Early 20th-century America saw rapid changes in economy and society, with increasing stress placed on the country’s governance systems. National institutions remained weak in relation to those of sovereign “states” within the Union, while facing mounting pressures from global trends in regional conflict and economic expansion. Following the pivotal 1912 national U.S. elections, new progressive voices helped Americans embrace a modern future, defining a pragmatic middle path between rural populists and urban finance capitalists. Among those emerging voices was that of Louis Dembitz Brandeis, raised in the state of Kentucky after the Civil War by European parents, and based in Boston as a public-interest lawyer with national recognition.

As the architect of President Woodrow Wilson’s economic platform in 1912, Brandeis would soon be appointed to the U.S. Supreme Court, marking a shift from his notable career in grass-roots legislative activism. A gifted lawyer, Brandeis championed the idea that legal expertise was ideally suited to crafting practical solutions to dynamic social problems. At age 60, Brandeis could draw on a lifetime of innovative legal practice in shaping his judicial role – a masterful performance lasting two more decades, and widely assessed as placing him among the greatest U.S. judges of the past century.

Louis Brandeis’ service as a Supreme Court Justice opened a new dimension for his strategic, problem-solving concept of law. Complexity and complementarity were central to his approach, which promoted the spirit of democratic pluralism, celebrated cultural diversity in the American melting pot, and integrated overlapping jurisdictions of national, state, and local levels of legal authority.

Had Louis Brandeis miraculously appeared at the 2012 BIIJ, he might have recognized common themes and concerns across the intervening century. While his specific concerns were domestic nation-building and balancing authority across overlapping internal jurisdictions, his methods may offer some inspiration for our century’s concerns with securing the international order in a diverse and complex world. For Brandeis, the overarching legal framework was not a static system that merely conserved privileged doctrine or authority at the top. Even the language of rights was to be employed in strategic ways.

His aim was ultimately practical and experimental: to strengthen the capacity of regional and local governments to respond to new problems. Such goals are situated in real history: in Brandeis’ era the entire nation was facing the economic tumult of the Great Depression. There was an imperative for development and growth, notwithstanding deep uncertainty about how to move forward. Federal judicial power – one pivotal point within a broad dynamic network – could be the catalyst for nurturing these capacities, tapping the energy of pluralistic values and diverse governing procedures. Neither strict
judicial neutrality nor judge-managed reform could fulfill this nuanced vision for overarching judicial frameworks. Human rights, whatever their status in legal doctrine, must be enabled to flourish under concrete conditions.

For building a modern nation, Brandeis saw opportunities in overlapping jurisdictions: finding virtues in conflicting, competing, and concurring layers of governance. Brandeis was not overly concerned to iron out inconsistencies, but rather saw each level as a point of leverage for improving the performance of the others. In one spectacular instance, near the end of his judicial career, he identified an entire jurisdictional layer (federal common law) as stifling creativity at other levels – so he used his authority as a Supreme Court Justice to abolish it outright. This well-known case, *Erie Railroad Co. v. Tompkins*, drew from Constitutional principles, but notably justified its bold action in terms of “social and economic” purposes.

Along with managing jurisdictional frictions, Brandeis understood the importance of structures and frameworks. His legal frameworks were not doctrines frozen in time, but dynamic, integrative systems that stressed human “capacities” over human “rights.” These systems took allowance of distinct cultural identities in pluralistic societies, and emphasized the importance of “groups” along with the classic legal categories of states and individuals.

Brandeis understood that courts were surrounded by politics, and could not – should not – evade that connection. Drawing on his entire career as a policy reformer, Brandeis thought it was not enough for courts to declare broad human rights; they had to work actively to build political capacities at the lower jurisdictional levels. As the author of the two greatest civil liberties decisions in American law (*Whitney v. California* and *Olmstead v. United States*), Brandeis gave lyrical expression to the importance of legal rights as the condition for human expression. In his judicial philosophy, the challenge was to enable such conditions to flourish for all peoples, in all corners of the nation.

**Notes**