Brandeis on Democracy
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Brandeis, the son of a successful merchant, was pleased to see the emergence of business as a profession rather than a trade. As he pointed out in "Business—A Profession," reprinted below, universities had begun establishing business schools. This implied that intellectual training was as necessary to the practice of business as to the profession of medicine or law. He spoke of business as "an applied science" in which the notion of "a good contract" had changed from "a transaction in which one man got the better of another" to one "which is good for both parties to it." It had become "an occupation which is pursued largely for others and not merely for one's self."

This, of course, was a statement that reflected Brandeis's view of what business ought to be rather than what it was in reality. He undertook his long fight with the New Haven Railroad because he believed that the railroad had violated the precepts of business as a profession. Not only was it being run for individual profit and against the best interests of workers and consumers; it was unforgivably inefficient as well. Quite aside from the malice he attributed to J. P. Morgan and his associates, Brandeis thought the New Haven had ignored the fact that excessive bigness was incompatible with the profession of business.

Bigness became excessive when an organization grew so large that its managers could not know the details of its operations. The result was that no one was in charge; waste, inefficiency, and exorbitant costs inevitably followed. That, along with a fear of concentrated and unaccountable power, was the reason for Brandeis's campaign against trusts. Brandeis eventually persuaded presidential candidate Woodrow Wilson to campaign on a platform of destroying the trusts. He did not see Theodore Roosevelt as a "trust-buster"; on the contrary, Roosevelt advocated letting the trusts exist but regulating them. Brandeis thought that impossible, given the enormous size of trusts and the power it gave them. His opposition to them was both moral and pragmatic: concen-
trated power made for irresponsibility; excessive size negated creativity and resulted in unnecessary expense.

"BUSINESS—A PROFESSION," 1912

The experiences that Brandeis had with the McElwain factory and the Filene clothing store in Boston are recounted in this commencement speech, delivered at Brown University, which hammers away at the ills wrought by irregularity of employment and the creativity business ought to exercise in redefining its relationship with labor. Elsewhere, in describing the way his ideas were altered by experience, he told an interviewer, "I first saw unemployment in its true features in the case of a New England shoe manufacturer whose men were going on strike. I had been called in. The more I studied it the more it seemed to me absurd that men willing to work should have to be idle during ten or fifteen weeks of each year. I said: 'This is unnecessary. It is an outrage that in an intelligent society a great industry should be so managed.' They talked to me of seasonal conditions and of averages. I abhor averages. I like the individual case. A man may have six meals one day and none the next, making an average of three per day, but that is not a good way to live. Unemployment in this industry was all the less excusable because of the fact that neither the raw material nor the finished product was perishable. My client was a man of unusual ability. He began to see it as I did. He inclined his thoughts to solve the problem, and it was solved. The disgrace of unemployment in his share of that industry was eliminated."

"Is that generally feasible, you think?"

"Unemployment is as unnecessary as disease epidemics. One who says in this intelligent age that unemployment is necessary or unavoidable is like one a generation ago who would have continued to insist that epidemics were, if not necessary and divinely imposed, at least inevitable."

Each commencement season we are told by the college reports the number of graduates who have selected the professions as their occupations and the number of those who will enter business. The time has come for abandoning such a classification. Business should be, and to some extent already is, one of the professions. The once meagre list of
The learned professions is being constantly enlarged. Engineering in its many branches already takes rank beside law, medicine and theology. Forestry and scientific agriculture are securing places of honor. The new professions of manufacturing, of merchandising, of transportation and of finance must soon gain recognition. The establishment of business schools in our universities is a manifestation of the modern conception of business.

The peculiar characteristics of a profession as distinguished from other occupations, I take to be these:

First. A profession is an occupation for which the necessary preliminary training is intellectual in character, involving knowledge and to some extent learning, as distinguished from mere skill.

Second. It is an occupation which is pursued largely for others and not merely for one’s self.

Third. It is an occupation in which the amount of financial return is not the accepted measure of success.

Is not each of these characteristics found today in business worthily pursued?

The field of knowledge requisite to the more successful conduct of business has been greatly widened by the application to industry not only of chemical, mechanical and electrical science, but also the new science of management; by the increasing difficulties involved in adjusting the relations of labor to capital; by the necessary intertwining of social with industrial problems; by the ever extending scope of state and federal regulation of business. Indeed, mere size and territorial expansion have compelled the business man to enter upon new and broader fields of knowledge in order to match his achievements with his opportunities.

This new development is tending to make business an applied science. Through this development the relative value in business of the trading instinct and of mere shrewdness have, as compared with other faculties, largely diminished. The conception of trade itself has changed. The old idea of a good bargain was a transaction in which one man got the better of another. The new idea of a good contract is a transaction which is good for both parties to it.

Under these new conditions, success in business must mean something very different from mere money-making. In business the able man ordinarily earns a larger income than one less able. So does the able man in the recognized professions—in law, medicine or engineering; and even in those professions more remote from money-making,
like the ministry, teaching or social work. The world's demand for efficiency is so great and the supply so small, that the price of efficiency is high in every field of human activity.

The recognized professions, however, definitely reject the size of the financial return as the measure of success. They select as their test, excellence of performance in the broadest sense—and include, among other things, advance in the particular occupation and service to the community. These are the basis of all worthy reputations in the recognized professions. In them a large income is the ordinary incident of success; but he who exaggerates the value of the incident is apt to fail of real success.

To the business of to-day a similar test must be applied. True, in business the earning of profit is something more than an incident of success. It is an essential condition of success; because the continued absence of profit itself spells failure. But while loss spells failure, large profits do not connote success. Success must be sought in business also in excellence of performance; and in business, excellence of performance manifests itself, among other things, in the advancing of methods and processes; in the improvement of products; in more perfect organization, eliminating friction as well as waste; in bettering the condition of the workingmen, developing their faculties and promoting their happiness; and in the establishment of right relations with customers and with the community.

In the field of modern business, so rich in opportunity for the exercise of man's finest and most varied mental faculties and moral qualities, mere money-making cannot be regarded as the legitimate end. Neither can mere growth in bulk or power be admitted as a worthy ambition. Nor can a man nobly mindful of his serious responsibilities to society, view business as a game; since with the conduct of business human happiness or misery is inextricably interwoven.

Real success in business is to be found in achievements comparable rather with those of the artist or the scientist, of the inventor or the statesman. And the joys sought in the profession of business must be like their joys and not the mere vulgar satisfaction which is experienced in the acquisition of money, in the exercise of power or in the frivolous pleasure of mere winning.

It was such real success, comparable with the scientist's, the inventor's, the statesman's, which marked the career of William H. McElwain of Boston, who died in 1908 at the age of forty-one. He had been in business on his own account but thirteen years. Starting without
means, he left a fortune, all of which had been earned in the competitive business of shoe manufacturing, without the aid of either patent or trademark. That shows McElwain did not lack the money-making faculty. His company’s sales grew from $75,957 in 1895 to $8,691,274 in 1908. He became thus one of the largest shoe manufacturers in the world. That shows he did not lack either ambition or organizing ability. The working capital required for this rapidly growing business was obtained by him without surrendering to outside investors or to bankers any share in the profits of business: all the stock in his company being owned either by himself or his active associates. That shows he did not lack financial skill.

But this money-making faculty, organizing ability and financial skill were with him servants, not masters. He worked for nobler ends than mere accumulation or lust of power. In those thirteen years McElwain made so many advances in the methods and practices of the long-established and prosperous branch of industry in which he was engaged, that he may be said to have revolutionized shoe manufacturing. He found it a trade; he left it an applied science.

This is the kind of thing he did: In 1902 the irregularity in the employment of the shoe worker was brought to his attention. He became greatly impressed with its economic waste, with the misery to the workers and the demoralization which attended it. Irregularity of employment is the worst and most extended of industrial evils. Even in fairly prosperous times the workingmen of America are subjected to enforced idleness and loss of earnings, on the average, probably ten to twenty per cent of their working time. The irregularity of employment was no greater in the McElwain factories than in other shoe factories. The condition was not so bad in shoe manufacturing as in many other branches of industry. But it was bad enough; for shoe manufacturing was a seasonal industry. Most manufacturers closed their factories twice a year. Some manufacturers had two additional slack periods.

This irregularity had been accepted by the trade—by manufacturers and workingmen alike—as inevitable. It had been bowed to as if it were a law of nature—a cross to be borne with resignation. But with McElwain an evil recognized was a condition to be remedied; and he set his great mind to solving the problem of irregularity of employment in his own factories; just as Wilbur Wright applied his mind to the aeroplane, as Bell, his mind to the telephone, and as Edison, his mind to the problems of electric light. Within a few years irregularity of employment had ceased in the McElwain factories; and before his death every one of
his many thousand employees could find work three hundred and five days in the year.

Closely allied with the establishment of regularity of employment was the advance made by McElwain in introducing punctual delivery of goods manufactured by his company. Shoes are manufactured mainly upon orders; and the orders are taken on samples submitted. The samples are made nearly a year before the goods are sold to the consumer. Samples for the shoes which will be bought in the spring and summer of 1913 were made in the early summer of 1912. The solicitation of orders on these samples began in the late summer. The manufacture of the shoes commences in November; and the order is filled before July.

Dates of delivery are fixed, of course, when orders are taken; but the dates fixed had not been taken very seriously by the manufacturers; and the trade was greatly annoyed by irregularities in delivery. McElwain recognized the business waste and inconvenience attendant upon such unfulfilled promises. He insisted that an agreement to deliver on a certain day was as binding as an agreement to pay a note on a certain day.

He knew that to make punctual delivery possible, careful study and changes in the methods of manufacture and of distribution were necessary. He made the study; he introduced the radical changes found necessary; and he so perfected his organization that customers could rely absolutely upon delivery on the day fixed. Scientific management practically eliminated the recurring obstacles of the unexpected. To attain this result business invention of a high order was of course necessary—invention directed to the departments both of production and of distribution.

The career of the Filenes of Boston affords another example of success in professionalized business. In 1891 the Filenes occupied two tiny retail stores in Boston. The floor space of each was only twenty feet square. One was a glove stand, the other a women's specialty store. Twenty years later their sales were nearly $5,000,000 a year. In September, 1912 they moved into a new building with more than nine acres of floor space. But the significant thing about their success is not their growth in size or in profits. The trade offers many other examples of similar growth. The pre-eminence of the Filenes lies in the advance which has been made in the nature, the aims and the ideals of retailing, due to their courage, initiative, persistence and fine spirit. They have applied minds of a high order and a fine ethical sense to the prosaic and seemingly uninteresting business of selling women's garments. Instead
of remaining petty tradesmen, they have become, in every sense of the word, great merchants.

The Filenes recognized that the function of retail distribution should be undertaken as a social service, equal in dignity and responsibility to the function of production; and that it should be studied with equal intensity in order that the service may be performed with high efficiency, with great economy and with nothing more than a fair profit to the retailer. They recognized that to serve their own customers properly, the relations of the retailer to the producer must be fairly and scientifically adjusted; and, among other things, that it was the concern of the retailer to know whether the goods which he sold were manufactured under conditions which were fair to the workers—fair as to wages, hours of work and sanitary conditions.

But the Filenes recognized particularly their obligations to their own employees. They found as the common and accepted conditions in large retail stores, that the employees had no voice as to the conditions or rules under which they were to work; that the employees had no appeal from policies prescribed by the management; and that in the main they were paid the lowest rate of wages possible under competitive conditions.

In order to insure a more just arrangement for those working in their establishment, the Filenes provided three devices:

First. A system of self-government for employees, administered by the store co-operative association. Working through this association, the employees have the right to appeal from and to veto policies laid down by the management. They may adjust the conditions under which employees are to work, and, in effect, prescribe conditions for themselves.

Second. A system of arbitration, through the operation of which individual employees can call for an adjustment of differences that may exist between themselves and the management as to the permanence of employment, wages, promotion or conditions of work.

Third. A minimum wage scale, which provides that no woman or girl shall work in their store at a wage less than eight dollars a week, no matter what her age may be or what grade of position she may fill.

The Filenes have thus accepted and applied the principles of industrial democracy and of social justice. But they have done more—they have demonstrated that the introduction of industrial democracy and of social justice is at least consistent with marked financial success. They assert that the greater efficiency of their employees shows indus-
trial democracy and social justice to be money-makers. The so-called "practical business man," the narrow money-maker without either vision or ideals, who hurled against the Filenes, as against McElwain, the silly charge of being "theorists," has been answered even on his own low plane of material success.

McElwain and the Filenes are of course exceptional men; but there are in America to-day many with like perception and like spirit. The paths broken by such pioneers will become the peopled highways. Their exceptional methods will become accepted methods. Then the term "Big business" will lose its sinister meaning, and will take on a new significance. "Big business" will then mean business big not in bulk or power, but great in service and grand in manner. "Big business" will mean professionalized business, as distinguished from the occupation of petty trafficking or mere money-making. And as the profession of business develops, the great industrial and social problems expressed in the present social unrest will one by one find solution.

"BIG BUSINESS AND INDUSTRIAL LIBERTY," FEBRUARY 10, 1912

Business was not an evil to Brandeis, but there was definite evil inherent in businesses so large that they could treat their laborers exactly as they liked and were ungovernable and inefficient. He thought the Steel Trust all too good an example of these phenomena. Like other trusts, it also destroyed the competition that led to creativity, opened new opportunities for each generation, and protected the interests of consumers. He viewed the kind of bigness favored by captains of industry as incompatible with industrial liberty and with democracy and felt it his obligation as a citizen to speak out against it.

In ten years [the Steel Trust] has reaped above a very generous return on its actual capital, $650,000,000. Two-thirds of that still remains as an accumulation held by the corporation for its employees; the other third was distributed in dividends on common stock, originally representing water [i.e., worthless].

The Associated Charities of Pittsburgh recently determined by actual investigation what it costs for a family consisting of husband, wife, and three children, not to live, but barely to subsist. If the common laborers
in the steel industry were to work 12 hours a day for 365 days a year they would be unable to earn even that minimum amount; they would fall just $1.50 short of that bare subsistence wage. Of course, it is physically impossible for any man to work 12 hours a day for 365 days. Moreover, there are only two holidays in the steel industry—Christmas and the Fourth of July—and in the shriveling heat of blast furnaces even these holidays are denied. Think of that situation side by side with the enormous profits taken from the American people to be distributed among stockholders of the Steel Trust.

It is a life so inhuman as to make our former Negro slavery infinitely preferable, for the master owned the slave, and tried to keep his property in working order for his own interest. The Steel Trust, on the other hand, looks on its slaves as something to be worked out and thrown aside. The result is physical and moral degeneracy—work, work, work, without recreation or any possibility of relief save that which dissipation brings. The men coming out of these steel mills move on pay day straight to the barroom. Think what such men transmit as a physical and moral heritage to their children and think of our American citizenship for men who live under such conditions.

There is only one explanation. This great corporation, which exemplifies the power of combination, and in connection with which combination has been justified, has made it its first business to prevent combination among its employees when they sought to procure decent working conditions and living conditions. It stamped out, through its immense powers of endurance, one strike after another. It developed a secret service, a system of espionage among its workmen, singling out individuals who favor unionism; and anyone fomenting dissatisfaction with existing conditions, as it was called, was quietly discharged. The trust is buttressed on one hand by the powers of the railroads and on the other by great financial interests; against it stands the poor miserable individual working man.

It has instanced as one of its benefits to its employees, its pension system, but this is only another system by which it deprives the worker of his just due. Nothing is so ever-present in the worker's mind as the fear of old age and his elimination from business thereby. Under the pension system everyone who remains with the corporation may look forward to getting a pension, but he has no right to it. It is absolutely in the discretion of the directors whether or not he shall get it or if it shall be withdrawn even after it has been granted. Anything that may in their opinion indicate that the worker is not loyal or working for the in-
"I iusts, Efficiency and the New Party" / 127

interests of the corporation, as they interpret them, will result in loss of pension.

Here you have a corporation that has made it its cardinal principle of action that its employees must be absolutely subject to its will. It is treason for an employee to participate with other employees for combination. In this corporation, and in other corporations, there is growing up under the guise of welfare work and efforts for more humane conditions for labor, a system which robs the laborer of what little liberty he should have. It is a condition which explains with peculiar force the term "iron master."

Must not this mean that the American who is brought up with the idea of political liberty must surrender what every citizen deems far more important, his industrial liberty? Can this contradiction—our grand political liberty and this industrial slavery—long coexist? Either political liberty will be extinguished or industrial liberty must be restored.

The real cause that is disturbing business today is not the uncertainty as to the interpretation of "reasonable" or "unreasonable" restraint of trade; it is this social unrest of our people in this struggle with which none in our history save the Revolution and the Civil War can be compared.

"Trusts, Efficiency and the New Party," September 14, 1912

Woodrow Wilson ran for president in 1912 as a progressive on the Democratic ticket, opposed to the continued existence of the trusts. Theodore Roosevelt ran against him, as the candidate of the newly formed Progressive party, on a platform of destruction only of the trusts whose social policies somehow made them hopeless but retention of large business entities regulated by government. Wilson, coached by Brandeis, argued that there came a point at which bigness itself was the problem, and there was no such thing as a "good" trust. It is the difference between these two strains of progressivism that Brandeis attempted to spell out in the articles he wrote during the campaign.

Leaders of the Progressive Party argue that industrial monopolies should be legalized, lest we lose the efficiency of large-scale production
and distribution. No argument could be more misleading. The issue of competition _versus_ monopoly presents no such alternative as "Shall we have small concerns or large?" "Shall we have ill-equipped plants or well-equipped?"

In the first place, neither the Sherman law nor any of the proposed perfecting amendments (La Follette–Lenroot bill or Stanley bill) contain any prohibition of mere size. Under them a business may grow as large as it will or can—without any restriction or without any presumption arising against it. It is only when a monopoly is attempted, or when a business, instead of being allowed to _grow_ large, _is made_ large by combining competing businesses in restraint of trade, that the Sherman law and the proposed perfecting amendments can have any application. And even then the Sherman law and the proposed amendments would not necessarily restrict size. They merely declare that _if there has been such a combination in restraint of trade_ the combiners have the burden of showing that it was reasonable, or, in other words, consistent with the public welfare; and that if such a combination controls more than thirty per cent of the country's business it will, in the absence of explanation, be deemed unreasonable.

In the second place, it may safely be asserted that in America there is no line of business in which all or most concerns or plants must be concentrated in order to attain the size of greatest efficiency. For, while a business may be too small to be efficient, efficiency does not grow indefinitely with increasing size. There is in every line of business a unit of greatest efficiency. What the size of that unit is cannot be determined in advance by a general rule. It will vary in different lines of business and with different concerns in the same line. It will vary with the same concern at different times because of different conditions. What the most efficient size is can be learned definitely only by experience. The unit of greatest efficiency is reached when the disadvantages of size counterbalance the advantages. The unit of greatest efficiency is exceeded when the disadvantages of size outweigh the advantages. For a unit of business may be too large to be efficient as well as too small. And in no American industry is monopoly an essential condition of the greatest efficiency.

The history of American trusts makes this clear. That history shows:

_First._ No conspicuous American trust owes its existence to the desire for increased efficiency. "Expected economies from combination" figure largely in promoters' prospectuses; but they have never been a compelling motive in the formation of any trust. On the contrary, the pur-
pose of combining has often been to curb efficiency or even to preserve inefficiency, thus frustrating the natural law of survival of the fittest.

Second. No conspicuously profitable trust owes its profits largely to superior efficiency. Some trusts have been very efficient, as have some independent concerns, but conspicuous profits have been secured mainly through control of the market—through the power of monopoly to fix prices—through this exercise of the taxing power.

Third. No conspicuous trust has been efficient enough to maintain long, as against the independents, its proportion of the business of the country without continuing to buy up, from time to time, its successful competitors.

These three propositions are also true of most of the lesser trusts. If there is any exception, the explanation will doubtless be found in extraordinary ability on the part of the managers or unusual trade conditions.

And this further proposition may be added:

Fourth. Most of the trusts which did not secure monopolistic positions have failed to show marked success or efficiency, as compared with independent competing concerns.

THE MOTIVES FOR TRUST BUILDING

The first proposition is strikingly illustrated by the history of the Steel Trust. The main purpose in forming that trust was to eliminate from the steel business the most efficient manufacturer the world has ever known—Andrew Carnegie. The huge price paid for his company was merely the bribe required to induce him to refrain from exercising his extraordinary ability to make steel cheaply. Carnegie could make and sell steel several dollars a ton cheaper than any other concern. Because his competitors were unable to rise to his remarkable efficiency, his business career was killed, and the American people were deprived of his ability—his genius—to produce steel cheaply. As the Stanley Investigating Committee found, the acquisition of the Carnegie Company by the promoters of the Steel Trust was "not the purchase of a mill, but the retirement of a man."

Herbert Knox Smith, Commissioner of Corporations, after elaborate investigation, declared:

"The conclusion is inevitable, therefore, that the price paid for the Carnegie Company was largely determined by fear on the part of the organizers of the Steel Corporation of the competition of that concern."
Mr. Carnegie's name in the steel industry had been long synonymous with aggressive competition, and there can be little doubt that the huge price paid for the Carnegie concern was, in considerable measure, for the specific purpose of eliminating a troublesome competitor, and Mr. Carnegie in particular."

... The bribe paid to eliminate Carnegie's efficiency was ... at least $250,000,000. It was paid, as the Stanley Committee finds, to prevent a contest 'between fabricators of steel and fabricators of securities; between makers of billets and of bonds.' It was paid to save the huge paper values which George W. Perkins and others had recently created by combining into eight grossly overcapitalized corporations a large part of the steel mills of America. No wonder that J. P. Morgan & Co. were panic-stricken at the rumor that Carnegie was to build a tube mill which might reduce the cost of making tubes $10 a ton, when those bankers had recently combined seventeen tube mills (mostly old) of the aggregate value of $19,000,000, had capitalized them at $80,000,000 and taken $20,000,000 of the securities for themselves as promotion fees. The seven other similar consolidations of steel plants floated about the same time had an aggregate capitalization of $437,825,800, of which $43,306,811 was taken by the promoters for their fees.

As Commissioner Herbert Knox Smith reported to the President:

''A steel war might have meant the sudden end of the extraordinary period of speculative activity and profit. On the other hand, an averting of this war, and the coalition of the various great consolidations, if successfully financed, would be a tremendous 'bull' argument. It would afford its promoters an opportunity for enormous stock-market profits through the sale of securities.''

So Carnegie was eliminated, and efficiency in steel making was sacrificed in the interest of Wall Street; the United States Steel Corporation was formed; and J. P. Morgan & Co. and their associates took for their services as promoters the additional sum of $62,500,000 in cash values.

THE SOURCES OF MOST PROFITS

The second proposition—that conspicuous trust profits are due mainly to monopoly control of the market—is supported by abundant evidence equally conclusive.

Next to the Standard Oil, the Tobacco Trust is, perhaps, the most prominent of the excessive profit takers ... In 1908, when the trust earned only 4 per cent on its cigar business, it controlled only about
one-eighth of the cigar business of the country. When it earned 103.5 per cent on its smoking tobacco subsidiaries, it controlled three-quarters of the smoking tobacco business of the country.

"The combination's ability to establish and maintain prices without much regard to competition in the principal branches of the business [says Commissioner Smith] ... is vividly illustrated by the fact that when the internal-revenue tax on tobacco was reduced in 1901 and 1902, the combination maintained its prices at the level which had been established when the tax was increased some years earlier. As a result of this policy it appropriated practically the entire reduction in the tax as additional profit in succeeding years."

That is the kind of efficiency in which trusts particularly excel.

**BUYING COMPETITORS**

The third proposition—that trusts are not efficient enough to hold their relative positions in the trade as compared with the independents without buying up successful competitors—is also supported by abundant evidence ...

**UNSUCCESSFUL TRUSTS**

Of the truth of the fourth proposition, stated above—that most of the trusts which did not secure monopolistic positions have failed to show marked success or efficiency as compared with the independent competing concerns—every reader familiar with business must be able to supply evidence. Let him who doubts examine the stock quotations of long-established industrials and look particularly at the common stock which ordinarily represents the "expected economies" or "efficiency" of combination ... perhaps the most conspicuous industrial trust which was not able to secure control of the market is the International Mercantile Marine. That company had behind it the ability and resources of J. P. Morgan & Co., and their great influence with the railroads ... It could not secure control of the Atlantic trade, and in the seven years since its organization has not paid a dividend on its $100,000,000 of stock. Its common [stock] stands at $1/8, its preferred at 18 7/8 ... On the other hand, the $120,000,000 stock of the Pullman Company, which has like influence with the railroads but succeeded in securing a monopoly, stands at 170 3/4.

Efficient or inefficient, every company which controls the market is
a "money-maker." No, the issue of "Competition versus Monopoly" cannot be distorted into the issue of "Small Concerns versus Large." The unit in business may, of course, be too small to be efficient, and the larger unit has been a common incident of monopoly. But a unit too small for efficiency is by no means a necessary incident of competition. And a unit too large to be efficient is no uncommon incident of monopoly. Man's work often outruns the capacity of the individual man; and no matter how good the organization, the capacity of an individual man usually determines the success or failure of a particular enterprise—not only financially to the owners but in service to the community. Organization can do much to make concerns more efficient. Organization can do much to make larger units possible and profitable. But the efficacy even of organization has its bounds. There is a point where the centrifugal force necessarily exceeds the centripetal. And organization can never supply the combined judgment, initiative, enterprise and authority which must come from the chief executive officer. Nature sets a limit to his possible achievement.

As the Germans say: "Care is taken that the trees do not scrape the skies."

"THE NEW ENGLAND RAILROAD SITUATION," 1912

Brandeis fought a fierce nine-year war with the New Haven Railroad and the monopoly that it and its guiding spirit, J. P. Morgan, were gaining over public transportation throughout a large part of the country. Many battles were lost, but the war finally was won in 1914 when President Woodrow Wilson's attorney general forced the company to divest itself of the Boston & Maine Railroad as well as all its steamship and trolley lines. This article details the horrors Brandeis saw resulting from monopolies and from bigness in general.

The breakdown of transportation in New England under the New Haven monopoly has become obvious. Demoralized and curtailed freight service, antiquated equipment, frequent wrecks, discontented employees, heavy depreciation in the market value of securities, and huge borrowing on short-time notes at high interest are the accumulated evidences of that deterioration in our transportation system which has been in process during the past eight years of aggressive monopolization . . .
Truth magazine received funds from the New Haven Railroad, a Brandeis target for almost a decade. In 1913, when Wilson was choosing his cabinet and the railroads feared Brandeis might be named attorney general, Truth ran a series of editorials claiming that he was dishonest, self-serving, and unethical and that if he was put in the cabinet his lack of real principles would show itself. One of the attacks was accompanied by this cartoon, labeled “The Substance and the Shadow,” published on February 5, 1913. (University of Louisville Archives)

While the policy of monopoly is the fundamental cause of the deterioration of our transportation system, it has itself bred subsidiary causes; and of these subsidiary causes excessive bigness is probably the most potent.

Excessive bigness often attends monopoly; but the evils of excessive bigness are something distinct from and additional to the evils of monopoly. A business may be too big to be efficient without being a monopoly; and it may be a monopoly and yet (so far as concerns size) may be well within the limits of efficiency. Unfortunately, the so-called New Haven system suffers from both excessive bigness and from monopoly.

THE MONOPOLY

The New Haven monopoly of transportation in New England, now substantially complete, rests upon ownership or legal control of an effective interest in:
Another Truth cartoon from the same period. Brandeis's being labeled "Ishmael" in it is of course an oblique and negative reference to his Jewishness. (University of Louisville Archives)

First. Substantially all the railroads in Maine, New Hampshire, Massachusetts, Rhode Island and Connecticut, except the Grand Trunk's line from Canada to New London and to Portland, the Canadian Pacific Line through northern Maine, and the Bangor and Aroostook.

Second. Substantially all the trolley lines in Rhode Island and Connecticut, the most important in western and central Massachusetts, and some in Maine, New Hampshire, Vermont and New York.

Third. Substantially all the steamship lines from any of the New England States to New York or Philadelphia or Baltimore . . .

All railroads entering Boston (unless the Boston, Revere Beach and Lynn be called a railroad and is independent) are either owned by the New Haven, or controlled legally or through an effective interest; for it has such a partnership interest also in the Boston and Albany. All the coastwise steamship lines sailing from Boston for New York, Philadelphia or Baltimore are owned or controlled legally or influenced through an effective interest.
In 1910 Brandeis represented business organizations when the railroads asked the Interstate Commerce Commission for an increase in freight rates. He commented that if they were more efficient, the railroads could save $1 million a day. The cartoon shows executives of various railroads begging him to come to work for them. In fact, he offered to meet with them to discuss details of how they could save money but said he would accept no salary. The railroads ignored his offer. (Boston Post, University of Louisville Archives)
THE NEW HAVEN SUPERIOR TO OUR LAW

Between a [local] street railway, gas or electric light monopoly, existing under such conditions [of government regulation], and the New Haven monopoly in transportation there is no real resemblance. The New Haven claims rights under the laws of seven States and, in addition, under acts of Congress. Massachusetts has, except in strictly local matters, no effective legal control over the company. Neither the Massachusetts legislature, nor any commission it may create, can regulate the New Haven in any of its important functions. Any statute attempting to do so would be void as interfering with interstate commerce.

And Massachusetts cannot enforce her will even as to intrastate matters, as it does in the case of street railways, gas and other street-using corporations; because the railroad franchises cannot be taken without paying compensation. Massachusetts prohibited the New Haven from issuing stock without the consent of the railroad commissioners. The New Haven disobeyed the laws with impunity. Massachusetts laws prohibited the New Haven from issuing more bonds than stock. The New Haven disobeyed the laws with impunity. Massachusetts laws prohibited the New Haven from acquiring steamship lines. The New Haven disobeyed the laws with impunity. Massachusetts laws prohibited the New Haven from consolidating with other companies. The New Haven disobeyed the laws with impunity. In each instance these prohibitions were a part of Massachusetts’ plan for regulating railroad companies; but the New Haven claimed the right to act under the laws of another State, and successfully defied Massachusetts... Regulation cannot produce efficient and enlightened railroad operation in the interests of the public; and without that the community cannot get satisfactory service... To abandon competition in transportation and rely upon regulation as a safeguard against the evils of monopoly would be like surrendering liberty and regulating despotism.

[A section follows listing the number and size of the railroads, trolleys, and steamship lines controlled by the New Haven.]

INTENSIVE RAILROADING

The bulk of the New Haven properties is huge; but it is not the huge bulk alone which renders impossible the task of efficient management. The New Haven properties are diverse in character and widely scattered; but it is not these facts which present the most serious difficulty in their operation. The insuperable obstacle to efficient manage-
For the solution of each of these problems there is required, not only separate investigation, but careful weighing of relevant facts. In order to secure unity of purpose and action, all these problems must be passed upon ultimately by the same chief executives. Now, the number of such decisions which any man can make, however able and hard-working he may be, and the extent of supervision which any man can effectively apply, are obviously very limited. Organization may accomplish much in extending the scope of work possible for an executive; but there is an obvious limit, also, to the efficiency of organization; for the success of the whole enterprise demands that the executive must be able to comprehend all the important facts bearing upon the properties. Real efficiency in any business in which conditions are ever changing must ultimately depend, in large measure, upon the correctness of judgment formed from day to day on the problems as they arise. And it is an essential of sound judgment that the executives have time to know and correlate the facts.

"INTERLOCKING DIRECTORATES," 1912

The continued success of the trusts, Brandeis found, was dependent on their access to huge amounts of capital. These came from banks, which invested heavily in the trusts and were tied to them through interlocking directorates. It was the series of articles about the Money Trust that Brandeis wrote in 1912 and that were published in Harper's Weekly that had such an impact on presidential candidate Woodrow Wilson. Brandeis's ideas not only underlay the "new Freedom" platform on which Wilson campaigned against Theodore Roosevelt's "New Nationalism," but culminated in Wilson's creation of the Federal Reserve Board. Brandeis's articles were collected and published as a volume entitled Other People's Money, subsequently reprinted numerous times.
The following passage concentrates on interlocking directorates and on Brandeis's bête noire, J. P. Morgan.

A single example will illustrate the vicious circle of control—the endless chain—through which our financial oligarchy now operates:

J. P. Morgan (or a partner), a director of the New York, New Haven, & Hartford Railroad, causes that company to sell to J. P. Morgan & Co. an issue of bonds. J. P. Morgan & Co. borrow the money with which to pay for the bonds from the Guaranty Trust Company, of which Mr. Morgan (or a partner) is a director. J. P. Morgan & Co. sell the bonds to the Penn Mutual Life Insurance Company, of which Mr. Morgan (or a partner) is a director. The New Haven spends the proceeds of the bonds in purchasing steel rails from the United States Steel Corporation, of which Mr. Morgan (or a partner) is a director. The United States Steel Corporation spends the proceeds of the rails in purchasing electrical supplies from the General Electric Company, of which Mr. Morgan (or a partner) is a director. The General Electric sells supplies to the Western Union Telegraph Company; and in both Mr. Morgan (or a partner) is a director. The Telegraph Company has an exclusive wire contract with the Reading, of which Mr. Morgan (or a partner) is a director. The Reading buys its passenger cars from the Pullman Company, of which Mr. Morgan (or a partner) is a director. The Pullman Company buys (for local use) locomotives from the Baldwin Locomotive Company, of which Mr. Morgan (or a partner) is a director. The Reading, the General Electric, the Steel Corporation and the New Haven, like the Pullman, buy locomotives from the Baldwin. The Steel Corporation, the Telephone Company, the New Haven, the Reading, the Pullman and the Baldwin Companies, like the Western Union, buy electrical supplies from the General Electric. The Baldwin, the Pullman, the Reading, the Telephone, the Telegraph and the General Electric companies, like the New Haven, buy steel products from the Steel Corporation. Each and every one of the companies last named markets its securities through J. P. Morgan & Co.; each deposits its funds with J. P. Morgan & Co.; and with these funds of each, the firm enters upon further operations.

NEW STATE ICE COMPANY V. LIEBMAN, 1932

An Oklahoma statute required new ice companies to obtain a certificate of public convenience and necessity from the state. The law's pur-
pose was to avoid the kind of duplication of plants and delivery service that resulted in higher costs for consumers. The Supreme Court struck it down as an undue interference with the right of property. Brandeis had long emphasized encouragement of competition, but substitution of judicial beliefs for the will of the majority in economic policy ran counter to his thinking about the nature of democracy, and he dissented here. Finding the briefs presented by Oklahoma insufficiently backed by facts, Brandeis wrote fourteen heavily footnoted pages to demonstrate the Oklahoma statute’s rationality. As the footnotes were designed to include the relevant facts and the sources for them, they took up far more of the fourteen pages than did his text.

MR. JUSTICE BRANDEIS, dissenting.

Chapter 147 of the Session Laws of Oklahoma, 1925, declares that the manufacture of ice for sale and distribution is “a public business”; confers upon the Corporation Commission in respect to it the powers of regulation customarily exercised over public utilities; and provides specifically for securing adequate service. The statute makes it a misdemeanor to engage in the business without a license from the Commission; directs that the license shall not issue except pursuant to a prescribed written application, after a formal hearing upon adequate notice both to the community to be served and to the general public, and a showing upon competent evidence, of the necessity “at the place desired;” and it provides that the application may be denied, among other grounds, if “the facts proved at said hearing disclose that the facilities for the manufacture, sale and distribution of ice by some person, firm or corporation already licensed by said Commission at said point, community or place are sufficient to meet the public needs therein.”

Under a license, so granted, the New State Ice Company is, and for some years has been, engaged in the manufacture, sale and distribution of ice at Oklahoma City, and has invested in that business $500,000. While it was so engaged, Liebmann, without having obtained or applied for a license, purchased a parcel of land in that city and commenced the construction thereon of an ice plant for the purpose of entering the business in competition with the plaintiff. To enjoin him from doing so this suit was brought by the Ice Company. Liebmann contends that the manufacture of ice for sale and distribution is not a public business; that it is a private business and, indeed, a common
calling; that the right to engage in a common calling is one of the fundamental liberties guaranteed by the due process clause; and that to make his right to engage in that calling dependent upon a finding of public necessity deprives him of liberty and property in violation of the Fourteenth Amendment.

First. The Oklahoma statute makes entry into the business of manufacturing ice for sale and distribution dependent, in effect, upon a certificate of public convenience and necessity. Such a certificate was unknown to the common law. It is a creature of the machine age, in which plants have displaced tools and businesses are substituted for trades. The purpose of requiring it is to promote the public interest by preventing waste. Particularly in those businesses in which interest and depreciation charges on plant constitute a large element in the cost of production, experience has taught that the financial burdens incident to unnecessary duplication of facilities are likely to bring high rates and poor service. There, cost is usually dependent, among other things, upon volume; and division of possible patronage among competing concerns may so raise the unit cost of operation as to make it impossible to provide adequate service at reasonable rates. The introduction in the United States of the certificate of public convenience and necessity marked the growing conviction that under certain circumstances free competition might be harmful to the community and that, when it was so, absolute freedom to enter the business of one's choice should be denied.

Long before the enactment of the Oklahoma statute here challenged a like requirement had become common in the United States in some lines of business. The certificate was required first for railroads; then for street railways; then for other public utilities whose operation is dependent upon the grant of some special privilege . . .

Second. Oklahoma declared the business of manufacturing ice for sale and distribution a "public business," that is, a public utility. So far as appears, it was the first State to do so. Of course, a legislature cannot by mere legislative fiat convert a business into a public utility. But the conception of a public utility is not static. The welfare of the community may require that the business of supplying ice be made a public utility, as well as the business of supplying water or any other necessary commodity or service. If the business is, or can be made, a public utility, it must be possible to make the issue of a certificate a requisite to engaging in it.

Whether the local conditions are such as to justify converting a pri-
Private business into a public one is a matter primarily for the determination of the state legislature. Its determination is subject to judicial review; but the usual presumption of validity attends the enactment. The action of the State must be held valid unless clearly arbitrary, capricious or unreasonable. "The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference." Whether the grievances are real or fancied, whether the remedies are wise or foolish, are not matters about which the Court may concern itself. "Our present duty is to pass upon the statute before us, and if it has been enacted upon a belief of evils that is not arbitrary we cannot measure their extent against the estimate of the legislature." A decision that the legislature's belief of evils was arbitrary, capricious and unreasonable may not be made without enquiry into the facts with reference to which it acted.

Third. . . The function of the Court is primarily to determine whether the conditions in Oklahoma are such that the legislature could not reasonably conclude (1) that the public welfare required treating the manufacture of ice for sale and distribution as a "public business"; and (2) that in order to ensure to the inhabitants of some communities an adequate supply of ice at reasonable rates it was necessary to give the Commission power to exclude the establishment of an additional ice plant in places where the community was already well served. Unless the Court can say that the Federal Constitution confers an absolute right to engage anywhere in the business of manufacturing ice for sale, it cannot properly decide that the legislature acted unreasonably without first ascertaining what was the experience of Oklahoma in respect to the ice business. The relevant facts appear, in part, of record. Others are matters of common knowledge to those familiar with the ice business. They show the actual conditions, or the beliefs, on which the legislators acted. In considering these matters we do not, in a strict sense, take judicial notice of them as embodying statements of uncontrovertible facts. Our function is only to determine the reasonableness of the legislature's belief in the existence of evils and in the effectiveness of the remedy provided. In performing this function we have no occasion to consider whether all the statements of fact which may be the basis of the prevailing belief are well-founded; and we have, of course, no right to weigh conflicting evidence.
[A] In Oklahoma a regular supply of ice may reasonably be considered a necessary of life, comparable to that of water, gas and electricity. The climate, which heightens the need of ice for comfortable and wholesome living, precludes resort to the natural product. There, as elsewhere, the development of the manufactured ice industry in recent years has been attended by deep-seated alterations in the economic structure and by radical changes in habits of popular thought and living. Ice has come to be regarded as a household necessity, indispensable to the preservation of food and so to economical household management and the maintenance of health. Its commercial uses are extensive. In urban communities, they absorb a large proportion of the total amount of ice manufactured for sale. The transportation, storage and distribution of a great part of the nation's food supply is dependent upon a continuous, and dependable supply of ice. It appears from the record that in certain parts of Oklahoma a large trade in dairy and other products has been built up as a result of rulings of the Corporation Commission under the Act of 1925, compelling licensed manufacturers to serve agricultural communities; and that this trade would be destroyed if the supply of ice were withdrawn. We cannot say that the legislature of Oklahoma acted arbitrarily in declaring that ice is an article of primary necessity, in industry and agriculture as well as in the household, partaking of the fundamental character of electricity, gas, water, transportation and communication...

In Oklahoma the mechanical household refrigerator is still an article of relative luxury. Legislation essential to the protection of individuals of limited or no means is not invalidated by the circumstance that other individuals are financially able to protect themselves. The businesses of power companies and of common carriers by street railway, steam railroad or motor vehicle fall within the field of public control, although it is possible, for a relatively modest outlay, to install individual power plants, or to purchase motor vehicles for private carriage of passengers or goods. The question whether in Oklahoma the means of securing refrigeration otherwise than by ice manufactured for sale and distribution has become so general as to destroy popular dependence upon ice plants is one peculiarly appropriate for the determination of its legislature and peculiarly inappropriate for determination by this Court, which cannot have knowledge of all the relevant facts.

The business of supplying ice is not only a necessity, like that of supplying food or clothing or shelter, but the legislature could also consider that it is one which lends itself peculiarly to monopoly. Charac-
characteristically the business is conducted in local plants with a market narrowly limited in area, and this for the reason that ice manufactured at a distance cannot effectively compete with a plant on the ground. In small towns and rural communities the duplication of plants, and in larger communities the duplication of delivery service, is wasteful and ultimately burdensome to consumers. At the same time the relative ease and cheapness with which an ice plant may be constructed exposes the industry to destructive and frequently ruinous competition. Competition in the industry tends to be destructive because ice plants have a determinate capacity, and inflexible fixed charges and operating costs, and because in a market of limited area the volume of sales is not readily expanded. Thus, the erection of a new plant in a locality already adequately served often causes managers to go to extremes in cutting prices in order to secure business. Trade journals and reports of association meetings of ice manufacturers bear ample witness to the hostility of the industry to such competition, and to its unremitting efforts, through trade associations, informal agreements, combination of delivery systems, and in particular through the consolidation of plants, to protect markets and prices against competition of any character.

That these forces were operative in Oklahoma prior to the passage of the Act under review, is apparent from the record. Thus, it was testified that in only six or seven localities in the State containing, in the aggregate, not more than 235,000 of the total population of approximately 2,000,000, was there "a semblance of competition"; and that even in those localities the prices of ice were ordinarily uniform. The balance of the population was, and still is, served by companies enjoying complete monopoly. Where there was competition, it often resulted to the disadvantage rather than the advantage of the public, both in respect to prices and to service. Some communities were without ice altogether, and the State was without means of assuring their supply. There is abundant evidence of widespread dissatisfaction with ice service prior to the Act of 1925, and of material improvement in the situation subsequently. It is stipulated in the record that the ice industry as a whole in Oklahoma has acquiesced in and accepted the Act and the status which it creates.

[B] The statute under review rests not only upon the facts just detailed but upon a long period of experience in more limited regulation dating back to the first year of Oklahoma's statehood. For 17 years prior to the passage of the Act of 1925, the Corporation Commission under §13 of the Act of June 10, 1908, had exercised jurisdiction over the rates,
practices and service of ice plants, its action in each case, however, being predicated upon a finding that the company complained of enjoyed a "virtual monopoly" of the ice business in the community which it served . . . By formal orders, the Commission repeatedly fixed or approved prices to be charged in particular communities; required ice to be sold without discrimination and to be distributed as equitably as possible to the extent of the capacity of the plant; forbade short weights and ordered scales to be carried on delivery wagons and ice to be weighed upon the customer's request; and undertook to compel sanitary practices in the manufacture of ice and courteous service of patrons. Many of these regulations, other than those fixing prices, were embodied in a general order to all ice companies, issued July 15, 1921, and are still in effect. Informally, the Commission adjusted a much greater volume of complaints of a similar nature. It appears from the record that for some years prior to the Act of 1925 one day of each week was reserved by the Commission to hear complaints relative to the ice business . . .

Fourth. Can it be said in the light of these facts that it was not an appropriate exercise of legislative discretion to authorize the Commission to deny a license to enter the business in localities where necessity for another plant did not exist? The need of some remedy for the evil of destructive competition, where competition existed, had been and was widely felt. Where competition did not exist, the propriety of public regulation had been proven. Many communities were not supplied with ice at all. The particular remedy adopted was not enacted hastily. The statute was based upon a long-established state policy recognizing the public importance of the ice business, and upon 17 years' legislative and administrative experience in the regulation of it. The advisability of treating the ice business as a public utility and of applying to it the certificate of convenience and necessity had been under consideration for many years. Similar legislation had been enacted in Oklahoma under similar circumstances with respect to other public services. The measure bore a substantial relation to the evils found to exist. Under these circumstances, to hold the Act void as being unreasonable, would, in my opinion involve the exercise not of the function of judicial review, but the function of a super-legislature . . .

Fifth. The claim is that manufacturing ice for sale and distribution is a business inherently private, and, in effect, that no state of facts can justify denial of the right to engage in it. To supply one's self with water, electricity, gas, ice or any other article, is inherently a matter of pri-
vate concern. So also may be the business of supplying the same articles to others for compensation. But the business of supplying to others, for compensation, any article or service whatsoever may become a matter of public concern. Whether it is, or is not, depends upon the conditions existing in the community affected. If it is a matter of public concern, it may be regulated, whatever the business. The public's concern may be limited to a single feature of the business, so that the needed protection can be secured by a relatively slight degree of regulation. Such is the concern over possible incompetence, which dictates the licensing of dentists, or the concern over possible dishonesty, which led to the licensing of auctioneers or hawkers. On the other hand, the public's concern about a particular business may be so pervasive and varied as to require constant detailed supervision and a very high degree of regulation. Where this is true, it is common to speak of the business as being a "public" one, although it is privately owned. It is to such businesses that the designation "public utility" is commonly applied; or they are spoken of as "affected with a public interest."

Sixth. It is urged specifically that manufacturing ice for sale and distribution is a common calling; and that the right to engage in a common calling is one of the fundamental liberties guaranteed by the due process clause. To think of the ice-manufacturing business as a common calling is difficult; so recent is it in origin and so peculiar in character . . .

It is settled that the police power commonly invoked in aid of health, safety and morals, extends equally to the promotion of the public welfare . . . While, ordinarily, free competition in the common callings has been encouraged, the public welfare may at other times demand that monopolies be created. Upon this principle is based our whole modern practice of public utility regulation. It is no objection to the validity of the statute here assailed that it fosters monopoly. That, indeed, is its design. The certificate of public convenience and invention is a device a recent social-economic invention—through which the monopoly is kept under effective control by vesting in a commission the power to terminate it whenever that course is required in the public interest. To grant any monopoly to any person as a favor is forbidden even if terminable. But where, as here, there is reasonable ground for the legislative conclusion that in order to secure a necessary service at reasonable rates, it may be necessary to curtail the right to enter the calling, it is, in my opinion, consistent with the due process clause to do so, what-
ever the nature of the business. The existence of such power in the legislature seems indispensable in our ever-changing society...

Eighth. The people of the United States are now confronted with an emergency more serious than war. Misery is wide-spread, in a time, not of scarcity, but of over-abundance. The long-continued depression has brought unprecedented unemployment, a catastrophic fall in commodity prices and a volume of economic losses which threatens our financial institutions. Some people believe that the existing conditions threaten even the stability of the capitalistic system. Economists are searching for the causes of this disorder and are reexamining the bases of our industrial structure. Business men are seeking possible remedies. Most of them realize that failure to distribute widely the profits of industry has been a prime cause of our present plight. But rightly or wrongly, many persons think that one of the major contributing causes has been unbridled competition. Increasingly, doubt is expressed whether it is economically wise, or morally right, that men should be permitted to add to the producing facilities of an industry which is already suffering from over-capacity. In justification of that doubt, men point to the excess-capacity of our productive facilities resulting from their vast expansion without corresponding increase in the consumptive capacity of the people. They assert that through improved methods of manufacture, made possible by advances in science and invention and vast accumulation of capital, our industries had become capable of producing from thirty to one hundred per cent. more than was consumed even in days of vaunted prosperity; and that the present capacity will, for a long time, exceed the needs of business. All agree that irregularity in employment—the greatest of our evils—cannot be overcome unless production and consumption are more nearly balanced. Many insist there must be some form of economic control. There are plans for proration. There are many proposals for stabilization. And some thoughtful men of wide business experience insist that all projects for stabilization and proration must prove futile unless, in some way, the equivalent of the certificate of public convenience and necessity is made a prerequisite to embarking new capital in an industry in which the capacity already exceeds the production schedules.

Whether that view is sound nobody knows. The objections to the proposal are obvious and grave. The remedy might bring evils worse than the present disease. The obstacles to success seem insuperable. The economic and social sciences are largely uncharted seas. We have been none too successful in the modest essays in economic control al-
ready entered upon. The new proposal involves a vast extension of the area of control. Merely to acquire the knowledge essential as a basis for the exercise of this multitude of judgments would be a formidable task; and each of the thousands of these judgments would call for some measure of prophecy. Even more serious are the obstacles to success inherent in the demands which execution of the project would make upon human intelligence and upon the character of men. Man is weak and his judgment is at best fallible.

Yet the advances in the exact sciences and the achievements in invention remind us that the seemingly impossible sometimes happens. There are many men now living who were in the habit of using the age-old expression: "It is as impossible as flying." The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation. In those fields experimentation has, for two centuries, been not only free but encouraged. Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science; and to the discouragement to which proposals for betterment there have been subjected otherwise. There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the States which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts.

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.
Florida imposed heavier license fees on stores that were part of multicity county chains than on independent shops or groups of independently owned stores that operated as cooperatives. Brandeis was convinced that both businesses and consumers ought to be organized into cooperatives. He used the occasion of his dissent to reiterate the social and economic problems caused by corporations by presenting a parade of facts, backed up by copious quotes from and references to books and articles by economists, congressional hearings, and government reports.

MR. JUSTICE BRANDEIS, dissenting in part.

The Florida law is general in its terms. It prohibits the operation of any retail store without securing annually a license; and provides, among other things, for annual fees which are in part graduated. If the owner operates only one store the state fee is $5; if more than one, the fee for the additional stores rises by step increases, dependent upon both the number operated and whether all operated are located in a single county. The highest fee is for a store in excess of 75. If all of the stores are located in a single county, the fee for each store in excess of 75 is $40; if all are not located in the same county the fee is $50. Under this law, the owner of 100 stores not located in a single county pays for each store operated, on the average, $33.65; and if they were located in a single county the owner would pay for each store, on the average, $25.20. If the 100 stores were independently owned (although operated cooperatively as a so-called "voluntary chain") the annual fee for each would be only $5...

The plaintiffs are thirteen corporations which engage in Florida exclusively in intrastate commerce. Each (except one) owns and operates a chain of retail stores within the State and some operate stores in more than one county...

If a State believes that adequate protection against harm apprehended or experienced can be secured, without revoking the corporate privilege, by imposing thereafter upon corporations the handicap of higher, discriminatory license fees as compensation for the privilege, I know of nothing in the Fourteenth Amendment to prevent it from making the experiment...

Whether the citizens of Florida are wise in seeking to discourage the operation of chain stores is, obviously, a matter with which this Court...
has no concern. Nor need it, in my opinion, consider whether the differences in license fees employed to effect such discouragement are inherently reasonable, since the plaintiffs are at liberty to refuse to pay the compensation demanded for the corporate privilege and withdraw from the State, if they consider the price more than the privilege is worth. But a review of the legislation of the several States by which all restraints on corporate size and activity were removed, and a consideration of the economic and social effects of such removal, will help to an understanding of Anti-Chain Store Laws; and will show that the discriminatory license fees prescribed by Florida, even if treated merely as a form of taxation, were laid for a purpose which may be appropriately served by taxation, and that the specific means employed to favor the individual retailer are not constitutionally objectionable.

Second. The prevalence of the corporation in America has led men of this generation to act, at times, as if the privilege of doing business in corporate form were inherent in the citizen; and has led them to accept the evils attendant upon the free and unrestricted use of the corporate mechanism as if these evils were the inescapable price of civilized life and, hence, to be borne with resignation. Throughout the greater part of our history a different view prevailed. Although the value of this instrumentality in commerce and industry was fully recognized, incorporation for business was commonly denied long after it had been freely granted for religious, educational and charitable purposes. It was denied because of fear. Fear of encroachment upon the liberties and opportunities of the individual. Fear of the subjection of labor to capital. Fear of monopoly. Fear that the absorption of capital by corporations, and their perpetual life, might bring evils similar to those which attended mortmain.

There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations. So, at first, the corporate privilege was granted sparingly; and only when the grant seemed necessary in order to procure for the community some specific benefit otherwise unattainable. The later enactment of general incorporation laws does not signify that the apprehension of corporate domination had been overcome. The desire for business expansion created an irresistible demand for more charters; and it was believed that under general laws embodying safeguards of universal application the scandals and favoritism incident to special incorporation could be avoided. The general laws, which long embodied severe restrictions upon size
and upon the scope of corporate activity, were, in part, an expression of the desire for equality of opportunity . . .

(a) Limitation upon the amount of the authorized capital of business corporations was long universal . . . (b) Limitations upon the scope of a business corporation's powers and activity were also long universal . . . (c) The removal by the leading industrial States of the limitations upon the size and powers of business corporations appears to have been due, not to their conviction that maintenance of the restrictions was undesirable in itself, but to the conviction that it was futile to insist upon them; because local restriction would be circumvented by foreign incorporation. Indeed, local restriction seemed worse than futile. Lesser States, eager for the revenue derived from the traffic in charters, had removed safeguards from their own incorporation laws. Companies were early formed to provide charters for corporations in states where the cost was lowest and the laws least restrictive. The states joined in advertising their wares. The race was not one of diligence but of laxity. Incorporation under such laws was possible; and the great industrial States yielded in order not to lose wholly the prospect of the revenue and the control incident to domestic incorporation.

Third. Able, discerning scholars have pictured for us the economic and social results of thus removing all limitations upon the size and activities of business corporations and of vesting in their managers vast powers once exercised by stockholders—results not designed by the States and long unsuspected. They show that size alone gives to giant corporations a social significance not attached ordinarily to smaller units of private enterprise. Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business, have become an institution—an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the State. The typical business corporation of the last century, owned by a small group of individuals, managed by their owners, and limited in size by their personal wealth, is being supplanted by huge concerns in which the lives of tens or hundreds of thousands of employees and the property of tens or hundreds of thousands of investors are subjected, through the corporate mechanism, to the control of a few men. Ownership has been separated from control, and this separation has removed many of the checks which formerly operated to curb the misuse of wealth and power. And as ownership of the shares is becoming continually more dispersed, the power which formerly accompanied ownership is becoming increasingly con-
The changes thereby wrought in the lives of the workers, of the owners and of the general public, are so fundamental and far-reaching as to lead these scholars to compare the evolving "corporate system" with the feudal system; and to lead other men of insight and experience to assert that this "master institution of civilized life" is committing it to the rule of a plutocracy.

The data submitted in support of these conclusions indicate that in the United States the process of absorption has already advanced so far that perhaps two-thirds of our industrial wealth has passed from individual possession to the ownership of large corporations whose shares are dealt in on the stock exchange; that 200 non-banking corporations, each with assets in excess of $90,000,000, control directly about one-fourth of all our national wealth, and that their influence extends far beyond the assets under their direct control; that these 200 corporations, while nominally controlled by about 2,000 directors are actually dominated by a few hundred persons—the negation of industrial democracy. Other writers have shown that, coincident with the growth of these giant corporations, there has occurred a marked concentration of individual wealth, and that the resulting disparity in incomes is a major cause of the existing depression. Such is the Frankenstein monster which States have created by their corporation laws.

Fourth. Among these 200 corporations, each with assets in excess of $90,000,000, are five of the plaintiffs. These five have in the aggregate, $820,000,000 of assets; and they operate, in the several States, an aggregate of 19,718 stores. A single one of these giants operates nearly 16,000. Against these plaintiffs, and other owners of multiple stores, the individual retailers of Florida are engaged in a struggle to preserve their independence—perhaps a struggle for existence. The citizens of the State, considering themselves vitally interested in this seemingly unequal struggle, have undertaken to aid the individual retailers by subjecting the owners of multiple stores to the handicap of higher license fees. They may have done so merely in order to preserve competition. But their purpose may have been a broader and deeper one. They may have believed that the chain store, by furthering the concentration of wealth and of power and by promoting absentee ownership, is thwarting American ideals; that it is making impossible equality of opportunity; that it is converting independent tradesmen into clerks; and that it is sapping the resources, the vigor and the hope of the smaller cities and towns . . .

The purpose of the Florida statute is not, like ordinary taxation,
merely to raise revenue. Its main purpose is social and economic. The chain store is treated as a thing menacing the public welfare. The aim of the statute, at the lowest, is to preserve the competition of the independent stores with the chain stores; at the highest, its aim is to eliminate altogether the corporate chain stores from retail distribution. The legislation reminds of that by which Florida and other States, in order to eliminate the "premium system" in merchandising, exacted high license fees of merchants who offered trading stamps with their goods.

The plaintiffs discuss the broad question whether the power to tax may be used for the purpose of curbing, or of exterminating, the chain stores by whomsoever owned. It is settled that a State "may carry out a policy" by "adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry." And since the Fourteenth Amendment "was not intended to compel the State to adopt an iron rule of equal taxation," it may exempt from taxation kinds of business which it wishes to promote; and may burden more heavily kinds of business which it wishes to discourage. It protects, by the oleomargarine laws, our farmers and dairymen from the competition of other Americans. It eliminated, by a prohibitive tax, the issue of state bank notes in competition with those of national banks. Such is the constitutional power of Congress and of the state legislatures. The wisdom of its exercise is not the concern of this Court...

The requirement of the equality clause that classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation," is here satisfied... The size of estates, or of bequests, is the difference on which rest all the progressive inheritance taxes of the States and of the Nation. Differences in the size of incomes is the basis on which rest all progressive income taxes. Differences in the size of businesses present, likewise, an adequate basis for different rates of taxation. And so do differences in the extent or field of operation...

The State's power to apply discriminatory taxation as a means of preventing domination of intrastate commerce by capitalistic corporations is not conditioned upon the existence of economic need. It flows from the broader right of Americans to preserve, and to establish from time to time, such institutions, social and economic, as seem to them desirable; and, likewise, to end those which they deem undesirable. The State might, if conditions warranted, subject giant corporations to a control similar to that now exerted over public utility companies. Or,
the citizens of Florida might conceivably escape from the domination of giant corporations by having the State engage in business. But Americans seeking escape from corporate domination have open to them under the Constitution another form of social and economic control—one more in keeping with our traditions and aspirations. They may prefer the way of cooperation, which leads directly to the freedom and the equality of opportunity which the Fourteenth Amendment aims to secure. That way is clearly open. For the fundamental difference between capitalistic enterprise and the cooperative between economic absolutism and industrial democracy—is one which has been commonly accepted by legislatures and the courts as justifying discrimination in both regulation and taxation.

There is a widespread belief that the existing unemployment is the result, in large part, of the gross inequality in the distribution of wealth and income which giant corporations have fostered; that by the control which the few have exerted through giant corporations, individual initiative and effort are being paralyzed, creative power impaired and human happiness lessened; that the true prosperity of our past came not from big business, but through the courage, the energy and the resourcefulness of small men; that only by releasing from corporate control the faculties of the unknown many, only by reopening to them the opportunities for leadership, can confidence in our future be restored and the existing misery be overcome; and that only through participation by the many in the responsibilities and determinations of business, can Americans secure the moral and intellectual development which is essential to the maintenance of liberty. If the citizens of Florida share that belief, I know of nothing in the Federal Constitution which precludes the State from endeavoring to give it effect and prevent domination in intrastate commerce by subjecting corporate chains to discriminatory license fees. To that extent, the citizens of each State are still masters of their destiny.