

The Brandeis–Gompers Debate on “Incorporation” of Labor Unions

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Almost a century ago, the *Green Bag* published Louis Brandeis’ opening statement in a debate in which he engaged Samuel Gompers at the Economic Club of Boston on the legal accountability of labor unions. See 15 *GREEN BAG* 11 (1903). Unfortunately, the *Green Bag* could not carry out its undertaking to publish Gompers’ reply because its text was not provided. See *id.* at 95. When we invited Professor Meltzer to comment on Brandeis’ remarks, we didn’t know that the *Boston Globe* had reported on the Brandeis–Gompers debate in great detail in its December 5, 1902 edition. See Stuart B. Kaufman, Peter J. Albert, & Grace Palladino, eds., 6 *THE SAMUEL GOMPERS PAPERS: THE AMERICAN FEDERATION OF LABOR AND THE RISE OF PROGRESSIVISM 1902–6* at 71. When Professor Meltzer uncovered the *Globe*’s report, we naturally agreed to combine our material with the *Globe*’s to produce the most complete report of the proceedings possible, and to extend Professor Meltzer’s remarks correspondingly. The text of the debate, beginning on page 306, follows his discussion.

– *The Editors*

AS BACKGROUND FOR THE DEBATE that appears below, a word about labor developments in the post-Civil War period may be useful. The great economic progress resulting from the Industrial Revolution was uneven; it had been accompanied by serious

social problems – pockets of poverty, workers’ loss of marketable skills, dismal working conditions, and serious and extensive labor-management violence,¹ increasingly in disputes over union recognition. Subsequently, various governmental investigating commis-

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¹ See Milton Derber, *THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY* 30–34 (1970).

sions² concluded that labor unions contributed to the common good and that employers should recognize and bargain with them. Furthermore, in 1901, a year before the debate, issues of union responsibility for wrongful conduct had been highlighted by the famous *Taff Vale* decision. There, the House of Lords had ruled that labor unions, at least those registered under the Trade Union Acts of 1871 and 1876, were to be accountable for breach of contract and tortious “union” action, and that damage judgments against unions could be satisfied out of union treasuries.³

Both Brandeis and Gompers presumably considered the debate *situs*, the Economic Club of Boston, friendly. The club had been established at the turn of the century “to assist in bringing about a more harmonious relationship between labor and capital to foster broad and independent economic thought.”⁴

Brandeis’ praise of labor unions and collective bargaining might have appeared to have been designed to make more plausible his appeal to labor’s enlightened self-interest. But his praise was rooted in his basic views – about the imbalance of power between the

individual employee and his employer, and the link between political and industrial democracy.⁵

He was especially concerned about the concentrated power of the large integrated firms, the “trusts,” such as the Steel Trust and Standard Oil.⁶ These were, he believed, a threat not only to the workers’ autonomy but to democracy itself.⁷ Such trusts, because of their size and power, could block the unionization of their workers and its concomitant check on “industrial absolutism.”⁸ He considered it vitally important for the moral development of workers for them to participate in employer decisions, directly or vicariously through their unions. Accordingly, even an employer’s higher compensation would not eliminate the need for, and the desirability of, unionization and collective bargaining.⁹ Elsewhere, however, he expressed doubt about the usefulness of legislative action in this area.¹⁰ His appeal in the debate was apparently not to compulsion, but to employers’ enlightened self-interest. It is not clear, however, whether his plea for incorporation was directed only to the unions’ self-interest and not for legislation

2 See Derber, *supra* note 1 at 86-87.

3 *Taff Vale Ry. Co. v. Amalgamated Soc’y of Ry. Servants*, [1901] A.C. 426. *Taff Vale* was overridden by Parliament five years later. See Trade Disputes Act of 1906, 6 Edw. VII, C.47, § 4, Sub§ 1; *Vacher & Sons v. London Society of Compositors*, [1913] A.C. 107.

4 Allon Gal, *BRANDEIS OF BOSTON* 65 (1980). Brandeis joined the club after the debate. *Id.*

5 See Louis D. Brandeis, *THE CURSE OF BIGNESS* 72-74, 82-83 (1934) (Osmond K. Frankel, ed.); Donald R. Richberg, *The Industrial Liberalism of Mr. Justice Brandeis*, in *MR. JUSTICE BRANDEIS* 129 *et seq.* (1932) (Felix Frankfurter, ed.).

6 See Brandeis, *supra* note 5 at 70, 78, 86.

7 *Id.* at 39.

8 Brandeis has been powerfully criticized for his indiscriminate attack on bigness reflected in his failure to distinguish between combinations yielding economies of scale or speed and those lacking any economic justification. See Thomas K. McCraw, *PROPHETS OF REGULATION* 80-84, 95-101, 105-06, and *passim* (1984). *But cf.* Paul A. Freund, *Mr. Justice Brandeis: A Centennial Memoir*, 70 *HARV. L. REV.* 769, 777-78 (1957). Gompers did not share Brandeis’ concerns about large firms, predicting (accurately) that in the longer run they too would be unionized, as many of them were. See Harold C. Livesay, *SAMUEL GOMPERS AND ORGANIZED LABOR IN AMERICA* 111-112, 126, 129 (1978).

9 Brandeis, *supra* note 5 at 73, 81. Large integrated “center” firms have in general paid their workers significantly more than other firms. See McCraw, *Rethinking the Trust Question*, in his *REGULATION IN PERSPECTIVE* 53 (1981).

10 See Brandeis, *supra* note 5 at 79-80.

compelling incorporation.¹¹

His incorporation proposal may be better understood in light of the doctrines that led to the practical immunity of unions and their treasuries against lawsuits for damages. At common law, a labor union, as an unincorporated association, lacked a legal personality. Each individual member obviously had such a legal personality and could therefore sue or be sued in his own name, but the union, as only an aggregation of its members, lacked those capacities. Consequently, a plaintiff seeking to recover damages for wrongful “union” activities typically had to name and serve all members of the union – usually an impossible task. Nonetheless, in some circumstances, use of devices such as the class suit¹² could circumvent the procedural requirements described above.

A plaintiff, even after satisfying these procedural requirements, would often face a substantive requirement – also virtually impossible to meet – before it could tap into the union treasury: prove that all members of the association had participated in, authorized, or ratified the wrongful act.¹³

Given the prevailing common law doctrines, some aspects of Brandeis’ argument are puzzling and problematic. First is his claim (exploited by Gompers) that an unincorporated labor union already was “legally responsible for its acts in much the same way that ... a corporation is”; and that, accordingly, the common belief to the contrary lacks any basis in law. In *Carew v. Rutherford*,¹⁴ the unnamed

case Brandeis appears to be relying on, the plaintiff had been fined \$500 by the local stonecutters association, to which he did not belong. The fine had been based on his subcontracting work to New York even though he had lacked the needed men or materials. After the plaintiff was struck, he ultimately paid the fine with a check made out to one Wagner, the union treasurer, who had been personally named as a defendant along with other individuals, as well as the association. Wagner had had that check credited to his account as union treasurer. In reversing the dismissal of the plaintiff’s restitutionary action, the Supreme Judicial Court ruled that the exaction had been wrongful and could be redressed in contract as well as tort.

Carew is not of much help to Brandeis’ position. The entity point doesn’t seem to have been raised. Furthermore, because of the treasurer’s pivotal role in collecting and adding the exaction to his bank account as union treasurer, the court’s order that he restore that amount to the plaintiff would appear to have been a proper quasi-contractual remedy – without regard to whether the union had legal personality.

The weakness of Brandeis’ claim of already existing union accountability was demonstrated by *Pickett v. Walsh*. Although decided a few years later, it echoed the previously established dogma: “Plaintiffs [cannot name] unincorporated labor unions [as] defendant[s]. That is an impossibility. There is no such entity known to the law as an unincorporated

11 Brandeis did not explicitly call for legislation, but Gompers’ reply referred to Brandeis’ advocacy of legislation without drawing contradiction in Brandeis’ closing. Earlier, union leaders, including Gompers, had obtained federal legislation permitting union incorporation. They had believed that such official recognition would encourage employer recognition. Gompers and others, however, later opposed incorporation because of unwelcome regulatory and judicial developments. See Alfred Kamin, *The Union as Litigant: Personality, Preemption and Propaganda*, 1966 S. CT. REV. 253, 256-59.

12 See *Pickett v. Walsh*, 192 Mass. 572, 590, 78 N.E. 753, 760 (1906); E. Merrick Dodd, Jr., *Dogma and Practice in the Law of Associations*, 42 HARV. L. REV. 977, 979, 983-84, 993, and *passim* (1929).

13 See *Martin v. Curran*, 303 N.Y. 276, 101 N.E.2d 683 (1951).

14 106 Mass. 1 (1870).

association."¹⁵

Second and equally troubling is Brandeis' reliance on *Taff Vale* as an application of pre-existing law. Brandeis did not acknowledge the uncertainties as to the reach of *Taff Vale* or the technical basis for the American union's practical immunity. To be sure, a debate before a general audience does not invite a time-consuming exposition of mystical technicalities. Perhaps for that reason he glossed over the fact that the various opinions in that case relied, in part at least, on the British Trade Unions Acts as impliedly providing for union liability for union action, at least if the union had registered under those statutes. A union's registration, which was voluntary, could, it was said, be treated as endowing the union with the benefits and qualities of a corporation, including a legal personality.¹⁶ Consequently, a registered union, like a business corporation, could be sued in its common name, and its treasury reached to satisfy judgments against it.

Although Brandeis as a lawyer is famous for having persuaded the Supreme Court to change its constitutional doctrine, he did not in the debate suggest that courts, responding to new realities, might eliminate the unions' immunity by common law development, regardless of incorporation. Perhaps, as an exponent of the rule of law, he was reluctant to suggest judicial abrogation of established doctrine.

Brandeis also did not mention that terminating the unions' immunity would provide legal advantages to them by recognizing their capacity to sue in their common name, for example, to enforce collective bargaining agreements. In order to achieve that result,

courts had to circumvent a union's lack of legal personality by a variety of confusing and uncertain expedients.¹⁷ To be sure, liability would have been a two-way street. But if the violators of collective agreements were, as Gompers urged, typically employers rather than unions, unions would presumably have obtained a net benefit from reciprocal legal responsibility for breaches. Furthermore, the party who perceives itself as weaker than its adversary (as unions then did) typically prefers a legal remedy to self-help. In any event, later on unions pressed the courts for remedies for employer breaches of collective agreements.¹⁸

Still, Brandeis was, I believe, overly optimistic about the net benefits unions would get from incorporation. As he implied during the debate, in some large strikes at least, unions had been responsible for "flagrant lawlessness." But then, inconsistently, he sugarcoated his medicine, observing that damage awards against unions "would doubtless be small." It seems unlikely that such small damages would have produced the large benefits he postulated. Employers and their professional managers typically viewed unions and collective bargaining as encroachments on their "right" to run their business, a threat to its efficiency and profitability as well as to capitalism itself. Such fears lay behind the bitterness and violence that had accompanied strikes and other pressures for union recognition. It seems unlikely that employer fears would have been significantly reduced by the prospect of recovering even substantial damages from unions, even for allegedly "union" misconduct. Nor was it likely that damages would significantly reduce employer resort to injunctions, which

¹⁵ 78 N.E. at 760.

¹⁶ See *Taff Vale*, [1901] A.C. at 436, 441, 444-45.

¹⁷ Those expedients are discussed in C. Lawrence Christenson, *Legally Enforceable Interests in American Labor Union Working Agreements*, 9 IND. L.J. 69 (1933).

¹⁸ See Christensen, *supra* note 17, and Ralph F. Fuchs, *Collective Labor Agreements in American Law*, 10 ST. LOUIS L. REV. 1 (1924).

could be issued quickly by a judge and then enforced through non-jury contempt actions.



I turn now to aspects of Gompers’ response. Employers had orchestrated violence against union organizers¹⁹ and may have, as he contended, deliberately provoked labor violence. Nonetheless, even historians not unsympathetic to labor unions have recognized that violence and intimidation had been continuing instruments of collective pressure, beginning with *Cordwainers*, the first American labor case.²⁰ Furthermore, the rigors of ancient English employment law, highlighted by Gompers, had been outdistanced by events in the United States²¹ as well as England.²² For example, after the decision by the highest court in Massachusetts in *Commonwealth v. Hunt*,²³ the criminal conspiracy doctrine had become a dead letter there and almost everywhere else.²⁴

Equally extravagant was Gompers’ description of the distressed state of the American worker. To be sure, there were great disparities in wages and working conditions; the worst conditions, typically those for some manual la-

borers, African-Americans, and Eastern and Central European immigrants, were abominable even under the laxer standards of the day. But, as Hayek showed, the great wealth produced by the industrial revolution was [not] “purchased at the price of depressing the standard of life of the weakest elements of society.”²⁵ Furthermore, at the time of the debate, unions, made up largely of skilled craftsmen, were often explicitly racist, sexist, and nativist, and did little to alleviate the lot of the most disadvantaged. Indeed, their conditions probably were made worse by union-imposed restrictions on entry into skilled occupations.

Much stronger was Gompers’ general attack on the labor injunction. Its procedural and substantive difficulties had generated labor’s justifiable resentment²⁶ as well as reformist efforts that led to the protections embodied in the Norris-LaGuardia Act of 1932.

Gompers’ specific criticism of Judge Jackson’s restraining order was much more problematic than his general attack. To be sure, Gompers’ constitutional objection to the breadth of that order appeared to be convincing. But Gompers had omitted one salient “fact” found by the judge.²⁷ The defendants

19 See Livesay, *supra* note 8 at 114.

20 See Walter Nelles, *The First American Labor Case*, 41 *YALE L.J.* 165, 187 n.65, 193 (1931); Phillip Taft and Phillip Ross, *American Labor Violence: Its Causes, Character, and Outcome*, in *THE HISTORY OF VIOLENCE IN AMERICA* ch. 8 (1969) (Hugh D. Graham and Ted R. Gurr, eds.).

21 See Robert J. Steinfeld, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE 1350-1870* ch. 1, 6-7 and *passim* (1991).

22 See William Holdsworth, *XV HISTORY OF ENGLISH LAW 17-29, 68-86* (1965) (A.L. Goodhart and H.G. Hanbury, eds.).

23 45 *Mass.* (4 *Met.*) 111 (1842).

24 See Leonard W. Levy, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 190* n.21 (1957).

25 See F.A. Hayek, *CAPITALISM AND THE HISTORIANS 10-12, 27* and *passim* (1954); Henry Pelling, *AMERICAN LABOR 119-20* (1960).

26 See Felix Frankfurter and Nathan Greene, *THE LABOR INJUNCTION* ch. II (1930), which incidentally was dedicated to Mr. Justice Brandeis.

27 Judge Jackson, relying on a sworn complaint, had issued his restraining order *ex parte*. See *United States ex rel. Guaranty Trust Co. v. Haggerty et al.*, 116 *Fed.* 510 (Cir. N.D. West Va. 1902). That common procedure was much criticized. See Frankfurter and Green, *supra* note 26 at 60-65. The citation to *Guaranty Trust* is not to Judge Jackson’s decision granting a restraining order (which is not available) but to the subsequent contempt action.

had assaulted the company's employees and blown up its property, as part of a coercive campaign designed to force unwilling West Virginia employees to join a strike by Pennsylvania miners. Plainly, the context of violence placed the legal questions involved in a wholly different light.²⁸

Gompers' arguments, despite the foregoing difficulties, had one overriding virtue. They highlighted underlying issues pivotal to labor's opposition to incorporation. The dominating consideration was labor's understandable distrust of the law and courts of the time, a distrust that sharpened the following issues: What doctrines and rules were to define the allowable area of economic conflict in labor-management relations? Were the tools of courts adequate for definition and application of the governing doctrine? What were the appropriate standards for determining whether unions should be responsible for damages caused by what may have been the spontaneous actions of individual member(s) or officer(s)? Finally, in labor disputes, what standards and restrictions should apply to "government by injunction"?

These larger questions, along with union accountability, were an important part of the agenda of labor law for the next half-century, from the Clayton Act of 1914 to the Taft-Hartley Act of 1947. Brandeis, who lived until 1941, presumably derived a sense of satisfaction from the general development of labor law, despite his previous reservations about the usefulness of state compulsion.

On the narrow issue of "incorporation," Brandeis also had reason for a sense of satis-

faction from post-debate developments. He was, of course, on the Court when the famous case of *United Mine Workers v. Coronado Coal Co.*,²⁹ allowed suits in federal courts against a union in its common name for violations of the federal antitrust laws even though such suits were not allowed in the forum state. The Court's rationale, moreover, warranted the treatment of unions as legal entities in all federal cases based on federal question jurisdiction.³⁰ On the state level, the unions' practical immunity was often limited or eroded.³¹ Finally, in the Taft-Hartley Act of 1947, Congress responded to complaints reminiscent of the incorporation debate, with Section 301 of the Act, which made collective bargaining agreements mutually enforceable. Brandeis presumably would have favored that result, whatever his overall views regarding that Act.



The reader may be pondering why the editors latched on to this aged debate. When I asked them this question some time ago, they were graciously noncommittal; perhaps this reserve was payback for their having long endured the Socratic method. Resisting a temptation to abandon this enterprise, I decided to answer my own question. First, there are the participants. Brandeis remains one of the most revered figures in American law even though his views and his methods have been subject to powerful criticism.³² At the top of the Harvard Law School class of 1887, he was also at the top of his profession by the time of the debate. Furthermore, he had

28 See *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941).

29 259 U.S. 344, 383, et seq. (1922).

30 See *id.* at 383-385, 387, 388-90, and *United Steelworkers of America v. R.H. Bouligny, Inc.*, 382 U.S. 145, 153 (1965). See also Rules of Civil Procedure, Rule 17(b).

31 See generally *Developments in the Law - Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 1081-82 (1963).

32 See McCraw, *supra* note 8, and Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445 (1996).

won his spurs as the “people’s lawyer,” declining a fee for work on matters of “public interest.”³³

As for Gompers, in 1863, when he was 13 years old, his needy Dutch parents brought him to the United States from England. Largely self-educated, 23 years later he helped establish, and became the first head of, the American Federation of Labor. As Oscar Handlin put it, “Pragmatically, he developed a pattern of action and a philosophy which enabled one segment of the labor force to organize itself effectively.”³⁴

Then there were the debaters in combination. Gompers, as an immigrant and a Jew, was essentially an outsider in the precincts of the classy Economic Club; and Brandeis, the child of middle class Bohemian immigrants and also a Jew, was not exactly an insider. Their preeminence exemplified the United States as the land of opportunity, albeit not for all.³⁵

Finally, there was one especially noteworthy aspect of Brandeis’ presentation – his freedom from identity politics. Even though he supported recognition of unions, he consid-

ered it “meet to expose to public gaze” particular deficiencies in their approach. Similarly, Brandeis also appeared willing to risk alienating some clients, present and prospective, by publicly praising an institution that they feared and by exhorting them to mend their ways.³⁶

Our profession once again is being charged, as it was in Brandeis’ time,³⁷ with having become unduly commercialized. Although Brandeis had reservations about that charge,³⁸ he agreed that lawyers had become “adjuncts of great corporations” and had neglected their obligation to use their powers for the protection of the people.³⁹ Our profession needs more lawyers who, like Brandeis, are willing as counselors to invite their clients to reconsider their ends, lawful as well as proscribed; and who as citizens can and do distinguish between their clients’ interests and their own vision of the common good. Perhaps the editors hoped, as I do, that the republication of this fragment of Brandeis’ work will encourage others to fill that need.



33 Brandeis seemed to believe (mistakenly) that by rejecting a fee he retained more autonomy in his representation of such clients. See Spillenger, *supra* note 32 at 1449-1450, 1479, and *passim*, and Charles W. Wolfram, *MODERN LEGAL ETHICS* § 10.2.1 (1986).

34 See Livesay, *supra* note 8, Editor’s Preface. Livesay, however, reviews the racism, sexism, anti-immigrant attitudes, and indifference to the needs of unskilled workers reflected in the policies of the American Federation of Labor and perhaps in Gompers’ personal views. *Id.* at 91-95. Nor does it appear that Brandeis protested against the racism of his time.

35 *Id.*

36 That risk may easily be overstated: Brandeis’ most important manufacturing clients generally had good relations with their workers, see Gal, *supra* note 4 at 63, and may have welcomed Brandeis’ praise of unions as a source of goodwill for themselves and pressure on their nonunion competitors.

37 See Brandeis, *The Opportunity in the Law*, 39 AM. L. REV. 555 (1905), reprinted in Louis D. Brandeis, *BUSINESS – A PROFESSION* 313, 318 (1914).

38 *Id.*

39 *Id.* at 321.