencies.

His thinking is expressed in articles, speeches and letters. His book, *Business: A Profession* and his writings to policyholders through reform committees¹⁵⁷ and public organizations¹⁵⁸ express his concerns about problems in the insurance industry. To a large extent they parallel those of the Armstrong committee. He suggested that, "Supervision alone—whether state or Federal—will not suffice to correct existing abuses in the life insurance business."¹⁵⁹

Brandeis played a major role in establishing the Federal Trade Commission, but he failed to take charge of that new agency and put his ideas into effect. Professors Richard B. Stewart and Stephen G. Breyer discuss the FTC in their book and quote a passage on the FTC from one of Justice Brandeis' opinions.¹⁶⁰ Of course Professor Breyer had himself become an Associate Justice of the Supreme Court. Professor McCraw also addresses Brandeis and the FTC.¹⁶¹

CONCLUSION

Brandeis and Hughes undertook separate work in different communities at approximately the same times. Their efforts were similar in many respects and their values were similar. But differences in their personalities led them to advance somewhat different solutions to the same problems. However, there is no right way or wrong way in these matters and both have had a long lasting impact on administrative law and regulatory agencies.

Brandeis was driven by his obsession with the "curse of bigness." Thomas K. McCraw has written, "Early in his career, Brandeis decided that big business could become big only through illegitimate means. By his frequent references to the 'curse of bigness,' he meant that bigness itself was a mark of Cain, a sign of prior sinning."¹⁶² Brandeis, in holding this belief, shared this line of thinking with many ordinary people. The opinion is widespread, even today, that persons of great wealth must have gained their assets through illegal means or through inheritance from forebears who were sinners. Perhaps what Brandeis found troubling was that a significant portion of successful business leaders, politicians, lawyers, and others have anti-social personality traits that make them overemphasize monetary success and power and that often allow them to be uncaring about those in distress. Political scientists, unlike lawyers, have observed the same phenomenon in bureaucrats who seek bureaucratic survival

157. See "Second Report to the Policy Holders of the Equitable Life Assurance Society," July 22, 1905.

158. See "Life Insurance: The Abuses and the Remedies," before the Commercial Club of Boston, Oct. 26, 1905.

159. *City Ownership*, *supra* note 9, at 19.

160. See STEPHEN G. BREYER & RICHARD B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 854 (2d ed. 1992).

161. See MCCRAW, *supra* note 41.

162. *Id.* at 108.

at all costs. Remaining in office becomes the all consuming passion.

Brandeis' concern is peculiar because he was himself a millionaire. But it led him to design administrative solutions that would "make them be good." He wanted legislation and programs that would be self-executing and would not depend on human intervention. After all, there were lobbyists with funds to tempt the most honest citizens. As a result, Brandeis proposed the "sliding scale" formula for gas rates. Lower your rates and you may increase your dividends. It was mechanical and required little human intervention. It would tend to prevent the spectacle that he described in a U.S. Senate hearing of an executive buying a \$500,000 jewelry item for his wife.¹⁶³

Perhaps Brandeis' brushes with anti-semitism and the irrational side of prejudice made him mistrustful of human nature. Professor Strum suggests that Brandeis did not experience anti-Semitism until 1914.¹⁶⁴ However, he certainly was aware of it before then. The Cushing letter tells us that he was not open with his fellow law students at Harvard about his being Jewish.¹⁶⁵ A letter to his brother suggests his dismay at the anti-Semitism had reached a pinnacle in a Detroit athletic club, which was established with 5000 members, but allowed no Jews. History professor Stanley Cutler stated at a 1998 seminar at Michigan State University that anti-Semitism in America had been widespread until it was all but fatally weakened by the newsreel showings at movie theaters of the liberation of concentration camp inmates at the end of World War II.¹⁶⁶

Charles Evans Hughes had greater faith in the ability of society to reform itself. He was not unaware of the baser side of humankind; he merely chose different ways to deal with it. Speaking to college students, he expressed the concerns shared by many reformists about the baser side of human nature.

Increasing prosperity tends to breed indifference and to corrupt moral soundness. Glaring inequalities in condition create discontent and strain the democratic relation. The vicious are the willing, and the ignorant are the unconscious instruments of political artifice. Selfishness and demagoguery take advantage of liberty. The selfish hand constantly seeks to control government, and every increase in governmental power, even to meet just needs, furnishes opportunity for abuse and stimulates the effort to bend it improper uses.¹⁶⁷

Hughes was a realist. He had seen the same anti-social qualities in many that Brandeis had seen. He was more willing to rely on commissions and human

163. See HEARING BEFORE THE COMMITTEE ON INTERSTATE COMMERCE, UNITED STATES SENATE (1911-1912).

164. See STRUM, *supra* note 49, at 234.

165. See *supra* note 7 and accompanying text.

166. See STRUM, *supra* note 49; Paul Brickner, *Bibliographic Essay*, 54 U. CIN. L. REV. 839 (1986) (reviewing THOMAS K. MCCRAW, *PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS [AND] ALFRED E. KAHN* (1984)).

167. CHARLES EVANS HUGHES, *CONDITIONS OF PROGRESS IN DEMOCRATIC GOVERNMENT* 7 (1910).

intervention to regulate on behalf of the public interest. In his 1916 acceptance speech of the Republican Presidential nomination, he spoke of the importance of competence, strength and expertise in of government officials in the area of foreign affairs. Interestingly, he concluded his moderately long address with four paragraphs on "Administrative Efficiency—Civil Service Laws—Budget." He began by saying, "Confronting every effort to improve conditions, is the menace of incompetent administration." Referencing his early remarks about appointments in the diplomatic service, he stated, "Democracy needs exact knowledge, special skill and thorough training of its servants." Administrative positions in our domestic service had to be filled with strong, competent and knowledgeable experts. Unlike Brandeis, he was not overly concerned with "the curse of bigness." "The curse of bigness" was Brandeis' menace, not mere "incompetent administration." His concern about "the menace of incompetent administration," was one that could be addressed by the careful selection of key personnel. After all, Senator Stevens had sought out Hughes as a man of competence and Hughes had checked out the Senator's credentials before undertaking to be counsel for the Joint Committee. For Brandeis there was "legalized robbery" to guard against. Instead of federal regulation, which would depend on one man, he proposed that the system of state regulation be maintained.¹⁶⁸

Hughes pressed for a Public Service Commission in speeches at Elmira, New York on May 3, 1907. His remarkable speech in 1916 to the New York State Bar Association tells much about his outlook. This was the speech praised by Professor Frankfurter in 1931:

The doctrine that the Legislature cannot delegate its power has not been pushed so far as to make needed adaptation of legislation impossible, and reconciliation has been found in the establishment by the Legislature itself of appropriate standards governing the action of its agency. The ideal which has been presented in justification of these new agencies, and that which alone hold promise of benefit rather than of hurt to the community, is the ideal of special knowledge, flexibility, disinterestedness, and sound judgment in applying broad legislative principles that are essential to the protection of the community, and of every useful activity affected, to the intricate situations created by expanding enterprise. But mere bureaucracy—narrow, partisan, or inexpert—is grossly injurious; it not only fails of the immediate purpose of the law and is opposed to traditions which, happily, are still honored, but its failure creates a feeling of discouragement bordering on pessimism which forms the most serious obstacle to real improvements in the adjustment of governmental methods to new exigencies.¹⁶⁹

The outlooks of Hughes and Brandeis have helped to mold the development of administrative law. Hughes' outlook and optimism may be more appealing

168. See WESSER, *supra* note 8, at 18.

169. ADDRESSES OF CHARLES EVANS HUGHES, 1906-1916, at 336-37 (2d ed. 1916).

and attractive, but Brandeis also was on target when he advanced law for those who had to be compelled to be good. Hughes recognized the need for compulsion, at times, but he was more willing to rely on human intervention and on skilled and competent bureaucrats to apply their expert knowledge to society's needs.

The two represent a tension in administration and regulation: how detailed do we make our legislation and regulations. Do we trust or mistrust the human side of administrators? Do we trust in the competence of administrators or do we "over regulate" to preclude less able administrators from inartfully exercising their discretion? Which approach will best prevent regulatory agencies from becoming captives of the very industries they were established to regulate?

