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Islands of Conscious Power: Louis D. Brandeis and the Modern Corporation

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Richard P. Adelstein

“Islands of Conscious Power”: Louis D. Brandeis and the Modern Corporation

In this examination of the beliefs of Louis Brandeis about the twentieth-century corporation, we are given a paradoxical portrait of a man strongly committed to individual liberty and fulfillment who nevertheless became an outspoken advocate of Taylorism. By tracing Brandeis's views on the law and economics of the corporation and placing them against the jurist's belief in the primacy of society's needs, the article reveals the complexities and contradictions in Brandeis's thought as he struggled to visualize an order in which the interests of individuals and society would be identical.

“Two souls,” wrote Dorothy Thompson in 1938, “dwell in the bosom . . . of the American people. The one loves the Abundant Life, as expressed in the cheap and plentiful products of large-scale mass production and distribution . . . The other soul yearns for former simplicities, for decentralization, for the interests of the ‘little man,’ revolts against high-pressure salesmanship, denounces ‘monopoly’ and ‘economic empires,’ and seeks means of breaking them up.”¹ Throughout his long and distinguished public life, Louis Dembitz Brandeis seemed, more than any other American, the authoritative voice of this “other soul,” the keeper of Thomas Jefferson's faith in “little men and little institutions.”² Born in 1856, educated in Dresden and at the Harvard Law School, Brandeis had won wealth and standing in Boston's cultural elite by the age of forty through his bril-

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¹ *New York Herald Tribune*, 24 Jan. 1938, quoted in Ellis W. Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (Princeton, N.J., 1966), 472.

² Alpheus Thomas Mason, *Brandeis: A Free Man's Life* (New York, 1946), 5.

liant representation of corporate interests. But after 1900, he turned his talents and his passion for justice vehemently against these interests. First as "the people's attorney" in a variety of causes and then, for twenty-three years after his appointment to the Supreme Court in 1916, from the "highest Bench of the world," he became the indefatigable champion of small enterprise, attacking the power of the trusts and freely invoking the authority of the state to sustain the regime of competition he believed that power was destroying.³

The persistence and rigor of his advocacy and the austere rectitude he brought to it led Franklin D. Roosevelt to refer to Brandeis affectionately as "Isaiah" and, in the last decade of his life, inspired admiring, even adulatory, portraits by Alfred Lief and a young Alpheus Mason, who in 1946 produced the full-scale biography that stood for some forty years as definitive.⁴ Following the publication of Brandeis's voluminous correspondence in 1978, several new and comprehensive studies appeared, each sharing Mason's sympathy for his subject and his emphasis on the consistency of Brandeis's liberal values, the self-assurance with which he promoted them, and the coherence of his political and economic philosophy.⁵ John Thomas has aptly called this philosophy an "intense libertarianism," but beyond a deeply felt commitment to the autonomy and personal development of the individual in all aspects of social life, Brandeis's creed has little in common with the simple, often naïve, hostility to the state that characterizes much of libertarian thought in our own day.⁶ At the core were the ideas of decentralization and privacy; throughout his life, Brandeis stood foursquare behind the economic claims of the independent agent against those of the corporation and the trust, the prerogatives of the states and municipalities against the federal government, and the right of each citizen "to be let alone" by the state, "the most

³ Quoted (1920) in Leonard Baker, *Brandeis and Frankfurter: A Dual Biography* (New York, 1984), 179.

⁴ Mason, *Brandeis: A Free Man's Life*, 597, 636; Alfred Lief, *Brandeis: The Personal History of an American Ideal* (New York, 1936); Alpheus Thomas Mason, *Brandeis: Lawyer and Judge in the Modern State* (Princeton, N.J., 1933).

⁵ Melvin I. Urofsky and David W. Levy, eds., *Letters of Louis D. Brandeis*, 5 vols. (Albany, 1971-78) [hereafter *Letters*]. In addition to a study of Zionism in America in which Brandeis plays a central role, *American Zionism from Herzl to the Holocaust* (Garden City, N.Y., 1975), Urofsky has collected two sets of interpretative essays in *A Mind of One Piece: Brandeis and American Reform* (New York, 1971); and *Louis D. Brandeis and the Progressive Tradition* (Boston, 1981); Lewis J. Paper, *Brandeis* (Englewood Cliffs, N.J., 1983); Philippa Strum, *Louis D. Brandeis: Justice for the People* (Cambridge, Mass., 1984); see also Baker, *Brandeis and Frankfurter*; Melvin I. Urofsky, "The Conservatism of Mr. Justice Brandeis," *Modern Age* 23 (Winter 1979): 39-48.

⁶ John L. Thomas, "Louis Brandeis's Utopia," *Reviews in American History* 13 (1985): 97.

comprehensive of rights and right most valued by civilized men.”⁷ But against these rights he insisted on the individual responsibility of free men and women and on the recognition of their obligations to others. “All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community,” he wrote, and that the instrument of government could and should be creatively employed to enforce that duty, he had no doubt.⁸ “His activity,” wrote the editors of his letters, “in all its phases, was united by a set of unwavering assumptions and goals to preserve democracy and individual opportunity in an industrialized America.”⁹ To Paul Freund, he was “a mind of one piece.”¹⁰

But critical voices have been heard as well. As early as 1962, Richard Abrams gently suggested the “inadequacy” of Brandeis’s analysis of the issues in the bitter struggle over the New Haven railroad merger.¹¹ Nine years later, discussing Brandeis’s role in the eastern rate hearings of 1910, Albro Martin was less charitable. Seeing “a certain intellectual coarseness in Brandeis’ grasp of the workings of the capitalistic economy,” Martin accused the people’s lawyer of “devotion to a set of economic and social doctrines which were at best rather old-fashioned and at worst distinctly inimical to the interests of the very people whom he claimed to represent.” Brandeis lacked the “analytical mind of the economist . . . and his eagerness to employ the crushing power of government to bring back a past that never was is poignantly self-contradictory in its authoritarian, father-knows-best fervor.”¹²

But the informed and penetrating critical analysis of Thomas McCraw, developed in a series of works published between 1981 and 1985, is more telling.¹³ Drawing perceptively on recent developments in economic theory to distinguish “center” from “peripheral” firms and horizontal from vertical integration, McCraw argues that Bran-

⁷ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

⁸ *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 488 (1921) (Brandeis, J., dissenting).

⁹ *Letters*, I: xxxii.

¹⁰ Quoted in Urofsky, *A Mind of One Piece*, xii.

¹¹ Richard M. Abrams, “Brandeis and the New Haven–Boston & Maine Merger Battle Revisited,” *Business History Review* 36 (Winter 1962): 411, 429.

¹² Albro Martin, *Enterprise Denied: Origins of the Decline of American Railroads, 1897–1917* (New York, 1971), 160, 217, 222.

¹³ Thomas K. McCraw, “Rethinking the Trust Question,” in *Regulation in Perspective: Historical Essays*, ed., Thomas K. McCraw (Cambridge, Mass., 1981), 1–55; McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis and Alfred E. Kahn* (Cambridge, Mass., 1984); McCraw, “Louis D. Brandeis Reappraised,” *American Scholar* 54 (1985): 525–36.



Louis D. Brandeis, 1910s • As both social reformer and jurist, Brandeis strongly supported the “little people” and individual fulfillment, yet his attraction to a kind of collectivist utopia is apparent in his embrace of Taylorism and Zionism. (Photograph reproduced courtesy of the Special Collections Department, Brandeis University Archives.)

deis’s failure to grasp these distinctions “fed his confusion concerning how and why big businesses evolved, which business practices would or would not help consumers, and which types of organizations were or were not efficient.”¹⁴ At the base of this confusion was Brandeis’s tenacious commitment to smallness, an “anti-modern ideology” prepared to sacrifice the interests of the majority of consumers

¹⁴ McCraw, “Rethinking the Trust Question,” 36.

to the preservation, on political grounds, of inefficiently small units of production threatened by inexorable pressures toward concentration. In the end, Brandeis's refusal to separate social science from moral philosophy, his readiness to tailor his economics to his "aesthetic preference for small size," overwhelmed his formidable analytical powers at the brink of conceptual breakthrough and, in coloring his perception of economic reality, "doomed to superficiality both his diagnosis and his prescription."¹⁵

I propose here to take issue with both these constellations of opinion. I hope first to show that, fairly examined in their proper place in the history of American economic thought, Brandeis's ideas about size and concentration in industry encompass elements of fruitful originality and strikingly modern insight. Indeed, Brandeis's suggestion, made in the face of potent contemporary opinion to the contrary, that the spontaneous "centripetal forces" driving the industrial corporation toward tightly hierarchical forms of internal organization are themselves naturally opposed by "centrifugal" forces whose magnitude increases with the size of the firm, and that the balance of these pressures imposes natural limits on the growth of the enterprise, contains the seeds of the very theory of industrial organization on which McCraw's critique itself is based.¹⁶ McCraw, moreover, seems not to recognize the extent to which personal values and political preferences intruded on all economic analysis at the turn of the century and overstates the degree to which economists in our own time have succeeded in separating the positive from the normative in economic discourse. Brandeis came to intellectual maturity before the ideal of objective social science had fully replaced the older conception of political economy as moral philosophy, and even those pressing hardest for the reformulation of economic theory as an experimental science, the American disciples of German historicism, were driven by the imperatives of social justice as they perceived them. Like Brandeis, they were drawn to just those theoretical questions suggested by their own normative evaluations of social life and conditions, and their solutions reflect the particular moral and political values they brought to the inquiry, quite independently of what subsequent history or theory might show

¹⁵ McCraw, "Brandeis Reappraised," 527–28; McCraw, "Rethinking the Trust Question," 33–34, 36–46, 54.

¹⁶ Statement of 14 December 1911, before the Committee on Interstate Commerce, United States Senate, *Hearings on Control of Corporations, Persons, and Firms Engaged in Interstate Commerce*, 62d Cong., 2d sess., 1911, 1146–1291, at 1147–48. The relevant passage is quoted in full in Alfred Lief, ed., *The Brandeis Guide to the Modern World* (Boston, 1941), 22–24.

to have been the "right" answers. Nor, finally, is McCraw himself free from this conflation of science and politics. His conclusions too derive from a set of explicit value judgments and a corresponding conceptual vocabulary that, unlike those of Brandeis, see the creation of material wealth as the touchstone of economic life and relegate those qualitative aspects of economic organization that speak to the autonomy and moral development of the individual to irrelevance. If, from this perspective, McCraw is able to identify genuine shortcomings in Brandeis's analysis, his indifference to the normative concerns most important to Brandeis blinds him to its equally real achievements.

But I shall also argue here that, far from being the embodiment of coherent, consistent liberal values that his biographers have portrayed, Brandeis was a social theorist of deeply contradictory impulses who mirrored precisely the American dilemma described by Dorothy Thompson. Toward this end, I separate Brandeis's thinking on economic matters into three useful, if informal, categories. Two of them, a jurisprudential component based on a moral commitment to personal responsibility and the flowering of individuality as the necessary prerequisites to democracy, and a more explicitly economic approach to concentration that distinguishes between monopoly and bigness and directs its primary attack against bigness as such, are satisfyingly consistent and together form a seamless political economy that, though not without its difficulties, still has much to offer us today. But the third, managerial, component of Brandeis's thought, an uncharacteristic, seemingly uncritical attraction to Frederick Winslow Taylor's system of scientific management, implicitly denies the individual development at the core of the jurisprudential component and exalts the very exercise of power in industrial hierarchies that his economic prescriptions were intended to minimize.

This attachment was neither an aberration nor a passing infatuation. It was rather the first sustained expression of Brandeis's mature aspirations for the good society, aspirations that found their fullest expression in his understanding of the meaning of Zionism for free men and women and that raise troubling questions about the nature of the individuality and moral development to which he seemed so devoted. Strongly attracted by the claim that Taylor's system could identify the common interest of worker and owner and show how to achieve it, and at a moment in his own life when immersion in the labor problems and *Yiddishkeit* of New York's garment trade brought hard questions of religious identity to the front of his mind, Brandeis began with increasing seriousness to ponder the meaning

of the “common good.” But where Taylor himself saw the firm as a social machine and adopted an unapologetically authoritarian managerial philosophy, Brandeis’s intensifying identification with the Zionist cause and his own Jewishness drew him closer to an organismic view of social existence and managerial relations shared by many intellectuals of his day and more properly understood as collectivist than authoritarian. In the Zion of his imagination, every citizen would instinctively recognize the common good and cheerfully accept the direction of superiors to do his or her part in realizing it. The needs of the whole would dominate the desires of the self in the consciousness of every free man and woman; the will to cooperate would replace the urge to compete. In the end, their freedom would be Lenin’s, not Jefferson’s.

A Mere Artificial Being

In the laboratory of American federalism, the first tentative experiments in limited liability began in 1811, when New York allowed free incorporation for some business purposes.¹⁷ But partnerships and proprietorships remained the predominant forms of business organization well into the nineteenth century, and in the typical manufacturing enterprise of these years the costs of fixed capital were small relative to those of labor and materials.¹⁸ Expensive machines and buildings were seldom required, so the ordinary citizen could not only realistically aspire to his own small business or shop, but could also easily shut down and reopen as conditions dictated. Business relationships were fluid, new partnerships constantly formed and reformed. Failures were frequent, but despite the law’s demand that every principal assume unlimited liability for the debts of the business, the consequences of bankruptcy were rarely devastating, and unless the scent of dishonesty rather than mere foolishness or bad luck surrounded him, the bankrupt found it easy to start over. The prevalence of small enterprise, the openness of the land, and the ease with which even the commonest of white men could start a business fostered the independence and responsibility that so impressed Alexis de Tocqueville. In these small, family-centered firms, every person could see

¹⁷ James Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States, 1780–1970* (Charlottesville, Va., 1970), 134; *Liggett v. Lee*, 288 U.S. 517, 548 (1933) (Brandeis, J., dissenting).

¹⁸ Glenn Porter, *The Rise of Big Business, 1860–1910* (Arlington Heights, Ill., 1973), 10–11.

just what each was contributing, and working relationships marked by respect and dignity developed easily. Work was ordinarily done near the home of a master artisan, who took personal responsibility for feeding and housing his help. For all the material hardship and uncertainty they endured and accepted as a natural part of life, Americans in the early nineteenth century enjoyed qualitative aspects of working life hard to recognize today. Power in the shop, and even in the modest factories of the era, was necessarily leavened by reciprocal obligation; masters were not yet “bosses,” apprentices and journeymen not yet “workers.”¹⁹

But by midcentury, technology had begun to make possible the mass production of material wealth at prices ordinary people could afford and to turn small enterprises into fodder for huge industrial combines. Because costs fell so dramatically at the scale of operations demanded by the new machines and processes, firms producing the same goods rapidly merged, and the intensifying need for stable supplies and outlets caused by the declining number of competitors drove the new companies to swallow previously independent suppliers and distributors as well.²⁰ Combinations grew and flourished, but as they transformed independent artisans and merchants into workers and clerks, it was certain that the new order would be strongly resisted by those for whom economic opportunity and self-reliance were still the animating ideals of the American experiment. One of these was Louis Brandeis. “Remember,” he wrote informally in 1922, “. . . that always and everywhere the intellectual, moral and spiritual development of those concerned will remain an essential—and the main factor—in real betterment.”

This development of the individual is, thus, both a necessary means and the end sought. For our objective is the making of men and women who shall be free—self-respecting members of a democracy—and who shall be worthy of respect. Improvement in material conditions of the worker and ease are the incidents of better conditions—valuable mainly as they may ever increase opportunities for development. The greater developer is responsibility. Hence, no remedy can be hopeful which does not devolve upon the workers’ [*sic*] participation in, responsibil-

¹⁹ Alfred D. Chandler, Jr., *The Visible Hand: The Managerial Revolution in American Business* (Cambridge, Mass., 1977), 8, 36–38, 50–53, 58–60, 67–72; Porter, *Rise of Big Business*, 8–9, 20–22, 29–31; Alexis de Tocqueville, *Democracy in America*, ed. Phillips Bradley (1840; New York, 1945), 2: 163–67, 187–95.

²⁰ Chandler, *The Visible Hand*, 75–77, 189, 209–83. See also McCraw’s insightful discussion of the particular environmental factors that promoted concentration in some industries but not in others. McCraw, *Prophets of Regulation*, 65–79.

ity for, the conduct of business; and their aim should be the eventual assumption of full responsibility—as in cooperative enterprises. This participation in and eventual control of industry is likewise an essential of obtaining justice in distributing the fruits of industry.

But democracy in any sphere is a serious undertaking. It substitutes self-restraint for external restraint. It is more difficult to maintain than to achieve. It demands continuous sacrifice by the individual and more exigent obedience to the moral law than any other form of government. Success in any democratic undertaking must proceed from the individual. It is possible only where the process of perfecting the individual is pursued.²¹

In these few sentences are the central themes of Brandeis's thought. As he struggled with the questions that dominated his long public life, he placed his faith in Jefferson's vision of self-reliant, free citizens joined in small institutions that nurtured their talents and developed their capacities. Would the Americans Tocqueville admired succumb to the alluring but perilous bargain of material wealth for industrial hierarchy now offered by "bigness"? Or could they find a way to enjoy the fruits of industrialism without becoming a "nation of slaves"?²² If there was such a way, Brandeis believed, it lay in economic and political institutions that preserved the crucial links between liberty, democracy, and responsibility forged in a simpler time. Just as increasing scale in politics reduced informed, active citizens to mere voters, the exchange of economic autonomy for the illusion of security produced people "dependent for mere subsistence upon somebody and something else than [their] own exertion and conduct."²³ If Americans were to be free, labor and capital alike must be made responsible, to one another and to the public. Socialism was no solution; if the separation of ownership from control left corporate management unanswerable to shareholders, even democratic socialism at the scale of industrial capitalism would simply replace private owners with an equally passive public. Capital could be made responsible only by

²¹ Brandeis to Robert W. Brùère, 25 Feb. 1922, *Letters*, 5: 45–46.

²² "We cannot reach our goal without those [material] things," Brandeis said early in 1915. "But we may have all those things, and have a nation of slaves. . . . Men must have industrial liberty as well as good wages." Testimony of 23 Jan. 1915, before the Commission on Industrial Regulations, United States Senate, 64th Cong., 1st sess., 1914, 7657–81. Portions reprinted as "On Industrial Relations," in *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis*, ed. Osmond K. Fraenkel (New York, 1934), 70–95, at 81, 80.

²³ "Unfortunately, there is a lack of popular participation in public affairs. The average man is not performing his function as a citizen. . . . The Government gives us ready-made conclusions instead of there being active discussion among the people." Quoted (1940) in Lief, *The Brandeis Guide*, 34; Louis D. Brandeis, "The Road to Social Efficiency (1911)," in *Business—A Profession* (1914; Boston, 1925), 58–59.

labor's participation in its decisions, and unions only through the discipline of legal incorporation.²⁴

But strong unions alone could not make workers "worthy of respect." Responsibility, in the end, was not a quality of collectives, public or private, but of individual men and women, and democracy, in industry as in government, demanded that they accept it.

We must bear in mind all the time, that however much we may desire material improvement and must desire it for the comfort of the individual, that the United States is a democracy, and that we must have, above all things, men. It is the development of manhood to which any industrial and social system should be directed. . . . There must be a division not only of profits, but a division also of responsibilities. The employees must have the opportunity of participating in the decisions as to what shall be their condition and how the business shall be run. They must learn also in sharing that responsibility that they, too, must bear the suffering arising from grave mistakes, just as the employer must. But the right to assist in making the decisions, the right of making their own mistakes, if mistakes there must be, is a privilege which should not be denied to labor.²⁵

All of this, as Jefferson had understood, militated for smallness, the continuous devolution of authority from the center to the periphery in all areas of social life. Law itself must come, where possible, from the states and localities, not just to tame Leviathan but to encourage responsible experimentation in public policy as well.²⁶ In matters of commerce and industry, state government now needed the power to address the imbalance and injustice that inevitably proceed from bigness. And this, in turn, meant that the great constitutional guarantees of due process and equal protection, intended to protect the rights of living men and women, must not be used to shield business organi-

²⁴ On Brandeis's attitudes toward state socialism, see Brandeis to Bruère, 25 Feb. 1922.; Strum, *Louis D. Brandeis*, 72, 145, 181; on organized labor, see Louis D. Brandeis, "The Employer and Trades Unions (1904)," in *Business: A Profession*, 13-27; Brandeis, "How Far Have We Come on the Road to Industrial Democracy? (1913)," in *Curse of Bigness*, 43-47; Brandeis, "The Incorporation of Trades Unions (1902)," in *Business: A Profession*, 88-98; on ownership and control, see, generally, Brandeis, *Other People's Money and How the Bankers Use It* (1914; New York, 1932); Alfred Lief, ed., *The Social and Economic Views of Mr. Justice Brandeis* (New York, 1930), 383-84; Mason, *Brandeis: A Free Man's Life*, 428-32.

²⁵ "On Industrial Relations," 74-75. See also Brandeis to Winthrop Talbot, 16 April 1912, *Letters*, 2: 586-89, at 587; Brandeis to A. Rosenberg, 15 Dec. 1915, *ibid.*, 3: 669; Louis D. Brandeis, "Hours of Labor (1906)," in *Business: A Profession*, 28-36.

²⁶ *New York State Ice Co. v. Liebmann*, 285 U.S. 262, 306-11 (1932) (Brandeis, J., dissenting); Brandeis to Paul U. Kellogg, 7 Nov. 1920, *Letters*, 4: 497-98; Brandeis to Woodrow Wilson, 15 April 1923, *ibid.*, 5: 91. See also Lief, *The Brandeis Guide*, 70; Strum, *Louis D. Brandeis*, 172-73.

zations, particularly corporations, from legislation designed to vindicate those very rights.

For Brandeis, this last point was crucial. Indeed, the idea that constitutional rights might inhere in corporations is far from clear, for the corporation is not a person but an abstraction, a form of organization. Its essence is the complex set of relationships among its stockholders, managers, and employees, and not those individuals themselves. Each of these participants comes to the corporation with different abilities and expectations, and each brings to it his own motives and purposes. They are bound by their reliance on one another for, whatever personal objectives they might hope to realize through the enterprise, none can achieve his own ends without the cooperation of the others. This mutuality of dependence induces each to exchange a measure of personal autonomy and discretion for the discipline of obligation, to abide by more or less well-defined rules of conduct so the others will be able to predict behavior in specific situations and confidently adapt their own to it. Submission to these rules creates an order that enables its participants to cooperate, as it were, in spite of themselves and of the diversity of their interests. All of this amounts to a contract, a set of rules and procedures that governs a limited range of activities and circumstances and regulates the behavior of the people who agree to it.²⁷ And as in any contract, participation is based on consent; any person may enter into the contract if the opportunity presents itself, and once obligations already assumed have been met, any person may leave it.²⁸

The subject of this contract is how various resources will be combined to produce goods for sale, and to the extent that the order it creates results from agreements spontaneously made by self-interested men and women, it can well be understood as a "natural" outcome of the market process. But the terms of the contract must be enforceable, and insofar as the state is the enforcer of last resort, it can, by choosing which provisions it will enforce or prohibit, effectively regulate the scope and content of those contracts. In this sense, then, the particular forms of contractual organization favored by the law are, as Brandeis put it, "man-made" as well, "and that which is man-made can be unmade."²⁹ Nor, of course, do all production contracts create

²⁷ Cf. Ronald Coase, "The Nature of the Firm," *Economica* 4 (1937): 390-92.

²⁸ Compare Brandeis to Lorin F. Deland, 9 Feb. 1895: "A manufacturer is no longer the master of his employee, but an associate. History records first master and slave, then master and servant, then employer and employee, and now they are as associates or contractors." *Letters*, 1: 121.

²⁹ Brandeis to Frank A. Fetter, 26 Nov. 1940, *Letters*, 5: 648.

the special form of organization the law recognizes as a corporation. Both proprietorships and partnerships, for example, had long been treated to some extent as legal entities distinct from their principals, but the links between them and their human counterparts remained very close. Neither form had a continuous existence of its own; each was dissolved by the departure of an owner or partner. Personal bankruptcy, moreover, constantly threatened every business person, for every principal assumed full responsibility for the financial obligations of the business. Not surprisingly, the risks of ambition or innovation in such a world made cardinal virtues of parsimony in investment, modesty in scale, and circumspection in the adoption of untried methods and technologies.

But with the rapid spread of the limited liability corporation after 1850, a decisive step was taken in the conceptual separation of the corporation from its human constituents. Stockholders owned shares in the corporation, but they no longer *were* the corporation in the eyes of the courts or creditors. The corporation took on a legal personality of its own; *it* owned the assets of the business, and *it* was liable for its obligations, even if all the shares were owned by a single person. The corporation itself made the necessary contracts with employees, suppliers, and customers, appearing in court in its own right as plaintiff or defendant as the need arose. With this legal personality came a kind of life, a continuous existence unaffected by the death or ruin of any shareholder or by the transfer of shares from one person to another. Growing businesses of all sorts recognized the virtues of limited liability as a means to the capital they needed. At first the states constrained the privilege of incorporation by limiting both the capitalization of business corporations and the scope of their powers, but as ever more firms sought the advantages of limited liability, their states hurried to accommodate them. Registration was made easier, and with land grants, tax concessions, and the realization of safeguards against fraud as inducements, the states were soon embroiled in an unseemly competition for the corporations' favor and registration fees. Statutes permitting limited liability corporations in manufacturing and commerce were common before the Civil War; after 1875 a general right to incorporate was recognized everywhere, and statutory limits on corporate capital were gradually abandoned.³⁰ Absent an antitrust law specifically attacking size as such, market forces remained the only check on the growth of firms.

³⁰ Arthur S. Miller, *The Modern Corporate State: Private Governments and the American Constitution* (Westport, Conn., 1976), 40; *Liggett v. Lee*, 548–64. See also Hurst, *Legitimacy of the Business Corporation*, 131–39.

As Morton Horwitz has shown, the nineteenth century saw a parallel shift in attitude toward the corporation in the federal courts.³¹ As early as 1819, the Supreme Court had ratified the precedent of common law by conceding both the personality and the immortality of the corporation.³² But despite its recognition that the “great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men,” the Court reflected the popular distrust of the corporation by refusing to endow it with the full range of rights enjoyed by real people, treating it instead as “an artificial being, invisible, intangible, and existing only in contemplation of law.”³³ Since incorporation itself was not a right but a privilege granted by special legislative charter, the artificial entity thus created possessed only those properties and powers that the state chose to give it.³⁴

As a model of the corporation, the artificial entity theory possesses a common sense as accessible to the positivist jurisprudence of the twentieth century as to the natural law theories of the eighteenth.³⁵ Whatever it is, the corporation is manifestly not a living person, and so can possess none of the rights that might be granted to a person by God’s hand or humanity’s constitution. And insofar as the obligations between its constituents can be enforced, if at all, only by the laws of the sovereign, it is perforce a legal creature of the state. But despite its logic and plausibility, the practical possibilities for corruption under the theory were endless, and the private monopolies legislated under it met with deep hostility in the America of Andrew Jackson. The result was the successful movement to replace the regime of special charters and tight legislative control with a new doctrine that recognized the general utility of incorporation and extended its advantages to all citizens as a matter of right.³⁶ But given the size and

³¹ Morton J. Horwitz, “*Santa Clam* Revisited: The Development of Corporate Theory,” *West Virginia Law Review* 88 (1985): 173–224.

³² *Dartmouth College v. Woodward*, 17 U.S. (4 Wheaton) 518, 636 (1819).

³³ *Providence Bank v. Billings and Pittman*, 29 U.S. (4 Peters) 514, 562 (1830).

³⁴ *Dartmouth College v. Woodward*, 518, 636. Thus, for example, in *Bank of Augusta v. Earle*, 38 U.S. (13 Peters) 519 (1839), the Court held that a business corporation was not a “citizen” within the meaning of the privileges and immunities clause of Article IV. This meant that although the business affairs of individuals could be conducted freely and equally anywhere in the United States, the corporation as such had no right to do business in any state other than the one that had chartered it.

³⁵ Compare Justices Hugo Black, in *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77, 83 (1938), and William O. Douglas, in *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 576 (1949).

³⁶ Horwitz, “*Santa Clam* Revisited,” 181; Hurst, *Legitimacy of the Business Corporation*, 30–47; William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (Chicago, 1965), 59–67.

nature of the industrial corporations that took root after this shift, new and difficult jurisprudential problems now presented themselves. The corporation clearly represented property, and property, which after all belonged to real people, was guaranteed the protection of the Constitution. But with effective control over this property now passing from shareholders who owned it to managers who did not, to whom (or what) were the relevant constitutional rights to be given? The rule of unlimited liability meant that, in the eyes of the law, partnerships and proprietorships were nothing more than hollow devices used by easily identifiable individuals to pursue their own interests, a perspective that the artificial entity theory extended to the corporation. Living persons, and only they, owned property, incurred obligations, and enjoyed constitutional rights, and it was generally a simple matter to look beyond the particular forms under which they did business to perceive their interests and to conceptualize the specific rights and duties that might attach to them in situations of conflict. But with business corporations grown very large and substantially independent of their hundreds or thousands of owners, could the corporation now be said to have "interests" of its own? And if so, could it too claim the protection of the Constitution as it pursued them?

At first, the answer seemed to be "yes and no." In 1886, the Supreme Court did hold, almost casually, that corporations were as entitled to the protections of the Fourteenth Amendment as any living man or woman.³⁷ With this, it all but forbade the close supervision and, if necessary, arbitrary regulation of corporations that had been possible under the artificial entity model and forced legislatures instead to show them the respect due certified bearers of constitutional rights. But the theory under which they did so is directed not at the rights of some abstract corporate entity, but at those of the individual shareholders. Though there is no discussion of the point in the *Santa Clara* opinion itself, Justice Stephen J. Field, sitting as a circuit judge in a similar case decided in 1882, clearly articulated the theory on which he and the Court seem to have relied in *Santa Clara*:

Private corporations are, it is true, artificial persons, but . . . they consist of aggregations of individuals united for some legitimate purpose. . . . It would be a most singular result if a constitutional provision intended for the protection of every person . . . should cease to exert such protection the moment the person becomes a member of a corporation. . . . On the contrary, we think that it is well established

³⁷ *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394, 396 (1886).

. . . that whenever a provision of the constitution, or of a law, guarantees to persons the enjoyment of property . . . the benefits of the provision extend to corporations, and that the courts will always look beyond the name of the artificial being to the individuals whom it represents.³⁸

“Looking beyond” the corporation in this sense to the people whose agreement creates it departs from the artificial entity theory by conceding that incorporation is a “natural” mode of business organization; the state may regulate its operation, but the corporation, intangible though it is, is no mere legal fiction but the real handiwork of its constituents. But despite its obvious appeal as social science, as a jurisprudential successor to the artificial entity theory the contractual model raises a serious problem. If the corporate entity is disregarded and its constituents treated as individuals in full possession of contractual and constitutional rights, symmetry seems to require their being equally subject to the corresponding obligations, a logic that undermines the justification for limited liability itself. Time, however, had left such arguments behind; the contractual jurisprudence was simply too dangerous for a society already committed to the technology of mass production and large-scale organization.³⁹

The alternative was what Horwitz calls the natural entity theory, in which the corporation is fully reified, treated as a real and purposeful creature separate in principle from its participants and endowed with economic interests and legal rights identical to those of real people. Here was a theory perfectly suited to the nascent collectivism of the age. By 1900, influential American intellectuals had begun to conceive of society as an organism, a concrete, living entity with purposes and interests entirely its own, distinct from and superior to those of its human constituents. They wanted not only to understand the scientific laws that governed modern civilization, but also to use them as social engineers, designing politically neutral techniques of administration to control complex social processes in the interests of a reified society.⁴⁰ The natural entity theory, with its similar affinity to the

³⁸ *San Mateo County v. Southern Pacific Railroad Co.*, 13 F. 722, 743–744 (1882); Horwitz, “*Santa Clara* Revisited,” 176–78.

³⁹ Horwitz, “*Santa Clara* Revisited,” 184–85.

⁴⁰ See generally Frank Tariello, Jr., *The Reconstruction of American Political Ideology, 1865–1917* (Charlottesville, Va., 1982), 53–69; R. Jeffrey Lustig, *Corporate Liberalism: The Origins of Modern American Political Theory, 1890–1920* (Berkeley, Calif., 1982), 150–94; Robert H. Wiebe, *The Search for Order, 1877–1920* (New York, 1967), 140–42. One of them, interestingly, was the young Woodrow Wilson: “Society is in no sense artificial; it is as truly natural and organic as the individual man himself.” Woodrow Wilson, *The State: Elements of Historical and Practical Politics* (1889; Boston, 1894), 597. See also “The Study of Administration

new science of business management, was the mirror of this collectivist politics in the realm of production and, as it rapidly won acceptance in the courts, it became a “major factor in legitimating big business.”⁴¹

But in Louis Brandeis, fifty years after economists and jurists alike had abandoned it, the artificial entity theory found its most eloquent champion. Dissenting in 1928 from the Court’s holding that a Pennsylvania tax on intrastate transportation unfairly discriminated against corporations, Brandeis had made clear his readiness to uphold state regulatory efforts against such challenges.⁴² But the Depression he had predicted offered Brandeis a context and a case, *Liggett v. Lee*, within which to weave all the related strands of his thought into a single, coherent analysis, a diagnosis of and a prescription for the nation’s misery.⁴³ The Florida legislature, responding to the rapid spread of chain stores in the state, had passed a complex licensing system for retail establishments whose effect was to impose a heavier fee on chain outlets than on independent retailers. The chains argued that the scheme denied them equal protection, and the Court considered the claim on by now well-settled principles. It upheld the gradation of fees according to the number of stores in operation under common ownership, but struck down as arbitrary and unreasonable the provision penalizing operation in more than one county.⁴⁴

Brandeis would have upheld the entire statute. The precedent cited by the Court concerned rights of real people rather than mere privileges that the states might choose to grant to business corporations; though analogous discrimination in the taxation of individuals might indeed deny constitutional rights, the statute was “valid as applied to corporations.”⁴⁵ “Its chief aim,” he said pointedly, “is to protect the individual, independently-owned, retail stores from the competition of chain stores . . . by subjecting the latter to financial handicaps which may conceivably compel their withdrawal from the state.”⁴⁶ But the legislature’s purpose may have been “broader and deeper” than this. “They may have believed that the chain store, by furthering the con-

(1887),” in *The Papers of Woodrow Wilson*, ed. Arthur S. Link (Princeton, N.J., 1968), 5: 359–80; compare text at note 93.

⁴¹ Horwitz, “*Santa Clara* Revisited,” 176, 181–83.

⁴² *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389 (1928) (Brandeis, J., dissenting).

⁴³ On Brandeis’s premonition of the Depression, see Brandeis to Elizabeth R. Raushenbush, 13 Nov. 1929, *Letters*, 5: 409–10.

⁴⁴ *Liggett v. Lee*, 517, 533–35.

⁴⁵ *Ibid.*, 543–44.

⁴⁶ *Ibid.*, 541.

centration of wealth and 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.”⁴⁷

If so, Brandeis argued, Florida was acting within a long and honorable tradition of state regulation designed to limit the privilege of incorporation. For, despite the form’s utility, “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. . . .⁴⁸

But in weakening their control, the states had allowed this “Frankenstein monster” to grow so large, to exercise such control over people’s lives, and to concentrate such wealth and power in the hands of a few, that first a feudal plutocracy in the last century and now a terrible depression caused by the maldistribution of income had been the results.⁴⁹ Perhaps, he seemed to say, the crisis would at last bring the states back to their senses and the nation back to the liberal principles of its youth.

There is a widespread belief 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 the 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. . . .⁵⁰

⁴⁷ *Ibid.*, 568–69.

⁴⁸ *Ibid.*, 548–49.

⁴⁹ *Ibid.*, 564–67.

⁵⁰ *Ibid.*, 580. Compare note 95.

Not, at any rate, under the artificial entity theory he now defended so vigorously. But the time for such argument was long past, and Brandeis knew it. In his rearguard assault on corporate rights, even he was forced in the end to concede that the “mere fact that the taxpayer is a corporation does not, of course, exclude it from the protection afforded by the equality clause.”⁵¹ Impassioned as it was, the *Liggett* dissent was a dead letter even as it was being written. Still, in revealing so clearly the nature and depth of his hostility to the corporation, it lets us see that, for all his controversial claims that size breeds inefficiency, the principal values at stake in his objection to bigness were moral rather than narrowly economic.⁵² The “curse of bigness” was the threat it posed to the development of the individual and the ideal of democracy, and Brandeis would not hesitate to use the full powers of the state to fight it. But he would not use them as a carpenter uses a hammer and saw, to construct a finished product whose every detail reflects the intentions of its designer as expressed in a blueprint.⁵³ Instead, government would be a gardener, using the tools of law to weed and prune, creating a regulatory environment within which states could experiment and people could grow freely and unpredictably. Power must be used to allow the innumerable, contradictory, sometimes foolish purposes of men and women to flourish, not to build efficient social machines that drove them in harness toward purposes set for them by remote planners. “The price of efficiency,” Brandeis said in 1912, “is high in every field of human activity.”⁵⁴ In *Liggett*, he made clear just what that price was.

The Economics of Autonomy

Karl Marx too theorized about the organization of production under capitalism, but as he saw it, the historical development of capitalist forms of production proceeded in just one direction. Firms would grow only larger, until a handful of monopolists held dominion over legions of oppressed workers and the resultant tension erupted into revolution. In the socialism that followed, the process of industrial concentration would reach its logical end; private monopoly would become public and, in Lenin’s words, the “whole of society . . .

⁵¹ *Ibid.*, 575.

⁵² Compare Urofsky, *A Mind of One Piece*, 55–60; McCraw, *Prophets of Regulation*, 108–9.

⁵³ Cf. Brandeis’s skeptical comments on the applicability of efficiency techniques to legislative drafting, Brandeis to Felix Frankfurter, 28 Jan. 1913, *Letters*, 3: 19–20.

⁵⁴ Louis D. Brandeis, “Business—A Profession,” in *Business—A Profession*, 1–12, at 3.

become one office and one factory.”⁵⁵ In America as well, at a time when political economists of all persuasions struggled to understand the forces driving firms to consolidate and when, despite the failure of trusts in such key industries as paper and leather, the significance of contemporary counterexamples to Marx’s conjecture had not yet been grasped, Marxists were scarcely alone in believing ever-increasing scale to be inevitable.⁵⁶ But a contractual perspective on capitalist production suggests that there are natural limits to the expansion of firms. If the relative merits of these two points of view could not have been fairly judged during the age of concentration in which Marx and Lenin (and Brandeis) lived, the experience of this century sheds a different light on the inevitability of bigness.

At their party congress in 1894, German Social Democrats hailed every “advance in the concentration of capital” as a welcome “step toward the realization of socialism,” an opinion shared with far less enthusiasm by Brandeis: “So socialists say in regard to [J. P.] Morgan . . . ‘He is our best friend, because he is paving the way for us, and we will have only a slight amount of legislation after Mr. Morgan is through with his work.’ ”⁵⁷ But the idea that concentration was a means to the common good struck a responsive chord in many American intellectuals. Jeremiah Jenks, for example, a conservative advisor to Theodore Roosevelt on antitrust policy, defended concentration as desirable as well as inevitable.⁵⁸ Progressives too generally saw at least some bigness as inevitable, as did their ally Brandeis, but they and he differed greatly as to its desirability and the proper policy toward it, and there is much to be learned from this quarrel among friends.

By 1910, an energetic group of academic economists committed to social reform, led by such men as Richard T. Ely, Henry Carter Adams, and John Bates Clark, had firmly established a new and self-consciously American school of political economy that drew heavily on the ideas of the German historicists with whom many had studied as young men. Repudiating the Manchesterian faith in laissez-faire for a commitment to an active state as an essential instrument of reform in the public interest, and moved by the social gospel that Christian ethics must be applied to all forms of human endeavor, they explicitly

⁵⁵ V. I. Lenin, *State and Revolution* (1917; New York, 1943), 84.

⁵⁶ Compare McCraw, *Prophets of Regulation*, 65–79, 94–101.

⁵⁷ Koppel S. Pinson, *Modern Germany: Its History and Civilization*, 2d ed. (New York, 1966), 238; Louis D. Brandeis, Statement of 14 Dec. 1911, 1258.

⁵⁸ Letwin, *Law and Economic Policy in America*, 198; Jeremiah W. Jenks, “The Trusts: Facts Established and Problems Unsolved,” *Quarterly Journal of Economics* 15 (1900): 46–74.

sought an economics that could project their vision of the good into reality. For them, the purpose of theory was normative, to help make "what is" into "what ought to be."⁵⁹ But to this they added what Frank Tariello has called a "metaphysical collectivism," an understanding of the ontological and political relationship between the individual and society much like that of Marx himself, which strongly conditioned both the substantive problems they addressed and the strategies they adopted to solve them.⁶⁰ For Marx, "the human essence is no abstraction inherent in each single individual. In its reality it is the ensemble of the social relations," and the individual little more than the temporal creation of society. Without society there could be no life, and its interests must therefore precede those of any mere human being.⁶¹ The Germanists took a similar view. "Man isolated and alone develops no individuality of value," wrote Ely in 1894, "but such individuality is developed only when he lives with and through his fellows. Giving up one's individualism means a growth in individuality."⁶² Thus, argued Adams,

Society is the organic entity about which all our reasoning should center. . . . Society, as a living and growing organism, is the ultimate thing disclosed by an analysis of human relations; and . . . it is not right to speak of a presumption in favor of individual initiative or of state control, as though these stood like contestants opposed to each other. . . . the true principle must recognize society as a unity, subject only to the laws of its own development.⁶³

And, concluded John Bates Clark, the "universal interdependence of parts is a primary characteristic of social organisms; each member exists and labors, not for himself, but for the whole. . . ."⁶⁴

⁵⁹ Sidney Fine, *Laissez Faire and the General-Welfare State* (Ann Arbor, Mich., 1956), 198–212. On the influence of German historicism in the development of American economics during this period, see Joseph Dorfman, "The Role of the German Historical School in American Economic Thought," *American Economic Review* 45 (May 1955): 17–28; Jürgen Herbst, *The German Historical School in American Scholarship: A Study in the Transfer of Culture* (Ithaca, N.Y., 1965), esp. 129–202; William J. Barber, ed., *Breaking the Academic Mould: Economists and American Higher Learning in the Nineteenth Century* (Middletown, Conn., 1988), 203–24, 290–375.

⁶⁰ Tariello, *Reconstruction*, 54.

⁶¹ Karl Marx, "Theses on Feuerbach (1845)," in David McLellan, ed., *Karl Marx: Selected Writings* (Oxford, 1977): 156–58, quotation on 157. Compare Robert L. Heilbroner, *Marxism: For and Against* (New York, 1980), 141–74.

⁶² Richard T. Ely, *Socialism* (New York, 1894), 351.

⁶³ Henry C. Adams, "Relation of the State to Industrial Action (1887)," in Joseph Dorfman, ed., *Relation of the State to Industrial Action and Economics and Jurisprudence: Two Essays by Henry Carter Adams* (New York, 1954), 56–133, quotation on 82–83 (emphasis in original).

⁶⁴ John B. Clark, *The Philosophy of Wealth* (Boston, 1886), 56.

If, as the proponents of this organic collectivism argued, modern industrialism had made traditional notions of personal autonomy and responsibility obsolete and demanded an extension of the powers of the state to realize the common good, Woodrow Wilson's separation of politics from administration offered a vision of public life that seemed to preserve the prerogatives of democracy while acknowledging the need for managerial control in the public interest. While democratic politics concerned itself with articulating the interests of "the whole," administrative elites could draw on managerial techniques already being developed in the private sector to promote those interests.⁶⁵ And if, like most economists, Clark, Adams, and Ely agreed that bigness in industry, at least in some sectors, was inevitable, they saw it not as a danger to liberty or democracy but "as a convenient tool for the attainment of social ends."⁶⁶ But Brandeis, starting from a very different set of presuppositions and, like the Germanists, searching for a "research program" compatible with them, became an original, insightful theorist of smallness whose focus on problems of organization and administration within large firms opened the door to what we now call the economics of "bounded rationality." Like the Germanists, he believed in knowledge by inference and facts as the backbone of theory. And if he was not truly a social engineer, he was a "gardener," ready to use the state to create an environment in which his political ends could be realized; like Adams, he saw an important role for regulation in elevating the "plane of competition."⁶⁷ But whereas the Germanists began from the ontological premise of collectivism and the moral politics of redistribution and moved to an economics that saw in large-scale organization the means to wealth and security for the masses, Brandeis proceeded from a premise of individualism and a politics of personal autonomy and responsibility to an economics that would reverse the trend toward bigness and, with open eyes, shun its material rewards in favor of the moral and political benefits of individual empowerment and small scale.

⁶⁵ Cf. Tariello, *Reconstruction*, 97; Wilson, "The Study of Administration"; Lustig, *Corporate Liberalism*, 170-75.

⁶⁶ Letwin, *Law and Economic Policy in America*, 71-77; Fine, *Laissez-Faire*, 223-25, 231-33, 337-38; Tariello, *Reconstruction*, 112. Thus, Adams explicitly presented his influential principles of returns to scale for the purposes of identifying those industries in which public control was necessary, so that "the state may realize for society the benefits of monopoly." Adams, "Relation of the State," 98-114; Dorfman, "Role of the German Historical School," 26.

⁶⁷ Compare Adams, "Relation of the State," 90-98, with Louis D. Brandeis, "Shall We Abandon the Policy of Competition? (1912)," and "Competition (1913)," in *Curse of Bigness*, 104-8, 112-24.

A brief elaboration of the contractual model of the firm, informed by many of the same developments in modern theory relied on by McCraw, will help make this clear. The central lesson of this theory is that it is neither the division of labor per se nor, indeed, any universal or immutable characteristic of markets, but the relative costs “at the margin”⁶⁸ of organizing production by market or contract in various environments that induce the growth of firms. The marginal costs and benefits of operating in one mode or another may vary with time and place, and they change, often rapidly, with shifts in preferences or technology. And though, as we shall see, the practical differences between the two cases may be very great, the relevant decisions may in principle be made either by living men and women responding to complex motives and purposes or by collectives motivated solely by profit maximization. But the nature of the organizational decision itself remains constant. When previously independent agents reckon the costs to them of organizing a given business transaction within a production contract to be less than those of dealing at arm’s length or competing in markets, firms will grow, either vertically along a single chain of production or horizontally across competing sellers of the same good; otherwise, they will stop expanding or shrink by returning operations governed by contract to the market. The search for equilibrium size implied by this continuing attempt to weigh the costs of alternative forms of organization makes clear that, as Ronald Coase noted with surprise fifty years ago, “In a competitive system, there is an ‘optimum’ amount of planning!”⁶⁹

As the firm evolves over time, the precise forms it assumes are sensitive to the environmental conditions within which exchange is carried out, and as these conditions change, the qualitative details of the division of labor, the internal structure and organization of the firm, are adapted more or less successfully to them by its participants. This process of organizational evolution reaches into every corner of the market. Under the constant pressure of competition, innovative experiments in organizing production in changing environments are continuously conducted and evaluated. The relative success of some of these experiments in enabling their participants to meet their objectives is observed; these are copied or adapted by others in similar situations and survive to provide the basis for mutations yet to come, whereas those that fail in this sense are soon abandoned.⁶⁹ The self-

⁶⁸ Coase, “The Nature of the Firm,” 389.

⁶⁹ Cf. Armen Alchian, “Uncertainty, Evolution, and Economic Theory,” *Journal of Political Economy* 58 (1950): 211–21; Sidney Winter, “Optimization and Evolution in the Theory

interested behavior of free agents drives this process, and their preferences, superimposed on environmental conditions, determine its outcomes. Where they see their own interests in production as better served by the discipline of contractual obligation than by the freedom of action offered by markets, work will be organized accordingly; where the value they place on economic independence or personal autonomy is smaller than the rewards of limited submission to the commands of others, there will be hierarchy. And so, in the evocative words of Dennis Robertson, there come to be firms, "islands of conscious power in this ocean of unconscious co-operation like lumps of butter coagulating in a pail of buttermilk."⁷⁰

Some of the costs that affect these decisions arise from the peculiar qualities of the goods in question, such as their relative homogeneity in exchange, or from characteristics of the particular environments in which they are traded—the frequent recurrence of similar transactions, for instance, or the available technologies of production and distribution. The heart of the competitive model is the axiom that the essential qualities of a commodity are independent of the specific identity of the person buying or selling it, for only where goods are homogeneous in this sense is competition by price possible at all. If the price offered by one seller of such a good is too high, the buyer always has the option of purchasing an identical product from another seller, and it is this property of goods that enables competition to drive prices to the single, "parametric" value that confronts all traders. But this assumption fails in the vast majority of manufacturing environments. To the extent that unfinished goods passing between the stages of production are homogeneous, effective competition can indeed take place, and traders will have little reason to forego the flexibility of markets for the security of contracts. Should the need arise, buyers can easily locate alternative sources of supply and sellers direct products intended for one purchaser to others. But the "specificity" of capital assets—the peculiarities of machines and the idiosyncratic knowledge and experience of people—makes them far more valuable in some circumstances than in others; a person who has spent thirty years making tools on an expensive but temperamental machine, for example, is likely to be worth much more in the short run to the owner of the machine, and vice versa, than any of the available substitutes on

of the Firm," in *Adaptive Economic Models*, ed. R. Day and R. Groves (New York, 1975), 73–118.

⁷⁰ Quoted in Coase, "The Nature of the Firm," 388.

either side. The time and effort needed to negotiate the terms of trade in such cases, and the opportunities for “strategic behavior” and exploitation, with all the corrosive acrimony they create, are a potent inducement to combination. And if the holders of effective bilateral monopolies must deal with one another on a regular basis, the pressures to replace recurring costs of bargaining with the security of a long-term agreement will be strong indeed.⁷¹

So, like McCraw, we can expect the typical manufacturing enterprise to gravitate from market to contract, extending itself both backward and forward in production by offering the free agents who make the raw materials it buys and who purchase the finished goods it produces the chance to participate in the contract themselves.⁷² As long as the relationship at the boundary between the enterprise and a still independent trading partner is a recurrent bilateral monopoly, the line separating them is likely to vanish. But at some point in every industrial environment, the exchange at the boundary will lose this quality. Toward one end of the chain of production, the firm will find itself in the market for a good, such as oil or raw metal, that is sufficiently homogeneous to support competing suppliers able to sell to a range of buyers; at the other, it will offer an output of its own, like nails or automobiles, that buyers find similar enough to those made by others that competition on both sides again becomes possible. The scale at which this limit is reached is largely what distinguishes “center” from “peripheral” firms.

Brandeis, conceding the economic advantages of size in particular circumstances but insisting that combination at the scale of the industrial trusts was not inevitable, had grasped the essentials of this evolutionary analysis by 1912.⁷³ It may, he said,

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

⁷¹ This discussion owes much to the work of Oliver Williamson. See, for example, “Transaction-Cost Economics: The Governance of Contractual Relations,” *Journal of Law and Economics* 22 (1979): 233–61; “The Organization of Work: A Comparative Institutional Assessment,” *Journal of Economic Behavior and Organization* 1 (1980): 5–38; “The Modern Corporation: Origins, Evolution, Attributes,” *Journal of Economic Literature* 19 (1981): 1537–68.

⁷² Compare McCraw, *Prophets of Regulation*, 68–79.

⁷³ Louis D. Brandeis, “Competition That Kills (1913),” in *Business—A Profession*, 243–61, at 260; Brandeis to Charles R. Crane, 11 Nov. 1911, *Letters*, 2: 510–11; Lief, *The Brandeis Guide*, 181; Strum, *Louis D. Brandeis*, 147–48.

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 [and] 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 [and] 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.⁷⁴

But Brandeis never lost sight of the critical distinctions between living people and collective entities as decision makers in this process. Individuals, he knew, were driven by tangled motives toward objectives they often could not articulate, and they would invariably be severely limited in their ability to gather and assess the information needed to pursue them. This perception, coupled with his unflagging solicitousness for the intellectual and moral development of the individual, led both to his consistent denial of the inevitability of bigness and to the important theoretical insights he achieved.

Bigness is not the child of the nineteenth century. Centralizing forces much like those sketched above had produced manufacturing enterprises of considerable size well before 1800. In textiles, for example, the system of “putting out,” in which an entrepreneur bought raw yarn or cloth, delivered it to workers who turned it into finished goods in their homes for piece rates, and then sold the goods, was common. *Verlagwesen* was big business in eighteenth-century Germany, and its methods were copied by scores of smaller but similarly organized ventures in America, which were producing clothing, furniture, and household goods by the 1790s. Still, organizing these pre-industrial firms posed few problems. The work rarely required costly equipment and was done at home by workers who owned their own tools, so there was no need to tie up capital in expensive machinery or in a central workshop. Nor was administration of a precise or detailed production schedule necessary. Despite the number of workers involved, the distance between raw materials and finished goods could be closed in just a few steps, and with production committed to men and women who combined it with farming or housework, the pace

⁷⁴ Louis D. Brandeis, “Trusts and Efficiency (1912),” in *Business—A Profession*, 205–24, at 206–7. See also “Competition,” 116; Statement of 14 Dec. 1911, 1147–48; Mason, *Brandeis: A Free Man's Life*, 322–23.

and timing of work, within limits, were necessarily left to them as well.⁷⁵

Thus the needs and preferences of the participants themselves, including the entrepreneur, largely account for the absence of hierarchy in these early firms. Organizational decisions at the margin were made by individuals for whom utility in the broadest sense, not the simple maximization of income, was the objective; the qualitative satisfactions of personal autonomy and control of one's own time and the demands of family and community life each had their place, even if they could not easily be assigned market values. But with limited liability and the consequent transfer of economic decision making from independent individuals to ever larger "corporate persons," this changed. Now, the agents facing one another across the boundary were not individuals, but firms, and the interests of firms, represented solely by profits measured by market prices and having little room for the qualitative aspects of economic organization, became the only consideration in the choice between market and contract. Efficiency was thus reduced to the maximization of wealth, the spectrum of human values conflated to mere profit and loss. This perspective, it must be stressed, is a matter of normative choice, not scientific necessity. Louis Brandeis would not choose it, but his contemporaries did, as have the great majority of economists in the years since, joined now by Thomas McCraw:

Consumer welfare . . . is obviously not the only criterion against which all public policy should be measured. Neither is economic growth. Both of these goals apply chiefly to "economic man" and say little—at least directly—about aesthetic values, ideological preferences, or any number of other legitimate concerns. In the argument of this essay, however, and in economic theory generally, any policy that promotes growth and consumer welfare carries a strong favorable presumption. Conversely, any policy tending to diminish them should, if it is to be justified, bring with it extremely strong offsetting benefits of a noneconomic nature.⁷⁶

From here, it is but a short step to the materialist determinism that suffuses the claims of McCraw and the Germanists alike that bigness is inevitable. But such a view would untenably reduce individuals, in whose actions must ultimately lie the origins of all social

⁷⁵ W. O. Henderson, *The Rise of German Industrial Power, 1834-1914* (London, 1975), 65; Chandler, *The Visible Hand*, 53-54.

⁷⁶ McCraw, "Rethinking the Trust Question," 8.

phenomena, to mere spectators of an autonomous evolutionary drama. For all the ideological subsumption of individual choice in the prerogatives of collectives, it remains within the power of individuals, in their roles as both workers and consumers, to choose otherwise and to reflect their choices in the market values that firms are able to read. To “justify” such a choice, to urge them to purchase the “noneconomic” virtues of smallness at the price of material wealth, was precisely the task Brandeis set for himself. And in the years before 1916, his vehicle was not moral suasion, but positive theory, grounded in a humble portrayal of the human ability to acquire the information and exercise the control necessary to manage outcomes in complex organizations.

“Bounded rationality” is the term coined by Herbert Simon to capture the informational impediments to optimizing behavior imposed by human frailty, and in different ways both he and Friedrich Hayek have argued since the 1940s that the difficulties of extracting the detailed knowledge of particular circumstances essential to efficient allocations and transmitting it in timely and useful fashion to decision makers at the center are a strong check on the growth of firms.⁷⁷ Brandeis understood this as well, and like Simon and Hayek, assigned primary significance to it in the question of size. “Many men are all wool, but none is more than a yard wide,” so we must “adjust our institutions to the wee size of man.”⁷⁸ “With the growth in size comes an increasing cost of organization and administration which is so much greater than the increase in the volume of business that the law of diminishing returns applies.”⁷⁹

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. . . . Organization can do much to make concerns more efficient [and] larger units possible and profitable. [But] 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 possi-

⁷⁷ Compare, for example, Herbert Simon, *Administrative Behavior* (New York, 1947) and “Rational Decision Making in Business Organizations,” *American Economic Review* 69 (1979): 493–513, with Friedrich Hayek, “The Use of Knowledge in Society,” *American Economic Review* 35 (1945): 519–31; and “Competition as a Discovery Procedure,” in *New Studies in Philosophy, Politics, Economics and the History of Ideas* (Chicago, 1978), 179–90.

⁷⁸ Quoted (1935) in Mason, *Brandeis A Free Man’s Life*, 620; Brandeis to Harold Laski, 21 Sept. 1921, *Letters*, 5: 16–17.

⁷⁹ Quoted (1915) in Lief, *The Brandeis Guide*, 22.

ble achievement. As the Germans say: "Care is taken that the trees do not scrape the skies."⁸⁰

But how big is too big? If the unit of greatest efficiency "cannot be determined in advance by a general rule," how is it to be found? Some, like Hayek, suggest that this determination be left to those best able to monitor the relevant costs and benefits. Given real market prices outside its boundaries, so it can know the true costs of its alternatives, when the firm itself concludes that further expansion is unprofitable, it will stop growing of its own volition.⁸¹ As a positive matter, however, bigness requires administration. If people were "perfectly rational," they could project their desires into the future to assess the value of all possible outcomes, reduce all the uncertainties of the future to a distribution of probabilities, and incorporate them in the terms of a single transaction.⁸² But real men and women must constantly account for contingencies whose likelihood or effects they cannot foresee. Because they do not know exactly what the future holds, they can at best decide now on the *procedures* they will use to fix the terms of exchange under those possibilities they can foresee and to resolve other disputes as they arise, and, in so doing, bind themselves into continuing relationships. These procedures may be consensual, in that they require all concerned to concur in decisions, or hierarchical, vesting in some a limited power of command, as the parties wish. The production contract itself determines the political (or moral) quality of the order it creates.

But as the contract expands, the rough equality of authority and consensual decision making possible in small groups must yield to hierarchy; "democracy" in the small gives way to "centralism" in the large. For if every operating decision requires the concurrence of every participant, the monopoly each has in his or her own consent simply reproduces the opportunities for friction and strategic bargaining that induce the contract itself. With markets no longer mediating the conflicting interests of large numbers of people, command is the only alternative to chaos. The choice between consensus and command in the firm is thus intimately bound to the question of size. Where a common production schedule governs the labor of just a few people, they may decide that the sense of equality and solidarity fostered

⁸⁰ Brandeis, "Trusts and Efficiency," 223–24. See also Statement of 14 Dec. 1911, 1147–48.

⁸¹ Friedrich A. Hayek, *Law, Legislation and Liberty* (Chicago, 1979), 3: 65–88.

⁸² Ian Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law," *Northwestern University Law Review* 72 (1978): 862–65.

by a regime of consensus justifies its costs. But even a small firm would find such an atmosphere hard to sustain without crippling losses in efficiency, and a steel plant employing five thousand would surely find it impossible. The state as entrepreneur might look to the army as a model for a practical system of authority in an organization of this size, and feudal societies may rely on submissive habits and attitudes to enforce order in large enterprises. But neither of these options is available to democratic capitalism. Should we not simply commit the search for efficient size and internal organization to the market?

Brandeis said no. Markets alone could not determine and enforce the efficient size of firms. He conceded that the "disadvantages of size" might not "counterbalance the advantages" until the firm was quite large.⁸³ But he insisted that the market had not prevented the largest corporations from exceeding their efficient size; the relationship of bigness to power made the market inadequate to the task. Over and over he stressed that the radical concentration of power in large corporations threatened an "industrial absolutism" inconsistent with the principles of American democracy.

Size alone gives to giant corporations a social significance not attached ordinarily to smaller units of private enterprise. . . . The typical business corporation of the last century . . . is being supplanted by huge concerns in which the lives 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; [removing] 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 concentrated in the hands of a few. 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 . . . 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.⁸⁴

Power distorted masters as well as servants. The divergence of interest between shareholders and managers in large firms left executives free to follow their own dreams of industrial empire or simply to crush

⁸³ As, indeed, in his own law firm; see Brandeis to William H. Dunbar, 19 Aug. 1896, *Letters*, 1: 124–25. He also recognized the superior capacity of large firms to conduct what we now call "research and development"; see Brandeis to Franklin K. Lane, 12 Dec. 1913, *ibid.*, 3: 218–21, at 219.

⁸⁴ *Liggett v. Lee*, at 565.

annoying competitors and bankers free to encourage inefficient growth just to win huge commissions.⁸⁵ But it was the effect of corporate power on little people, and through them on the quality of American democracy, that most disturbed Brandeis. The deadening effect of hierarchy on innovation and the inhuman coercion and exploitation of workers with few options beyond employment in the big firms certainly gave cause for concern.⁸⁶ But worse still was the subtle corruption of the people themselves, their apparent willingness to trade their birthright of economic liberty and personal responsibility for the “mess of pottage” made possible by bigness.⁸⁷

Summarizing the differences between his own views on the trusts, represented in 1912 by Woodrow Wilson, and those of Theodore Roosevelt’s new Progressive party, Brandeis asked, “Shall we regulate competition or monopoly?”⁸⁸ Roosevelt’s position, premised on the inevitability of monopolistic competition, was clear enough: “This nation should definitely adopt the policy of attacking not the mere fact of combination, but the evils and wrongdoing which so frequently accompany combination. . . . We should enter upon a course of supervision, control, and regulation of these great corporations. . . .”⁸⁹ In a memorandum to Wilson, Brandeis made his (and Wilson’s) support for the “regulation of competition” instead, and their disdain for the “New Party’s” hopes of effectively distinguishing searchers after industrial efficiency from predators and cheats, equally plain.

The Democratic Party insists that competition can be and should be maintained in every branch of private industry [and] that competition can be and should be restored in those branches of industry in which it has been suppressed by the trusts. . . . [But] the New Party declares that private monopoly in industry is not necessarily evil, but may do evil; and that legislation should be limited to such laws and regulations as should attempt merely to prevent the doing of evil. The New Party does not fear commercial power, however great, if only methods for regulations are provided. We believe that no methods of regulation ever have been or can be devised to remove the menace inherent in private monopoly and overweening commercial power.⁹⁰

⁸⁵ Statement of 14 Dec. 1911, 1171. See also Mason, *Brandeis: A Free Man's Life*, 322–23.

⁸⁶ Strum, *Louis D. Brandeis*, 147–51; Urofsky, *A Mind of One Piece*, 55–57; Mason, *Brandeis: Lawyer and Judge*, 48–49.

⁸⁷ “Competition That Kills,” 261.

⁸⁸ “Competition,” 113.

⁸⁹ On Roosevelt’s views, see Letwin, *Law and Economic Policy*, 244–47, 266; quoted (1911) in Urofsky, *A Mind of One Piece*, 77.

⁹⁰ *Letters*, 2: 688–94, at 688. “I used to think that there were ‘good trusts’; that there were big men at the head of some of them, and that they worked out things for the benefit

Granting the difficulty in defining “wrongdoing” in the market, a salient virtue of Roosevelt’s approach is its commitment to consumer sovereignty. Given competition as we have defined it and a market cleansed of “evil,” the Progressive plan relies on the people themselves to decide just how much “fairly earned” bigness they want and allows the market to adjust the size of firms to those preferences. As we have argued, absent coercion, hierarchical production contracts will expand only so long as the individuals involved attach greater value to the material benefits to be gained from contractual organization than they do to the developmental advantages of personal liberty and the atmosphere of “human scale” that must be sacrificed for them. Brandeis, in contrast, went well beyond simply preserving the conditions under which potential competitors might emerge to prescribe an active policy of taxing bigness as such (as in *Liggett*) or of dismantling large firms to restore the existence of actual competitors, despite his conceded inability to specify just when and how far this dismemberment should go in any given case.⁹¹ The basis of his policy is thus a *presumption* that large scale is not worth its costs, and where the market has in fact accurately registered the people’s preferences with respect to scale, pursuing the policy requires the state to act explicitly against the will of its citizens.

Brandeis himself seemed to recognize this: “The statement that size is not a crime is entirely correct . . . from the point of motive. But size may become such a danger in its results to the community that the community may have to set limits.”⁹² But who is “the community,” if not the same little people who had traded Thomas Jefferson’s America for Teddy Roosevelt’s, and how were they to express themselves with regard to size, if not in markets or popular legislation? Brandeis’s answer, that despite the obvious potential for error and corruption, legislatures must sometimes overrule the people on this question and push them toward their own best interest in spite of themselves, betrays a frustrated, even despairing, distrust of the little people he claimed to represent. Reflecting on his differences with Wilson as they battled the trusts, Brandeis said, “In my opinion the real curse was bigness rather than monopoly. Mr. Wilson (and others

of the community. I know better now. There are no good trusts.” Quoted (1912) in Lief, *The Brandeis Guide*, 181.

⁹¹ Brandeis to Felix Frankfurter, 30 Sept. 1922 and 4 Jan. 1923, *Letters*, 5: 65–71, at 67, and 84–85; Urofsky, *A Mind of One Piece*, 59–68; Strum, *Louis D. Brandeis*, 390–91.

⁹² “On Industrial Relations,” 80.

wise politically) made the attack on lines of monopoly—because Americans hated monopoly and loved bigness.”⁹³ Their unthinkable but apparently real swap of personal freedom for mass production had turned responsible Americans into “consumers,” whom he contemptuously described to George Soule as “servile, self-indulgent, indolent, ignorant.”⁹⁴ “It’s clear, I think,” he told Felix Frankfurter in 1925, “that the gentle enslavement of our people is proceeding apace . . . & that the only remedy is via the individual. To make him care to be a free man & willing to pay the price.” But the people seemed to want the material bounty of corporate bigness more than the elevating rigors of economic liberty, and a short time later, Brandeis captured the essence of the matter as he made his anger plain: “Isn’t there among your economists some one who could make clear to the country that the greatest social-economic troubles arise from the fact [that] the consumer has failed absolutely to perform his function? He lies not only supine, but paralyzed & deserves to suffer like others who take their lickings ‘lying down.’ He gets no worse than his just deserts.”⁹⁵

There is much in the economics of decentralization and dispersal of power to attract us today, all the more so when it is extended, as Brandeis did, to politics as well and becomes a coherent political economy with free men and women at its center.⁹⁶ But in the compass of his own lifetime, and to his deep disappointment, the people chose a different way. Brandeis supported measure after measure designed to protect small producers and retailers against the inexorable efficiencies of large scale, to shield existing competitors against the creative destruction of competition. Whatever the issue—resale price maintenance, the exchange of information among independent lumber mills, or the limitation of price competition in grain markets—he consistently identified the public interest with “the interest of the small man.”⁹⁷ If

⁹³ Brandeis to Ray Stannard Baker, 5 July 1931, *Letters*, 5: 482.

⁹⁴ Brandeis to George Soule, 22 April 1923, *Letters*, 5: 91–92, at 92.

⁹⁵ Brandeis to Felix Frankfurter, 8 Nov. 1925 and 12 Feb. 1926, *Letters*, 5: 192–93, at 93, 207. Compare McCraw, *Prophets of Regulation*, 105–8, and Brandeis’s response to his former clerk Henry Friendly, who had been in Tallahassee as the *Liggett* statute was being adopted. “I was down watching the Florida Legislature,” an amused Friendly reported, “and I don’t think they had any of those social benefits in mind that you discussed. I think they were just influenced by the drug lobby.” Brandeis did not smile or respond in any way, and changed the subject. Paper, *Brandeis*, 335.

⁹⁶ See, e.g., *Myers v. United States*, 272 U.S. 52, 291–95 (1926) (Brandeis, J., dissenting); *New York State Ice Co. v. Liebmann*, 262, 306–11. Cf. Urofsky, *A Mind of One Piece*, 58–59; Strum, *Louis D. Brandeis*, 151–52.

⁹⁷ On resale price maintenance, see “Competition That Kills”; on information exchange

his calculation of that interest and its relation to bigness ultimately contradicted the desire for material comfort expressed by the people themselves, it was nonetheless a perfect complement to his own commitment to the moral advantages of smallness and to the increasing material asceticism of his later life. And if in *Liggett* he showed how great a price the pursuit of productive efficiency would exact from a free people, his increasingly lonely struggle to preserve the values of an earlier time against the organizational imperatives of the industrial age proved that he, at least, was unwilling to pay it.

“The Truly Triumphant Twentieth-Century Democracy”

The logic of industrial growth demanded the conscious planning and administration of entire domains of economic life, and as salaried managers in large firms assumed the tasks of coordination once performed by the market, daily operations came to be supervised by people whose job was to direct the movements of goods and workers according to plan.⁹⁸ The necessary administrative talent was supplied at first almost entirely by engineers, who brought to management their own confident intellectual style. Their business was designing machines, bringing theory to bear on practical problems, and evidence of their success in subjugating nature to man was everywhere. For them, the corporation too was a machine, its operation reflecting the purposes of its designer and its parts constrained to move in concert at the behest of a single will. The raw materials might be different, but the objective of control was the same, and the problems of management would surely yield to the rational methods of modern science.⁹⁹

Nowhere was this point of view more clearly expressed than in Frederick Winslow Taylor's system of “scientific management.”¹⁰⁰

and grain markets, *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921) (Brandeis, J., dissenting); *Chicago Board of Trade v. United States* 246 U.S. 231 (1918); Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York, 1978), 41–47.

⁹⁸ Alfred D. Chandler, Jr., “The Large Industrial Corporation and the Making of the Modern American Economy,” in *The Shaping of Twentieth Century America*, ed. R. Abrams and L. Levine, 2d ed. (Boston, 1971), 101–5; Alfred D. Chandler, Jr., “The United States: Seedbed of Managerial Capitalism,” in *Managerial Hierarchies: Comparative Perspectives on the Rise of the Modern Industrial Enterprise*, ed. Alfred D. Chandler, Jr., and Herman Daems (Cambridge, Mass., 1980), 11–19.

⁹⁹ Chandler, *The Visible Hand*, 464–66; David F. Noble, *America by Design: Science, Technology, and the Rise of Corporate Capitalism* (New York, 1979), 263. Compare Samuel Haber, *Efficiency and Uplift: Scientific Management in the Progressive Era, 1890–1920* (Chicago, 1964), x, 19–21; Hugh G. J. Aitken, *Taylorism at Watertown Arsenal: Scientific Management in Action, 1908–1915* (Cambridge, Mass., 1960), 16, 35–38.

¹⁰⁰ F. W. Taylor, *The Principles of Scientific Management* (New York, 1911).

While still a young man, Taylor had become chief engineer at a small steel company and, convinced that metal workers in his charge were loafing, he set out to eliminate their “soldiering” by increasing the pace of work to a rate closer to that of the machinery itself. His solution, presented in a paper to the American Society of Mechanical Engineers in 1895, was to establish a specific working time as a performance standard for every job in the shop, so that as the time any worker took to finish the job diverged from the “honest day’s work” represented by the standard, the piece rate earned would fall sharply.¹⁰¹ What distinguished Taylor’s system from others like it was his claim that there was an *optimal* time for every job, which could be determined scientifically. He believed in an objective science of work and adopted the method of René Descartes; every task was broken down into a series of minute “elementary operations” performed by a person on a machine, and then, with the aid of a stopwatch and a strong, agile worker, the time required to complete each operation was computed. With allowances for variations in machines and materials, the times were added together to set the standard on which piece rates would be based.

In this way, Taylor derived one “science” of lathe work, another of lifting pig iron, and a third of shoveling, each characterized by the tuning of workers to machines, adjusting human labor to the requirements of the equipment to create a single, smoothly integrated productive unit. His own objective in this was clear; in the interests of both productivity for the company and what he saw as the moral development of the workers themselves, he meant to secure for management the absolute control over the industrial machine necessary to bring every one of its human components to “its highest state of excellence.” Workers, he wrote, must “do what they are told promptly and without asking questions or making suggestions. . . . it is absolutely necessary for every man in an organization to become one of a train of gear wheels.”¹⁰² The purpose of the machine, of course, was profits, and this reduction of the objectives of a complex organization to the maximization of a single number provided the basis for both a new “theory of the firm” and a cognate science of management built on the model of Newtonian mechanics. Possessing all the knowledge needed to turn “inputs” into “outputs” with mathematical precision, its parts moving in harmony toward an equilibrium in which the unifying goal of maximum profit is achieved, the firm could become both

¹⁰¹ Aitken, *Taylorism*, 19–20; Haber, *Efficiency and Uplift*, 1–2.

¹⁰² Haber, *Efficiency and Uplift*, 2–3, 20–24; Aitken, *Taylorism*, 21–28.

an object and an instrument of control, a collective personality of concentrated purpose through which the behavior of real men and women could be disciplined. The commanding, lasting influence of this vision in the evolution of modern economics is eloquent testimony to its power.

If, as Gabriel Kolko has described them, Taylor's system and its philosophy of control are indeed "thoroughly totalitarian," then perhaps Lenin's embrace of Taylorism as a means to the centralization of authority in Soviet factories ought not to surprise us.¹⁰³ More difficult to understand is the continuing enthusiasm of Louis Brandeis, who more than anyone else popularized the term "scientific management" and promoted its virtues to a wider public. Brandeis had discovered Taylor's ideas in 1903, and he saw some of them in practice at the shoe factory of his client W. H. McElwain several years before Brandeis's electrifying performance at the eastern rate hearings of the Interstate Commerce Commission in 1910, where he made headlines by proclaiming that the introduction of Taylorism could save the railroads "a million dollars a day."¹⁰⁴ In his brief, he adopted the engineer's metaphor in strikingly explicit language. The scientific manager, he said,

considers a business as an intricate machine. He analyzes each process into its ultimate units, and compares each of the smallest steps of the process with an ideal of perfect conditions. . . . Then he seeks . . . the interlocking or assembling of all these prime elements in each process into a well-built smooth-running machine; and when there are, as usual, several processes in each department and several departments in the business, all the departments as well as all the processes must be coordinated, so that the machinery of the whole business works with equal smoothness. . . . In scientific management, therefore, results are predetermined. Before the work is commenced, it is determined not only what shall be done, but how it shall be done, when it shall be done and what it shall cost.

Taylorism, he said, thus promised a revolution "comparable only to that effected in the transition from hand to machine production," a revolution of order and predictability:

¹⁰³ Gabriel Kolko, *The Triumph of Conservatism: A Reinterpretation of American History, 1900–1916* (Chicago, 1967), 208; Judith A. Merkle, *Management and Ideology: The Legacy of the International Scientific Management Movement* (Berkeley, Calif., 1980), 105–15.

¹⁰⁴ Oscar Kraines, "Brandeis' Philosophy of Scientific Management," *Western Political Quarterly* 13 (1960): 192; Mason, *Brandeis: Lawyer and Judge*, 17; "Business—A Profession," 8–9. On the hearings, see Mason, *Brandeis: A Free Man's Life*, 315–34; Martin, *Enterprise Denied*, 194–234.

Under scientific management nothing is left to chance. All is carefully prepared in advance. Every operation is to be performed according to a predetermined schedule under definite instructions, and the execution under this plan is inspected and supervised at every point. Errors are prevented instead of being corrected. The terrible waste of delays and accidents is avoided. Calculation is substituted for guess; demonstration for opinion.¹⁰⁵

This enthusiasm was not merely a courtroom tactic. Outside the hearings, Brandeis urged scientific management on his friend Amos Pinchot as "the greatest field for immediate conservation," and he ended a lengthy endorsement of the system to a midwestern editor by observing that "of all the social economic movements with which I have been connected none seems to me to equal this in its importance and its hopefulness."¹⁰⁶ He wrote a foreword to Frank Gilbreth's 1912 *Primer of Scientific Management* and spoke at a memorial service for Taylor in October 1915, and though he said nothing more in public on the subject after joining the Court, in 1932 he did commend his ICC brief to his nephew, who was then involved in the problems of the railroads.¹⁰⁷ But unlike Taylor, who regarded organized labor as pernicious and resented its opposition to his system, Brandeis understood that scientific management could not succeed without labor's consent and believed that its participation in the establishment of performance standards in small firms was the way to "attain that freedom and development of the worker without which even his greater happiness would not promote the general welfare."¹⁰⁸ Tirelessly, he preached the gospel to skeptical workers and their leaders in letters, addresses, and articles in the popular press.¹⁰⁹ Where Brandeis saw genius, his friends saw only "speeding up," thinly disguised as science.¹¹⁰ But Brandeis insisted that Taylorism *was* science, and he

¹⁰⁵ Louis D. Brandeis, brief submitted to the Interstate Commerce Commission, 3 Jan. 1911, portions reprinted as *Scientific Management and Railroads* (New York, 1911), 8, 6, 17.

¹⁰⁶ Brandeis to Amos Pinchot, 14 Nov. 1910, *Letters*, 2: 386; Brandeis to Rudolph G. Leeds, 9 Nov. 1910, *ibid.*, 383-85, at 385.

¹⁰⁷ Frank B. Gilbreth, *Primer of Scientific Management* (New York, 1912); Kraines, "Brandeis' Philosophy," 196; Brandeis to Louis B. Wehle, 21 May 1932, *Letters*, 5: 502. The memorial address is "Efficiency by Consent (1915)," in *Business—A Profession*, 51-56.

¹⁰⁸ Aitken, *Taylorism*, 45; "Efficiency by Consent," 51-56, at 56.

¹⁰⁹ Brandeis to John Mitchell, 12 Dec. 1910, *Letters*, 2: 394-95; Brandeis to A. J. Howlitt, 29 March 1911, *ibid.*, 418; Louis D. Brandeis, "The New Conception of Industrial Efficiency," *Journal of Accountancy* 12 (1911): 35-42; Louis D. Brandeis, "Organized Labor and Efficiency (1911)," in *Business—A Profession*, 37-50; Louis D. Brandeis, "Efficiency Systems and Labor (1914)," in *Curse of Bigness*, 48-50; Strum, *Louis D. Brandeis*, 165-68.

¹¹⁰ Strum, *Louis D. Brandeis*, 165-68; Mason, *Brandeis: A Free Man's Life*, 332. On the attitudes of labor toward scientific management, see generally Milton J. Nadworny, *Scientific Management and the Unions, 1900-1932: A Historical Analysis* (Cambridge, Mass., 1955).

tried in vain to overcome labor's hostility by pointing out the benefits workers too could reap from it:

When Fred W. Taylor, with infinite patience and genius, discovered the laws by which a given quantity of pig iron might be loaded into a car or a given quantity of coal shovelled by hand in a third or fourth of the time ordinarily taken, he was protecting his workmen, not exhausting them. [Under Taylor's system] management sees to it that the best possible way of doing the job is shown the worker. . . . The management sees to it that the worker's machine is always in perfect order. The management sees to it that he is always supplied with the necessary materials. The management sees to it that the work comes to him at proper times, with proper instructions and in proper condition. Relieved of every unnecessary effort, of every unnecessary interruption and annoyance, the worker is enabled without greater strain to furnish much more in production. And under the exhilaration of achievement he develops his capacity. . . . He secures the development and rise in self-respect, the satisfaction with his work, which in almost every line of human activity accompany great accomplishment by the individual. Eagerness and interest take the place of indifference, both because the workman is called upon to do the highest work of which he is capable, and also because in doing this better work he secures appropriate and substantial recognition and reward.¹¹¹

What are we to make of this apparent paradox, the warm embrace of a managerial philosophy explicitly meant to deny workers every opportunity for the exercise of discretion and initiative by the same man who believed so deeply 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?"¹¹² How could the austere judge who demanded that ordinary workers "pay the price" for industrial liberty ask them to submit to Taylor's lockstep for "recognition and reward?" Part of the answer may lie in the allure of science and the promise of social engineering to a man (and an age) committed to the logic of facts and the substitution of observation and induction for outmoded deductive theory.¹¹³ But Brandeis's belief in the unifying potential of Taylorism, that social interests ostensibly in conflict could be reconciled in a common purpose by the systematic application of managerial technique, suggests more than this. "Don't assume," he

¹¹¹ Brandeis, "Organized Labor and Efficiency," 42-43, 48-49.

¹¹² *Liggett v. Lee*, 517, 580.

¹¹³ Strum, *Louis D. Brandeis*, 125-26; Mason, *Brandeis: A Free Man's Life*, 400; Haber, *Efficiency and Uplift*, 11, 79-80.

said, "that the interests of employer and employee are necessarily hostile. . . . The opposite is more apt to be the case."¹¹⁴ Taylor himself had consistently emphasized this point. In his 1895 paper, he argued that the higher wages and lower costs resulting from the faster pace of work made "each workman's interests the same as that of his employers" and, years later, encouraged both sides to "take their eyes off the division of the surplus until this surplus becomes so large that it is unnecessary to quarrel over how it shall be divided."¹¹⁵

For Brandeis, the unity of purpose in the workplace created by the prospect of new wealth through "efficiency" was a central element and a major achievement of scientific management and offered labor the chance to redress an old grievance. With the introduction of Taylorism, he said early in 1915,

we ought to make up for the opportunity we lost when we changed from hand labor to machine labor. [When] that change was made the employer got more than he ought to have got; and labor did not get its share, because labor was not organized. Now, when labor is to a very considerable extent organized, labor ought to insist upon scientific management. . . . Then, when the proceeds . . . are secured, labor ought to insist upon getting its share.¹¹⁶

But if Brandeis saw little point in disrupting industry now by reopening the battle between labor and capital over the wealth created by the introduction of machines, settling instead for a fairer distribution of the fruits of this new social technology, workers saw no reason to concede the earlier fight now that unionism was at last evening the odds, especially when to do so made submission to Taylorism the price of their fair share. In this, they could find comfort in the words of a different Brandeis. "The wastes of democracy are among the greatest obvious wastes, but we have compensations in democracy which far outweigh that waste and make it more efficient than absolutism."¹¹⁷ Taylorism's concentration of authority in management, its promise to spare workers "every unnecessary effort," seemed to contradict not only Brandeis's commitment to the mental and moral development of the individual as the prerequisite of effective democracy, but the basic structural principle of American government itself: "The doctrine of the separation of powers was adopted by the Convention of

¹¹⁴ Quoted (1905) in Mason, *Brandeis: A Free Man's Life*, 141.

¹¹⁵ Quoted (1895, 1915) in Haber, *Efficiency and Uplift*, 2, 27.

¹¹⁶ "On Industrial Relations," 86–87; see also Brandeis to Abraham J. Portenar, 22 Jan. 1913, *Letters*, 3: 10–11, at 11.

¹¹⁷ Quoted (1912) in Lief, *The Brandeis Guide*, 54–55.

1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but . . . to save the people from autocracy.”¹¹⁸ Not even winning their fair share, this other Brandeis had always insisted, could justify turning free men and women into cogs in a mass production machine that left them “not only supine, but paralyzed.”¹¹⁹

It was not the creation of wealth but the virtues of unity that drew Brandeis so powerfully to scientific management. Just weeks before the rate hearings, in the summer of 1910, he had been deeply involved in mediating a bitter labor dispute in New York’s garment trade and drafting a protocol that, by improvising a “preferential union shop,” temporarily ended it.¹²⁰ The contestants on each side were Yiddish-speaking Jews, most from Eastern Europe and many only recently come to America, and Brandeis, the son of assimilated German Jews for whom, at the age of fifty-three, religious identity was not yet important, was greatly moved by the encounter. It was, said his close friend Elizabeth Evans, this “profound emotional experience that gave birth to his realization of himself as a Jew.”¹²¹ “I was,” he recalled,

impressed, deeply impressed, that these Jews . . . showed in a striking degree the qualities which, to my mind, make for the best American citizenship, that within them there was a true democratic feeling and a deep appreciation of the elements of social justice. . . . Observation and study revealed to me that this was not an accident, that it was due to the fact that twentieth century ideals of America had been the age-old ideals of the Jews.¹²²

Gradually, as his growing sensitivity to antisemitism at home and his appreciation of the suffering of Jews in a Europe torn by war nurtured both his sense of Jewishness and his intense commitment to Zionism, Brandeis began to articulate the “true democratic feeling” that linked this ancient people to the needs of a modern, industrial America.¹²³ Centuries of persecution had given Jews, like the Puritans of New England, a stern sense of duty and produced a people uniquely sensitive to the demands of brotherhood and community.¹²⁴

¹¹⁸ *Myers v. United States*, 52, 293.

¹¹⁹ Brandeis to Frankfurter, 12 Feb. 1926, *Letters*, 5: 207.

¹²⁰ Strum, *Louis D. Brandeis*, 174–80, 233–35; Mason, *Brandeis: A Free Man’s Life*, 289–315; Allon Gal, *Brandeis of Boston* (Cambridge, Mass., 1980), 124–27.

¹²¹ Quoted (1931) in Strum, *Louis D. Brandeis*, 233.

¹²² Quoted (1914) in Gal, *Brandeis of Boston*, 126.

¹²³ *Ibid.*, 149–73, 195–207; Strum, *Louis D. Brandeis*, 248–65.

¹²⁴ Louis D. Brandeis, “A Call to the Educated Jew,” *Menorah Journal* 1 (1915): 13–19,

"To describe the Jew as an individualist is to state a most misleading half-truth. He has to a rare degree merged his individuality and his interests in the community of which he forms a part."¹²⁵ Brandeis's solicitousness for the rights and duties of living men and women was now extended to collectives, to "whole peoples": "The movements of the last century have proved that whole peoples have individuality no less marked than that of a single person. . . . As democracy insists that the full development of each individual is not only right but a duty of society, so the new nationalism proclaims the right and duty of each race or people to develop itself fully."¹²⁶

In the ideal democracy, moreover, individuals would instinctively value the interests of this collective more highly than their own and cede priority to its "rights" over theirs. Late in 1914, Brandeis told a meeting of university Menorah Societies that for the Jews, "democracy was not an ideal [but] a practice," made possible by the existence of four "conditions essential to successful democracy." Of these, only one, "relatively high intellectual attainments," addressed the personal development of the individual. In the others, "an all-pervading sense of duty in the citizen," "submission to leadership as distinguished from authority," and "a developed community sense," the needs of the collective took precedence. To capture the meaning of the last condition, he borrowed the words of the philosopher Achad Ha'am (Asher Ginzberg). Judaism, he said,

found "eternal life" on earth, by strengthening the social feeling of the individual; by making him regard himself not as an isolated being with an existence bounded by birth and death, but as part of a larger whole, as a limb of the social body. . . . When the individual thus values the community as his own life, and strives after its happiness as though it were his individual well-being, he finds satisfaction, and no longer feels so keenly the bitterness of his individual existence, because he sees the end for which he lives and suffers.

"Is not that," asked Brandeis, "the very essence of the truly triumphant twentieth-century democracy?"¹²⁷

reprinted as "Our Richest Inheritance," in *The Menomah Treasury: Harvest of Half a Century*, ed. Leo W. Schwarz (Philadelphia, Pa., 1964), 868–74. See also Brandeis to editor, *Menomah Journal*, Jan. 1915, *Letters*, 3: 398–99.

¹²⁵ "Our Richest Inheritance," 871–72.

¹²⁶ Address to the Economic Club of Boston, 8 Feb. 1915. Quoted in Lief, *The Brandeis Guide*, 262–63. See also Louis D. Brandeis, "The Jewish Problem: How to Solve It (1915)," in *Curse of Bigness*, 218–32, at 218–24; Brandeis to Norman Hapgood, 1 Oct. 1914, *Letters*, 3: 306–7; Brandeis to Gustave Hartman, 16 June 1915, *ibid.*, 534–35.

¹²⁷ "Our Richest Inheritance," 871–72; Strum, *Louis D. Brandeis*, 236.

Perhaps. But two things do seem certain. First, within a very short span of time, during which he was, in other forums, eloquently defending the liberties of free men and women against corporate giants that stunted their growth and sapped their individuality, Brandeis had come to endorse an organic collectivism with which any of the Germanists would have been quite at home. And as his anomalous support for Prohibition after 1918 makes clear, even he was not averse to a bit of paternalistic authoritarianism when the interests of the whole required it.¹²⁸ Second, and more unsettling still, is Brandeis's unblinking acceptance of the corollary to this collectivism, his idealization of a citizen who looks uncomfortably like the Socialist Man Lenin believed it the historical duty of the Socialist state to mold. Lenin understood well that the strict central planning necessary in the "first phase" of communism could not be successful until the atavism of "bourgeois rights" had been purged from the minds of workers; submission to the will of the whole as revealed in the commands of the planners could scarcely be expected if the common man still calculated, "with the hard-heartedness of a Shylock, whether he has not worked half an hour more than another, whether he is not getting less pay than another." True democracy will be realized, and the coercive powers of the state made superfluous, only when every person comes to understand that his interests and those of the collective are one and the same, and "the necessity of observing the simple, fundamental rules of everyday social life in common [becomes] a habit."¹²⁹ Socialist Man, Lenin knew, would submit to Taylorism without a murmur.

But, as Brandeis clearly saw, the converse holds as well; scientific management in a world of "bourgeois" commitments to individual liberty and the privacy of interests cannot succeed unless free men and women selflessly identify those interests with the objectives of those commanding the machine, an identification possible only for the inhabitants of Achad Ha'am's utopia.¹³⁰ And this, it seems, is precisely what Brandeis saw in the Palestine that seized his imagination well before his only visit in 1919 and held it until the end of his life in 1941: a social laboratory of small, scientifically managed institutions peopled by industrious Jews devoted to the common good.¹³¹

¹²⁸ Compare the discussion of a surprised and disappointed Alpheus Mason on this point, in Mason, *Brandeis: Lawyer and Judge*, 170–73.

¹²⁹ Lenin, *State and Revolution*, 75–85.

¹³⁰ Compare Lief, *Brandeis*, 478–79.

¹³¹ Strum, *Louis D. Brandeis*, 234–47, 273–79; Urofsky, *A Mind of One Piece*, 101. See

“The very lack of wealth in Palestine,” recalled his friend Norman Hapgood, “the impossibility of there ever being wrung from that soil much luxury—has been an attraction to Mr. Brandeis.”¹³² Here, he thought, was a hardy, uncorrupted people who shared his disdain for material comforts, whose cooperation with schemes like Taylorism could be taken for granted, and who, appropriately, were ready to live in relative poverty if it could not.

Conclusion

“Individual worth,” Mason writes of Brandeis, “remained his favorite theme, human dignity his unvarying touchstone. The basic test of any institution, economic or political, was whether it valued man as man and not as machine. His vision, his ideal, was of a community within which the individual would develop as a human being,” a vision movingly expressed in *Liggett* and possible only in the economy of small firms and modest local government that he consistently expounded.¹³³ But in his enthusiasm for a system of planning whose purposes and implications contradicted the individualist principles he seemed to hold dear, and in the thoroughgoing collectivism awakened in him by his vision of the Jewish homeland, he gave voice to the same deep ambivalence felt by his fellow citizens. Throughout his maturity, two spokesmen for the public good coexisted uneasily within him, competing for his loyalty. One, the libertarian gardener of little people’s spirits who spoke in *Liggett*, saw the unpredictable and uncontrollable growth of free men and women as the highest value in public life and sought to create an environment within which individuality could flourish by carefully pruning away the weeds that stifled and coerced men and women into deadening conformity. The other, the collectivist social engineer who rallied behind the flag of Taylorism, understood that modern technology and the efficient creation of wealth demand production planned by professionals and carried out by men and women working under their direction in sovereign organizations. Brandeis himself never resolved the conflict between these irreconcilable voices, and in this he reflects the uncertainty with which

also Brandeis to Rudolph I. Coffee, 2 May 1916, *Letters*, 4: 178; Brandeis to Mary Fels, 6 July 1916, *ibid.*, 247–48; Brandeis to Chaim Weizmann, 13 Jan. 1918, *ibid.*, 334–35.

¹³² Quoted (1930) in Gal, *Brandeis of Boston*, 180–81.

¹³³ Mason, *Brandeis: A Free Man’s Life*, 644.

his contemporaries entered the age of concentration. But though the doubts he expressed can still be heard in the culture and politics of our own day, muted and hesitant, we seem to have made the choice nonetheless. For if the spontaneous order theory of the eighteenth century gave life and influence to the gardener throughout the nineteenth century, bigness and the economics of control have surely given the twentieth century to the engineer.