THE CURSE OF BIGNESS

MISCELLANEOUS PAPERS

OF LOUIS D. BRANDEIS

EDITED BY OSMOND K. FRAENKEL

AS PROJECTED BY CLARENCE M. LEWIS

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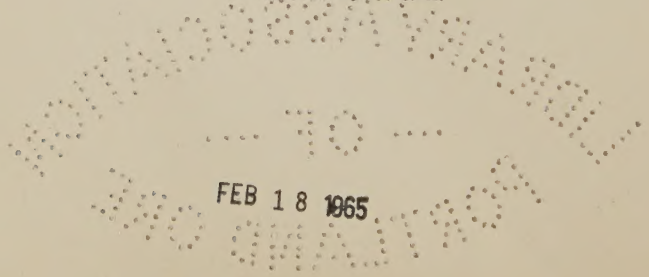

FOREWORD

My friend, Clarence M. Lewis, projected this book and before his sudden death collected a large part of the material here reprinted. My task in carrying out the conception has been greatly facilitated by his partners, Walter N. Seligsberg and William E. Friedman, Mr. Friedman having made many valuable suggestions as to form and content.

Preceding the text of the reprinted matter each section of the work contains a brief note and following it a bibliography of articles and addresses on the subject covered by that section. The reprinted articles are given in full even when parts of them appear more than once.

I am grateful to David Rein and Herman Sulken for assistance in obtaining material, and to the former for preparing the digest of the opinions.

O. K. F.

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Part I

SAVINGS-BANK LIFE INSURANCE

Editor's Note

Reform is seldom so quickly established as was this measure regarding savings-bank life insurance, proposed by Louis D. Brandeis after he had studied the work of the New York Committee which in 1905 investigated life insurance companies. During 1906 Mr. Brandeis made speeches and wrote articles on the subject and in June 1907 Massachusetts enacted his proposals into law. The system then set up has flourished mightily. Twenty-one banks are now writing insurance of this description and one hundred more act as receiving agents for premiums. On March 31, 1934, there were in force 107,000 policies totaling $96,000,000 of insurance. The system has shown its strength by large increases during years of depression; it earned 5.02 per cent on its investments in 1932 and 4.67 per cent in 1933. Expenses now average about 5.35 per cent of premium income, and the cost to the insured is much less than that of ordinary companies. Furthermore, in 1933 the lapse rate was only 2.62 per cent, whereas the lapses in the ordinary companies have been tremendous.[1] The articles and addresses here listed are, therefore, as pertinent today as when written. This is especially true since no states have yet followed the example of Massachusetts, although in New York a bill similar to this one was presented to the Legislature at its last regular session (1934) but not acted upon.

Three of the most comprehensive papers on the subject are reprinted.

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[1] These data are taken from a survey published March 31, 1934, by the Massachusetts Commissioner. See also address by Governor Ely delivered March 29, 1934, reprinted in the *Congressional Record*, vol. 78, pp. 9175, 9176.

WAGE-EARNERS' LIFE INSURANCE

THE average expectancy of life in the United States of a man 21 years old is, according to Meech's *Table of Mortality*, 40.25 years. In other words, take any large number of men who are 21 years old, and the average age which they will reach is 61¼ years.[1]

If a man, beginning with his 21st birthday, pays throughout life 50 cents a week into Massachusetts savings banks, and allows these deposits to accumulate for his family, the survivors will, in case of his death at this average age of 61¼ years, inherit $2,265.90 if an interest rate of 3½ per cent a year is maintained.[2]

If this same man should, beginning at age 21, pay throughout his life the 50 cents a week to the Prudential [3] Insurance Company as premiums on a so-called "industrial" life policy for the benefit of his family, the survivors would be legally entitled to receive, upon his death at the age of 61¼ years, only $820.[4]

If this same man, having made his weekly deposit in a savings bank for 20 years, should then conclude to discontinue his weekly payments and withdraw the money for his own benefit, he would receive $746.20. If, on the other hand, having made for 20 years such weekly payments to the Prudential Insurance Company, he should then conclude to discontinue payments and surrender his policy, he would be legally entitled to receive only $165.

So widely different is the probable result to the workingman if he selects the one or the other of the two classes of savings investment which are open to him; and yet life insurance is but a method

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[1] According to the *American Experience Table of Mortality*, the expectancy is 41.53 years; according to *Dr. Farr's General English Experience Table No. 3*, it is 38.80 years.

[2] The average interest rate paid by the Massachusetts savings banks during the ten years ending October 31, 1905, was 3.83 per cent. The lowest average rate of all these banks in any one year (1903) was 3.709 per cent.

[3] The result in other industrial life insurance companies would be substantially the same.

[4] The payment to be made by the insurance company would be increased by small amounts from time to time paid by way of benefits or dividends if any are declared.

of saving. The savings banks manage the aggregate funds made up of many small deposits until such time as they shall be demanded by the depositor; the insurance company, ordinarily until the depositor's death. The savings bank pays back to the depositor his deposit with interest less the necessary expense of management. The insurance company in theory does the same, the difference being merely that the savings bank undertakes to repay to each individual depositor the whole of his deposit with interest, while the insurance company undertakes to pay to each member of a class the average amount (regarding the chances of life and death), so that those who do not reach the average age get more than they have deposited (including interest), and those who exceed the average age less than they deposited (including interest). The fundamental object of both savings and life insurance institutions is the safe and profitable investment and care, at a minimum of expense, of funds contributed from time to time in small amounts. To attain this end, the essential qualities on the part of the management of both classes of institutions are good judgment, honesty, economy, and accuracy.

Why, then, does the workingmen's investment in industrial insurance prove relatively so disastrous?

What Industrial Insurance Is

Industrial insurance is simply life insurance in small amounts of the kind commonly taken by the wage-earner. In the United States the policies average now about $140. They serve mainly to provide funds to meet the wage-earner's heavy expenses of a last illness and a decent burial. They are considered a prime necessity among the working people, so that of the 20,936,565 level-premium life insurance policies outstanding in the ninety American companies on January 1, 1905, 15,678,310 were industrial policies.

The peculiar features of industrial as distinguished from ordinary life insurance are:

(*a*) That the premiums are fixed for all ages at 5 cents or multiples thereof, the variations for different ages being in the amount of insurance so purchased, whereas in ordinary life insurance the variation is in the amount of premium.

(*b*) That the premium is payable weekly, whereas in ordinary life

insurance the premium is payable annually, semi-annually, or quarterly.

(*c*) That the premium is collected from house to house, whereas in ordinary life insurance the payments of premium are commonly remitted by mail or are made at the office of the company or of its agents.

INDUSTRIAL—Infantile Table

Weekly Premium, *Ten Cents*

BENEFIT PAYABLE IF POLICY HAS BEEN IN FORCE FOR	Age next birthday when policy is issued							
	2	3	4	5	6	7	8	9
Less than 3 months	$16	$18	$20	$22	$24	$28	$32	$40
More than 3, but less than 6 months	20	22	26	28	32	38	44	56
More than 6, but less than 9 months	24	28	32	36	44	52	70	100
More than 9 months, but less than 1 year	30	34	40	48	58	70	100	150
One year	34	40	48	58	78	110	160	240
Two years	40	48	58	86	120	170	240	
Three "	48	58	94	130	180	240		
Four "	58	102	140	190	240			
Five "	110	150	200	240				
Six "	160	200	240					
Seven "	200	240						
Eight "	240							

One-half the above amounts will be paid for a weekly premium of five cents. No higher premium than ten cents will be taken.

Table showing the rates charged for baby insurance by the Prudential Insurance Company. For five cents a week this company will insure a child one year old, paying the parents eight dollars in case of death.

The Appalling Waste in Industrial Insurance

In the United States about 94 per cent of all industrial insurance is furnished by three companies: the Metropolitan of New York writing 49 per cent, the Prudential of New Jersey 36 per cent, and the John Hancock of Massachusetts 9 per cent. Each company issues also ordinary life policies.

The Metropolitan (which alone separates in any published statement the expense of its industrial department from its ordinary life department) discloses that the managing expenses of its industrial department in the year 1904 (exclusive of real estate taxes, insurance taxes, and departmental fees) was 42.08 per cent of all premium re-

ceipts. The expense in the John Hancock is stated to be "about" 40 per cent. That of the Prudential is probably higher than either of the other companies.

In the year 1904 the average expense of management of these three companies (including both the ordinary life and the industrial departments) was 37.21 per cent of all premium receipts. Premium receipts of insurance companies correspond to deposits of savings banks. In the same year the percentage of management expenses to deposits made during the year of the 188 Massachusetts savings banks was 1.47 per cent. In other words, the percentage of expense of management to premium receipts of these insurance companies was twenty-five times as great as that of the savings banks to their year's deposits. Yet the percentage of expense of the industrial department of these insurance companies alone is even greater than 37.21 per cent of the premium receipts, the companies' percentage of expense being reduced by reason of the fact that the companies issue also ordinary life policies. Even the extravagantly managed Mutual Life, New York Life, and Equitable (which issue only ordinary life policies) took for such managing expenses in 1904, on the average, only 23.33 per cent of the year's premium receipts; while the Metropolitan, the Prudential, and the John Hancock (which issued both kinds of policies) took 37.21 per cent.

It is true that the collections of premiums by an insurance company are partly for the purpose of carrying insurance risk, as well as for that of investment, while the deposits in a savings bank are accepted solely for the purpose of investment, but this circumstance does not by any means wholly destroy the significance of the foregoing comparisons.

How heavy the burden is which the present system of industrial life insurance imposes upon the workingman can, however, be fully appreciated only if we bear in mind the following facts:

First, the double premium. The premium payable for any given amount of industrial insurance is about double that payable on ordinary life non-participating policies.

Thus, in the Metropolitan, an industrial policy-holder insuring at age 21 would pay 60 cents a week, or in the aggregate $31.20 a year for a $984 policy, while he would pay only $16.55 a year for an ordinary life non-participating $1,000 policy. In the Prudential a

man of 40 would pay 50 cents a week, or in the aggregate $26 a year, for a $500 policy, while he would pay only $27.03 for an ordinary life non-participating $1,000 policy.

Second, the quadruple expense of management. The proportion of the premium taken for management expenses in the case of industrial insurance is about twice as great as in the case of ordinary life non-participating policies; and, since the premium also is about twice as great as for an ordinary non-participating life policy of like amount, it follows that the industrial policy-holder pays toward expense of management four times as much as even the present expense charge borne by the ordinary life policy-holder for the same amount of insurance.

Third, the high lapse rate. About two-thirds of all industrial policies lapse and are forfeited within three years of the date of issue, the premiums paid thereon proving a total loss to the policy-holder. *In the year 1904, 87 per cent of the industrial policies in the Metropolitan, the Prudential, and the John Hancock which terminated within the year were forfeited; and only 13 per cent resulted in any payment to the insured.*

Of the 2,761,449 industrial insurance policies in these three great companies which terminated by death, surrender, and lapse during the year 1904, aggregating in amount $422,633,987, payment was made to insured on only 347,072, or about one-eighth of the policies. In other words, the holders of 2,414,377 policies, with aggregate insurance of $379,708,958, made a total loss of all premiums paid.

The fact that more than 40 per cent of each premium goes to expense of management, when taken alone, fails, therefore, to show how great this industrial insurance waste is. We must remember that the expense is more than 40 per cent of a premium which is double the ordinary premium. But even these facts considered together do not fully disclose the waste. They indicate only the loss to persisting policy-holders. We must remember also that those whose policies lapse—a great majority of all who insure—lose also (except for the temporary protection) the whole 100 per cent of their premiums.

The Causes of This Waste

What are the causes of this appalling waste of the workingmen's savings?

Financial depravity is not an important cause. The recent * insurance investigations have, it is true, disclosed in the Metropolitan and in the Prudential, as in the Equitable, the New York Life, and the Mutual Life of New York, grave breaches of trust. These industrial companies also have paid exorbitant salaries. In them also official position and policy-holders' money have been used for private profit. By them, also, illegal contributions have been made to secure legislative favors. And, in addition, the stockholders of the Metropolitan and of the Prudential have, to a degree unknown in ordinary life companies, received unjustifiable dividends. *The capital of the Prudential has been swelled from $91,000 to $2,000,000 out of the premiums exacted from workingmen, so that now the company, while paying nominally a 10 per cent dividend, in fact pays to its stockholders in dividends each year an equivalent of 219.78 per cent on the cash actually paid in on the capital stock.* The capital of the Metropolitan likewise has been swelled out of wage-earners' premiums from $500,000 to $2,000,000, so that now the company, while paying nominally a 7 per cent dividend, in fact pays to stockholders each year an equivalent of 28 per cent on the cash actually paid in on the capital stock. The profitableness of the business to stockholders and officers is further shown by the fact that the Metropolitan, in order to increase its own business and to eliminate competition, bought out, in 1902, a small Kentucky company on terms which netted its stockholders nearly $400 per share for stock on which only $100 had been paid in.

But the amount diverted from policy-holders by financial irregularities, though large in the aggregate, is small as compared with the total of premiums paid. Financial depravity does not explain why *in fifteen years the workingmen of Massachusetts have paid $55,285,744 in industrial premiums to these three companies, and received back in all only $19,881,353;* that is, 35.96 per cent of the aggregate premiums paid, without interest.[5] The John Hancock appears to have been managed throughout with scrupulous honesty as a mutual company, and yet in the fifteen years ending December 31, 1904, it took from Massachusetts industrial policy-holders in premiums $18,319,730,

* This was written in 1906.—*Ed.*

[5] The figures for the United States are not available, the payments to industrial policy-holders not being separated from those to ordinary policy-holders.

and paid to them only $5,942,033, or 32.43 per cent, without interest, of the premiums paid.[6]

Nor is this fearful waste of workingmen's savings due to mere extravagance in management. The working organization of these companies is said to be admirable; and, aside from a few exorbitant official salaries in the Metropolitan and the Prudential, the employees of the three companies are certainly not overpaid on the average. The Armstrong Report states that, of the 12,000 or 13,000 agents in the Metropolitan, "an enterprising man who devotes his whole time to the business" received an average of $11.64 per week; the 2,112 clerks, an average of $15; the about 2,700 assistant superintendents, $25 a week; and the about 350 superintendents $50; and that the fees paid for each medical examination and inspection were 50 cents and 25 cents respectively; that the Prudential paid to 8,582 agents on the average $14.61 per week; to 1,751 assistant superintendents, $24.24; and to 223 superintendents $95.55. Obviously, therefore, mere extravagance is not the cause of this waste of workingmen's savings.

The real cause of these meager results to the insured from industrial insurance is not financial depravity or extravagance, but the extraordinary wastefulness necessarily attendant upon the present system of supplying life insurance for workingmen.

The principal elements of expense in industrial insurance are:

(1) The initial expense on issue of policies, taken in connection with the large percentage of policies lapsed.

(2) The expense of house-to-house collection of weekly premiums.

The average initial expense as figured by the Metropolitan was, in 1904, $2.07 per policy on which the average premium was 12 cents weekly. It is probably about the same in other companies. In the John Hancock the initial expense includes the agent's commission at the rate of 48 cents for placing a policy bearing 5 cents weekly premium, and the physician's fee of 50 cents. But the issue of each policy involves besides these specific charges a large pro rata for general expense, the exact amount of which is not supplied by the published accounts. The initial charge, while large in itself as compared with the

[6] The insurance reserve and some surplus were, of course, accumulated also.

year's premiums, becomes particularly burdensome to persisting policy-holders by reason of the heavy lapse rate.

"From the most careful accounting made time and again," says the John Hancock, "the weekly premium policies do not square themselves and make good the initial and current expenses and loss and provide for the State requirement of reserve, until at least three full years' premiums have been paid. . . . Not a policy that lapses before at least three full years' premiums have been paid but leaves a greater or less deficiency for the survivors to bear. . . .

"On the average fully one-half the entrants lapse their policies before the end of the first year and a majority of these within the first quarter, though no policy lapses until four weekly premiums are overdue."

The experience of the John Hancock is, of course, not exceptional. The Metropolitan lapse rate appears to be larger, and that of the Prudential still larger. The Armstrong Committee found that in the Metropolitan—

"More than one-third of the policies issued do not survive three months, and about one-half are canceled within a year. In 1903 the company took one week's industrial issue from each month in the year, and followed the issue through a period of twelve months, with the following result:

	Per Cent
"Rate of lapses in first 3 months from date of issue	35.40
" " " 6 " " " "	43.57
" " " 9 " " " "	48.28
" " " 12 " " " "	51.46"

In 1904 the average time for which premiums were paid on policies which lapsed within one year from issue was 6.05 weeks.

The net result to the Metropolitan Company from each policy so lapsed is as follows:

Initial cost of policy	$2.07
Cost of carrying policy	.52
	$2.59
Average weekly premiums at 12.004 cents for 6.05 weeks ..	.726
Net loss to the company (*i.e.*, to the persisting policy-holders)	$1.864
Net loss to the insured (12.004 cents per week for 6.05 weeks)	.726

During the second year (in which about 10 per cent of the policies lapse) and the third year (in which about 5 per cent lapse) the net loss to the company (that is, to the persisting policy-holders) grows gradually less, but that to the insured whose policies lapse grows very much greater. For, while the average net loss to the insured whose policies lapse during the first year is only 73 cents, the average, figured on the same basis, for those whose policies lapse in the second year is approximately $8.88, and the average net loss to those whose policies lapse in the third year is approximately $15.12. In 1904 the Metropolitan wrote 1,829,559 new policies. Applying the above percentages to the business of the Metropolitan for the full years of 1904 and 1905, we find that 941,491 of the 1,829,559 policies written in 1904 must have lapsed within the year 1905, and that the net loss on these lapsed policies aggregated $2,438,461.68, of which the insured bore $683,522.46, and the persisting policy-holders $1,754,939.22.

But besides the deficit due to lapses the persisting policy-holder bears another fearful burden. Even in the honestly managed John Hancock the fee of the collector is 20 per cent of each week's premium, and this 20 per cent charge is only a part of the cost of collection. There is in addition necessarily the large expense of an elaborate system of superintendence and accounting. Bear in mind that 20 per cent of an industrial premium is equal to 40 per cent of the sum payable as premium for a like amount of ordinary insurance.

Obviously, therefore, a substantial reduction of the present cost of industrial insurance is not possible unless some radical change of system be introduced whereby the initial expenses, the cost of premium collection, and the percentage of lapses is greatly lessened.

The Sacrifice of the Thrifty

The supporters of the present system of industrial insurance declare that such a reduction of expenses and of lapses is impossible. They insist that the total loss to the insured and the heavy burden to the policy-holders from lapses, as well as from the huge cost of premium collection, must all be patiently borne as being the unavoidable incidents of the beneficent institution of life insurance when applied to the workingman. They declare that the appalling waste incident to

the forfeiture within three years of two-thirds of all policies written is a sacrifice essential to the ultimate salvation of the small persisting minority, and that the huge expense involved in the house-to-house collection of weekly premiums is necessary to prevent still more lapses on account of the workingman's alleged lack of thrift.

It may be questioned whether, in view of the heavy expense now attending industrial insurance, the discontinuance of premium payments which yield such slight probability of net returns is not evidence rather of thrift than of thriftlessness. It is surely difficult to justify a system of insurance as to which it may be foretold that, of the millions who are entered each year at a per capita initial expense of $2.07, a majority will not only let their policies lapse within the year, but will on the average pay in premiums only 72 cents. Does not such a record of mortality in policies prove conclusively that most of the entrants had been over-persuaded or misled into taking the insurance? *But if, as the companies contend, the discontinuance of premium payments is evidence of thriftlessness, surely the thrifty who persevere should not be compelled to submit to a system which requires such great and largely useless sacrifices in the supposed interest of a small minority.*

The thrifty workingman, like people of larger means, should have the opportunity of obtaining life insurance at more nearly its necessary cost.

The Remedy

The sacrifice incident to the present industrial insurance system can be avoided only by providing an institution for insurance which will recognize that its function is not to induce working people to take insurance regardless of whether they really want it or can afford to carry it, but rather to supply insurance upon proper terms to those who do want it and can carry it—an institution which will recognize that the best method of increasing the demand for life insurance is not eloquent, persistent persuasion, but, as in the case of other necessaries of life, is to furnish a good article at a low price.

The Savings Bank the Best Medium

Massachusetts in its 189 savings banks, and the other States with savings banks similarly conducted, have institutions which, with a

slight enlargement of their powers, can at a minimum of expense fill the great need of life insurance for workingmen.

The only proper elements of the industrial insurance business not common to the savings bank business are simple, and can be supplied at a minimum of expense in connection with our existing savings banks. They are:

(*a*) Fixing the terms on which insurance shall be given.

(*b*) The initial medical examination.

(*c*) Verifying the proof of death.

The last involves an inquiry similar in character to that now performed by the clerks of savings banks in the identification of depositors.

The second is the work of a physician, who is available at no greater expense to the savings bank than to the insurance company.

The first is the work of an insurance actuary, who would be equally available to the savings banks as he is to insurance companies, if the former undertook the insurance business. And the present cost of actuarial service can be greatly reduced: first, by limiting the forms of insurance to two or three standard forms of simple policies, uniform throughout the State; and, secondly, by providing for the appointment of a State actuary, who, in connection with the insurance commissioner, shall serve all the savings-insurance banks. The work of such an actuary is, indeed, now necessarily performed in large part in each State by the insurance department, as an incident of supervising life insurance companies.

The savings banks could thus enter upon the insurance business under circumstances singularly conducive to extending to the workingman the blessing of safe life insurance at a low cost, because:

First. The insurance department of savings banks would be managed by experienced trustees and officers who had been trained to recognize that the business of investing the savings of persons of small means is a quasi-public trust which should be conducted as a beneficent and not as a selfish money-making institution.

Second. The insurance department of savings banks would be managed by trustees and officers who in their administration of the savings of persons of small means had already been trained to the practice of the strictest economy.

Third. The insurance business of the savings banks, although kept

entirely distinct as a matter of investment and accounting, would be conducted with the same plant and the same officials, without any large increase of clerical force or incidental expense, except such as would be required if the bank's deposits were increased. Until the insurance business attained considerable dimensions, probably the addition of even a single clerk might not be necessary. The business of life insurance could thus be established as an adjunct of a savings bank without incurring that heavy expense which has ordinarily proved such a burden in the establishment of a new insurance company.

If the individual risks were limited at first to, say, $150 on a single life, the business could be begun safely on a purely mutual basis as soon as a few hundred lives were insured, or earlier if a guaranty fund were provided. As the business increased, the limit of single risks could be correspondingly increased, but should probably not exceed $500.

Fourth. The insurance department of savings banks would open with an extensive and potent good will, and with the most favorable conditions for teaching, at slight expense, the value of life insurance. The safety of the institution would be unquestioned. For instance, in Massachusetts the holders of the 1,829,487 savings bank accounts, a number equal to three-fifths of the whole population of the State, would at once become potential policy-holders; and a small amount of advertising would soon suffice to secure a reasonably large business without solicitors.

Fifth. With an insurance clientele composed largely of thrifty savings bank depositors, house-to-house collection of premiums could be dispensed with. The more economical monthly payments of premiums could also probably be substituted for weekly payments.

Sixth. A small initiation fee could be charged, as in assessment and fraternal associations, to cover necessary initial expenses of medical examination and issue of policy. This would serve both as a deterrent to the insured against allowing policies to lapse and a protection to persisting policy-holders from unjust burdens which the lapse of policies casts upon them.

Seventh. The safety of savings banks would, of course, be in no way imperiled by extending their functions to life insurance. Life insurance rests upon substantial certainty, differing in this respect radi-

cally from fire, accident, and other kinds of insurance. As Insurance Commissioner Host, of Wisconsin, said in a recent address:

"If we take a number of thousand persons of different ages, nothing is more certain in nature than that their natural deaths will occur in a series not differing very widely from that of other thousands of persons under similar circumstances.

"The practical experience of this theory has given to the world the mortality tables upon which life insurance premiums are ascertained and the reserves for the future needs calculated.

"No life insurance company has ever failed which complied strictly with the law governing the calculation, maintenance, and investment of the legal reserve. . . ."

The causes of failure in life insurance companies since Elizur Wright established the science have been excessive expense, unsound investment, or rapacious or dishonest management. To the risk of these abuses all financial institutions are necessarily subject, but they are evils from which our savings banks have been remarkably free. This practical freedom of our savings banks from these evils affords a strong reason for utilizing them to supply the kindred service of life insurance.

The theoretical risk of a mortality loss in a single institution greater than that provided for in the insurance reserve could be absolutely guarded against, however, by providing a general guaranty fund, to which all savings-insurance banks within a State would make small pro rata contributions—a provision similar to that prevailing in other countries, where all banks of issue contribute to a common fund which guarantees all outstanding bank notes.

Eighth. In other respects, also, co-operation between the several savings-insurance banks within a State would doubtless, under appropriate legislation, be adopted; for instance, by providing that each institution could act as an agent for the others to receive and forward premium payments.

Ninth. The law authorizing the establishment of an insurance department in connection with savings banks should, obviously, be permissive merely. No savings bank should be required to extend its functions to industrial insurance until a majority of its trustees are convinced of the wisdom of so doing.

The savings banks are not, however, the only existing class of financial institutions which could be utilized for the purpose of supplying, at a low expense rate, insurance in small amounts under a system requiring frequent premium payments. Co-operative banks, as operated in Massachusetts and in some other States, would, under appropriate regulation, be admirably adapted to supply a part of the required service. The excellent record of these institutions in Massachusetts presents a most encouraging exhibit of the achievements of financial democracy when applied to small units and when operating under a wise system of supervision.

Public attention having at last been directed to this subject, our workingmen will not long submit to the needless sacrifice of their hard-earned savings, described in the following judgment of the Armstrong Committee on the methods of the Metropolitan Company:

"*In fine the industrial department furnishes insurance at twice the normal cost to those least able to pay for it;* a large proportion, if not the greater number of the insured, permitting their policies to lapse, receive no money return for their payments. Success is made possible by thorough organization on a large scale and by the employment of an army of underpaid solicitors and clerks; and from margins small in individual cases, but large in the aggregate, enormous profits have been realized upon insignificant investment."

If an opportunity for cheaper life insurance is afforded by means of an extension of the functions of our savings banks, the present industrial insurance companies may be permitted to pursue their efforts at inculcating thrift in accordance with the system which seems to them wise, and their claim that the present huge waste is inevitable will be duly tested.

But if we fail to offer to workingmen some opportunity for cheaper insurance through private or quasi-private institutions, the ever-ready remedy of state insurance is certain to be resorted to soon; and there is no other sphere of business now deemed private upon which the state could so easily and so justifiably enter as that of life insurance.

However great the waste in present life insurance methods, our workingmen will not be induced to abandon life insurance. To them, as to others, life insurance has become a prime need. It must be continued. It should be encouraged. In spite of the disastrous results of this form of savings investment, the industrial insurance business has

assumed enormous proportions. On December 31, 1904, the number of industrial life policies outstanding in the three great companies (Metropolitan, Prudential, and John Hancock) was 14,731,463, as against a total of only about 5,258,255 ordinary life policies outstanding in the 90 legal reserve companies. The New York Life, with its record of 957,201 policies outstanding, had only one-eighth as many policy-holders as the Metropolitan, one-sixth as many as the Prudential, and three-fifths as many as the John Hancock. In the year 1904 alone the Metropolitan, Prudential, and John Hancock wrote 3,742,209 industrial policies; that is, more than three times as many as the 90 leading level premium companies wrote of ordinary life policies during that year. In Massachusetts the predominance of industrial policies is even greater than the average. With a population of 3,000,680 there were outstanding December 31, 1904, 1,080,003 industrial policies; that is, one for every three inhabitants, counting men, women, and children, and of ordinary life policies only 257,792 were outstanding.

The demand of workingmen for life insurance will continue and will grow; but *the yearly tribute of the workingmen to Prudential stockholders of dividends equivalent to 219.78 per cent on the capital actually paid into the company, the yearly waste of millions in lapsed policies, in fruitless solicitation, and in needless collections, will cease.* The question is merely whether the remedy shall be applied through properly regulated private institutions or whether the State must itself enter upon the business of life insurance.

THE GREATEST LIFE INSURANCE WRONG

For the greatest of life insurance wrongs—the so-called industrial insurance—the Armstrong Committee failed to offer any remedy. And yet nearly three-fourths of all level premium life insurance policies issued are of this character. On December 31, 1905, the day after the committee closed its hearings, there were 16,872,583 industrial policies outstanding in the United States. In New York alone their number was then 3,898,810, and while the committee was sitting an average of 67,200 such policies were being issued in that state every month.

Industrial insurance, the workingman's life insurance, is simply life insurance in small amounts, on which the premiums are collected weekly at the homes of the insured. It includes both adult and child insurance. The regular premium charge for such insurance is about double that charged by the Equitable, the New York Life, or the Mutual Life of New York, for ordinary life insurance. In the initial period of the industrial policy, the premium rate rises to eight times that paid for ordinary insurance, since, by a clause which will be found in most industrial policies, it is provided that, if death occurs within the first six months after the date of the policy, only one-fourth of the face of the policy will be paid, and if death occurs within the second six months, payment will be made of only one-half. So heavy are the burdens cast upon those least able to bear them.

The disastrous result to the policy-holder of this system of life insurance may be illustrated from the following data, drawn from Massachusetts official reports:

In the fifteen years ending December 31, 1905, the workingmen of Massachusetts paid to the so-called industrial life insurance companies an aggregate of $61,294,887 in premiums, and received back in death benefits, endowments, or surrender values an aggregate of only $21,819,606. The insurance reserve arising from these premiums still held by the insurance companies does not exceed $9,838,000. It thus appears that, in addition to interest on invested funds, about one-half

of the amounts paid by the workingmen in premiums has been absorbed in the expense of conducting the business and in dividends to the stockholders of the insurance companies.

If this $61,294,887, instead of being paid to the insurance companies, had been deposited in Massachusetts savings banks, and the depositors had withdrawn from the banks an amount equal to the aggregate of $21,819,606 which they received from the insurance companies during the fifteen years, the balance remaining in the savings banks December 31, 1905, with the accumulated interest, would have amounted to $49,931,548.35—and this, although the savings banks would have been obliged to pay upon these increased deposits in taxes to the Commonwealth more than four times the amount which was actually paid by the insurance companies on account of the insurance.

Perhaps the appalling sacrifice of workingmen's savings through this system of insurance can be made more clear by the following illustration:

The average expectancy of life in the United States of a man 21 years old is, according to Meech's Table of Mortality, 40.25 years. In other words, take any large number of men who are 21 years old, and the average age which they will reach is 61¼ years.

If a man, beginning with his 21st birthday, pays throughout life 50 cents a week into Massachusetts savings banks and allows these deposits to accumulate for his family, the survivors will, in case of his death at this average age of 61¼ years, inherit $2,265.90 if an interest rate of 3½ per cent a year is maintained.

If this same man should, beginning at the age of 21, pay throughout his life 50 cents a week to the Prudential Insurance Company as premiums on a so-called "industrial" life policy for the benefit of his family, the survivors would be legally entitled to receive, upon his death at the age of 61¼ years, only $820.

If this same man, having made his weekly deposit in a savings bank for 20 years, should then conclude to discontinue his weekly payments and withdraw the money for his own benefit, he would receive $746.20. If, on the other hand, having made for 20 years such weekly payments to the Prudential Insurance Company, he should then conclude to discontinue payments and surrender his policy, he would be legally entitled to receive only $165.

So widely different is the probable result to the workingman if he selects the one or the other of the two classes of savings investment which are open to him; and yet life insurance is but a method of saving. The savings banks manage the aggregate funds made up of many small deposits until such time as they shall be demanded by the depositor; the insurance company manages them ordinarily until the depositor's death. The savings bank pays back to the depositor his deposit with interest less the necessary expense of management. The insurance company in theory does the same, the difference being merely that the savings bank undertakes to repay to each individual depositor the whole of his deposit with interest; while the insurance company undertakes to pay to each member of a class the average amount (regarding the chances of life and death), so that those who do not reach the average age get more than they have deposited (including interest) and those who exceed the average age less than they have deposited (including interest).

It is obvious that the community should not and will not long tolerate such a sacrifice of the workingmen's savings as the present system of industrial insurance entails; for the causes of this sacrifice are easily determined and a remedy lies near.

The extraordinary wastefulness of the present system of industrial insurance is due in large part to the fact that the business, whether conducted by stock or by mutual companies, is carried on for the benefit of others than the policy-holders. The needs and financial inexperience of the wage-earner are exploited for the benefit of stockholders or officials. The Prudential (which was the first American company to engage in the business) pays annual dividends to its stockholders equivalent to more than 219 per cent upon the capital actually paid in; the Metropolitan dividends are equivalent to 28 per cent of such capital; and stock in the Columbian National Life Insurance Company, a corporation which commenced business but four years ago, has risen from par to $296.

But the excessive amounts paid in dividends or in salaries to the favored officials account directly for only a small part of the terrible shrinkage of the workingmen's savings. The main cause of waste lies in the huge expense of soliciting insurance, taken in connection with the large percentage of lapses, and in the heavy expenses incident to a

weekly collection of premiums at the homes of the insured. The commission of the insurance solicitor is from ten to twenty times the amount of the first premium. The cost of collecting the premiums varies from one-fifth to one-sixth of the amount collected. And yet commissions for soliciting and collection are only a part of the expenses. The physician's fee, the cost of supervision, of accounting and of advertising, must all be added; with the result that no industrial policy "pays its way" until it has been in force about three years. In other words, if the policy lapses before it has been in force three years, not only does the policy-holder lose (except the temporary protection) all that he has paid in, but the company (that is the persisting policy-holders) bears a part—generally the larger part—of the cost of the lapsed policy.

And only a small percentage of industrial policies survive the third year. A majority of the policies lapse within the first year. In 1905, the average payments on a policy in the Metropolitan so lapsing continued little more than six weeks. The aggregate number of such lapses in a single year reaches huge figures. In 1905, 1,253,635 Metropolitan and 951,704 Prudential policies lapsed. The experience of their young and energetic rival, the Columbian National Life Insurance Company, is even more striking. On January 1, 1905, that company had outstanding 40,397 industrial policies. It wrote, during the year, 103,466. At the end of the year it had outstanding only 63,497; and yet, of the 143,863 policy-holders, only 699 had died, while 79,677 policies—that is, one hundred and fourteen times as many—had lapsed.

The results of this system of insurance establish conclusively that, in the conduct of the business, the interests of the insured are ignored. A life insurance company for workingmen should, as to each policy-holder, be conducted like a savings bank, as a benevolent institution. No one should be induced to take out a policy unless it is advisable for him to do so in the interests of those whom he wishes to protect by it. No one should take a policy unless he will probably be able and willing to continue it in force. Furthermore, economy in the management of the insurance savings is as essential to satisfactory results as the economy on the part of the workingmen, which alone makes it possible to pay premiums.

The supporters of the present system of industrial insurance declare that a reduction of expenses and of lapses is impossible. They insist that the loss to the insured and the heavy burden borne by the persisting policy-holders from lapses, as well as from the huge cost of premium collection, must all be patiently borne as being the inevitable incidents of the beneficial institution of life insurance, when applied to the workingman. It is obvious that a remedy cannot come from men holding such views—from men who refuse to recognize that the best method of increasing the demand for life insurance is not eloquent persistent persuasion, but to furnish a good article at a low price. A remedy can be provided only by some institution which will proceed upon the principle that its function is to supply insurance upon proper terms to those who want it and can carry it, and not to induce working people to take insurance regardless of their real interests. To attain satisfactory results the change of system must be radical.

The savings banks established on the plan prevailing in New York and generally through the New England states are managed upon principles and under conditions upon which alone a satisfactory system of life insurance for workingmen can be established. These savings banks have no stockholders, being operated solely for the benefit of the depositors. They are managed by trustees, usually men of large business experience and high character, who serve without pay, recognizing that the business of collecting and investing the savings of persons of small means is a quasi-public trust, which should be conducted as a beneficent, and not as a money-making institution. The trustees, the officers, and the employees of the savings banks have been trained in the administration of these savings to the practice of the strictest economy. While the expenses of managing the industrial departments of the Metropolitan, the Prudential and the John Hancock companies have, excluding taxes, exceeded 40 per cent of the year's premiums, the expense of management in 1905 (exclusive of taxes on surplus) of the 130 New York Savings banks, holding $1,292,358,866 of deposits, was only 0.28 of 1 per cent of the average assets, or 1 per cent of the year's deposits; and the $662,000,000 of deposits held in 1905 in the 189 Massachusetts savings banks were managed at an expense of 0.23 of 1 per cent of the average assets, or 1.36 per cent of the year's deposits.

Savings institutions so managed offer adequate means of providing insurance to the workingman. With a slight enlargement of their powers, these savings banks can, at a minimum of expense, fill the great need of cheaper life insurance in small amounts. The only proper elements of the industrial insurance business not common to the savings bank business are simple, and can be supplied at a minimum of expense in connection with such existing savings banks. They are:

First—Fixing the terms on which insurance shall be given.

Second—The initial medical examination.

Third—Verifying the proof of death.

The first is the work of an insurance actuary; and the present cost of actuarial service can be greatly reduced both by limiting the forms of insurance policies to two or three standard forms of policy to be uniform throughout the state, and by providing for the appointment of a state actuary who, in connection with the insurance commissioner, shall serve all the savings insurance banks.

The initial medical examination and the verification of proof of death are services that may be readily performed for the savings banks at no greater pro rata expense than for the existing insurance companies.

The insurance department of the savings banks would, of course, be kept entirely distinct as a matter of accounting from the savings department; but it would be conducted with the same plant and the same officials, without any large increase of clerical force or incidental expense, except such as would be required if the deposits of the bank were increased. On the other hand, the insurance department of savings banks would open with an extensive and potent good-will, and under the most favorable conditions for teaching the value of life insurance—a lesson easily learned when insurance is offered at about half the premium exacted by the industrial companies. With an insurance clientele composed largely of thrifty savings banks depositors, the expensive house-to-house collection of premiums could be dispensed with, and more economical payments of premiums could probably be substituted for weekly payments. Indeed, it is probable that the following simple, convenient, and inexpensive method of paying premiums would, to a large extent, be adopted, namely, making deposits in the savings department from time to time, and giving, when

the policy is issued, a standing order to draw on the savings fund in favor of the insurance fund to meet the premium payments as they accrue.

The safety of savings banks, would, of course, be in no way imperiled by extending their functions to life insurance. Life insurance rests upon substantial certainty, differing in this respect radically from fire, accident, and other kinds of insurance. Since practical experience has given to the world the mortality tables upon which life insurance premiums rest and the reserves for future needs are calculated, no life insurance company has ever failed which complied with the law governing the calculation, maintenance, and investment of the legal reserve. The causes of failure of life insurance companies have been excessive expense, unsound investment, or dishonest management. From these abuses our savings banks have been practically free, and that freedom affords strong reason for utilizing them as the urgent need arises to supply the kindred service of life insurance.

In Massachusetts, the proposition of permitting savings banks to establish insurance departments has already taken definite shape. The plan has been recently submitted to the Recess Insurance Committee of its Legislature, and many of its eminent and public-spirited citizens have associated themselves under the name of Massachusetts Savings Insurance League, for the purpose of securing the passage of a permissive act.

Massachusetts laid the foundation of America's admirable system of savings banks by chartering, in 1810, Provident Institutions for Savings in the Town of Boston. Massachusetts established for the world the scientific practice of life insurance by the work of its great insurance commissioner, Elizur Wright. It seems fitting that Massachusetts should lead in another great advance in the development through thrift of general prosperity by extending the functions of savings banks to the issuing of workingmen's life insurance.

MASSACHUSETTS'S SUBSTITUTE FOR OLD-AGE PENSIONS

THE urgent need of an adequate system of old-age annuities for wage-earners is becoming generally recognized. A quarter of a century ago Germany resorted to compulsory old-age insurance, dividing the burden of premiums between employer, employee, and the state. This year England is turning reluctantly to old-age pensions, borne wholly by general taxation. In America the subject is engaging the attention of Congress, of state and municipal governments, and of public service and private corporations. The problem is pressing for solution.

Massachusetts now offers a partial solution of the problem by authorizing, under a recent act, savings banks to issue old-age annuities and life insurance. Unlike Germany, Massachusetts seeks to secure for her wage-earners voluntary instead of compulsory old-age insurance. Unlike England, Massachusetts plans to make her superannuated workingmen independent instead of dependent, to relieve instead of further burdening general taxation. Her aim is to make the opportunities for saving money as numerous as the opportunities for wasting it; to make saving popular by giving to the saver all his money can earn.

The Massachusetts State Actuary, in a recent publication, shows that, under its system, the old-age annuity *plus* life insurance will cost less than the workingman now pays for his industrial life insurance alone.

"Suppose you are twenty-five years old and pay to the savings bank $1.30 each month and your neighbor who is the same age pays $1.35 each month to the insurance company.

"When *you* reach age sixty-five, you will have no more deposits to make. Instead of making deposits you will begin to receive an annuity of $100.

"While you are enjoying the fruits of your saving, your neighbor will still be paying $1.35 every month to the insurance company and he will have to continue paying this amount until he is seventy-five years old.

"Which would you rather be—your neighbor or yourself?"

The maximum premiums to be charged and the minimum benefits to be received on such a policy are shown in the table on page 27.

As stated, these tables show the maximum of premiums and the minimum of benefits. All the profits of the annuity and life insurance business will go to the policy-holders, just as now all the net earnings of the savings department go to the depositors. It is expected that these profits will be large.

The Massachusetts savings banks have a long record of large earnings on deposits and of small expenses of management. Though the character of permissible investments is narrowly limited by law to ensure safety, these banks earned last year 4.73 per cent on the deposits, while the expense of management was only ¼ of 1 per cent. All earnings of the annuity and insurance department, except so far as required for expenses or taxes or as applied to build up guaranty funds, will be paid to the policy-holders. For the Massachusetts savings banks have been operated solely for the benefit of the depositors. They have no stockholders. Their trustees, usually men of high character and of large experience, serve substantially without pay, recognizing that the business of collecting and investing the savings of persons of small means is a quasi-public trust. The savings bank is therefore conducted by its officials as a beneficent and not as a selfish money-making institution. Its trustees, officers, and employees have been trained to the practice of strictest economy in the administration of these savings. These opportunities for safe and profitable investment have made saving popular in Massachusetts, and account in a large degree for the prosperity of the Commonwealth. With a population of little more than 3,000,000 people, Massachusetts has by these means developed in her 189 savings banks 1,971,644 separate deposit accounts, aggregating $706,940,596, the average amount of each account being $358.55.

Under the act passed last year, the organization and facilities of these savings banks, and the good-will and efficiency developed in nearly a century of honorable service, are to be applied in furnishing opportunities for the other forms of saving more recently organized, namely, old-age annuities and life insurance. The statute authorizes any savings bank to issue, under adequate safeguards, to residents of Massachusetts, annuities up to the amount of $200 and life insurance

up to the amount of $500. The same individual can take out policies in any desired number of banks. Each savings bank, through its trustees and incorporators, decides for itself whether it will extend its functions so as to include the issuance of annuities and life insurance. Likewise each bank decides for itself whether it will engage in the annuity and insurance business on its own account or consent to

INSURANCE AND ANNUITY POLICY

INSURANCE PAYABLE AT DEATH PRIOR TO AGE 65, ANNUITY COMMENCING AT AGE 65

The figures below show the most you will have to pay, and the least you will get. All the profits go to the policy-holders

Age next birthday	Amount of Insurance and Annuity for Monthly Premium of									
	Ins.	Ann.	Ins.	Ann.	Ins.	Ann.	Ins.	Ann.	Ins.	Ann.
	25c.		50c.		75c.		$1.00		$1.25	
18	$124	$24	$248	$49	$372	$75	$496	$99	...	...
19	119	24	238	48	357	72	476	95	...	...
20	115	23	230	46	345	69	460	92	...	...
21	111	22	222	44	333	67	444	89	...	...
22	107	21	214	43	321	64	428	86	...	...
23	103	20	206	41	309	62	412	82	...	...
24	100	20	200	40	300	60	400	80	$500	$100
25	96	19	192	38	288	58	384	77	480	96
26	93	18	186	37	279	56	372	74	465	93
27	89	17	178	36	267	54	356	71	445	89
28	86	17	172	34	258	52	344	69	430	86
29	83	16	166	33	249	50	332	66	415	83
30	80	16	160	32	240	48	320	64	400	80
31	77	15	154	31	231	46	308	62	385	77
32	74	14	148	30	222	44	296	60	370	74
33	71	14	142	28	213	43	284	57	355	71
34	68	13	136	27	204	41	272	54	340	68
35	65	13	130	26	195	39	260	52	325	65
36	62	12	124	25	186	37	248	50	310	62
37	60	12	120	24	180	36	240	48	300	60
38	57	11	114	23	171	34	228	46	285	57
39	54	10	108	22	162	33	216	43	270	54
40	51	10	102	21	153	31	204	41	255	51
41	49	9	98	20	147	29	196	39	245	49
42	46	9	92	19	138	28	184	37	230	46
43	44	8	88	18	132	26	176	35	220	44
44	41	8	82	17	123	25	164	33	205	41
45	39	7	78	16	117	23	156	31	195	39
46	36	7	72	15	108	22	144	29	180	36
47	34	6	68	14	102	20	136	27	170	34
48	32	6	64	13	96	18	128	26	160	32
49	30	6	60	12	90	18	120	24	150	30
50	27	5	54	11	81	16	108	22	135	27

act as agent for some other bank. The statute prohibits savings banks from employing solicitors and collectors, for the system of personal solicitation and house-to-house collection of premiums practiced by the industrial insurance companies is recognized as the main cause of the waste and of the heavy percentage of lapsed policies attendant upon their operations. But the statute provides in the amplest manner for establishing agencies through which annuities or life insurance may be applied for, and premiums and benefits be paid. Not only may each savings bank become an agent for others, but such agencies may be established, under proper safeguards, in factories, stores, trade, and other organizations, and generally wherever the convenience of the community and the desire to disseminate the blessings of thrift may dictate.

The savings banks, at their own offices or at some agency, are to receive applications for insurance as they now receive deposits—that is, without personal solicitation. Premiums are to be payable monthly. It is expected, however, that eventually more simple, convenient, and economical methods of premium payment will be quite generally introduced. For instance, upon issuing the policy an effort can be made to induce the insured, if he is not already a savings bank depositor, to become such, and to give the bank a standing order to draw on the savings deposit in favor of the annuity or insurance fund, to meet the premiums as they accrue. Again, where large numbers of employees of a single concern are insured, an effort will be made to induce the insured employees to have their employer reserve from the wages the amount of the premiums and pay them to the bank monthly. The payment of individual premiums can thus be made practically automatic so far as the insured is concerned.

The savings bank in the town of Whitman, in southeastern Massachusetts, was the first to avail itself of the provisions of the Insurance and Annuity Act. Its first policy was issued June 22, 1908. The People's Savings Bank of Brockton will soon follow. Its president, ex-Governor Douglas, one of Massachusetts' most successful manufacturers, has been one of the leaders in the movement to extend the functions of the savings banks.

The machinery provided by the new law is such as to promote a general extension of the system throughout the Commonwealth. The

insurance actuarial services and the facilities incident to that department of the business will be furnished by the Commonwealth to the banks without charge. The State Actuary is to perform all the expert insurance work for all the banks. He determines premiums and reserves, frames the forms of applications and of policies, and prescribes the methods of accounting. The State Medical Director prescribes in like manner the rules relating to health and acceptability of the applicant for insurance, and acts as supervising and advising physician to the local physician of the bank. The blanks and books used, as well as the services of these experts, are furnished by the Commonwealth to the banks without charge.

Success of the Massachusetts system can, of course, come only with a full appreciation by the employee, the employer, and the community that provision for old-age and life insurance is an integral part of the daily cost of living; that no wage is a "living wage" which does not permit the workingman to set apart each day or week or month the necessary cost of such provision for the future; that no workingman can be truly self-supporting and independent who does not make such provision; and that the savings bank will enable him to make the provision at the lowest possible cost.

In the necessary work of education, long strides have already been taken. The enlightenment campaign which preceded the passage of the act resulted in a wide discussion of the subject in every part of the State. Nearly three hundred labor unions joined in the effort to secure the requisite legislation. The presidents of the State Branch of the American Federation of Labor, of the Boston Central Labor Union, of the International Boot and Shoe Workers Union, and the International Textile Workers Union—thus representing Massachusetts' leading industries—were among its most enthusiastic supporters. The movement is thus assured of a broad sympathy from the wage-earners. It has secured the same cordial support from employers, from social workers, and other public-spirited citizens.

The efficient administration of the new law is assured. It is under the direct supervision of the Bank Commissioner and the Insurance Commissioner; and the savings insurance and annuity banks are under the general supervision of the trustees of the General Insurance Guaranty Fund. The members of this Board are appointed by the Gov-

ernor from among the trustees of the savings banks. They are men of influence and ability, and are filled with zeal for this important work.

List of Articles and Addresses

1905 October 26th	Address before the Commercial Club of Boston, entitled "Life Insurance, the Abuses and the Remedies," published as a pamphlet by the Policy-Holders' Protective Committee, reprinted in *Business—a Profession*, pp. 115–59. Those portions of the address bearing particularly on savings-bank insurance were reprinted in *Social and Economic Views*, pp. 349–53.
1906 September 15th	Article in *Collier's Weekly*, pp. 16, 17, 28, 30, entitled **"Wage-Earner's Life Insurance,"** published as a pamphlet by the Massachusetts Savings Insurance League, reprinted in *Business—a Profession*, pp. 160–87; the concluding portion was reprinted in *Social and Economic Views*, pp. 353–9. As this article is the most complete presentation of the subject it is here reprinted in full.
December 20th	Article in *The Independent*, pp. 1475–80, entitled **"The Greatest Life Insurance Wrong,"** published as a pamphlet by the Massachusetts Savings Insurance League, a small part of which was reprinted in *Social and Economic Views*, pp. 359–60; here reprinted in full.
December	Article in *Banker's Magazine*, vol. 73, pp. 952–5, entitled "Savings Insurance Banks." A small portion of this was reprinted in *Social and Economic Views*, pp. 360–1. Practically all of this paper is contained in the preceding two articles.
1907 February	Article in *Albany Law Journal*, vol. 69, pp. 50–5, entitled "Savings Bank Life Insurance for Wage-Earners."
February 16th	Article in *Charities*, vol. 17, pp. 887–90, entitled "Savings Insurance Banks for Workingmen."
May	Article in *American Review of Reviews*, vol. 35, pp. 337–339, entitled "Why Not Savings Bank Life Insurance for Wage-Earners?" The three foregoing articles embody matter contained in other papers here reprinted.
1908 July 16th	Article in *The Independent*,* pp. 125–8, entitled **"Massachusetts' Substitute for Old Age Pensions,"** reprinted in full.

* Now *The New Outlook*.

1908 AUGUST — Article in *Banker's Magazine*, vol. 77, pp. 186–8, entitled "Massachusetts Savings Insurance and Annuity Banks," two paragraphs reprinted in *Social and Economic Views*, p. 362. Since this paper is almost identical with the preceding article it is not reprinted here.

1909 MARCH — Article in *American Statistical Association Publications*, vol. 11, pp. 409–15, entitled "Massachusetts Savings Bank Insurance and Pension Systems," partly reprinted in *Social and Economic Views*, pp. 362–4. This paper is substantially similar to the article which appeared in *The Independent* in 1908 and it is, therefore, not here reprinted.

1912 JANUARY — Discussion before the Stanley Committee entitled "Our New Peonage; Discretionary Pensions," published in *The Independent*, July 25, 1912, pp. 187–91; reprinted in *Business—a Profession*, pp. 71–87; excerpts were reprinted in *Social and Economic Views*, pp. 370–2.

1914 — Chapter in *Business—a Profession*, pp. 188–203, entitled "Success of Savings Bank Life Insurance"; part of this was reprinted in *Social and Economic Views*, pp. 364–8.

Part II

INDUSTRIAL DEMOCRACY AND EFFICIENCY

Editor's Note

Closely allied to Mr. Brandeis's campaign for savings-bank life insurance has been his insistence on security for the worker. He advocated regularity of employment and insurance against its absence, and warned that strong labor unions were necessary to assure equality for labor. He suggested the preferential union shop as constituting the most satisfactory solution of the vexing problem of closed versus open shop and denounced continuously the hostility of the big trusts to unions and their holding of labor in virtual peonage. He urged the adoption of proper insurance against disease and old age. Economic independence was essential, he maintained, to the proper workings of any democracy. And he labored to reduce costs by greater efficiency. The methods sponsored by such men as Frederick W. Taylor, if properly applied, Mr. Brandeis advised, would be of real advantage to labor. And he insisted that the worker was more efficient if well paid and not overworked.

Over a long period, in speeches and articles and before legislative bodies, Mr. Brandeis gave expression to these views. Many of the papers have already been reprinted. Those here presented are both characteristic and comprehensive.

INDUSTRIAL CO-OPERATION

THE members of the Filene Co-operative Association have in my opinion an unusual privilege and are subject to an unusual duty by reason of the opportunity which they have of aiding in the solution of the greatest problem which is before the American people in this generation—the problem of reconciling our industrial system with the political democracy in which we live.

One hundred years ago the civilized world did not believe that it was possible that the people could rule themselves; they did not believe that it was possible to have government of the people, by the people, and for the people. America in the last century proved that democracy is a success.

The civilized world today believes that in the industrial world self-government is impossible; that we must adhere to the system which we have known as the monarchical system, the system of master and servant, or, as now more politely called, employer and employee. It rests with this century and perhaps with America to prove that as we have in the political world shown what self-government can do, we are to pursue the same lines in the industrial world.

And what will that involve? I take it: free thinking. In the first place, of course, whether we have an institution mastered by the employer and employee in the old form or in the form of industrial democracy to which we look forward, we shall have Obedience. But the obedience will be this: it will be obedience to the laws which the people make for themselves in a business, and not the laws which are made for them and in the making of which they have no part. That is the first difference between this industrial democracy to which we look forward and the old monarchical form.

In the next place, we have a condition in which these laws are made for the benefit or mainly for the benefit of those who make them, and that is, who do the work.

And in the third place, we have leaders of industry instead of masters of industry or captains of industry.

Those are the great differences.

And how are they to be attained?

I take it, also, that there are three things essential. In the first place, those who engage in the effort of freeing industry, or becoming free, must note this: that in order not to have someone as master, they must be master of themselves. That is the first rule.

The second rule is: that when they work, they must work with and for others, for the institution of which they are a part.

The third rule is that they must think. Democracy is only possible, industrial democracy, among people who think; among people who are above the average intelligence. And that thinking is not a heaven-born thing, that intelligence is not a gift that merely comes. It is a gift men make and women make for themselves. It is earned, and it is earned by effort. There is no effort, to my mind, that is comparable in its qualities, that is so taxing to the individual, as to think, to analyze fundamentally.

The brain is like the hand. It grows with using.

And these meetings of the Filene Co-operative Association seem to me particularly valuable because they have for their purpose to make men and women think.

Now, I say that you have an unusual opportunity, because while the constitution of this business is today far from the perfection of industrial democracy, I view it only in its early stages; it rests with you whether and to what extent the approach to perfection shall be made. It is you who can determine how far this experiment shall go. If by your mastery of yourselves, if by your thought that you are working not merely each for himself, but for the institution of which you are a part, and if by careful attention and working of the mind you develop what is necessary for the success of this business, that it may not only prosper as it has, but may grow much larger than it is—you will have shown in this business and shown to a large part of the world what it is possible for American men and women to do in business.

What you are doing here men and women employers will watch all over the country—indeed, all over the world. If this experiment fails, a great deal of the hope which there is for the improvement of the condition of the employee goes out of the world for some time. And I mean by "fail" not any failure of the success of the business, in

the ordinary sense, but the failure of your success in the management of the business through those who are in it. That is where the responsibility lies. And it seems to me you must take that responsibility as a citizen of a free community takes his responsibility—something, that is, to be proud of; something that bears with it at times heavy burdens, not lightly but joyously.

I believe as President Eliot says: when you realize what you have to do and can do, that you are working not merely for yourselves, but for the ideal, for the improvement of all work—then there will indeed be the joy of work.

I am glad to be with you. I am glad to have been able to say this to you, for I think you have a large opportunity.

BIG BUSINESS AND INDUSTRIAL LIBERTY

The Steel Trust, owing to its immense profits, should be in a better position than any other business to make good the boast of Judge Gary. In ten years it has reaped above a very generous return on its actual capital, $650,000,000. Two-thirds of that still remains as an accumulation held by the corporation for its employees; the other third was distributed in dividends on common stock, originally representing water.

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

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

There is only one explanation. This great corporation, which exemplifies the power of combination, and in connection with which combination has been justified, has made it its first business to prevent combination among its employees when they sought to procure decent

working conditions and living conditions. It stamped out, through its immense powers of endurance, one strike after another. It developed a secret service, a system of espionage among its workmen, singling out individuals who favor unionism; and anyone fomenting dissatisfaction with existing conditions, as it was called, was quietly discharged. The trust is buttressed on one hand by the powers of the railroads and on the other by great financial interests; against it stands the poor miserable individual workingman.

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

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

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

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

AN INTERVIEW

"We are just at the beginning of social attainments. When men begin to think as hard, as intensely, about their social problems as they have thought about automobiles, aeroplanes, and wireless telegraphy, nothing will be socially impossible. Many things which have seemed inevitable will be seen to have been quite unnecessary."

"Putting thought upon social problems does not pay so well as putting it upon automobiles and aeroplanes," suggests his interrogator.

"No," Mr. Brandeis says, slowly. "That isn't it. Think of the great work that has been done in the world by men who had no thought of money reward. No; money is not worth a great man's time. It is unworthy of greatness to strive for that alone. What then? Power? That isn't much better, if you mean the kind of power that springs from money. Is it the game? You hear that now-a-days—the game! It sounds too frivolous. To me the word is Service. Money-making will become incidental to Service. The man of the future will think more of giving Service than of making money, no matter what particular kind of Service it happens to be. It will become a distinction worth striving for to give the best Service, whether you are conducting a retail shop or a great railroad. It naturally follows that those who give the best Service will make money, because success must be profitable, yet Service, and not money-making, will be the end. Though the work of the greatest artists may command the highest prices, their incentive has not been money. It has been the desire to achieve professional success. That will be the spirit of business in the future."

He slouches in his chair to the other side, hangs the other hand up, puts the other in his pocket, and smiles. The forehead wrinkles with a new idea.

"When we come to think about it hard, and really try, how much more rapidly we shall be able to produce results with people than from any other form of raw material. All the raw material from which man produces his mechanical miracles is inert. But the people, as raw material, can help. They have will."

"How came you by your democracy? You were not bred to it?"

"No; my early associations were such as to give me greater reverence than I now have for the things that are because they are. I recall that when I began to practice law I thought it awkward, stupid, and vulgar that a jury of twelve inexpert men should have the power to decide. I had the greatest respect for the Judge. I trusted only expert opinion. Experience of life has made me democratic. I began to see that many things sanctioned by expert opinion and denounced by popular opinion were wrong."

"For instance?"

"Well, take unemployment. I first saw unemployment in its true features in the case of a New England shoe manufacturer whose men were going on strike. I had been called in. The more I studied it the more it seemed to me absurd that men willing to work should have to be idle during ten or fifteen weeks of each year. I said: 'This is unnecessary. It is an outrage that in an intelligent society a great industry should be so managed.' They talked to me of seasonal conditions and of averages. I abhor averages. I like the individual case. A man may have six meals one day and none the next, making an average of three per day, but that is not a good way to live. Unemployment in this industry was all the less excusable because of the fact that neither the raw material nor the finished product was perishable. My client was a man of unusual ability. He began to see it as I did. He inclined his thoughts to solve the problem, and it was solved. The disgrace of unemployment in his share of that industry was eliminated."

"Is that generally feasible, you think?"

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

"That looks to the future. Everybody has not the patience of such optimism."

"I am not so patient as you think. I want results, too. And we get them. Now, take the recall of judges as the kind of thing that is crudely radical and inartistically bad. I am opposed to it, of course, as an end, and yet it is clear to me that the clamor for recall of judges has had a lot to do with the movement to reform judicial procedure

in this country—a movement which ought to have started fifty years ago. So you see that, while the recall of judges itself would be bad, the demand for that experiment has produced one very good result. So it is elsewhere. I am out of sympathy with impulsive union labor at many points, and yet the main tendency is productive of large good. Or take Mellen—I feel toward him somewhat as I feel toward the recall of judges. He has served an important purpose. I may say that I have actually a kindly feeling toward him, in that he has compressed into nine years, so that everybody may see it whole, the lesson of monopoly. From beginning to failure has often required a generation, so that many who saw the beginning had time to forget. Here it is in the briefest possible space. We owe Mr. Mellen a debt for that."

He is going to be late for dinner.

The telephone rings. A wise hostess knows her Brandeis and calls up to make sure.

"But the area of the undesirable does narrow," he says, putting down the telephone instrument and making toward his dinner clothes.

HOW FAR HAVE WE COME ON THE ROAD TO INDUSTRIAL DEMOCRACY? —AN INTERVIEW

Mr. Brandeis was first requested to give his opinion as to the conflicting claims of the efficiency engineers and the union leaders. It was indicated to him that, while the advocates of scientific management were looking forward to an end of labor troubles through their shop methods, the trade unionists, jealous of the right to organize and the right to strike, were distrustful of the efficiency systems, convinced that their concealed but hidden purpose, or at any rate their certain effect, must be the disruption of the unions.

"I have very decided notions on that point," declared Mr. Brandeis. "On the one hand, I feel sure that the trade unions were too hasty in making up their minds to oppose the efficiency engineers. If they had taken more time to consider I do not believe they would have taken the stand they did.

"On the other hand, the efficiency engineers are altogether wrong if they count on carrying their ideas into effect without the consent and active co-operation of the unions. Strong, responsible unions are essential to industrial fair play. Without them the labor bargain is wholly one-sided. The parties to the labor contract must be nearly equal in strength if justice is to be worked out, and this means that the workers must be organized and that their organizations must be recognized by employers as a condition precedent to industrial peace.

"I do not by any means assert that the efficiency engineers, either explicitly or implicitly, stake their chances of success on getting rid of union interference. But I do assert that if they have any such idea they will not succeed, and ought not to succeed."

"Do you think the trade unionists are justified in their uncompromising demand that the right to strike shall under no circumstances be either abridged or suspended?"

"They are entirely justified. Labor cannot on any terms surrender the right to strike. In last resort, it is its sole effective means of protest.

The old common law, which assures the employer the right to discharge and the employee the right to quit work, for any reason or for no reason in either case, is a necessary guaranty of industrial liberty."

"You are, then, opposed to compulsory arbitration, since it involves penalizing the striker?"

"Absolutely. Not only that, but I do not approve even of compulsory investigation, with a penalty for a walk-out during the period of inquiry."

"Mr. Gompers takes the same ground," it was suggested. "His first reason is that compulsory investigation is wrong because it suspends the right to strike. His second reason is that compulsory investigation is wrong because it enables the employer to get into a defensive position from which he can regard a strike, should it come, with indifference. His third reason is that compulsory investigation is wrong because its supposed object, namely, the enlistment of an unbiased public opinion on the right side of the controversy, is not in practice attained. Do you agree with this argument?"

"Yes, I do. I think Mr. Gompers is right on all these points."

"And do you consider that the right to strike is just as clear in the case of a public utility as in any other case? You think, for instance, that with a common carrier, in spite of the paramountcy of the public interest, the right to strike ought not to be abridged to any extent whatever?"

"I do not think the question whether or not the employment is a public utility makes any difference in the situation. Where there is public ownership of the utility it is possible that the right to strike might be affected. That, however, is the only conceivable case in which the right could, perhaps, be abridged without contravening public policy. In every other instance, including utilities, I am convinced that the right to strike must be kept inviolate."

"What, now, of voluntary arbitration? Do you regard that as the way out?"

"No, except in a few cases. I believe that arbitration is going to be a comparatively insignificant factor in the prevention and settlement of trade disputes. Arbitration implies and involves the shirking of responsibility by the chief parties to the dispute. The burden of the task of adjustment is shifted onto the shoulders of some alien tri-

bunal. The result is that employer and workman fail to get the discipline they ought to have, and they are prevented from obtaining that intimate insight into one another's needs and difficulties without which essential justice is likely to be missed.

"But beyond that, the arbitrators are rather likely, from the very nature of their task, to hand down a wrong award. They may easily miss the heart of the difficulty, because they are not in the midst of the actual struggle. No, I do not anticipate any very great results, in the long run, from arbitration."

"What, then, have you left?"

"The best of all is left—strong unions and direct adjustment between employer and workmen. This is the source of the strength of the elements combined in the cloakmakers' protocol of 1910. By the terms of that agreement the employers and workmen in the garment industry have simply been forced—not by law, but by their mutual bargain—to work together. They are brought together on the boards of grievances every week, where they sit face to face with their common problems and learn to know one another. Each comes to see the other's side, to make allowances, to accommodate and compromise. Mutual understanding and forbearance, self-knowledge and discipline, tend to become realized more and more."

"Apparently, then, nothing would be left for the State to do, through law, in the settlement of trade disputes? If, in the absence of any such voluntary working agreement as you have outlined, strikes should continue to occur, they would simply have to occur, and the public would still be exposed to whatever inconvenience, cost, and danger might ensue? Industrial wars must still be fought, let the consequences be what they may?"

"We cannot hope to get on without struggle," replied Mr. Brandeis. "In last resort, labor will fight for its rights. It is a law of life. Must we not fight, all of us, even for the peace that we most crave?

"I believe that the possibilities of human advancement are unlimited. I believe that the resources of productive enterprise are almost untouched, and that the world will see a vastly increased supply of comforts, a tremendous social surplus out of which the great masses will be apportioned a degree of well-being that is now hardly dreamed of. As Gilbert Murray says in his translation of Euripides:

" 'Would'st thou make me weep with dreams of hope that never can be won?
Deeds that were dreamed not of will yet be done.'

"But precisely because I believe in this future in which material comfort is to be comparatively easy of attainment, I also believe that the race must steadily insist upon preserving its moral vigor unweakened. It is not good for us that we should ever lose the fighting quality, the stamina, and the courage to battle for what we want when we are convinced that we are entitled to it, and other means fail. There is something better than peace, and that is the peace that is won by struggle. We shall have lost something vital and beyond price on the day when the State denies us the right to resort to force in defense of a just cause."

"But already, on the legal side, have we not, in the application of the anti-trust laws, a more or less serious abridgment of the freedom of labor? Strikes have been declared in restraint of interstate commerce. Peaceful picketing, in New Jersey, at least, has been so hedged about with limitations that the machinery of the strike is in danger of being crippled."

"That is true," replied Mr. Brandeis. "The courts, in my judgment, have gone too far in both these directions. A proper application of the anti-trust law would permit of a 'reasonable' restraint of trade by the unions in the promotion of their proper interests. What is reasonable is to be determined by public policy. Public policy, in turn, will not declare that labor shall be prohibited from taking whatever action may prove to be essential to the preservation of its rights, the legitimate advancement of its cause.

"And as to picketing (I may, perhaps, add the boycott), the New Jersey courts, as you say, have gone to extremes. In the control of picketing the old common law of trespass should be borne in mind, as expressed in the Latin rule, '*Molliter manus imposuit.*' (He used force with moderation.) Everyone is permitted by law to impound trespassing cattle by driving them and shutting them up. Everyone may induce a trespasser to leave his premises by the exercise of such force as strictly may be required. The same principle holds when a picket seeks by similar means to induce another workman not to enter the employment of the business against which the strike is in force."

"What of the future, Mr. Brandeis? What, as you see it, is to be the outcome of the industrial struggle?"

"In my judgment, we are going through the following stages: We already have had industrial despotism. With the recognition of the unions, this is changing into a constitutional monarchy, with well-defined limitations placed about the employer's formerly autocratic power. Next comes profit-sharing. This, however, is to be only a transitional, half-way stage. Following upon it will come the sharing of responsibility, as well as of profits. The eventual outcome promises to be full-grown industrial democracy.

"As to this last step the Socialists have furnished us with an ideal full of suggestion."

"It remains to put Syndicalism in its proper place in the scheme. How do you regard the program of the Industrial Workers of the World?"

"The final aim of the I.W.W. is, of course, entirely worthless from a practical point of view. It is simply impossible of attainment or maintenance, even if it were desirable. I do think, however, that the industrial unionists have exerted an influence that will be of value. In Lawrence, for example, they certainly found waiting a piece of work that badly needed to be done. They ought to receive full credit for that; it is no more than their due. Then, too, they have put the old-line unions on their mettle. The craft unionists will be forced to gird their loins."

"You do not anticipate, then, that the I.W.W. will grow faster than the craft unions or become a force strong enough to affect very positively the industrial outlook?"

"No; I am rather inclined to think, on the contrary, that their effect will be to promote very greatly the growth and modify the character of the old unions. And this will doubtless be encouraged, too, by a livelier recognition on the part of the employers of the fact that, while they can work, and, indeed, must work, with the American Federation of Labor, the I.W.W. represent, in substance, an irresponsible force, a menacing protest, not a helpmeet of industry."

EFFICIENCY SYSTEMS AND LABOR

We hear a great deal about inequality in the distribution of wealth or the profits of industry. Such inequality exists, but it is clear that even if there were a perfectly fair distribution, our ideals could not be attained unless we succeeded in greatly increasing the productivity of man. Perhaps the greatest evil attendant upon this existing inequality is that it tends to discontent, which in turn discourages effort and therefore impairs productivity. Such progress as we have made in improving the condition of the workingmen during the last century, and particularly during the last fifty years, has been made possible by invention, by the introduction of machinery, through which the productivity of the individual man has been greatly increased. The misfortune is that when this method of increasing the productivity of man was introduced, labor did not get the share of the increased profit to which it was entitled. With the advent of the new science of management has come the next great opportunity for labor; and it seems to me of the utmost importance, not only that this science should be developed and should be applied as far as possible, but that it should be applied in co-operation with the representatives of organized labor, in order that labor may through this movement get its proper share in the proceeds of industry.

I take it that this science of management is nothing more than an organized effort, pursued intensively, to eliminate waste. The efficiency experts tell us how this may be done. The experts make the individual detailed study, which is an essential of the elimination of waste. But, after all, the fundamental problems are social and industrial. You cannot eliminate waste unless you secure the co-operation of the worker, and you cannot secure his co-operation unless he is satisfied that there is a fair distribution of profits.

In order to accomplish this, it is absolutely essential that the unions should be represented in the process of introducing and of applying scientific management. In the first place, in applying scientific management, you must determine the standard time; that is, the proper time

in which a certain operation shall be performed. In the determination of what is the proper time, representatives of the workers ought surely to have a voice. No matter how far you may go through experts in scientific investigation, there will remain matters of judgment for the common man as to how hard a man ought to work, how fast he ought to work, and how fast he can work consistently with health. Before those questions are answered, the men who do the work ought to have the opportunity to be heard, and they can get full protection only through representatives of organized labor.

The first step is fixing the standard. The next step is that of applying some incentive to the worker—the bonus or other reward by which a fair division of the profits resulting from the introduction of the new system is to be attained. Now, who shall say what is fair, what the amount is which ought to go to labor? That question cannot be determined by any scientific investigation. It is a matter for the exercise of judgment, judgment not only as to what is the best or a proper incentive, but judgment as to what is just, what is consistent with the interests of the community. That question involves a consideration of all the conditions which surround the introduction of the new science; all of the conditions which may affect the pursuit of business under these new conditions. In the solution of those problems, labor needs its representatives just as much under the new conditions as it did under the old. If labor is given such representation, I am unable to find anything in scientific management which is not strictly consistent with the interests of the workingman. Scientific management is merely an application to business of those methods which have been pursued in other branches of science, to discover the best and the most effective methods of accomplishing a result. Scientific management does not mean making men work harder. Its every effort is to make them work less hard; to accomplish more by the same amount of effort, and to eliminate all unnecessary motions; to educate them so as to make them more effective; to give special assistance to those who when entering upon their work are most in need of assistance, because they are least competent.

Each and every one of the purposes which apostles of scientific management set before themselves tends to improve the condition of the workingman. But in applying the principles of scientific management to a business, there are dangers to the workingman against which he

should be protected; and for this he needs a proper representation.

So that as I view the problem it is on the one hand that of making the employer recognize the necessity of the participation of representatives of labor in the introduction and carrying forward of the work, and on the other hand that of bringing to the workingman and the representatives of organized labor the recognition of the fact that there is nothing in scientific management itself which is inimical to the interests of the workingman, and that what seemed hostile was surely the individual practices of certain employers who applied scientific methods of management.

Organized labor has now a great opportunity. Since scientific management rests upon fundamental principles of advance in man's productivity—determining what the best way of doing a thing is instead of pursuing a poor way—complete co-ordination and organization of the various departments of business, scientific management of our businesses, is certain to come. Those who oppose its introduction altogether are pursuing a course foredoomed to failure. If organized labor takes a position in absolute opposition, instead of taking the position of merely opposing unless it is given its proper part in the introduction of this system and the conduct of business under it, organized labor will lose its greatest opportunity and will defeat the very purpose for which it exists.

EFFICIENCY AND SOCIAL IDEALS

EFFICIENCY is the hope of democracy. Efficiency means greater production with less effort and at less cost, through the elimination of unnecessary waste, human and material. How else can we hope to attain our social ideals?

The "right to life" guaranteed by our Constitution is now being interpreted according to demands of social justice and of democracy as the right to *live,* and not merely to exist. In order to live men must have the opportunity of developing their faculties; and they must live under conditions in which their faculties may develop naturally and healthily.

In the first place, there must be abolition of child labor, shorter hours of labor, and regular days of rest, so that men and women may conserve health, may fit themselves to be citizens of a free country, and may perform their duties as citizens. In other words, men and women must have leisure, which the Athenians called "freedom" or liberty. In the second place, the earnings of men and women must be greater, so that they may live under conditions conducive to health and to mental and moral development.

Our American ideals cannot be attained unless an end is put to the misery due to poverty.

These demands for shorter working time, for higher earnings and for better conditions cannot conceivably be met unless the productivity of man is increased. No mere redistribution of the profits of industry could greatly improve the condition of the working classes. Indeed, the principal gain that can be expected from any such redistribution of profits is that it may remove the existing sense of injustice and discontent, which are the greatest obstacles to efficiency.

THE CONSTITUTION AND THE MINIMUM WAGE

For the first time, questions affecting minimum-wage laws are before this court. It may be helpful, therefore, if I discuss briefly the nature of these laws and state their origin and history.

Counsel for the plaintiffs described the minimum-wage laws of Oregon, Wisconsin, Minnesota, Colorado, California, and Washington, as compulsory laws. It would be more accurate to call them prohibitory laws. They do not compel any employer to employ any person. They do not compel any employee to contribute to the needs of any person. They only prohibit him from employing women at a wage which is less than the living-wage. The laws would not prevent his employing a woman to whom no wage whatever was paid, and who was living wholly upon her independent income or was supported wholly by someone else. The Oregon minimum-wage law prevents his employing for wages a woman who receives less than a living-wage, in the same way that other laws would prevent a person from employing as an engineer someone who lacked the training necessary to entitle him to a certificate or license from the proper authorities, or as they would prevent him from employing as an elevator-tender someone under the age of eighteen or twenty-one.

The Oregon minimum-wage law is thus prohibitory in its nature rather than compulsory; and to the extent that it is prohibitory, it restricts the liberty not only of the employer but also the liberty of the employee.

The justification of that restriction may be read in the statute itself. It lies in three facts or conclusions drawn from facts. The first is, that wages which are not sufficient to support women in health, lead both to bad health and to immorality; hence they are detrimental to the interests of the state. The second proposition is, that women need protection against being led to work for inadequate wages. And the third proposition is, that adequate protection can be given to women only by way of prohibition; that is, by refusing to allow them to work for less than living-wages. Those are the three propositions which are,

in substance, either expressly stated in recitals of the act, or necessarily deduced from its language and provisions.

On what do those propositions rest? They rest upon facts ascertained through an investigation into the conditions of women in industry actually existing in the state of Oregon. And the results reached in this Oregon investigation are confirmed by numerous investigations made in other states and countries by the United States Bureau of Labor. What these results are I have endeavored to set forth in my brief. In it you will find three hundred and sixty-nine extracts which present the facts from various publications bearing upon this subject.

If the argument in this case had been postponed two or three months, the number of extracts would have been very much larger, possibly doubled, because much additional material will soon be available. Up to the present time only nine of our states have legislated upon the subject of the minimum wage, but many other states are actively considering such legislation; and in most of these other states, similar investigations into the facts have either been completed or are now in process, and the reports on these additional investigations have not yet been published. This case involves, therefore, not only the constitutionality of the laws of these states which have already legislated on this subject, but upon the decision will depend also the action of the states which are in the process of preparing for legislation.

Reference has been made to the fact that all these acts were passed in the year 1913. The explanation of that fact lies quite near at hand. Three important events contributed to the enactment of this legislation at that particular time. One was the passage, by Great Britain, of its minimum-wage law in 1909. The British act called this subject specifically and widely to the attention of Americans.

The second event which called this subject specifically to the attention of Americans was the publication, in 1910 and 1911, by the Federal Bureau of Labor, of the results of its investigations into the labor of women and children in the United States, a monumental work, filling nineteen volumes and describing with great detail the wages and conditions of women in industry in the United States.

The third event was the report of the Massachusetts Commission on the Minimum Wage of 1912, which was followed by the law enacted there in the same year.

The British act, the publications of our federal government, and the action in Massachusetts led to still other investigations in other communities; and questions affecting women in industry were brought to the attention of our people in a way not thought of before. The extent to which the condition of women in industry has been publicly discussed, is indicated by the fact that the bibliography on the minimum wage, prepared for the New York Factory Investigation Commission, includes seventy different publications during the year 1913; fifty-one, in the year 1912; twenty, in the year 1911; fifteen, in the year 1910; and when you get back to the years 1892 and 1893, one each year.

Through this discussion, various American communities learned of the earliest minimum-wage legislation in the Province of Victoria, and of similar acts passed in other Australian commonwealths and in New Zealand.

Let us consider now the situation in the state of Oregon early in 1913, and see what induced its legislature to enact the law in question.

The first thing the people of Oregon did was to ascertain to what extent, as a matter of fact, women in industry in that state were working for less than a minimum wage, for a wage less than the necessary cost of decent living. That was the first subject of investigation; and it was found that in the state of Oregon, whatever might be the case elsewhere, a majority of the women to whom the investigation extended, were working for a wage smaller than that required for decent living.

The next inquiry was what happened to women who worked for wages smaller than the minimum cost of decent living. It was found that in Oregon a large number of such women were ruining their health because they were not eating enough. That was the commonest result. They scrimped themselves on eating, in order to live decently in other respects or in order to dress and hold their jobs. Those that ate enough, roomed under conditions that were unwholesome, or they were insufficiently clothed. Besides those who lacked these ordinary necessaries of life, the investigators found another class of women whose wages were inadequate but who supplied themselves with the necessities by a sacrifice of morality. They found that in a large number of cases, the insufficient wage was supplemented by contributions from "gentlemen friends."

Such were the conditions found to exist in Oregon at the time of the investigation, which preceded the passage of the act. The act provides machinery for determining from time to time what wage is necessary. The amount required for decent living may vary in every city in Oregon. It may vary, and it actually does vary, in different occupations in Oregon. In the city of Portland, for instance, it requires more for a woman to live decently while engaged in department-store work than if engaged in factory work. The reason is this: that a woman in a department store must always be well dressed, whereas a factory worker need not be well dressed in the factory.

Thus the conditions found to exist at the time of the passage of the act, and which led to its passage, were: First, that a majority of the women in industry were receiving as wages less than was necessary for their decent support; and, secondly, that such inadequacy of wages resulted on the one hand in a reduction of vitality and in ill health, and on the other hand in immorality and the corruption of the community.

The third subject of inquiry concerned the inference to be drawn from facts not peculiar to Oregon. It was this: In view of the function of women as the bearers of children, and in view of the fact that women may become in any community an instrument of immorality, the legislature found that in Oregon, if women did not have wages sufficient to maintain them in health and in morals, detriment would result to the state in two ways. In the first place, degeneration would threaten the people of Oregon, because unhealthy women would not as a rule have healthy children. In the second place, unhealthy or immoral women would impose upon the community, directly or indirectly, heavy burdens by the development of ever-larger dependent classes which would have to be supported by taxpayers.

Such are the results which the legislature found would flow in Oregon from women working at less than living wages, results which affect vitally not only the present but also future generations. Hence, the legislature was confronted with this alternative: either to seek, and possibly to find, a remedy; or to fold their arms in despair and say, "The resulting unhappiness of our people and the ruin of the commonwealth must be accepted as one of the crosses that man and states must bear." The Legislature did not adopt this second alternative; and it therefore looked about for a remedy.

It was not necessary to invent a new remedy because elsewhere in the world four different remedies had been tried for curing the prevalent social disease—wages insufficient to support working women in decency.

The first of these remedies was what might properly be called a voluntary remedy. The other three, differing in kind, were all what the opposing counsel would call compulsory remedies.

The voluntary remedy for wages inadequate to sustain life in decency is education—education, economic and ethical. No proposition in economics is better established than that low wages are not cheap wages. On the contrary, the best in wages is the cheapest. For most businesses, the economy of high wages has been demonstrated. Why should the proposition be doubted, that wages insufficient to sustain the worker properly are uneconomical? Does anybody doubt that the only way you can get work out of a horse is to feed the horse properly? Does anyone doubt that the only way you can get hens to lay is to feed the hens properly? Regarding cows, we have learned now that even proper feeding is not enough, or proper material living conditions; we must have also humane treatment in other respects. In certified dairies you will find often a sign forbidding the use of harsh words there, because experience has taught us that harsh language addressed to a cow impairs her usefulness. Are women less sensitive than beasts in these respects?

It has been proved as clearly as anything can be proved by actual tests, that in industry, efficiency is advanced by good treatment of the workers. Every enlightened employer recognizes that fact and strives to create good working-conditions. He furnishes a factory well lighted, well ventilated, and clean; he is ready to pay not only living-wages but high wages, knowing that high wages do not necessarily involve a high labor-cost. America has lines of industry in which wages are the highest, competing successfully with the rest of the world; and this for the simple reason that we have gotten from the worker full value, and often more than full value, for the higher wage paid.

There is also a law of ethics that man shall not advance his own interests by exploiting his weaker fellows or through casting burdens upon the community. In course of time it might be possible so to extend the system of education as to make every employer in the State of Oregon recognize that he is doing something both economically and

ethically wrong, when he employs women at less than living-wages. Employers might be convinced so thoroughly of these truths that the practice would be abolished. But the legislature of Oregon apparently decided that there was not time to await the fruits of this process of education; that meanwhile disaster would come to the state. For people have been as slow to recognize the wrongs of low wages as they have been slow in recognizing—or at least delinquent in acting upon—the great truth that "the wages of sin is death."

So the legislature of Oregon concluded that this voluntary remedy of education was not sufficient to meet these needs; and it turned to a consideration of compulsory remedies.

The first compulsory remedy to suggest itself was organization. "Why don't women do what men do—combine, organize themselves for collective bargaining and insist upon a living-wage?" In many industries and in most states, men succeed in securing a living-wage by means of trade unionism. But the fact is that trade unionism has not yet flourished among women. Doubtless in time women in industry will become organized; but the State of Oregon felt that it could not await the lapse of time necessary to make the experiment of educating the women to trade unionism; for there are very good reasons why progress in organizing women workers has been slow.

In the first place, the average life of a woman in industry is very short, whereas the life of a man in industry is long. You are confronted, therefore, not merely with women's general inexperience in business but with the fact that the shortness of her business life precludes adequate opportunity for educating her to trade unionism. Up to the present time it has been found practically impossible in many trades and in most communities to organize women effectively. So the legislature of Oregon found itself obliged to reject organization as an effective remedy for the inadequacy of women's wages prevailing there.

The next remedy, also compulsory in its nature, to which the opposing counsel referred with approval, is that adopted in Massachusetts. That law is in substance identical with the minimum-wage law of Oregon, with one exception. It provides for the same investigations, for the same hearings, for the same findings, as the Oregon law does; but instead of prohibiting the payment of less than the minimum found to be necessary, and enforcing that prohibition of law by fine

or imprisonment, it invokes another sanction—publicity. Lawmakers may properly choose among different sanctions that which, in their opinion, appeals best to their own community. In Massachusetts, we seek to prevent the payment of inadequate wages to women by holding up to public scorn those who pay less than our commission finds to be a living-wage.

Unlike other states, Massachusetts has also in other connections long sought to secure observance of standards by official recommendations rather than through fine or imprisonment. While nearly all the other railroad commissions of America were exercising compulsory powers, our commission was given power only to recommend. For more than a generation we of Massachusetts believed that in our small, once homogeneous community, with its Puritan traditions, the sense of duty was so potent that men could be relied upon to do in important relations of life what they ought to do, if only the facts were made clear to them and publicly disclosed. We believed that without resort to policeman or sheriff, publicity would be effective in enforcing what investigation had proved to be proper.

But within the last decade, after our railroads passed largely into the control of citizens of other states, doubts arose as to the efficacy of our law, and recently our Public Service Commission was given compulsory powers. It remains to be seen whether the present sanction in our minimum-wage law will prove effective. Other states believed in a minimum-wage commission with powers of compulsion through fine or imprisonment, perhaps because conditions are different in other states from those in Massachusetts. At all events, the state of Oregon, with the Massachusetts law of 1912 before it, concluded that considering the habits, customs, and traditions of the people of Oregon, legislation giving to the commission only recommendatory powers would be ineffective; and Oregon refused to follow the Massachusetts precedent.

Then Oregon looked about the world and found the application of still another remedy, a remedy that seemed more promising. Her legislators considered the system which had been in force for eighteen years in Victoria, which had been gradually adopted by the other Australian colonies and by New Zealand, and which had been applied there with such extraordinary success that it was adopted in Great Britain in 1909. This legislation undertook to prohibit by law under

threat of fine or imprisonment, the employment of persons at less than living-wages, instead of resorting merely to education or to trade unionism, or to publicity, as a means of eradicating the evil.

The legislature of Oregon found in Victoria, a community which, in many particulars, bore a striking resemblance to Oregon—a land newly settled by men and women with the Anglo-Saxon inheritances and traditions of liberty and freedom. That community had entered upon the experiment of dealing with the evil of inadequate wages in this particular way; and no people could have been more intelligently conscious of the fact that what they were proposing was an experiment.

It was an experiment carried on under a government without the specific constitutional limitation here invoked. But our constitution differs, in the respect of which I am talking, in no way from the unwritten constitution of Great Britain or the fundamental laws of the several British colonies.

The legislators of Oregon recognized that they too must make an experiment. They rejected the three other remedies proposed and, in looking about for another, found this fourth remedy, compulsion by prohibition, instead of compulsion by publicity under law or the compulsion through trade-union organization under law, or mere educational processes; and they declared: "We will prohibit the employment of women at less than living-wages as we now prohibit their working more than ten hours; as other states prohibit their working at night, or without adequate opportunity for meals, or at certain industries which experience has shown are especially deleterious to health."

Thus Oregon concluded to follow the lead of a commonwealth of English-speaking free people who had made the experiment, entering upon it with much trepidation and with as much doubt as some now feel as to the wisdom of this experiment which is discussed today.

Victoria entered upon that experiment eighteen years ago. When the first law was passed the parliament limited its application to five trades; soon after the number was increased to six. Victoria also limited the duration of the law to a few years, and provided that it could not be extended to any other trades except by resolution of Parliament. But in each of the years after 1899, Parliament extended the operation of that act so that, whereas at first it applied to only 6 trades, its

application was extended to 27, in 1900; in 1901, to 38; and by gradually adding new trades each year, the number brought within the operation of the act before the close of the year 1913, was 134.

Victoria has not only had a reasonably long experience with this legislation, but it has been obliged to check up the results of its experience from time to time. As the term of the law was limited, it was necessary to determine in the earlier years whether it should be continued. Instead of abandoning the experiment, as its opponents predicted would be done, the law was continued five times until it was made permanent. Furthermore, each year after 1899, a resolution has been passed extending the scope of the act to additional trades. It applied to men as well as to women.

But the legislators of Oregon were not limited to the experience of Victoria. Her neighbors, the other Australian colonies and New Zealand, made similar experiments. They knew of the race degeneration which threatened England, and which it attempted to meet by the factory acts. Gradually one after another of the Australian colonies and New Zealand concluded that the Victoria experiment was so promising that they were justified in enacting similar legislation; and finally, England, brought almost to the point of despair by the fruits of her industrial system, made a thorough investigation of all these experiments and borrowed from her Australian colonies the remedy of compulsory minimum-wage laws.

The British act was passed in 1909. It was put into operation in 1910. With that conservatism which marks the British people, it was confined at the start to four trades in which conditions appeared to be particularly bad. After Great Britain had watched for two years the effect of this law upon the four trades, it concluded that the apprehensions of opponents of the measure were unfounded, or that the disadvantages attending it were negligible as compared with the advantages; for in the first four trades, conditions had greatly improved. Then conservative England took the next step and extended the operation of the law to four other trades.

It was in the light of this wide experience, the experience of the old as well as of a new world, that the people of Oregon, outraged at the conditions which they found to exist in their midst, and stimulated by the reports of the Bureau of Labor of the United States describing the conditions that attended women's work elsewhere, con-

cluded to try this remedy that had proved effective in Australia and Great Britain.

Oregon adopted this remedy for the same reason that the several Australian colonies adopted it and, later, England adopted it—because they found that the apprehensions of the wise men of business who had opposed it, were unfounded; that they had misjudged the human factors, and that, contrary to the prophecies of the opponents, important beneficent results were obtained.

If the three hundred and sixty-nine extracts from reports and other publications which appear in my brief, are examined, it will be found that few of those who describe the successes of this legislation, think it will bring the millennium. They say merely: "We have made advances; and the particular things which were apprehended from the enactment of these laws, did not come to pass."

Wise men had declared, purporting to speak in the interests of the wage-earner: "If you establish a minimum wage, it will result in becoming a maximum wage." The answer to that prognostication is simply that the predicted did not happen. The least efficient actually engaged in the trade, received the minimum wage. The more efficient received higher wages. The minimum was but the plane above which the more efficient rose. That is one thing which experience has taught.

Another objection made by those purporting to speak in the interest of the worker was this: "What are you going to do with the inefficients, with the people who are not worth the minimum?" These countries found what we have found every time we have undertaken to raise wages—that high wages tend to improve the efficiency both of the employer and of the employee. And improving the efficiency of the employer is quite as important as to improve the efficiency of the employee. When we undertake to investigate the facts concerning any particular industry, we find that the efficient employers are usually paying higher wages than the inefficient. In other words, the greater the efficiency, the greater the ability of the employee in his particular business, the higher ordinarily are the wages paid.

Such were the effects of the minimum-wage legislation in Victoria and elsewhere. The legislature of Oregon must have found what I have stated: that it raised wages; that it tended to increase the efficiency of the wage-earner as well as of the manufacturer; and that it tended to reduce the greatest of all industrial evils, irregularity of employ-

ment. This is true because, in fixing minimum wages, the trade boards had to consider not only the rate of wages, but also the average number of days in which the employee works; and employers are thereby induced to seek to regularize employment. Thus the minimum-wage acts have tended to increase efficiency; have tended to eliminate the the casual worker and have tended to regularize employment.

The legislature of Oregon doubtless found that these acts tended to eliminate also cut-throat competition in wages. The legislature of Oregon must have found further that both employer and employee, after the act was in operation, welcomed its extension. Indeed, in Victoria, when the first experimental period set for the act was expiring, the extension was secured largely because the ministry had in its hands letters from employers urging the extension of the act because they found that it had created much better conditions in industry than had existed prior to its passage. And, finally, in answer to the prophecies that the industries would be injured, the legislature of the State of Oregon was doubtless furnished with the facts showing that in Victoria and the other Australian states, where minimum-wage legislation was in force, industry prospered, and the cry that business would be driven away had proved groundless.

Such was the situation which confronted the legislature of Oregon; and in enacting the minimum-wage law, it did not take any revolutionary steps. It was, as has been pointed out, the kind of action which had previously been resorted to, and during a long period of years. Similar restrictions of individual liberty, limiting the freedom of contract, had been imposed among English-speaking people, from time to time, during the past one hundred and twelve years.

One hundred and twelve years ago, in 1802, the first factory-act was passed, limiting the employment of children in the textile mills. There is hardly an economic or social argument now urged against minimum-wage laws which you cannot find raised against that act in the parliamentary debates and in the contemporary literature of England. Yet the condition then was this: Children of five or six years, and in some instances even children of four, were at work in the textile mills from fifteen to sixteen hours a day. It took twenty-five years to raise the age limit for children to nine years. Today, in the State of Ohio, girls may not work in manufacturing establishments before they are sixteen, nor boys before they are fifteen; the permis-

sible working-hours are reduced to eight, and work after six or seven o'clock in the afternoon is prohibited.

Some people thought that when the first child-labor laws were enacted, everything had been done that was necessary to protect the State against the degeneration of the race. Others recognized then that such legislation was inadequate; that the mothers needed protection as much as the children. But British conservatism, exercised in the interest of manufacturers at that time, would not permit the extension of protective legislation to women workers. It took forty-five years for England to learn that it was not enough to protect the children; that we must begin earlier and protect the mothers of the children. And when England began to protect the mothers, Parliament thought it was taking a bold step when it gradually reduced the working-time to twelve hours. Later it was reduced to eleven and a quarter; and finally it was reduced to nine hours, in many trades to eight hours. And then experience taught that merely to reduce the hours of labor was not enough, but that it was necessary to provide by law a lunch-hour, and to prohibit continuous employment without rest for more than five or six hours.

While these limitations were being imposed upon the working-hours of women and children, it was found necessary to restrict even further the liberty of contract. Laws were enacted next in regard to dangerous trades. Then, recognizing that trades may be dangerous not only to life and limb but to health, it was soon found that any trade may become dangerous under certain conditions. In consequence laws were enacted to secure proper construction, sanitation, and ventilation of factories and workshops. Finally, finding still other evils to be combated, legislatures now enter upon the broad field of social insurance.

Thus the British people, and the American people following the British, have gone on step after step in their effort to prevent misery and the degeneration of the race. The legislatures have certainly not been guilty of precipitate action. Our marvel is at the patience with which widespread evils have been borne as if they were inevitable.

How potent the forces of conservatism that could have prevented our learning that, like animals, men and women must be properly fed and properly housed, if they are to be useful workers and survive!

The question has been asked whether the requirement, that the

wage in any given occupation should be sufficient to support the wage-earner, did not bear a reasonable relation to that occupation. Now, we happen to have an extremely interesting statement bearing upon that subject by an eminent judge who was in Washington last year. Mr. Justice Higgins, of the Supreme Court of the Commonwealth of Australia, had occasion to consider what rule he should lay down in regard to the minimum wage under a statute which provided for that which was "fair and reasonable." And, discussing it, he stated (this appears on page 301 of my brief): "The standard of fair and reasonable—I cannot think of any other standard more appropriate than the normal needs of the average employee regarded as a human being in a civilized community."

Does that seem a revolutionary doctrine? Does it seem revolutionary for the legislature of Oregon to pass a minimum-wage law when it knows the conditions in Oregon to be such that degeneration of the people, and heavy burdens upon the taxpayer and upon the industry of the commonwealth, must necessarily result if women are permitted to continue to be employed at less than living-wages? The Supreme Court of Oregon, likewise knowing something of local conditions, held that it was not.

Let me, at this point, discuss for a moment the question of constitutionality. I did not state earlier the legal principles which must govern this case, because they are so well established and have been so often applied by this court that I did not feel justified in taking time to refer to the decisions.

These things are perfectly clear: first, that the constitution does protect "liberty"; and, secondly, that the right to contract is a part of "liberty." But it is also perfectly clear that this right of contract is not an absolute right; and there are scores and scores of decisions of this court which have said this and have shown respects in which this right of contract may be abridged.

Upon a careful examination of all of those decisions, I have been unable to find any in which this court has held invalid an act designed to protect health, safety, or morals where there was shown to exist an evil and the remedy proposed gave reasonable promise of eliminating or mitigating the evil.

The test of constitutionality which this court has laid down was this: whether this court can see that the legislature had reasonable cause

to believe that the act in question would produce the desired result or had a reasonable relation to it; or whether this court could see that the legislature of the State had no reasonable cause to believe that the act would produce such a result and that it was an arbitrary exercise of power. In only a very few instances has there been occasion to apply the test with the result of annulling a State law. The burden of proof must always be upon those who undertake to attack the law.

I conceive the only question before the court to be this: Is this particular restriction upon the liberty of the individual one which can be said to be arbitrary, to have no relation to the ends sought to be accomplished? Whether or not it is arbitrary, whether it is reasonable, must be determined largely by results where it has been tried out. Can this court say that the legislature of Oregon, knowing local conditions in Oregon, supported by the Supreme Court of Oregon (supposed also to have some special knowledge of local conditions in Oregon), was so absolutely and inexcusably mistaken in their belief that the evils exist and that the measures proposed would lessen those evils, as to justify this court in holding that the restriction upon the liberty of contract involved cannot be permitted?

In order that the court may determine that question, it is important to know what really did happen when this remedy was tried out. Some may doubt whether this particular remedy is the best remedy, or whether its adoption may not lead to some other evils which later legislatures may have to deal with, possibly by a repeal of this law. Even if you entertained a doubt well founded, you cannot interfere because you have doubts as to the wisdom of an act, provided that act is of such a character that it may conceivably produce results sought to be attained. When we know—and on this point there is no room for doubt—when we know that the evil exists which it is sought to remedy, the legislature must be given latitude in experimentation. The evil so clearly exists that even opposing counsel admits it; and he agrees that it is economically and ethically most objectionable to pay wages so low that they do not supply the necessary cost of living.

In answer to the question, whether this brief contains also all the data opposed to minimum-wage law, I want to say this: I conceive it to be absolutely immaterial what may be said against such laws. Each one of these statements contained in the brief in support of the contention that this is wise legislation, might upon further investiga-

tion be found to be erroneous, each conclusion of fact may be found afterwards to be unsound—and yet the constitutionality of the act would not be affected thereby. This court is not burdened with the duty of passing upon the disputed question whether the legislature of Oregon was wise or unwise, or probably wise or unwise, in enacting this law. The question is merely whether, as has been stated, you can see that the legislators had no ground on which they could, as reasonable men, deem this legislation appropriate to abolish or mitigate the evils believed to exist or apprehended. If you cannot find that, the law must stand.

Of course, there are certain instances of discrimination in state legislation which are wholly outside of our discussion here, which may invalidate an exercise of the police power. But here there is clearly no discrimination. The objection originally made that the order of the commission was invalid because it applied only to the city of Portland, has been abandoned. Of course, there may be great differences between Portland, a large city, and some other smaller city or country town, as to what is the necessary cost of living. The legislature of Oregon, in giving to the Welfare Commission the power to fix hours of labor as well as minimum wages, has recognized such differences, and very properly. It seems perfectly reasonable that in Portland, a large city where the workers perhaps would have to travel morning and evening half an hour, or an hour possibly, as they do in our large cities, to get to or from their homes, women ought to have shorter hours than in a country town where perhaps the women lived next door to the store or factory in which they work. Local conditions are thus involved and so far as there is an opportunity for differentiation it is not discrimination. In proving a general rule to be locally applied, the legislature disclosed probably growing wisdom in dealing with questions of this character.

Differences of place and of industry are thus taken into consideration. For instance, in the chains trade, in the particular community where the work is done on chains, the minimum is less than it is in other communities where the law is applied to garment-workers. That is, the decisions have been made there with reference to different conditions of different communities. Similarly, the Oregon law contemplates orders applicable to varying states of fact. The capacity of the business to pay I do not conceive is necessarily thus taken into

account. For this law does not undertake to compel any business to pay minimum wages. It merely prohibits the employment of a woman at less than a living-wage.

You cannot say that this particular woman, who is paid $12, is more expensive help than the next woman over here, who is paid $10. The $10 woman may be much the cheaper help. The law does not say that you must pay the $10 woman $12, but it does say you must not employ any woman whom you do not pay a living-wage; just as another law says you must not employ an engineer who has not had the training necessary to get a certificate. The minimum-wage law simply limits the choice of the employer; it does not impose any obligation upon him.

Opposing counsel has argued that when you prohibit employment at less than a living-wage you do something which is entirely different from the prohibitions as to hours or conditions of employment. He admits that the legislature may prohibit work in a place which is not sanitary, that it may protect against hazards peculiar to a particular occupation; but he insists that the legislature cannot protect against a deficiency in wages because in some way, which I do not understand, the wage is detached from the occupation. But if there is some distinction which keener minds may be able to follow, it seems to me the court has shown that as a rule of law it cannot regard such a distinction as of any importance.

Take the case recently decided, the Erie Railroad *vs.* Williams, which requires semimonthly payment of wages. Of course, that at once affects the amount in value which the employee receives and it affects the amount which the employer pays; because not only does the employer lose the interest but he loses what is often far more important than the interest—namely, the added expense of making payments at more frequent intervals. I had occasion to deal with this matter in connection with the weekly-payment law in Massachusetts; and in those cases the interest was a matter of little concern. But the cost of bookkeeping and the cost of the time incident to paying off the people once a week was so great as to amount to three or four times the loss of the interest.

And take the truck law, the difference between being paid in cash and being paid in goods. That may be a difference of ten, fifteen, or twenty per cent of the wage—quite as great a difference as that be-

tween a prescribed minimum wage and the wage previously paid. Or take the case of the determination of wages by the Arkansas coal-screen law. In all these cases, laws governing wages have been held valid, just as laws governing the other working conditions incident to occupations have been held valid.

The real test, as I conceive it, is, "Is there an evil?" If there is an evil, is the remedy, this particular device introduced by the legislature, directed to remove that evil which threatens health, morals, and welfare? Does it bear a reasonable relation to it? And in applying it, is there anything discriminatory, which looks like a purpose to injure and not a purpose to aid? Has there been an arbitrary exercise of power?

Laws prescribing a minimum wage differ in no respect in principle from those other laws affecting wages just referred to. Indeed, they do not differ from still other acts held valid by this court, which declare void provisions in wage agreements designed to protect the employee; such as the acts preserving the right of recovery for accidents, although the employee has solemnly agreed to surrender that right in electing to take benefits from a railroad relief society.

No such distinction as that suggested exists in fact. Living-wages are most intimately connected with the occupation in which the wage-earner is engaged. The legislature interferes for the protection of women because it has found that the alleged law of supply and demand does not, in fact, operate—or if it does, it works destructively. The legislature interferes to protect health, safety, morals, and the general welfare in connection with this wage relation of employer and employee, just as it interferes with the conditions under which the employee may live, in prescribing how tenements must be constructed to insure health and safety.

If Congress and the States have power to prevent cut-throat competition in the sale of manufactured products, as this court has held in connection with the anti-trust laws, and as Congress has further undertaken in the Clayton act and the Federal Trade Commission act, there certainly exists power also to legislate to prevent cut-throat competition in wages.

In any or all this legislation there may be economic and social error. But our social and industrial welfare demands that ample scope should be given for social as well as mechanical invention. It is a condition not only of progress but of conserving that which we have. Nothing

could be more revolutionary than to close the door to social experimentation. The whole subject of woman's entry into industry is an experiment. And surely the federal constitution—itself perhaps the greatest of human experiments—does not prohibit such modest attempts as the woman's minimum-wage act to reconcile the existing industrial system with our striving for social justice and the preservation of the race.

CHAIRMAN WALSH. Have the large corporations increased the wages as rapidly as the prices of commodities have increased, or shortened working-hours as rapidly as the development of the industry would warrant?

MR. BRANDEIS. It is difficult to answer that comprehensively. I should feel quite certain that in some respects they had not—certain corporations, and very prominent ones, have not increased wages as rapidly as the profits of the organization warranted, nor have they reduced hours. But I think that is true also of many corporations that are small.

CHAIRMAN WALSH. Does the corporate type of organization tend to produce a higher grade of workmen and citizens?

MR. BRANDEIS. I should think not.

CHAIRMAN WALSH. Have the large corporations acted as a bulwark to prevent the growth of trade unions, from your observation, Mr. Brandeis?

MR. BRANDEIS. Yes.

CHAIRMAN WALSH. I wish you would state what information you have, generally, of course, upon which you base that answer.

MR. BRANDEIS. I think that the large industrial corporations have found this possible. That is true of the trusts and true also of large corporations which are not among those technically known as trusts, but which have powerful financial organizations; for instance, the Steel Trust, the Tobacco Trust, the Sugar Trust. It seems to me that they have possessed the power against which, in the main, the unions —union organizations have struggled in vain. There have been a very large number, undoubtedly, of other employers who were not large, who had exactly the same desires and the same economic views as those who control these great corporations, but they had not the power of resistance, the power of endurance, and the influence and connections, which enabled them to make their will law. It was a difference, not of motive in the main, but of conditions.

Chairman Walsh. Have you observed the extent to which potential control over labor conditions is concentrated in the hands of financial directors of large corporations?

Mr. Brandeis. To a certain extent. I think that goes necessarily with the control of the corporations themselves. There has been undoubtedly great financial concentration—direct to a certain extent and indirect to a greater extent—and that influence which came from the concentration in comparatively few hands of a deciding voice in important financial and industrial questions almost necessarily affects the labor problems, as it does other problems, although it may not have been the design primarily to deal with the labor problem.

Chairman Walsh. Have you observed the extent to which this potential control is exercised in connection with labor matters? Do you know of individual instances in which the control is directly used?

Mr. Brandeis. Well, the report of the Stanley investigating committee indicated that it had been used quite effectively in the steel trade.

Chairman Walsh. Do such financial directors, in your opinion, Mr. Brandeis, have sufficient knowledge of industrial conditions and social conditions to qualify them to direct labor policies involving hundreds of thousands of men?

Mr. Brandeis. I should think most of them did not; but what is perhaps more important or fully as important is the fact that neither these same men nor anybody else can properly deal with these problems without a far more intimate knowledge of the facts than it is possible for men to get who undertake to have a voice in so many different businesses. They are prevented from obtaining an understanding not so much because of their point of view or motive, but because of human limitations. These men have endeavored to cover far more ground than it is possible for men to cover properly, and without an intimate knowledge of the facts they cannot possibly deal with the problems involved.

Chairman Walsh. Does the fact that many large corporations with thousands of stockholders, among whom are large numbers of employees, in any way whatever affect the policy of large corporations?

Mr. Brandeis. I do not believe that the holding of stock by employees—what is practically almost an insignificant participation, considering their percentage to the whole body of stockholders in large

corporations—improves the condition of labor in those corporations. I think its effect is rather the opposite.

CHAIRMAN WALSH. I wish you would elucidate that a little, if you will, please, Mr. Brandeis; state the reasons for it.

MR. BRANDEIS. Perhaps I would have to go a little further into my general feeling in this respect——

CHAIRMAN WALSH. I wish you would do so, Mr. Brandeis.

MR. BRANDEIS.—As to the causes of the difficulty and of the unrest.

CHAIRMAN WALSH. I wish you would please do so.

MR. BRANDEIS. My observation leads me to believe that while there are many contributing causes to unrest, that there is one cause which is fundamental. That is the necessary conflict—the contrast between our political liberty and our industrial absolutism. We are as free politically, perhaps, as free as it is possible for us to be. Every male has his voice and vote; and the law has endeavored to enable, and has succeeded practically, in enabling him to exercise his political franchise without fear. He therefore has his part; and certainly can secure an adequate part in the government of the country in all of its political relations; that is, in all relations which are determined directly by legislation or governmental administration.

On the other hand, in dealing with industrial problems the position of the ordinary worker is exactly the reverse. The individual employee has no effective voice or vote. And the main objection, as I see it, to the very large corporation is, that it makes possible—and in many cases makes inevitable—the exercise of industrial absolutism. It is not merely the case of the individual worker against the employer which, even if he is a reasonably sized employer, presents a serious situation calling for the interposition of a union to protect the individual. But we have the situation of an employer so potent, so well organized, with such concentrated forces and with such extraordinary powers of reserve and the ability to endure against strikes and other efforts of a union, that the relatively loosely organized masses of even strong unions are unable to cope with the situation. We are dealing here with a question, not of motive, but of condition. Now, the large corporation and the managers of the powerful corporation are probably in large part actuated by motives just the same as an employer of a tenth of their size. Neither of them, as a rule, wishes to have his liberty

abridged; but the smaller concern usually comes to the conclusion that it is necessary that it should be, where an important union must be dealt with. But when a great financial power has developed—when there exists these powerful organizations, which can successfully summon forces from all parts of the country, which can afford to use tremendous amounts of money in any conflict to carry out what they deem to be their business principle, and can also afford to suffer large losses—you have necessarily a condition of inequality between the two contending forces. Such contests, though undertaken with the best motives and with strong conviction on the part of the corporate managers that they are seeking what is for the best interests not only of the company but of the community, lead to absolutism. The result, in the cases of these large corporations, may be to develop a benevolent absolutism, but it is an absolutism all the same; and it is that which makes the great corporation so dangerous. There develops within the State a state so powerful that the ordinary social and industrial forces existing are insufficient to cope with it.

I noted, Mr. Chairman, that the question you put to me concerning the employees of these large corporations related to their physical condition. Their mental condition is certainly equally important. Unrest, to my mind, never can be removed—and fortunately never can be removed—by mere improvement of the physical and material condition of the workingman. If it were possible we should run great risk of improving their material condition and reducing their manhood. 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. We Americans are committed not only to social justice in the sense of avoiding things which bring suffering and harm, like unjust distribution of wealth; but we are committed primarily to democracy. The social justice for which we are striving is an incident of our democracy, not the main end. It is rather the result of democracy—perhaps its finest expression—but it rests upon democracy, which implies the rule by the people. And therefore the end for which we must strive is the attainment of rule by the people, and that involves industrial democracy as well as political democracy. That means that the problem of a trade

should be no longer the problems of the employer alone. The problems of his business, and it is not the employer's business alone, are the problems of all in it. The union cannot shift upon the employer the responsibility for conditions, nor can the employer insist upon determining, according to his will, the conditions which shall exist. The problems which exist are the problems of the trade; they are the problems of employer and employee. Profit sharing, however liberal, cannot meet the situation. That would mean merely dividing the profits of business. Such a division may do harm or it might do good, dependent on how it is applied.

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. We must insist upon labor sharing the responsibilities for the result of the business.

Now, to a certain extent we are gradually getting it—in smaller businesses. The grave objection to the large business is that, almost inevitably, the form of organization, the absentee stockingholdings, and its remote directorship prevent participation, ordinarily, of the employees in such management. The executive officials become stewards in charge of the details of the operation of the business, they alone coming into direct relation with labor. Thus we lose that necessary co-operation which naturally flows from contact between employers and employees—and which the American aspirations for democracy demand. It is in the resultant absolutism that you will find the fundamental cause of prevailing unrest; no matter what is done with the superstructure, no matter how it may be improved in one way or the other, unless we eradicate that fundamental difficulty, unrest will not only continue, but, in my opinion, will grow worse.

Chairman Walsh. From your observation, Mr. Brandeis, what would you say is the responsibility of these so-called absentee owners of industries for conditions, wages, and other conditions existing in the corporations in which they are financially interested?

Mr. Brandeis. They must be held absolutely responsible. There is no such thing, to my mind, applying it in this connection, as an innocent stockholder. He may be innocent in fact, but socially he cannot be held innocent. He accepts the benefits of a system. It is his business and his obligation to see that those who represent him carry out a policy which is consistent with the public welfare. If he fails in that, so far as a stockholder fails in producing a result, that stockholder must be held absolutely responsible, except so far as it shall affirmatively appear that the stockholder endeavored to produce different results and was overridden by a majority. Of course, stockholders may be innocent if they have been active and have been outvoted; but stockholders cannot be innocent merely by reason of the fact that they have not personally had anything to do with the decision of questions arising in the conduct of the business. That they have personally selected gentlemen or given their proxies to select gentlemen of high standing in the community, is not sufficient to relieve them from responsibility. As a matter of course, most stockholders do have very little to do with the management and in these great corporations they have practically nothing to do. It is largely the financial interests who determine policies and the practical results. But the stockholder is morally responsible although he actually has nothing to do with the management, because he cannot justify himself in being a stockholder unless he assumes the obligations which go with stockholdership; and stockholdership is practically partnership in the establishment so far as concerns the questions now under consideration.

Chairman Walsh. You have probably noticed that practical—I was going to say practical unanimity, but that might be putting it a little too strong—the very general and broad statements that are made by directors in these corporations, especially those located in the city here, to the effect that they feel that they discharge their duties when labor policies are left to their local officials or to their executive officers here.

Mr. Brandeis. I have not read with any care the reports of what was testified to and that you have reference to.

Chairman Walsh. They are exceptions, but generally that has been the statement; that is, that they leave that to the executive officers.

Mr. Brandeis. That position, so far as it may have been taken,

seems to me absolutely unsound. It is a position which, I think, must be deemed a relic of those earlier days when the labor problem was not regarded as the prime problem in the industrial world. The obligation of a director must be held to be absolute. Of course, I said a little while ago that one of the grave objections to this situation with large corporations was the directors did not know what was going on, and they could not therefore pass an intelligent judgment on these questions of the relations between employer and employee, because they did not have the facts.

Nobody can form a judgment that is worth having without a fairly detailed and intimate knowledge of the facts, and the circumstances of these gentlemen, largely bankers of importance, with a multitude of different associations and occupations—the fact that those men cannot know the facts is conclusive to my mind against a system by which the same men are directors in many different companies. I doubt whether anybody who is himself engaged in any important business has time to be a director in more than one large corporation. If he seeks to know about the affairs of that one corporation as much as he should know, not only in the interest of the stockholders, but in the interest of the community, he will have a field for study that will certainly occupy all the time that he has.

Chairman Walsh. Have you observed, Mr. Brandeis, in the development of these large corporations, the percentage of stock which might give control, or in practical everyday life does give control—what I mean is this: There seems to be an impression in some quarters that the controllers had to have a majority of the stock—51 per cent, for instance.

Mr. Brandeis. I think it is true not only of these very large corporations, but of very much smaller corporations in which the stock is listed and widely distributed, that not only a small percentage of the stock may give control, but that for a long series of years control is held sometimes without the ownership of any stock whatsoever, or of practically no more stock than is necessary to qualify directors.

I had a professional experience in connection with one corporation whose capitalization is very small as compared to those to which you refer, Mr. Chairman, but which runs into the millions, where I represented the outside stockholders who wanted to get control. The contest lasted a considerable time. We ultimately got control of the

management, and when we examined the books we found that the management had practically sold itself out of all stock years before, and held practically no stock at all; that the president of the corporation had not only sold his stock holdings, but had sold out even his qualifying shares, and had to go to the market the next day and buy five shares of stock in order to qualify as director.

I mean these corporations are not controlled through a majority of the stock; they are controlled very largely by position. And that is an almost inevitable result of the wide distribution of stock.

From the standpoint of the community, the welfare of the community and the welfare of the workers in the company, what is called a democratization in the ownership through the distribution of stock is positively harmful. Such a wide distribution of the stock dissipates altogether the responsibility of stockholders, particularly of those with 5 shares, 10 shares, 15 shares, or 50 shares. They recognize that they have no influence in a corporation of hundreds of millions of dollars capital. Consequently they consider it immaterial whatever they do, or omit to do—the net result is that the men who are in control, it becomes almost impossible to dislodge, unless there should be such a scandal in the corporation as to make it clearly necessary for the people on the outside to combine for self-protection. Probably even that necessity would not be sufficient to ensure a new management. That comes rarely except when those in control withdraw because they have been found guilty of reprehensible practices resulting in financial failure.

The wide distribution of stock, instead of being a blessing, constitutes, to my mind, one of the gravest dangers to the community. It is absentee landlordism of the worst kind. It is more dangerous, far more dangerous than the absentee landlordism from which Ireland suffered. There, at all events, control was centered in a few individuals. By the distribution of nominal control among ten thousand or a hundred thousand stockholders, there is developed a sense of absolute irresponsibility on the part of the person who holds that stock. The few men that are in position continue absolute control without any responsibility except that to their stockholders of continuing and possibly increasing the dividends.

Now, that responsibility, while proper enough in a way, may lead to action directly contrary to the public interest.

Chairman Walsh. For the purpose of illustration, take a corporation such as the Steel Corporation and explain what you mean by the democratization of industry, and to apply it to a concrete corporation, take that one.

Mr. Brandeis. I think the difficulty of applying it to that corporation, I mean a corporation as large as that and as powerful as that, is this: The unit is so large that it is almost inconceivable that the men in control can be made to realize the necessity of yielding a part of their power to the employee.

Now, when they resist a particular labor policy—for instance, the unionization of shops—and they do resist it violently, most of the officials do so in absolute good faith, convinced that they are doing what they ought to do. They have in mind the excesses of labor unions and their obligations to stockholders to protect the property; and having those things in mind and exaggerating, no doubt, the dangers of the situation, they conclude that they cannot properly submit to so-called union demands. They are apt to believe that it is "un-American" to do so—and declare it to be contrary to our conceptions of liberty, and the rest. And they believe they are generally sincere in their statements.

The possession of almost absolute power makes them believe this. It is exactly the same condition that presents itself often in the political world.

No doubt the Emperor of Russia means just as well toward each of his subjects as most rulers of a constitutional government or the executives of a republic. But he is subject to a state of mind that he cannot overcome. The fact that he possesses the power and that he is the final judge of what is right or wrong prevents his seeing clearly and doing that which is necessary to give real liberty and freedom.

It is almost inconceivable to my mind that a corporation with powers so concentrated as the Steel Corporation could get to a point where it would be willing to treat with the employees on equal terms. And unless they treat on equal terms then there is no such thing as democratization. The treatment on equal terms with them involves not merely the making of a contract; it must develop into a continuing relation. The making of a contract with a union is a long step. It is collective bargaining—a great advance. But it is only the first step. In order that collective bargaining should result in industrial democracy it

must go further and create practically an industrial government—a relation between employer and employee where the problems as they arise from day to day, or from month to month, or from year to year, may come up for consideration and solution as they come up in our political government.

In that way conditions are created best adapted to securing proper consideration of any question arising. The representative of each party is heard—and strives to advance the interest he represents. It is the conflict of these opposing forces which produces the contract ultimately. But adequately to solve the trade problems there must be some machinery which will deal with these problems as they arise from day to day. You must create something akin to a government of the trade before you reach a real approach to democratization. You must create a relation of employer to employee similar to that which exists in the trade under the protocol with the preferential union shop.

Chairman Walsh. Past experience indicates that large corporations can be trusted to bring about these reforms themselves?

Mr. Brandeis. I think all of our human experience shows that no one with absolute power can be trusted to give it up even in part. That has been the experience with political absolutism; it must prove the same with industrial absolutism. Industrial democracy will not come by gift. It has got to be won by those who desire it. And if the situation is such that a voluntary organization like a labor union is powerless to bring about the democratization of a business, I think we have in this fact some proof that the employing organization is larger than is consistent with the public interest. I mean by larger, is more powerful, has a financial influence too great to be useful to the State; and the State must in some way come to the aid of the workingmen if democratization is to be secured.

Chairman Walsh. Are the workmen employed by large corporations in a position to work out their own salvation by trade-union organization today?

Mr. Brandeis. I think our experience, taking the steel trade as an example, has certainly shown that they are not. And this is true also of many other lines of business. Even in case of corporations very much smaller than the Steel Corporation, where the unions have found it impossible to maintain their position against the highly centralized, well-managed, highly financed company. Such corporations as a means

of overcoming union influence and democratization frequently grant their employees more in wages and comforts than the union standard demands. But "man cannot live by bread alone." Men must have industrial liberty as well as good wages.

Chairman Walsh. Do you believe that the existing State and Federal legislation is adequately and properly drawn to provide against abuses in industry, so far as the employees are concerned?

Mr. Brandeis. I have grave doubt as to how much can be accomplished by legislation, unless it be to set a limit upon the size of corporate units. I believe in dealing with this labor problem as in dealing with the problem of credit. We must meet this question.

Chairman Walsh. Of what? Excuse me.

Mr. Brandeis. Size. And in dealing with the problem of industrial democracy there underlies all of the difficulties the question of the concentration of power. This factor so important in connection with the subject of credit and in connection with the subject of trusts and monopolies is no less important in treating the labor problem. As long as there is such concentration of power no effort of the workingmen to secure democratization will be effective. The statement that size is not a crime is entirely correct when you speak of it 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. A large part of our protective legislation consists of prohibiting things which we find are dangerous, according to common experience. Concentration of power has been shown to be dangerous in a democracy, even though that power may be used beneficently. For instance, on our public highways we put a limit on the size of an autotruck, no matter how well it is run. It may have the most skillful and considerate driver, but its mere size may make it something which the community cannot tolerate, in view of the other uses of the highway and the danger inherent in its occupation to so large an extent by a single vehicle.

Chairman Walsh. Commissioner Lennon has a few questions he would like to ask.

Commissioner Lennon. Mr. Brandeis, in speaking with regard to the physical betterment that has come about in some instances in these great industries, did you mean to indicate that these physical betterments were not something of an element toward progress, toward democratic manhood?

Mr. Brandeis. I think they contribute a very material amount, provided they do not result in a bribe to forgo that which is more important.

Commissioner Lennon. Now, to apply it to the work that the unions have done for physical betterment, increase of wages and limitation of the hours, and the elimination of children like in the coal industry.

Mr. Brandeis. Oh, I think those are all positive gains, unqualified gains.

Commissioner Lennon. Gains for manhood?

Mr. Brandeis. They are all gains for manhood; and we recognize that manhood is what we are striving for in America. We are striving for democracy; we are striving for the development of men. It is absolutely essential in order that men may develop that they be properly fed and properly housed, and that they have proper opportunities of education and recreation. We cannot reach our goal without those things. But we may have all those things and have a nation of slaves.

Commissioner Lennon. Now, in speaking of the exercise of power by those that acquire it through any means, what is your view as to the exercise of power in foundations, like the Rockefeller Foundation and the Russell Sage Foundation—the possibility of that power being applied not for the welfare of humanity, but whether or not there will be difficulties likely for the people to overcome the exercise of that power some time in the future.

Mr. Brandeis. I have never given that subject very close study, and I have never questioned in any way that those foundations arose from the highest motives. So far as I have known anything about them, they express a desire, a zealous purpose to aid humanity. But I have such faith in democracy and such a distrust of the absence of it that I have felt a grave apprehension at times as to what might ultimately be the effect of these foundations when the control shall have passed out of the hands of those who at present are administering them to those who may not be governed by the excellent intent of the creators.

Commissioner Lennon. That is, the creation of such institutions does bring into being a great power that is possible of application not for the good of humanity but sometimes under different directions?

Mr. Brandeis. It is. I mean it is creating the power and we do not know into what hands it ultimately may get and how it may be used. And I think there is this also in regard to it. It seems to me on the

whole inconsistent with our democratic aspirations. I have, and I think many must have, a grave apprehension as to some of the great educational endowments of the so-called private universities in contrast with the State universities. I think we are fortunate in having in this country both the one and the other; and that other foundations, if they are not too large, may be very beneficial; provided always that there are other forces in governmental agencies which can counteract them. Still I cannot help feeling a certain apprehension as to later results of these foundations.

CHAIRMAN WALSH. Commissioner Weinstock has some questions he would like to ask.

COMMISSIONER WEINSTOCK. The question, Mr. Brandeis, has been put to various witnesses that have come before us, as to what, in their opinion, was the prime remedy for industrial unrest, and different witnesses have offered different remedies. One has suggested that the prime remedy in modern industry is scientific management with a bonus system; another has suggested arbitration; still another, mediation and conciliation; yet another, profit sharing; another has expressed the opinion that the remedy lies along the line of legal minimum wage. I take it your prime remedy for industrial unrest, from what you have said this morning, is a condition of industrial democracy?

MR. BRANDEIS. That is fundamental, and I should adopt each one of these five remedies that you have named also as an incident, as an aid.

COMMISSIONER WEINSTOCK. As subsidiary?

MR. BRANDEIS. Yes; as subsidiary.

COMMISSIONER WEINSTOCK. But the prime remedy, in your opinion, is industrial democracy?

MR. BRANDEIS. Yes.

COMMISSIONER WEINSTOCK. That is the first, the essential?

MR. BRANDEIS. Yes; it is not only a prime remedy, but absolutely essential.

COMMISSIONER WEINSTOCK. Will you tell us, please, Mr. Brandeis, whether your opinion is that this industrial democracy should be voluntary or compulsory?

MR. BRANDEIS. I do not believe it can be made compulsory at the present time.

COMMISSIONER WEINSTOCK. Let us be sure, please, that we under-

stand alike the meaning of industrial democracy. I understand by industrial democracy a condition whereby the worker has a voice in the management of the industry—a voice in its affairs. Do we agree on that?

Mr. Brandeis. Yes, sir; and not only a voice, but a vote; not merely a right to be heard, but a position through which labor may participate in management.

Commissioner Weinstock. Has a right of action in regard to its affairs?

Mr. Brandeis. Yes; the power contributing to action—of participating in action.

Commissioner Weinstock. Returning, then, to the question as to whether you would make that voluntary or compulsory, what do you say?

Mr. Brandeis. I think that certainly for the present it should be made voluntary, and the great work now is the work of education. I referred a few moments ago to a protocol in the garment trade, and I think the accomplishment in that trade—in the cloak, suit, and skirt trade—to my mind, the most promising indications in the American industrial world.

Commissioner Weinstock. To what degree, in the garment industry, as conducted in New York, does labor have a voice?

Mr. Brandeis. Labor has a voice in this way: The protocol which was adopted on September 2, 1910, did this: In the first place it removed certain known grievances—long hours and a number of other grievances incident to the ordinary conduct of business which were then specified—and, among other things, the removal of insanitary conditions. Such results are accomplished by many agreements between the union and employers. But it went very much further. It created a system of government for employers on the one hand and employees on the other hand. In many agreements between employers and unions you find a provision for a grievance committee, but such committees are only for occasional use. The protocol establishes a government with administrative officers, courts, and a legislature always ready to take up questions arising in the trade.

Commissioner Weinstock. You mean it is a continuous performance?

Mr. Brandeis. It is absolutely as continuous as our political govern-

ment. They have a well-equipped office on both sides. There are hundreds of manufacturers operating under the cloak, suit, and skirt protocol—the oldest one of the existing protocols—and perhaps 22,000 or 30,000 workers directly employed in about 500 shops.

The questions arising there, in view of the character of the industry, are very numerous, and the officials of the union on the one hand and of the employers on the other hand are constantly passing upon these questions.

The regular paid officers, like administrators in the city or State government, act from day to day and many times a day on questions presented. But, besides, there come up from time to time questions more serious and far-reaching, similar to questions submitted to our courts. And there come up other questions, like those we have to submit to our legislatures. These representatives of employers and employees come together to determine the problems of the trade in precisely the same way that members of the legislatures and the judges of the courts come together to decide the matters for the Nation or of the State or of the city. It is participation in the decision of such questions arising between employer and employee which brings those men constantly into relation with each other.

Some of these questions are very difficult questions; they are questions which call for the inventive faculties, questions which involve experiments, questions which compel deep thinking. But the representatives of employer and employee called together to solve those questions have come to realize that the problems which arise are problems of the trade and not problems of one side or the other of a controversy; that no satisfactory solution can be reached by shifting the responsibility and getting rid of the question by throwing the burden on to the other side, saying, "The fault is yours; solve the problem." Most of the members of this industrial government have come to recognize that conscious fault or wrong-doing on either side is rather uncommon.

Their board of arbitration, of which I have acted as chairman, is not an arbitration board acting like one settling a strike. It is comparable rather to the highest court of appeal on judicial questions and occasionally Congress on legislative questions.

Early in the history of the protocol there was often the claim that one side or the other was at fault; there was mutual recrimination,

such as is constantly occurring in controversies between employer and employee. Now the attitude is just the opposite.

At one of the most heated hearings last year one of the employers came to me, who had been very bitter in the earlier days, and said, "We cannot do this thing that the union wants; but if I were the union representative, I should ask for the same thing." Now, that is the way they approach the problems, each side recognizing that the other person has rights. And when there is a conflict, it is seen that usually this presents a condition to be remedied; that it is the joint obligation of both sides to remedy it; that they must get together and work out the problem if the difficulty is to be removed. They recognize that it is the business of both sides.

Commissioner Weinstock. I take it that in this particular industry, there is an earnest and sincere effort on both sides to find equity?

Mr. Brandeis. It is not merely to find equity—that is one thing. I think as a rule we have gotten past the point, except in the heat of individual questions that come up—but usually both sides desire equity. They have reached now a desire to solve industrial problems, and the recognition that the problems of the employer cannot be solved by shifting them on to the employee, and that the problems of the employee cannot be solved by shifting them on to the employer; that some way must be found to arrive at the cause of the difficulty, to remove that cause, and relieve the trade, as a whole, from the crushing burden. That is a hopeful attitude, and it is the only attitude that can lead to the solution of these industrial difficulties.

Commissioner Weinstock. How many of these suggested remedies are embodied in the conditions that prevail in the garment industry of New York—scientific management with bonus, is that a part of it?

Mr. Brandeis. I think it has a recognition. I think they recognize, as I believe all intelligent and enlightened thinkers will recognize, that the only way permanently and appreciably to better the condition of labor, is to increase productivity and to eliminate the waste. That is what scientific management is. It means merely getting more with less effort. It means stopping all waste effort either in the exertion of the individuals or in goods. Just how you are going to apply the principle is a matter of detail. It is most important that it shall be applied democratically. It cannot be successfully applied otherwise in the long run; that is, both employer and employee must come to

recognize the fact that the elimination of waste is beneficial to both sides and that they must co-operate to produce the best results and the most effective methods of production. That condition is recognized under the agreement of the protocol referred to, not by express declaration in the protocol, but by the action and attitude of the leaders.

COMMISSIONER WEINSTOCK. Before I put my next question I want to preface it by asking another question to lay the foundation. You and I have heard a great deal about overproduction and underconsumption. Now, as an economic student, do you believe there is such a thing as overproduction, or is it because of underconsumption?

MR. BRANDEIS. I think it is underconsumption, or maladjustment in distribution. I think it is entirely true that at a given time you may have produced an amount that the market cannot take. You may disarrange conditions or produce an article which the market does not want. But we have not the power to produce more than there is a potential desire to consume.

COMMISSIONER WEINSTOCK. In other words, so long as there are hungry mouths and naked bodies in the world there cannot be overproduction?

MR. BRANDEIS. Not only hungry mouths and naked bodies, but there are many other things that people want.

COMMISSIONER WEINSTOCK. Well, then, if we are laboring under a condition of underconsumption rather than of overproduction, is it or is it not wise to minimize production?

MR. BRANDEIS. I believe it is one of the greatest economic errors to put any limitation upon production. If we took all the property there is in the country today and distributed it equally among the people of the country, we should not improve conditions materially. The only way in which we can bring that improvement in the condition of the workers which Mr. Lennon referred to, and in which I heartily agree, is to make not only the worker but all the people produce more so that there will be more to divide.

COMMISSIONER WEINSTOCK. Exactly.

MR. BRANDEIS. Then to see to it that the division is a fair division.

COMMISSIONER WEINSTOCK. Exactly.

MR. BRANDEIS. And I have felt in connection with scientific management, with the introduction of that method of producing more, that we ought to make up for the opportunity we lost when we changed

from hand labor to machine labor. I think it is perfectly clear that 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. It has a just cause of complaint if a business is not well managed. Then, when the proceeds of good management are secured, labor ought to insist upon getting its share; and, as I have said, I think its share ought to be large, because of the reason that when machines were introduced labor did not get its share.

Commissioner Weinstock. Well, then, assuming, Mr. Brandeis, that our machinery for distribution was perfected so that everything that we produced reached the parties that needed it, and it was placed within their power to buy—assuming that, then the more that was produced under those circumstances, the more there would be to divide between employer and worker. Is that not right?

Mr. Brandeis. I think that is; yes.

Commissioner Weinstock. Well, then, if I, as your fellow worker, should advocate or advise you to minimize your output, would I be your friend or your enemy?

Mr. Brandeis. A condition might well arise where it might be to my individual benefit to restrict production, but the benefit to labor as a whole would be immensely advanced by increasing production. We ought to develop enlightened unselfishness, as a substitute for the old, so-called, enlightened selfishness; and enlightened unselfishness would give us all a great deal more than we have.

Commissioner Weinstock. And while it is undisputed, and would be, I think, that organized labor officially has never advocated a diminished output, yet the general opinion is that unofficially many branches of organized labor look with favor upon a diminished output. Do you regard that as a wise or unwise thing?

Mr. Brandeis. Unwise. I think it is due probably to two causes. In the first place, it has an historical cause. Workingmen have known that in a great many instances employers encouraged an increased output, particularly when business was depressed, and then when earnings grew large they cut the rate of pay. In that way increased profits have resulted not necessarily in a decrease of pay, but not in a corresponding increase in the wages of the worker. That was unfair. The employees

were thus cheated in a great many cases by individual employers; and in many minds has arisen the belief that labor will not gain by increased production. Now, that is the historical cause. It is merely an instance showing how the wrongful act of each person is injuring an immense number of other persons, how one employer has the capacity to injure a thousand employees.

COMMISSIONER WEINSTOCK. I see.

MR. BRANDEIS. That is one thing.

The other thing is, I think, uneconomic thinking. Many labor leaders have regarded demand as static, as something fixed. They have therefore assumed that if there is a hundred per cent to divide, it will last longer if we each do less, and it will go further. That I believe to be absolutely unsound, as shown by experience. There is no fixed demand. Demand is capable of almost any degree of expansion. It is partly this unfortunate lack of confidence in employers, as a whole, and partly a failure to recognize the results of economic experience, to which the tendency of many labor leaders to restrict production by the individual worker is due.

COMMISSIONER WEINSTOCK. Well, now, Mr. Brandeis, you, in your position, are not an employer nor are you a wage-earner. You have been an economic student.

MR. BRANDEIS. Yes; and to a great extent an adviser both of employers and of wage-earners.

COMMISSIONER WEINSTOCK. Exactly. Now, for the information of the commission, will you be good enough to point out, Mr. Brandeis, what you have observed to be the mistakes of employers in dealing with labor. Will you brief them?

MR. BRANDEIS. I think the main mistake that the employers have made has been a failure to acquire understanding of the conditions and facts concerning labor. There has been ignorance in this respect on the part of employers—ignorance due in large part to lack of imagination. Employers have not been able to think themselves into the labor position. They do not understand labor and many successful business men have never recognized that labor presents the most important problem in the business. One of the ablest business men I ever came in contact with, and who later made some very important advances in dealing with labor problems, said to me when I first had occasion to discuss a pressing labor problem with him: "I want to take up the

labor question when I get around to it." He had been proceeding for years with a reorganization of his business in all other respects—in respect to distribution, in respect to financing and factory organization —but he postponed taking up the labor question until he should be through with all the other problems. Now, he was a man who looked upon business as applied science—as something to be thought out. His was a master mind; he was also a man of splendid heart and character in every way. But he had held the traditions generally prevailing that labor was something you could leave to the superintendents of your factories. He held an attitude similar to that which the chairman called attention to as being the attitude of directors who had testified here. Instead of recognizing that in most businesses the labor problem is the most important one, even from the business standpoint; that if you solve that satisfactorily all other problems are comparatively simple—it had seemed to him one that could be left to a subordinate. The fact that this man, whose record as a business man is very high, both in character and ability, was putting off the labor question until he got through with all the others, shows why labor has been so often misunderstood by employers.

The other cause of employers' difficulties is a failure to think clearly. The employers' refusal to deal with a union is ordinarily due to erroneous reasoning or false sentiment. The man who refuses to deal with the union acts ordinarily from a good motive. He is impressed with "union dictation." He is apt to think "this is my business and the American has the right of liberty of contract." He honestly believes that he is standing up for a high principle and is willing often to run the risk of having his business ruined rather than abandon that principle. They have not thought out clearly enough that liberty means exercising one's rights consistently with a like exercise of rights by other people; that liberty is distinguished from license in that it is subject to certain restrictions, and that no one can expect to secure liberty in the sense in which we recognize it in America without having his rights curtailed in those respects in which it is necessary to limit them in the general public interest. The failure of many employers to recognize these simple truths is a potent reason why employers have not been willing to deal with unions. I think our employers, as a rule, are kind-hearted; they mean to do right; they mean to be just; and there is no difference between the men who have fought

the hardest against labor unions and those who have yielded to and dealt with labor unions in that respect, except that the former have not had that education which comes from actual active co-operation with unions in the solution of these problems.

I had my first practical experience in dealing with labor problems while acting for manufacturers in the effort to settle or prevent strikes. I found if I wanted to bring about a settlement it was absolutely necessary that the head of the business be brought into the conference. If the employer was a large corporation, nothing less than the president would do, and on the other hand we required the president of the international union to deal with the man in real authority. My effort was to bring these two men together and make each understand the problems of the other. And when I could bring that about, when I could make the union understand the employers' problem and the employer the union's problem, a settlement was almost certain. The next step was to make the individual employee feel that whatever the system of dealing, either through superintendents or otherwise, that there was no individual in that employ who was so insignificant but that if he believed a wrong was done him, he could, in the last analysis, appeal to the highest official of the corporation. When once that principle was established, the danger of a rupture between employer and employee was usually passed. The labor men felt faith; they felt that they could deal with the employer in full confidence; and under those circumstances I found that the laboring man would accept the definite statement of the corporation as to what they could afford to pay and what they could not afford to pay. I offered the union representative the opportunity of going through the employer's books; offered them every facility to learn the actual facts and requested their suggestions. They withdrew manfully from the opposition, for they were convinced they were being dealt with fairly, and that the rights of each individual laboring man were recognized as important as those of the biggest official. The corporation operated many factories, but the president was not burdened with numerous appeals. The fact that he recognized that there was nothing more important than the rights of the individual laboring man to human treatment was all the assurance needed.

Commissioner Weinstock. You feel, then, Mr. Brandeis, that one

mistake that employers have made is not putting themselves in the other fellow's place?

Mr. Brandeis. Yes; in not putting themselves in the other fellow's place is one thing, and not recognizing that in order to put themselves in the other fellow's place they must come into actual contact with him. Now, one of the great things that has been accomplished in the garment trade through this protocol is, that the employers have sat down with the laboring men again and again to deal with individual problems, and these men, no matter how much they differ—and they differ very radically and with the greatest of intensity—have the greatest respect for one another. They have the same respect for one another which opposing lawyers have for each other. Their conflict does not create enmity. The men though contending for exactly the opposite results become friends.

Commissioner Weinstock. Are there any mistakes that employers have made that you care to touch upon?

Mr. Brandeis. Well, I think that embodies the principal mistakes. Now, the other thing, which I think is involved in what I have said, is the tendency to deduce a wrong motive from what appears to be a wrong result. In things economic and social, wrong results do not proceed to any very great extent from wrong motives. The motives are, in the main, right—meaning by "motives," intent. But the results sought are very often wrong. People fail to recognize true values. It is failure to recognize things at their real worth which leads to unfortunate results.

Commissioner Weinstock. On the other hand, Mr. Brandeis, what are the mistakes of organized labor, as you see them?

Mr. Brandeis. Well, in many ways they are similar—they are the correlative of the mistakes of the employers.

I think in the first place the commonest mistake is a belief that the employer is earning a tremendous amount of money at the expense of labor. Taking all things into consideration, the employer rarely earns "a tremendous amount of money." He earns in a great many cases far less than is proper for the industry. The margins of earnings in most business is less than it should be—less than is required for safety. The workingmen are mostly unfamiliar with large figures and are misled by them. They do not readily understand

percentages, and they do not consider the risk that is involved. Very few workmen appreciate how necessary it is that there should sometimes be large profits in order to set off the losses. Few people care to advertise their losses, but the profits are advertised freely, and very often are exaggerated.

Now, what the employer needs most is to have proper representatives of labor understand the problems of his business; how serious they are, how great is the chance of losing money, how relatively small is the chance of making large profits, and how great is the percentage of failures. Put a competent representative of labor on your board of directors; make him grapple with the problems of whether to do or not to do a specific thing, and undertake to balance the advantages and disadvantages presented, and he will get a realizing sense of how difficult it is to operate a business successfully and what the dangers are of the destruction of the capital in the business. A few years ago, when union leaders were demanding from my client an increase in wages, and I asked them: "How much do you think the employer ought to earn before he increases your wages?" they named a figure which was far above his actual earnings, and I said to them: "Gentlemen, the books are open. If you can find either that more is being earned, or can show any way in which the employer can earn more than he is earning, the balance shall go to you." That put the responsibilities upon the labor leaders; they came to realize the difficulties under which the employer was laboring and acquiesced in the situation. The second cause of discord is the natural distrust felt by labor due largely to their lack of knowledge and of opportunities for knowledge.

The third cause is the sense of being subject to the power of the employer. That feeling of subjection cannot be removed without changing the conditions under which industry is being carried on. Perhaps the greatest of labor's mistakes is the practice, in many trades or communities, of restricting production. That is a very serious difficulty. Nothing would do so much to win the employer to collective bargaining as action on the part of the labor leaders favoring increased production. If employers could be satisfied that unionism meant increased production and better discipline and that the unions were striving for that result, a large part of the apprehension of employers would be removed and collective bargaining would be wisely extended.

Both labor and employers should bear constantly in mind that each

is his brother's keeper; that every employer is injured by any single employer who does labor a wrong; and that every laboring man and every union is injured by every individual unionist who does an employer a wrong. The influence of a single wrongful act by one who can be classified, is tremendous. It affects every other member of the class. When an employer acts improperly toward his employees, it is the business of other employers to see that such conduct is prevented, for his wrong will injure them. And in the same way any lack of fairness and any act of lawlessness on the part of labor is certain to injure other workers and the unions as a whole, and the individual members of labor unions with employers.

* * * *

Commissioner Commons. I had thought of asking Mr. Brandeis questions on the boycott, on the open shop, and on the preferential union shop, from a legal standpoint, but if you are going to close at this hour, I suppose we cannot talk longer at this time, but I can ask him those questions at a later time.

Chairman Walsh. I understand that it will be impossible for Mr. Brandeis to appear again today.

Mr. Brandeis. I could, perhaps, answer the question as to the preferential shop.

Commissioner Commons. I wanted to ask with regard to the legal aspects of it. I understand that the opinion of the courts is that the closed-shop demands of unions is an illegal demand. I think that is the statement of the anthracite-coal strike commission. On the other hand, the records of the anthracite-coal strike commission take the ground that there should be only an open shop. The question is, has the employer the right to maintain only a non-union shop if he desires—that is, has he the right to refuse to recognize a union or employ union men? Further, if it is legal to have the closed shop, why should it be legal to prescribe a preferential union shop?

Mr. Brandeis. I think the preferential union shop—I have never heard any question raised, and I do not see how any question can be raised, as to the legality of the preferential union shop. The preferential union shop is this: It is a shop in which union standards and conditions prevail, and in which the employer agrees, other things being equal, that he will employ union men—that he will give the union

man a preference over a non-union man. Now, that preferential union shop has seemed to me, certainly in many trades, to be a necessity if we are to have an effective union. I had, in early dealings with labor problems, found this situation to be very common where there was a perfectly honest open shop—that is, where the employer was willing to deal with the union fairly and squarely, making a contract with the union and agreeing with that union that he would not change conditions in his shop except upon negotiation with the union, but allow men in that shop to be either union or non-union men—the better that worked, the stronger was the tendency of the men to drop out of the union. They felt that they were getting all of the benefits of the union without having to submit to any of its burdens. So a relatively small part of the men had to bear the burden of the union, not only in money, but in the administrative work of the union and in submission to those restrictions which are put upon the members of the union for the common benefit. So in the perfect operation of the union shop, in those instances, conditions existed which undermined the union itself. The very perfection of the operation of the open-shop agreement worked to the detriment of the union. Furthermore, it was unfair and was demoralizing to the non-union men to get the benefits of the union without in any way contributing either by restriction or by money.

The question then came up as to how you can secure to the employer and others certain liberty of action and at the same time maintain the union. Justice and practical experience showed the necessity of creating some incentive to join the union, and, on the other hand, some disadvantage in not joining the union. On the whole the most advantageous incentive was to give preference in employment to him who joined the union; to say to the man who joins that union: "I will give you preference, but you must be up to the standard; you must be as good as the other man." And if the union cannot supply such men, then, that you may take some non-union man. Under this system the closed shop is avoided. In the preferential union shop certain men are given preference over other men; and that is the principle which underlies the protocol in the garment workers' trade.

Commissioner Commons. Do you advise unions now giving up the closed-shop idea and asking for the preferential shop?

Mr. Brandeis. I do; and I think such a course would remove to a

large extent the opposition of employers to unionism, and their refusing to enter into agreements with unions.

Commissioner Commons. Is your reason legal or given on legal grounds?

Mr. Brandeis. It is partly legal, partly sentimental, and partly a recognition of economic rights and a sound social policy.

Commissioner Commons. Employers that now stand for the open shop, what is your advice to them?

Mr. Brandeis. I should say to those employers who stand for the open shop, that they ought to recognize that it is for their interests as well as that of the community that unions should be powerful and responsible; that it is to their interests to build up the unions, to aid as far as they can in making them stronger, and to create conditions under which the unions shall be led by the ablest and most experienced men. A large part of all union activity today, and in the past, has been devoted to the struggle for existence; and that fact accounts also for a large part of union excesses. As nearly as possible union existence should be assured so that the efforts of the leaders might be devoted to solving the fundamental and difficult problems of discipline and organization, and the working out of other problems of the trades.

THE RIGHT TO WORK

For every employee who is "steady in his work," there shall be steady work. The right to regularity in employment is co-equal with the right to regularity in the payment of rent, in the payment of interest on bonds, in the delivery to customers of the high quality of product contracted for. No business is successfully conducted which does not perform fully the obligations incident to each of these rights. Each of these obligations is equally a fixed charge. No dividend should be paid unless each of these fixed charges has been met. The reserve to ensure regularity of employment is as imperative as the reserve for depreciation; and it is equally a part of the fixed charges to make the annual contribution to that reserve. No business is socially solvent which cannot do so.

List of Articles and Addresses

1902 December 4th	Address before the Economic Club of Boston, entitled "The Incorporation of Trades Unions," published in January 1903 in *Green Bag*, vol. 15, pp. 11–14, reprinted in *Business—a Profession*, pp. 88–98.
1904 April 21st	Address delivered to the Boston Typothetæ, entitled "The Employer and Trades Unions," reprinted in *Business—a Profession*, pp. 13–27.
1905 May	Address before the Filene Co-operative Association in Boston, on **Industrial Co-operation**, published in *Filene Co-operative Association Echo*, May, here reprinted.
1906 June 11th	Address delivered to the Civic Federation of New England, entitled "Hours of Labor," reprinted in *Business—a Profession*, pp. 28–36.
1911 March	Address published in American Cloak & Suit Review, p. 188.
April 2d	Address before the Boston Central Labor Union, entitled "Organized Labor and Efficiency," published in *Survey*, April 22d, vol. 26, pp. 148–51, reprinted in *Business—a Profession*, pp. 37–50.

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JUNE — Address delivered at Brown University Commencement, Providence, R. I., entitled "Business—the New Profession," published in *System*, October, vol. 22, pp. 365–9, reprinted in *Business—a Profession*, pp. 1–12, excerpts reprinted in *Social and Economic Views*, pp. 387, 388.

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DECEMBER 17th — Argument before the Supreme Court of the United States in Stettler *vs.* O'Hara (See 243 U.S. 629), published in *Survey*, February 6th, 1915, vol. 33, pp. 490–4, 521–4, as **"The Constitution and the Minimum Wage,"** here reprinted.

1915 JANUARY 23d — **Testimony before the United States Commission on Industrial Relations,** published as Senate Document, 64th Congress, 1st Session, Vol. 26 (Serial Vol. 6936), pp. 7657–81, extracts reprinted in *Social and Economic Views*, pp. 380–5, other portions here reprinted.

* Now *The New Outlook.*

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1929 April 1st — Statement in *Survey Graphic*, vol. 62, p. 5, entitled "The Right to Work," first formulated in 1913, reprinted in *Social and Economic Views*, p. 385, and also here.

References to Legislative Hearings

1911 December 14th to 16th — Senate Committee on Interstate Commerce, 62nd Congress, 2nd Session, Hearings on Control of Corporations, Persons, and Firms engaged in Interstate Commerce, vol. 1, pp. 1146–291; excerpts reprinted in *Social and Economic Views*, pp. 372–5.

1912 February 24th — *Idem*, vol. 3, pp. 2615–23 (a letter).

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(*See also* references under next section.)

Part III

"THE CURSE OF BIGNESS"

Editor's Note

Mr. Brandeis fought the interests not only because of their hostility toward labor, but also because he believed them to be inimical to the good of society at large. Implacable foe that he was of monopoly, he did not fail to realize, however, the folly of mere "trust busting." And while he persistently advocated the necessity of preserving competition he likewise insisted that competition itself needed regulation. One of the measures he advocated, directed not only to the curbing of cut-throat competition, but also to depriving monopoly of a favorite weapon, was the maintenance of retail prices set by manufacturers of nationally known products. He championed small units not merely because he hated the excesses of the large ones but because he doubted the efficiency of great aggregations of capital.

Today the perennial struggle of small against great assumes even more significant proportions than when Mr. Brandeis wrote most of the papers here reproduced. We print his dissenting opinions in the Oklahoma Ice case and the Florida Chain Store case to show that his own views on the subject have been strengthened by the events of recent years.

AN ILLEGAL TRUST LEGALIZED

THE decree of the United States Circuit Court approving the plan submitted by the American Tobacco Company for the so-called "disintegration" is, in effect, a nullification, not only of the Sherman law, but of the decision of the Supreme Court of the United States, so far as concerns that Trust.

The main feature of the plan is to divide the corporation, which upon admitted facts had been declared an illegal combination by the unanimous opinion of the Supreme Court, into three parts; these three parts to be owned by the same persons, in the same proportions and to be controlled by the same individuals who the Supreme Court held to have combined in violation of the law. It is inconceivable that even a decision rendered by able and upright judges can make the American people believe that such a "disintegration" will restore "honest" competition.

The decision of the Circuit judges appears to result from a misapprehension of the intent of the Supreme Court of the United States. That court declared that the requirements of the Sherman law should be given effect by the issue of "an injunction restraining the movement of the products of the combination in channels of Interstate Commerce or by the appointment of a receiver" if "the combination . . . is not dissolved and a condition of disintegration in harmony with the law is not brought about" through "some plan or method of dissolving the combination and re-creating out of the elements composing it a new condition which shall be honestly in harmony with and not repugnant to the law."

It was admitted by all that a condition to be "honestly in harmony with the law" must be one under which fair competition would prevail. The Supreme Court recognized the situation as a complex one that would require an investigation into commercial facts in order to determine whether it was possible to provide a feasible plan of disintegration consistent with the requirements of the law—and if so, what the detailed provisions should be. The Supreme Court, therefore,

committed to the lower court the duty of investigating this commercial question. It directed the Circuit judges to give to the Trust an opportunity to present some plan consistent with the law; and it imposed upon the judges the duty of withholding their approval unless the plan were such as to restore the conditions essential to fair competition.

The Circuit judges apparently misconstrued this direction of the Supreme Court as a command to accept some plan and as limiting their own discretion to accepting the plan in their opinion the most favorable that the American Tobacco Company was willing to offer. In other words, the Circuit Court, in the first place, abdicated the power to determine whether it was possible to formulate a practical plan in conformity with the law and, in the second place, abdicated the power to insist upon such a plan as would comply with the requirements of the law. This is shown clearly by the statement of the presiding judge who, after discussing the modifications of the plan submitted by the "independents," says:

"No time need be given to the consideration of these as long as there is no suggestion that the defendants will adopt them. On the contrary, counsel for the defendants expressly stated on argument that they would not undertake to carry them out. Presumably, they think they might better take their chances at a receiver's sale. This court has neither authority nor power to carry out and enforce any plan of readjustment without the co-operation of the owners of the property, the holders of these stocks and bonds. It would be a sheer waste of time, therefore, to consider any plan radically different from the one now before us."

In other words, the Circuit judges, having first assumed that the Supreme Court had ordered them to accept the best plan they could get, then assumed that what the Tobacco Trust said was "the best they would do" was really their best offer.

The investigation into the flagrantly illegal operations of the Tobacco Trust by the Bureau of Corporations occupied five years. This investigation proved conclusively that the huge profits of the Trust were due to its monopolistic control, that its control of the industry was so complete as to enable it "to absorb practically all the benefits of the reduction" of the Spanish War tax on tobacco, "adding millions yearly to its income"; that the monopoly used its power so ex-

tortionately that a single branch, the Duke business, valued in 1885 at $250,000, yielded to the owners by 1908, in securities and cash dividends, an aggregate of $37,000,000. The legal prosecution of the Trust occupied four years. It was successful at every point up to the decree induced by the Circuit judges. These years of skillful investigation by Commissioner Herbert Knox Smith and of ably conducted litigation by the special assistant have been rendered worse than futile by the decree now entered with the approval of the Attorney-General.

A combination heretofore illegal has been legalized. The value of that legalization is shown by the high market value of the common stock of the American Tobacco Company. At a time when the business of the country is depressed, when railroad shares and other industrial stocks are relatively low, the common stock of the American Tobacco Company reaches the proud eminence of $450 a share. Surely other Trusts would welcome such an "immunity bath."

Eminent counsel who appeared to represent committees of the security holders (and whose fees the decree orders to be paid by the American Tobacco Company) declared that they would resist to the uttermost the adoption of those provisions that were urged as necessary for the restoration of competition. They invoked the Constitution, assuming that it protects not only vested rights, but vested wrongs. And they appear to have discovered in the Constitution a new implied prohibition:

"What man has illegally joined together, let no court put asunder."

SHALL WE ABANDON THE POLICY OF COMPETITION?

SHALL we abandon as obsolete the long-cherished policy of competition, and accept in its place the long-detested policy of monopoly? The issue is not (as it is usually stated by advocates of monopoly), "Shall we have unrestricted competition or regulated monopoly?" It is, "Shall we have regulated competition or regulated monopoly?"

Regulation is essential to the preservation and development of competition, just as it is necessary to the preservation and best development of liberty. We have long curbed physically the strong, to protect those physically weaker. More recently we have extended such prohibitions to business. We have restricted theoretical freedom of contract by factory laws. The liberty of the merchant and manufacturer to lie in trade, expressed in the fine phrase of *caveat emptor*, is yielding to the better conceptions of business ethics, before pure-food laws and postal-fraud prosecutions. Similarly, the right to competition must be limited in order to preserve it. For excesses of competition lead to monopoly, as excesses of liberty lead to absolutism. The extremes meet.

The issue, therefore, is: Regulated competition *versus* regulated monopoly. The policy of regulated competition is distinctly a constructive policy. It is the policy of development as distinguished from the destructive policy of private monopoly.

It is asserted that to persist in the disintegration of existing unlawful trusts is to pursue a policy of destruction. No statement could be more misleading. Progress demands that we remove the obstacles in the path of progress; and private monopoly is the most serious obstacle.

One has heard of late the phrases: "You can't make people compete by law." "Artificial competition is undesirable."

These are truisms, but their implication is false. The suggestion is not that traders be compelled to compete, but that they be prevented from killing competition. Equally misleading is the phrase, "Natural

monopolies should not be interfered with." There are no natural monopolies today in the industrial world. The Oil Trust and the Steel Trust have been referred to as natural monopolies, but they are both most unnatural. The Oil Trust acquired its control of the market by conduct which involved flagrant violations of law. Without the aid of criminal rebating, of bribery and corruption, the Standard Oil would never have acquired the vast wealth and power which enabled it to destroy its small competitors by price-cutting and similar practices.

The Steel Trust acquired control not through greater efficiency, but by buying up existing plants and ore supplies at fabulous prices. It is believed that not a single industrial monopoly exists today which is the result of natural growth. Competition has been suppressed either by ruthless practices or by an improper use of inordinate wealth and power. If the law prohibiting such practices is clearly defined and enforced, as it is the purpose of the La Follette Bill to accomplish, no similar trust will arise in the future.

The only argument that has been seriously advanced in favor of private monopoly is that competition involves waste, while the monopoly prevents waste and leads to efficiency. This argument is essentially unsound. The wastes of competition are negligible. The economies of monopoly are superficial and delusive. The efficiency of monopoly is at the best temporary.

Undoubtedly competition involves waste. What human activity does not? 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. So it is with competition. The waste is relatively insignificant. There are wastes of competition which do not develop, but kill. These the law can and should eliminate, by regulating competition.

It is true that the unit in business may be too small to be efficient. It is also true that the unit may be too large to be efficient, and this is no uncommon incident of monopoly.

Whenever trusts have developed efficiency, their fruits have been absorbed almost wholly by the trusts themselves. From such efficiency as they have developed, the community has gained substantially nothing.

The proposed Government commission to fix prices would not

greatly relieve the evils attendant upon monopoly. It might reduce a trust's profits, but it would fail materially to reduce the trust's prices; because the limitation of the monopoly's profits would, by lessening this incentive, surely reduce the monopoly's efficiency.

To secure successful management of any private business, reward must be proportionate to success. The establishment of any rule fixing a maximum return on capital would, by placing a limit upon the fruits of achievement, tend to lessen efficiency.

No selling price for monopoly products could be set constitutionally at a point lower than that which would allow a reasonable return on capital. And in the absence of comparative data from any competing businesses producing the same article at less cost, it would be virtually impossible to determine that the cost should be lower.

The success of the Interstate Commerce Commission has been invoked as an argument in favor of licensing and regulating monopoly.

But the Interstate Commerce Commission has been effective principally in preventing rate increases and in stopping discrimination. In those instances where the Commission has reduced rates (as distinguished from preventing increases) the Commission rested its decisions largely on the ground that existing rates amounted to discriminations against particular places or articles, or the lower rates were justified by a comparison with other rates of the same or other companies. Price-fixing of that nature applied to industrial trusts would afford little protection to the public.

In the second place, there is a radical difference between attempts to fix rates for transportation and similar public services, and fixing prices in industrial businesses. Problems of transportation, while varying infinitely in detail, are largely the same throughout the whole country, and they are largely the same yesterday, today, and tomorrow. In industry we have, instead of uniformity, infinite variety; instead of stability, constant change.

In the third place, the problems of the Interstate Commerce Commission, relatively simple as they are, already far exceed the capacity of that or any single board. Think of the infinite questions which would come before an industrial commission seeking to fix rates, and the suffering of the community from the inability of that body promptly and efficiently to dispose of them.

Every business requires for its business health the *memento mori*

of competition from without. It requires likewise a certain competition from within, which can exist only where the ownership and management, on the one hand, and the employees, on the other, shall each be alert, hopeful, self-respecting, and free to work out for themselves the best conceivable conditions.

The successful, the powerful trusts, have created conditions absolutely inconsistent with these—America's—industrial and social needs. It may be true that as a legal proposition mere size is not a crime, but mere size may become an industrial and social menace, because it frequently creates as against possible competitors and as against the employees conditions of such gross inequality, as to imperil the welfare of the employees and of the industry.

In the midst of our indignation over the unpardonable crimes of trade-union leaders, disclosed at Los Angeles, would not our statesmen and thinkers seek to ascertain the underlying cause of this widespread, deliberate outburst of crimes of violence? What was it that led men like the McNamaras to believe really that the only recourse they had for improving the condition of the wage-earner was to use dynamite against property and life?

Certainly it was not individual depravity. Was it not because they, and men like them, believed that the wage-earner, acting singly, or collectively, is not strong enough to secure substantial justice? Is there not a causal connection between the development of these huge indomitable trusts and the horrible crimes now under investigation? Are not these irresistible trusts important contributing causes of these crimes—these unintelligent expressions of despairing social unrest? Is it not irony to speak of the equality of opportunity, in a country cursed with their bigness?

The right of labor to organize and to deal collectively with its employers should not be curtailed.

There is not the slightest danger that labor will assume control of industry. It has become exceedingly difficult for the unions to maintain themselves because of the constant inflow of foreign labor and the great number of non-union men. This maintains a state of competition, which, did it exist in the industrial and financial business of the country, would make unnecessary any change in existing laws.

The only right claimed by the labor unions is that of collective bargaining, and this right employers also should have and exercise.

It would be perfectly proper for independent competing employers to form employers' organizations, and to deal with the labor unions upon exactly the same footing as is the case with unions—that is, collectively.

Nothing has been done to improve the conditions under which men labor, that has not increased their efficiency. Shorter hours often lead to greater production; and there is economy in high wages.

THE REGULATION OF COMPETITION AGAINST THE REGULATION OF MONOPOLY

A LARGE part of the American people realize today that competition is in no sense inconsistent with large-scale production and distribution. They realize that the maintenance of competition does not necessarily involve destructive and unrestrained competition, any more than the maintenance of liberty implies license or anarchy. We learned long ago that liberty could be preserved only by limiting in some way the freedom of action of individuals; that otherwise liberty would necessarily lead to absolutism and in the same way we have learned that unless there be regulation of competition, its excesses will lead to the destruction of competition, and monopoly will take its place.

A large part of our people have also learned that efficiency in business does not grow indefinitely with the size of the business. Very often a business grows in efficiency as it grows from a small business to a large business; but there is a unit of greatest efficiency in every business at any time, and a business may be too large to be efficient, as well as too small. Our people have also learned that these profits are not due in the main to efficiency but are due to control of the market, to the exercise by a small body of men of the sovereign taxing power. Nothing has helped so much to make this clear to our people as an incident in the life of the Tobacco Trust. When the Spanish War came on and we needed additional revenue, Congress properly increased the tax on tobacco products. Three years later, when our country no longer needed that additional revenue, Congress sought to remove the burden which it had placed upon the people, but Congress found itself powerless to remove the burden it had imposed. And when Congress reduced the tax, the effect was merely to transfer, from the Treasury of the United States to the treasury of the Trust, the several millions of dollars a year which represented the reduction in the tax; because the tobacco-products market was controlled by the Trust, which held the selling price practically unchanged.

The history of the Tobacco Trust also showed in the history of its detailed operations how control made for profit, for the degree of control exercised by that great Trust was very different in the various departments of its business and, as the commissioner of corporations found, the ratio of profit was ordinarily in direct relation to the ratio of control. Where the trusts had a high degree of control, the profits were great; where they had a small degree of control the profits were small. In the cigar business, in which the Trust had no control of the market, in which it was merely a large concern, doing perhaps one-eighth of the cigar business of the country, the Trust's profits were not only small, but they were very much smaller than would be satisfactory to the ordinary manufacturer. In the same year in which some of the subsidiary corporations of the Trust were earning fifty, sixty, eighty, or one hundred per cent upon the tangible assets, the Trust was earning in its cigar department only four to six per cent, although the ultimate management of all departments of the Trust's business rested with the same able men and was supplied with the same great resources. Such facts as these have made men realize that while trusts are sometimes efficient, it is not their efficiency but the fact that they control the market, that accounts for the huge profits of trusts.

And people have learned also another fact of perhaps even greater importance. They have come to realize the effect of monopoly in arresting progress, arresting that advance in industry without which a great industrial future is unattainable.

What America needs is not that we do anything for these, our fellow citizens, but that we keep open the path of opportunity to enable them to do for themselves. When these Americans come to do for themselves they find this situation: The trust is not merely a capitalistic control of men. It is the worst form of capitalistic control. One hundred and fifty thousand persons are said to be interested as stockholders in the Steel Trust. The Steel Trust is a conspicuous instance of ownership separated from responsibility. The Steel Trust presents a condition similar to that which led to the demoralization of Ireland —the condition of absentee landlordism. The managers may be good men and true, but the permanent separation of ownership from control must prove fatal to the public interest. The responsibility of ownership is lacking. If there had been responsibility of ownership in the Steel Trust it would have been impossible that with the huge profits

of the corporation—which the commissioner of corporations found to be $650,000,000 in ten years, far in excess of a fair return upon the capital originally invested in that concern—men would have been compelled to work twelve hours a day, seven days in a week, and at such low wages that even if they had worked 365 days in a year, seven days a week, the year's earnings would have been less than was necessary, less than the minimum amount necessary in the city of Pittsburgh for the support of a man, his wife, and three children with the minimum of decency, alas!

COMPETITION

PRACTICALLY all Americans agree there is a trust problem; but upon every matter relating to the problem there is the greatest diversity of opinion. In this wide divergence of view, two lines of cleavage may be drawn according as men take one or the other side of the two following important questions:

First, shall the industrial policy of America be that of competition, or that of monopoly?

Second, have we adequate governmental machinery to enforce whatever industrial policy America concludes to adopt, whether that policy be competition or monopoly?

Now, these two questions are frequently confused, but they are entirely distinct. The first is a question of economic policy, the second, the question of governmental machinery.

Some men who believe in competition think we have adequate governmental machinery now to secure competition, and all that is necessary is to enforce the Sherman law as it stands. Other men who believe in competition think we lack governmental machinery necessary to secure and maintain it, and that appropriate machinery should be devised and adopted for regulating competition. Likewise, some men who believe that private monopoly should be permissible think that the public will be best served if we simply repeal the Sherman law and let business take care of itself. Other men who believe in private monopoly think that we should devise and introduce new governmental machinery by which monopoly would be regulated.

Furthermore, there is a division among those who believe in the necessity of additional governmental machinery to enforce the policy either of competition or of monopoly; for they differ widely as to the nature of the machinery to be installed. This difference is not merely a difference in numerous and important details. They differ quite fundamentally as to the nature of the machinery to be employed—some persons maintaining that the new machinery shall be wholly judicial, that is, shall be such as will be enforced only through

courts of law; other persons insisting that however much the judicial machinery is improved, there must also be introduced administrative machinery; that is, such as would be applied through some kind of a commission. Such a commission was proposed in the bill introduced by a Democrat, Senator Newlands, on August 21, 1911, under the title of Interstate Trade Commission, and another and more elaborate one was later introduced by a Progressive Republican, Senator La Follette, under the name of Federal Trade Commission, and legislation of this character is strongly urged by the New Party.

For the purpose of this discussion most of the differences of view indicated can be eliminated. The question, "Shall we regulate competition or regulate monopoly?" assumes that there will be some regulation, and it is clear that in order to regulate either, the legal machinery must be greatly improved, and an administrative board of some kind, and with fairly broad powers, must be created to supplement the powers of the courts in dealing with this subject.

The only fundamental difference as between the New Party's program and that of its opponent relates to the economic policy to be enforced. All other differences are differences in degree or of emphasis.

In saying that the New Party stands for monopoly I do not mean that it wants to introduce monopoly generally in private industry, but merely that it accepts private monopoly as permissible, and the trusts as in themselves unobjectionable, requiring only that they be "good." It is prepared to protect existing trusts from dismemberment, if only they will be "good" hereafter, thus leaving them in the possession of the huge profits obtained through violations of law. But once we treat monopoly as permissible, we have given away the whole case of competition, for monopoly is the path of least effort in business, and is sure to be pursued, if opened.

On the other hand those who stand for competition do not advocate what has been frequently described as "unrestricted" or "destructive" competition. They demand a regulated competition or, if one may adopt the phrase, competition which is "good."

Regulation is essential to the preservation of competition and to its best development just as regulation is necessary to the preservation and development of civil or political liberty. To preserve civil and political liberty to the many we have found it necessary to restrict the

liberty of the few. Unlicensed liberty leads necessarily to despotism or oligarchy. Those who are stronger must to some extent be curbed. We curb the physically strong in order to protect those physically weaker. The liberty of the merchant and manufacturer to lie in trade, formerly permissible, and expressed in the fine phrase *caveat emptor*, has yielded largely to the better business ethics supplemented by pure-food laws and postal-fraud prosecution. Formerly the interests of business and of the community were supposed to be best served by letting buyer and seller trade without restriction on native or acquired shrewdness. Those laws present examples of protecting those who, by reason of position or training are, in respect to particular business transactions, the weaker or unable to take care of themselves. Recognizing differences in position of employer and employee, we have similarly restricted theoretically freedom of contract by factory laws which prescribe conditions under which work may be performed and, to some extent, the hours of labor. Experience had shown that under the changed conditions in industry it was necessary, in order that life and liberty of the worker be preserved, to put a restraint upon the theoretical freedom of the individual worker and the employer—the employer and the employee —to do as he chose in that respect.

The right of competition must be similarly limited; for excesses of competition lead to monopoly just as excesses of liberty have led to despotism. It is another case where the extremes meet.

What are those excesses of competition which should be prevented because they lead to monopoly? The answer to that question should be sought—not in theorizing, but in the abundant experiences of the last twenty-five years, during which the trusts have been developed. We have but to study the facts and ascertain:

"How did monopoly, wherever it obtained foothold, acquire its position?"

And we can, in the first place, give the comprehensive answer, which should relieve the doubts and fears of many: no monopoly in private industry in America has yet been attained by efficiency alone. No business has been so superior to its competitors in the processes of manufacture or of distribution as to enable it to control the market solely by reason of its superiority. There is nothing in our industrial history to indicate that there is any need whatever to limit the natural growth of

a business in order to preserve competition. We may emphatically declare: "Give fair play to efficiency."

One has heard of late the phrases: "You can't make people compete by law." "Artificial competition is undesirable." These are truisms, but their implication is false. Believers in competition make no suggestion that traders be compelled to compete. They ask merely that no trader should be allowed to kill competition. Competition consists in trying to do things better than someone else; that is, making or selling a better article, or the same article at a lesser cost, or otherwise giving better service. It is not competition to resort to methods of the prize ring, and simply "knock the other man out." That is killing a competitor.

Clearly misleading is the phrase, "Natural monopoly should not be interfered with." There are no natural monopolies in the industrial world. The Oil Trust and the Steel Trust have sometimes been called "natural monopolies," but they are both most unnatural monopolies. The Oil Trust acquired its control of the market by ruthless conduct which was not only a sin against society, but in large part involved flagrant violations of law. Without the aid of criminal rebating the Standard Oil would not have acquired the vast wealth and power which enabled it to destroy its smaller competitors by price-cutting and similar processes. The course of the Tobacco Trust was similar in character.

The Steel Trust, while apparently free from the coarser forms of suppressing competition, acquired control of the market not through greater efficiency, but by buying up existing plants and particularly ore supplies at fabulous prices, and by controlling strategic transportation systems. A monopoly like the Steel Trust can hardly be called natural, when it resulted in the main by the purchase of a single huge concern —the Carnegie Company—for, at least, $250,000,000 more than its value, thus bribing Mr. Carnegie to retire from the field in which he was master; and by the purchase of its vast ore resources at many times their value.

It will be found that wherever competition has been suppressed it has been due either to resort to ruthless processes, or by improper use of inordinate wealth and power. The attempt to dismember existing illegal trusts is not, therefore, an attempt to interfere in any way with the natural law of business. It is an endeavor to restore health by re-

moving a cancer from the body industrial. It is not an attempt to create competition artificially, but it is the removing of the obstacle to competition. The policy of regulated competition is distinctly a constructive policy. It is the policy of development as distinguished from the destructive policy of private monopoly. It has always in the past and must always in the future paralyze individual effort and initiative and deaden enterprise. Business progress demands that the industrial advance be unobstructed and private monopoly's highways of industrial and commercial development kept open.

Earnest argument is constantly made in support of monopoly by pointing to the wastefulness of competition. Undoubtedly competition involves some waste. What human activity does not? 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. So it is with competition. Incentive and development which are incident to the former system of business result in so much achievement that the accompanying waste is relatively insignificant. The margin between that which men naturally do and which they can do is so great that a system which urges men on to action, enterprise, and initiative is preferable in spite of the wastes that necessarily attend that process. I say, "necessarily" because there have been and are today wastes incidental to competition that are unnecessary. Those are the wastes which attend that competition which do not develop, but kill. Those wastes the law can and should eliminate. It may do so by regulating competition.

It is, of course, true that the unit in business may be too small to be efficient. The larger unit has been a common incident of monopoly. But a unit too small for efficiency is by no means a necessary incident of competition. It is also true that the unit in business may be too large to be efficient, and this is no uncommon incident of monopoly. In every business concern there must be a size-limit of greatest efficiency. What that limit is will differ in different businesses and under varying conditions in the same business. But whatever the business or organization there is a point where it would become too large for efficient and economic management, just as there is a point where it would be too small to be an efficient instrument. The limit of efficient size is exceeded when the disadvantages attendant upon size outweigh the advantages, when the centrifugal force exceeds the centripetal. Man's

work often outruns the capacity of the individual man; and, no matter what the organization, the capacity of an individual man usually determines the success or failure of a particular enterprise, not only financially to the owners, but in service to the community. Organization can do much to make concerns more efficient. Organization can do much to make larger units possible and profitable. But the efficiency even of organization has its bounds; and organization can never supply the combined judgment, initiative, enterprise, and authority which must come from the chief executive officers. Nature sets a limit to their possible accomplishment. As the Germans say, "Care is taken that the trees do not scrape the skies."

That mere size does not bring success is illustrated by the record of our industrial system during the past ten years. This record, if examined, will show that:

(*1*) Most of the trusts which did not secure monopolistic positions have failed to show marked success as compared with the independent concerns.

This is true of many existing trusts, for instance, of the Newspaper Trust, the Writing Paper Trust, the Upper Leather Trust, the Sole Leather Trust, the Woolen Trust, the Paper Bag Trust, the International Mercantile Marine, and those which have failed, like the Cordage Trust, the Mucilage Trust, the Flour Trust, should not be forgotten.

(*2*) Most of those trusts which have shown marked success secured monopolistic positions either by controlling the whole business themselves, or by doing so in combination with others. And their success has been due mainly to their ability to fix prices.

This is true, for instance, of the Standard Oil Trust, the Shoe Machinery Trust, the Tobacco Trust, the Steel Trust, the Pullman Car Company.

(*3*) Most of the trusts which did not secure for themselves monopoly in the particular branch of trade, but controlled the situation only through price agreements with competitors, have been unable to hold their own share of the market as against the independents.

This is true, for instance, of the Sugar Trust, the Steel Trust, the Rubber Trust.

(*4*) Most of the efficiently managed trusts have found it necessary to limit the size of their own units for production and for distribution.

This is true, for instance, of the Tobacco Trust, the Standard Oil Trust, the Steel Trust.

These general rules are, of course, subject to exceptions due to instances of conspicuous ability on the part of managers or unusual trade conditions.

Lack of efficiency is ordinarily manifested either (*1*) in rising cost of product, (*2*) in defective quality of goods produced, or (*3*) in failure to make positive advances in processes and methods.

The third of these manifestations is the most serious of all. In this respect monopoly works like poison which infects the system for a long time before it is discovered, and yet a poison so potent that the best of management can devise no antidote.

Take the case of the Steel Trust. It inherited through the Carnegie Company the best organization and the most efficient steel makers in the world. It has had since its organization exceptionally able management. It has almost inexhaustible resources. It produces on so large a scale that practically no experimental expense would be unprofitable if it brought the slightest advance in the art. And yet in only ten years after its organization, high American authority—the *Engineering News*, declares:

"We are today something like five years behind Germany in iron and steel metallurgy, and such innovations as are being introduced by our iron and steel manufacturers are most of them merely following the lead set by foreigners years ago.

"We do not believe this is because American engineers are any less ingenious or original than those of Europe, though they may indeed be deficient in training and scientific education compared with those of Germany. We believe the main cause is the wholesale consolidation which has taken place in American industry. A huge organization is too clumsy to take up the development of an original idea. With the market closely controlled and certain of profits by following standard methods, those who control our trusts do not want the bother of developing anything new.

"We instance metallurgy only by way of illustration. There are plenty of other fields of industry where exactly the same condition exists. We are building the same machines and using the same methods as a dozen years ago, and the real advances in the art are being made by European inventors and manufacturers."

This judgment is confirmed by the "Menace of the Broken Rail."

The Steel Trust was organized in 1901. It has dominated the steel trade of America. Its power has been particularly great in respect to rails, partly because of the system of inter-locking directorates. Steel Trust directors are also directors in railroad companies, owning more than one half of the railroad mileage in the United States. Ten years after the organization of the Steel Trust, the country was aroused by one or two shocking railroad accidents. The accidents appeared to result from broken rails. The Interstate Commerce Commission was led to make an investigation into the general subject and found that whereas in 1902 there were 72 derailments due to broken rails, there were in 1911, 249 derailments due to the same cause. In the past decade—the era of the Steel Trust—there have been 2,059 derailments due to broken rails, resulting in 106 killed and injured. Of course, all of these rails were not made by the Steel Trust, and the strain put upon rails has increased with the increase in the weight of equipment more than ever before; but the fact that articles produced by the Steel Trust have failed to keep pace with the requirements of transportation to such an extent as to require an investigation by the Government certainly indicates a marked limitation upon the efficiency of the greatest of all industrial units. Another instance of this character of inefficiency was disclosed recently in the ably managed Shoe Machinery Trust.

The Shoe Machinery Trust, the result of combining directly and indirectly more than a hundred different concerns, acquired substantially a monopoly of all the essential machinery used in bottoming boots and shoes. Its energetic managers were conscious of the constant need of improving and developing inventions and spent large sums in efforts to do so. Nevertheless, in the year 1910 they were confronted with a competitor so formidable that the Company felt itself obliged to buy him off, though in violation of the law and at a cost of about $5,000,000. That competitor, Thomas G. Plant, a shoe manufacturer who had resented the domination of the trust, developed an extensive system of shoe machinery, which is believed to be superior to the Trust's own system, which represents the continuous development of that Company and its predecessors for nearly half a century.

H. B. Endicott, one of the leading shoe manufacturers of the country, and now a director in the Shoe Machinery Trust, publicly de-

clared, after examining the Plant system: "In my judgment, and that of my experts, what you (Plant) have shown us was by far the most perfect set of working machinery that we had ever seen, or expected to see."

But the efficiency of monopolies, even if established, would not justify their existence unless the community should reap benefit from the efficiency; experience teaches us that whenever trusts have developed efficiency, their fruits have been absorbed almost wholly by the trusts themselves. From such efficiency as they have developed the community has gained substantially nothing. For instance:

The Standard Oil Trust, an efficiently managed monopoly, increased the prices of its principal products (refined oil, naphtha, and paraffin wax) between 1895 and 1898, and 1903 to 1906 by 46 per cent. The profits per gallon on crude oil used increased from 1882 to 1906 from $1.78 per gallon to $3.05 per gallon. The profits of the marketing companies of the Trust increased from 88 cents per gallon of illuminating oil in 1898 to $1.50 per gallon in 1906. The profits on naphtha per gallon nearly doubled between 1898 and 1906.

The Tobacco Trust, an efficiently managed monopoly. Between 1899 and 1907 the selling price (less taxes) on smoking tobacco rose from 21.1 cents per pound to 30.1 cents; the profit per pound from 2.8 cents per pound to 9.8 cents. The selling price of plug tobacco rose from 24.9 cents per pound to 30.4 cents; the profit per pound from 1.9 cents to 8.7 cents.

In the snuff business the Tobacco Trust controlled 96 per cent of the market. The extortion was even greater. The selling price of snuff (less taxes) rose from 29.2 cents per pound in 1900 to 37.1 cents in 1907; whereas the cost decreased from 22.6 cents per pound to 20.8 cents. Thus the profit per pound exacted by the Trust rose from 6.6 cents per pound to 16.3 cents per pound. In other words, in 1907 on every pound of snuff sold by the Trust there was exacted from the public a profit of about 81 per cent on its cost.

The following statement of the Commissioner of Corporations illustrated the power and disposition of the Trust to absorb whatever profits existed:

"The results of the Spanish War tax upon tobacco products especially illustrate the monopolistic power of the combination. When that tax was imposed in 1898, prices were generally raised. In 1901 and

1902 the tax was reduced to its former basis, but the combination was powerful enough to keep its prices at the higher level. It thus absorbed practically all the benefit of the reduction, adding millions yearly to its income. The episode shows the unforeseen results of fiscal legislation affecting monopolistic conditions not fully recognized. The tax reduction, of course, was intended to benefit the consumers. As a matter of fact, it benefited almost solely the controlling interest in the industry."

The Steel Trust, a corporation of reputed efficiency. The high prices maintained by it in the industry are matters of common knowledge. In less than ten years it accumulated for its shareholders or paid out as dividends on stock representing merely water, over $650,000,000.

Compare with this record of increased or stationary prices and of growing profits, the record of strictly competitive manufacturing businesses where the selling prices have shown a marked tendency to decrease and the ratio of profits has been almost uniformly lessened. For instance:

The Book Paper business furnishes a conspicuous example of this. In important mills the average selling-price of book paper declined from 7.08 cents per pound in 1889 to 4.24 cents in 1899, and to 3.99 in 1910; the ratio of profit per pound declined from 19 per cent on cost in 1889 to 13 per cent in 1899 and 7 per cent in 1910. This reduction is the more noteworthy because the principal raw material used—wood—(like wages) has steadily risen in price during the period.

The proposed Government commission to fix prices would not greatly relieve the evils attendant upon monopoly. It might be effective in preventing private monopoly from taking excessive profits, but Government price-regulation would be powerless to secure to the public the low prices commonly attendant upon competition. In other words, price-fixing might reduce the trust's profits, but it would fail materially to reduce the trust's prices; because the limitation of the monopoly's profits would, by lessening this incentive, surely reduce the monopoly's efficiency.

Capital and property will yield, according to the degree of the judgment and efficiency applied in management, vastly different returns. To secure the successful management of any private business reward must be proportionate to success. The establishment of any rule fixing a maximum return on capital would, by placing a limit

upon the fruits of achievement, tend to lessen efficiency. For efficiency is naturally reflected in large net earnings; and as no ready means exists for determining whether greater net earnings are due to greater efficiency in management or to excessive profits, large net earnings would be followed by compulsory reduction of prices, and such reduction by a lessening of effort. To take from a private business the natural fruits of efficiency would create a sense of injustice suffered, which would paralyze effort and individual enterprise, and produce slipshod management. The attempt to secure low prices through price-fixing would prove as impotent as the statutes which have sought to protect the public in respect to railroad rates by limiting the dividends of railroads. The permissible dividends generally exhausted the profits. No selling price for monopoly products could be set constitutionally at a point lower than that which would allow a reasonable return on capital. And in the absence of comparative data from any competing businesses producing the same article at less cost, it would be practically impossible to determine that the cost should be lower.

The success of the Interstate Commerce Commission has been invoked as an argument in favor of licensing monopoly, and regulating it by a similar commission.

If the experience of the Interstate Commerce Commission is carefully inquired into, it will be found to present argument against, rather than in favor of, the proposition that the evils naturally attendant upon industrial private monopolies can be avoided through establishing such an industrial commission.

In the first place, the success of the Interstate Commerce Commission has been effective principally in preventing rate increases and in stopping discrimination. The great reductions in railroad rates which have been made in the last 24 years (during the life of the Commission) have been due, in not rare instances, to action of the Interstate Commerce Commission. In those instances where the Commission has reduced rates (as distinguished from preventing increases) the Commission rested its decision largely on the ground that existing rates amounted to discrimination against particular places or articles, or the lower rates were justified by a comparison with other rates of the same or other companies. Price fixing of that nature applied to industrial trusts would afford little protection to the public.

In the second place, there is a radical difference between attempts to

fix rates for transportation and similar public services and fixing prices in industrial businesses. The striking characteristic of the railroad problems of the whole country is their uniformity. Problems of transportation, while varying infinitely in detail, are largely the same throughout the whole country, and they are largely the same yesterday, today, and tomorrow. For this reason the Commission reaches its decision as to the reasonableness of a rate most frequently by a comparison of what is charged upon the same or some other railroad for a similar service. In spite, therefore, of the numerous problems as to the reasonableness of rates with which the Interstate Commerce Commission is confronted, their task would be a relatively simple one as compared with that which would necessarily arise if prices were to be fixed in the field of industry. In industry we have, instead of uniformity, infinite variety; instead of stability, constant change.

In the third place, the problems of the Interstate Commerce Commission, relatively simple as they are by reason of the character of the service to be regulated, already far exceed the capacity of that or any single board. A single question of rates, like that involved in the Spokane and intermountain rate cases has been before the Commission awaiting final adjudication nearly twenty years. Think of the infinite questions which would come before an industrial commission seeking to fix rates, and the suffering of the community from the inability of that body to dispose of them promptly and efficiently. It would require not only one but hundreds of commissioners to protect the American people from the extortions of monopolies, even if protection were possible at all.

Everyone admits that the reasonableness of the railroads' rates is in some degree at least dependent upon the cost of the service. The Commission has been in existence twenty-four years and no data exist today for determining with reasonable accuracy the cost of any service upon the railroads, and indeed none can exist until a valuation of the railroads is made.

Since private monopoly is not beneficial to the community there can remain but two questions:

First, can we preserve competition where it exists?

Second, can we restore competition where it has been suppressed?

To both the answer is, Yes.

Diagnosis shows monopoly to be an artificial, not a natural, product.

Competition, therefore, may be preserved by preventing that course of conduct by which in the past monopolies have been established. If we had in the past undertaken by appropriate legal and administrative machinery to prevent our financiers and others from carrying out agreements to form monopolies; if we had seriously attempted to prevent those methods of destructive or unfair competition, as are manifest in "cut-throat competition"—discrimination against customers who will not deal exclusively with the combination; if we had made any persistent, intelligent effort to stop advantages gained by railroad discrimination, espionage, or the practice of establishing "fake independents," or to stop those who have secured control of essential raw material from denying business rivals access to it—few of the trusts, of which we now complain, would have come into existence, or would, at all events, have acquired power to control the market. We made no serious attempt to stop monopoly—certainly no intelligent attempt; partly because we lacked knowledge, partly because we lacked desire; for we had a sneaking feeling that perhaps, after all, a private monopoly might be a good thing, and we had no adequate governmental machinery to employ for this purpose. But in the past twenty-two years we have acquired much experience with trusts. We know their ways. We have learned what the defects in the existing machinery are; and if we will but remedy those defects by appropriate legal and administrative machinery—somewhat on the lines proposed in the La Follette–Stanley and Newlands bills—and supplement the prohibition of monopoly by the regulation of competition, we shall be able, not only to preserve the competition we now enjoy, but gradually regain the free soil upon which private monopoly has encroached, and we may be assured that, despite all industrial changes, the day for industrial liberty has not yet passed.

ON MAINTAINING MAKERS' PRICES

Mr. Toastmaster and Gentlemen: You gentlemen must pardon the very kind words concerning me which came from your Toastmaster. They are the result of an old friendship beginning when he was my client in Boston, and one of the first clients that I had.

In order to preserve and to extend the right which you are discussing this evening—the right of a manufacturer who has given a reputation to particular goods which he creates to fix the price at which these goods should be sold to the consumer—it is necessary to make absolutely clear the reasons why you ask that right, and to make clear also the difference between that trade practice and another class of facts with which the fixed-price policy is often confused.

I can conceive of nothing more prejudicial to the maintenance and extension of the right of a manufacturer to fix the selling-price to the consumer than to rail generally against the provisions of the Sherman law, or against the attitude of the Government in endeavoring to enforce that beneficent statute. The danger to business discussed this evening arises from the fact that men have failed to draw the distinction between a manufacturer fixing the retail selling-price of an article of his own creation and to which he has imparted his reputation, and the fixing of prices by a monopoly or by a combination tending to a monopoly.

And what you as manufacturers need to protect your just right so to fix retail prices, and what you publishers need in order to preserve efficient and generous advertisers, is to draw clearly that distinction, and to frown upon any general denunciation of the law against monopoly.

If what you desired, and what you purposed doing, were the perpetuation of monopoly, you would have no chance whatsoever, in my opinion, of preserving such right as you now have to make fixed selling-prices, or of extending further that right, as I think it should be extended. For the American people are wisely determined to restrict the existence and operation of private monopolies.

Your position is a very clear one: your aim is directly opposed to monopoly; and your policy one which, to my mind, is extremely beneficent, not only to business but to the whole people. You say simply this: "That which is specifically mine, that which I create, and the good-will which attends it—which was originally confined to my particular establishment," as Mr. Ingersoll put it, "but now extends throughout the whole country or, perhaps, throughout the whole world—that is my specific property; I have made it valuable to myself, and I make it valuable to the consumer because I have endowed that specific property with qualities on which everyone who purchases my goods may rely. That certainly is of value to the consumer, as it is of value to the maker."

Now, fixing retail-prices under those circumstances has in it no element of monopoly. Operating as an independent manufacturer under competitive conditions, you fix the price at your peril. If you fix it too high, one of two things is likely to happen: either the community won't buy it, or, if it does, despite the high prices, some other person will come in and share your prosperity, so long as you have a field open to competition; and the price will fall if there is no combination. To so fix the ultimate selling price in a competitive business is not a restraint of trade in any proper case. On the contrary, it stimulates trade, because it gives an appropriate reward to the man who creates; and it is of the essence of trade to make as large as possible the rewards of successful creation. As long as we maintain conditions favorable to competition and the freedom of individual development—conditions which leave the individual's effort untrammeled by superior power—so long may we safely allow men to make what profit they can get from an expectant public, and to exercise the largest degree of liberty in the marketing of their products.

But the moment that you endeavor by a combination of superior power to close the field to competition or to restrict individual effort; the moment you take away from the people that protection which comes from the incentive in the individual to create, and from the opportunity of the customer to discriminate in his purchases (as you do when you close the avenues of competition)—then a grave danger arises to progress in industry and to the general welfare; and it is against such danger that the Sherman law was appropriately directed. The statute aims to accomplish in part the very thing which Mr. Inger-

soll set forth so clearly in his preliminary statement. It seeks to protect the small man against the powerful trust, against the capitalistic combination.

The Sherman law seeks to protect men in the right freely to compete and to prevent practices which must result in suppressing competition. It seeks to preserve to the individual both the opportunity and the incentive to create, it seeks to encourage individual effort; and a right in the individual manufacturer of a competitive business to market his goods in his own way, by fixing, if he desires, the selling-price to the consumer, is in entire harmony with the underlying purposes of the Sherman law. But when men combine to form a monopoly, or control a particular line or branch of trade, however good may be their intentions, they necessarily curb individual effort. Under the fundamental laws of human nature and of trade they withdraw incentive from those who enjoy the monopoly, and they narrow the field of human effort by confining leadership to a comparatively few individuals.

And even where a complete monopoly does not exist, a powerful combination makes it so difficult for others to enter the field that most men are practically barred by the great chances of failure from entering upon so unequal a contest. It is against such conditions that the Sherman law was directed. That is, the true restraint of trade—restraint through monopoly or combinations tending to monopoly, a condition under which business success is at best temporary, is often delusive, and is always purchased at the expense of the community.

Now, I take it that the effort which was made in Congress last year to limit further the right (as it now exists in respect to patented articles) to fix selling-prices to the ultimate consumers and which finds expression in Section 2 of the Oldfield Bill, proceeds from an admirable motive. But though the motive is good and the purpose worthy, the course pursued is a mistaken one. And the mistake arises from the failure to recognize that certain hardships inflicted by conspicuous trusts which do fix prices have not arisen from the fixing of the wholesale or retail prices, but from the fact that a monopoly or combination existed which made it possible to fix those prices at an unreasonably high figure. In other words, it was not the fixing of the price, but it was the power of the great trust behind the price-fixing which was the cause of the hardship which it is vainly sought to remove by Section 2

of the Oldfield Bill. And the way to remove, both the community's anxiety over price-fixing and your anxiety over the effort to limit that right, is to suppress private monopolies and combinations of like character.

Now, I was greatly impressed with the wisdom of the resolution of which we have been advised by this excellent publication, *The Evening Assassin*—the resolution of the National Retail Merchants' Association, at its annual convention, which appears on the second page of the *Assassin.* [*Laughter.*] That resolution, quite unlike the title of the paper, is distinctly constructive, and it is also instructive because it draws very closely the distinction for which I am contending. It shows that the fixing of the retail price in and of itself is an aid to competition, preventing, as it does, the extension of the trust and of the chain-of-stores into fields not occupied by them at present. But it goes on and expresses with equal emphasis its protest against monopoly, its protest against that indiscriminate combination to fix prices and to control businesses against which the Sherman law is directed.

I think if you gentlemen will direct your efforts to making clear in the minds of our people that distinction, you will not only preserve your individual rights in this respect, but add greatly to the business prosperity of the country. Make clear the distinction between that monopolizing which the Sherman law seeks to prevent and to extinguish, and that price-fixing which is an incident of the individual development of business and the building up of reputations of goods as of individuals. Take up the work of education on those lines, and you will, I am convinced, succeed and ultimately will get such wise legislation as Denmark has given to her people on this subject.

THE SOLUTION OF THE TRUST PROBLEM

The trust problem was, perhaps, the leading issue in the presidential campaign. The recent letter of President Wilson to Congressman Clayton indicates that the solution of this problem will be made the principal task of the coming session of Congress. Much valuable preliminary work has already been done. The main facts concerning the Money Trust have been collected by the Pujo Committee; and the report proposes certain remedies. The facts concerning industrial monopolies have been developed in a series of investigations, the list of which is so long that it reminds one of Homer's "Catalogue of Ships." The Industrial Commission made its report on Trusts and Industrial Combinations in 1901. It has been followed by separate reports of the Commissioner of Corporations on the Beef Trust, the Oil Trust, the Tobacco Trust, the Steel Trust, the Harvester Trust, and the Lumber Trust. The Commissioner of Labor has reported on conditions of employees in the steel mills. Different committees of Congress have investigated the Steel Trust, the Sugar Trust, and the Shipping Trust. There was some discussion of the Shoe Machinery Trust before the Judiciary Committee. And the Patent Committee considered, to some extent, the relation of trusts to the patent law. The Senate Committee on Interstate Commerce conducted a prolonged inquiry into methods of dealing with trusts, the record of which fills 2,782 pages. In the last Congress, trust bills were reported to the House by the Stanley Committee and by the Oldfield Committee; Congressman Lenroot also introduced an important bill. Senator Newlands and Senator Cummins introduced bills to establish an Interstate Trade Commission, and two bills dealing comprehensively with the subject of trusts were introduced by Senator La Follette. Several of these have been reintroduced in the present Congress and are now pending.

The decision in the Standard Oil case, May 1911, led to an active discussion of the trust question throughout the country; and this discussion, which was continued until the end of the presidential campaign, served to clarify thought. The issue was distinctly drawn be-

tween two economic policies which differ fundamentally, namely: Are the admitted evils incident to trusts to be prevented by "regulating monopoly" or by "regulating competition"? Those who advocate "regulation of monopoly" insist that private monopoly may be desirable in some branches of industry, or is, at all events, inevitable; and that existing trusts should not be dismembered nor forcibly dislodged from those branches of business in which they have already acquired a monopoly, but should be made "good" by regulation. The advocates of this view do not fear commercial power, however great, if only methods for regulation are provided. Those who advocate "regulation of competition" insist 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. They believe that no methods of regulation ever have been or can be devised to remove the menace inherent in private monopoly and overweening financial power; and that if, at any future time, monopoly should appear to be desirable in any branch of industry, the monopoly should be a public one—a monopoly owned by the people, and not by the capitalists. The difference between these two economic policies is fundamental and irreconcilable. It is the difference between industrial liberty and industrial absolutism.

Democratic leaders and Senator La Follette alike advocate "regulation of competition." They believe that the Sherman Anti-Trust Act has in the past been little more than a declaration of our economic policy; but that the experience gained in the twenty-three years since the Act was passed has served some useful purpose. It has established the soundness of the economic policy which it embodied, and it has taught us some of the defects in the Statute which prevented, in large part, its effective operation. These leaders agreed that additional and comprehensive legislation is necessary to make the Sherman law a controlling force—to preserve competition where it now exists, and to restore competition where it has been suppressed; that to this end the prohibition of combination contained in the Act must be made more definite; that methods for enforcing the prohibition by the Court must be improved; and that the judicial remedies must be supplemented by other adequate machinery to be administered by a federal board or a commission.

As Congress is to resume now its consideration of the trust problem, it may be valuable to restate the general character of the trust legislation which has been advocated by those who favor the "regulation of competition," although there are many differences in matters of detail.

First: Remove the Uncertainties in the Sherman Law

This can be accomplished, in large measure, by making the prohibitions upon combinations more definite, somewhat as the La Follette–Stanley Anti-Trust bills propose, and the recent New Jersey legislation has to some extent done. The Sherman law, as interpreted by the United States Supreme Court, prohibits monopolies and combinations "unreasonably" in restraint of trade. Experience has taught us, in the main, what combinations are thus "unreasonable." They are the combinations which suppress competition. And experience has also taught us that competition is never suppressed by the greater efficiency of one concern. It is suppressed either by agreement to form a monopoly or by those excesses of competition which are designed to crush a rival. And experience has taught us likewise many of the specific methods or means by which the great trusts, utilizing their huge resources or particularly favored positions, commonly crush rivals: for instance, "cut-throat" competition; discrimination against customers who would not deal exclusively with the combination; excluding competitors from access to essential raw material; espionage; doing business under false names; and as "fake independents"; securing unfair advantage through railroad rebates; or acquiring, otherwise than through efficiency, such a control over the market as to dominate the trade. The time has come to utilize that experience and to embody its dictates into rules of positive law, which will instruct the many business men who desire to obey the statute, what they should avoid—and admonish those less conscientious what they must avoid. In the course of deciding Sherman law cases, the Supreme Court has specified many illegal methods, but by making the prohibitions upon combinations thus definite, the uncertainty of the Act, about which business men most complain, will be still further removed, and the enforcement of the law will become much simpler and more effective.

Second: Facilitate the Enforcement of the Law by the Courts

A great advance in regulating competition and preventing monopoly will result from making the judicial machinery efficient; and several measures wisely framed to further this end are also embodied in the La Follette–Stanley Anti-Trust bills. Efficient judicial machinery will give relief to the people by effecting a real disintegration of those trusts which have heretofore suppressed competition and will also enable individuals who have suffered from illegal acts to secure adequate compensation. Efficient judicial machinery will be even more potent as a deterrent than as a cure; for inefficient judicial processes are the greatest encouragement to law-breaking. Despite the tolerance of trusts heretofore exhibited by the Government, it is hardly conceivable that prviate monopoly would have acquired its present sway in America, if the judicial machinery for enforcing the prohibitions of the Sherman law had been adequate; and it is certain that the lamentable failure of the proceedings against the Standard Oil could have been averted. For the failure of those proceedings was not due primarily to inability of courts to prevent or to disintegrate illegal combinations. It was due to defects in judicial machinery or methods, or to a failure of the courts to recognize or apply existing powers.

The Standard Oil and Tobacco Trust suits present, among other things, this glaring defect in judicial processes; namely, the failure to afford redress for wrongs done in the past. Each of these trusts had extorted hundreds of millions of dollars from the public and in the process had ruthlessly crushed hundreds of independent business-concerns. Upon the admitted facts the Supreme Court declared unanimously that the combinations and their acts were illegal; but the corporations were left in undisputed possession of their ill-gotten gains, and no reparation was made to anyone for the great wrongs so profitably pursued by the trusts—obviously a failure of justice destined to bring into disrepute not only the Sherman law, but all law.

This failure is not inherent in judicial processes. It is due wholly to a surprising lack of effective legal methods and machinery. The judicial determination of the illegality of the combination and its practices should result, under any proper system of law, as a matter of course, in compensation to the injured, the restoration to the public in

some form of the profits wrongfully obtained. The Sherman law contemplated in part such a result; for it provided that anyone injured by an illegal combination might recover three times the damages actually suffered. But that provision has been practically a dead letter, because under the general rules of law the decisions in proceedings instituted by the Government do not inure in any respect to the individual benefit of those who have been injured. In order to get redress, the injured person or corporation would have to institute an entirely independent suit, proceeding exactly as if the Government had never acted. In other words the private litigant would derive no legal aid from the decree in favor of the Government.

This rule of general law has afforded to the trusts immunity for wrong done. Few injured individuals or concerns could afford to conduct the expensive litigation necessary to establish the illegality of the trusts. Few could, regardless of expense, obtain the evidence required for that purpose until it was disclosed in the proceeding instituted by the Government. But before the Government's protracted litigation closed, the Statute of Limitation would ordinarily bar any suits of individual concerns to recover compensation for the wrongs done.

The bills now pending in Congress supply these gross defects in the judicial machinery by a very simple device. They provide, in substance, that whenever in a proceeding instituted by the Government a final judgment is rendered declaring that the defendant has entered into a combination in unreasonable restraint of trade, that finding shall be conclusive as against the defendant in any other proceeding brought against the defendant by anyone, so that the injured person would thereafter merely have to establish the amount of the loss suffered; and the danger of losing the right to compensation while awaiting the results of the Government suit is averted by the further simple device of providing that the Statute of Limitations shall not run while the Government suit is pending.

These are a few of the many improvements in judicial machinery which, if adopted, would go far toward making the Sherman law a controlling force. It is largely by similar improvements in our judicial machinery that the inefficiency of our courts will be overcome, a just administration of law be attained, and respect for the courts be restored.

Third: Create a Board or Commission to Aid in Administering the Sherman Law

The functions of government should not be limited to the enactment of wise rules of action, and the providing of efficient judicial machinery, by which those guilty of breaking the law may be punished, and those injured, secure compensation. The Government, at least where the general public is concerned, is charged with securing, also, compliance with the law. We need the inspector and the policeman, even more than we need the prosecuting attorney; and we need for the enforcement of the Sherman law and regulation of competition, an administrative board with broad powers. What the precise powers of such a board should be is a subject which will require the most careful consideration of Congress. The bill introduced by Senator Newlands and Senator La Follette's Federal Trade Commission bill contain many suggestions of great value. It is clear that the scope of the duties of any board that may be created should be broad; and it is probable that whatever powers are conferred upon the board at the outset will be increased from time to time as we learn from experience what powers may be safely conferred upon the board. There is, however, little room for difference of opinion on the following:

(1) The board should have ample powers of investigation, not only as mainly for the purpose of detecting and exposing lawless business, but in order to foster and build up law-abiding business. In the complicated questions involved in dealing with "Big Business" the first requisite is knowledge—comprehensive, accurate, and up-to-date—of the details of business operations.

The Bureau of Corporations has, to a slight extent, collected such information in the past, and a part of it has been published with much benefit to the public. The current collection and prompt publication of such information concerning the various branches of business would prove of great value in preserving competition. The methods of destructive competition will not bear the light of day. The mere substitution of knowledge for ignorance—of publicity for secrecy—will go far toward preventing monopoly. But aside from the questions bearing specifically upon the Sherman law, the collection of this data would prove of inestimable advantage to business.

(2) The board should co-operate with the Department of Justice

in securing compliance with the Sherman law. The comprehensive knowledge of the different branches of business systematically acquired by the board would greatly facilitate and expedite the work of the Department of Justice and would enable it to supply the Court with that detailed and expert knowledge required to deal intelligently with the intricate commercial problems involved in administering the Sherman law.

(*3*) The board should be empowered to aid in securing compliance with the law, not only in the interests of the general public, but at the request and for the benefit of those particular individuals or concerns who have been injured or fear injury by infractions of the law by others. The inequality between the great corporations with huge resources and the small competitor and others is such that equality before the law will no longer be secured merely by supplying adequate machinery for enforcing the law. To prevent oppression and injustice the Government must be prepared to lend its aid.

Fourth: Trade Agreements

While we have acquired much information concerning the great monopolistic trusts like the Oil, Tobacco, Steel, Sugar, and Beef Trusts, which have been investigated by the Bureau of Corporations or congressional committees—little data have been collected and made public concerning the many competitive concerns engaged in many different lines of business, and which have entered into some sort of agreement with one another to limit prices or output, or concerning trade rules and practices. Some of these agreements are doubtless reasonable and beneficent restraints upon trade and should be permitted—others are doubtless vicious and should be abrogated. But in the absence of comprehensive and detailed knowledge of the subjects, we are not in a position to lay down general rules or to legislate intelligently concerning them.

The Trade Commission should be empowered and directed to obtain such detailed and comprehensive knowledge, and to that end all those competitive concerns now parties to such agreements should be directed to file the same with the Commission and also to furnish other relevant information concerning their business. Upon so doing, these concerns should be relieved from any criminal liability for having

entered into such agreements in the past and should not be liable criminally for continuing such existing agreements or arrangements, unless they are continued after the Department of Justice or the Trade Commission shall have given notice that it deems the same to be in contravention of law.

This would not involve giving immunity for any civil liability that may exist, nor the making of any decision by the Commission or the Department of Justice as to whether a liability, criminal or civil, existed. It merely prescribes a means of securing, in aid of justice, and of further necessary legislation, full, comprehensive and detailed information concerning existing trade agreements relating to competitive business, knowledge of which is essential to wise and just action by Congress, the Department of Justice, and the proposed Trade Commission. Of course, any concern which failed to furnish the required information or made a false return would remain subject to criminal liability for the past, as well as for the future.

When all this information shall have been collected, published, and opportunity for its due consideration shall have been presented, we shall be able to deal intelligently with the problem of the extent to which trade agreements among competitors should be permitted. We cannot do it now. Our present duty is to put ourselves into a position to deal with it wisely hereafter.

THE DEMOCRACY OF BUSINESS

I HAD hoped to participate in a discussion of the pending trust legislation, but a hearing before the Interstate Commerce Commission in the Advance in Rates case prevented my hearing what has been said by most of the speakers, and it would obviously be improper for me to attempt to refer to them and to what they may have said, when I know so little what it was.

I want, however, to say this: The program of President Wilson is not a program of free and unrestricted competition, but it is a program of regulating competition instead of regulating monopoly. This, too, should be remembered as coming from President Wilson: He laid down in his message to Congress certain broad lines upon which, in his opinion, the trust legislation should proceed, and it was then stated at the same time that the bills that were introduced were not the administration bills, but were bills of certain members of Congress or of committees which the public, business men, and others had called upon them to present.

As far as I myself am concerned, while I unqualifiedly commend each of the provisions contained in the President's message on this subject, I find very much in the bill that needs amendment and correction; and I may say that I have found that those who have these bills under consideration, including the gentlemen who have prepared them, have the greatest desire to get such aid as they may get from those who speak with a view to perfecting them, pointing out their errors and pointing out how the end which the administration has in mind can be accomplished.

The details of those bills are matters which are altogether too complex and cover altogether too much ground for me to take up here, but there are one or two others that hit one or two other precise points that I want to call your attention to in this connection, and the first is this:

Transportation Preferences as Affecting Equality

No one can possibly approach the subject of trusts, the subject of equality of opportunity to our business men, of which the trust problem is but a part, without realizing this great problem. Transportation is one of the privileges which places the greatest restraint in favor of a few upon a large number of the American business men. It has been said sometimes that you cannot follow up any industrial monopoly today without finding that some unjust and preferential transportation privilege accounts in large measure for the power possessed. That, obviously, was the case with the Standard Oil Company. It is obviously, also, the case in large measure with the Steel Corporation; and it has been true of a very large number of the other corporations.

Privilege, preference, discrimination in favor of very large and powerful interests in the transportation field have been the main causes of the overweening growth of a few concerns as compared with the more struggling growth of many others.

This trust problem—and by that I mean the problem of giving to American business men an equal opportunity—cannot be solved unless there be effected a complete divorce of transportation from industry. We undertook a few years ago, in the Hepburn Act, to prevent the railroads from owning industries, from owning mines and manufactures, and in that way getting a preferential position which the ordinary shipper was not able to meet. The Act was narrowly construed by the Supreme Court, but even if the fullest and most generous construction had been given to it, it would not have been adequate, because it is not only important that the railroads should not control mining and other industries, but that the industries should not control railroads; and, equally, that there should not be a holding company controlling both industries and railroads in the same interest. Therefore, legislation affecting that result is absolutely essential to the giving of equality of opportunity to American business men.

While legislation is necessary, the Interstate Commerce Commission has recently taken a very important step in that direction. Within a fortnight it has rendered its decision in the Industrial Railroads case which marks an epoch in American transportation. It has declared that the great industries owning for their own convenience, as a plant facility, industrial railroads shall no longer stand in a preferential position

as against the smaller shipper who has not such industrial railroads.

Before that decision the basis of the facts which led to that decision was that the great industries owning these industrial railroads were receiving, as a part of the freight rates, important services free—services so great in the aggregate, that it was estimated that the illegal allowances granted to these industrial railroads and the illegal services aggregated, in this eastern Official Classification Territory alone, $15,000,000; and when we consider that the whole amount which is supposed to be involved in this five per cent advance in freight rates is only about $50,000,000, you will realize how important is that preference enjoyed by the great industries. There is now a proceeding before the Interstate Commerce Commission calling for a consideration of questions quite similar in principle to those involved in this case—services which are granted by railroads free, in addition to the line haul, to certain industries, mainly the larger industries—not secretly, not in any sense illegal as to create in any way a moral taint, but actually rendered under circumstances that only the large interests can avail themselves of.

Today we have been discussing at great length before the Interstate Commerce Commission what is called the "Trap" or ferry car service, granted free to those who have spur tracks to their industries. Under that the large shipper who has not only a spur track but who deals in such large quantities that he may send to the freight houses for trans-shipment at one time 10,000 pounds of freight in less than carload lots to be trans-shipped in less than carload lots gets what is equivalent to his truckage free, whereas all the smaller shippers must bear the truckage charge, heavy though that may be.

That is but one of many industries which, the investigation of the Interstate Commerce Commission has disclosed, are receiving, owing to the circumstances under which it operates, from the railroads a service very much greater than the smaller shipper receives—receiving free a service which the great mass of shippers cannot participate in at all. And just as in the Industrial Railroads case, it appears that those special services and allowances have been depleting the revenues of the railroads to the extent of $15,000,000, so those very services granted to individuals circumstanced as only the larger shippers can be are taking from the railroads a very huge revenue in the aggregate.

When we come to consider this broad question of equality of op-

portunity which, for short, is sometimes called, rather inaccurately, "the trust problem" we must bear in mind this feature: that there is going on in the railroad world today a discrimination against the small man that has nothing to do directly with his efficiency. He may be ever so efficient, but if he is small, if he is unable to ship in large enough quantities to avail, for instance, of this truckage service, his competitor, who is big, gets an advantage which, in the aggregate, is very big against him, and he moves on, not through superior efficiency, but through a preference that is given to him; and in the course of that preference you are taking from the railroads a very large revenue.

Those questions must be considered when you come to deal with the broad business problems to which the present administration is so earnestly directing itself.

Advantages Lying in Great Industries

There is one other feature in regard to this matter that I venture to call to your attention. I understand that Secretary Redfield has spoken about the relative efficiency of the large and the small plant. It seems to me that the limit of efficiency in business is reached at a fairly early stage, that the disadvantages of size outweigh in many respects the advantage of size; but there is one respect in which the great industry has an important advantage. That is in the collection, the getting of knowledge, the collection of data in regard to trade, that knowledge for which great concerns extend their bases of inquiry all over the world; and they have great capacity in the different parts of this country to know the state of the market, to know what is being done, to know what are the possibilities of trade, and also in their work through the laboratory. Laboratories are maintained, and they can be maintained only by great concerns.

That gives a perfectly legitimate advantage to the great industry—one for the pursuit of which our great captains of industry are to be commended.

We must also remember that we are working here in America upon the problem of democracy, and we cannot successfully grapple with the problem of democracy if we confine our efforts to political democracy. American development can come on the lines on which we seek

it, and the ideals which we have can be attained, only if side by side with political democracy comes industrial democracy.

It is the relatively small man who pre-eminently needs the aid and the solicitous care of industry and of government. We have, gentlemen, to bear all the time that democratic view in mind, and to bear in mind that education does not end with the common school, nor does it end with the university. We are beginning throughout the country to talk now of vocational training. But where shall vocational training end? Not merely with the training of the individual for the bit of work that he is to enter into. That training must continue throughout life, and that training must extend to every part of his business life.

In what is perhaps the greatest department of our business—in the business of farming—we have come to recognize that fact, possibly because the need of greater efficiency in farming is more marked than it is anywhere else; but the Government has undertaken, with the good-will and to the gratification, I believe, of every citizen, to give to the humblest farmer an opportunity to acquire the best knowledge which America affords. Through the agricultural experiment stations of state and nation, through the great work of our Department of Agriculture, we are undertaking to advance in every possible way the efficiency of the farmer.

The Government recognizes its duty to give to the farmer the opportunity of education. By giving him, on the one hand, all the knowledge of the state of the market which can be obtained, and giving him, on the other hand, the best results of all the research that we know. What better could the Government of this country do than to extend to business that care and solicitude and aid which it shows in the case of the farmer? To make it affirmatively the business of the Government to extend to the manufacturer throughout this country the opportunity of knowing about his particular line of manufacture the best that can be known, because every man among us who is adopting any process in business which is not the best is guilty of a waste from which all of us are suffering. The best that there is, the most advanced knowledge in every department of business, is that to which every American citizen, every American business man, ought to be entitled, and more.

Why should not we recognize in the great realm of business those

principles which have been the common property of the most advanced thought? Every man in the medical world glories in having given to the world something which advances medical science. Every man in the field of architecture glories when he can give to the world something that advances architectural science. You will find exactly the same thing in almost every department of engineering. Why should it not be so in business? Is there any lack of opportunity for competition, honorable competition, in the field of engineering or of architecture or of medicine? They can play the game wherever a man can see it. There need be no secrets when it comes to the question of advancing the art to which man devotes himself. And the same is absolutely true of business and will be recognized as true of business as soon as men come to recognize that business is one of the noblest and most promising of all the professions. And in the carrying out of this idea of advancing business, of putting business into its proper place among human activities, the Government of the United States may play a great part. I look forward to the trade commission which we are about to establish as an instrument which will be of inestimable advantage to the business and the future of America by making the common property and the common knowledge of American business men the best that has been done and is being done in every department of business throughout the world.

NEW STATE ICE COMPANY VS. LIEBMANN
Dissenting Opinion

[Mr. Justice Sutherland, writing for the majority, held invalid an Oklahoma law, which required a person about to engage in the ice business to obtain a certificate of public necessity, on the ground that it was an arbitrary attempt to restrict a business essentially private in character. The following dissenting opinion was concurred in by Mr. Justice Stone. Mr. Justice Cardozo took no part in the consideration or decision of the case. The text of the opinion is given in full except for citations, the omission of which is indicated by dots. Because of the exigencies of space only a few of the interesting footnotes are reproduced. Those omitted are indicated by †, and can be found in the legal reports.]

Chapter 147 of the Session Laws of Oklahoma 1925 declares that the manufacture of ice for sale and distribution is "a public business," confers upon the Corporation Commission in respect to it the powers of regulation customarily exercised over public utilities, and provides specifically for securing adequate service. The statute makes it a misdemeanor to engage in the business without a license from the commission; directs that the license shall not issue except pursuant to a prescribed written application, after a formal hearing upon adequate notice both to the community to be served and to the general public, and a showing upon competent evidence, of the necessity "at the place desired"; and it provides that the application may be denied, among other grounds, if "the facts proved at said hearing disclose that the facilities for the manufacture, sale, and distribution of ice by some person, firm, or corporation already licensed by said commission at said point, community, or place, are sufficient to meet the public needs therein." (Section 3.)

Under a license, so granted, the New State Ice Company is, and for some years has been, engaged in the manufacture, sale, and distribution of ice at Oklahoma City, and has invested in that business $500,000. While it was so engaged, Liebmann, without having obtained or applied for a license, purchased a parcel of land in that city

and commenced the construction thereon of an ice plant for the purpose of entering the business in competition with the plaintiff. To enjoin him from doing so this suit was brought by the ice company. Compare Frost *v.* Corporation Commission, 278 U. S. 515, 49 S. Ct. 235, 73 L. Ed. 483. Liebmann contends that the manufacture of ice for sale and distribution is not a public business; that it is a private business and, indeed, a common calling; that the right to engage in a common calling is one of the fundamental liberties guaranteed by the due process clause; and that to make his right to engage in that calling dependent upon a finding of public necessity deprives him of liberty and property in violation of the Fourteenth Amendment. Upon full hearing the District Court sustained that contention and dismissed the bill. 42 F.(2d) 913. Its decree was affirmed by the Circuit Court of Appeals. 52 F.(2d) 349. The case is here on appeal. In my opinion, the judgment should be reversed.

First. The Oklahoma statute makes entry into the business of manufacturing ice for sale and distribution dependent, in effect, upon a certificate of public convenience and necessity. Such a certificate was unknown to the common law. It is a creature of the machine age, in which plants have displaced tools and businesses are substituted for trades. The purpose of requiring it is to promote the public interest by preventing waste. Particularly in those businesses in which interest and depreciation charges on plant constitute a large element in the cost of production, experience has taught that the financial burdens incident to unnecessary duplication of facilities are likely to bring high rates and poor service.[1] There, cost is usually dependent, among other things, upon volume; and division of possible patronage among competing concerns may so raise the unit cost of operation as to make it impossible to provide adequate service at reasonable rates. The introduction in the United States of the certificate of public convenience and necessity marked the growing conviction that under certain circumstances free competition might be harmful to the community, and that, when it was so, absolute freedom to enter the business of one's choice should be denied.

Long before the enactment of the Oklahoma statute here chal-

[1] Compare Sumner H. Slichter, *Modern Economic Society*, pp. 56, 326–8; Eliot Jones and T. C. Bigham, *Principles of Public Utilities*, p. 70; Eliot Jones, "Is Competition in Industry Ruinous?" 34 *Quarterly Journal of Economics*, 473, 488.

lenged, a like requirement had become common in the United States in some lines of business. The certificate was required first for railroads, then for street railways, then for other public utilities whose operation is dependent upon the grant of some special privilege.[2] Latterly, the requirement has been widely extended to common carriers by motor vehicle which use the highways, but which, unlike street railways and electric light companies, are not dependent upon the grant of any special privilege.[3] In Oklahoma the certificate was required, as early as 1915, for cotton gins—a business then declared a public one, and, like the business of manufacturing ice, conducted wholly upon private property. . . . As applied to public utilities, the validity under the Fourteenth Amendment of the requirement of the certificate has never been successfully questioned.

Second. Oklahoma declared the business of manufacturing ice for sale and distribution a "public business," that is, a public utility. So far as appears, it was the first state to do so.[4] Of course, a Legislature cannot by mere legislative fiat convert a business into a public utility. . . . But the conception of a public utility is not static.† The welfare

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[2] See Ford P. Hall, "Certificates of Convenience and Necessity," 28 *Mich. L. Rev.* 107, 276; Waldo O. Willhoft, *Certificates of Convenience and Necessity in Michigan*, 10 *Mich. State Bar Journal* 257; Charles S. Hyneman, "Public Encouragement of Monopoly in the Utility Industries," *Annals* of American Academy of Political and Social Science, January, 1930, p. 160, 24 *Col. L. Rev.* 528. Professor Hall lists statutes of forty-three states, most of them enacted within the last twenty years, requiring a certificate for the operation of various classes of public utilities. Before the advent of the certificate of public convenience and necessity, similar but less flexible control over the entry of many public utilities into business was exercised through the grant of franchises, municipal or state. See Eliot Jones and T. C. Bigham, *Principles of Public Utilities*, chap. III. The certificate was first introduced into federal law by the Transportation Act 1920, chap. 91, § 402, pars. 18–20, 41 Stat. 456, 477 (49 USCA § 1 (18–20). Compare Thomas H. Kennedy, "The Certificate of Convenience and Necessity Applied to Air Transportation," 1 *Journal of Air Law* 76.

[3] See D. E. Lilienthal and I. S. Rosenbaum, "Motor Carrier Regulation by Certificates of Necessity and Convenience," 36 *Yale L. J.* 163, "Motor Carrier Regulation: Federal, State, and Municipal," 26 *Col. L. Rev.* 954. Compare LaRue Brown and S. N. Scott, "Regulation of the Contract Motor Carrier Under the Constitution," 44 *Harv. L. Rev.* 530.

[4] Such a law has since been passed in Arkansas. (Ark. Acts 1929, No. 55, p. 110.) The state court held that the measure violated the State Constitution in so far as it sanctioned denial of the right to engage in the ice business. (Cap. F. Bourland Ice Co. *v.* Franklin Utilities Co., 180 Ark. 770, 22 S.W. (2d) 993, 68 A. L. R. 1018.) The provisions for the regulation of rates, attacked under the Fourteenth Amendment, were sustained. See 15 *St. Louis L. Rev.* 414. Bills declaring the business of manufacturing ice a public utility have been introduced in Kansas, Louisiana, Michigan, New York, and Texas. See 70 *Ice & Refrigeration* 425; 72 Id. 172, 239; 74 Id. 110; 76 Id. 216, 217; H. P. Hill, "Commission Control of the Ice Industry," Id. 80.

of the community may require that the business of supplying ice be made a public utility, as well as the business of supplying water or any other necessary commodity or service. If the business is, or can be made, a public utility, it must be possible to make the issue of a certificate a prerequisite to engaging in it.

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

Third. Liebmann challenges the statute—not an order of the Corporation Commission. If he had applied for a license and been denied one, we should have been obliged to inquire whether the evidence introduced before the Commission justified it in refusing permission to establish an additional ice plant in Oklahoma City. As he did not apply, but challenges the statute itself, our inquiry is of an entirely different nature. Liebmann rests his defense upon the broad claim that the Federal Constitution gives him the right to enter the business of manufacturing ice for sale even if his doing so be found by the properly constituted authority to be inconsistent with the public welfare. He claims that, whatever the local conditions may demand, to confer upon the Commission power to deny that right is an unreasonable, arbitrary, and capricious restraint upon his liberty.

The function of the Court is primarily to determine whether the conditions in Oklahoma are such that the Legislature could not reasonably conclude *(1)* that the public welfare required treating the manufacture of ice for sale and distribution as a "public business," and *(2)* that, in order to insure to the inhabitants of some communities an adequate supply of ice at reasonable rates, it was necessary to give the Commission power to exclude the establishment of an additional ice plant in places where the community was already well served. Unless the Court can say that the Federal Constitution confers an absolute right to engage anywhere in the business of manufacturing ice for sale, it cannot properly decide that the legislators acted unreasonably without first ascertaining what was the experience of Oklahoma in respect to the ice business. The relevant facts appear, in part, of record. Others are matters of common knowledge to those familiar with the ice business. . . . They show the actual conditions, or the beliefs, on which the legislators acted. In considering these matters, we do not, in a strict sense, take judicial notice of them as embodying statements of uncontrovertible facts. Our function is only to determine the reasonableness of the Legislature's belief in the existence of evils and in the effectiveness of the remedy provided. In performing this function we have no occasion to consider whether all the statements of fact which may be the basis of the prevailing belief are well-founded; and we have, of course, no right to weigh conflicting evidence.

(A) In Oklahoma a regular supply of ice may reasonably be considered a necessary of life, comparable to that of water, gas, and electricity. The climate, which heightens the need of ice for comfortable and wholesome living, precludes resort to the natural product.† There, as elsewhere, the development of the manufactured-ice industry in recent years † has been attended by deep-seated alterations in the economic structure and by radical changes in habits of popular thought and living. Ice has come to be regarded as a household necessity, indispensable to the preservation of food and so to economical household management and the maintenance of health.† Its commercial uses are extensive. In urban communities, they absorb a large proportion of the total amount of ice manufactured for sale.† The transportation, storage, and distribution of a great part of the nation's food supply is dependent upon a continuous, and dependable supply of

ice.[5] It appears from the record that in certain parts of Oklahoma a large trade in dairy and other products has been built up as a result of rulings of the Corporation Commission under the Act of 1925, compelling licensed manufacturers to serve agricultural communities; [6] and that this trade would be destroyed if the supply of ice were withdrawn.[7] We cannot say that the Legislature of Oklahoma acted arbitrarily in declaring that ice is an article of primary necessity, in industry and agriculture as well as in the household, partaking of the fundamental character of electricity, gas, water, transportation, and communication.

Nor can the Court properly take judicial notice that, in Oklahoma, the means of manufacturing ice for private use are within the reach of all persons who are dependent upon it. Certainly it has not been so. In 1925 domestic mechanical refrigeration had scarcely emerged from the experimental stage.† Since that time, the production and consumption of ice manufactured for sale, far from diminishing, has steadily increased.† In Oklahoma the mechanical household refrigerator is still an article of relative luxury.† Legislation essential to the protection of individuals of limited or no means is not invalidated by the circumstance that other individuals are financially able to protect themselves. The businesses of power companies and of common carriers by street railway, steam railroad, or motor vehicle fall within the field of public control, although it is possible, for a relatively

[5] Were it not for refrigeration, the market for perishable foodstuffs, in warm seasons, would be limited in area to a few miles and in time to a few days, or even hours. A considerable part of this refrigeration is supplied by concerns manufacturing ice for sale. Such concerns commonly supply ice used in car-icing. Mechanical refrigeration is beyond the means of many small retail dealers. Moreover, since decay in food, once begun, cannot be arrested by subsequent refrigeration, ice, or a substitute, is often essential on the farm. See M. E. Pennington and A. D. Greenlee, "The Refrigeration of Dressed Poultry in Transit," *Bulletin* No. 17, U. S. Department of Agriculture, p. 31.

[6] More than 80 per cent of the milk and cream sold from farms in the United States is produced in sections where natural ice can be harvested. See U. S. Department of Agriculture, "Cooling Milk and Cream on the Farm," *Farmers' Bulletin* No. 976, p. 1. The dairy industry in Oklahoma, however, is wholly dependent upon artificial ice, or its substitutes. Refrigeration on the farm is indispensable to the safe marketing of dairy products, at any season when the temperature exceeds 50 degrees. See John T. Bown, "The Application of Refrigeration to the Handling of Milk," *Bulletin* No. 98, U. S. Department of Agriculture, pp. 2, 65 et seq.

[7] The power of the commission to compel this service, of course, depends upon the status of the ice business as a public utility. The evidence shows that the distribution of ice in rural communities not themselves possessing ice plants has developed almost wholly since the passage of the Act of 1925. There was testimony that such distribution would be impracticable without the protection afforded by the Act.

modest outlay, to install individual power plants, or to purchase motor vehicles for private carriage of passengers or goods. The question, whether in Oklahoma the means of securing refrigeration otherwise than by ice manufactured for sale and distribution has become so general as to destroy popular dependence upon ice plants, is one peculiarly appropriate for the determination of its Legislature and peculiarly inappropriate for determination by this Court, which cannot have knowledge of all the relevant facts.

The business of supplying ice is not only a necessity, like that of supplying food or clothing or shelter, but the Legislature could also consider that it is one which lends itself peculiarly to monopoly.[8] Characteristically the business is conducted in local plants with a market narrowly limited in area,† and this for the reason that ice manufactured at a distance cannot effectively compete with a plant on the ground.† In small towns and rural communities † the duplication of plants, and in larger communities the duplication of delivery service,† is wasteful and ultimately burdensome to consumers. At the same time the relative ease and cheapness with which an ice plant may be constructed exposes the industry to destructive and frequently ruinous competition. Competition in the industry tends to be destructive because ice plants have a determinate capacity, and inflexible fixed charges and operating costs, and because in a market of limited area the volume of sales is not readily expanded. Thus, the erection of a new plant in a locality already adequately served often causes man-

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[8] It is noteworthy that the ice industry has the characteristic of uniformity of product or service common to most public utilities, and distinguishing it from other businesses in which differences in quality or style make difficult effective regulation. See S. Howard Patterson and Karl W. H. Scholz, *Economic Problems of Modern Life*, 2nd Ed. 1931, p. 426.

The tendency of the industry to be conducted as a public utility is reflected in the widespread entry into it in recent years of electrical, gas, and water utilities, and the like. Such companies in Oklahoma operate more than one-third of the ice plants. See *Ice and Refrigeration Blue Book*, 10th Ed., pp. 1268–88. Compare Oklahoma Light & Power Co. *v.* Corporation Commission, 96 Okl. 19, 24, 220, p. 54.

Municipalities have engaged extensively in the business of manufacturing and selling ice in foreign countries, and to a lesser extent in the United States. On several occasions, departments of the federal government, unable to secure ice at what were regarded as reasonable prices, have installed their own ice plants. Both in the Philippine Islands and in Panama, plants have been operated which sell ice to government employees. See Carl D. Thompson, *Public Ownership*, pp. 301–5; Jeanie Wells Wentworth, "A Report on Municipal and Government Ice Plants," submitted to the Borough President of Manhattan, December 15, 1913.

agers to go to extremes in cutting prices in order to secure business. Trade journals and reports of association meetings of ice manufacturers bear ample witness to the hostility of the industry to such competition, and to its unremitting efforts, through trade associations, informal agreements, combination of delivery systems, and in particular through the consolidation of plants, to protect markets and prices against competition of any character.†

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

(B) The statute under review rests, not only upon the facts just detailed, but upon a long period of experience in more limited regulation dating back to the first year of Oklahoma's statehood. For seventeen years prior to the passage of the Act of 1925, the Corporation Commission, under Section 13 of the Act of June 10, 1908, had exercised jurisdiction over the rates, practices, and service of ice plants; its action in each case, however, being predicated upon a finding that the company complained of enjoyed a "virtual monopoly" of the ice business in the community which it served.† The jurisdiction thus exercised was upheld by the Supreme Court of the State. . . .

By formal orders, the Commission repeatedly fixed or approved prices to be charged in particular communities; † required ice to be sold without discrimination † and to be distributed as equitably as possible to the extent of the capacity of the plant; † forbade short weights and

ordered scales to be carried on delivery wagons and ice to be weighed upon the customer's request; † and undertook to compel sanitary practices in the manufacture of ice † and courteous service of patrons. † Many of these regulations, other than those fixing prices, were embodied in a general order to all ice companies, issued July 15, 1921, and are still in effect. † Informally, the Commission adjusted a much greater volume of complaints of a similar nature. † It appears from the record that for some years prior to the Act of 1925 one day of each week was reserved by the Commission to hear complaints relative to the ice business.

As early as 1911, the Commission, in its annual report to the Governor, had recommended legislation more clearly delineating its powers in this field:

"There should be a law passed putting the regulation of ice plants under the jurisdiction of the Commission. The Commission is now assuming this jurisdiction under an Act passed by the Legislature known as the anti-trust law. A specific law upon this subject would obviate any question of jurisdiction." †

This recommendation was several times repeated, in terms revealing the extent and character of public complaint against the practices of ice companies. †

The enactment of the so-called Ice Act in 1925 enlarged the existing jurisdiction of the Corporation Commission by removing the requirement of a finding of virtual monopoly in each particular case . . . by conferring the same authority to compel adequate service as in the case of other public utilities, and by committing to the Commission the function of issuing licenses equivalent to a certificate of public convenience and necessity. With the exception of the granting and denying of such licenses and the exertion of wider control over service, the regulatory activity of the Commission in respect to ice plants has not changed in character since 1925. It appears to have diminished somewhat in volume.

In 1916 the Commission urged, in its report to the Governor, that all public utilities under its jurisdiction be required to secure from the Commission "what is known as a 'certificate of public convenience and necessity' before the duplication of facilities.

"This would prevent ruinous competition resulting in the driving

out of business of small though competent public service utilities by more powerful corporations, and often consequent demoralization of service, or the requiring of the public to patronize two utilities in a community where one would be adequate."

Up to that time a certificate of public convenience and necessity to engage in the business had been applied only to cotton gins. (Okla. Sess. Laws 1915, c. 176, § 3.) In 1917 a certificate from the Commission was declared prerequisite to the construction of new telephone or telegraph lines. In 1923 it was required for the operation of motor carriers. In 1925, the year in which the Ice Act was passed, the requirement was extended also to power, heat, light, gas, electric, or water companies proposing to do business in any locality already possessing one such utility.

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

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

A regulation valid for one kind of business may, of course, be invalid for another; since the reasonableness of every regulation is dependent upon the relevant facts. But so far as concerns the power to regulate, there is no difference, in essence, between a business called private and one called a public utility or said to be "affected with a public interest." Whatever the nature of the business, whatever the scope or character of the regulation applied, the source of the power invoked is the same. And likewise the constitutional limitation upon that power. The source is the police power. The limitation is that set by the due process clause, which, as construed, requires that the regulation shall be not unreasonable, arbitrary, or capricious; and that the means of regulation selected shall have a real or substantial relation to the object sought to be obtained. The notion of a distinct category of business "affected with a public interest," employing property "devoted to a public use," rests upon historical error. The con-

sequences which it is sought to draw from those phrases are belied by the meaning in which they were first used centuries ago,[9] and by the decision of this Court, in Munn *v.* Illinois, 94 U. S. 113, 24 L. Ed. 77, which first introduced them into the law of the Constitution.[10] In my opinion, the true principle is that the State's power extends to every regulation of any business reasonably required and appropriate for the public protection. I find in the due process clause no other limitation upon the character or the scope of regulation permissible.

Sixth. It is urged specifically that manufacturing ice for sale and distribution is a common calling; and that the right to engage in a common calling is one of the fundamental liberties guaranteed by the due process clause. To think of the ice-manufacturing business as a common calling is difficult; so recent is it in origin and so peculiar in character. Moreover, the Constitution does not require that every calling which has been common shall ever remain so. The liberty to engage in a common calling, like other liberties, may be limited in the exercise of the police power. The slaughtering of cattle had been a common calling in New Orleans before the monopoly sustained in Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394, was created by the Legislature. Prior to the Eighteenth Amendment, selling liquor was a common calling, but this Court held it to be consistent with the due process clause for a state to abolish the calling . . . or to establish a system limiting the number of licenses. . . . Every citizen has the right to navigate a river or lake, and may even carry others thereon

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[9] In Lord Hale's *Treatise on the Ports of the Sea*, Hargrave, *Law Tracts*, pp. 77–78. Lord Hale was speaking of the particulars, wharves, and cranes in ports; and did not purport to generalize the obligation to serve all persons at reasonable rates in other circumstances. See Breck P. McAllister, "Lord Hale and Business Affected with a Public Interest," 43 *Harv. L. Rev.* 759. He was speaking of duties arising at common law, and not of limitations upon the legislative power of Parliament. See J. A. McClain, Jr., "The Convenience of the Public Interest Concept," 15 *Minn. L. Rev.* 546. He could not have been speaking of such limitations, for in England they did not exist; and Parliament was accustomed to regulate prices and commodities of all kinds. See note 46, infra.

[10] Chief Justice Waite, who wrote the opinion, said generally, page 126 of 94 U. S., 24 L. Ed. 77, "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large," and referred with approval to statutes regulating the prices of bread and the rates of chimney-sweepers, as well as of persons in other callings still regulated. See Walton H. Hamilton, "Affectation with a Public Interest," 39 *Yale L. J.* 1089, 1095, 1096. See, also, German Alliance Insurance Co. *v.* Lewis, 233 U. S. 389, 408, 34 S. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189.

for hire. But the ferry privilege may be made exclusive in order that the patronage may be sufficient to justify maintaining the ferry service. . . .

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

It is settled by unanimous decisions of this Court that the due process clause does not prevent a state or city from engaging in the business of supplying its inhabitants with articles in general use, when it is believed that they cannot be secured at reasonable prices from the private dealers. Thus, a city may, if the local law permits, buy and sell at retail coal and wood . . . or gasoline. . . . And a state may, if permitted by its own Constitution, build and operate warehouses, elevators, packing-houses, flour-mills, or other factories. . . . As states may engage in a business, because it is a public purpose to assure to their inhabitants an adequate supply of necessary articles, may they not achieve this public purpose, as Oklahoma has done, by exercising the lesser power of preventing single individuals from wantonly engaging in the business and thereby making impossible a dependable private source of supply? As a state so entering upon a business may exert the taxing power, all individual dealers may be driven from the calling by the unequal competition. If states are denied the power to

prevent the harmful entry of a few individuals into a business, they may thus, in effect, close it altogether to private enterprise.

Seventh. The economic emergencies of the past were incidents of scarcity. In those days it was pre-eminently the common callings that were the subjects of regulation. The danger then threatening was excessive prices. To prevent what was deemed extortion, the English Parliament fixed the prices of commodities and of services from time to time during the four centuries preceding the Declaration of Independence.[11] Like legislation was enacted in the Colonies; and in the states, after the Revolution.[12] When the first due process clause was written into the Federal Constitution, the price of bread was being fixed by statute in at least two of the states, and this practice continued long thereafter.† Dwelling houses when occupied by the owner are pre-eminently private property. From the foundation of our Government those who wished to lease residential property had been free to charge to tenants such rentals as they pleased. But for years after the World War had ended, the scarcity of dwellings in the city of New York was such that the state's legislative power was invoked to insure reasonable rentals. The constitutionality of the statute was sustained by this Court. . . . Similar legislation of Congress for the city of Washington was also upheld. . . .

Eighth. The people of the United States are now confronted with an emergency more serious than war. Misery is widespread, in a time, not of scarcity, but of overabundance. The long-continued depression has brought unprecedented unemployment, a catastrophic fall in commodity prices, and a volume of economic losses which threatens our financial institutions.† Some people believe that the existing conditions threaten even the stability of the capitalistic system.[13] Econo-

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[11] "In Lord Hale's time . . . all activity comprehended under what we call business, was public, and all of it subject to price control." Walton H. Hamilton, "Affectation with a Public Interest," 39 *Yale L. J.* 1089, 1094. For voluminous collections of statutes and materials relating to Parliamentary control of business in England prior to the American Revolution, see the references in Edward A. Adler, "Business Jurisprudence," 28 *Harv. L. Rev.*, 135; J. A. McClain, Jr., "The Convenience of the Public Interest Concept," 15 *Minn. L. Rev.* 546; Breck P. McAllister, "Lord Hale and Business Affected with a Public Interest," 43 *Harv. L. Rev.* 759, 767.

[12] Statutes of eight of the thirteen states, passed during the Revolution, and fixing the price of almost every commodity in the market, are listed in 33 *Harv. L. Rev.* 838, 839.

[13] See Edward S. Corwin, "Social Planning under the Constitution," *American Political Science Review,* vol. 26, p. 1; W. B. Donham, *Business Adrift* (1931), p.

mists are searching for the causes of this disorder and are re-examining the basis of our industrial structure. Business men are seeking possible remedies. Most of them realize that failure to distribute widely the profits of industry has been a prime cause of our present plight. But, rightly or wrongly, many persons think that one of the major contributing causes has been unbridled competition.[14] Increasingly, doubt is expressed whether it is economically wise, or morally right, that men should be permitted to add to the producing facilities of an industry which is already suffering from overcapacity. In justification of that doubt, men point to the excess capacity of our productive facilities resulting from their vast expansion without corresponding increase in the consumptive capacity of the people. They assert that through improved methods of manufacture, made possible by advances in science and invention and vast accumulation of capital, our industries had become capable of producing from 30 to 100 per cent more than was consumed even in days of vaunted prosperity; and that the present capacity will, for a long time, exceed the needs of business.[15] All agree that irregularity in employment—the greatest of our evils—cannot be overcome unless production and consumption are more nearly balanced. Many insist there must be some form of economic control. There are plans for proration. There are many proposals for stabilization.[16] And some thoughtful men of wide busi-

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165; *America Faces the Future*, edited by Charles A. Beard (1932), pp. 1–10; Paul M. Mazur, *New Roads to Prosperity* (1931), Chap. V.

[14] W. B. Donham, *Business Adrift*, pp. 141, 142; *The Swope Plan*, edited by J. George Frederick (1931), pp. 70, 73, 128; Richard T. Ely, *Hard Times*, The Way In and the Way Out (1931), pp. 62–4, 135, 137; *The Menace of Overproduction*, edited by Scoville Hamlin (1930); Dexter M. Keezer and Stacy May, *The Public Control of Business* (1930), p. 83; Walker D. Hines, "Planning in a Particular Industry," *Bulletin* of the Taylor Society, October 1931; Philip Cabot, "The Vices of Free Competition," *The Yale Review*, Autumn, 1931; Julius H. Barnes, "Business Looks at Unemployment," *Atlantic Monthly*, August, 1931; *The Federal Anti-Trust Laws: A Symposium*, edited by Milton Handler (December, 1931).

[15] The depression which began in 1920 has greatly reduced the present consumptive capacity; and the loss of export trade, and the arrest in the growth in population (resulting from the lessened birth-rate and the practical stoppage of immigration) apparently precludes the rapid increase of consumptive capacity which followed the earlier periods of depression.

[16] See Charles A. Beard, *America Faces the Future* (1932), pp. 117–40; *The Swope Plan*, edited by J. George Frederick (1931); Report No. 12 of the Committee on Continuity of Business and Employment of the United States Chamber of Commerce, October 2, 3, 1931; Report of the Executive Council, American Federation of Labor, to the 51st Annual Convention, October 5, 1931; Stuart Chase, "A Ten Year Plan for America," *Harpers' Magazine*, June, 1931; George Soule, "What Planning Might Do,"

ness experience insist that all projects for stabilization and proration must prove futile unless, in some way, the equivalent of the certificate of public convenience and necessity is made a prerequisite to embarking new capital in an industry in which the capacity already exceeds the production schedules.[17]

Whether that view is sound nobody knows. The objections to the proposal are obvious and grave. The remedy might bring evils worse than the present disease. The obstacles to success seem insuperable.[18] The economic and social sciences are largely uncharted seas. We have been none too successful in the modest essays in economic control already entered upon. The new proposal involves a vast extension of

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New Republic, March 11, 1931; "When We Choose to Plan," *Graphic-Survey,* March 1, 1932; "The New Challenge to Scientific Management," *Bulletin* of the Taylor Society, April, 1931; Robert J. McFall, "Planning Industry," Id., June, 1931; Horace B. Drury, "The Hazard of Business," Id., December, 1931; Grover A. Whalen, "National Planning," Id., February, 1932; J. Russell Smith, "The End of an Epoch," *Graphic-Survey,* July 1, 1931; Mary van Kleeck, "Planning and the World Paradox," Id., November 1, 1931; Lewis L. Lorwin, "The Origins of Economic Planning," Id., February 1, 1932; H. S. Person, "Scientific Management as a Philosophy and Technique of Progressive Industrial Stabilization," paper presented at World Social Economic Congress, August, 1931; "When Will American Begin to Plan?" *Christian Century,* March 11, 1931. See, generally, Hearings before the La Follette Subcommittee, on S. 6215, supra, note 49. Compare Editorial Research Reports, Washington, D. C., August 1, August 8, December 3, 1931.

[17] See Charles R. Stevenson, *The Way Out* (1932), particularly pp. 27, 31, 33; Philip Cabot, "The Vices of Free Competition," *The Yale Review,* Autumn, 1931; J. A. Hobson, "The State as an Organ of Rationalization," *Political Quarterly,* January–March 1931; and the discussions by Professor Beard and Messrs. Swope, Chase, Soule, and Smith, supra, note 16. Concerning the bituminous coal business, see United States Coal Commission, Final Report 1925, Part 1, pp. 268, 269; *Opening New Mines on the Public Domain: A Way of Order for Bituminous Coal,* by Walter H. Hamilton and Helen R. Wright, pp. 35–7; *The Case of Bituminous Coal,* by Walton H. Hamilton and Helen R. Wright, pp. 170–3, 263, 264; Willard E. Atkins, et al., *Economic Behavior* (1931), Chap. XXII; Senate Bill No. 2935, §§ 2, 8 (72d Congress), introduced by Senator Davis, and report of hearings, *U. S. Daily,* March 15, 1932, p. 1. Concerning petroleum and gas, see Ralph H. Fuchs, *Legal Technique and National Control of the Petroleum Industry;* I. Howard Marshall and Norman L. Myers, "Legal Planning of Petroleum Production," 41 *Yale Law Journal* 33; Samuel H. Slichter, *Modern Economic Society,* 861, 862.

[18] Compare Sumner H. Slichter, *Modern Economic Society* (1931), pp. 872–88; Charles Whiting Baker, *Pathways Back to Prosperity* (1932), pp. 59–61; Samuel Crowther, *A Basis for Stability* (1932), pp. 3–17; J. Franklin Ebersole, "National Planning," *Bulletin* of the Taylor Society, August 1931; Virgil Jordan, "Some Aspects of National Stabilization," *Mechanical Engineering,* January 1932; "What Price Stability," *The Annalist,* October 9, 1931; Warren Bishop, "The Rain of Plans," *The Nation's Business,* October 1931; Myron W. Watkins, "The Economic Philosophy of Anti-Trust Legislation," *Annals* of the American Academy of Political and Social Science, January 1930; Albert W. Atwood, "The Craze for National Planning," *Saturday Evening Post,* March 19, 1932.

the area of control. Merely to acquire the knowledge essential as a basis for the exercise of this multitude of judgments would be a formidable task; and each of the thousands of these judgments would call for some measure of prophecy. Even more serious are the obstacles to success inherent in the demands which execution of the project would make upon human intelligence and upon the character of men. Man is weak and his judgment is at best fallible.

Yet the advances in the exact sciences and the achievements in invention remind us that the seemingly impossible sometimes happens. There are many men now living who were in the habit of using the age-old expression: "It is as impossible as flying." The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation. In those fields experimentation has, for two centuries, been not only free but encouraged. Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science; and to the discouragement to which proposals for betterment there have been subjected otherwise. There must be power in the States and the nation to remold, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the states which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts.[19]

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment.[20] We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable

[19] Compare Charles Warren, "The New 'Liberty' under the Fourteenth Amendment," 39 *Harv. L. Rev.* 431.

[20] Compare Felix Frankfurter, *The Public and Its Government*, pp. 49–51.

to matters of substantive law as well as to matters of procedure. But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

LIGGETT COMPANY VS. LEE

Dissenting Opinion

[Mr. Justice Roberts, writing for the majority, held invalid that portion of the Florida Chain Store Tax Law which imposed heavier license fees where stores were located in more than one county because he could find no reasonable basis for such a classification. Mr. Justice Cardozo dissented from this decision on the ground that a distinction could properly be based upon different local units, that the Legislature had discretion in selecting which local units to use and that there was justification in the record for the classification by counties. Mr. Justice Stone concurred in this opinion. Mr. Justice Brandeis, after stating that the law should be sustained because those attacking it had not sustained the burden of proving it unwarranted by local conditions, discussed at length the proposition that the particular plaintiffs could not object to the law because they were corporations and as such were subject to whatever non-discriminatory regulation the state desired to impose. These matters had not been argued by counsel and were, therefore, reserved by Mr. Justice Cardozo in his opinion. Mr. Justice Brandeis's opinion is given in full except for citations, the omission of which is indicated by dots. Because of the exigencies of space only a few of the interesting footnotes are reproduced. Those omitted are indicated by †, and can be found in the legal reports.]

In my opinion, the judgment of the Supreme Court of Florida should be affirmed.

Florida Laws 1931 (Ex. Sess.), chapter 15624, is legislation of the type popularly called Anti-Chain Store Laws. The statute provides for the licensing of retail stores by the state, the counties, and the municipalities—a system under which large revenues may be raised. But the raising of revenue is obviously not the main purpose of the legislation. Its chief aim is to protect the individual, independently owned, retail stores from the competition of chain stores. The statute seeks to do this by subjecting the latter to financial handicaps which may conceivably compel their withdrawal from the state. An injunc-

tion against its enforcement is sought on the ground that the law violates rights guaranteed by the Federal Constitution.

The Florida law is general in its terms. It prohibits the operation, after September 30, 1931, of any retail store without securing annually a license; and provides, among other things, for annual fees which are in part graduated. If the owner operates only one store, the state fee is $5; if more than one, the fee for the additional stores rises by step increases, dependent upon both the number operated and whether all operated are located in a single county. The highest fee is for a store in excess of 75. If all of the stores are located in a single county, the fee for each store in excess of 75 is $40; if all are not located in the same county, the fee is $50. Under this law, the owner of 100 stores not located in a single county pays for each store operated, on the average, $33.65; and, if they were located in a single county, the owner would pay for each store, on the average, $25.20. If the 100 stores were independently owned (although operated cooperatively as a so-called "voluntary chain"), the annual fee for each would be only $5. The statute provides that the licenses shall issue to expire on September 30th of each calendar year. This suit was begun September 30, 1931. The first license year had expired before the case was heard in this Court.

In its main features, this statute resembles the Indiana law discussed in State Board of Tax Commissioners *v.* Jackson, 283 U. S. 527, 51 S. Ct. 540, 75 L. Ed. 1248, 73 A. L. R. 1464. For the reasons there stated, the Court sustains like provisions in the Florida statute. But it declares arbitrary, and hence invalid, the novel provision imposing heavier license fees where the multiple stores of a single owner are located in more than one county, because it is "unable to discover any reasonable basis for this classification." There is nothing in the record to show affirmatively that the provision may not be a reasonable one in view of conditions prevailing in Florida. Since the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute, its validity should, in my opinion, be sustained. . . .

There is, however, another ground on which this provision should be, and the whole statute could be, sustained—a ground not considered in the Jackson Case and not pertinent there. Jackson was an individual. The plaintiffs here are all corporations. Though the pro-

visions of the statutes in the two states are similar, certain rules of law applicable to the parties to the litigation are different.

The plaintiffs are thirteen corporations which engage in Florida exclusively in intrastate commerce. Each (except one) owns and operates a chain of retail stores within the state and some operate stores in more than one county. Several of the plaintiffs are organized under the laws of Florida; the rest under the laws of other states. No claim of discrimination as between the foreign and domestic corporations is made . . . nor could it be, since the statute affects both classes of corporations alike. The suit is brought as a class suit, for the benefit of all merchants similarly situated who may desire to avail themselves thereof. From certain allegations in the bill it may be inferred that there are at least two natural persons within the state who own and operate more than one store. But, as no such person has intervened in the cause, we have no occasion to inquire whether the discrimination complained of would be fatal as applied to natural persons. The plaintiffs can succeed only if the discrimination is unconstitutional as applied to them; that is, as applied to corporations. One who would strike down a statute must show not only that he is affected by it, but that as applied to him it exceeds the power of the state. . . . For the reasons to be stated, the discrimination complained of, and held arbitrary by the Court, is, in my opinion, valid as applied to corporations.

First. The Federal Constitution does not confer upon either domestic or foreign corporations the right to engage in intrastate commerce in Florida. The privilege of engaging in such commerce in corporate form is one which the state may confer or may withhold as it sees fit. . . . Florida might grant the privilege to one set of persons and deny it to others; might grant it for some kinds of business and deny it for others; might grant the privilege to corporations with a small capital while denying it for those whose capital or resources are large. Or it might grant the privilege to private corporations whose shares are owned mainly by those who manage them and to corporations engaged in co-operative undertakings, while denying the privilege to other concerns called private, but whose shares are listed on a stock exchange—corporations financed by the public, largely through the aid of investment bankers. It may grant the privilege broadly, or restrict its exercise to a single county, city, or town, and to a single place of business within any such subdivision of the state.

Whether the corporate privilege shall be granted or withheld is always a matter of state policy. If granted, the privilege is conferred in order to achieve an end which the state deems desirable. It may be granted as a means of raising revenue; or, in order to procure for the community a public utility, a bank, or a desired industry not otherwise obtainable; or the reason for granting it may be to promote more generally the public welfare by providing an instrumentality of business which will facilitate the establishment and conduct of new and large enterprises deemed of public benefit. Similarly, if the privilege is denied, it is denied because incidents of like corporate enterprise are deemed inimical to the public welfare and it is desired to protect the community from apprehended harm.

Here we are dealing only with intrastate commerce. . . . Since a state may fix the price for the privilege of doing intrastate commerce in corporate form, and the corporation is free to accept or reject the offer, the state may make the price higher for the privilege of locating stores in two counties than in one. Can it be doubted that a state, being free to permit or to prohibit branch banking, would be at liberty to exact a higher license fee from banks with branches than from those with only a single place of business; that it might exact a higher fee from those banks which have branches in several counties than it does from those whose branches are all within a single county; and that it might do so without obligation to justify, before some court, the reasonableness of the difference in the license fees? † The difference made by Florida in exacting a higher license fee for those concerns which do business in more than one county is similar in character to that suggested.

If the Florida statute had stated in terms that the license fee was exacted as compensation for the privilege of conducting multiple stores in corporate form, it seems clear that no corporation could successfully challenge its validity. . . . And, since the state had the power so to do, the mere failure to state that such was the nature of the exaction does not render it invalid. . . . Nor does the fact that the plaintiffs had been admitted to the state prior to enactment of the statute. A state which freely granted the corporate privilege for intrastate commerce may change its policy. It may conclude, in the light of experience, that the grant of the privilege for intrastate commerce is harmful to the community, and may decide not to grant the

privilege in the future. It may go further in the process of exclusion. It may revoke privileges theretofore granted . . . since, in the absence of contract, there is no vested interest which requires the continuance of a legislative policy, however expressed—whether embodied in a charter or in a system of taxation. . . .

If a state believes that adequate protection against harm apprehended or experienced can be secured, without revoking the corporate privilege, by imposing thereafter upon corporations the handicap of higher, discriminatory license fees as compensation for the privilege, I know of nothing in the Fourteenth Amendment to prevent it from making the experiment. The case at bar is not like those where a restriction upon the liberty of the individual may be attacked by showing that no evil exists, or is apprehended, or that the remedy provided cannot be regarded as appropriate to its removal. Nor is the case like those where a state regulation or state taxes burden interstate commerce. . . .

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

Second. The prevalence of the corporation in America has led men of this generation to act, at times, as if the privilege of doing business in corporate form were inherent in the citizen; and has led them to accept the evils attendant upon the free and unrestricted use of the corporate mechanism as if these evils were the inescapable price of civilized life, and, hence, to be borne with resignation. Throughout

the greater part of our history a different view prevailed. Although the value of this instrumentality in commerce and industry was fully recognized, incorporation for business was commonly denied long after it had been freely granted for religious, educational, and charitable purposes.† It was denied because of fear. Fear of encroachment upon the liberties and opportunities of the individual. Fear of the subjection of labor to capital. Fear of monopoly. Fear that the absorption of capital by corporations, and their perpetual life, might bring evils similar to those which attended mortmain.† There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations. So at first the corporate privilege was granted sparingly, and only when the grant seemed necessary in order to procure for the community some specific benefit otherwise unattainable. The later enactment of general incorporation laws does not signify that the apprehension of corporate domination had been overcome. The desire for business expansion created an irresistible demand for more charters; and it was believed that under general laws embodying safeguards of universal application the scandals and favoritism incident to special incorporation could be avoided. The general laws, which long embodied severe restrictions upon size and upon the scope of corporate activity, were, in part, an expression of the desire for equality of opportunity.†

(a) Limitation upon the amount of the authorized capital of business corporations was long universal.† The maximum limit frequently varied with the kinds of business to be carried on, being dependent apparently upon the supposed requirements of the efficient unit. Although the statutory limits were changed from time to time, this principle of limitation was long retained. Thus in New York the limit was at first $100,000 for some businesses and as little as $50,000 for others.† Until 1881 the maximum for business corporations in New York was $2,000,000; and until 1890, $5,000,000. In Massachusetts the limit was at first $200,000 for some businesses and as little as $5,000 for others.† Until 1871 the maximum for mechanical and manufacturing corporations was $500,000; and until 1899 $1,000,000.† The limit of $1,000,000 was retained for some businesses until 1903.†

In many other states, including the leading ones in some industries, the removal of the limitations upon size was more recent. Penn-

sylvania did not remove the limits until 1905.† Its first general act not having contained a maximum limit, that of $500,000 was soon imposed.† Later, it was raised to $1,000,000; and, for iron and steel companies, to $5,000,000.† Vermont limited the maximum to $1,000,000 until 1911,† when no amount over $10,000,000 was authorized if, in the opinion of a judge of the Supreme Court, such a capitalization would tend "to create a monopoly or result in restraining competition in trade." † Maryland limited until 1918 the capital of mining companies to $3,000,000; and prohibited them from holding more than 500 acres of land (except in Allegheny county, where 1,000 acres was allowed).† New Hampshire did not remove the maximum limit until 1919.† It had been $1,000,000 until 1907,† when it was increased to $5,000,000.† Michigan did not remove the maximum limit until 1921.† The maximum, at first $100,000,† had been gradually increased until in 1903 it became $10,000,000 for some corporations and $25,000,000 for others; † and in 1917 became $50,000,000.† Indiana did not remove until 1921 the maximum limit of $2,000,000 for petroleum and natural gas corporations.† Missouri did not remove its maximum limit until 1927.† Texas still has such a limit for certain corporations.†

(*b*) Limitations upon the scope of a business corporation's powers and activity were also long universal. At first, corporations could be formed under the general laws only for a limited number of purposes—usually those which required a relatively large fixed capital, like transportation, banking, and insurance, and mechanical, mining, and manufacturing enterprises.† Permission to incorporate for "any lawful purpose" † was not common until 1875; and until that time the duration of corporate franchises was generally limited to a period of twenty, thirty, or fifty years.† All, or a majority, of the incorporators or directors, or both, were required to be residents of the incorporating state.† The powers which the corporation might exercise in carrying out its purposes were sparingly conferred and strictly construed. Severe limitations were imposed on the amount of indebtedness, bonded or otherwise.† The power to hold stock in other corporations was not conferred or implied.† The holding company was impossible.

(*c*) The removal by the leading industrial states of the limitations upon the size and powers of business corporations appears to have been

due, not to their conviction that maintenance of the restrictions was undesirable in itself, but to the conviction that it was futile to insist upon them; because local restriction would be circumvented by foreign incorporation. Indeed, local restriction seemed worse than futile. Lesser states, eager for the revenue † derived from the traffic in charters, had removed safeguards from their own incorporation laws.† Companies were early formed to provide charters for corporations in states where the cost was lowest and the laws least restrictive.† The states joined in advertising their wares.† The race was one not of diligence but of laxity.† Incorporation under such laws was possible; and the great industrial states yielded in order not to lose wholly the prospect of the revenue and the control incident to domestic incorporation.

The history of the changes made by New York is illustrative. The New York revision of 1890, which eliminated the maximum limitation on authorized capital, and permitted intercorporate stockholding in a limited class of cases,† was passed after a migration of incorporation from New York, attracted by the more liberal incorporation laws of New Jersey.† But the changes made by New York in 1890 were not sufficient to stem the tide.† In 1892, the Governor of New York approved a special charter for the General Electric Company, modeled upon the New Jersey act, on the ground that otherwise the enterprise would secure a New Jersey charter.† Later in the same year the New York corporation law was again revised, allowing the holding of stock in other corporations.† But the New Jersey law still continued to be more attractive to incorporators.† By specifically providing that corporations might be formed in New Jersey to do all their business elsewhere,† the state made its policy unmistakably clear. Of the seven largest trusts existing in 1904, with an aggregate capitalization of over two and a half billion dollars, all were organized under New Jersey law; and three of these were formed in 1899.† During the first seven months of that year, 1,336 corporations were organized under the laws of New Jersey, with an aggregate authorized capital of over two billion dollars.† The Comptroller of New York, in his annual report for 1899, complained that "our tax list reflects little of the great wave of organization that has swept over the country during the past year and to which this state contributed more capital than any other state in the Union." "It is time," he declared, "that great corpora-

tions having their actual headquarters in this state and a nominal office elsewhere, doing nearly all of their business within our borders, should be brought within the jurisdiction of this state not only as to matters of taxation but in respect to other and equally important affairs." † In 1901 the New York corporation law was again revised.†

The history in other states was similar. Thus the Massachusetts revision of 1903 was precipitated by the fact that "the possibilities of incorporation in other states have become well known, and have been availed of to the detriment of this Commonwealth."

Third. Able, discerning scholars [1] have pictured for us the economic and social results of thus removing all limitations upon the size and activities of business corporations and of vesting in their managers vast powers once exercised by stockholders—results not designed by the states and long unsuspected. They show that size alone gives to giant corporations a social significance not attached ordinarily to smaller units of private enterprise. Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business, have become an institution—an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the state. The typical business corporation of the last century, owned by a small group of individuals, managed by their owners, and limited in size by their personal wealth, is being supplanted by huge concerns in which the lives of tens or hundreds of thousands of employees and the property of tens or hundreds of thousands of investors are subjected, through the corporate mechanism, to the control of a few men. Ownership has been separated from control; and this separation has removed many of the checks which formerly operated to curb the misuse of wealth and power. And, as ownership of the shares is becoming continually more dispersed, the power which formerly accompanied ownership is becoming increasingly 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 these scholars to compare the evolving "corporate system" with the feudal system; and to lead other men of insight and experience to

[1] Adolf A. Berle, Jr., and Gardiner C. Means, *The Modern Corporation and Private Property* (1932). Compare William Z. Ripley, *Main Street and Wall Street* (1927).

assert that this "master institution of civilized life" is committing it to the rule of a plutocracy.[2]

The data submitted in support of these conclusions indicate that in the United States the process of absorption has already advanced so far that perhaps two-thirds of our industrial wealth has passed from individual possession to the ownership of large corporations whose shares are dealt in on the stock exchange; [3] that 200 non-banking corporations, each with assets in excess of $90,000,000, control directly about one-fourth of all our national wealth, and that their influence extends far beyond the assets under their direct control;[4] that these 200 corporations, while nominally controlled by about 2,000 directors, are actually dominated by a few hundred persons [5]—the negation of industrial democracy. Other writers have shown that, coincident with the growth of these giant corporations, there has occurred a marked concentration of individual wealth; [6] and that the resulting disparity

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[2] Thorstein Veblen, *Absentee Ownership and Business Enterprise* (1923), p. 86; Walther Rathenau, *Die Neue Wirtschaft* (1918), pp. 78–81.

[3] Berle and Means, *The Modern Corporation and Private Property*, Preface, p. vii.

[4] Id., pp. 31, 32. Compare H. W. Laidler, *Concentration of Control in American Industry* (1931).

[5] Berle and Means, p. 46, *n.* 34. Compare James C. Bonbright and Gardiner C. Means, *The Holding Company* (1932); "Regulation of Stock Ownership in Railroads," H. R. No. 2789, 71st Cong., 3rd Sess. (Dr. W. M. W. Splawn); Hearings before Senate Judiciary Committee, 72nd Cong., 2nd Sess., on S. 5267, February 14, 1933 (John Frey); Stanley Edwin Howard, "Business, Incorporated," in *Facing the Facts* (J. G. Smith, Ed. 1932), p. 124 et seq.; Lewis Corey, *The House of Morgan*, pp. 354–6, 441–8.

[6] Federal Trade Commission, *National Wealth and Income* (1926); S. Howard Patterson and Karl W. H. Scholz, *Economic Problems of Modern Life* (1927), chap. 22; Lewis Corey, "The New Capitalism," in *American Labor Dynamics* (J. B. S. Hardman, Ed., 1928), chap. 3; Stuart Chase, *Prosperity—Fact or Myth?* (1929) chap. 9; H. Gordon Hayes, *Our Economic System* (1929), Vol. II, chap. 56; Willard E. Atkins et al., *Economic Behavior* (1931), Vol. II, chap. 34; Harold Brayman, "Wealth Rises to the Top," in *Outlook and Independent*, Vol. 158, No. 3 (May 20, 1931), p. 78; Buel W. Patch, "Death Taxes and the Concentration of Wealth," in *Editorial Research*, Reports, Vol. II, 1931, No. 11 (September 18, 1931), pp. 635–7; Frederick C. Mills, *Economic Tendencies in the United States* (National Bureau of Economic Research, in Co-operation with the Committee on Recent Economic Changes, 1932), pp. 476–528, 549–58; Paul H. Douglas, "Dividends Soar, Wages Drop," in *World Tomorrow*, December 28, 1932, p. 610; reprinted in *Congressional Record*, 72nd Cong., 2d Sess., Vol. 76, p. 2291 (January 20, 1933). Compare Morris A. Copeland, "The National Income and Its Distribution," in *Recent Economic Changes in the United States* (Report of President's Conference on Unemployment, Committee on Recent Economic Changes, 1929), Vol. II, chap. 12; Willford I. King, *The National Income and Its Purchasing Power* (1930). George L. Knapp pointed out that in 1929, 504 persons had $1,185,135,300 taxable net income whereas the aggregate gross market value of all the cotton and all the wheat grown in the United States in 1930 by

in incomes is a major cause of the existing depression.[7] Such is the Frankenstein monster which states have created by their corporation laws.[8]

Fourth. Among these 200 corporations, each with assets in excess of $90,000,000, are five of the plaintiffs. These five have, in the aggregate, $820,000,000 of assets; † and they operate, in the several states, an aggregate of 19,718 stores.† A single one of these giants operates nearly 16,000.† Against these plaintiffs, and other owners of multiple stores, the individual retailers of Florida are engaged in a struggle to preserve their independence—perhaps a struggle for existence. The citizens of the state, considering themselves vitally interested in this seemingly unequal struggle, have undertaken to aid the individual retailers by subjecting the owners of multiple stores to the handicap of higher license fees. They may have done so merely in order to preserve competition. But their purpose may have been a broader and deeper one. They may have believed that the chain store, by furthering the concentration of wealth and of power and by promoting absentee ownership, is thwarting American ideals; that it is making impossible equality of opportunity; that it is converting independent tradesmen into clerks; and that it is sapping the resources, the vigor and the hope of the smaller cities and towns.[9]

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the 2,332,000 cotton and wheat farmers was only $1,191,451,000 (see *Labor*, March 31, 1931, p. 4; Id., May 19, 1931, p. 4; Id., November 29, 1932, p. 4); and that the estimate of the aggregate dividends and interest paid in the United States in 1932 was $1,642,000,000, whereas that of factory wages was $903,000,000. See *Labor*, February 14, 1933, p. 4. (Compare the final figures in Bureau of Internal Revenue, Statistics of Income for 1929, pp. 5, 61, showing that 513 persons had taxable net income of $1,212,098,784.)

[7] Compare J. A. Hobson, *Poverty in Plenty* (1931), chaps. 2, 4; Arthur B. Adams, "The Business Depression of 1930," in *American Economic Review*, vol. 21 (March, 1931, supplement), p. 183; John A. Ryan, "The Industrial Depression of 1929–1931," in *Questions of the Day* (1931), pp. 209–17; Philip F. La Follette, Message to the Legislature of Wisconsin, November 24, 1931, pp. 6–8; Fred Henderson, *Economic Consequences of Power Production* (1931), chap. 1; Paul Blanshard, "Socialist and Capitalist Planning," in *Annals* of The American Academy of Political and Social Science, vol. 162 (July, 1932), pp. 6–8; Arthur Dahlberg, *Jobs, Machines, and Capitalism* (1932), pp. 205–8; Scott Nearing, *Must We Starve?* (1932), p. 119; George Soule, "The Maintenance of Wages," in *Proceedings* of The Academy of Political Science, vol. 14, No. 4 (January, 1932), pp. 87, 91; Christ Christensen, "Major Problems of Readjustment," in Id., vol. 15, No. 2 (January, 1933), p. 235.

[8] Compare I. Maurice Wormser, *Frankenstein, Incorporated* (1931).

[9] Compare Montaville Flowers, *America Chained* (1931); H. E. Fryberger, *The Abolition of Poverty* (1931); W. H. Cameron, *Our Juggernaut* (1932); M. M. Zimmerman, *The Challenge of Chain Store Distribution* (1931), pp. 2–4; Godfrey M.

The plaintiffs insist that no taxable difference exists between the owner of multiple stores and the owner of an individual store. A short answer to the contention has already been given, so far as required for the decision of this case. It is that the license fee is not merely taxation. The fee is the compensation exacted for the privilege of carrying on intrastate business in corporate form. As this privilege is one which a state may withhold or grant, it may charge such compensation as it pleases. Nothing in the Federal Constitution requires that the compensation demanded for the privilege should be reasonable. Moreover, since the authority to operate many stores, or to operate in two or more counties, is certainly a broader privilege than to operate only one store, or in only one county, there is in this record no basis for a finding that it is unreasonable to make the charge higher for the greater privilege.

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

The plaintiffs discuss the broad question whether the power to tax may be used for the purpose of curbing, or of exterminating, the chain stores by whomsoever owned. It is settled that a state "may carry out a policy" by "adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry." [10] . . . And, since the Fourteenth Amendment "was not intended to

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Lebhar, *The Chain Store—Boon or Bane?* (1932), p. 59; James L. Palmer, "Are These Twelve Charges Against the Chains True?" in *Retail Ledger*, July 1929, reprinted in E. C. Buehler, *Debate Handbook on the Chain Store Question* (1930), p. 102; Edward G. Ernst and Emil M. Hartl, "The Chain Store and the Community," in *Nation*, November 19, 1930, p. 545; John P. Nichols, *Chain Store Manual* (1932), chap. 5.

[10] Indeed, it has been urged that the taxation of the states and the nation should be framed not with a view solely to the raising of revenue, but always for the purpose of promoting that social policy which the people deem wise.

compel the states to adopt an iron rule of equal taxation" . . . it may exempt from taxation kinds of business which it wishes to promote . . . and may burden more heavily kinds of business which it wishes to discourage. . . . To do that has been the practice also of the Federal Government. It protects, by customs duties, our manufacturers and producers from the competition of foreigners. . . . It protects, by the oleomargarine laws, our farmers and dairymen from the competition of other Americans. . . . It eliminated, by a prohibitive tax, the issue of state bank notes in competition with those of national banks. . . . Such is the constitutional power of Congress and of the state legislatures. The wisdom of its exercise is not the concern of this Court.

Whether chain stores owned by individuals may be subjected to the discrimination here challenged need not, however, be decided. This case requires decision only of the narrower question—whether the state may freely apply discrimination in license fees against corporate chain stores. The essential difference between corporations and natural persons has been recognized by the Federal Government in taxing the income of businesses when conducted by corporations, while exempting a similar business when carried on by an individual or partnership. . . . It has, at other times, imposed upon businesses conducted by corporations heavier taxes than upon those conducted by individuals.† The equality clause of the Fourteenth Amendment presents no obstacle to a state, likewise, taxing businesses engaged in intrastate commerce differently according to the instruments by which they are carried on; provided the purpose of the discrimination is a permissible one, the discrimination employed a means appropriate to achieving the end sought, and the difference in the instruments so employed vital. . . . The corporate mechanism is obviously a vital element in the conduct of business. The encouragement or discouragement of competition is an end for which the power of taxation may be exerted. And discrimination in the rate of taxation is an effective means to that end.

The requirement of the equality clause that classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation" . . . is here satisfied. Mere difference in degree has been widely applied as a difference justifying different taxation or regulation.† The difference in power between

corporations and natural persons is ample basis for placing them in different classes. Even as between natural persons, where the equality clause applies rigidly, differences in size furnish an adequate basis for discrimination in a tax rate. The size of estates, or of bequests, is the difference on which rest all the progressive inheritance taxes of the states and of the nation. . . . Difference in the size of incomes is the basis on which rest all progressive income taxes. . . . Differences in the size of businesses present, likewise, an adequate basis for different rates of taxation. . . . And so do differences in the extent or field of operation.

The state might justify progressively higher license fees for corporations of larger size, or a more extended field of operation, on the oft-asserted ground that such concerns are more efficient than smaller units, and hence that they can, and should, contribute more to the public revenues. But the state need not rest the difference in tax rates on a ground so debatable as the assertion that efficiency increases with size.[11] The Federal Constitution does not require that taxes (as distinguished from assessments for betterments) be proportionate to the differences in benefits received by the taxpayers . . . or that taxes be proportionate to the taxpayer's ability to bear the burden.

Since business must yield to the paramount interests of the community in times of peace as well as in times of war, a state may prohibit a business found to be noxious and, likewise, may prohibit incidents or excrescences of a business otherwise beneficent. . . . Busi-

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[11] Compare Hearings before Senate Committee on Interstate Commerce, pursuant to S. Res. 98, Sen. Doc. 62nd Cong., 2nd Sess., vol. 1, p. 1147 et seq. (1912); Report of Federal Trade Commission on the Meat Packing Industry (1919), pt. III, p. 118 et seq.; A. M. Kales, *Contracts and Combinations in Restraint of Trade* (1918), §§ 74–90; F. A. Fetter, "Big Business and the Nation," in *Facing the Facts* (J. G. Smith, Ed., 1932), pp. 186–213; F. A. Fetter, *The Masquerade of Monopoly* (1931), pp. 367–80; Myron W. Watkins, "Large-Scale Production," in *Encyclopædia of the Social Sciences*, vol. 9, p. 170; A. S. Dewing, "A Statistical Test of the Success of Consolidations," *Quarterly Journal of Economics*, vol. 36, p. 84; Virgil Jordan, "The Flight from the Centre," in *Scribner's*, vol. 91, p. 262 (May, 1932); W. L. Thorp, "The Changing Structure of Industry," in *Recent Economic Changes* (1929), pp. 167, 179–206; Glenn Frank, "Big Men and Big Enterprise," *Albany Evening News*, December 7, 1931; December 18, 1931; Julius Klein, Assistant Secretary of Commerce, *United States Daily*, April 11, 1932, p. 1; Frederick M. Feiker, Director, Bureau of Foreign and Domestic Commerce, *U. S. Daily*, February 27, 1932, p. 3; Carter D. Poland, "Small Business Has Its Day," *Nation's Business*, March, 1933, p. 51; also, Camera dei Deputati, N. 1209–A, Relazione della Giunta Generale del Bilancio (April 29, 1932), pp. 45–47.

nesses may become as harmful to the community by excessive size, as by monopoly or the commonly recognized restraints of trade. If the state should conclude that bigness in retail merchandising as manifested in corporate chain stores menaces the public welfare, it might prohibit the excessive size or extent of that business as it prohibits excessive size or weight in motor trucks or excessive height in the buildings of a city. . . . It was said in United States *v.* United States Steel Corporation, 251 U. S. 417, 451, 40 S. Ct. 293, 64 L. Ed. 343, 8 A. L. R. 1121, that the Sherman Anti-Trust Act (15 USCA §§ 1–7, 15 note) did not forbid large aggregations; but the power of Congress to prohibit corporations of a size deemed excessive from engaging in interstate commerce was not questioned.

The elimination of chain stores, deemed harmful or menacing because of their bigness, may be achieved by leveling the prohibition against the corporate mechanism—the instrument by means of which excessive size is commonly made possible. Or, instead of absolutely prohibiting the corporate chain store, the state might conclude that it should first try the more temperate remedy of curbing the chain by imposing the handicap of discriminatory license fees. . . . And the state's power to make social and economic experiments is a broad one.

Fifth. The mere fact that the taxpayer is a corporation does not, of course, exclude it from the protection afforded by the equality clause. Corporations and individuals, aliens and citizens, are for most purposes in the same class. Ordinarily, they have the same civil rights, are entitled to the same remedies, are subject to the same police regulations, and are also subject to the same tax laws. Where such is the case, the corporation taxpayer is entitled, like the individual, to the protection of the equality clause against discrimination, however effected. . . . But the chief aim of the Florida statute is apparently to handicap corporate chain stores—that is, to place them at a disadvantage, to make their success less probable. No other justification of the discrimination in license fees need be shown; since the very purpose of the legislation is to create inequality and thereby to discourage the establishment, or the maintenance, of corporate chain stores; since that purpose is one for which the power of taxation may be exerted; since higher license fees is an appropriate means of discouragement; and corporations have not the inherent right to engage in intrastate commerce. The clear distinction between the equality clause and the

due process clause of the Fourteenth Amendment should not be overlooked in this connection. The mandate of the due process clause is absolute. That clause is of universal application. It knows not classes. It applies alike to corporations and to individuals, to citizens and to aliens. . . . The equality clause, on the other hand, is limited in its operation to members of a class.

It is true that the Florida Anti-Chain Store Law, like others, is not drawn so as to apply only to giant corporate chains. In terms, it applies to the small corporations as well as to the large; and also to natural persons. But the history of such legislation indicates that these laws were aimed at the huge, publicly-financed corporations; and that the statutes were couched in comprehensive terms in the hope of thereby avoiding constitutional doubts raised by judicial statements that the equality clause applies alike to natural persons and corporations. It was said in Quaker City Cab Co. *v.* Com. of Pennsylvania, 277 U. S. 389, 402, 48 S. Ct. 553, 72 L. Ed. 927, that the equality clause precludes making the character of the owner the sole fact on which a discrimination in taxation shall depend. And in Frost *v.* Corporation Commission, 278 U. S. 515, 522, 49 S. Ct. 235, 238, 73 L. Ed. 483, it was said . . . "that a corporation is as much entitled to the equal protection of the laws as an individual." These statements require, in my opinion, this qualification. Whenever the discrimination is for a permitted purpose—as when a state, having concluded that activity by corporation should be curbed, seeks to favor businesses conducted by individuals—the corporate character of the owner presents a difference in ownership which may be made the sole basis of classification in taxation, as in regulation.† The discrimination cannot, in such a case, be held arbitrary, since it is made in order to effect the permitted hostile purpose and is appropriate to that end. . . .

Sixth. The plaintiffs contend, for a further reason, that there is no taxable difference justifying the discrimination in license fees. They assert that the struggle between them and the independently owned stores is, in fact, not an unequal one; and, in support of this assertion, they call attention to those paragraphs in the bill which describe the co-operative chains of individual stores and their rapid growth. These paragraphs allege that by "affiliations and co-operative organizations single grocery [and other] store owners have adopted the best features of chain store merchandising and have secured substantially all

the benefits derived therefrom, while at the same time they have avoided burdens of capital investment, insurance, etc., incident to the carrying of a large stock in a central warehouse." The bill sets forth how this has been achieved, describing in detail the recent advances in efficiency of such co-operative merchandising. It alleges, moreover, that the members of a co-operative chain have the superior advantage of the good-will and personal interest of the individual owners, as compared with the hired managers of the regular chains; and that all these facts were known to the Legislature when it enacted the statute here challenged.

These allegations are admitted by the motion to dismiss; and they are supported by recent experience of which we may take notice.[12] But it does not follow that, because the independently owned stores are overcoming through co-operation the advantages once possessed by chain stores, there is no taxable difference between the corporate chain and the single store. The state's power to apply discriminatory taxation as a means of preventing domination of intrastate commerce by capitalistic corporations is not conditioned upon the existence of economic need. It flows from the broader right of Americans to preserve, and to establish from time to time, such institutions, social and economic, as seem to them desirable; and, likewise, to end those which they deem undesirable. The state might, if conditions warranted, subject giant corporations to a control similar to that now exerted

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[12] Federal Trade Commission, *Report on Co-operative Grocery Chains*, Sen. Doc. No. 12, 72nd Cong., 1st Sess.; *Report on Co-operative Drug and Hardware Chains*, Sen. Doc. No. 82, 72nd Cong., 1st Sess. See, also, A. E. Haase and V. H. Pelz, "The Voluntary Chain," in *Printer's Ink Monthly*, February 1929, p. 29, Id., March 1929, p. 31, Id., April 1929, p. 52, Id., May 1929, p. 52; Paul H. Nystrom, *Chain Stores* (U. S. Chamber of Commerce, 1930), pp. 17, 21; Nystrom, *Economics of Retailing* (3d Ed., 1932), Chap. 13; Craig Davidson, *Voluntary Chain Stores* (1930); Marvin M. Black, Jr., "Troubled Waters of Distribution," *Outlook and Independent*, May 15, 1929, p. 90; *The Voluntary Chains* (American Institute of Food Distribution, Inc., 1930); M. E. Bridston, "Voluntary Chain Flourishes in Difficult Field," in *Chain Store Review*, April 1929, p. 12; " 'The Challenge of the Chains' Accepted by 500 Pacific Coast Grocers," *Magazine of Business*, July 1928, p. 28. Compare Federal Trade Commission, *Report on Co-operation in Foreign Countries*, Sen. Doc. No. 171, 68th Cong., 2d Sess.; Huston Thompson, "The Co-operative Movement in Foreign Countries," *Congressional Digest*, October 1925, p. 256; C. R. Fay, *Co-operation at Home and Abroad* (Rev. Ed. 1925); A. H. Enfield, *Co-operation* (1927); J. P. Warbasse, *Co-operative Democracy* (1923); Cedric Long, "Consumers Co-operation," in *A New Economic Order* (Kirby Page Ed., 1930), p. 213; Charles R. Tuttle, *The New Co-operative Order* (1918); Charles T. Sprading, *Mutual Service and Co-operation* (1930), pp. 44–127; Henry Clay, *Co-operation and Private Enterprise* (1928).

over public utility companies.[13] Or the citizens of Florida might conceivably escape from the domination of giant corporations by having the state engage in business. . . . But Americans seeking escape from corporate domination have open to them under the Constitution another form of social and economic control—one more in keeping with our traditions and aspirations. They may prefer the way of co-operation, which leads directly to the freedom and the equality of opportunity which the Fourteenth Amendment aims to secure.[14] That way is clearly open. For the fundamental difference between capitalistic enterprise and the co-operative—between economic absolutism and industrial democracy—is one which has been commonly accepted by Legislatures and the courts as justifying discrimination in both regulation and taxation. . . .†

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

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[13] The general apprehension of corporations with huge capital was not allayed until after the introduction of two governmental devices designed to protect the rights and opportunities of the individual. Commissions to regulate public utilities—to curb the exaction of sanctioned monopolies. Anti-trust laws—to prevent monopolies in industry and commerce. When the Act to Regulate Commerce was passed in 1887, there were commissions in 25 states. Vanderblue and Burgess, Railroads (1923) p. 15. See M. H. Hunter, "The Early Regulation of Public Service Corporations," 7 *American Economic Review*, p. 569, reprinted in Dorau, *Materials for the Study of Public Utility Economics* (1930), pp. 283–94).

[14] Compare Harold J. Laski, *The Recovery of Citizenship* (1928); Horace M. Kallen, *Individualism* (1933), pp. 235–41.

give it effect and prevent domination in intrastate commerce by subjecting corporate chains to discriminatory license fees. To that extent, the citizens of each state are still masters of their destiny.

List of Articles and Addresses

1911 December — Article in *World Today*, vol. 21, pp. 1440, 1441, entitled **"An Illegal Trust Legalized,"** here reprinted.

1912 February — Article in *Case and Comment*, vol. 18, pp. 494–6, entitled **"Shall We Abandon the Policy of Competition?"** here reprinted.

September 14th — Article in *Collier's Weekly*, pp. 14, 15, entitled "Trusts, Efficiency and the New Party," reprinted in *Business—a Profession*, pp. 205–24.

September 21st — Article in *Collier's Weekly*, pp. 10, 11, entitled "Trusts, the Export Trade and the New Party," reprinted in *Business—a Profession*, pp. 225–42.

Both these articles were made part of the hearings before the Senate Committee on Interstate Commerce, 62nd Congress, 2nd Session, vol. 3, supplementary material, pp. 3–13.

November 1st — Address before the Economic Club entitled **"The Regulation of Competition against the Regulation of Monopoly,"** here reprinted as reported in the *New York Times*, November 2nd.

December 13th — Article in the *Boston Journal*, entitled "Competition in Transportation," partly reprinted in *Social and Economic Views*, pp. 388–90.

1913 January — Article in American Legal News, vol. 44, pp. 5–14, entitled **"Competition,"** here reprinted.

May 14th — Address at banquet of the National Association of Advertising Managers in New York City, entitled **"On Maintaining Makers' Prices,"** published in *Harper's Weekly*, June 14th, p. 6, and in *Scientific American*, vol. 109, p. 56, under the title "Price Protection Distinguished from Price Control," here reprinted.

November 8th — Article in *Harper's Weekly*, p. 18, entitled **"The Solution of the Trust Problem,"** here reprinted.

November 15th — Article in *Harper's Weekly*, pp. 10, 12, entitled "Cut-Throat Prices," reprinted in *Business—a Profession*, pp.

243–61, under the title "Competition that Kills"; excerpts reprinted in *Social and Economic Views,* pp. 403–8.

1914 FEBRUARY 5th — Address before the Chamber of Commerce of the United States, entitled **"The Democracy of Business,"** published as a pamphlet, here reprinted.

1932 MARCH 21st — **Dissenting opinion in New State Ice Company v. Liebmann,** 285 U. S. 262, pp. 280–311, here reprinted.

1933 MARCH 13th — **Dissenting opinion in Liggett Company v. Lee,** 288 U. S. 517, pp. 541–580, here reprinted.

REFERENCES TO LEGISLATIVE HEARINGS

1911 DECEMBER 14th to 16th — Senate Committee on Interstate Commerce, 62nd Congress, 2nd Session, listed under preceding section.

1912 JANUARY 26th — House Committee on Judiciary, 62nd Congress, 2nd Session, Hearings on Trust Legislation, No. 2, pp. 13–54.

JANUARY 29th, 30th — House Committee on Investigation of the United States Steel Corporation, 62nd Congress, 2nd Session, vol. 4, pp. 2835–72, excerpts reprinted in *Social and Economic Views,* pp. 376, 377.

MAY 15th — House Committee on Patents, Oldfield Revision, 62nd Congress, 2nd Session, No. 18, pp. 3–25, partly reprinted in *Social and Economic Views,* pp. 400–3.

1914 JANUARY 30th — House Committee on Interstate and Foreign Commerce, 63rd Congress, 2nd Session, Hearings on Interstate Trade Commission, pp. 3–21, excerpts reprinted in *Social and Economic Views,* pp. 409, 410.

FEBRUARY 4th — Idem, pp. 89–109.

FEBRUARY 16th — House Committee on Judiciary, 63rd Congress, 2nd Session, Hearings on Trust Legislation, vol. 2, pp. 637–95.

FEBRUARY 25th — Idem, vol. 3, pp. 921–52.

1915 JANUARY 9th — House Committee on Interstate and Foreign Commerce, 64th Congress, 1st Session, Hearings on Regulation of Prices, pp. 198–241, partly reprinted in *Social and Economic Views*, pp. 398, 399.

Part IV

RAILROADS AND FINANCE

Editor's Note

Particular manifestation of Mr. Brandeis's campaign against inefficient and undemocratic monopoly appears in his writings on railroads and finance. In these fields his work is pre-eminent. It is so well known that little remains to be collected. The whole of *Other People's Money and How the Bankers Use It* deals with banking and in part with railroads. Originally published in 1913 and 1914 in the form of articles for *Harper's Weekly*, the book appeared in the latter year. On account of its pertinence to the problems of the depression a new edition was issued in 1932 and following the banking crises of the past few years one hundred thousand copies of a cheap edition have been sold. *Business—a Profession* (1914) included other articles on these subjects. With papers not previously reprinted these are listed below and some of them given in full.

WE NEED MORE MINDS, NOT FEWER

The three main objections to the merger are these:

It would create a monopoly of all transportation in New England—railroad, electric, and steamship. It would create a system too large to be efficiently and economically managed. It would create a corporation so large as to be dangerous to the political integrity of Massachusetts.

The dangers of monopoly are generally appreciated, but the loss of efficiency attendant upon our monster business organizations is commonly overlooked.

For every business concern there must be a limit of greatest efficiency. What that limit is differs under varying conditions; but it is clear that an organization may be too large for efficient and economical management, just as it may be too small. The disadvantages attendant upon size may outweigh the advantages.

Man's works have in many instances outrun the capacity of the individual man. For no matter how good the organization, the capacity of an individual man must ordinarily determine the success of a particular enterprise, not only financially to the owners, but in service to the community. Organization can do much to make possible larger efficient units; but organization can never be a substitute for initiative and for judgment. These must be supplied by the chief executive officers, and nature sets a limit to their possible accomplishment. Any transportation system which is called upon not merely to operate, but to develop its facilities, makes heavy demands upon its executive officers for initiative and for the exercise of sound judgment. And New England needs most emphatically development of its transportation facilities.

To aid in this development, we need more minds, not fewer.

Massachusetts has had and is having a lesson on the evils of too large units, which should not readily be overlooked, namely, the wretched service of the Boston & Albany Railroad. Even in mere operation that railroad has failed egregiously as compared with its

condition prior to its lease to the New York Central. The Boston & Albany, which ten years ago was recognized as the model railroad, so that the Chicago, Rock Island & Pacific had emblazoned upon its banner "The Boston & Albany of the West," has under this mania for consolidation reached such a degree of deterioration that hardly a man in Massachusetts has escaped the consequences. And what is the cause of this fall? Not, I submit, intentional neglect, on the part of the New York Central officials, of the interests of Massachusetts or the comfort of its patrons; not a settled purpose on the part of the management to prefer other communities to our own. The wretched service is due, in the main, at least, to the fact that the New York Central system is greater than the administrative capacity of its executive officers. From that overgrowth, its finances, its service, and its patrons have alike suffered. And we may be sure that if we spread the ability of the New Haven management over a larger field, we shall get, not better, but worse service throughout the whole territory.

We must not be misled by the idea that this is an age of consolidation, and that the manifest destiny is to be all consolidated. If Mr. Byrnes's arguments were true and sound, they should prevail equally for the whole of the United States. We might as well have one railroad system for the whole country. We should always remember this: a consolidation may be a good thing or it may be a bad thing. A combination may grow more efficient, or it may grow less efficient, by growing larger.

Let us not imagine either that the obvious evil attendant upon a monopoly of all transportation and an overgrown concern can be prevented by regulation. The limits of effective regulation are soon reached; and in no event can there be efficient regulation where there is not an efficient instrument to be regulated. Our Massachusetts Railroad Commission has long had the reputation of being the best railroad commission in the country, as it was the first to be inaugurated. But our Commission has been absolutely powerless to prevent in the case of the Boston & Albany Railroad even continuing deterioration. To prevent deterioration ought not to be a very serious problem. But the mere prevention of deterioration is not what we want—we want improvement; we must have continuous development of transportation facilities; we want men to think, and think hard and continuously

how they may help develop Massachusetts—and not have their thoughts and interests primarily in Connecticut or New York.

Mr. Byrnes says that the New Haven is a Massachusetts road; that we own forty per cent of the stock and sixty per cent of its other securities. To my mind there is nothing so humiliating in this whole situation as that fact which he mentions. For, although we do own sixty per cent of the securities and forty per cent of the stock, nearly, we are absolutely powerless to control or seriously influence the management of the New Haven. There are twenty-four directors of the company; Massachusetts, with its great ownership of stock and bonds, has two, and the influence of those two on the Board of twenty-four, is, I venture to say, quite in proportion to their number.

It is sought to support this transportation monopoly by referring to certain existing well-operated local monopolies in lighting or gas or street railways. But this analogy is delusive. In the first place, a local gas company may have a monopoly of gas, but it has not a monopoly of lighting. It has the competition of electric light and the competition of oil. But there is, furthermore, this marked difference: a local monopoly, like a gas company or electric light company or a street railway company, is simply a servant of the state, its creature, wholly subject to the control of the state within which it is situated, wholly dependent for its prosperity upon the particular community which it serves, and in Massachusetts subject at all times to being terminated by the authority which created it.

The street railways of Massachusetts, and the gas and electric light companies of Massachusetts, so far as they are monopolies, are performing practically, as agents of the state, public functions during good behavior. If they do not properly serve the community, the community may at any time terminate their franchises without even paying compensation. The right to run street railways in our public streets, the right to lay gas pipes or electric light wires, is a license merely, and is subject at all times to termination by the state and municipal authorities. There is no resemblance between such a monopoly of service covering a specific agency and the proposed New Haven monopoly of all transportation, a monopoly which claims rights under the laws of other states, and has asserted, though operating only in Massachusetts, that it is free from the restrictions imposed by the Massachusetts law.

As its business is largely interstate commerce, it is, moreover, free to a great extent from all state control. Furthermore, even in respect to these local service monopolies, Massachusetts recognized long ago that legislation was necessary to protect our people from the abuses incident to their being controlled by foreign corporations.

The officials of the New Haven seem very loath to admit that they are seeking a monopoly for New England of all transportation. They say that what they desire is to find some way in which that company as a large stockholder of the Boston & Maine may exert the influence which a large or a majority stockholder should exert. But see what that really means. It means for northern New England what has happened in southern New England. Practically every railroad in Connecticut and Rhode Island, every trolley line in Connecticut and Rhode Island, every steamship line which in any way connects New England with any point on the Atlantic coast, with the exception of one now in the hands of a receiver—every one of those lines has passed into the control of the New Haven—not by accident, not because wicked and designing bankers have "held up" the company, but because the New Haven has, with the deliberate and persistent purpose of extinguishing at any cost any competition in transportation, gone forward to overcome competition by buying where they could buy, and destroying where they could not buy.

We who oppose the merger propose legislation which shall compel the New Haven to dispose of the Boston & Maine stock which it has acquired without authority under our law, and shall also prevent such a disposition of that stock as would result in Massachusetts losing control of the Boston & Maine system.

The New Haven officials argue the impotency of New England in regard to what exists west of the Hudson River. If the New Haven had spent upon a line west of the Hudson River one half of the money which it has spent and the obligations which it has incurred in subjecting to absolute monopoly all of southern New England we could in New England be independent of the trunk lines. One hundred and fifty and more millions of dollars of the New Haven money have gone into forging the chains of monopoly in southern New England. It was not necessary to acquire all the trolleys in Rhode Island and Connecticut and in southern Massachusetts and in southern New York State.

The New Haven was so eager for these trolleys that their latest

trolley acquisitions in Connecticut stand at $153,000 a mile of track—that their Rhode Island trolleys stand at $142,000 per mile of track—while we in Massachusetts cannot earn reasonable dividends upon roads similarly situated constructed at a cost of $48,000 per mile of track. The money that has gone into those acquisitions, and into the steamship lines, would have built us a trunk line, not to Buffalo, but to Chicago, and the whole of the West would have been open to us. But the New Haven had no desire so to free New England. Its desire has been to control all transportation in the New England states.

Mr. Mellen promises, if he effects a merger, to give us better rates between northern and southern New England. We have heard just that sort of siren song before. I say, in the first place, that we may judge the future by the past. For instance, before the New Haven controlled southern New England, as it controls it now, we had a differential, not of five cents, but of ten cents, and the New Haven compelled the differential roads to reduce their differential from ten cents to five cents.

The New Haven officials state that if they do not get the Boston & Maine they fear for the independence of the New Haven. We fear that this movement to acquire the Boston & Maine is a device of the trunk lines, not to get the New Haven on which they already exert an extraordinary influence, but by getting the Boston & Maine to deprive us of that little independence which we have. That independence is due wholly to the existence of two Canadian lines, the Grand Trunk and the Canadian Pacific, which these gentlemen, who control the trunk lines, by community of interest, are trying, through the New Haven, to obliterate. That independence is all that is left to us since the New Haven has taken control of the Merchants & Miners Transportation Company.

We must ask ourselves: is there hope of industrial development from such a monopoly? Is there prospect in it of relief from our present unsatisfactory situation? The only safeguard against the evils of monopoly which is proposed is that the railroads may be trusted for their enlightened "self-interest" to do what is best for the community. If that were a safeguard there would not today be a "Railroad Problem."

We in America have found out that in spite of the extraordinary ability of the railroad managers, the community must look out for it-

self, just as the community must look out for itself in *other* ways. It had to look out for itself in the matter of insurance, and the insurance company officials said that the community knew nothing about insurance. The politicians thought the civil service reformers knew nothing about political organization. Still the community must protect itself if it is to find salvation; and the situation today is such that the people of northern New England must refuse to abdicate to the railroad officials their right to reason concerning their own welfare.

We must not be misled by specious arguments and fair promises. We must remember the *past* of the New Haven, its political past, and bear in mind that if this monopoly is once perfected, Massachusetts cannot control under *any* circumstances; that Massachusetts will be a state within a corporation, as Connecticut is now a state within the New Haven, and as New Hampshire has been a state within the Boston & Maine.

AN INTERVIEW

THE decision of the I.C.C. refusing to approve the proposed advance in freight rates will, of course, give great satisfaction to the manufacturers and merchants whose business was menaced by the sweeping increases contemplated by the railroads. But the decision is of even greater importance to the consumer, particularly to wage-earners, upon whom the burden of advanced rates would have to rest ultimately. The plan of the railroads to meet their larger operating costs by combining to raise rates would, in the end, have proved fatal to the railroads themselves, for that course involved the vicious circle of ever-increasing freight rates and ever-increasing cost of living.

When President Willard, of the Baltimore & Ohio R. R., admitted in answering Commissioner Lane that, in his opinion, there would have to be progressive increases in freight rates, he made it clear that some way other than advances in rates would have to be found to meet the railroad's needs.

While the decision of the I.C.C. may seem to the railroads a serious blow the time is I believe not far distant when it will be recognized by them to have been a great blessing.

The decision compels them to look within, instead of without, for relief. The able railroad managers will soon learn to increase greatly their net incomes by scientific management. They will show lessened operating costs in spite of higher wages, and by maintaining or lowering rates they will have increases in the volume business.

Led by their present necessities to introduce advanced methods and to eliminate questionable practices, the railroads will so strengthen their organization as to establish their credit on a firmer basis than ever before. Even before this decision was rendered some of the ablest and most enlightened railroad managers had shown a determination to improve the methods on their roads, and this process will be greatly aided and accelerated by the decision.

Such investors as are inclined to regard the denial of increased rates with apprehension should be reassured by the fact that the stability of and income from railroad stocks has been constantly improving under the beneficent legislation and wise administration of the I.C.C.

THE BEST SOLUTION IS A GOVERNMENT BUREAU

The decision of the Interstate Commission having established that there shall be no general advance in railroad freight rates, the attention of the public should now be directed toward encouraging improvement in service and operating conditions, and to development of transportation facilities.

To accomplish these ends, efficiency in management, with incidental economies and an ample supply of capital, are necessary. Railroading being a private business, the corporation must, in order to secure capital as well as ability and zeal in management, offer the ordinary incentives of private business—namely, liberal money rewards.

Capital or property will yield, according to the degree of judgment and efficiency applied in management, vastly different returns. To secure successful administration of any railroad, the rewards should be proportional to the success. The establishment therefore of any rule fixing a maximum return on capital invested in railroads would tend to prevent efficiency by placing a limit on achievement. Today efficiency in management is in danger of being punished, whereas it should be rewarded. Efficiency is naturally reflected in large net earnings; and as no ready means exists for determining whether greater net earnings are due to greater efficiency in management, or to higher rates, large earnings are frequently accepted as evidence that rates are too high, and invite a demand for reduction; whereas in fact the large earning may be due wholly to better judgment, greater efficiency, and economy in administration. To take from railroad corporations the natural fruits of efficiency—that is, greater money rewards, must create a sense of injustice suffered, which paralyzes effort, invites inefficiency, and produces slipshod management. The public interest, as well as justice, demands, therefore, the due appreciation of greater efficiency in management; and some method must be found of determining the degree of efficiency attained and of providing adequate rewards.

Private capital embarked in a quasi-public business ought to receive compensation on a sliding scale, so that the greater the service to the public, the greater the profit to those furnishing that service. We should endeavor to approximate results similar to those obtained in Boston by applying the sliding-scale system to the production and sale of gas. There the dividend to the stockholders rises as the selling-price to the public is reduced.

The problem presented in the gas business was so simple that it was possible to apply the principle and make it operate automatically. The problem in railroading is infinitely more difficult, owing to the complexities arising from multitudinous rates, varying conditions and degrees of service, and interstate relations. But if the principle of the sliding scale is once definitely recognized by the Interstate Commerce Commission, State Railroad Commissions, and the public as properly controlling the relations between the public and railroad corporations, methods will undoubtedly be worked out in time by which it can be safely applied.

In view of the obligations already assumed by the Government in the regulation of railroad rates and service, it should be prepared also to lend its aid to the railroads in advancing efficiency and in securing to them greater justice by permitting them to enjoy earnings on capital in proportion to the efficiency of their management. To this end a great forward step would be taken if the Government should establish a Bureau of Railroad Costs and an Experimental Station in Railroad Economies.

The railroads are the greatest single industry in the United States next to agriculture. The interest of the general public to secure efficient and economical transportation is so great that the Government would be fully justified in incurring any reasonable expense to aid in increasing railroad efficiency. The expenditure would be similar to that now incurred by it in aid of more efficient agriculture.

The simple ultimate unit costs of each operation in every department of every railroad ought to be ascertained. They should be properly supervised, analyzed, classified, and compared, so that each railroad should have the benefit of knowing the lowest unit cost of each operation attained by any American railroad, and how it was attained. This information should be disseminated as the Government now disseminates other useful information through the various

bureaus of the Agricultural Department, the Department of Labor and Commerce, and the Department of the Interior. There should also be established an experimental station in railroad economies.

Such a station could be conducted similarly to the present experimental stations in the Department of Agriculture which are so potent in raising the standard of agriculture in the United States.

The Government now undertakes, through its Bureau or Office of Public Roads, under the Department of Agriculture, to advance with excellent results road building throughout the United States. The co-operation of the Government in furthering improvements in railroading would be infinitely more effective. It would undoubtedly develop valuable inventions and discoveries in its own laboratories, as the various experimental stations of the Agricultural Department have done. But it would be of even greater service in testing the inventions made and methods suggested by others and bringing to the attention of the railroads those of especial value. There are undoubtedly in existence today hundreds of inventions of greater or less significance —hundreds of new methods which, if adopted, would enhance the efficiency of railroad operation, and introduce economies of wide scope, but which are not known to the operating men because no adequate means exist for bringing them to their notice, which are unused because no single railroad is willing to give the time or incur the expense of testing their value, or because the inventor or discoverer is unable to secure a hearing or trial. There are undoubtedly also a large number of devices and methods in use in foreign countries of which our railway managers have either no knowledge or have but inadequate information. It is a proper function of our Government to make such investigations and to give to the railroads and to the public the full benefit thereof.

CONSTRUCTIVE CO-OPERATION VS. CUT-THROAT COMPETITION

THE United States has, in widely varying degrees, developed four methods or systems of transportation—the railroad, the water-carrier, the trolley, and the auto. Each of these has to some extent competed with the other. The results have not been altogether satisfactory. The railroads complain, not without just cause, that their net earnings are smaller than they should be; and this convention * testifies to the fact that there is a widespread demand on the part of the public for greater transportation facilities at less cost.

The question that is bound to come up in connection with the development of these facilities for which you are working is this: "What shall be the relation of the different methods or systems of transportation, one to the other?" And on that question we may get some light from the experience of the past. We have made many experiments.

We began, in the first place, with free and unrestricted competition. The results were largely disastrous to the carriers and were unsatisfactory to the community. Free and unrestricted competition involved, among other things, charging "what the traffic would bear." It meant on the one hand that, where there was no competition, the traffic would have to bear everything which the carrier attempted to put upon it—everything that it could bear and still move. That was a great hardship, not only upon individual shippers, but even more upon particular communities not blessed with competitive methods or systems of transportation.

But "what the traffic would bear" involved, on the other hand, something extremely bad for the carriers; it involved charging no more than the competitive traffic would bear; and the result was a scramble for traffic among competitive lines, in which many carriers became bankrupt.

So free and unrestricted competition was recognized as a failure.

* A Congress of water transportation organizations held in Washington in December, 1914.—*Ed.*

Having reached that conclusion, the next step taken was combination resulting in monopoly of transportation. The most striking modern instance of the disastrous results of combination, both to the community and to the carrier, is presented by the New Haven system. The New Haven succeeded in getting, through combination, practically a monopoly of all the railroads in New England. But the company went much further. It moved on to the water-carriers, with the result that the five New England states with ports upon the Atlantic, free to any traffic, had not a single line of steamships between those different states that was not owned or practically controlled by the New Haven. But more striking still is the fact that no one of these five New England states had a single line of steamships to the city of New York, or to the city of Philadelphia, which was not controlled by the New Haven; and the influence of the New Haven extended considerably further south still.

This monopoly of transportation, however, did not merely include the railroads and water-carriers. It extended to the trolleys. Practically all of the trolleys of Connecticut, Rhode Island, and western Massachusetts, and some of the trolleys in New York and Vermont, were also acquired by the New Haven, with the result that it was actually impossible for anyone to go from any of the New England states to New York except by some method of transportation controlled by the New Haven, unless he went by auto or the old-fashioned horse and wagon.

Now there you had a combination and monopoly of practically all of the known methods of transportation in one organization; and the failure was egregious. Why?

In the first place, the combination failed because the cost of acquiring the monopoly was very great. It was not merely the cost of buying up these various systems, it was the cost of killing the competition which was not bought up; the cost, for instance, of killing the Enterprise Transportation Company's Steamship Line, which was built to compete with the New Haven's lines. There was also a cost very much greater than that, greater than the cost which was incident to the buying of competing lines at excessive valuations, or the cost of running steamships at ruinous rates in order to kill a competitor. That was the cost of inefficiency in management, the cost of bad management which had resulted from the attempt of one organization, through one body

of men, to run these various concerns. The loss in this experiment was tremendous. The limitation which is put by Providence upon the powers and capacities of the individual man was the greatest cause of the failure which ensued.

So competition failed; and combination failed also; and yet the conviction of the American people, as expressed in the Sherman law, as expressed in the provision of the Panama Canal bill prohibiting the ownership by railroads of competing lines of steamships, is that competition should continue between the various methods or classes of transportation. The question now presented is this: having found that free and unrestricted competition is a failure; having found that monopoly, or combination, is a failure; having nevertheless determined that we are to have competition among the different forms of transportation, and among the different members of each class competing with one another—what is the rule that we are to lay down? What is to determine the proper relation of service on the one and on the other hand? How are we to distribute the traffic and the work which is to be done for the American people? I think any one of us who stops to consider this situation to determine what shall be done by each one of four different methods of transportation, would say to himself at once: "Let each one do that which it can do best." That is the law of efficiency; and, generally, the cheapest service is what will be deemed the best.

That it is largely a question of cost, seems self-evident. It seems self-evident not only when you consider the different forms or methods of transportation, like railroad as against water-carrier or railroad as against trolley, but it is equally self-evident when you are considering what ought to be the competition between the different members or concerns in the same class. The one that can do it the best—and usually that means the one that can do it the cheapest—ought to perform the service.

Well, now, if that is self-evident, as it seems, why has it not been pursued? Why have carriers gone on doing business that was not profitable, as they have done to a very considerable degree?

I think there are really three reasons. The first reason is that with all the development of our transportation—take the railroads, which are, of course, our chief agency—with all the marvelous development of our railroad transportation the cost of the service has never yet been determined. I do not mean merely the cost of service as a whole; but,

if a railroad receives $100,000,000 or $200,000,000 as the year's income, how much of that is cost and how much of that is profit has not been determined. The facts in that respect are known in a general way, but the thing that has not been determined is, what any particular service costs.

This statement will seem almost incredible to an up-to-date manufacturer, for every up-to-date manufacturer has found out, or has been in the process of finding out by the most careful methods for at least a generation, what it costs him to manufacture and sell every article which he manufactures and sells. If the manufacturer simply understood how to make an article without knowing the cost of its manufacture and sale, what would happen to him, ordinarily, would be bankruptcy; but he knows better than to incur that risk, and so he undertakes to find out the cost of the manufacture and sale of each one of the articles he produces.

In this very hall not many years ago, we were told by one manufacturer, who had in his catalogue one hundred thousand articles, that he undertook to find out what every article that he sold cost. Now the railroads have never undertaken to find out in detail what their service costs. With very few exceptions they do not even know how much profit or loss there is in the passenger service taken as a whole, or how much profit or loss there is in the freight service taken as a whole. Even that first step in the division of cost and in the ascertaining of facts absolutely essential to doing business safely, has not been taken by most railroads; and, of course, they do not know how much profit or loss they have in carrying business from one point to another. They do not know how much it costs to carry from one city to another, excluding the terminal cost in the city. They do not know what the terminal costs are in any of the cities on the articles which they are carrying.

Now, the result has been one which has been disastrous to them, and which has also been quite disastrous in many instances to the development of water-carriers. The fact that there were competing water-carriers, by which freight could be carried cheaply as compared with the rail cost, resulted merely in lowering the rail rate so as to meet the water competition. But whether in meeting the water competition the railroad made money or lost money, the records kept did not show, and nothing except a guess at the cost could be made by the railroads.

Therefore they have not had, up to the present time, a means of applying the rule that that carrier should do the business which can do it the cheapest, even if they had been disposed to do so.

Then there is a second reason why railroads have not ascertained transportation costs. It is in a sense historical in its nature. It is this: when you start a railroad—and, of course, that is true to a certain extent of other forms of transportation—you have not enough traffic to utilize fully the capacity of the plant. Consequently you put the rates down, and the traffic manager says, "If I can fill my cars, even if I do it for much less than the regular rate, if I can carry more passengers, if I can add another car to this train which has to run anyhow, almost anything that I get will mean a profit to the railroad, because the roadbed is there, the cars are there, the engine has to move, and therefore the additional passengers or additional tonnage that I can get must be adding at least something to the income of the railroad."

Now, at one time in the history of almost every railroad there was a certain amount of truth in that; but we have long passed that period in respect to most of the railroads of the country, and particularly in respect to the railroads in this eastern district, which do about one-half of the business of the whole country. Our situation is now and has been for quite a number of years, say ten or fifteen years, that the railroads have reached the point of saturation of business; therefore every additional bit of business taken by the railroads imposed upon them new burdens in providing facilities. And whenever business was taken that in and of itself did not pay a profit, the railroad was subjected to an actual loss—the loss that was involved in providing the capital that was necessary to increase the facilities so that they could take care of the business. The whole situation had changed, but the traffic men who made rates and who sought business did not realize the change that had come over the situation; and they continued precisely as they had done to make such a rate as the traffic would bear, no matter how low that rate was. Indeed, with the congestion which has come in our eastern communities through great development and increased population, this new business added involved, in very many instances, larger investment in capital pro rata, than had the original construction of the road.

You will, therefore, when you examine the figures showing the investment and the returns of the railroads in this eastern district, find

a huge increase in the invested capital. The capital invested forms an extraordinarily important factor in the cost of running a railroad, and for every dollar of income which is received by the railroads in this great eastern district, east of the Mississippi and north of the Ohio and the Potomac, you will find between $5.00 and $5.50 of capital invested. One of the reasons, and a very potent reason, why the railroads in this region have felt the pinch, why the earnings have been inadequate, is because this capital investment has grown upon them, and the doing of more business, the great increase of business, has been done in very many instances at a loss.

Now, how this works, how this scramble for tonnage operates, has been manifested in very extraordinary ways by the investigation which the Interstate Commerce Commission has made during the last year.

Take this situation: they have carried from the great grain states to the Atlantic seacoast carload upon carload of grain and of flour, on which the earnings, after paying some special terminal and similar charges, were not enough to yield the interest and cost of repairs to the cars in which the flour or grain was moved, to say nothing whatever about the cost of operating the railroad, the cost of the roadbed, and the cost of the administration of the property. This all comes from failure to know the facts, from failure to deal with the bottom causes of loss and the essentials of profit.

Railroad managers will necessarily all move in the dark until they learn what a thing costs. When they do know what a thing costs then they can protect themselves against loss; then also they will welcome the fact that other people also do that business on which these others alone can make a profit. All the water-carriage ought to be welcomed, and not looked upon jealously, if carriage by water can be done cheaper, as it ordinarily can. Take the case of freight movements on our Great Lakes. Grain from Duluth to Buffalo is moved in bulk at one cent and a half a bushel, railroads could not get it from Duluth to Buffalo at a rate of less than thirteen and a half cents, and it would not be profitable at that rate. Take the case of ore. The ore rate in vessels on the Great Lakes, carrying as they do in bulk, is about one-eighth of the rate at which it is carried on the railroads; and probably the railroads can make no great profit, even at this much higher rate.

Now, what ought to be done is to learn these facts with reference to the individual cost of such transportation service. If men did but know

these facts we would count upon it that these losses would stop—this scramble for traffic, which possibly may hurt the competitor from which it is taken, but which hurts the carrier that gets it very much more. The method which has been pursued in the past should be abandoned.

Related to these conditions is the desire for bigness, the feeling that, if the system were only large enough and if you could comprise in one unit sufficient of the carrying capacity of the country, then you would be sure of profits; but that proposition is absolutely unsound. The unit of greatest efficiency is reached before a system is very large, because the ability of every man is limited; and, having reached through growth the size of greatest efficiency, this also must be borne in mind—the question of profit is merely the question of how much you can earn per dollar of investment. The question to be considered is the possible return on your capital, and it does not follow that, by multiplying your five million, or ten million, or fifteen million, by twenty or thirty, and getting together a huge transportation system, you can earn more on a dollar than you did before.

Take the entire returns of the railroads of this country, and follow the history of the various systems, and you will see that after they had passed a very modest capitalization the earnings per dollar invested diminished instead of increasing. Now, let those who own, and those who manage, these various forms of transportation, keep these facts clearly before them, and if they do they will readily recognize the law which should govern the relation of competing carriers to one another —a law of business more binding than any that legislatures can enact or the courts enforce.

And what you gentlemen should insist upon, you who are urging a form of transportation which can carry traffic at a cost so much below anything that the railroads have been able to reach, is simply, "Let us all stand on our merits, and let every other form of transportation stand on its merits." (*Applause.*) You should insist upon scientific cost ascertainment, upon a system worked out carefully, elaborately, and patiently. Hold that up before the managers and owners of these competing properties, and you will get what is your due. We shall then have a fair field and no favor, where the fittest will survive; and practically all can survive, if each does that for which it is best fitted.

I thank you for your attention. (*Applause.*)

List of Articles and Addresses

1903 April — Article in *Municipal Affairs*, vol. 6, pp. 721–9, entitled "Experience of Massachusetts in Street Railways."

1904 April 8th — Address before the Good Government League in Cambridge, Massachusetts, reported in *Cambridge Chronicle*, April 9th, under title "Compensation for the Use of Streets."

1905 February 24th — Address delivered at Cooper Union in New York City, entitled "The Massachusetts System of Dealing with Public Franchises."

These three papers, although never reprinted, are not here published because of their somewhat local interest.

1907 November — Article in *American Review of Reviews*, vol. 36, pp. 594–8, entitled "How Boston Solved the Gas Problem," reprinted in *Business—a Profession*, pp. 99–114.

1908 February 11th — Address before the New England Dry Goods Association in Boston, entitled "The New England Transportation Monopoly," reprinted in *Business—a Profession*, pp. 262–285.

May — Article in *New England Magazine*, vol. 38, pp. 267–9, entitled **"The Proposed Railroad Merger: We Need More Minds, not Fewer,"** here reprinted.

1909 June 19th — Article in *Survey*, vol. 22, p. 436, entitled "Boston and Maine Pensions." This article is not published because of its technical nature.

1910 November — Statement before Interstate Commerce Commission, summarized, with a quotation, in an editorial in *Engineering News*, vol. 64, December 1st, pp. 600, 601, under the title "Can the Principles of Scientific Management Be Applied to Railway Operation?"

1911 March — **Interview** in *American Cloak and Suit Review*, p. 106, here reprinted.

March 6th — Statement before the Hadley Railroad Securities Commission, published in *Engineering Magazine*, vol. 42, October, pp. 16–18, under the title **"The Best Solution is a Government Bureau,"** reprinted in modified form in *Business—a Profession*, pp. 313–19, under the title "An Aid to Railroad Efficiency," and here reprinted as originally published.

1912 DECEMBER 13th — Article in the *Boston Journal*, entitled "The New England Railroad Situation," reprinted in *Business—a Profession*, pp. 286–312 under the title "The New Haven—an Unregulated Monopoly"; also made part of hearings before Senate Committee on Interstate Commerce, 62nd Congress, 2nd Session, vol. 3, supplementary material pp. 15 *ff*.

1913 AUGUST 16th — Article in *Harper's Weekly*, pp. 14–15, entitled "Banker Management," reprinted under the title "The Failure of Banker Management" in *Other People's Money*, pp. 189–200.

NOVEMBER 22nd — Article in *Harper's Weekly*, pp. 10–13, entitled "Breaking the Money Trust," reprinted under the title "Our Financial Oligarchy" in *Other People's Money*, pp. 1–27.

NOVEMBER 29th — Article in *Harper's Weekly*, pp. 9–12, entitled "How the Combiners Combine," reprinted in *Other People's Money*, pp. 28–50.

DECEMBER 6th — Article in *Harper's Weekly*, pp. 13–17, entitled "Endless Chain," reprinted under the title "Interlocking Directorates," in *Other People's Money*, pp. 51–68.

DECEMBER 13th — Article in *Harper's Weekly*, pp. 10–12, entitled "Serving One Master Only," reprinted in *Other People's Money*, pp. 69–91.

1913 DECEMBER 20th — Article in *Harper's Weekly*, pp. 10–13, entitled "What Publicity Can Do," reprinted in *Other People's Money*, pp. 92–108.

DECEMBER 27th — Article in *Harper's Weekly*, pp. 18–21, entitled "Where the Banker is Superfluous," reprinted in *Other People's Money*, pp. 109–34.

1914 JANUARY 3rd — Article in *Harper's Weekly*, pp. 11–15, entitled "Big Men and Little Business," reprinted in *Other People's Money*, pp. 135–61.

JANUARY 10th — Article in *Harper's Weekly*, pp. 18–21, entitled "The Curse of Bigness," reprinted in *Other People's Money*, pp. 162–88.

JANUARY 17th — Article in *Harper's Weekly*, pp. 18–21, entitled "Efficiency of the Oligarchy," reprinted in *Other People's Money*, pp. 201–23.

DECEMBER 9th — Address before the National Rivers and Harbors Congress in Washington entitled **"Constructive Co-operation vs. Cut-Throat Competition,"** published in *Harper's*

Weekly, June 12, 1915, pp. 573–4, under the title "Co-operation vs. Cut-Throat Competition," here reprinted.

1915 JANUARY — Address before the American Academy of Political and Social Sciences in Philadelphia, entitled "Interlocking Directors," published in their *Annals*, vol. 57, pp. 45–9, reprinted in the second edition of *Business—a Profession*, pp. 320–8.

APRIL 30th — Statement before Federal Trade Commission, partly reprinted in *Social and Economic Views*, pp. 411–15, under the title "Disseminating the Facts of Industry."

References to Legislative Hearings

Hearings on Proposed Advances in Freight Rates before Interstate Commerce Commission, published as Senate Document, 61st Congress, 3rd Session, vol. 47–54 (Serial vol. 5905–12). Mr. Brandeis appeared throughout these hearings as counsel for the Traffic Committee of Commercial Organizations of the Atlantic Seaboard. Particular references follow:

1910 JANUARY 17th — Argument, vol. 52 (Serial vol. 5910), pp. 4333–41.

1911 JANUARY 3rd — Brief, vol. 53 (Serial vol. 5911), pp. 4752–845, partly reprinted as a booklet under the title "Scientific Management and the Railroads," *The Engineering Magazine*, New York, 1911, 92 pages; a few excerpts reprinted in *Social and Economic Views*, pp. 391, 392.

JANUARY 11th — Argument, vol. 53 (Serial vol. 5911), pp. 5251–78, excerpts reprinted in *Social and Economic Views*, pp. 394–7.

1911 DECEMBER 14th to 16th — Senate Committee on Interstate Commerce, 62nd Congress, 2nd Session, listed under Section B.

Hearings on 5% Rate Case before Interstate Commerce Commission, published as Senate Document, 63rd Congress, 2nd Session, vol. 14 (Serial vol. 6581). Mr. Brandeis was special counsel for the Commission in these proceedings and participated in discussion throughout. Specific references follow:

1914 February 12th	Statement, Part 2, pp. 1735–7.
February 13th	Statement, Part 2, pp. 1834, 1835.
April 30th May 1st	Argument, Part 6, pp. 5233–66, two paragraphs reprinted in *Social and Economic Views*, pp. 397, 398.
October 29th	Argument, Part 7, pp. 6328–35. (The brief in these proceedings, submitted April 27, 1914, was not included in the Senate Document, but has been separately published, Government Printing Office, Washington, 1914, 199 pp.)
1914 June 26th and 27th	Senate Committee on Interstate Commerce, 63rd Congress, 2nd Session, Hearings on Interstate Trade, pp. 1309–29.

Part V

ZIONISM

Editor's Note

Again Palestine appears to fill the rôle of the "Promised Land," and that not only for the harassed Jews in particular but as an object lesson to the rest of the world. As a result of co-operative effort, a shortage of labor and land exist here in spite of the general depression.

Judge Brandeis has long been a passionate prophet of Palestine as a haven for the oppressed and as a place for the founding of a new way of life. His activities in this field have been fully described by Mr. Jacob De Haas in *Louis D. Brandeis, a Biographical Sketch,* published in 1929. Mr. De Haas has reprinted most of the speeches and papers which deal with Jewish subjects. Some of them we reprint here along with a few not to be found in that book.

ZIONISM AND PATRIOTISM

During most of my life my contact with Jews and Judaism was slight, and I gave little thought to their problems save by asking myself from time to time whether we were showing by our lives due appreciation of the opportunities which this hospitable country affords. My approach to Zionism was through Americanism. Practical experience and observation convinced me that to be good Americans, we must be better Jews, and to be better Jews we must be Zionists.

Lest there be misunderstanding, let me state at the outset what Zionism is and what it is not.

It is not a movement to remove all the Jews of the world compulsorily to Palestine. In the first place there are 14,000,000 Jews, and Palestine would not accommodate more than one-fifth of that number. In the second place, it is not a movement to compel anyone to go to Palestine. It is essentially a movement to give to the Jew more, not less freedom—it aims to enable the Jews to exercise the same right now exercised by practically every other people in the world: to live at their option either in the land of their fathers or in some other country; a right which members of small nations as well as of large—which Irish, Greek, Bulgarian, Servian, or Belgian, may now exercise as fully as Germans or English.

Furthermore, Zionism is not a movement to wrest from the Ottoman the sovereignty of Palestine. Zionism merely seeks to establish in Palestine, as part of the Turkish Empire, for such Jews as choose to go and remain there, and for their descendants, a legally secured home, where they may live together and lead a Jewish life; where they may expect ultimately to constitute a majority of the population, and may look forward to what we should call home rule.

Since the destruction of the Temple, nearly two thousand years ago, the longing for Palestine has been ever present with the Jew. It was the hope of a return to the land of his fathers that buoyed up the Jew amidst persecution, and for the realization of which the devout ever prayed. Until a generation ago this was a hope merely—a wish piously

prayed for but not worked for. The Zionist movement is idealistic, but essentially practical. It seeks to realize that hope; to make the dream of a Jewish life in a Jewish land come true as other great dreams of the world have been realized—by men working with devotion, intelligence, and self-sacrifice. It was thus the dream of Italian independence and unity, after centuries of vain hope, came true through the efforts of Mazzini, Garibaldi, and Cavour; that the dream of home rule in Ireland has just been realized; that the dream of Greek, of Bulgarian, and of Servian independence became facts.

The rebirth of the Jewish nation is no longer a mere dream. It is in process of accomplishment in a most practical way; and the story is a most wonderful one. A generation ago a few Jewish emigrants from Russia and from Roumania, instead of proceeding westward to this hospitable country where they might easily have secured material prosperity, turned eastward for the purpose of settling in the land of their fathers. They came from countries where the Jews were persecuted and subjected to the gravest injustice; but the desire to avoid persecution and injustice was not the main cause of their settling in Palestine. Some of them were devoutly orthodox; but religious devotion was not the main cause of their settling in Palestine. They went to Palestine because they were convinced that the undying longing of Jews for Palestine was a fact of deepest significance; that it was a manifestation in the struggle for existence by an ancient people which had established its right to live—a people whose three thousand years of civilization had produced a faith, culture, and individuality which enabled them to contribute largely in the future, as they had in the past, to the advance of civilization; and that it was not a right view, that it was not a right merely, but a duty of the Jewish nation to survive and develop.

These new Pilgrim Fathers sought, therefore, to restore in the land of their fathers the Jewish national life. They believed that there only could Jewish life be protected from the forces of disintegration; that there alone could the Jewish spirit reach its full and natural development; and that by securing for those Jews who wished to settle in Palestine the opportunity to do so, not only those Jews, but all other Jews would be benefited and that the long perplexing Jewish problem would, at last, find solution.

To the worldly wise these efforts at colonization appeared very

foolish. Nature and man presented obstacles in Palestine which appeared to them insuperable; the colonists were in fact ill-equipped for their task, save in their spirit of devotion and self-sacrifice. The land, harassed by centuries of misrule, was treeless and apparently sterile; and it was infested with malaria. The Government offered them no security, either as to life or property. The colonists themselves were not only unfamiliar with the character of the country, but were ignorant of the farmer's life which they proposed to lead; for the Jews of Russia and Roumania had been generally denied the opportunity of owning or working land. Furthermore, these colonists were not inured to the physical hardships to which the life of a pioneer is necessarily subjected. To these hardships and to malaria the men succumbed. Those who survived were long confronted with failure. But at last success came. Within a generation these Jewish Pilgrim Fathers, and those who followed them, had succeeded in establishing these two fundamental propositions:

First, that Palestine is fit for the modern Jew.

Second, that the modern Jew is fit for Palestine.

This land, then treeless and supposed to be sterile and hopelessly arid, has been shown to have been treeless and sterile only because of man's misrule. It has been shown to be capable of becoming again a land "flowing with milk and honey." Oranges and grapes, olives and almonds, wheat and other cereals are now growing there in profusion. Those who undertake to describe Palestine are apt to speak of it as a miniature California, in its climate, its topography, and its agricultural possibilities. Others have compared it with Sicily—long the granary of Rome.

Much patience and perseverance and faith have been required to develop these possibilities in Palestine; and very much remains to be done to make the life of the Jewish settler what it should be. But the commercial test has been made. The progress is obvious to every traveler; and it may already be measured in statistics. In a single generation the export of oranges increased from 60,000 boxes to 1,500,000, and in recent years the groves have been so largely extended that exports to twice this amount are expected within a few years when these trees shall begin to bear fruit. The grape, the almond, and the olive culture have prospered likewise, and there are important exports of wheat and other cereals.

This material development has been attended by a spiritual and social development no less extraordinary; a development in education, in health, and in social order, and in the character and habits of the population. Perhaps the most extraordinary achievement of Jewish nationalism is the revival of the Hebrew language, which has again become a language of the common intercourse of men. The Hebrew tongue, called a dead language for nearly two thousand years, has, in the Jewish colonies and in Jerusalem, become again the living mother-tongue. The effect of this common language in unifying the Jews is, of course, great; for the Jews of Palestine came literally from all the lands of the earth, each speaking, except for the use of Yiddish, the language of the country from which he came, and remaining, in the main, almost a stranger to the others.

But the effect of the renaissance of the Hebrew tongue is far greater than that of unifying the Jews. It is a potent factor in reviving the essentially Jewish spirit. It was a bold dream to plan the foundation of a new Jewish nation in Palestine by giving a common language to the natives of so many lands, particularly so when it is remembered that the language, long called dead, had not only to be introduced, but to be adapted to modern use. Yet this has actually been accomplished in a single generation; and the man who took the first practical step, Eliezer Ben Jehuda, is still in Jerusalem, engaged in furthering the work.

Ben Jehuda's story will have a place in history. In 1880, living comfortably in Paris, he wrote an article for a Jerusalem paper, demanding that Hebrew become the language of intercourse in the Talmud-Torahs and Yeshibahs of Palestine. The editor of the paper in which that article was published spoke of the proposition as "a pious wish"; but Ben Jehuda was not content that it should remain a wish. He proposed that the wish become a fact, so he went to Palestine himself. He concluded that if Hebrew was to become a spoken language, the way to begin with Hebrew, as with charity, was at home. He said he would marry no woman who did not speak Hebrew fluently. Fortunately, he found one who could; and Hebrew became the language of his own household. Then he declared that he would deal only with those who could speak Hebrew. He was naturally regarded as half-crazy. But soon others followed his example!

And before a generation had passed, Hebrew became the language

of kindergartens, of primary schools, and of higher institutions of learning. Daily papers and magazines are now published, public lectures are delivered, and plays performed in Hebrew. Many were the parents who learned Hebrew from their children! And there are instances also of non-Jews learning Hebrew in order to avail themselves of the advantages offered by the Hebrew educational and cultural institutions.

It was no ordinary sense of piety that made Ben Jehuda seek to introduce the Hebrew language. He recognized what the leaders of other peoples, seeking rebirth and independence, have recognized: that it is through the national language expressing the people's soul that the national spirit is aroused and the national power restored. In spite of the prevalence of the English tongue in Ireland, the revival of Gaelic was one of the most important factors in the movement which has just resulted in securing for the Irish their long-coveted home rule. The revival of Flemish was a potent factor in the rebirth of the Belgian people, who have now given such good account of themselves. And so it was with the revival of Greek, of Bulgarian, and of Servian.

The intensity of conviction and the devotion which the revival of Hebrew has developed was shown in the struggle for its maintenance last year (1914) in the Palestinian schools. Believing that an effort was being made to supersede it in some of the schools, practically every teacher—two hundred in all—struck, giving up their only means of livelihood rather than submit to the impairment of the position of the Hebrew language. Pupils followed teachers, and parents aided by others in the community willingly faced, despite their poverty, the burden of establishing new national schools, so that their new-old national language might predominate. This is stuff out of which nations can be built!

The burden has fallen upon America to maintain the Zionist movement, now so promising after years of travail. The organization which has hitherto directed the movement had its headquarters in Berlin. The governing committee is composed mainly of citizens of the different nations now at war with one another. Some of the members are from Russia, some from Germany, some from Austria. The president of the Zionist congress was a German; and the leading financial institutions through which the business of the organization was conducted, were organized under British law. The war has scattered these officers

under conditions which prevent their co-operating or, indeed, communicating freely with one another, and which prevent them from directing affairs in Palestine. The establishment in a neutral country of a provisional committee to take up the work thus became necessary, and such a committee was naturally established in America, the only neutral country which has a large Jewish population, and where more than one-fifth of all the Jews in the world live. The committee so formed has at the outset the task of providing funds necessary for maintaining the Zionist organization and institutions.

Hitherto, ninety per cent of all the money required for this purpose was raised in Europe. The European Jews are now prevented from contributing practically anything. Upon us falls the obligation and the privilege of providing the needed funds. When we consider how large and generous has been the contribution of the Irish in America for the cause of home rule—the present demand upon the Jews for this purpose seems very small indeed.

The Jews in America can be relied upon to perform fully their obligation. And there are special reasons why we should be eager to do so, for Palestine gives promise of doing for us far more than we can ever be called upon to do for Palestine, for the Jewish renaissance in Palestine will enable us to perform our plain duty to America. It will help us to make toward the attainment of the American ideals of democracy and social justice that large contribution for which religion and life have peculiarly fitted the Jew.

America's fundamental law seeks to make real the brotherhood of man. That brotherhood became the Jewish fundamental law more than twenty-five hundred years ago. America's insistent demand in the twentieth century is for social justice. That also has been the Jews' striving for ages. Their affliction as well as their religion has prepared the Jews for effective democracy. Persecution broadened their sympathies; it trained them in patient endurance, in self-control, and in sacrifice. It made them think as well as suffer. It deepened the passion for righteousness.

The Jewish spirit, the product of their religion and experiences, is essentially modern and essentially American. Not since the destruction of the Temple have the Jews in spirit and in ideals been, in these respects, so fully in harmony with the noblest aspirations of the country in which they lived. The Jewish spirit, so long preserved, the character

developed by so many centuries of sacrifice, should be preserved and developed further, so that in America as elsewhere the sons of the race may in future live lives and do deeds worthy of their ancestors.

But as the Ghetto walls are falling Jewish life cannot be preserved and developed, assimilation cannot be averted, unless there be re-established in the fatherland a center, from which the Jewish spirit may radiate, and give to the Jews scattered throughout the world that inspiration which springs from memories of a great past and the hope of a great future. To accomplish this, it is not necessary that the Jewish population of Palestine be large as compared with the whole number of Jews in the world. Throughout centuries when the Jewish influence was greatest, during the Persian, the Greek, and the Roman Empires, only a relatively small part of the Jews lived in Palestine; and only a small part of the Jews returned from Babylon when the Temple was rebuilt.

But we have also an immediate and more pressing duty in the performance of which Zionism alone seems capable of affording effective aid. We must protect America and ourselves from demoralization which has to some extent already set in among American Jews. Throughout all the years of persecution the general standard of morals was exceptionally high among the Jews. The Jewish criminal was very rare, for with the Jews laws were self-enforced and each individual was his own policeman. The Rosenthal case with its horrible revelations of violence and corruption, and the white-slave prosecutions, with their disclosures of prostitution among Jewish women, brought to the American Jew a deep sense of humiliation, and to the thoughtful grave concern. What could be more remote from Jewish tradition than such resorts to violence, unless it be the prevalence of unchastity?

The cause of this demoralization is clear. It results in large part from the fact that in our land of liberty all the restraints of liberty and of law, by which the Jews were protected in their Ghettos, had been removed and a new generation was left without necessary moral and spiritual support. And is it not equally clear what the only possible remedy is? It is the laborious task of inculcating self-respect—a task which can be accomplished only by restoring the ties of the Jew to the noble past of his race, and by making him realize the possibilities of a no less glorious future. The only bulwark against demoralization

is to develop in each new generation of Jews in America the sense of "*Noblesse oblige.*" That spirit can be developed only with those who regard their race as destined to live and to live with a bright future. That spirit can best be developed by actively participating in some way in furthering the ideals of the Jewish renaissance, and this can be done effectively only through furthering the Zionist movement.

In the Jewish colonies of Palestine there are no Jewish criminals; because everyone, old and young alike, is led to feel the glory of his race and his obligation to carry forward its ideals. The new Palestinian Jewry produces, instead of criminals, great scientists like Aaron Aaronsohn, the discoverer of wild wheat; great pedagogues like David Yellin; craftsmen like Boris Schatz, the founder of the Bezalel; intrepid Shomerim, the Jewish guards of peace, who stand watch in the night against marauders and doers of violent deeds.

Every Irish-American who contributed towards advancing home rule was a better man and a better American for the sacrifice he made. Every American Jew who aids in advancing the Jewish settlement in Palestine, though he feel that neither he nor his descendants will ever be there, will likewise be a better man and a better American for doing so.

There is one other consideration to which the Jews of America should give thought. Though the result of this war should be, as we hope, the removal or lessening of the disabilities under which the Jews labor in eastern Europe, nevertheless, when peace comes, emigration from the war-stricken countries will certainly proceed in large volume, because of the misery incident to the war's devastation. More than one-half of the Jews of the whole world live in that territory near the western frontier of Russia, which has become one of the two vast battlefields of the nations. Is it desirable that America should be practically the only country to which the Jews of eastern Europe may emigrate? Is it not desirable that Palestine should give a special welcome to the Jews, as the Zionists propose?

I am impelled all the more to ask for your support, both moral and financial, because at this critical juncture we should all stand together, so that when the occasion arises, we may be of lasting service to our people. Now is not the time to foreshadow the policy which we should engage upon. But when the nations approach peace, the Jews of America, if united, may be factors in obtaining for the Jews

of the other parts of the world something more real than promises of amelioration; something more lasting than philanthropy. And this greater undertaking depends upon the readiness with which you rally in every possible form to the cause.

Your loyalty to America, your loyalty to Judaism, should lead you to support the Zionist cause.

THE JEWISH PROBLEM

How to Solve It

THE suffering of the Jews due to injustices continuing throughout nearly twenty centuries is the greatest tragedy in history. Never was the aggregate of such suffering larger than today. Never were the injustices more glaring. Yet the present is pre-eminently a time for hopefulness. The current of world thought is at last preparing the way for our attaining justice. The war is developing opportunities which may make possible the solution of the "Jewish Problem." But to avail of these opportunities we must understand both them and ourselves. We must recognize and accept facts. We must consider our course with statesmanlike calm. We must pursue resolutely the course we shall decide upon, and be ever ready to make the sacrifices which a great cause demands. Thus only can liberty be won.

For us the Jewish Problem means this: How can we secure for Jews, wherever they may live, the same rights and opportunities enjoyed by non-Jews? How can we secure for the world the full contribution which Jews can make, if unhampered by artificial limitations?

The problem has two aspects: that of the individual Jew—and that of Jews collectively. Obviously, no individual should be subjected anywhere, by reason of the fact that he is a Jew, to a denial of any common right or opportunity enjoyed by non-Jews. But Jews collectively should likewise enjoy the same right and opportunity to live and develop as do other groups of people. This right of development on the part of the group is essential to the full enjoyment of rights by the individual. For the individual is dependent for his development (and his happiness) in large part upon the development of the group of which he forms a part. We can scarcely conceive of an individual German or Frenchman living and developing without some relation to the contemporary German or French life and culture. And since death is not a solution of the problem of life, the solution of the Jewish Problem necessarily involves the continued existence of the Jews as Jews.

Councils of Rabbis and others have undertaken at times to prescribe by definition that only those shall be deemed Jews who professedly adhere to the orthodox or reformed faith. But in the connection in which we are considering the term, it is not in the power of any single body of Jews—or indeed of all Jews collectively—to establish the effective definition. The meaning of the word Jewish in the term "Jewish Problem" must be accepted as coextensive with the disabilities which it is our problem to remove. It is the non-Jews who create the disabilities and in so doing give definition to the term Jew. Those disabilities extend substantially to all of Jewish blood. The disabilities do not end with a renunciation of faith, however sincere. They do not end with the elimination, however complete, of external Jewish mannerisms. The disabilities do not end ordinarily until the Jewish blood has been so thoroughly diluted by repeated intermarriages as to result in practically obliterating the Jew.

And we Jews, by our own acts, give a like definition to the term Jew. When men and women of Jewish blood suffer—because of that fact—and even if they suffer from quite different causes—our sympathy and our help goes out to them instinctively in whatever country they may live and without inquiring into the shades of their belief or unbelief. When those of Jewish blood exhibit moral or intellectual superiority, genius or special talent, we feel pride in them, even if they have abjured the faith like Spinoza, Marx, Disraeli, or Heine. Despite the meditations of pundits or the decrees of councils, our own instincts and acts, and those of others, have defined for us the term Jew.

Half a century ago the belief was still general that Jewish disabilities would disappear before growing liberalism. When religious toleration was proclaimed, the solution of the Jewish Problem seemed in sight. When the so-called rights of man became widely recognized, and the equal right of all citizens to life, liberty, and the pursuit of happiness began to be enacted into positive law, the complete emancipation of the Jew seemed at hand. The concrete gains through liberalism were indeed large. Equality before the law was established throughout the western hemisphere. The Ghetto walls crumbled; the ball and chain of restraint were removed in central and western Europe. Compared with the cruel discrimination to which Jews are now subjected in Russia and Roumania, their advanced condition in other parts of Europe seems almost ideal.

But anti-Jewish prejudice was not exterminated even in those countries of Europe in which the triumph of civil liberty and democracy extended fully to Jews "the rights of man." The anti-Semitic movement arose in Germany a year after the granting of universal suffrage. It broke out violently in France, and culminated in the Dreyfus case, a century after the French Revolution had brought "emancipation." It expressed itself in England through the Aliens Act, within a few years after the last of Jewish disabilities had been there removed by law. And in the United States the Saratoga incident reminded us, long ago, that we too have a Jewish question.

The disease is universal and endemic. There is, of course, a wide difference between the Russian disabilities with their Pale of Settlement, their denial of opportunity for education and choice of occupation, and their recurrent pogroms, and the German disabilities curbing university, bureaucratic, and military careers. There is a wide difference also between these German disabilities and the mere social disabilities of other lands. But some of those now suffering from the severe disabilities imposed by Russia and Roumania are descendants of men and women who in centuries before our modern liberalism enjoyed both legal and social equality in Spain and southern France. The manifestations of the Jewish Problem vary in the different countries, and at different periods in the same country, according to the prevailing degree of enlightenment and other pertinent conditions. Yet the differences, however wide, are merely in degree and not in kind. The Jewish Problem is single and universal. But it is not necessarily eternal. It may be solved.

Why is it that liberalism has failed to eliminate the anti-Jewish prejudice? It is because the liberal movement has not yet brought *full* liberty. Enlightened countries grant to the individual equality before the law; but they fail still to recognize the equality of whole peoples or nationalities. We seek to protect as individuals those constituting a minority; but we fail to realize that protection cannot be complete unless group equality also is recognized.

Deeply imbedded in every people is the desire for full development —the longing, as Mazzini phrased it, "to elaborate and express their idea, to contribute their stone also to the pyramid of history." Nationality like democracy has been one of the potent forces making for man's advance during the past hundred years. The assertion of nation-

ality has infused whole peoples with hope, manhood, and self-respect. It has ennobled and made purposeful millions of lives. It offered them a future, and in doing so revived and capitalized all that was valuable in their past. The assertion of nationality raised Ireland from the slough of despondency. It roused southern Slavs to heroic deeds. It created gallant Belgium. It freed Greece. It gave us united Italy. It manifested itself even among free peoples—like the Welsh who had no grievance, but who gave expression to their nationality through the revival of the old Cymric tongue. Each of these peoples developed because, as Mazzini said, they were enabled to proclaim "to the world that they also live, think, love, and labor for the benefit of all."

In the past it has been generally assumed that the full development of one people necessarily involved its domination over others. Strong nationalities are apt to become convinced that by such domination only, does civilization advance. Strong nationalities assume their own superiority, and come to believe that they possess the divine right to subject other peoples to their sway. Soon the belief in the existence of such a right becomes converted into a conviction that a duty exists to enforce it. Wars of aggrandizement follow as a natural result of this belief.

This attitude of certain nationalities is the exact correlative of the position which was generally assumed by the strong in respect to other individuals before democracy became a common possession. The struggles of the eighteenth and nineteenth centuries both in peace and in war were devoted largely to overcoming that position as to individuals. In establishing the equal right of every person to development, it became clear that equal opportunity for all involves this necessary limitation: each man may develop himself so far, but only so far, as his doing so will not interfere with the exercise of a like right by all others. Thus liberty came to mean the right to enjoy life, to acquire property, to pursue happiness in such manner and to such extent as the exercise of the right in each is consistent with the exercise of a like right by every other of our fellow citizens. Liberty thus defined underlies twentieth-century democracy. Liberty thus defined exists in a large part of the western world. And even where this equal right of each individual has not yet been accepted as a political right, its ethical claim is gaining recognition. Democracy rejected the proposal of the superman who should rise through sacrifice of the many. It insists that the full de-

velopment of each individual is not only a right, but a duty to society, and that our best hope for civilization lies not in uniformity, but in wide differentiation.

The movements of the last century have proved that whole peoples have individuality no less marked than that of the single person, that the individuality of a people is irrepressible, and that the misnamed internationalism which seeks the obliteration of nationalities or peoples is unattainable. The new nationalism proclaims that each race or people, like each individual, has a right and duty to develop, and that only through such differentiated development will high civilization be attained. Not until these principles of nationalism, like those of democracy, are generally accepted, will liberty be fully attained, and minorities be secure in their rights. But there is ground for hope that the establishment of these principles will come as one of the compensations of the present war—and, with it, the solution of the Jewish Problem.

The difference between a nation and a nationality is clear; but it is not always observed. Likeness between members is the essence of nationality; but the members of a nation may be very different. A nation may be composed of many nationalities, as some of the most successful nations are. An instance of this is the British nation, with its division into English, Scotch, Welsh, and Irish at home; with the French in Canada; and, throughout the Empire, scores of other nationalities. Other examples are furnished by the Swiss nation with its German, French, and Italian sections; by the Belgian nation composed of Flemings and Walloons; and by the American nation which comprises nearly all the white nationalities. The unity of a nationality is a fact of nature. The unity into a nation is largely the work of man. The false doctrine that nation and nationality must be made coextensive is the cause of some of our greatest tragedies. It is, in large part, the cause also of the present war. It has led, on the one hand, to cruel, futile attempts at enforced assimilation, like the Russianizing of Finland and Poland, and the Prussianizing of Posen, Schleswig-Holstein, and Alsace-Lorraine. It has led, on the other hand, to those Panistic movements which are a cloak for territorial ambitions. As a nation may thrive though composed of many nationalities, so a nationality may thrive though forming parts of several nations. The

essential in either case is recognition of the equal rights of each nationality.

W. Allison Philips recently defined nationality as "an extensive aggregate of persons, conscious of a community of sentiments, experiences, or qualities which make them feel themselves a distinct people." And he adds: "If we examine the composition of the several nationalities we find these elements: race, language, religion, common habitat, common conditions, mode of life and manners, political association. The elements are, however, never all present at the same time, and none of them is essential. . . . A common habitat and common conditions are doubtless powerful influences at times in determining nationality; but what part do they play in that of the Jews or the Greeks or the Irish in dispersion?"

See how this high authority assumes without question that the Jews are, despite their dispersion, a distinct nationality; and he groups us with the Greeks or the Irish—two other peoples of marked individuality. Can it be doubted that we Jews, aggregating 14,000,000 people, are "an extensive aggregate of persons"; that we are "conscious of a community of sentiments, experiences and qualities which make us *feel* ourselves a distinct people," whether we admit it or not?

It is no answer to this evidence of nationality to declare that the Jews are not an absolutely pure race. There has, of course, been some intermixture of foreign blood in the 3,000 years which constitute our historic period. But, owing to persecution and prejudice, the intermarriages with non-Jews which occurred have resulted merely in taking away many from the Jewish community. Intermarriage has brought few additions. Therefore the percentage of foreign blood in the Jews of today is very low. Probably no important European race is as pure.

But common race is only one of the elements which determine nationality. Conscious community of sentiments, common experiences, common qualities are equally, perhaps more, important. Religion, traditions, and customs bound us together though scattered throughout the world. The similarity of experiences tended to produce similarity of qualities and community of sentiments. Common suffering so intensified the feeling of brotherhood as to overcome largely all the influences making for diversification. The segregation of the Jews was

so general, so complete, and so long continued as to intensify our "peculiarities" and make them almost ineradicable.

We recognize that with each child the aim of education should be to develop his own individuality, not to make him an imitator, not to assimilate him to others. Shall we fail to recognize this truth when applied to whole peoples? And what people in the world has shown greater individuality than the Jews? Has any a nobler past? Does any possess common ideas better worth expressing? Has any marked traits worthier of development? Of all the peoples in the world those of two tiny states stand pre-eminent as contributors to our present civilization—the Greeks and the Jews. The Jews gave to the world its three greatest religions, reverence for law, and the highest conceptions of morality. Never before has the value of our contribution been so generally recognized. Our teaching of brotherhood and righteousness has, under the name of democracy and social justice, become the twentieth-century striving of America and of western Europe. Our conception of law is embodied in the American constitutions which proclaim this to be a "government of laws and not of men." And for the triumph of our other great teaching—the doctrine of peace, this cruel war is paving the way.

While every other people is striving for development by asserting its nationality, and a great war is making clear the value of small nations, shall we voluntarily yield to anti-Semitism, and instead of solving our "problem" end it by ignoble suicide? Surely this is no time for Jews to despair. Let us make clear to the world that we too are a nationality clamoring for equal rights, to life and to self-expression. That this should be our course has been recently expressed by high non-Jewish authority. Thus Seton-Watson, speaking of the probable results of the war, said:

"There are good grounds for hoping that it (the war) will also give a new and healthy impetus to Jewish national policy, grant freer play to their splendid qualities, and enable them to shake off the false shame which has led men who ought to be proud of their Jewish race to assume so many alien disguises and to accuse of anti-Semitism those who refuse to be deceived by mere appearances. It is high time that the Jews should realize that few things do more to foster anti-Semitic feeling than this very tendency to sail under false colors and conceal

their true identity. The Zionists and the orthodox Jewish Nationalists have long ago won the respect and admiration of the world. No race has ever defied assimilation so stubbornly and so successfully; and the modern tendency of individual Jews to repudiate what is one of their chief glories suggests an almost comic resolve to fight against the course of nature." . . .

Standing upon this broad foundation of nationality, Zionism aims to give it full development. Let us bear clearly in mind what Zionism is, or rather what it is not.

It is not a movement to remove all the Jews of the world compulsorily to Palestine. In the first place there are 14,000,000 Jews, and Palestine would not accommodate more than one-fifth of that number. In the second place, it is not a movement to compel anyone to go to Palestine. It is essentially a movement to give to the Jew more, not less, freedom—it aims to enable the Jews to exercise the same right now exercised by practically every other people in the world: To live at their option either in the land of their fathers or in some other country; a right which members of small nations as well as of large—which Irish, Greek, Bulgarian, Servian, or Belgian, may now exercise as fully as Germans or English.

Zionism seeks to establish in Palestine, for such Jews as choose to go and remain there, and for their descendants, a legally secured home, where they may live together and lead a Jewish life; where they may expect ultimately to constitute a majority of the population, and may look forward to what we should call home rule. The Zionists seek to establish this home in Palestine because they are convinced that the undying longing of Jews for Palestine is a fact of deepest significance; that it is a manifestation in the struggle for existence by an ancient people which had established its right to live —a people whose three thousand years of civilization has produced a faith, culture, and individuality which enable them to contribute largely in the future, as they had in the past, to the advance of civilization; and that it is not a right merely, but a duty of the Jewish nationality to survive and develop. They believe that there only can Jewish life be fully protected from the forces of disintegration; that there alone can the Jewish spirit reach its full and natural development; and that by securing for those Jews who wish to settle in

Palestine the opportunity to do so, not only those Jews, but all other Jews will be benefited and that the long perplexing Jewish Problem will, at last, find solution.

They believe that to accomplish this, it is not necessary that the Jewish population of Palestine be large as compared with the whole number of Jews in the world; for throughout centuries when the Jewish influence was greatest—during the Persian, the Greek, and the Roman Empires, only a relatively small part of the Jews lived in Palestine; and only a small part of the Jews returned from Babylon when the Temple was rebuilt.

Since the destruction of the Temple, nearly two thousand years ago, the longing for Palestine has been ever present with the Jew. It was the hope of a return to the land of his fathers that buoyed up the Jew amidst persecution, and for the realization of which the devout ever prayed. Until a generation ago this was a hope merely—a wish piously prayed for, but not worked for. The Zionist movement is idealistic, but it is also essentially practical. It seeks to realize that hope; to make the dream of a Jewish life in a Jewish land come true as other great dreams of the world have been realized—by men working with devotion, intelligence, and self-sacrifice. It was thus that the dream of Italian independence and unity, after centuries of vain hope, came true through the efforts of Mazzini, Garibaldi, and Cavour; that the dream of Greek, of Bulgarian, and of Servian independence became facts; that the dream of home rule in Ireland has just been realized.

The rebirth of the Jewish nation is no longer a mere dream. It is in process of accomplishment in a most practical way, and the story is a wonderful one. A generation ago a few Jewish emigrants from Russia and from Roumania, instead of proceeding westward to this hospitable country where they might easily have secured material prosperity, turned eastward for the purpose of settling in the land of their fathers.

To the worldly wise these efforts at colonization appeared very foolish. Nature and man presented obstacles in Palestine which appeared almost insuperable; and the colonists were in fact ill-equipped for their task, save in their spirit of devotion and self-sacrifice. The land, harassed by centuries of misrule, was treeless and apparently sterile; and it was infested with malaria. The government offered

them no security, either as to life or property. The colonists themselves were not only unfamiliar with the character of the country, but were ignorant of the farmer's life which they proposed to lead; for the Jews of Russia and Roumania had been generally denied the opportunity of owning or working land. Furthermore, these colonists were not inured to the physical hardships to which the life of a pioneer is necessarily subjected. To these hardships and to malaria many succumbed. Those who survived were long confronted with failure. But at last success came. Within a generation these Jewish Pilgrim Fathers, and those who followed them, have succeeded in establishing these two fundamental propositions:

First, that Palestine is fit for the modern Jew.

Second, that the modern Jew is fit for Palestine.

Nearly fifty self-governing Jewish colonies attest to this remarkable achievement.

This land, treeless a generation ago, supposed to be sterile and hopelessly arid, has been shown to have been treeless and sterile only because of man's misrule. It has been shown to be capable of becoming again a land "flowing with milk and honey." Oranges and grapes, olives and almonds, wheat and other cereals are now growing there in profusion.

This material development has been attended by a spiritual and social development no less extraordinary; a development in education, in health, and in social order; and in the character and habits of the population. Perhaps the most extraordinary achievement of Jewish nationalism is the revival of the Hebrew Language, which has again become a language of the common intercourse of men. The Hebrew tongue, called a dead language for nearly two thousand years, has, in the Jewish colonies and in Jerusalem, become again the living mother-tongue. The effect of this common language in unifying the Jews is, of course, great; for the Jews of Palestine came literally from all the lands of the earth, each speaking, except for the use of Yiddish, the language of the country from which he came, and remaining in the main, almost a stranger to the others. But the effect of the renaissance of the Hebrew tongue is far greater than that of unifying the Jews. It is a potent factor in reviving the essentially Jewish spirit.

Our Jewish Pilgrim Fathers have laid the foundation. It remains for us to build the superstructure.

Let no American imagine that Zionism is inconsistent with patriotism. Multiple loyalties are objectionable only if they are inconsistent. A man is a better citizen of the United States for being also a loyal citizen of his state, and of his city; for being loyal to his family, and to his profession or trade; for being loyal to his college or his lodge. Every Irish-American who contributed towards advancing home rule was a better man and a better American for the sacrifice he made. Every American Jew who aids in advancing the Jewish settlement in Palestine, though he feels that neither he nor his descendants will ever live there, will likewise be a better man and a better American for doing so.

Note what Seton-Watson says:

"America is full of nationalities which, while accepting with enthusiasm their new American citizenship, nevertheless look to some center in the old world as the source and inspiration of their national culture and traditions. The most typical instance is the feeling of the American Jew for Palestine which may well become a focus for his *déclassé* kinsmen in other parts of the world."

There is no inconsistency between loyalty to America and loyalty to Jewry. The Jewish spirit, the product of our religion and experiences, is essentially modern and essentially American. Not since the destruction of the Temple have the Jews in spirit and in ideals been so fully in harmony with the noblest aspirations of the country in which they lived.

America's fundamental law seeks to make real the brotherhood of man. That brotherhood became the Jewish fundamental law more than twenty-five hundred years ago. America's insistent demand in the twentieth century is for social justice. That also has been the Jews' striving for ages. Their affliction as well as their religion has prepared the Jews for effective democracy. Persecution broadened their sympathies; it trained them in patient endurance, in self-control, and in sacrifice. It made them think as well as suffer. It deepened the passion for righteousness.

Indeed, loyalty to America demands rather that each American Jew become a Zionist. For only through the ennobling effect of its strivings can we develop the best that is in us and give to this country the full benefit of our great inheritance. The Jewish spirit, so long preserved, the character developed by so many centuries of sacrifice,

should be preserved and developed further, so that in America as elsewhere the sons of the race may in future live lives and do deeds worthy of their ancestors. . . .

But we have also an immediate and more pressing duty in the performance of which Zionism alone seems capable of affording effective aid. We must protect America and ourselves from demoralization, which has to some extent already set in among American Jews. The cause of this demoralization is clear. It results, in large part, from the fact that in our land of liberty all the restraints by which the Jews were protected in their Ghettos were removed and a new generation left without necessary moral and spiritual support. And is it not equally clear what the only possible remedy is? It is the laborious task of inculcating self-respect—a task which can be accomplished only by restoring the ties of the Jew to the noble past of his race, and by making him realize the possibilities of a no less glorious future. The sole bulwark against demoralization is to develop in each new generation of Jews in America the sense of "Noblesse oblige." That spirit can be developed in those who regard their race as destined to live and to live with a bright future. That spirit can best be developed by actively participating in some way in furthering the ideals of the Jewish renaissance; and this can be done effectively only through furthering the Zionist movement.

In the Jewish colonies of Palestine there are no Jewish criminals; because everyone, old and young alike, is led to feel the glory of his race and his obligation to carry forward its ideals. The new Palestinian Jewry produces instead of criminals, great scientists like Aaron Aaronsohn, the discoverer of wild wheat; great pedagogues like David Yellin; craftsmen like Boris Schatz, the founder of the Bezalel; intrepid Shomerim, the Jewish guards of peace, who watch in the night against marauders and doers of violent deeds.

And the Zionist movement has brought like inspiration to the Jews in the Diaspora, as Steed has shown in this striking passage from *The Hapsburg Monarchy*:

"To minds like these Zionism came with the force of an evangel. To be a Jew and to be proud of it; to glory in the power and pertinacity of the race, its traditions, its triumphs, its sufferings, its resistance to persecution; to look the world frankly in the face and to enjoy the luxury of moral and intellectual honesty; to feel pride in belong-

ing to the people that gave Christendom its divinities, that taught half the world monotheism, whose ideas have permeated civilization as never the ideas of a race before it, whose genius fashioned the whole mechanism of modern commerce, and whose artists, actors, singers, and writers have filled a larger place in the cultured universe than those of any other people. This, or something like this, was the train of thought fired in youthful Jewish minds by the Zionist spark. Its effect upon the Jewish students of Austrian universities was immediate and striking. Until then they had been despised and often ill-treated. They had wormed their way into appointments and into the free professions by dint of pliancy, mock humility, mental acuteness, and clandestine protection. If struck or spat upon by 'Aryan' students, they rarely ventured to return the blow or the insult. But Zionism gave them courage. They formed associations, and learned athletic drill and fencing. Insult was requited with insult, and presently the best fencers of the fighting German corps found that Zionist students could gash cheeks quite as effectually as any Teuton, and that the Jews were in a fair way to become the best swordsmen of the university. Today the purple cap of the Zionist is as respected as that of any academical association.

"This moral influence of Zionism is not confined to university students. It is quite as noticeable among the mass of the younger Jews outside, who also find in it a reason to raise their heads, and, taking their stand upon the past, to gaze straightforwardly into the future."

Since the Jewish Problem is single and universal, the Jews of every country should strive for its solution. But the duty resting upon us of America is especially insistent. We number about 3,000,000, which is more than one-fifth of all the Jews in the world—a number larger than that comprised within any other country, except the Russian Empire. We are representative of all the Jews in the world; for we are composed of immigrants, or descendants of immigrants coming from every other country, or district. We include persons from every section of society, and of every shade of religious belief. We are ourselves free from civil or political disabilities, and are relatively prosperous. Our fellow Americans are infused with a high and generous spirit, which insures approval of our struggle to ennoble, liberate, and otherwise improve the condition of an important part of the human

race; and their innate manliness makes them sympathize particularly with our efforts at self help. America's detachment from Old World problems relieves us from suspicions and embarrassments frequently attending the activities of Jews of rival European countries. And a conflict between American interests or ambitions and Jewish aims is not conceivable. Our loyalty to America can never be questioned.

Let us therefore lead—earnestly, courageously, and joyously in the struggle for liberation. Let us all recognize that we Jews are a distinct nationality of which every Jew, whatever his country, his station, or shade of belief is necessarily a member. Let us insist that the struggle for liberty shall not cease until equality of opportunity is accorded to nationalities as to individuals. Let us insist also that full equality of opportunity cannot be obtained by Jews until we, like members of other nationalities, shall have the option of living elsewhere or of returning to the land of our forefathers.

The fulfillment of these aspirations is clearly demanded in the interest of mankind, as well as in justice to the Jews. They cannot fail of attainment if we are united and true to ourselves. But we must be united not only in spirit but in action. To this end we must organize. Organize, in the first place, so that the world may have proof of the extent and the intensity of our desire for liberty. Organize, in the second place, so that our resources may become known and be made available. But in mobilizing our forces it will not be for war. The whole world longs for the solution of the Jewish Problem. We have but to lead the way, and we may be sure of ample co-operation from non-Jews. In order to lead the way, we need, not arms, but men; men with those qualities for which Jews should be peculiarly fitted by reason of their religion and life: men of courage, of high intelligence, of faith and public spirit, of indomitable will and ready self-sacrifice; men who will both think and do, who will devote high abilities to shaping our course, and to overcoming the many obstacles which must from time to time arise. And we need other, many, many other men—officers commissioned and non-commissioned, and common soldiers in the cause of liberty, who will give of their effort and resources, as occasion may demand, in unfailing and ever-strengthening support of the measures which may be adopted. Organization, thor-

ough and complete, can alone develop such leaders and the necessary support.

Organize, organize, organize—until every Jew in America must stand up and be counted—counted with us—or prove himself, wittingly or unwittingly, of the few who are against their own people.

JEWISH UNITY AND THE CONGRESS

When the war ends the Jews of America hope to aid in the solution of those problems which most deeply affect their brethren abroad. Everyone recognizes that without unity this is impossible. But many fail to understand what unity means, and what the essential conditions of unity are. When the meaning of unity is made clear, and these essential conditions set forth, it must appear that a Congress is indispensable, if the end sought is to be attained.

First, unity means not oneness in opinion, but oneness in action. Division in opinion may be helpful. Division in action is fatal. Differences of opinion are inevitable among thoughtful men, if the question under consideration is one worthy of discussion. Differences in opinion are not only natural but desirable where the question is difficult; for only through such differences do we secure that light and fuller understanding which are necessary to a wise decision. On the other hand, when action is contemplated, some decision must be made. Then someone's opinion must be accepted as the basis of action. It may be one of the hitherto opposing opinions, or it may be a new opinion developed out of and possibly reconciling those previously conflicting. But when a decision is made all division should cease. Only so can effective action result.

Second, the making of a decision implies the existence of a body which has authority to decide. Such a body may be either autocratic or democratic. It is autocratic when it is self-constituted, and imposes its decision or will upon those for whom it purports to act. It is democratic when selected by and expresses the decision or will of those whom it actually represents. Among a free people the body which makes a decision must necessarily be democratic, since among a free people there can be no self-constituted body of men possessing the power to decide what the action of the whole people shall be.

Third, absence of discord does not imply unity. Absence of discord may be due to indifference. Unity implies interest and participation. There may be acquiescence in the decision of a self-constituted

body purporting to act on behalf of a free people. But there cannot be unity of action of a free people unless the decision is the act of that people participating through its properly constituted representatives.

Fourth, what is demanded of the Jewish people now is action, not acquiescence. We must seek to put an end to those conditions which through the centuries, and not merely during this war, have brought misery and suffering to the Jews. We must consider more than the superficial effects of the war, grievous though they may be. For the Jewish suffering in this war would not be so great if the Jews had not been victims of oppression and persecution during so many centuries. The position of the Jew is not entirely unique. The history of the Bohemians, Poles, and several other Slavic races, as well as the Armenians, provides remarkable parallels, and among all these nationalities hopes are now high that in the peace that will follow the war their elemental wrongs will be righted. Several of these peoples are actively participating as belligerents. The Jews as a people have joined neither one side nor the other. But the Jewish people cannot stand by and simply look on with folded arms. We must take other action after careful deliberation and with a thorough understanding of what is at stake.

But we can do this only if the Jews of America *will* that those conditions shall end, and undertake to express that will through action. What this action shall be involves decisions which are both difficult and serious, decisions on which reasonable men will necessarily differ. The Jews are a people of thinkers; and they have a passion for freedom. If we acquiesce in decisions made *for* us and not *by* us, it can only be because we are practically indifferent; because we do not care, or, at all events, do not care enough, to assert our views. And if we do not care enough to assert our views, we certainly will not care enough to make the sacrifices necessarily involved in saving our brethren, and solving the problem of the Jewish people.

Fifth, there are certainly a large number of Jews in America who are not indifferent to the suffering of their brethren abroad, or to the injustice to which these are subjected. There are a large number of Jews in America who are eager that something should be done to remove the causes of their brethren's misery. These Americans have views differing widely from one another as to what can be done, and

what ought to be done, and how it should be done. They ask to be heard on these questions through their duly constituted representatives; and they ask also to hear the views of others in order that the different proposals may be subjected to the test of public criticism. They deem it necessary that in view of the grave and difficult problems involved, the minds not of a few, but of many, should be turned towards their solution. It is for these reasons, among others, that they have demanded a Congress, and have demanded that it be convened on a democratic basis, and that the proceedings shall be made public. The deliberations of such a Congress would be enriched by the public discussion from others who are not delegates to it. And the Congress itself will create needed public opinion in support of the measures which it determines upon.

Sixth, but the Congress is essential also for other reasons. Besides those Jews who have already given evidence of their readiness to aid in remedying the condition of their brethren, there are many in America whom the present need of action has failed to rouse. They are indifferent largely through lack of knowledge. We have such faith in our people as to believe that with most of them knowledge will overcome indifference and will lead to active participation in the effort to solve our people's problem. We must bring home the situation to those seemingly indifferent and make clear to them not merely the intensity of existing suffering, but also that they can play a part in ending it, and indeed they must do their part or we cannot succeed. And for the awakening of interest the Congress is a necessary means.

Seventh, the Congress is not an end in itself. It is an incident of the organization of the Jewish people—an instrument through which their will may be ascertained, and when ascertained may be carried out. In order that their will may be ascertained truly the Congress must be democratically representative. In order that their will may be carried into effect, the decision of their delegates must be supported by Jewish public opinion, intelligent, widespread, and expressive of deep conviction. In order that there may be a definite public opinion to be so expressed, the Congress must be preceded by public discussion. In order that the decision may be the wisest possible, the Congress should be preceded by general public discussion of the measures proposed. The decision must embody the wisdom, not of the few,

however able and public-spirited, but the thought and judgment of the whole people. The support must be active; it must be financial as well as moral. It must be the support of the million, not of a few generous, philanthropic millionaires. In order that the support may be adequate, the Congress must also be preceded by such organization of the Jews of America as will ensure their co-operation in carrying out such measures as shall be decided upon. The Congress is not to be an exalted mass-meeting. It is to be the effective instrument of organized Jewry of America.

It cannot be effective if its functions are limited to the passing of resolutions, however carefully framed. Those whom the Congress authorizes to act for the Jewish people must have the actual support of the Jews of America. They must not only be prepared to act, but must be supplied with the means to do so.

Such being the necessary function of a Congress, it must be clear that there can be no substitute for it. The meeting of the organization presidents for an exchange of views, called by Mr. Kraus of the B'nai B'rith to be held October 3rd, is a proper beginning of the discussion of the grave problems involved.

There should from time to time be many such gatherings not only of those whose official positions place upon them special responsibilities for Jewish interests, but also of many others whose special study of the questions involved enable them to make valuable contributions to the thought on this subject—and whose intense interest will aid in the great task of effective organization. On the other hand, the conference which the American Jewish Committee proposed should be held on October 24th, would be not only futile but dangerous. It would be futile because the conference would purport to be an assembly authorized to express the will of the Jewish people, whereas it would in fact have no such mandate and would lack the necessary support of the Jews of America without which its action would be ineffective.

Such a conference would be positively dangerous to Jewish interests: first, because its deliberations would be secret, and the fact of secrecy would lead necessarily to suspicion and misrepresentation of Jewish purposes and deprive us of non-Jewish support. We seek action in the open so that there shall be no misunderstanding either among our own people or among our fellow citizens, as to our aims and methods. We need to avoid any real or seeming secrecy of action

and of aim which might cause mistrust and which might breed prejudice. The ends which the Jewish people seek are so simple and their difficulties are so well known that no one has yet been able to state an adequate reason for holding a Jewish conference in secret.

Secondly, such a conference would be dangerous because it would discourage activity on the part of the Jews of America who would assume that the conference had relieved them of the necessity of doing their part.

In the third place, such a conference, in secret, would inevitably prevent Jewish unity, because a large part of the Jews of America have definitely declared against it. Of the organizations originally invited, those to which more than two-thirds of all the delegates arranged for have been assigned (and which together have a membership of more than 400,000 persons) have already refused to participate in the conference.

Let us bear in mind the statement made by Earl Derby in 1876 to the memorial which Baron Worms presented in the hope of securing a removal of the Roumanian disabilities: "I cannot advise you better than to appeal constantly and on all fitting occasions to that which you will find stronger support than that which any government can give you, namely, the support of general public opinion." The demand for democracy in the consideration of Jewish problems is not a matter of form. It is of the essence. "Democracy is not a mere form of government; it does not depend on ballot boxes or franchise laws or any constitutional machinery. These are but its trappings. Democracy is a spirit, and an atmosphere, and its essence is trust in the moral instinct of the people." This is a matter which every true American, and particularly every true American Jew, should take to heart.

PALESTINE AND THE JEWISH DEMOCRACY

THREE centuries ago Elder Brewster, reviewing the first year after the landing of the Pilgrims at Plymouth Rock, said: "It is not with us as with men whom small things can discourage or small discontents make them wish themselves home again." Small discontents! Out of the hundred who came in the *Mayflower* fifty-one had died before the close of the year, and at times out of the forty-nine survivors only seven were fit to work. Yet the spirit of the Pilgrim Fathers did not falter. To that spirit we owe in large part the Commonwealth of Massachusetts and that which we prize most in American life.

With a like spirit the Jewish Pilgrim Fathers turned a generation ago to Palestine, and began to establish those settlements called colonies, through which Zionism is becoming a reality.

To avoid misunderstanding, let me say at the outset what Zionism is, and particularly what it is not.

First, it is not a movement to transport all the Jews in the world to Palestine. That, indeed, would be impossible, for Palestine is only about the size of Massachusetts. There are 14,000,000 Jews in the world, and Palestine could not accommodate more than one-fifth of the number.

Secondly, it is not a movement to transport compulsorily a single Jew to Palestine. For Zionism is pre-eminently a movement of freedom, to give the Jews more liberty, not less—the liberty which practically every other people in the world enjoys—the liberty to live in the land of their birth or adoption or to go to the land of their fathers.

Thirdly, neither is it a movement to wrest the sovereignty of Palestine from the Turkish Government. Zionism is a movement to give the Jews a home in the land of their fathers where the Jewish life may be lived normally and naturally, and where the Jews may in time hope to constitute a majority of the population and look forward to what we have come to call home rule.

For nearly two thousand years, since the destruction of Jerusalem

and the Second Temple, the Jews have longed for a return to Palestine. They have been buoyed up by this hope. The prayer of the devout has been, "Next year in Jerusalem." For more than eighteen centuries that prayer has been repeated in all parts of the world; and now Zionism has come to make that dream a reality in the same way that other dreams of the world have been made realities—through the intelligent devotion and self-sacrifice of those who were true to their ideal. It was thus that the dream of Italian unity and independence became a reality. Garibaldi at the side of Victor Emmanuel entered Rome, the capital of a free and united Italy, half a century after the charcoal-burners of the Abruzzi dreamed their dream of freedom and Mazzini framed the plan of a united nation. And we all know well the dream of Irish Home Rule, which has recently come true.

The Jewish Pilgrim Fathers a generation ago took the first active steps to convert the dream of Zion into a reality. They were a small body of Russian and Roumanian Jews. Instead of following their brethren to America, where a hospitable welcome would have awaited them, they turned to the East, to the land of their fathers. They came from countries where they had been persecuted and oppressed, but it was not only persecution and oppression that led them to Palestine. They would have found freedom from that in America. They were deeply devout, but it was not the desire to practice their religion untrammeled that led them to Palestine. They would have been free to practice it elsewhere. What led them to Palestine was largely this: they felt that the longing that had animated the Jews during the many centuries of exile was a longing of deep significance which represented the struggle for life of an ancient and gifted people, the struggle of a people who could again do for the world things as great and glorious as they had done in the past, when they gave to the world its great religions and largely its system of morals. They felt that, particularly at this time, the Jews might make a contribution greater than ever before, because the world, or at least America, had set for its aim democracy and social justice—ideals for which the Jew had been striving, under the name of brotherhood and righteousness, for twenty-five hundred years. And those Jewish Pilgrim Fathers were filled with a deep sense of nationality, a strong desire for self-government, a desire for natural, normal development, as well as a longing to live in the land of their fathers, where there was the inspiration

of their noble traditions to work out again a great contribution to the world's civilization. And for this work they had been particularly fitted by those hardships and persecutions which only men of stout heart and strong faith are able to survive.

So these small bands set out from Russia and Roumania for Palestine. The worldly wise among the Jews shook their heads. They spoke of Palestine gloomily. Palestine the abused, the misgoverned, where neither life nor property was safe; Palestine, believed by them to be sterile, offering nothing comparable with the riches held out by the New World which beckoned a welcome to the Jews. The worldly wise had much to support their forebodings, because the Jews who went, went to a land they knew not, to a land long suffering from all the evils of a long-continued misgovernment; but they went prepared for whatever sacrifices might be demanded by their great cause. They had been separated from the land for many centuries, for by law in Russia and Roumania Jews were forbidden to own land. They knew nothing of the soil which they were to till. They did not know the language of the people among whom they were to live. They knew nothing save that this was the country for which their fathers and their fathers' fathers had longed, the country which they hoped and believed would solve the Jewish problem and enable their people to make other great contributions to the civilization of the world.

The first years of these Jewish settlers resembled the first years of the Pilgrim Fathers at Plymouth. They had to fight death and disease. Misgovernment of the country had brought malaria into it. The land appeared to be exhausted, and they knew not how to enrich and till it. Many died, and those who survived lived only to be confronted by obstacle after obstacle. Failure followed failure; but they were determined, and every failure meant new effort; every mistake was a teacher. Plowing as they did in the field of faith and reaping experience, these men and those who joined them succeeded at the end of twenty-five years in establishing the two great propositions upon which practical Zionism rests: (1) that Palestine is fit for the modern Jew, and (2) that the modern Jew is fit for Palestine.

Malaria was conquered. The settlers learned to till the soil and saw the possibility of a land again flowing with milk and honey. They went about the task not only of settlement but of building a new Jewish civilization.

First came the revival of the Hebrew language. We have long thought of Hebrew as a dead language, like the Greek and Latin, but it has come to life. A great part of the Jews in Palestine speak it today as their ordinary language of intercourse. Those who have come from many different lands, speaking as many different tongues as those spoken at the Tower of Babel, have joined in learning and speaking the Hebrew tongue—not Yiddish, but the Hebrew language of old. They have developed this language of the Old Testament so that all conceptions of modern philosophy, economics, politics, science, may be expressed in Hebrew. It has become the language of the instruction in the schools, the language of the press, and of the platform.

Education has ever been treasured by the Jewish people. Civilization without education is inconceivable to them. And so they have established a school system almost complete. But for this war it would have been capped with the establishment of the first department of the University of Jerusalem—the medical department. The war interrupted that forward step, and also the opening of the Institute of Technology at Haifa. But before the war there had been established high schools in which were fitted, not only Jews of Palestine, but hundreds who came from Russia and Roumania, so thoroughly that they could enter, on equal terms with the European students, any of the great universities of Austria, Germany, and France. But it is not only in things material and intellectual that the Zionists undertook to develop civilization in Palestine. They sought otherwise to carry forward the work of the Jewish spirit. Carlyle has said: "Two men he honors and no third. The toilworn craftsman who conquers the earth; and him who is seen striving for the spiritually indispensable." Had Carlyle lived he would have sent greetings to those Jewish settlers of Palestine; for they have both tilled the soil and have sought to establish the principles of democracy and social justice for which we of America are now striving. In their self-governing colonies, over forty in number, ranging in population from a few families to some two thousand, they have pure democracy, and, since those self-governing colonies were establishing a true democracy, they gave women equal rights with men, without so much as a doubt on the part of any settler. And women contributed, like the men, not only in the toil of that which is narrowly called the home, but in the solution of broader difficult problems. One of these problems was law and order. For the

Jewish settlers in Palestine had in some respects problems similar to those of our own early settlers—the Bedouins taking the place of the Indians. Their farms and settlements needed protection. The Turkish Government does not, among its functions, assume that of policing. The Jews therefore hired Arabs to guard their colonies, and mounted Arabs protected their land. But after a number of years a woman—one of the women voters—said: "We must protect ourselves. We must establish our own mounted police." And the Jewish young men, largely sons of the original immigrants, responded; and out of the suggestion of a woman came the great Palestine institution, a Guild of Honor among the Jewish youth of the land.

The Jews carried out otherwise principles of democracy. Among the problems which they undertook to solve is one with which we have been particularly concerned this last year—the problem of unemployment. The prosperity of the Palestine colonies had depended largely upon its export trade. The orange crop, grapes, the olives, the almonds, are the crops from which money had been brought into Palestine. Even wheat has been exported in considerable quantities, and sold principally to Italy, because it is well suited to the manufacture of macaroni.

When the war came, their trade practically ceased, because the export markets were closed to them. It ceased wholly later because, when Turkey entered the war, it prohibited all exports. This stoppage of trade naturally brought on unemployment. The industries dependent on the export business closed down. Moreover, there had been almost a boom in building in Palestine just before the war, because the immigration had increased largely, the last year before the war being the most prosperous the colonies had ever had.

But when the war began the Zionists found themselves confronted with this situation: builders, planters, and manufacturers, employing comparatively large numbers of Jewish workmen, were forced to close or curtail operations and the workmen were thrown out of employment. The Zionists recognized that the burdens consequent on this common disaster ought not to fall on that part of the Jewish population alone, but should be borne by the entire Jewish people. They undertook to find employment for those who had lost their jobs. In part they did this by going on courageously with public works, with road-building and drainage work, with the construction of a public

hospital, and similar undertakings. That helped some. They suggested that the farmers look ahead and do upon their farms work that would add ultimately to the value of these farms. That took care of a large part of the workmen in the country districts. But there were many unemployed Jewish workmen in the cities, which had been growing incident to the growth of the colonies. What could be done there? The Zionists studied the problem, and found that the reason many of the industries closed down was not that the owners wished to do so, but that they were unable to get the money to continue to carry on their business. They therefore undertook, to the extent of their available funds, to lend money to those industries which were relatively large employers of labor, to the end that those for whom they held themselves responsible should not be put in the position of takers of charity. To this end those who had steady jobs suffered their salaries to be cut one-fourth, one-third, and in some cases even more, and those who had not steady jobs were enabled to work at least part of the time under a fair distribution of that work which it was possible to provide for them. Thus did this people, struggling against the hardships of the war, without the ability to call upon a government to aid them, dependent largely only upon themselves for help, undertake to do what social justice demands. And what they did in this emergency they have long been doing, or attempting to do, through their institutions in various fields of public activity.

Notable among the Zionist institutions is the Jewish National Fund, formed to purchase land as the inalienable property of the Jewish people in Palestine. A large part of the settlers own individual property, but the Zionist organization determined that the land it acquired should be the property of the Jewish people, remaining national domain and leased to the settlers at a rent which would not allow of unearned increment. That Jewish National Fund, besides being used for acquiring land, has been devoted to afforestation and to securing proper housing conditions for Jewish working-people. Funds have thus been lent for the purpose of erecting proper workingmen's dwellings in the colonies and cities.

This Jewish National Fund, used thus for the Jewish people, is, in the most exact sense, a fund of the people. Hundreds of thousands of persons have contributed to that fund. They have contributed also to another fund—the Jewish Colonial Trust, of which the Anglo-

Palestine Company is the leading bank of Palestine. To purchase the shares of that bank hundreds of thousands of people have contributed. I have been told that in Russia and Galicia, where for centuries poverty has been so deep, there are people who pawned their coats to raise money to buy a share in the Jewish Colonial Trust, in order to help carry out the national ideal. The bank, founded on strictly business principles, is managed also on strictly humanitarian and social principles. Through that bank the Jewish colonists have been aided in many ways. It has enabled them to establish co-operative societies dealing with almost every activity of Jewish life. It has enabled communities to avoid the heavy burdens of tax farming. It has enabled villages to establish a system of irrigation and water supply. And, while thus serving the public welfare, it became the leading bank of deposits and financial institution of Palestine.

In other fields likewise Zionists have undertaken functions which governments should assume, but generally do not. Among their institutions is the Palestine Office, so called, an exalted information-bureau and intelligence office for the prospective settler, which helps to place him in his new home with the minimum of self-sacrifice and suffering on his part, and which acts in many ways as friend and adviser of the Jewish inhabitants in the land of their fathers.

In the glorious times of the past only a small fraction of the Jews actually lived in Palestine, and it is expected that only a small fraction of them will live there even after the longed-for "home" shall have been re-established. But from Palestine came then the spirit which inspired the Jews throughout the Mediterranean countries in Asia Minor, along the Black Sea, in the Euphrates Valley, scattered all over the then known world as they are scattered over the world now. And we may hope that the spirit of that land will touch us here as it did the scattered Jews of old and inspire us with the spirit of nobleness which is in these settlers.

I was talking not long ago with one of the men who went as a pioneer to Palestine. He referred in discussion to another Palestinian, and, as a word of severest censure, he said: "Yes, he is a Zionist, but he thinks of his own interests first. That is all right in other countries, but in Palestine it is all wrong." And as he spoke he made me think of the words which Mazzini uttered when entering Rome in 1849:

"In Rome we may not be moral mediocrities." That is the feeling of the Palestinian Pilgrim Fathers. That should be the feeling of their brethren throughout the world when they think of their great inheritance, of their glorious past—the mirror of the future.

THE *ZEELAND* MEMORANDUM

On the *Zeeland,* August 24, 1920.

A. The objective: To populate Palestine within a comparatively short time with a preponderating body of manly, self-supporting Jews, who will develop into a homogeneous people with the high Jewish ideals, will develop and apply there the Jewish spiritual and intellectual ideals, and will ultimately become a self-governing commonwealth.

The present misery of the Jews elsewhere, together with their traditional longing for Palestine, makes possible the necessary immigration. The San Remo decision, together with the appointment of Sir Herbert Samuel, provides the open door and adequate opportunity for the development to be striven for. The country is in character and location such as to permit of such settlement and development.

B. The special difficulties: So far as we have to deal with them now, arise from the conditions there prevailing which differ from those under which the colonization of other countries has been effected, namely:

(*a*) The land on which the Jews must live and from which directly or indirectly they must earn their living is not *free* land. On the contrary, it is land which must be bought.

(*b*) The land is (in the main) now in a condition which would prevent the individual, even if he owned it free, from gaining there a living by individual investment or effort. That is, he could not raise a crop upon it for lack of water or of drainage or because of malarial conditions. He could not build a house upon it by felling of trees thereon or nearby. He could not utilize it as the site of a factory, for lack of power, there being neither wood, coal, nor oil available. Certain indispensables to making a living thereon and therefrom possible must be supplied in some way by community action. Water, water-power, health (*i.e.,* elimination of malaria), drainage. These, besides roads, and the intellectual and spiritual needs of a Jewish population are indispensable to the development desired.

(*c*) The natural resources, so far as known, are meager and those resources have been in part exhausted and largely abused. What remains is the raw material out of which land and the instruments for utilizing the land may be made. For making the land and the instruments for its utilization, a large community investment is necessary. Ultimately that investment may be made financially remunerative by and to a thrifty, hard-working people. But between the making of the necessary outlay of capital and the period when it can earn a financial return on the amount so expended, there must elapse a long time. This long time must elapse partly because the facilities provided must exist long before they can be fully utilized, partly because much time must elapse before the pioneers can bear reasonably heavy charges for use of the services so rendered. It is necessary, therefore, that the raw material called land and the services to be rendered by such public utilities shall be furnished under conditions which do not call for immediate return upon the investment made. In other colonies such investments, where indispensable, are made by the government, local or imperial, through loans secured primarily by the taxing power of the empire or the locality. We are denied this resort: (1) because we wish to control the concessions, (2) because England could not and would not lend its credit, and (3) Palestine could probably not, without unduly increasing the burden of taxation, provide for the same in any large degree by taxation.

(*d*) The present unremunerative character of these needed investments of capital is intensified by the present high cost of construction —yet we cannot wait until prices fall. Their need is urgent. The expenditure must be made immediately, like a war expenditure, regardless of cost, because speed in settlement is indispensable. For the same reason we cannot, as in the case of other colonial development, leave would-be settlers to work out the problems slowly and painfully through successive failures to ultimate success. We must succeed reasonably soon in effecting the settlement, partly because others will intervene, partly because our effort will be ever on general exhibition and subject to hostile criticism.

C. How then shall the money be raised for these general fundamental public utilities? It cannot be left wholly or largely to private enterprise, *i.e.*, investment in the ordinary sense of the term, because the capitalist would not, with other investment opportunities at hand,

incur the risk without the prospect of corresponding profit, and this, in view of the present money conditions and cost of installation, does not exist at all, or if it exists, could be effected only through exploitation contrary to the Pittsburgh program. Independently of such program, such exploitation would not be tolerated. The only alternative appears to be for the Jews to raise the necessary funds and administer them. As the Jews of Palestine cannot provide any large part of these funds themselves, they must come from the Diaspora.

To buy the land and to provide the utilities for making it productive, directly or indirectly (including in time afforestation of land acquired and perhaps even harbor facilities), such large contributions from Jews of the Diaspora will, for the immediate future and for many years indeed, be indispensable. These contributions may properly take the form of investment in stock, like that in the Jewish Colonial Trust or the Zion Commonwealth, as in that form no obligation of paying a return would be incurred. But the contributions must not take the form of investment or bonds bearing interest, because interest cannot be earned for a long time to come and could be paid only from new contributions. We must not make any representations, expressed or implied, that any return by way of dividends may be expected soon on the stock to be issued. The obligation assumed must be limited to the assumption of the duty to expend the money wisely and efficiently, *i.e.*, in a proper capital outlay in the best possible manner and with the greatest possible economy. If such an expenditure of the funds is made, the outlay will be a good investment. That is, one from which the Jewish people, and eventually individual owners of the shares of stock also, may hope to receive a proper return.

Besides acquisition of land and the installation of recognized indispensable public utilities and afforestation, there is a wide field for contribution by Jews of the Diaspora of funds to be treated as capital investments.

(*a*) *Financial Institutions.* Credit for the development of landed enterprises as well as industrial and commercial enterprises and municipal undertakings, is not so clearly dependent upon community action as furnishing credit for the installation of essential public utilities; but community, as distinguished from private, institutions for providing such credit will be of great service in furthering the development which is our objective. Such a community provision will lighten the

necessary interest burden; it will tend to prevent discrimination in the grant of credit, and better insure its being granted for purposes subserving the desired development; and it will also tend to avert that hostility to capitalists which arises from the control by private individuals and concerns of the sources of credit. Included in the proper field for the granting of temporary credits are the consumers' and producers' co-operatives.

This in general is the service which the Jewish Colonial Trust and the Anglo-Palestine Company undertook to render, and have in part rendered, heretofore. They are unable to continue to render these services adequately now; partly because their capital is inadequate; partly because a large part of the existing capital is tied up in loans to the Zionist Organization or the Zionist Commission, partly because it is tied up in real estate and real estate loans.

The working capital of the Jewish Colonial Trust and the Anglo-Palestine Company should be increased so as to enable them to supply the demand for short-time commercial and industrial loans. This must be done in part by the increase of capital issues; in part by paying off the Zionist Organization and the Zionist Commission loans; and in part by disposing of the real estate and real estate loans. To these ends there should be: (*a*) A sale of new Jewish Colonial Trust and Anglo-Palestine shares of stock. (*b*) Cash funds should be raised to pay off the existing Zionist Organization and Zionist Commission indebtedness. (*c*) A land and mortgage bank should be created to purchase the immobile assets of the Anglo-Palestine Company and to make proper real estate loans in the future. The sale of shares in such land and mortgage bank, like the sales of shares in the Jewish Colonial Trust and the Anglo-Palestine Company, may properly absorb a large amount of money, and on such shares a dividend should be earned and a modest one paid from the start—the balance of earnings being used to build up a surplus.

(*b*) There is pressing need in the towns, in order that newcomers in commerce and industry may be housed, that very modest dwellings be constructed. This should be done on land acquired for the Jewish people. The cost of building such houses now is much greater than it probably will be a few years hence, owing to war inflation and primitive conditions of the country. If men are to be housed in buildings constructed under present conditions and must pay now and forever

after rent sufficient to meet interest and sinking fund charges, the rent will be prohibitively high. A part of the cost of necessary new buildings may properly be treated as a war expense because it is due to temporary conditions and it is proper that this extra expense be borne as such by the Jews of the Diaspora. In other words, the return on their investment may properly be less than a fair return on the whole sum expended if treated as an investment made today. There may properly be expected a very small return thereon, by way of a dividend on shares of stock, representing the cost of these urban dwellings so constructed. But it should be made clear in selling such stock that the houses so constructed will have to compete in renting later with houses to be built under conditions when building will cost much less in pounds and when the cost of money, measured at the current rate of interest, will be much lower. The building investment may be compared with that now being made by the London County Council.

(*c*) *Educational facilities and research institutions.* These, likewise, may properly be aided by contributions from the Diaspora for expenditures, both as capital outlay and for running expenses. The research incident to a new country—the knowledge of its resources, its possibilities, defects, and diseases and how to deal with them—is absolutely an expense proper to be borne by the community. It is an outlay demanded by a prudent administration of the Government. It should properly be borne by the Government of Palestine. But many new countries cannot afford such prudent expenditures, *i.e.*, cannot bear the burden of taxation which would be involved in providing by taxation of a sparse and struggling population to the extent required to meet cost of such research. Poverty in such cases may compel a country to be wastefully ignorant. Moneys for this purpose must, unless there is to be a very slow growth of the desired knowledge of local conditions and needs, be provided from without.

To a certain extent money required for educating individuals, particularly in higher education and for vocational training, may properly be so provided also. But narrow limits must, in this respect, and for the reasons following, be strictly observed.

D. The development which is our objective is impossible except through a manly, self-supporting population. The conditions requiring speedy settlement, taken in connection with the character and

conditions of the country above set forth, prevent our securing such a population by the process of letting the settlers shift wholly for themselves, so that only the fittest would survive, and of relying upon the old common incentive of striving for a fortune to induce the requisite sacrifices. We are compelled by the present conditions of the country and political requirements to create ourselves those new conditions under which self-support can alone become possible. But in doing so we must be careful to go no step further, otherwise we shall demoralize our settlers and make success not only impossible, but also develop a population of undesirables. Our care must, therefore, be to determine in what respect aid may be given without sapping independence and preventing or destroying the prevalence of manly self-reliance on the part of the individual settlers. To me it seems that we may go so far as to provide the new conditions and facilities above outlined, but not a hairbreadth further. That is, we may supply land, water, health, afforestation, credit facilities, some dwellings, institutions for necessary research and a limited amount of education, without necessarily debilitating and demoralizing the inhabitants. We cannot attain our objective of a manly, self-supporting population unless the settlers are made to realize that they must, and unless they actually do incur, in some form, hardships equivalent to those incurred by hardy pioneers in other lands. These hardships will be of a different character, but must be equally severe if we are to succeed. The slogans must be "No easy money in Palestine," and "No easy living" for any human being. And the Zionist official must set the example in simple living, high thinking, and hard work.

E. Immigration: It is clear that the Zionist Organization, as such, should not grant any financial aid, directly or indirectly, to effect any immigration to Palestine. But it is not clear that it may not properly grant certain temporary aid to those who actually reach the country. It is, however, highly desirable that the Zionist Organization of America, in particular, should not undertake to grant such aid, unless it become absolutely necessary that it do so. It would be much better, for instance, to have any such aid granted through the Joint Distribution Committee and let the International Zionist Organization and that of America confine themselves to work for immediate constructive measures in the upbuilding of the country. In other words, if it could possibly be managed, the task of caring for the immigrant from

his arrival until he is absorbed in the industrial, agricultural, or commercial life of the country, had better be assumed by some other organization. This is perhaps not logical, but the dangers attendant upon the other course are very great. On the other hand, it may be advisable to undertake some definite agricultural projects, by which immigrants may be permanently absorbed. We are committed to making a success of Balfouria. Experience gained in that project and that to be gained elsewhere in other land cultivation projects may show the way to that successful industrial agriculture which should be developed by us in Palestine. It is politically and socially important that Palestine should become largely self-sufficient.

F. The Palestine Government under the High Commissioner is about to issue a *Palestine National Loan* of £2,500,000. It is imperative for the success of the entire work that this be promptly and widely subscribed, for American Jewry must do its share. And to this the Zionist Organization, co-operating with all others interested in the development of Palestine, must at once devote all its energies.

G. Funds: It follows from the foregoing statement of objectives that the Zionist Organization may properly undertake to raise funds for the following purposes:

(*a*) *Investments:* (1) Palestinian Government Loan; (2) Jewish Colonial Trust, Anglo-Palestine Company, and a land mortgage bank.

(*b*) *Quasi-Investment:* (3) Zion Commonwealth; (4) stock of Hydro-Electric, Power, Light, Irrigation, and Drainage Plant; (5) dwelling projects; (6) certain agricultural undertakings.

(*c*) *Gifts for:* (7) Medical Unit; (8) research in aid of Palestine, Applied Science; (9) afforestation; (10) university, libraries, museums, and the like; (11) land purchase; (12) current educational needs, limited in extent, leaving a large part of the educational burden on the Palestinians.

H. Application of funds: Insofar as we undertake to solicit funds for any purpose, we must undertake to see that they are properly applied. If, and so far as may be necessary for that, we must make the application through companies, boards, or officials controlled by us. But it is to be hoped that such an improvement in administration by the International Organization may soon be effected that this special action may not be necessary generally.

Those who contribute funds to any of these purposes must have

the assurance that all the funds they so contribute will be applied to the purpose for which it has been specifically contributed, whether as an investment or as a gift. To this end all funds required for:

(*a*) Administration expenses of the World Zionist Organization in all of its activities, whether in Palestine or in the Diaspora, must be covered by the Shekolim.

(*b*) Administration of the Zionist Organization of America and of local organizations must be raised by membership fees or specific gifts for purposes of administration and propaganda.

(*c*) No part of the money contributed by way of investment or gift should be used in defraying the expenses incurred in raising the money unless the part so to be used shall be clearly set forth in the prospectus in advance of any collection, and there must at all times be full and frequent accounting.

I. The instrumentalities by which these special functions to be undertaken directly or indirectly through Zionist efforts should be operated, must differ according to the needs of the service undertaken. For instance, there should be a competent and devoted Board of Trustees formed, who will be responsible to the Zionist Organization of America and the Joint Distribution Committee for the work of the Medical Unit.

J. Reorganization: I purposely abstain from considering the form which the reorganized Zionist Organization of America is to take for the very obvious reason that this raises many complicated and different issues. The solution of the reorganization problems can only come through the deliberations of a small working committee who will consider all the proposals that may be submitted and draft a maturely considered plan for action by the Executive Committee. However, the character of the reorganization will, of course, seek to meet the new problems confronting the organization. Inevitably, the form of reorganization to be involved must be such as to enable us effectively to meet the practical problems confronting the Zionists in the concrete and pressing re-establishment of Palestine. The form of the organization must translate into actualities the phrase used by all of us that "we have reached the parting of the ways"; that we are no longer a propaganda movement except the propaganda that comes from undertaking and achieving concrete enterprises.

K. Co-operation: Furthermore, we must never lose sight of the fact

that our plans should be such as to elicit the full co-operation of all Jews, those who do not want to build up the Zionist Organization, but who do want to share with the Zionist Organization in the upbuilding of Palestine.

ADDRESS TO WASHINGTON CONFERENCE

I AM here gladly at the suggestion of the chairman, because I am convinced that a group of American business men of proved ability and loyalty to the Jewish cause can, co-operating under the leadership of Mr. Warburg, assure a Jewish Palestine.

I had for years been much concerned as to what that necessary act of supplying money, in which I was myself taking a small part, would have in the development of the people on whom we have to rely.

I am happy to say that the years have removed from my mind all doubt on that question. On that subject, as on many others, in an incredibly short time, when you think of the development of peoples, that question and others of less importance have solved themselves.

So marched the years.

Then came this thing,* which from many standpoints must be talked of as a massacre of helpless old people and peaceful religious students, a terrible thing to have happened in any part of the world. But there are compensations.

There, too, as I see it, the first and most fundamental thing is that it has shown the metal of the people whom we have been aiding in these years to make life in Palestine possible and to develop it. They have shown manhood, courage, and ability to look out for themselves, which is all that we could wish and all that any people on earth could wish for their pioneers in a new and difficult situation.

Jewish intelligence, Jewish courage, Jewish persistence have all been manifested, and I know of nothing certainly in recent history finer than the temper shown by these men and women, and I would almost include the children, under the perils which confronted them in Palestine. The massacres occurred where there were the old, the infirm, those unused to effort in the world. Largely, the old people in Palestine, not the newcomers, suffered.

* The reference is to the killing of Jews by Arabs at Hebron and other places in Palestine in August and September, 1929.—*Ed.*

I say again, because it is always recurring to my mind, that there is nothing in this whole situation, nothing, to my mind, in the Jewish problem anywhere, that is as important as the character trained by 2,000 years of suffering and of effort. Therefore, knowing of that country and its possibilities, I have no fear of the Arab question or of any other.

I have no fear, because I know in my heart, as my reason tells me from all that I have observed, not only there but elsewhere in a life that is now beginning to seem long, that those Jewish qualities are qualities that tell.

For one, I am not sorry that our representatives have been tested. It gives me infinitely more courage, infinitely more desire to help them than I ever had before. Of course, there are risks—there are risks in everything.

The Jews have made their success in the world in very different ways. Whether it be in money or in thought, they have used their imagination, their courage, their intelligence to do things that were not always safe. By using intelligence, the power of adaption, by a readiness to think where others do not think, they have achieved great things, great successes wherever they are.

That success I am convinced is open to us now in Palestine, and I believe the conditions are really very favorable. I was strongly in favor, and still am, of the Balfour Declaration, because I realized that it was as much for British interest as for our interest that Palestine should be developed by Jews. I reached that conclusion after very close relations with Britishers who were here during the war.

But even before that I believed that such a thing as the Balfour Declaration was possible because I believed it not only to be in accord with British interests, but consistent with the interests of all the European powers and consistent also with the interests of the Allies.

I found in Palestine, and I believe it is still true, that the danger of the Arabs is grossly exaggerated. There always has been danger from the earliest times that man knows anything about, of the incursion of Bedouins from without. They crossed the Jordan. They came over the southern boundary. But even ten years ago our people were able to protect ourselves against them and there grew up a respect for our people, for the Shomer, the mounted Jewish police which guarded the colonies.

And I think there were few things in Palestine that gave me more of a sense that our people could look out for themselves than the Arabs' legend which has grown up in regard to the ability of one of the Shomer as a sharpshooter.

Our people can take care of themselves and our obligation or privilege is to enable not only those who are there to develop, but to assist hundreds of thousands of others who are ready to go there, who are ready to share in that enterprise, who are eager to work and who, if they go there, will in my opinion make Palestine perhaps, all things considered, the safest place in the world.

For when the Jew is there in numbers there will be no anti-Semitism. There will be Jewish joy as well as Jewish sorrow. I found among those who had gone to the colonies far more of joy than of sorrow. They reminded me of that self-reliant attitude of our own pioneers of the West and of those who had made the East a few centuries ago. So I came to tell you what I believe and what I think you can do.

Do not with money only, because money has been merely an instrument of the Jew. Brains have been his chief commodity, and character, will, and strength of every kind. But money is as necessary to these enterprises as is water to the land. And we of America ought to provide it.

List of Articles and Addresses

1910 December 9th	Interview in the *Jewish Advocate* of Boston, pp. 1, 8, reprinted by De Haas, pp. 151–4.
1913 March 20th	Speech at a meeting held at the Plymouth Theatre, Boston; a small portion of this was reprinted by De Haas at pp. 154, 155.
May 18th	Speech at a meeting of the Chelsea Young Men's Hebrew Association, reprinted by De Haas, pp. 155–9.
1914 August 30th	Acceptance of chairmanship of the Zionist Provisional Emergency Committee in New York City, reprinted by De Haas, pp. 161, 162.
October	Address entitled "The Rebirth of the Jewish Nation," reprinted by De Haas, pp. 163–70.

1915	The same address was published as a pamphlet by the Federation of American Zionists in somewhat amplified form under the title "**Zionism and Patriotism**" and is so here reprinted in full.
January	Address delivered at a conference of Menorah Societies entitled "A Call to the Educated Jew," published in *Menorah Journal*, January 1915, vol. 1, pp. 13–19, reprinted by De Haas, pp. 190–200.
June 26th to 28th	Addresses delivered to Boston Zionist Convention, reprinted by De Haas, pp. 201–6.
June	Address delivered before Eastern Council of the Central Conference of Reform Rabbis, entitled "**The Jewish Problem: How to Solve It**," published as a pamphlet by the Zionist Essays Publication Committee, reprinted by De Haas, pp. 170–90. This paper is here reprinted because of its significance.
September 27th	Address delivered at Baltimore, Maryland, entitled, "**Jewish Unity and the Congress**," published as a pamphlet by Jewish Congress Organization Committee, here reprinted despite certain similarities to the later address, "Jewish Rights and the Congress."
November	Address delivered at Washington, D. C., entitled "Democracy in Palestine," published in *The Independent*, November 22nd, p. 311, practically all contained in the later article, "Palestine and the Jewish Democracy."
1916 January 5th	Article in *The Outlook*, pp. 36–40, entitled "**Palestine and the Jewish Democracy**," reprinted in full herein.
January 24th	Address delivered at Carnegie Hall, New York City, entitled "Jewish Rights and the Congress," published as a pamphlet by the Jewish Congress Organization Committee, reprinted by De Haas at pp. 218–31.
July 7th	Address delivered at Zionist Convention in Philadelphia, Pennsylvania, entitled "Duties of Jewish Democracy," reprinted by De Haas, pp. 206–12.
1920 July 7th	Address delivered at Zionist conference in London, entitled "The Upbuilding of Palestine," reprinted by De Haas at pp. 233, 234.

July 14th	Statement made to the American Delegation in London, entitled "Reorganization Plan," reprinted by De Haas, pp. 241–59.
August 24th	Memorandum prepared on S.S. *Zeeland*, subsequently known as **The Zeeland Memorandum**, published, November 1920, in *The Maccabæan* pp. 103–106, under the title "Proposed Palestine Policy," reprinted by De Haas, pp. 260–72, and also here.
August 29th	Address before the National Executive Committee in New York City, entitled "Review of London Conference," reprinted by De Haas, pp. 235–41.
1921 June 10th	Address in New York City entitled "Social Economic Policy," reprinted by De Haas, pp. 273–8.
1923 May 27th	Address at a conference in New York City, entitled "Confidence in Palestine," reprinted by De Haas, pp. 279–84.
1923 May 28th	Address at a conference in New York City, entitled "Men as Natural Resources," reprinted by De Haas, pp. 285–6.
June	Address delivered in Boston, entitled "Taking the Initiative in Palestine," reprinted by De Haas, pp. 286–92.
September 9th	Address delivered in New York City, entitled "Self-Help in Palestine," reprinted by De Haas, pp. 292–5.
1924 February 17th	Letter to conference in New York City, reprinted by De Haas, p. 296.
1929 November 24th	**Address** at a conference in Washington, here reprinted, as reported in the *New York Times*, November 25th.

Part VI

PUBLIC SERVICE

Editor's Note

The keynote of Justice Brandeis's character is his dedication of mind and energy to the service of the public. This showed itself early in his vigorous attacks upon the insurance companies, the railroads, and other utilities, and in his support of labor legislation. His career as people's advocate is well portrayed by Ernest Poole in the article which appeared first in the *American Magazine* for February 1911, and later as foreword to *Business—a Profession*. Some of Mr. Brandeis's views on the lawyer's function in the battle of the weak against the strong and his discussion of other subjects of a general nature follow.

ADDRESS ON CORRUPTION

About six weeks ago a member of the Boston City Council was obliged to resign because he had been convicted of the charge of larceny.

A fortnight had not elapsed till a representative of the Legislature and a member of the Board of Assessors was arrested on a charge of conspiracy to defraud the United States through false impersonation in civil service examinations.

And before another fortnight had passed there was opened up a vista of political fraud and corruption, far beyond anything ever previously heard of in Massachusetts. Then a member of our Legislature and an ex-president of our City Council and a leader of the most powerful political element in Boston was charged with bribery and assisting in a system of repeating.

It is to men such as these that we have committed the administration of the government of Boston. This is a stupendous trust. Millions of dollars are subject to their appropriation. Still it is a question of far more importance than administering the business of Boston as a municipality.

The question is can you afford to be represented in the state and in the city of Boston by the class of men that represent us? We cannot afford to be represented by men who are dishonest and reckless of the great heritage of an honorable, glorious past, handed down to us by our fathers.

We spend in Boston annually about $21,000,000. Think of commiting that trust in large part to men who are corrupt and dishonest!

I suggest that present corruption can be shown by a comparison of this past year's figures with those of eight years ago. You will find an extraordinary increase in expenditures by our City Council, and for this there can be found no explanation except that there is a high degree of corruption in our municipal government. This corruption exists in large part in the payrolls, many of whose beneficiaries are paid for work that is not done and never was intended to be done.

In this period of eight years the valuation of realty and personalty in Boston has increased 5 per cent, and compared with that we have a net increase of 13 per cent and an increase of annual tax collection of 17 per cent. How and where has that increase come? I mean an increase per capita of Boston's citizens.

When you take the fire department the increase has been but 2 per cent. On the other hand the increase in the street department has been 82 per cent. Where has the money gone in the street department?

This department carries large numbers of men on the roll that are not fit to work, even if they were willing and desirous. One-half of the men in this department could easily do the work required.

This element of prodigality is seen in all the departments of our city government. Why, the painting of a ward room in Boston took three men 38 days and cost the city $549.

There is a widespread feeling that there is something of the original sin in all of our city departments. There should be a change. An improvement should be made. It is possible to have a good government, not necessarily a perfect government.

Public opinion in Boston is sensitive, and whenever it is intelligently directed against any department of our government, good, salutary reform ensues at once. The purification of our fire department illustrates this.

It is needed that public opinion be aroused, and that good, honest, honorable men be drafted into service as our office holders. We need intelligent public opinion. I don't mean the periodic, spasmodic indignation at wrong. That won't give us good government. It is necessary to force the people to think of this corruption and the great need of action for the public good. It is here that the function of the business man comes in.

The miserable fellows who cannot or will not earn a living for themselves will have to seek elsewhere.

But to do this good citizens will have to organize, formulate plans for their work and delegate each section thereof to competent hands. Then men will follow the various departments of our government from day to day. The light of truth and honesty and honor will be shed in all the nooks and corners of our political system of Boston, and the corrupt politicians will be forced into darkness.

The politician can stand any amount of attack, but he cannot stand the opposition of public opinion. We cannot submit to the dishonor of being represented by those men. We should not allow ourselves to be represented by thieves and convicts.

I AM convinced that such saving is possible through the introduction of scientific management and shall be glad, as a public service, to arrange conferences with these Western Presidents at an early date and point out how scientific management will accomplish these results. I suggest that the Eastern Presidents be invited to attend these conferences.

I must decline to accept any salary or other compensation from the railroads for the same reason that I have declined compensation from the shipping organizations that I represent, namely, that the burden of increased rates, while primarily affecting the Eastern manufacturers and merchants, will ultimately be borne in large part by the consumer through increasing the cost of living, mainly of those least able to bear the added burdens. I desire that any aid I can render in preventing such added burdens shall be unpaid service. Kindly suggest date and place for conference. . . .

Some men buy diamonds and rare works of art, others delight in automobiles and yachts. My luxury is to invest my surplus effort, beyond that required for the proper support of my family, to the pleasure of taking up a problem and solving, or helping to solve it, for the people without receiving any compensation. Your yachtsman or automobilist would lose much of his enjoyment if he were obliged to do for pay what he is doing for the love of the thing itself. So I should lose much of my satisfaction if I were paid in connection with public services of this kind.

What we need in this country is a combination to reduce the cost of production, in place of combinations to increase prices. The result of the application of efficiency methods in many departments of industry have shown that in the United States we have been shockingly prodigal of our resources of labor and material, and we are now facing a situation where the indefinite continuation of the theory of increasing prices every time there comes a demand for more revenue must be checked.

AN ESSENTIAL OF LASTING PEACE

Those discussing the possibilities of a lasting peace usually emphasize one or the other of the following means of securing it:

First. The creation of a Congress of the Nations to determine what should be their relative rights, of an International Court to decide any disputed claims, and of an International Police to enforce the laws of this Congress and the decisions of this Court.

Second. The democratization of the nations, and particularly of the war-making power; so that the people, who must ultimately bear the burdens of war, may decide whether war shall be entered upon.

Third. Disarmament—so that unpreparedness may prevent precipitate action—and encourage sober second thought.

Fourth. The removal of economic causes of war, and pre-eminently the prohibition of preferential tariffs.

These suggestions, if carried out, would undoubtedly tend to preserve peace; for together they would reduce the provocations of war and lessen the facility of conducting it. But is there not a cause of war which is more fundamental than any of those which it is sought thus to remove?

Deeply imbedded in every nation and people is the desire for full development—the longing for self-expression. In the past it has been generally assumed that the full development of one people necessarily involved its domination over others. Strong nations are apt to become convinced that by such domination only does civilization advance. Strong nations assume their own superiority, and come to believe that they possess the divine right to subject other peoples to their sway. Soon the belief in the existence of such a right becomes converted into a conviction that a duty exists to enforce it. Wars of aggrandizement follow as a natural result of this belief.

This attitude of nations and peoples is the exact correlative of the position generally assumed by the strong in respect to other individuals before democracy became a common possession. The struggles of the eighteenth and nineteenth centuries, both in peace and in war,

were devoted largely to overcoming that position as to individuals, to establishing the equal right to development of every person, and in making clear that equal opportunity for all involves this necessary limitation: each man may develop himself so far, but only so far, as his doing so will not interfere with the exercise of a like right by all others. Thus liberty has come to mean the right to enjoy life, to acquire property, to pursue happiness, in such manner that the exercise of the right in each is consistent with the exercise of a like right by every other of our fellow citizens. Liberty thus defined underlies twentieth-century democracy. Liberty thus defined exists in a large part of the western world. And even where this equal right of all has not yet been accepted as a political right, its ethical value is becoming recognized.

The movements of the last century have proved that whole peoples have individuality no less marked than that of the single person; that the individuality of a people is irrepressible, and that internationalism which seeks the obliteration of nations or peoples is unattainable. As democracy rejects the proposal of the superman who shall rise through sacrifice of the many and insists that the full development of each individual is not only a right but a duty to society; so the new nationalism proclaims the right and the duty of each race or people to develop itself fully.

The history of the last century shows the persistence and intensity of this feeling. It made a great and united country out of the Italy which had been declared by Metternich to be but a "geographical expression." It freed Greece. It created the kingdoms of Roumania, Bulgaria, and Servia. It made little Montenegro an independent state. It established home rule in Ireland. It revived the Cymbric language in Wales. It has kept alive the struggle for a free Poland. It made a dual monarchy out of Austria; and the demands of its many other peoples subjected to the German-Hungarian rule have kept it in constant turmoil. If we wish to find the true explanation of the readiness of the European peoples to sacrifice their best in man and property—of their joyousness amid losses which cannot be repaired in generations—we must look deeper for the war's causes than economic ambitions or treaty violations. The fundamental cause is the longing of the people for self-development—for self-expression; and the mistaken belief on

one side or the other that this self-development justly requires the subjection of other peoples.

No peace which is lasting can ever come until the nations, great and small, accept the democratic principle that there is and shall be no supernation, to rise through subjection of others, and the truth that each people has in it something of peculiar value which it can contribute to that civilization for which we are all striving. And until that principle is accepted—and that truth recognized, unrest must be unending. Whatever economic arrangement may be made, however perfect and comprehensive may become the machinery for enforcing the treaties of the nations, those people who are not accorded equality of opportunity for full development will prove a source of irritation; injustice will bring its inevitable penalty; and the peace of the world will be broken again and again, as those little nations of the Balkans have taught us in recent years.

Equal opportunity for all people as for all individuals—that is the essential of international as well as of national justice upon which a peace which is to be permanent must rest. Unless that fundamental right is recognized and granted universally, there will be discord and war in the future, as there has been in the past.

LETTER TO ROBERT W. BRUERE

Refuse to accept as inevitable any evil in business (*e.g.*, irregularity of employment). Refuse to tolerate any immoral practice (*e.g.*, espionage). But do not believe that you can find a universal remedy for evil conditions or immoral practices in effecting a fundamental change in society (as by State Socialism). And do not pin too much faith in legislation. Remedial institutions are apt to fall under the control of the enemy and to become instruments of oppression.

Seek for betterment within the broad lines of existing institutions. Do so by attacking evil in situ; and proceed from the individual to the general. Remember that progress is necessarily slow; that remedies are necessarily tentative; that because of varying conditions there must be much and constant inquiry into facts . . . and much experimentation; and 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 great developer is responsibility. Hence no remedy can be hopeful which does not devolve upon the workers participation in responsibility for the conduct of business; and their aim should be the eventual assumption of full responsibility—as in co-operative 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. His development is attained mainly in the processes of common living. Hence the industrial struggle is essentially an affair of the church and its imperative task.

List of Addresses

1903 March 18th — **Address before the Boot & Shoe Club of Boston,** dealing with corruption, here reprinted as reported in the *Boston Post,* March 19th, p. 1.

1905 May 4th — Address before the Harvard Ethical Society, entitled "The Opportunity in the Law," published in *American Law Review,* August, vol. 39, pp. 555–63, reprinted in *Business—a Profession,* pp. 329–43.

1911 January — **Interview in American Cloak and Suit Review,** p. 159, here reprinted.

1915 February 8th — Address before the Economic Club of Boston, entitled "**An Essential of Lasting Peace,**" published in *Harper's Weekly,* March 13th, p. 259, and in National Economic League *Quarterly,* May, vol. 1, pp. 24–6, here reprinted.

July 4th — Address delivered at Faneuil Hall, Boston, entitled "True Americanism," reprinted in the second edition of *Business—a Profession,* pp. 364–74.

1922 February 25th — **Letter to Robert W. Bruere,** here published as quoted by Richberg, *Columbia Law Review,* vol. 31, p. 1098.

References to Legislative Hearings

Joint Congressional Committee Investigating the Department of Interior and the Bureau of Forestry, published as Senate Document, 61st Congress, 3rd Session, vol. 42 (Serial vol. 5900). Mr. Brandeis was attorney for L. R. Glavis and took part throughout the entire hearings. Specific references follow:

1910 May 27th — Argument, pp. 4903–23, excerpts reprinted in *Social and Economic Views,* pp. 390, 391.

May 28th — Argument, pp. 5005–21.

Brief, pp. 5041–182.

Part VII

THE LAW

Editor's Note

Justice Brandeis's greatest contribution to the law is in his briefs and opinions. Professor Mason of Princeton University has appraised this work in *Brandeis—Lawyer and Judge in the Modern State* (1933), as have also Professor Frankfurter and others in *Mr. Justice Brandeis* (1932). In *The Social and Economic Views of Mr. Justice Brandeis* (1930) Mr. Lief has presented the Judge's most characteristic, if not always his most influential, utterances in a selection from the opinions.

We append a subject digest of the opinions Judge Brandeis has handed down since the last listed in Professor Frankfurter's digest. The two most important recent dissenting opinions we have printed as part of a preceding section. It has not been practicable to present any of the briefs. An interesting oral argument, however, has been included in the section dealing with Industrial Democracy. Mr. Lief has reprinted the most significant passages of the brief in the Oregon Laundry case and also extracts from some briefs submitted to the Interstate Commerce Commission.

In addition to the articles listed below the reader's attention should be called to the two volumes of *Notes on Business Law* privately printed by Mr. Brandeis in 1894 and 1896, for the use of students in Massachusetts Institute of Technology.

LIABILITY OF TRUST-ESTATES ON CONTRACTS MADE FOR THEIR BENEFIT*

It is intended in this article to discuss the following question: Does a contract entered into with a trustee for the benefit of the trust-estate subject the same to any liability, or is the sole remedy of the creditor a personal action against the trustee? The multiplication of trust-estates in this country, attendant upon the rapid increase of wealth, renders the question one of practical importance, and, as the subject has not been considered by the text-writers, its discussion here may be of general interest.

It is well settled that trustees,[1] executors, and administrators [2] are personally liable on contracts entered into by them for the benefit of the trust-estate, in the absence of an express provision in the agreement to the contrary. Likewise persons who, though not technically trustees, are yet intrusted with the care and management of the estates of others; *e.g.*, guardians of minors [3] and lunatics [4] are *prima facie* individually bound by the contracts made by them in their fiduciary capacity. The circumstance that the contract purported to be made by the party "as trustee," [5] or "as guardian," [6] or that the goods furnished or services rendered were necessary for the preservation of the estate [7] or maintenance of the ward, is immaterial. Someone, it is

* The writer wishes to state that he was of counsel for plaintiff in a cause still pending, requiring the advocacy of the equity herein suggested, and that this investigation was made and his views were formed while acting in such capacity. Still, it is believed that the subject is fairly treated, and that the collection of authorities on the mooted questions is complete.

[1] Noyes *v.* Blakeman, 6 N. Y. 567 (1852); New *v.* Nicoll, 73 N. Y. 127 (1878).

[2] Meyer *v.* Cole, 12 Johns. 349; Demott *v.* Field, 7 Cow. 58; Reynolds *v.* Reynolds, 3 Wend. 244; Ferrin *v.* Myrick, 41 N. Y. 315; Austin *v.* Munro, 47 id. 361.

[3] Sperry *v.* Fanning, 80 Ill. 371 (1876); Simms *v.* Norris & Co., 5 Ala. 42 (1843); Tobin *v.* Addison, 2 Strobh. (Law) 3 (1847); Poole *v.* Wilkinson, 42 Ga. 539 (1871).

[4] See Westmoreland *v.* Davis, 1 Ala. 299 (1840).

[5] 1 Parsons on Contracts (6th ed.), *121.

[6] Sperry *v.* Fanning, 80 Ill. 371 (1876).

[7] Tobin *v.* Addison, 5 Strobh. (Law) 3 (1847); Poole *v.* Wilkinson, 42 Ga. 539 (1871).

said, must be bound by the contract; if he does not bind some other, he binds himself.[8] And it is frequently stated that a trustee,[9] executor,[10] or administrator [11] cannot by contract bind his beneficiaries or the trust-estate, nor a guardian [12] the person or estate of his ward.

But generally, when goods are supplied or services are rendered to an estate at the request of a trustee or guardian, the creditors consider the solvency of the estate, and not the solvency of the person with whom the contract is entered into. The trustee or guardian is looked upon merely as the agent of the estate, which itself is supposed to be liable for the goods supplied or services rendered. Is there any foundation for this belief? Practically, of course, the estate is in most cases liable. A trustee or guardian has a lien upon the estate for all money properly advanced and expended by him in the administration of the trust,[13] and would, therefore, be entitled to be reimbursed out of the estate for all money paid by him on contracts made for its benefit. But suppose that after the goods have been furnished or services rendered the trustee refuses to pay for them, has the creditor any mode of collecting his debt except by proceeding against the trustee or guardian personally?

At law, clearly no other course is open to him. As already stated, the *cestui que trust* can never be bound by the contract of the trustee; the committee cannot bind the lunatic,[14] nor the guardian his ward.[15] The administrator or executor cannot so bind himself that execution may issue against the goods of the deceased,[16] nor can any other right against the trust-estate be enforced at law.[17] In equity, also, trustee and guardian are unable to make their beneficiaries personally liable by their contracts. The rule that a person can be bound only by a con-

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[8] 1 Parsons on Contracts (6th ed.), *121.

[9] Stanton *v.* King, 8 Hun. 4 (1876); Burch *v.* Breckenridge, 16 B. Mon. 488; New *v.* Nicoll, 73 N. Y. 127 (1878).

[10] Meyer *v.* Cole, 12 Johns. 349; Demott *v.* Field, 7 Cow. 58.

[11] Ferrin *v.* Myrick, 41 N. Y. 315; Austin *v.* Munro, 47 id. 361.

[12] Forster *v.* Fuller, 6 Mass. 59 (1809); Jones *v.* Brewer, 1 Pick. 316; Tenney *v.* Evans, 14 N. H. 351; Pearl *v.* McDowell, 3 J. J. Marsh. 658 (lunatic).

[13] Perry on Trusts (2d ed.), § 907.

[14] Pearl *v.* McDowell, 3 J. J. Marsh. 658.

[15] Forster *v.* Fuller, 6 Mass. 59 (1809); Jones *v.* Brewer, 1 Pick. 316; Tenney *v.* Evans, 14 N. H. 351; Poole *v.* Wilkinson, 42 Ga. 539 (1871).

[16] Ferrin *v.* Myrick, 41 N. Y. 315; Austin *v.* Munro, 47 id. 361. But see *In re Estate of Thompson*, 41 Barb. 254.

[17] Habersham *v.* Huguenin, R. M. Charlt. 378 (Law J.).

tract entered into by himself or his authorized agent is equally operative in courts of chancery and in courts of common law. Nor does any remedy ordinarily exist against the *estate* in equity where contracts are made by trustee or guardian for its benefit. There are some authorities [18] in New York which recognize the right of trustees, executors, and administrators to create, by their oral agreement, a lien on the estate for the payment of goods or services which are necessary for the preservation of the estate, where they have no money of the estate in their hands, and do not wish to incur any personal liability. Possibly a guardian would be held to possess the same right. In such cases the estate becomes primarily and exclusively liable. It is made so by express agreement, and perhaps on the theory of an implied authority in the trustee. But in the ordinary case of a contract by a trustee or guardian for the benefit of the estate, where he becomes personally liable on the same, no lien arises against the estate as a concurrent remedy. If the trustee or guardian is solvent, he, and he alone, must be proceeded against.

No objection can be urged against this rule of law. The creditor is fully protected when trustee and guardian are solvent and the latter are fully protected by their lien upon the estate. There is no occasion for giving the creditor an additional remedy against the estate. But the case is otherwise where the trustee or guardian, who has made the contract on behalf of the estate, is insolvent, and the beneficiaries colluding with him refuse to pay the creditor; or, as is more frequently the case, where the fiduciary dies insolvent, and the beneficiaries simply refuse to pay the debt. Under such circumstances clearly, if the contract was necessary in the administration of the trust, and the estate has received the benefit thereof, the creditor should not be remediless; yet he must be, unless an equity can be worked out against the trust-estate to subject it to the payment of the debt.

It is clear that the mere fact of the insolvency of the trustee or guardian could not create a right against the estate. If the contract were unreasonable or improper, or if the estate did not receive the benefit of the goods furnished to the trustee or guardian, no equity

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[18] Noyes *v.* Blakeman, 6 N. Y. 567 (1852); Randall *v.* Dusenbury, 39 N. Y. Superior Ct. 174, aff. 63 N. Y. 645; New *v.* Nicoll, 73 N. Y. 127 (1878); Lewis *v.* Harris, 4 Met. (Ky.) 357 (1863). See Salem Female Academy *v.* Phillips, 68 N. C. 491 (1873).

could arise. But where the trustee or guardian is insolvent, and a contract has been made with him which was necessary and proper in the administration of the trust, and of which the estate, the *cestui que trust*, or the ward has received the benefit, the creditor may, according to the decisions of several states, proceed against the estate itself to enforce payment of his demand.[19] It may be urged against the existence of such an equity that a trustee, executor, or administrator has, in the absence of express authority, no power to charge the trust-estate by his contracts; that, *a fortiori*, a guardian, who has no title to the property of his ward, would be unable to do so; and that, consequently, the mere contract of a trustee or guardian could not have the effect of binding the estate, where an attempt by express words to charge it would be ineffectual.

The answer to this argument lies in the fact that the equity against the estate does not rest upon the theory of a lien impliedly granted by the trustee or guardian, and that, therefore, the absence of authority to create a lien is immaterial. The right against the estate is not a lien, nor is it created by the act of the trustee or guardian; *it arises by operation of law;* it proceeds upon the broad principle of natural equity that a benefit given at request, with the understanding that it is not to be gratuitous, ought to be paid for.

Chancellor Harper thus states the doctrine in Magwood *v.* Patterson:[20]

"The equity on which a creditor comes into this court to render the trust-estate liable for the payment of his debt is this: that he has advanced his money or given his credit to effect the objects of the

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[19] *Contract made by trustee:* Cater *v.* Everleigh, 4 Desaus. 19 (1809); James *v.* Mayrant, id. 591 (1815); Montgomery *v.* Everleigh, 1 McCord Ch. 267 (1826); Magwood *v.* Patterson, 1 Hill's Ch. 228 (1833); Gaudy *v.* Barrit, 56 Ga. 640 (1876); Tennant *v.* Stoney, 1 Rich. Eq. 222, 243 (1845); Wylly *v.* Collins & Co., 9 Ga. 223 (1851); Frost *v.* Shackleford, 57 id. 261; Ferrin *v.* Myrick, 41 N. Y. 315 (1869). But see *contra*, Worral *v.* Harford, 8 Ves. Jr. 8 (1802); Mulhall *v.* Williams, 32 Ala. 489 (1858); Jones *v.* Dawson, 19 id. 672 (1851).

Contracts by executors and administrators: Douglas *v.* Executors of Frazer, 2 McCord Ch. 105 (1827); Habersham *v.* Huguenin, R. M. Charlt. (Ga.) 376 (1832); Coopwood *v.* Lawrence, 12 Ala. 790. But see *contra*, Wade *v.* Pope, 44 id. 690.

Contracts made by guardian of minor: Poole *v.* Wilkinson, 42 Ga. 539 (1871); Owens *v.* Mitchell, et al., 38 Tex. 588 (1873). See Copley *v.* O'Neil, 39 How. Pr. 47 (1869).

Contracts made by committee of lunatic: See Westmoreland *v.* Davis, 1 Ala. 299 (1840).

[20] 1 Hill's Ch. 228, 232.

trust, and, having accomplished the objects of the trust at his own expense, he has a right to be put in the place of the *cestui que trust*, or to be reimbursed out of the trust fund. If there were a trust to keep a hospital in repair, he who has made the repairs at his own expense might have his equity to be reimbursed out of the trust fund. So if trusts were to pay rents and profits for the separate maintenance of a married woman, he who has advanced his money for her separate maintenance might have such an equity."

Our law affords no precise analogy of an equity like the one in question, but the principle on which it rests has been acted on by the common-law courts as well as by the courts of equity. The liability of infants and lunatics at law for necessaries is very similar. The infants and lunatics are not liable, even in the case of necessaries, on a contract —for they do not possess the power of binding themselves by contract —but the law makes them liable personally for the reasonable value of the necessaries furnished them at their request. And though at law they would not be liable for money lent which was applied to the purchase of necessaries, they would in equity be obliged to refund all that had been so used.[21] Likewise a husband is in equity obliged to repay money lent his wife, and applied by her in the purchase of necessaries; [22] and this doctrine has recently been applied to the case where a corporation has improperly borrowed money on an *ultra vires* contract, but has applied the same to the payment of legal demands and the purchase of necessaries.[23] It is true that in all these cases the remedy was a personal one; but they have an important bearing on the question under consideration, because they furnish instances of our courts having acted on the principle that where goods, services, or money are furnished on request to supply a want which the law considers a necessary one, a liability to pay arises although the power to contract did not exist. The liability which the law imposed was in those cases a personal one; because the fiction of an implied promise could easily be adopted where the request was made, the necessaries furnished to and the benefit enjoyed by the same person. But where

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[21] Darby *v.* Boucher, 1 Salk. 279.

[22] Jenner *v.* Morris, 1 Dr. & Sm. 218; 3 De G., F. & J. 45; Dean *v.* Soutten, L. R. 9 Eq. 151.

[23] Cork *v.* Youghal Railway Co., L. R. 4 Ch. 748; *National Permanent Benefit Building Society*, L. R. 5 Ch. 309; *Magdalena Steam Navigation Co.*, Johns. (Eng.), 690; 1 Lindley on Partnership (4th ed.), 363.

a contract is made by the trustee or guardian for the benefit of the estate, the facts do not allow of the adoption of the fiction of an implied promise, and resort was therefore had to the creation of a right against the estate. In this respect the liability of a married woman's separate estate on agreements made by her with reference to that property affords some analogy. There a legal obstacle to the existence of a personal liability presented itself, and the court of chancery enforced the equity against the estate.

Considerations of policy seem strongly to favor the doctrine that a creditor of the trustee or guardian under the circumstances above set forth acquires a remedy against the estate. It protects the creditor without imperiling the estate; for the equity extends merely to the reasonable value of the necessaries furnished to the trustee, of which the estate received the benefit, and the beneficiaries are made to pay to the creditor only what they would ordinarily have been obliged to pay to the trustee or guardian, had he paid the debt.

The first attempt to render a trust-estate liable for necessaries furnished it at the request of the trustee appears to have been made in the year 1802. In Worral *v.* Harford,[24] a bill was filed by an attorney to subject the estate of an insolvent in the hands of a trustee to the payment of legal services rendered the estate. The instrument creating the trust contained a provision that the expenses of the trust should be paid. Lord Eldon, in allowing a demurrer to the bill, said:

"It is in the nature of the office of a trustee, whether expressed in the instrument or not, that the trust-property shall reimburse him all the charges and expenses incurred in the execution of the trust. That is implied in every such deed. But it would be strange from that implication to conclude that the persons employed by them are therefore creditors of the trust fund. I doubt very much, and desire not to be understood to admit, that even if the trustees are charged not to be solvent, those persons may come upon the fund. They can have no better right upon the expression of what would, if not expressed, be implied. But particular cases may be exceptions. Try this in bankruptcy. The petitioning creditor is answerable till the assignment. Can there be a doubt that the assignees, if there was nothing special in the deed, would have a clear right to pay all the expenses incurred? It would

[24] 8 Ves. Jr. 8.

be implied, if not expressed. But can it be said that therefore not the solicitor only, but every person with whom the trustee has incurred a just and fair demand, might sue the trustees, and come for an account of the whole administration? That would be quite mischievous."

The decision of Worral *v.* Harford was cited in Hall *v.* Lowes,[25] but the subject, in spite of its importance, seems not to have attracted any further attention in England.[26]

Soon after this decision of Lord Eldon's the question arose in South Carolina. Cater *v.* Everleigh,[27] decided in the year 1809, was a suit in equity brought against a trustee and the *cestui que trust*, to subject the estate to the payment for certain necessaries furnished the estate at the request of the trustee. The bill set forth the insolvency of the trustee, and the prayer was granted. It does not appear from the short report of the case whether any authority was cited by the court or by the counsel. It is probable that the court and counsel knew of the decision of Worral *v.* Harford, and the allegation that the trustee was insolvent may have been inserted on that account. But no authority is cited, and according to the report the judges proceeded wholly on the natural equity of the case. Mr. Justice Gaillard said: "As the gin was bought for the trust-estate, as it belongs to it, and as it has not been paid for, it is but just that the complainant's demand should be satisfied out of the estate, and it is ordered and decreed accordingly."

The doctrine of Cater *v.* Everleigh was subsequently affirmed by numerous decisions of the same court; [28] it was soon followed by the Supreme Court of Georgia,[29] and was, in the year 1851, declared by a learned judge of the latter state to be well-settled law.[30] Since that time the same conclusion has been reached by the Supreme Court of Texas; [31] and courts of several other states seem to incline to the doc-

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[25] 1 Hare, 577.

[26] See Lewin on Trusts (6th ed.), 530.

[27] 4 Desaus. 19.

[28] James *v.* Mayrant, 4 Desaus. 591 (1815); Montgomery *v.* Everleigh, 1 McCord Ch. 267 (1826); Douglas *v.* Executors of Frazer, 2 id. 105 (1827); Magwood *v.* Patterson, 1 Hill Ch. 228 (1833); Tennant *v.* Stoney, 1 Rich. Eq. 222 (1845).

[29] Habersham *v.* Huguenin, R. M. Charlt. 376 (1832); Poole *v.* Wilkinson, 42 Ga. 539 (1871); Frost *v.* Shackleford, 57 id. 261 (1876); Gaudy *v.* Barrit, 56 id. 640 (1876).

[30] Wylly *v.* Collins & Co., 9 Ga. 223, 231 (1851).

[31] Owens *v.* Mitchell *et al.*, 38 Tex. 588 (1873).

trine.[32] It has, on the other hand, been expressly denied in Alabama.[33] And the books abound in dicta to the effect that contracts of trustees and guardians affect them only, and are not binding on the estate.[34] But these general statements occur in cases (generally actions at law against the *cestui que trust* or the ward) which in no way involved the doctrine under discussion, and appear to have been made in ignorance of the numerous authorities just cited, and without reference to the special circumstances under which these decisions held the estates liable.

The statement is frequently found in the Massachusetts reports [35] that "the guardian cannot by his contracts bind the ward or his estate"; but upon examination of the authorities cited it will be seen that this statement, which recurs in the different opinions almost in the same terms, has reference to the liability of the ward and his estate at law, and that the court has not in mind any supposed liability of the estate in equity. It merely affirms what is clearly established everywhere, that a ward cannot be sued on a contract entered into by his guardian, nor execution issue against the property of the ward on a judgment recovered against the guardian.

There are numerous New York cases in which attempts to hold trust-estates liable for goods or services furnished to the estate or to the trustee were unsuccessful; but closer scrutiny of these decisions will show that they are not inconsistent with Cater *v.* Everleigh,[36] and the later authorities. Even if the doctrine, as established in South Carolina, had been expressly recognized by the courts of New York, the decisions in those New York cases must have been the same. For the instances where the remedy against the estate was denied were cases where it was sought at law, either to have execution issue against the estate upon a judgment recovered against an executor or admin-

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[32] Ferrin *v.* Myrick, 41 N. Y. 315 (1869); Lewis *v.* Harris, 4 Met. (Ky.) 357 (1863).

[33] Jones *v.* Dawson, 19 Ala. 672 (1851); Mulhall *v.* Williams, 32 id. 489 (1866); Wade *v.* Pope, 44 id. 690 (1870); overruling Coopwood *v.* Lawrence, 12 id. 790 (1848).

[34] Thatcher *v.* Dinsmore, 5 Mass. 299; Forster *v.* Fuller, 6 id. 58; Wallis *v.* Bardwell, 126 id. 366.

[35] Thatcher *v.* Dinsmore, 5 Mass. 299; Forster *v.* Fuller, 6 id. 58; Wallis *v.* Bardwell, 126 id. 366.

[36] 4 Desaus. 19.

istrator on his personal contract,[37] or to hold an administrator liable *de bonis intestatoris* on a contract entered into on behalf of the estate by a former administrator; [38] or where the attempt was made in equity to subject the estate to the payment of the claim without first having proceeded against the trustee and without alleging his insolvency; [39] or where the goods furnished or services rendered to the estate were not supplied at the request of the trustee.[40] Whether the doctrine of Cater *v.* Everleigh is recognized or not, these decisions are correct. The mere fact of a benefit rendered the estate, although it supplies a want which the law considers a necessary one, will not, of course, render the estate liable. Like a voluntary service rendered to an individual, it creates no rights. The request of the person having charge and control of the estate is essential; there must be a personal liability of the trustee or guardian which was created by his contract and not discharged by reason of his insolvency. The limitation of the right against the estate to cases where the trustee or guardian is insolvent is not only consonant with reason, but would seem to follow from the general rule that a court of equity will afford no relief where a party has a complete and adequate remedy at law. A bill to apply equitable interests of a debtor to the payment of his debts will not be maintained unless it is shown that the debtor has no property which can be reached at law. Indeed, the only expression of opinion on the doctrine under discussion to be found in the New York cases favors its existence. In Ferrin *v.* Myrick,[41] Chief Justice Hunt says: "It ought to be added that, in case of fraud or insolvency of the executor, an equitable cause of action would probably be thereby created against the estate, which could be enforced on behalf of the creditor, and which would enable him to maintain a claim against the estate directly."

It is remarkable, however, that the numerous cases above cited enforcing an equity against the estate should have escaped the notice of the text-writers on the law of trusts, and that the doubt expressed by Lord Eldon should not have induced a discussion by them of this very practical question. Still, even the authorities which concur in

[37] Austin *v.* Munro, 47 N. Y. 361.
[38] Ferrin *v.* Myrick, 41 N. Y. 315.
[39] Stanton *v.* King, 8 Hun. 4 (1876).
[40] New *v.* Nicoll, 73 N. Y. 127 (1878).
[41] 41 N. Y. 325.

establishing this contingent liability of trust-estates on contracts made for their benefit differ widely as to the precise nature of the equity.

That it is not concurrent with the remedy against the trustee,[42] but is a secondary remedy, which arises only upon the insolvency of the same, is probably settled; but the authorities are in conflict as to whether the creditor is merely subrogated [43] to the rights of the trustee, or has an independent, contingent equity against the estate.[44]

The question is not one of theoretical interest merely, for the adoption of one or the other of these views leads practically to very different results. If the right of the creditor is merely that of subrogation, *i.e.*, if he is simply put into the position which the trustee would have been in had he paid the debt in question, his right to recover will depend entirely upon the condition of the accounts between the trustee and the estate at the time of bringing the suit. If at the time of instituting the suit the trustee or guardian is indebted to the estate in an amount equal to or greater than the indebtedness on which the suit is brought, the creditor can recover nothing; because, if at that moment the trustee paid the creditor and the trustee accounted with the estate, nothing would be due him.[45]

This view is perhaps a misconception of the rule as sometimes stated. In speaking of the doctrine, the courts have said that the creditor can recover against the estate where the circumstances attending the transaction are such "that the trustee, if he had paid the creditor, would have had a lien on the estate for his reimbursement."

If this statement correctly represents the rights of the creditor, it necessarily follows that the creditor has no rights against the estate where the indebtedness of the trustee to the estate is equal to or greater than the indebtedness of the estate to the trustee would have been, in case he had paid the creditor; for under those circumstances the trustee would have been in advance to the estate, and could, consequently, have had no lien. But it would seem that the courts, in using

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[42] But see *In re* Estate of Thompson, 41 Barb. 254 (1864); Gaudy *v.* Babbit, 56 Ga. 640.

[43] Guerry *v.* Capers, 1 Bailey Eq. 162 (1830); Manigault *v.* Deas, id. 290 (1831); Henshaw *v.* Freer, id. 317, 318 (1831); Tennant *v.* Stoney, 1 Rich. Eq. 222 (1845).

[44] Wylly *v.* Collins & Co., 9 Ga., 223, 233–6 (1851). In the other cases on the subject this question was not directly raised.

[45] Guerry *v.* Capers, 1 Bailey Eq. 162 (1830). Manigault *v.* Deas, id. 290 (1831); Henshaw *v.* Freer, id. 317, 318 (1831).

this right of the trustee to reimburse himself, as a test of the creditor's right against the estate, meant merely to designate the kind of transactions in which the creditor could recover. The language was probably used simply to describe those contracts which are necessary and proper in the administration of the trust; because it is only for payments on such contracts that the trustee would be entitled to be reimbursed. These suggestions derive great support from the fact that in the earlier cases, which established the doctrine, the state of accounts between the trustee and the estate is never referred to, and the benefit and necessity of the goods furnished or services rendered is alone considered.[46] It is, furthermore, doubtful whether the equity of subrogation can be invoked at all in the class of cases under consideration. Ordinarily, a party is subrogated only to rights in existence. But the right of the trustee to reimbursement, his lien on the estate for advances, is a right which does not come into existence until an advance is made. The very act which creates the right would do away with all occasion for subrogation. To speak, except as of an abstraction, of a trustee's lien for advances before any advance has been made would seem to be erroneous. The right against the estate which the law gives to a trustee who has expended money for the estate is not to be likened to a lien on property created by act of the parties to secure future advances. It is more like the right of a banker to retain securities of a depositor who is indebted to him, or of his right to extinguish a debt due him by the customer by a debt which he owes the customer—rights to which it has been held sureties cannot be subrogated.[47] Again, the so-called lien of the trustee is not a right to enforce payment out of the estate by foreclosure, decree, or sale. It is probably little more than a right of the trustee to reimburse himself from the rents and profits as they are received, and the right to resist in equity until payment of his claim the beneficiaries' demand for a conveyance.[48]

The adoption of the "subrogation" theory would amount practically to a repudiation of the whole doctrine. Every suit by a creditor would either involve an examination of the multifarious and voluminous ac-

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[46] Cater *v.* Everleigh, 4 Dess. 19 (1809); James *v.* Mayrant, id. 591 (1815); Habersham *v.* Huguenin, R. M. Charlt. 376 (1832); Montgomery *v.* Everleigh, 1 McCord Ch. 267 (1826); Douglas *v.* Executor of Frazer, 2 id. 105 (1827).

[47] National Mechanics' Bank *v.* Peck, 127 Mass. 299.

[48] Lewin on Trusts (6th ed.), 528.

counts of a trust-estate, or, if there had been a judicial settlement of the accounts, the creditor would be bound by a proceeding to which he had actually not been a party, because, by the hypothesis, he claims as a privy of the trustee. Besides, it will be found in practice that where a trustee or guardian is insolvent, and refuses to pay just creditors, he is usually also in arrears with the estate which he is administering. And as guardians of minors and lunatics have usually only the control and management of the ward's property, the creditor would often have no remedy against the estate, for a lien would probably be held to exist only where the legal title was in the guardian. Yet this view is adopted by the Supreme Court of South Carolina [49]—the very tribunal which originated and most frequently affirmed the doctrine. The New York cases also, though there are none on the exact question, seem to favor this view; for the learned judges speak of the possibility of a trustee, instead of himself advancing money and obtaining a lien on the estate, transferring the lien to the contractor by express contract, and exempting himself from all liability.[50] The reasoning of these cases is not very satisfactory. As has already been said, the right against the estate to secure advances is not a lien, but rather the possibility of acquiring one: it is a right peculiar to and arising from the position of trustee. Even after the right of the trustee has become fixed by reason of his having advanced money for the estate, it would probably not be assignable, because it is a personal right. According to the other theory of the liability of the estate, which has been clearly established in Georgia,[51] the right of the creditor against the estate must be looked upon as an equity, which has its origin in the benefit received by the estate, and which becomes available only upon the insolvency of the trustee.

This equity has been held to exist where a person has advanced money to a trustee which was required to supply a want which the law considers a necessary one, and was properly applied in the administra-

[49] Guerry *v.* Capers, 1 Bailey Eq. 362 (1830). Compare Lyrn *v.* Hays, 30 Ala. 430 (1867); Mulhall *v.* Williams, 32 id. 489 (1858); Manigault *v.* Deas, 1 Bailey Eq. 290 (1831); Henshaw *v.* Freer, id. 317, 318 (1831); Tennant *v.* Stoney, 1 Rich. Eq. 222 (1845).

[50] Noyes *v.* Blakeman, 6 N. Y. 567, 580 (1852); New *v.* Nicoll, 73 id. 127, 130 (1878).

[51] Wylly *v.* Collins & Co., 9 Ga. 223 (1831).

tion of the trust.[52] The right against the estate is, of course, not affected by the circumstance that the trustee or guardian has given his own promissory note for the amount of the indebtedness to the creditor.[53]

There seems to be some doubt as to the manner in which the insolvency of the trustee must be established; and it has been suggested that a judgment and execution returned unsatisfied might be necessary.[54] In many jurisdictions this would surely not be at present required, and the maxim, *Lex neminem cogit ad vana seu inutilia*, would seem to have here a proper application.

It has been held by some authorities that the right of the creditor against the trust-estate does not go beyond the income, and that the *corpus* can in no event be reached.[55] The solution of this question would probably depend upon the circumstances of each particular case. If the contract under which the liability arose were to supply a want which the law deemed so necessary that an encroachment upon the *corpus* would have been decreed for reimbursing the trustee, if he had, at his own expense, supplied it, the creditor, too, would be entitled to his remedy against the *corpus*.

Where several persons are successively entitled to the estate, the question may arise as to the proportion in which the burden must be borne by them. The decision of it must depend upon the same considerations which would be regarded in determining who should bear expenses, paid by the trustee for the benefit of the estate under similar circumstances.[56]

A question might arise as to the manner of enforcing the liability where, before suit brought, the trust has been terminated, and the property conveyed to the beneficiaries, or where the minors become

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[52] Montgomery *v.* Everleigh, 1 McCord Ch. 267 (1825).

[53] Cater *v.* Everleigh, 4 Desaus. 19 (1809); Wylly *v.* Collins & Co., 9 Ga. 223 (1851); Douglas *v.* Executors of Frazer, 2 McCord Ch. 105 (1827).

[54] Wylly *v.* Collins & Co., 9 Ga. 243, 244 (1851); Henshaw *v.* Freer, 1 Bailey Eq. 311, 317.

[55] Magwood *v.* Patterson, 1 Hill's Ch. 228 (1833); James *v.* Mayrant, 4 Desaus. 591 (1815); Wylly *v.* Collins & Co., 9 Ga. 223 (1851). Compare O'Neall, J., in Manigault *v.* Deas, 1 Bailey Eq. 290 (1831); Haydel *v.* Hurck, 5 Mo. App. 267 (1878). In the remaining cases on this subject the decree seems to have been against the estate generally, without *expressly* limiting the right to the income.

[56] Magwood *v.* Patterson, 1 Hill's Ch. 231, 232 (1833); Jones *v.* Dawson, 19 Ala. 679. Compare Parker *v.* Ames, 121 Mass. 220 (1876). See Westmoreland *v.* Davis, 1 Ala. 299 (1840).

of age, or the lunatics are restored to their right mind. The case reminds one of that where a married woman who has contracted in regard to her separate estate becomes *discovert* before payment of the demand.[57]

As the creditor acquires no right to proceed against the estate before the trustee becomes insolvent, it has been said that the Statute of Limitations, if it applies at all, does not begin to run before the insolvency.[58] The remedy against the estate will remain as long as that against the trustee or guardian has not been barred, so that a new promise by the trustee or guardian would revive the remedy against the estate.[59] The suit being purely an equitable one, and the jurisdiction of chancery exclusive, according to the rule generally adopted the Statute of Limitations would have no application. But it may be doubted whether the courts would be disposed to enforce the remedy against the estate after all right of action against the trustee or guardian is barred. If the equity of the creditor were a lien in the nature of a security for the payment of the debt, according to the weight of authority, it would remain enforceable, even after the remedy against the trustee had been barred.[60]

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[57] Field *v.* Sowle, 4 Russ. 112; Nail *v.* Punter, 4 Sim. 555; Johnson *v.* Gallagher, 3 De G., F. & J. 513; King *v.* Mittalberger, 50 Mo. 182 (1872).

[58] Wylly *v.* Collins & Co., 9 Ga. 242, 243 (1851).

[59] Wylly *v.* Collins & Co., 9 Ga. 243 (1851); Henshaw *v.* Freer, 1 Bailey Eq. 314 (1831).

[60] Angell on Limitations (6th ed.), § 73.

THE RIGHT TO PRIVACY

BY

SAMUEL D. WARREN AND LOUIS D. BRANDEIS

> "It could be done only on principles of private justice, moral fitness, and public convenience, which, when applied to a new subject, make common law without a precedent; much more when received and approved by usage."
>
> WILLES, J., in Millar *v.* Taylor, 4 Burr, 2303, 2312.

THAT the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life—the right to be let alone, the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession—intangible, as well as tangible.

Thus, with the recognition of the legal value of sensations, the protection against actual bodily injury was extended to prohibit mere attempts to do such injury; that is, the putting another in fear of such

injury. From the action of battery grew that of assault.[1] Much later there came a qualified protection of the individual against offensive noises and odors, against dust and smoke, and excessive vibration. The law of nuisance was developed.[2] So regard for human emotions soon extended the scope of personal immunity beyond the body of the individual. His reputation, the standing among his fellow men, was considered, and the law of slander and libel arose.[3] Man's family relations became a part of the legal conception of his life, and the alienation of a wife's affections was held remediable.[4] Occasionally the law halted—as in its refusal to recognize the intrusion by seduction upon the honor of the family. But even here the demands of society were met. A mean fiction, the action *per quod servitium amisit*, was resorted to, and by allowing damages for injury to the parents' feelings, an adequate remedy was ordinarily afforded.[5] Similar to the expansion of the right to life was the growth of the legal conception of property. From corporeal property arose the incorporeal rights issuing out of it; and then there opened the wide realm of intangible property, in the products and processes of the mind,[6] as works

[1] Year Book, Lib. Ass., folio 99, pl. 60 (1348 or 1349), appears to be the first reported case where damages were recovered for a civil assault.

[2] These nuisances are technically injuries to property; but the recognition of the right to have property free from interference by such nuisances involves also a recognition of the value of human sensations.

[3] Year Book, Lib. Ass., folio 177, pl. 19 (1356), (2 Finl. Reeves Eng. Law, 395) seems to be the earliest reported case of an action for slander.

[4] Winsmore *v.* Greenbank, Willes, 577 (1745).

[5] Loss of service is the gist of the action; but it has been said that "we are not aware of any reported case brought by a parent where the value of such services was held to be the measure of damages." Cassoday, J., in Lavery *v.* Crooke, 52 Wis. 612, 623 (1881). First the fiction of constructive service was invented; Martin *v.* Payne, 9 John. 387 (1812). Then the feelings of the parent, the dishonor to himself and his family, were accepted as the most important element of damage. Bedford *v.* McKowl, 3 Esp. 119 (1800); Andrews *v.* Askey, 8 C. & P. 7 (1837); Phillips *v.* Hoyle, 4 Gray, 568 (1855); Phelin *v.* Kenderdine, 20 Pa. St. 354 (1853). The allowance of these damages would seem to be a recognition that the invasion upon the honor of the family is an injury to the parent's person, for ordinarily mere injury to parental feelings is not an element of damage, *e.g.*, the suffering of the parent in case of physical injury to the child. Flemington *v.* Smithers, 2 C. & P. 292 (1827); Black *v.* Carrolton R.R. Co., 10 La. Ann. 33 (1855); Covington Street Ry. Co. *v.* Packer, 9 Bush, 455 (1872).

[6] "The notion of Mr. Justice Yates that nothing is property which cannot be earmarked and recovered in detinue or trover, may be true in an early stage of society, when property is in its simple form, and the remedies for violation of it also simple, but is not true in a more civilized state, when the relations of life and the interests arising therefrom are complicated." Erle, J., in Jefferys *v.* Boosey, 4 H. L. C. 815, 869 (1845).

of literature and art,[7] good-will,[8] trade secrets, and trade-marks.[9]

This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone." [10] Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops." For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons; [11] and the evil of the invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer.[12] The alleged facts of a somewhat notorious case brought before an inferior tribunal in New York a few months ago,[13] directly involved the

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[7] Copyright appears to have been first recognized as a species of private property in England in 1558. Drone on Copyright, 54, 61.

[8] Gibblett *v.* Read, 9 Mod. 459 (1743), is probably the first recognition of good-will as property.

[9] Hogg *v.* Kirby, 8 Ves. 215 (1803). As late as 1742 Lord Hardwicke refused to treat a trade-mark as property for infringement upon which an injunction could be granted. Blanchard *v.* Hill, 2 Atk. 484.

[10] Cooley on Torts, 2d ed., p. 29.

[11] 8 Amer. Law Reg. N. S. 1 (1869); 12 Wash. Law Rep. 353 (1884); 24 Sol. J. & Rep. 4 (1879).

[12] *Scribner's Magazine*, July 1890. "The Rights of the Citizen: to His Reputation," by E. L. Godkin, Esq., pp. 65, 67.

[13] Marion Manola *v.* Stevens & Myers, N. Y. Supreme Court, *New York Times* of June 15, 18, 21, 1890. There the complainant alleged that while she was playing in the Broadway Theater, in a rôle which required her appearance in tights, she was, by means of a flashlight, photographed surreptitiously and without her consent, from one of the boxes, by defendant Stevens, the manager of the "Castle in the Air" company, and defendant Myers, a photographer, and prayed that the defendants might be restrained from making use of the photograph taken. A preliminary injunction issued *ex parte*, and a time was set for argument of the motion that the injunction should be made permanent, but no one then appeared in opposition.

consideration of the right of circulating portraits; and the question whether our law will recognize and protect the right to privacy in this and in other respects must soon come before our courts for consideration.

Of the desirability—indeed of the necessity—of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.

It is our purpose to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is.

Owing to the nature of the instruments by which privacy is invaded, the injury inflicted bears a superficial resemblance to the wrongs dealt with by the law of slander and of libel, while a legal remedy for such injury seems to involve the treatment of mere wounded feelings, as a substantive cause of action. The principle on which the law of defamation rests, covers, however, a radically different class of effects from those for which attention is now asked. It deals only with damage to reputation, with the injury done to the individual in his external relations to the community, by lowering him in the estimation of his fellows. The matter published of him, however widely circulated, and however unsuited to publicity, must, in order to be actionable, have a direct tendency to injure him in his intercourse with others, and even if in writing or in print, must subject him to the hatred, ridicule, or contempt of his fellow men—the effect of the publication upon his estimate of himself and upon his own feelings not forming an essential element in the cause of action. In short, the wrongs and correlative rights recognized by the law of slander and libel are in their nature material rather than spiritual. That branch of the law simply extends the protection surrounding physical property to certain of the conditions necessary or helpful to worldly prosperity. On the other hand, our law recognizes no principle upon which compensation can be granted for mere injury to the feelings. However painful the mental effects upon another of an act, though purely wanton or even malicious, yet if the act itself is otherwise lawful, the suffering inflicted is *damnum absque injuria*. Injury of feelings may indeed be taken account of,[14] in ascertaining the

[14] Though the legal value of "feelings" is now generally recognized, distinctions have been drawn between the several classes of cases in which compensation may or may not be recovered. Thus, the fright occasioned by an assault constitutes a cause of action, but fright occasioned by negligence does not. So fright coupled with bodily injury affords a foundation for enhanced damages; but, ordinarily, fright unattended by bodily injury cannot be relied upon as an element of damages, even where a valid cause of action exists, as in trespass *quare clausum fregit*. Wyman *v.* Leavitt, 71 Me. 227; Canning v. Williamstown, 1 Cush. 451. The allowance of damages for injury to the parents' feelings, in case of seduction, abduction of a

amount of damages when attending what is recognized as a legal injury; but our system, unlike the Roman law, does not afford a remedy even for mental suffering which results from mere contumely and insult, from an intentional and unwarranted violation of the "honor" of another.[15]

It is not, however, necessary, in order to sustain the view that the common law recognizes and upholds a principle applicable to cases of invasion of privacy, to invoke the analogy, which is but superficial, to injuries sustained, either by an attack upon reputation or by what the civilians called a violation of honor; for the legal doctrines relating to infractions of what is ordinarily termed the common-law right to intellectual and artistic property are, it is believed, but instances and applications of a general right to privacy, which properly understood afford a remedy for the evils under consideration.

The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.[16] Under our system of government, he can never be compelled to express them (except when upon the witness-stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them. The existence of this right does not depend upon

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child (Stowe *v.* Heywood, 7 All. 118), or removal of the corpse of child from a burial-ground (Meagher *v.* Driscoll, 99 Mass. 281), are said to be exceptions to a general rule. On the other hand, injury to feelings is a recognized element of damages in actions of slander and libel, and of malicious prosecution. These distinctions between the cases, where injury to feelings does and where it does not constitute a cause of action or legal element of damages, are not logical, but doubtless serve well as practical rules. It will, it is believed, be found, upon examination of the authorities, that wherever substantial mental suffering would be the natural and probable result of the act, there compensation for injury to feelings has been allowed, and that where no mental suffering would ordinarily result, or if resulting, would naturally be but trifling, and, being unaccompanied by visible signs of injury, would afford a wide scope for imaginative ills, there damages have been disallowed. The decisions on this subject illustrate well the subjection in our law of logic to common-sense.

[15] "Injuria, in the narrower sense, is every intentional and illegal violation of honor, *i.e.*, the whole personality of another." "Now an outrage is committed not only when a man shall be struck with the fist, say, or with a club, or even flogged, but also if abusive language has been used to one." Salkowski, *Roman Law*, p. 668 and p. 669, *n.* 2.

[16] "It is certain every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends." Yates, J., in Millar *v.* Taylor, 4 Burr. 2303, 2379 (1769).

the particular method of expression adopted. It is immaterial whether it be by word [17] or by signs,[18] in painting,[19] by sculpture, or in music.[20] Neither does the existence of the right depend upon the nature or value of the thought or emotion, nor upon the excellence of the means of expression.[21] The same protection is accorded to a casual letter or an entry in a diary and to the most valuable poem or essay, to a botch or daub and to a masterpiece. In every such case the individual is entitled to decide whether that which is his shall be given to the public.[22] No other has the right to publish his productions in any form, without his consent. This right is wholly independent of the material on which, or the means by which, the thought, sentiment, or emotion is expressed. It may exist independently of any corporeal being, as in words spoken, a song sung, a drama acted. Or if expressed on any material, as a poem in writing, the author may have parted with the paper, without forfeiting any proprietary right in the composition itself. The right is lost only when the author himself communicates his production to the public—in other words, publishes it.[23] It is en-

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[17] Nicols *v.* Pitman, 26 Ch. D. 374 (1884).

[18] Lee *v.* Simpson, 3 C. B. 871, 881; Daly *v.* Palmer, 6 Blatchf. 256.

[19] Turner *v.* Robinson, 10 Ir. Ch. 121; s. c. ib. 510.

[20] Drone on Copyright, 102.

[21] "Assuming the law to be so, what is its foundation in this respect? It is not, I conceive, referable to any consideration peculiarly literary. Those with whom our common law originated had not probably among their many merits that of being patrons of letters; but they knew the duty and necessity of protecting property, and with that general object laid down rules providently expansive—rules capable of adapting themselves to the various forms and modes of property which peace and cultivation might discover and introduce.

"The produce of mental labor, thoughts and sentiments, recorded and preserved by writing, became, as knowledge went onward and spread, and the culture of man's understanding advanced, a kind of property impossible to disregard, and the interference of modern legislation upon the subject, by the stat. 8 Anne, professing by its title to be 'For the encouragement of learning,' and using the words 'taken the liberty,' in the preamble, whether it operated in augmentation or diminution of the private rights of authors, having left them to some extent untouched, it was found that the common law, in providing for the protection of property, provided for their security, at least before general publication by the writer's consent." Knight Bruce, V. C., in Prince Albert *v.* Strange, 2 DeGex & Sm. 652, 695 (1849).

[22] "The question, however, does not turn upon the form or amount of mischief or advantage, loss or gain. The author of manuscripts, whether he is famous or obscure, low or high, has a right to say of them, if innocent, that whether interesting or dull, light or heavy, salable or unsalable, they shall not, without his consent, be published." Knight Bruce, V. C., in Prince Albert *v.* Strange, 2 DeGex & Sm. 652, 694.

[23] Duke of Queensbury *v.* Shebbeare, 2 Eden, 329 (1758); Bartlett *v.* Crittenden, 5 McLean, 32, 41 (1849).

tirely independent of the copyright laws, and their extension into the domain of art. The aim of those statutes is to secure to the author, composer, or artist the entire profits arising from publication; but the common-law protection enables him to control absolutely the act of publication, and in the exercise of his own discretion, to decide whether there shall be any publication at all.[24] The statutory right is of no value, *unless* there is a publication; the common-law right is lost *as soon as* there is a publication.

What is the nature, the basis, of this right to prevent the publication of manuscripts or works of art? It is stated to be the enforcement of a right of property; [25] and no difficulty arises in accepting this view, so long as we have only to deal with the reproduction of literary and artistic compositions. They certainly possess many of the attributes of ordinary property: they are transferable; they have a value; and publication or reproduction is a use by which that value is realized. But where the value of the production is found not in the right to take the profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent any publication at all, it is difficult to regard the right as one of property, in the common acceptation of that term. A man records in a letter to his son, or in his diary, that he did not dine with his wife on a certain day. No one into whose hands those papers fall could publish them to the world, even if possession of the

[24] Drone on Copyright, pp. 102, 104; Parton *v.* Prang, 3 Clifford, 537, 548 (1872); Jefferys *v.* Boosey, 4 H. L. C. 815, 867, 962 (1854).

[25] "The question will be whether the bill has stated facts of which the court can take notice, as a case of civil property, which it is bound to protect. The injunction cannot be maintained on any principle of this sort, that if a letter has been written in the way of friendship, either the continuance or the discontinuance of the friendship affords a reason for the interference of the court." Lord Eldon in Gee *v.* Pritchard, 2 Swanst. 402, 413 (1818).

"Upon the principle, therefore, of protecting property, it is that the common law, in cases not aided or prejudiced by statute, shelters the privacy and seclusion of thought and sentiments committed to writing, and desired by the author to remain not generally known." Knight Bruce, V. C., in Prince Albert *v.* Strange, 2 DeGex & Sm. 652, 695.

"It being conceded that reasons of expediency and public policy can never be made the sole basis of civil jurisdiction, the question, whether upon any ground the plaintiff can be entitled to the relief which he claims, remains to be answered; and it appears to us that there is only one ground upon which his title to claim, and our jurisdiction to grant, the relief, can be placed. We must be satisfied, that the publication of private letters, without the consent of the writer, is an invasion of an exclusive right of property which remains in the writer, even when the letters have been sent to, and are still in the possession of his correspondent." Duer, J., in Woolsey *v.* Judd, 4 Duer, 379, 384 (1855).

documents had been obtained rightfully; and the prohibition would not be confined to the publication of a copy of the letter itself, or of the diary entry; the restraint extends also to a publication of the contents. What is the thing which is protected? Surely, not the intellectual act of recording the fact that the husband did not dine with his wife, but that fact itself. It is not the intellectual product, but the domestic occurrence. A man writes a dozen letters to different people. No person would be permitted to publish a list of the letters written. If the letters or the contents of the diary were protected as literary compositions, the scope of the protection afforded should be the same secured to a published writing under the copyright law. But the copyright law would not prevent an enumeration of the letters, or the publication of some of the facts contained therein. The copyright of a series of paintings or etchings would prevent a reproduction of the paintings as pictures; but it would not prevent a publication of a list or even a description of them.[26] Yet in the famous case of Prince Albert *v.* Strange, the court held that the common-law rule prohibited not merely the reproduction of the etchings which the plaintiff and Queen Victoria had made for their own pleasure, but also "the publishing (at least by printing or writing), though not by copy or resemblance, a descrip-

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[26] "A work lawfully published, in the popular sense of the term, stands in this respect, I conceive, differently from a work which has never been in that situation. The former may be liable to be translated, abridged, analyzed, exhibited in morsels, complimented, and otherwise treated, in a manner that the latter is not.

"Suppose, however—instead of a translation, an abridgment, or a review—the case of a catalogue—suppose a man to have composed a variety of literary works ('innocent,' to use Lord Eldon's expression), which he has never printed or published, or lost the right to prohibit from being published—suppose a knowledge of them unduly obtained by some unscrupulous person, who prints with a view to circulation a descriptive catalogue, or even a mere list of the manuscripts, without authority or consent, does the law allow this? I hope and believe not. The same principles that prevent more candid piracy must, I conceive, govern such a case also.

"By publishing of a man that he has written to particular persons, or on particular subjects, he may be exposed, not merely to sarcasm, he may be ruined. There may be in his possession returned letters that he had written to former correspondents, with whom to have had relations, however harmlessly, may not in after life be a recommendation; or his writings may be otherwise of a kind squaring in no sort with his outward habits and worldly position. There are callings even now in which to be convicted of literature, is dangerous, though the danger is sometimes escaped.

"Again, the manuscripts may be those of a man on account of whose name alone a mere list would be matter of general curiosity. How many persons could be mentioned, a catalogue of whose unpublished writings would, during their lives or afterwards, command a ready sale!" Knight Bruce, V. C., in Prince Albert *v.* Strange, 2 DeGex & Sm. 652, 693.

tion of them, whether more or less limited or summary, whether in the form of a catalogue or otherwise." [27] Likewise, an unpublished collection of news possessing no element of a literary nature is protected from piracy.[28]

That this protection cannot rest upon the right to literary or artistic property in any exact sense, appears the more clearly when the subject-matter for which protection is invoked is not even in the form of intellectual property, but has the attributes of ordinary tangible prop-

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[27] "A copy or impression of the etchings would only be a means of communicating knowledge and information of the original, and does not a list and description of the same? The means are different, but the object and effect are similar; for in both, the object and effect is to make known to the public more or less of the unpublished work and composition of the author, which he is entitled to keep wholly for his private use and pleasure, and to withhold altogether, or so far as he may please, from the knowledge of others. Cases upon abridgments, translations, extracts, and criticisms of published works have no reference whatever to the present question; they all depend upon the extent of right under the acts respecting copyright, and have no analogy to the exclusive rights in the author of unpublished compositions which depend entirely upon the common-law right of property." Lord Cottenham in Prince Albert *v.* Strange, 1 McN. & G. 23, 43 (1849). "Mr. Justice Yates, in Millar *v.* Taylor, said, that an author's case was exactly similar to that of an inventor of a new mechanical machine; that both original inventions stood upon the same footing in point of property, whether the case were mechanical or literary, whether an epic poem or an orrery; that the immorality of pirating another man's invention was as great as that of purloining his ideas. Property in mechanical works or works of art, executed by a man for his own amusement, instruction, or use, is allowed to subsist, certainly, and may, before publication by him, be invaded, not merely by copying, but by description or by catalogue, as it appears to me. A catalogue of such works may in itself be valuable. It may also as effectually show the bent and turn of the mind, the feelings and taste of the artist, especially if not professional, as a list of his papers. The portfolio or the studio may declare as much as the writing-table. A man may employ himself in private in a manner very harmless, but which, disclosed to society, may destroy the comfort of his life, or even his success in it. Everyone, however, has a right, I apprehend, to say that the produce of his private hours is not more liable to publication without his consent, because the publication must be creditable or advantageous to him, than it would be in opposite circumstances.

"I think, therefore, not only that the defendant here is unlawfully invading the plaintiff's rights, but also that the invasion is of such a kind and effects such property as to entitle the plaintiff to the preventive remedy of an injunction; and if not the more, yet, certainly, not the less, because it is an intrusion—an unbecoming and unseemly intrusion—an intrusion not alone in breach of conventional rules, but offensive to that inbred sense of propriety natural to every man—if intrusion, indeed, fitly describes a sordid spying into the privacy of domestic life—into the home (a word hitherto sacred among us), the home of a family whose life and conduct form an acknowledged title, though not their only unquestionable title, to the most marked respect in this country." Knight Bruce, V. C., in Prince Albert *v.* Strange, 2 DeGex & Sm. 652, 696, 697.

[28] Kiernan *v.* Manhattan Quotation Co., 50 How. Pr. 194 (1876).

erty. Suppose a man has a collection of gems or curiosities which he keeps private: it would hardly be contended that any person could publish a catalogue of them, and yet the articles enumerated are certainly not intellectual property in the legal sense, any more than a collection of stoves or of chairs.[29]

The belief that the idea of property in its narrow sense was the basis of the protection of unpublished manuscripts led an able court to refuse, in several cases, injunctions against the publication of private letters, on the ground that "letters not possessing the attributes of literary compositions are not property entitled to protection"; and that it was "evident the plaintiff could not have considered the letters as of any value whatever as literary productions, for a letter cannot be considered of value to the author which he never would consent to have published." [30] But these decisions have not been followed,[31] and

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[29] "The defendants' counsel say, that a man acquiring a knowledge of another's property without his consent is not by any rule or principle which a court of justice can apply (however secretly he may have kept or endeavored to keep it) forbidden without his consent to communicate and publish that knowledge to the world, to inform the world what the property is, or to describe it publicly, whether orally, or in print or writing.

"I claim, however, leaving to doubt whether, as to property of a private nature, which the owner, without infringing on the right of any other, may and does retain in a state of privacy, it is certain that a person who, without the owner's consent, express or implied, acquires a knowledge of it, can lawfully avail himself of the knowledge so acquired to publish without his consent a description of the property.

"It is probably true that such a publication may be in a manner or relate to property of a kind rendering a question concerning the lawfulness of the act too slight to deserve attention. I can conceive cases, however, in which an act of the sort may be so circumstanced or relate to property such, that the matter may weightily affect the owner's interest or feelings, or both. For instance, the nature and intention of an unfinished work of an artist, prematurely made known to the world, may be painful and deeply prejudicial against him; nor would it be difficult to suggest other examples. . . .

"It was suggested that, to publish a catalogue of a collector's gems, coins, antiquities, or other such curiosities, for instance, without his consent, would be to make use of his property without his consent; and it is true, certainly, that a proceeding of that kind may not only as much embitter one collector's life as it would flatter another—may be not only an ideal calamity—but may do the owner damage in the most vulgar sense. Such catalogues, even when not descriptive, are often sought after, and sometimes obtain very substantial prices. These, therefore, and the like instances, are not necessarily examples merely of pain inflicted in point of sentiment or imagination; they may be that, and something else beside." Knight Bruce, V. C., in Prince Albert *v.* Strange, 2 DeGex & Sm. 652, 689, 690.

[30] Hoyt *v.* Mackenzie, 3 Barb. Ch. 320, 324 (1848); Wetmore *v.* Scovell, 3 Edw. Ch. 515 (1842). See Sir Thomas Plumer in 2 Ves. & B. 19 (1813).

[31] Woolsey *v.* Judd, 4 Duer, 379, 404 (1855). "It has been decided, fortunately for the welfare of society, that the writer of letters, though written without any

it may now be considered settled that the protection afforded by the common law to the author of any writing is entirely independent of its pecuniary value, its intrinsic merits, or of any intention to publish the same, and, of course, also, wholly independent of the material, if any, upon which, or the mode in which, the thought or sentiment was expressed.

Although the courts have asserted that they rested their decisions on the narrow grounds of protection to property, yet there are recognitions of a more liberal doctrine. Thus in the case of Prince Albert *v.* Strange, already referred to, the opinions both of the Vice-Chancellor and of the Lord Chancellor, on appeal, show a more or less clearly defined perception of a principle broader than those which were mainly discussed, and on which they both placed their chief reliance. Vice-Chancellor Knight Bruce referred to publishing of a man that he had "written to particular persons or on particular subjects" as an instance of possibly injurious disclosures as to private matters, that the courts would in a proper case prevent; yet it is difficult to perceive how, in such a case, any right of property, in the narrow sense, would be drawn in questions, or why, if such a publication would be restrained when it threatened to expose the victim not merely to sarcasm, but to ruin, it should not equally be enjoined, if it threatened to embitter his life. To deprive a man of the potential profits to be realized by publishing a catalogue of his gems cannot *per se* be a wrong to him. The possibility of future profits is not a right of property which the law ordinarily recognizes; it must, therefore, be an infraction of other rights which constitutes the wrongful act, and that infraction is equally wrongful, whether its results are to forestall the profits that the individual himself might secure by giving the matter a publicity obnoxious to him, or to gain an advantage at the expense of his mental pain and suffering. If the fiction of property in a narrow sense must be preserved, it is still true that the end accomplished by the gossip-monger is attained by the use of that which is another's, the facts relating to his private life, which he has seen fit to keep private. Lord Cottenham stated that a

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purpose or profit, or any idea of literary property, possesses such a right of property in them, that they cannot be published without his consent, unless the purposes of justice, civil or criminal, require the publication." Sir Samuel Romilly, *arg.*, in Gee *v.* Pritchard, 2 Swanst. 402, 418 (1818). But see High on Injunctions, 3d, ed., § 1012, *contra.*

man "is entitled to be protected in the exclusive use and enjoyment of that which is exclusively his," and cited with approval the opinion of Lord Eldon, as reported in a manuscript note of the case of Wyatt *v.* Wilson, in 1820, respecting an engraving of George the Third during his illness, to the effect that "if one of the late king's physicians had kept a diary of what he heard and saw, the court would not, in the king's lifetime, have permitted him to print and publish it"; and Lord Cottenham declared, in respect to the acts of the defendants in the case before him, that "privacy is the right invaded." But if privacy is once recognized as a right entitled to legal protection, the interposition of the courts cannot depend on the particular nature of the injuries resulting.

These considerations lead to the conclusion that the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. It is like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed. In each of these rights, as indeed in all other rights recognized by the law, there inheres the quality of being owned or possessed—and (as that is the distinguishing attribute of property) there may be some propriety in speaking of those rights as property. But, obviously, they bear little resemblance to what is ordinarily comprehended under that term. The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.[32]

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[32] "But a doubt has been suggested, whether mere private letters, not intended as literary compositions, are entitled to the protection of an injunction in the same manner as compositions of a literary character. This doubt has probably arisen from the habit of not discriminating between the different rights of property which belong to an unpublished manuscript, and those which belong to a published book. The latter, as I have intimated in another connection, is a right to take the profits of publication. The former is a right to control the act of publication, and to decide whether there shall be any publication at all. It has been called a right of property; an expression perhaps not quite satisfactory, but on the other hand sufficiently descriptive of a right which, however incorporeal, involves many of the essential elements of property, and is at least positive and definite. This expression can leave us in no doubt as to the meaning of the learned judges who have used it, when they have applied it to cases of unpublished manuscripts. They obviously

If we are correct in this conclusion, the existing law affords a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds. For the protection afforded is not confined by the authorities to those cases where any particular medium or form of expression has been adopted, nor to products of the intellect. The same protection is afforded to emotions and sensations expressed in a musical composition or other work of art as to a literary composition; and words spoken, a pantomime acted, a sonata performed, is no less entitled to protection than if each had been reduced to writing. The circumstance that a thought or emotion has been recorded in a permanent form renders its identification easier, and hence may be important from the point of view of evidence, but it has no significance as a matter of substantive right. If, then, the decisions indicate a general right to privacy for thoughts, emotions, and sensations, these should receive the same protection, whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression.

It may be urged that a distinction should be taken between the deliberate expression of thoughts and emotions in literary or artistic compositions and the casual and often involuntary expression given

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intended to use it in no other sense, than in contradistinction to the mere interests of feeling, and to describe a substantial right or legal interest." Curtis on Copyright, pp. 93, 94.

The resemblance of the right to prevent publication of an unpublished manuscript to the well-recognized rights of personal immunity is found in the treatment of it in connection with the rights of creditors. The right to prevent such publication and the right of action for its infringement, like the cause of action for an assault, battery, defamation, or malicious prosecution, are not assets available to creditors.

"There is no law which can compel an author to publish. No one can determine this essential matter of publication but the author. His manuscripts, however valuable, cannot, without his consent, be seized by his creditors as property." McLean, J., in Bartlett *v.* Crittenden, 5 McLean, 32, 37 (1849).

It has also been held that even where the sender's rights are not asserted, the receiver of a letter has not such property in it as passes to his executor or administrator as a salable asset. Eyre *v.* Higbee, 22 How. Pr. (N. Y.) 198 (1861).

"The very meaning of the word 'property' in its legal sense is 'that which is peculiar or proper to any person; that which belongs exclusively to one.' The first meaning of the word from which it is derived—*proprius*—is 'one's own.' " Drone on Copyright, p. 6.

It is clear that a thing must be capable of identification in order to be the subject of exclusive ownership. But when its identity can be determined so that individual ownership may be asserted, it matters not whether it be corporeal or incorporeal.

to them in the ordinary conduct of life. In other words, it may be contended that the protection afforded is granted to the conscious products of labor, perhaps as an encouragement to effort.[33] This contention, however plausible, has, in fact, little to recommend it. If the amount of labor involved be adopted as the test, we might well find that the effort to conduct one's self properly in business and in domestic relations had been far greater than that involved in painting a picture or writing a book; one would find that it was far easier to express lofty sentiments in a diary than in the conduct of a noble life. If the test of deliberateness of the act be adopted, much casual correspondence which is now accorded full protection would be excluded from the beneficent operation of existing rules. After the decisions denying the distinction attempted to be made between those literary productions which it was intended to publish and those which it was not, all considerations of the amount of labor involved, the degree of deliberation, the value of the product, and the intention of publishing must be abandoned, and no basis is discerned upon which the right to restrain publication and reproduction of such so-called literary and artistic works can be rested, except the right to privacy, as a part of the more general right to the immunity of the person—the right to one's personality.

It should be stated that, in some instances where protection has been afforded against wrongful publication, the jurisdiction has been asserted, not on the ground of property, or at least not wholly on that ground, but upon the ground of an alleged breach of an implied contract or of a trust or confidence.

Thus, in Abernethy *v.* Hutchinson, 3 L. J. Ch. 209 (1825), where the plaintiff, a distinguished surgeon, sought to restrain the publication in the *Lancet* of unpublished lectures which he had delivered at St. Bartholomew's Hospital in London, Lord Eldon doubted whether there could be property in lectures which had not been reduced to writing, but granted the injunction on the ground of breach of con-

[33] "Such then being, as I believe, the nature and the foundation of the common law as to manuscripts independently of Parliamentary additions and subtractions, its operation cannot of necessity be confined to literary subjects. That would be to limit the rule by the example. Wherever the produce of labor is liable to invasion in an analogous manner, there must, I suppose, be a title to analogous protection or redress." Knight Bruce, V. C., in Prince Albert *v.* Strange, 2 DeGex & Sm. 652, 696.

fidence, holding "that when persons were admitted as pupils or otherwise, to hear these lectures, although they were orally delivered, and although the parties might go to the extent, if they were able to do so, of putting down the whole by means of short-hand, yet they could do that only for the purposes of their own information, and could not publish, for profit, that which they had not obtained the right of selling."

In Prince Albert *v.* Strange, 1 McN. & G. 25 (1849), Lord Cottenham, on appeal, while recognizing a right of property in the etchings which of itself would justify the issuance of the injunction, stated, after discussing the evidence, that he was bound to assume that the possession of the etchings by the defendant had "its foundation in a breach of trust, confidence, or contract," and that upon such ground also the plaintiff's title to the injunction was fully sustained.

In Tuck *v.* Priester, 19 Q. B. D. 639 (1887), the plaintiffs were owners of a picture, and employed the defendant to make a certain number of copies. He did so, and made also a number of other copies for himself, and offered them for sale in England at a lower price. Subsequently, the plaintiffs registered their copyright in the picture, and then brought suit for an injunction and damages. The Lords Justices differed as to the application of the copyright acts to the case, but held unanimously that independently of those acts, the plaintiffs were entitled to an injunction and damages for breach of contract.

In Pollard *v.* Photographic Co., 40 Ch. Div. 345 (1888), a photographer who had taken a lady's photograph under the ordinary circumstances was restrained from exhibiting it, and also from selling copies of it, on the ground that it was a breach of an implied term in the contract, and also that it was a breach of confidence. Mr. Justice North interjected in the argument of the plaintiff's counsel the inquiry: "Do you dispute that if the negative likeness were taken on the sly, the person who took it might exhibit copies?" and counsel for the plaintiff answered: "In that case there would be no trust or consideration to support a contract." Later, the defendant's counsel argued that "a person has no property in his own features; short of doing what is libellous or otherwise illegal, there is no restriction on the photographer's using his negative." But the court, while expressly finding a breach of contract and of trust sufficient to justify its interposition, still seems to have felt the necessity of rest-

ing the decision also upon a right of property,[34] in order to bring it

[34] "The question, therefore, is whether a photographer who has been employed by a customer to take his or her portrait is justified in striking off copies of such photograph for his own use, and selling and disposing of them, or publicly exhibiting them by way of advertisement or otherwise, without the authority of such customer, either expressed or implied. I say 'expressed or implied,' because a photographer is frequently allowed, on his own request, to take a photograph of a person under circumstances in which a subsequent sale by him must have been in the contemplation of both parties, though not actually mentioned. To the question thus put, my answer is in the negative, that the photographer is not justified in so doing. Where a person obtains information in the course of a confidential employment, the law does not permit him to make any improper use of the information so obtained; and an injunction is granted, if necessary, to restrain such use; as, for instance, to restrain a clerk from disclosing his master's accounts, or an attorney from making known his client's affairs, learned in the course of such employment. Again, the law is clear that a breach of contract, whether express or implied, can be restrained by injunction. In my opinion the case of the photographer comes within the principles upon which both these classes of cases depend. The object for which he is employed and paid is to supply his customer with the required number of printed photographs of a given subject. For this purpose the negative is taken by the photographer on glass; and from this negative copies can be printed in much larger numbers than are generally required by the customer. The customer who sits for the negative thus puts the power of reproducing the object in the hands of the photographer; and in my opinion the photographer who uses the negative to produce other copies for his own use, without authority, is abusing the power confidentially placed in his hands merely for the purpose of supplying the customer; and, further, I hold that the bargain between the customer and the photographer includes, by implication, an agreement that the prints taken from the negative are to be appropriated to the use of the customer only." Referring to the opinions delivered in Tuck *v.* Priester, 19 Q. B. D. 639, the learned justice continued: "Then Lord Justice Lindley says: 'I will deal first with the injunction, which stands, or may stand, on a totally different footing from either the penalties or the damages. It appears to me that the relation between the plaintiffs and the defendant was such that, whether the plaintiffs had any copyright or not, the defendant has done that which renders him liable to an injunction. He was employed by the plaintiffs to make a certain number of copies of the picture, and that employment carried with it the necessary implication that the defendant was not to make more copies for himself, or to sell the additional copies in this country in competition with his employer. Such conduct on his part is a gross breach of contract and a gross breach of faith, and, in my judgment, clearly entitles the plaintiffs to an injunction, whether they have a copyright in the picture or not.' That case is the more noticeable, as the contract was in writing; and yet it was held to be an implied condition that the defendant should not make any copies for himself. The phrase 'a gross breach of faith' used by Lord Justice Lindley in that case applies with equal force to the present, when a lady's feelings are shocked by finding that the photographer she has employed to take her likeness for her own use is publicly exhibiting and selling copies thereof." North, J., in Pollard *v.* Photographic Co., 40 Ch. D. 345, 349–52 (1888).

"It may be said also that the cases to which I have referred are all cases in which there was some right of property infringed, based upon the recognition by the law of protection being due for the products of a man's own skill or mental labor; whereas in the present case the person photographed has done nothing to merit such protection, which is meant to prevent legal wrongs, and not mere sentimental grievances. But a person whose photograph is taken by a photographer is not thus deserted by the law; for the Act of 25 and 26 Vict., c. 68, s. 1, provides that when the negative of any

within the line of those cases which were relied upon as precedents.[35]

This process of implying a term in a contract, or of implying a trust (particularly where the contract is written, and where there is no established usage or custom), is nothing more nor less than a judicial declaration that public morality, private justice, and general convenience demand the recognition of such a rule, and that the publication under similar circumstances would be considered an intolerable abuse. So long as these circumstances happen to present a contract upon which such a term can be engrafted by the judicial mind, or to supply relations upon which a trust or confidence can be erected, there may be no objection to working out the desired protection through the doctrines of contract or of trust. But the court can hardly stop there. The narrower doctrine may have satisfied the demands of society at a time when the abuse to be guarded against could rarely have arisen without violating a contract or a special confidence; but now that modern devices afford abundant opportunities for the perpetration of such wrongs without any participation by the injured party, the protection granted by the law must be placed upon a broader foundation. While, for instance, the state of the photographic art was such that one's picture could

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photograph is made or executed for or on behalf of another person for a good or valuable consideration, the person making or executing the same shall not retain the copyright thereof, unless it is expressly reserved to him by agreement in writing signed by the person for or on whose behalf the same is so made or executed; but the copyright shall belong to the person for or on whose behalf the same shall have been made or executed.

"The result is that in the present case the copyright in the photograph is in one of the plaintiffs. It is true, no doubt, that sect. 4 of the same act provides that no proprietor of copyright shall be entitled to the benefit of the act until registration, and no action shall be sustained in respect of anything done before registration; and it was, I presume, because the photograph of the female plaintiff has not been registered that this act was not referred to by counsel in the course of the argument. But, although the protection against the world in general conferred by the act cannot be enforced until after registration, this does not deprive the plaintiffs of their common-law right of action against the defendant for his breach of contract and breach of faith. This is quite clear from the cases of Morison *v.* Moat [9 Hare, 241] and Tuck *v.* Priester [19 Q. B. D. 629] already referred to, in which latter case the same act of Parliament was in question." Per North, J., ibid. p. 352.

This language suggests that the property right in photographs or portraits may be one created by statute, which would not exist in the absence of registration; but it is submitted that it must eventually be held here, as it has been in the similar cases, that the statute provision becomes applicable only when there is a publication, and that before the act of registering there is property in the thing upon which the statute is to operate.

[35] Duke of Queensberry *v.* Shebbeare, 2 Eden, 329; Murray *v.* Heath, 1 B. & Ad. 804; Tuck *v.* Priester, 19 Q. B. D. 629.

seldom be taken without his consciously "sitting" for the purpose, the law of contract or of trust might afford the prudent man sufficient safeguards against the improper circulation of his portrait; but since the latest advances in photographic art have rendered it possible to take pictures surreptitiously, the doctrines of contract and of trust are inadequate to support the required protection, and the law of tort must be resorted to. The right of property in its widest sense, including all possession, including all rights and privileges, and hence embracing the right to an inviolate personality, affords alone that broad basis upon which the protection which the individual demands can be rested.

Thus, the courts, in searching for some principle upon which the publication of private letters could be enjoined, naturally came upon the ideas of a breach of confidence, and of an implied contract; but it required little consideration to discern that this doctrine could not afford all the protection required, since it would not support the court in granting a remedy against a stranger; and so the theory of property in the contents of letters was adopted.[36] Indeed, it is difficult to conceive on what theory of the law the casual recipient of a letter, who proceeds to publish it, is guilty of a breach of contract, express or implied, or of any breach of trust, in the ordinary acceptation of that term. Suppose a letter has been addressed to him without his solicitation. He opens it, and reads. Surely, he has not made any contract; he has not accepted any trust. He cannot, by opening and reading the letter, have come under any obligation save what the law declares; and, however expressed, that obligation is simply to observe the legal right of the sender, whatever it may be, and whether it be called his right of property in the contents of the letter, or his right to privacy.[37]

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[36] See Mr. Justice Story in Folsom *v.* Marsh, 2 Story, 100, 111 (1841):

"If he [the recipient of a letter] attempt to publish such letter or letters on other occasions, not justifiable, a court of equity will prevent the publication by an injunction, as a breach of private confidence or contract, or of the rights of the author; and *a fortiori,* if he attempt to publish them for profit; for then it is not a mere breach of confidence or contract, but it is a violation of the exclusive coypright of the writer. . . . The general property, and the general rights incident to property, belong to the writer, whether the letters are literary compositions, or familiar letters, or details of facts, or letters of business. The general property in the manuscripts remains in the writer and his representatives, as well as the general copyright. *A fortiori,* third persons, standing in no privity with either party, are not entitled to publish them, to subserve their own private purposes of interest, or curiosity, or passion."

[37] "The receiver of a letter is not a bailee, nor does he stand in a character analogous to that of a bailee. There is no right to possession, present or future, in the writer. The only right to be enforced against the holder is a right to prevent publication, not to re-

A similar groping for the principle upon which a wrongful publication can be enjoined is found in the law of trade secrets. There, injunctions have generally been granted on the theory of a breach of contract, or of an abuse of confidence.[38] It would, of course, rarely happen that anyone would be in the possession of a secret unless confidence had been reposed in him. But can it be supposed that the court would hesitate to grant relief against one who had obtained his knowledge by an ordinary trespass—for instance, by wrongfully looking into a book in which the secret was recorded, or by eavesdropping? Indeed, in Yovatt *v.* Winyard, 1 J. & W. 394 (1820), where an injunction was granted against making any use of or communicating certain recipes for veterinary medicine, it appeared that the defendant, while in the plaintiff's employ, had surreptitiously got access to his book of recipes, and copied them. Lord Eldon "granted the injunction, upon the ground of there having been a breach of trust and confidence"; but it would seem to be difficult to draw any sound legal distinction between such a case and one where a mere stranger wrongfully obtained access to the book.[39]

We must therefore conclude that the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world; and, as above stated, the principle which has been applied to protect these rights is in reality not the principle of private property, unless that word be used in an extended and unusual sense. The principle which protects personal writ-

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quire the manuscript from the holder in order to a publication by himself." Per Hon. Joel Parker, quoted in Grigsby *v.* Breckenridge, 2 Bush, 480, 489 (1867).

[38] In Morison *v.* Moat, 9 Hare, 241, 255 (1851), a suit for an injunction to restrain the use of a secret medical compound, Sir George James Turner, V. C., said: "That the court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, and in others, again, it has been treated as founded upon trust or confidence—meaning, as I conceive, that the court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given, the obligation of performing a promise on the faith of which the benefit has been conferred; but upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it."

[39] A similar growth of the law showing the development of contractual rights into rights of property is found in the law of good-will. There are indications, as early as the Year Books, of traders endeavoring to secure to themselves by contract the advantages now designated by the term "good-will," but it was not until 1743 that good-will received legal recognition as property apart from the personal covenants of the traders. See Allan on Goodwill, pp. 2, 3.

ings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relations, domestic or otherwise.[40]

If the invasion of privacy constitutes a legal *injuria*, the elements for demanding redress exist, since already the value of mental suffering, caused by an act wrongful in itself, is recognized as a basis for compensation.

The right of one who has remained a private individual, to prevent his public portraiture, presents the simplest case for such extension; the right to protect one's self from pen portraiture, from a discussion by the press of one's private affairs, would be a more important and far-reaching one. If casual and unimportant statements in a letter, if handiwork, however inartistic and valueless, if possessions of all sorts are protected not only against reproduction, but against description and enumeration, how much more should the acts and sayings of a man in his social and domestic relations be guarded from ruthless publicity. If you may not reproduce a woman's face photographically without her consent, how much less should be tolerated the reproduction of her face, her form, and her actions, by graphic descriptions colored to suit a gross and depraved imagination.

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[40] The application of an existing principle to a new state of facts is not judicial legislation. To call it such is to assert that the existing body of law consists practically of the statutes and decided cases, and to deny that the principles (of which these cases are ordinarily said to be evidence) exist at all. It it not the application of an existing principle to new cases, but the introduction of a new principle, which is properly termed judicial legislation.

But even the fact that a certain decision would involve judicial legislation should not be taken as conclusive against the propriety of making it. This power has been constantly exercised by our judges, when applying to a new subject principles of private justice, moral fitness, and public convenience. Indeed, the elasticity of our law, its adaptability to new conditions, the capacity for growth, which has enabled it to meet the wants of an ever-changing society and to apply immediate relief for every recognized wrong, have been its greatest boast.

"I cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated, or that there is any danger whatever in allowing them that power which they have in fact exercised, to make up for the negligence or the incapacity of the avowed legislator. That part of the law of every country which was made by judges has been far better made than that part which consists of statutes enacted by the legislature." 1 Austin's Jurisprudence, p. 224.

The cases referred to above show that the common law has for a cenury and a half protected privacy in certain cases, and to grant the further protection now suggested would be merely another application of an existing rule.

The right to privacy, limited as such right must necessarily be, has already found expression in the law of France.[41]

It remains to consider what are the limitations of this right to privacy, and what remedies may be granted for the enforcement of the right. To determine in advance of experience the exact line at which the dignity and convenience of the individual must yield to the demands of the public welfare or of private justice would be a difficult task; but the more general rules are furnished by the legal analogies already developed in the law of slander and libel, and in the law of literary and artistic property.

First. The right to privacy does not prohibit any publication of matter which is of public or general interest.

In determining the scope of this rule, aid would be afforded by the analogy, in the law of libel and slander, of cases which deal with the qualified privilege of comment and criticism on matters of public and general interest.[42] There are of course difficulties in applying such a rule; but they are inherent in the subject-matter, and are certainly no greater than those which exist in many other branches of the law—for instance, in that large class of cases in which the reasonableness or unreasonableness of an act is made the test of liability. The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever their position or station, from having matters which they may properly prefer to keep private, made public against their will. It is the unwarranted invasion of individual privacy which is reprehended, and to be, so far as possible, prevented. The distinction, however, noted in the above statement is obvious and fundamental. There are persons who may reasonably claim as a right, protection from the notoriety entailed by being made the victims of journalistic enterprise. There are others who, in varying degrees, have renounced the right

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[41] Loi Relative à la Presse. 11 Mai 1868.

"11. Toute publication dans un écrit périodique relative à un fait de la vie privée constitue une contravention punie d'un amende de cinq cent francs.

"La poursuite ne pourra être exercée que sur la plainte de la partie intéressée."

Rivière: Codes Français et Lois Usuelles. App. Code Pén., p. 20.

[42] See Campbell *v.* Spottiswoode, 3 B. & S. 769, 776; Henwood *v.* Harrison, L. R. 7 C. P. 606; Gott *v.* Pulsifer, 122 Mass. 235.

to live their lives screened from public observation. Matters which men of the first class may justly contend concern themselves alone, may in those of the second be the subject of legitimate interest to their fellow-citizens. Peculiarities of manner and person, which in the ordinary individual should be free from comment, may acquire a public importance, if found in a candidate for political office. Some further discrimination is necessary, therefore, than to class facts or deeds as public or private according to a standard to be applied to the fact or deed *per se*. To publish of a modest and retiring individual that he suffers from an impediment in his speech or that he cannot spell correctly, is an unwarranted, if not an unexampled, infringement of his rights, while to state and comment on the same characteristics found in a would-be congressman could not be regarded as beyond the pale of propriety.

The general object in view is to protect the privacy of private life, and to whatever degree and in whatever connection a man's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn.[43] Since, then, the propriety of publishing the very same facts may depend wholly upon the person concerning whom they are published, no fixed formula can be used to prohibit obnoxious publications. Any rule of liability adopted must have in it an elasticity which shall take account of the varying circumstances of each case—a necessity which unfortunately renders such a doctrine not only more difficult of application, but also to a certain extent uncertain in its operation and easily rendered abortive. Besides, it is only the more flagrant breaches of decency and propriety that could in practice be reached, and it is not perhaps desirable even to attempt to repress everything which the nicest taste and keenest sense of the respect due to private life would condemn.

In general, then, the matters of which the publication should be repressed may be described as those which concern the private life,

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[43] "Nos moeurs n'admettent pas la prétention d'enlever aux investigations de la publicité les actes qui relèvent de la vie publique, et ce dernier mot ne doit pas être restreint à la vie officielle ou à celle du fonctionnaire. Tout homme qui appelle sur lui l'attention ou les regards du publique, soit par une mission qu'il a reçue ou qu'il se donne, soit par le rôle qu'il s'attribue dans l'industrie, les arts, le theâtre, etc., ne peut plus invoquer contre la critique ou l'exposé de sa conduite d'autre protection que les lois qui repriment la diffamation et l'injure." Circ. Mins. Just., 4 Juin, 1868. Rivière: Codes Français et Lois Usuelles, App. Code Pen. 20 n(b).

habits, acts, and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested, or for any public or quasi-public position which he seeks or for which he is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi-public capacity. The foregoing is not designed as a wholly accurate or exhaustive definition, since that which must ultimately in a vast number of cases become a question of individual judgment and opinion is incapable of such definition; but it is an attempt to indicate broadly the class of matters referred to. Some things all men alike are entitled to keep from popular curiosity, whether in public life or not, while others are only private because the persons concerned have not assumed a position which makes their doings legitimate matters of public investigation.[44]

Second. The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel.

Under this rule, the right to privacy is not invaded by any publication made in a court of justice, in legislative bodies, or the committees of those bodies; in municipal assemblies, or the committee of such assemblies, or practically by any communication made in any other public body, municipal or parochial, or in any body quasi-public, like the large voluntary associations formed for almost every purpose of benevolence, business, or other general interest; and (at least in many jurisdictions) reports of any such proceedings would in some measure be accorded a like privilege.[45] Nor would the rule prohibit any publication made by one in the discharge of some public or private duty, whether legal or moral, or in conduct of one's own affairs, in matters where his own interest is concerned.[46]

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[44] "Celui-la seul a droit au silence absolu qui n'a pas expressément ou indirectment provoqué ou authorisé l'attention, l'approbation ou le blâme." Circ. Mins. Just., 4 Juin, 1868. Rivière: Codes Français et Lois Usuelles, App. Code Pen. 20 n (b).

The principle thus expressed evidently is designed to exclude the wholesale investigations into the past of prominent public men with which the American public is too familiar, and also, unhappily, too well pleased; while not entitled to the "silence *absolu*" which less prominent men may claim as their due, they may still demand that all the details of private life in its most limited sense shall not be laid bare for inspection.

[45] Wason *v.* Walters, L. R. 4 Q. B. 73; Smith *v.* Higgins, 16 Gray, 251; Barrows *v.* Bell, 7 Gray, 331.

[46] This limitation upon the right to prevent the publication of private letters was recognized early:

Third. The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.

The same reasons exist for distinguishing between oral and written publications of private matters, as is afforded in the law of defamation by the restricted liability for slander as compared with the liability for libel.[47] The injury resulting from such oral communications would ordinarily be so trifling that the law might well, in the interest of free speech, disregard it altogether.[48]

Fourth. The right to privacy ceases upon the publication of the facts by the individual, or with his consent.

This is but another application of the rule which has become familiar in the law of literary and artistic property. The cases there decided established also what should be deemed a publication—the important principle in this connection being that a private communication or circulation for a restricted purpose is not a publication within the meaning of the law.[49]

Fifth. The truth of the matter published does not afford a defense.

"But, consistently with this right [of the writer of letters], the persons to whom they are addressed may have, nay, must, by implication, possess, the right to publish any letter or letters addressed to them, upon such occasions, as require, or justify, the publication or public use of them; but this right is strictly limited to such occasions. Thus, a person may justifiably use and publish, in a suit at law or in equity, such letter or letters as are necessary and proper, to establish his right to maintain the suit, or defend the same. So, if he be aspersed or misrepresented by the writer, or accused of improper conduct, in a public manner, he may publish such parts of such letter or letters, but no more, as may be necessary to vindicate his character and reputation, or free him from unjust obloquy and reproach." Story, J., in Folsom *v.* Marsh, 2 Story, 100, 110, 111 (1841).

The existence of any right in the recipient of letters to publish the same has been strenuously denied by Mr. Drone; but the reasoning upon which his denial rests does not seem satisfactory. Drone on Copyright, pp. 136–9.

[47] Townshend on Slander and Libel, 4th ed., § 18; Odgers on Libel and Slander, 2d ed., p. 3.

[48] "But as long as gossip was oral, it spread, as regards any one individual, over a very small area, and was confined to the immediate circle of his acquaintances. It did not reach, or but rarely reached, those who knew nothing of him. It did not make his name, or his walk, or his conversation familiar to strangers. And what is more to the purpose, it spared him the pain and mortification of knowing that he was gossipped about. A man seldom heard of oral gossip about him which simply made him ridiculous, or trespassed on his lawful privacy, but made no positive attack upon his reputation. His peace and comfort were, therefore, but slightly affected by it." E. L. Godkin, "The Rights of the Citizen: to His Reputation." *Scribner's Magazine*, July, 1890, p. 66.

Vice-Chancellor Knight Bruce suggested in Prince Albert *v.* Strange, 2 DeGex & Sm. 652, 694, that a distinction would be made as to the right to privacy of works of art between an oral and a written description or catalogue.

[49] See Drone on Copyright, pp. 121, 289, 290.

Obviously this branch of the law should have no concern with the truth or falsehood of the matters published. It is not for injury to the individual's character that redress or prevention is sought, but for injury to the right of privacy. For the former, the law of slander and libel provides perhaps a sufficient safeguard. The latter implies the right not merely to prevent inaccurate portrayal of private life, but to prevent its being depicted at all.[50]

Sixth. The absence of "malice" in the publisher does not afford a defense.

Personal ill-will is not an ingredient of the offense, any more than in an ordinary case of trespass to person or to property. Such malice is never necessary to be shown in an action for libel or slander at common law, except in rebuttal of some defense, *e.g.*, that the occasion rendered the communication privileged, or, under the statutes in this state and elsewhere, that the statement complained of was true. The invasion of the privacy that is to be protected is equally complete and equally injurious, whether the motives by which the speaker or writer was actuated are, taken by themselves, culpable or not; just as the damage to character, and to some extent the tendency to provoke a breach of the peace, is equally the result of defamation without regard to the motives leading to its publication. Viewed as a wrong to the individual, this rule is the same pervading the whole law of torts, by which one is held responsible for his intentional acts, even though they are committed with no sinister intent; and viewed as a wrong to society, it is the same principle adopted in a large category of statutory offenses.

The remedies for an invasion of the right of privacy are also suggested by those administered in the law of defamation, and in the law of literary and artistic property, namely:

1. An action of tort for damages in all cases.[51] Even in the absence of special damages, substantial compensation could be allowed for injury to feelings as in the action of slander and libel.

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[50] Compare the French law.

"En prohibant l'envahissement de la vie privée, sans qu'il soit nécessaire d'établir l'intention criminelle, la loi a entendue interdire toute discussion de la part de la défense sur la vérité des faits. Le remède eut été pire que le mal, si un débat avait pu s'engager sur ce terrain." Circ. Mins. Just., 4 Juin, 1868. Rivière: Codes Français et Lois Usuelles, App. Code Pen. 20 n(a).

[51] Comp. Drone on Copyright, p. 107.

2. An injunction, in perhaps a very limited class of cases.[52]

It would doubtless be desirable that the privacy of the individual should receive the added protection of the criminal law, but for this, legislation would be required.[53] Perhaps it would be deemed proper to bring the criminal liability for such publication within narrower limits; but that the community has an interest in preventing such invasions of privacy, sufficiently strong to justify the introduction of such a remedy, cannot be doubted. Still, the protection of society must come mainly through a recognition of the rights of the individual. Each man is responsible for his own acts and omissions only. If he condones what he reprobates, with a weapon at hand equal to his defense, he is responsible for the results. If he resists, public opinion will rally to his support. Has he then such a weapon? It is believed that the common law provides him with one, forged in the slow fire of the centuries, and today fitly tempered to his hand. The common law has always recognized a man's house as his castle, impregnable, often even to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?

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[52] Comp. High on Injunctions, 3d ed., § 1015; Townshend on Libel and Slander, 4th ed., §§ 417a–417d.

[53] The following draft of a bill has been prepared by William H. Dunbar, Esq., of the Boston bar, as a suggestion for possible legislation:

"*Section 1.* Whoever publishes in any newspaper, journal, magazine, or other periodical publication any statement concerning the private life or affairs of another, after being requested in writing by such other person not to publish such statement or any statement concerning him, shall be punished by imprisonment in the State prison not exceeding five years, or by imprisonment in the jail not exceeding two years, or by fine not exceeding one thousand dollars; provided, that no statement concerning the conduct of any person in, or the qualifications of any person for, a public office or position which such person holds, has held, or is seeking to obtain, or for which such person is at the time of such publication a candidate, or for which he or she is then suggested as a candidate, and no statement of or concerning the acts of any person in his or her business, profession, or calling, and no statement concerning any person in relation to a position, profession, business, or calling, bringing such person prominently before the public, or in relation to the qualifications for such a position, business, profession, or calling of any person prominent or seeking prominence before the public, and no statement relating to any act done by any person in a public place, nor any other statement of matter which is of public and general interest, shall be deemed a statement concerning the private life or affairs of such person within the meaning of this act.

"*Section 2.* It shall not be a defense to any criminal prosecution brought under *Section 1* of this act that the statement complained of is true, or that such statement was published without a malicious intention; but no person shall be liable to punishment for any statement published under such circumstances that if it were defamatory the publication thereof would be privileged."

THE LIVING LAW

THE history of the United States, since the adoption of the Constitution, covers less than 128 years. Yet in that short period the American ideal of government has been greatly modified. At first our ideal was expressed as, "A government of laws and not of men." Then it became, "A government of the people, by the people, and for the people." Now it is, "Democracy and social justice."

In the last half century our democracy has deepened. Coincidently there has been a shifting of our longing from legal justice to social justice, and—it must be admitted—also a waning respect for law. Is there any causal connection between the shifting of our longing from legal justice to social justice and waning respect for law? If so, was that result unavoidable?

Many different causes contributed to this waning respect for law. Some related specifically to the lawyer, some to the courts and some to the substantive law itself. The lessening of the lawyer's influence in the community came first. James Bryce called attention to this as a fact of great significance already a generation ago. Later criticism of the efficiency of our judicial machinery became widespread. Finally, the law as administered was challenged—a challenge which expressed itself vehemently a few years ago in the demand for recall of judges and of judicial decisions.

Many different remedies must be applied before the ground lost can be fully recovered and the domain of law extended further. The causes and the remedies have received perhaps their most helpful discussion from three lawyers whom we associate with Chicago: Prof. Roscoe Pound, recently secured for Harvard, who stands preeminently in the service in this connection; Professor Wigmore, and Professor Freund. Another Chicago professor, who was not a lawyer but a sociologist, the late Charles R. Henderson, has aided much by intelligent criticism. No court in America has in the last generation done such notable pioneer work in removing the causes of criticism as your own Municipal Court under its distinguished Chief Justice Harry Olson. And the American Judicature Society, under the efficient man-

agement of Mr. Herbert Harley, is stimulating thought and action throughout the country by its dissemination of what is being done and should be done in aid of the reform of our judicial system.

The important contribution which Chicago has made in this connection makes me wish to discuss a small part of this large problem.

The challenge of existing law is not a manifestation peculiar to our country or to our time. Sporadic dissatisfaction has doubtless existed in every country at all times. Such dissatisfaction has usually been treated by those who govern as evidencing the unreasonableness of lawbreakers. The lines, "No thief e'er felt the halter draw with good opinion of the law," express the traditional attitude of those who are apt to regard existing law as "the true embodiment of everything that's excellent." It required the joint forces of Sir Samuel Romilly and Jeremy Bentham to make clear to a humane, enlightened, and liberty-loving England that death was not the natural and proper punishment for theft. Still another century had to elapse before social science raised the doubt whether theft was not perhaps as much the fault of the community as of the individual.

In periods of rapid transformation, challenge of existing law, instead of being sporadic, becomes general. Such was the case in Athens, twenty-four centuries ago, when Euripides burst out in flaming words against "the trammelings of law which are not of the right." Such was the case also in Germany during the Reformation, when Ulrich Zäsius declared that, "All sciences have put off their dirty clothes; only jurisprudence remains in its rags."

And after the French Revolution, another period of rapid transformation, another poet-sage, Goethe, imbued with the modern scientific spirit, added to his protest a clear diagnosis of the disease:

Customs and laws, in every place,
Like a disease, an heirloom dread,
Still trace their curse from race to race,
And furtively abroad they spread.
To nonsense, reason's self they turn;
Beneficence becomes a pest;
Woe unto thee, thou art a grandson born!
As for the law, born with us, unexpressed
That law, alas, none careth to discern.

Is not Goethe's diagnosis equally applicable to the twentieth-century challenge of the law in the United States? Has not the recent dissatisfaction with our law as administered been due, in large measure, to the fact that it had not kept pace with the rapid development of our political, economic, and social ideals? In other words, is not the challenge of legal justice due to its failure to conform to contemporary conceptions of social justice?

Since the adoption of the Federal Constitution, and notably within the last fifty years, we have passed through an economic and social revolution which affected the life of the people more fundamentally than any political revolution known to history. Widespread substitution of machinery for hand labor (thus multiplying hundred-fold man's productivity), and the annihilation of space through steam and electricity, have wrought changes in the conditions of life which are in many respects greater than those which had occurred in civilized countries during thousands of years preceding. The end was put to legalized human slavery—an institution which had existed since the dawn of history. But of vastly greater influence upon the lives of the great majority of all civilized peoples was the possibility which invention and discovery created of emancipating women and of liberating men called free from the excessive toil theretofore required to securing food, clothing, and shelter. Yet while invention and discovery created the possibility of releasing men and women from the thraldom of drudgery, there actually came with the introduction of the factory system and the development of the business corporation, new dangers to liberty. Large publicly owned corporations replaced small privately owned concerns. Ownership of the instruments of production passed from the workman to the employer. Individual personal relations between the proprietor and his help ceased. The individual contract of service lost its character, because of the inequality in position between employer and employee. The group relation of employee to employer, with collective bargaining, became common; for it was essential to the workers' protection.

Political as well as economic and social science noted these revolutionary changes. But legal science—the unwritten or judge-made laws as distinguished from legislation—was largely deaf and blind to them. Courts continued to ignore newly arisen social needs. They applied complacently eighteenth-century conceptions of the liberty of

the individual and of the sacredness of private property. Early nineteenth-century scientific half-truths like "The survival of the fittest," which, translated into practice, meant "The devil take the hindmost," were erected by judicial sanction into a moral law. Where statutes giving expression to the new social spirit were clearly constitutional, judges, imbued with the relentless spirit of individualism, often construed them away. Where any doubt as to the constitutionality of such statutes could find lodgment, courts all too frequently declared the acts void. Also in other countries the strain upon the law has been great during the last generation; because there also the period has been one of rapid transformation; and the law has everywhere a tendency to lag behind the facts of life. But in America the strain became dangerous; because constitutional limitations were invoked to stop the natural vent of legislation. In the course of relatively few years hundreds of statutes which embodied attempts (often very crude) to adjust legal rights to the demands of social justice were nullified by the courts, on the grounds that the statutes violated the constitutional guaranties of liberty or property. Small wonder that there arose a clamor for the recall of judges and of judicial decisions and that demand was made for amendment of the constitutions and even for their complete abolition. The assaults upon courts and constitutions culminated in 1912. They centered about two decisions: the Lochner case,[1] in which a majority of the judges of the Supreme Court of the United States had declared void a New York law limiting the hours of labor for bakers; and the Ives case,[2] in which the New York Court of Appeals had unanimously held void its accident compensation law.

Since 1912 the fury against the courts has abated. This change in the attitude of the public toward the courts is due not to any modification in judicial tenure, nor to amendments of the constitutions, but to the movement, begun some years prior to 1912, which has more recently resulted in a better appreciation by the courts of existing social needs.

In 1895 the Illinois court held in the first Ritchie case [3] that the eight-hour law for women engaged in manufacturing was unconstitutional. In 1908 the United States Supreme Court held in Muller *v.*

[1] Lochner *v.* New York, 198 U. S. 45.
[2] Ives *v.* South Buffalo Ry. Co., 94 N. E. R. 431.
[3] Ritchie *v.* People, 40, N. E. R. 454.

Oregon [4] that the Women's Ten-Hour Law was constitutional. In 1910 the Illinois court held the same in the second Ritchie case.[5] The difference in decision in the two Ritchie cases was not due to the difference between a ten-hour day and a eight-hour day; for the Supreme Court of the United States has since held (as some state courts had held earlier) that an eight-hour law also was valid; and the Illinois court has since sustained a nine-hour law. In the two Ritchie cases the same broad principles of constitutional law were applied. In each the right of a legislature to limit (in the exercise of the police power) both liberty of contract and use of property was fully recognized. But in the first Ritchie case the court, reasoning from abstract conceptions, held a limitation of working hours to be arbitrary and unreasonable; while in the second Ritchie case, reasoning from life, it held the limitation of hours not to be arbitrary and unreasonable. In other words—in the second Ritchie case it took notice of those facts of general knowledge embraced in the world's experience with inrestricted working hours, which the court had in the earlier case ignored. It considered the evils which had flowed from unrestricted hours, and the social and industrial benefit which had attended curtailed working hours. It considered likewise the common belief in the advisability of so limiting working hours which the legislatures of many states and countries evidenced. In the light of this evidence as to the world's experience and beliefs it proved impossible for reasonable judges to say that the Legislature of Illinois had acted unreasonably and arbitrarily in limiting the hours of labor.

Decisions rendered by the Court of Appeals of New York show even more clearly than do those of Illinois the judicial awakening to the facts of life.

In 1907, in the Williams case,[6] that court held that an act prohibiting night work for women was unconstitutional. In 1915, in the Schweinler case [7] it held that a similar night-work act was constitutional.

Eight years elapsed between the two decisions. But the change in the attitude of the court had actually come after the agitation of 1912.

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[4] Muller *v.* Oregon, 208 U. S. 412.
[5] W. C. Ritchie & Co. *v.* Wageman, 91 N. E. R. 695.
[6] People *v.* Williams, 81 N. E. R. 778.
[7] People *v.* Charles Schweinler Press, 108 N. E. R. 639.

As late as 1911, when the court in the Ives case [8] held the first accident compensation law void, it refused to consider the facts of life, saying:

"The report (of the Commission appointed by the legislature to consider that subject before legislating) is based upon a most voluminous array of statistical tables, extracts from the works of philosophical writers and the industrial laws of many countries, all of which are designed to show that our own system of dealing with industrial accidents is economically, morally, and legally unsound. Under our form of government, however, courts must regard all economic, philosophical, and moral theories, attractive and desirable though they may be, as subordinate to the primary question whether they can be molded into statutes without infringing upon the letter or spirit of our written constitutions. In that respect we are unlike any of the countries whose industrial laws are referred to as models for our guidance. Practically all of these countries are so-called constitutional monarchies in which, as in England, there is no written constitution, and the parliament or lawmaking body is supreme. In our country the federal and state constitutions are the charters which demark the extent and the limitations of legislative powers; and while it is true that the rigidity of a written constitution may at times prove to be a hindrance to the march of progress, yet more often its stability protects the people against the frequent and violent fluctuations of that which, for want of a better name, we call 'public opinion.'"

On the other hand, in July 1915, in the Jensen case,[9] the court holding valid the second compensation law (which was enacted after a constitutional amendment), expressly considered the facts of life, and said:

"We should consider practical experience, as well as theory, in deciding whether a given plan in fact constitutes a taking of property in violation of the constitution. A compulsory scheme of insurance to secure injured workmen in hazardous employments and their dependents from becoming objects of charity certainly promotes the public welfare as directly as does an insurance of bank depositors from loss."

The court reawakened to the truth of the old maxim of the civilians *ex facto oritur jus*. It realized that no law, written or unwritten, can

[8] Ives *v.* South Buffalo Ry. Co. 94 N. E. R. 431.
[9] Jensen *v.* Southern Pacific Co. 109 N. E. R. 600.

be understood without a full knowledge of the facts out of which it arises, and to which it is to be applied. But the struggle for the living law has not been fully won. The Lochner case has not been expressly overruled. Within six weeks the Supreme Judicial Court of Massachusetts, in supposed obedience to its authority, held invalid a nine-hour law for certain railroad employees.[10] The Supreme Court of the United States which, by many decisions, had made possible in other fields the harmonizing of legal rights with contemporary conceptions of social justice, showed by its recent decision in the Coppage case [11] the potency of mental prepossessions. Long before, it has recognized that employers "and their operatives do not stand upon an equality"; that "the legislature being familiar with local conditions, is primarily the judge of the necessity of such enactments." And that unless a "prohibition is palpably unreasonable and arbitrary, we are not at liberty to say that it passes beyond the limitation of a state's protective authority." And in the application of these principles it has repeatedly upheld legislation limiting the right of free contract between employer and employee. But in the Adair [12] case, and again in the Coppage case, the Supreme Court declared unconstitutional a statute which prohibited an employer from requiring as a condition of his securing or retaining employment, that the workman should not be a member of a labor union, refusing to recognize that Congress or the Kansas Legislature might have had good cause to believe that such prohibition was essential to the maintenance of trade unionism, and that trade unionism was essential to securing equality between employer and employee. Our Supreme Court declared that the enactment of the anti-discrimination law which has been enacted in many states was an arbitrary and unreasonable interference with the right of contract.

The challenge of existing law does not, however, come only from the working classes. Criticism of the law is widespread among business men. The tone of their criticism is more courteous than that of the working classes; and the specific objections raised by business men are different. Business men do not demand recall of judges or of judicial decisions. Business men do not ordinarily seek constitutional amend-

[10] Commonwealth *v.* B. & M. R.R. 110 N. E. R. 264.
[11] Coppage *v.* Kansas 236 U. S. 1.
[12] Adair *v.* U. S. 208 U. S. 161.

ments. They are more apt to desire repeal of statutes than enactment. But both business men and working-men insist that courts lack understanding of contemporary industrial conditions. Both insist that the law is not "up to date." Both insist that the lack of familiarity with the facts of business life results in erroneous decisions. In proof of this business men point to certain decisions under the Sherman law, and certain applications of the doctrine of contracts against public policy —decisions like the Dr. Miles Medical Co. case,[13] in which it is held that manufacturers of a competitive trade-marked article cannot legally contract with retailers to maintain a standard selling-price for their article, and thus prevent ruinous price-cutting. Both business men and working-men have given further evidence of their distrust of the courts and of lawyers by their efforts to establish non-legal tribunals or commissions to exercise functions which are judicial (even where not legal) in their nature, and by their insistence that the commissions shall be manned with business and working-men instead of lawyers. And business men have been active in devising other means of escape from the domain of the courts, as is evidenced by the widespread tendency to arbitrate controversies through committees of business organizations.

The remedy so sought is not adequate, and may prove a mischievous one. What we need is not to displace the courts, but to make them efficient instruments of justice; not to displace the lawyer, but to fit him for his official or judicial task. And, indeed, the task of fitting the lawyer and the judge to perform adequately the functions of harmonizing law with life is a task far easier of accomplishment than that of endowing men, who lack legal training, with the necessary qualifications.

The training of the practicing lawyer is that best adapted to develop men not only for the exercise of strictly judicial functions, but also for the exercise of administrative functions, quasi-judicial in character. It breeds a certain virile, compelling quality, which tends to make the possessor proof against the influence of either fear or favor. It is this quality to which the prevailing high standard of honesty among our judges is due. And it is certainly a noteworthy fact that

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[13] Dr. Miles Medical Co. *v.* Park & Sons Co. 220 U. S. 409.

in spite of the abundant criticism of our judicial system, the suggestion of dishonesty is rare; and instances of established dishonesty are extremely few.

The pursuit of the legal profession involves a happy combination of the intellectual with the practical life. The intellectual tends to breadth of view; the practical to that realization of limitations which are essential to the wise conduct of life. Formerly the lawyer secured breadth of view largely through wide professional experience. Being a general practitioner, he was brought into contact with all phases of contemporary life. His education was not legal only; because his diversified clientage brought him, by the mere practice of his profession, an economic and social education. The relative smallness of the communities tended to make his practice diversified not only in the character of matters dealt with, but also in the character or standing of his clients. For the same lawyer was apt to serve at one time or another both rich and poor, both employer and employee. Furthermore—nearly every lawyer of ability took some part in political life. Our greatest judges, Marshall, Kent, Story, Shaw, had secured this training. Oliver, in his study of Alexander Hamilton, pictured the value of such training in public affairs: "In the vigor of his youth and at the very summit of hope, he brought to the study of the law a character already trained and tested by the realities of life, formed by success, experienced in the facts and disorders with which the law has to deal. Before he began a study of the remedies he had a wide knowledge of the conditions of human society. . . . With him . . . the law was . . . a reality, quick, human, buxom, and jolly, and not a formula, pinched, stiff, banded, and dusty like a royal mummy of Egypt." Hamilton was an apostle of the living law.

The last fifty years have wrought a great change in professional life. Industrial development and the consequent growth of cities have led to a high degree of specialization—specialization not only in the nature and class of questions dealt with, but also specialization in the character of clientage. The term "corporation lawyer" is significant in this connection. The growing intensity of professional life tended also to discourage participation in public affairs, and thus the broadening of view which comes from political life was lost. The deepening of knowledge in certain subjects was purchased at the cost of vast areas of ignorance and grave danger of resultant distortion of judgment.

The effect of this contraction of the lawyers' intimate relation to contemporary life was doubly serious; because it came at a time when the rapidity of our economic and social transformation made accurate and broad knowledge of present-day problems essential to the administration of justice. "Lack of recent information," says Matthew Arnold, "is responsible for more mistakes of judgment than erroneous reasoning."

The judge came to the bench unequipped with the necessary knowledge of economic and social science, and his judgment suffered likewise through lack of equipment in the lawyers who presented the cases to him. For a judge rarely performs his functions adequately unless the case before him is adequately presented. Thus were the blind led by the blind. It is not surprising that under such conditions the laws as administered failed to meet contemporary economic and social demands.

We are powerless to restore the general practitioner and general participation in public life. Intense specialization must continue. But we can correct its distorting effects by broader education—by study undertaken preparatory to practice—and continued by lawyer and judge throughout life: study of economics and sociology and politics which embody the facts and present the problems of today. "Every beneficent change in legislation," Professor Henderson said, "comes from a fresh study of social conditions and social ends, and from such rejection of obsolete laws to make room for a rule which fits the new facts. One can hardly escape from the conclusion that a lawyer who has not studied economics and sociology is very apt to become a public enemy."

Charles R. Crane told me once the story of two men whose lives he should have cared most to have lived. One was Bogigish, a native of the ancient city of Ragusa off the coast of Dalmatia—a deep student of law, who after gaining some distinction at the University of Vienna, and in France, became professor at the University of Odessa. When Montenegro was admitted to the family of nations, its prince concluded that, like other civilized countries, it must have a code of law. Bogigish's fame had reached Montenegro—for Ragusa is but a few miles distant. So the prince begged the Tsar of Russia to have the learned jurist prepare a code for Montenegro. The Tsar granted the request; and Bogigish undertook the task. But instead of utilizing

his great knowledge of laws to draft a code, he proceeded to Montenegro, and for two years literally made his home with the people—studying everywhere their customs, their practices, their needs, their beliefs, their points of view. Then he embodied in law the life which the Montenegrins lived. They respected that law, because it expressed the will of the people.

List of Articles and Addresses

1881 July	Article in 15 *American Law Review* 449, pp. 449–62, entitled **"Liability of Trust Estates on Contracts Made for Their Benefit,"** here reprinted.
1888 December	Article in *2 Harvard Law Review*, pp. 195–211, jointly with Samuel D. Warren, entitled "The Watuppa Pond Cases."
1889 January	Article in *Green Bag*, vol. 1, pp. 10–25, entitled "The Harvard Law School."
April	Article in *3 Harvard Law Review*, pp. 1–22, jointly with Samuel D. Warren, entitled "The Law of Ponds."

The three preceding articles have never been reprinted but are not here included because of their special subject-matter.

1890 December	Article in *4 Harvard Law Review*, pp. 193–220, jointly with Samuel D. Warren, entitled **"The Right to Privacy,"** here reprinted.
1905 May 4th	Address, "The Opportunity in the Law," listed in Part VI.
1911 December	Article, "An Illegal Trust Legalized," listed and reprinted in Part III.
1913 November	Article, "Cut-Throat Prices," listed in Part III.
1914 December	Argument on Minimum Wage, listed and reprinted in Part II.
1916 January 3d	Address before the Chicago Bar Association, entitled **"The Living Law,"** published in *10 Illinois Law Review*, February, pp. 461–71, and also in *Harper's Weekly*, February 19th and 26th, pp. 173–4, 201–2, reprinted in the second edition of *Business—a Profession*, pp. 344–63, and here reprinted because of its interest and importance.

APPENDICES

I

Books by Justice Brandeis

1894–6 *Notes on Business Law*, privately printed for the use of students in Massachusetts Institute of Technology, Boston. (2 vols.)

I. Legal Limits of Business Combinations.

II. The Legal Relation of Capital and Labor.

1907 *Financial Condition of the New York, New Haven & Hartford Railroad Company, and of the Boston & Maine Railroad*, privately printed, Boston. A pamphlet. (77 pp.)

1914 *Other People's Money and How the Bankers Use It*, Frederick A. Stokes Company, New York, with preface by Norman Hapgood, pp. vii to xvi. (223 pp.) New edition 1932, with foreword by Norman Hapgood, pp. xix to lxii, entitled "Prophet and Statesman." (223 pp.) The chapters of this book have been listed under the heading "Railroads and Finance." A cheap reprint was published in 1933 in the Jacket Library, The National Home Library Foundation, Washington, with a note by Sherman F. Mittell, Editor. (152 pp.)

1914 *Business—a Profession*, Small, Maynard, Co., Boston, with introductory article by Ernest Poole, pp. ix to lvi. (327 pp.) New edition 1925, Hale, Cushman & Flint, Boston, with supplementary notes by Professor Felix Frankfurter, pp. lvii to lxiii. (374 pp.) A third edition in 1933, with foreword by Professor James C. Bonbright, pp. lxiv to lxxx. (374 pp.) The various articles contained in this book have been classified under their several topics in the foregoing bibliographies of articles. (The pagination of the references is to the last edition of the book.)

1930 *The Social and Economic Views of Mr. Justice Brandeis*, The Vanguard Press, New York, collected, with introductory notes, by Alfred Lief, with a foreword by Professor Charles A. Beard,

pp. vii to xxi. (419 pp.) This book contains extracts from many dissenting opinions and from a few majority opinions. There are also extracts from the brief in the Oregon laundry case and from articles and addresses on various subjects and from statements and arguments before various legislative bodies, which have been referred to in the foregoing bibliographies of articles.

II

Books about Justice Brandeis

1929 *Louis D. Brandeis: a Biographical Sketch,* with special reference to his contributions to Jewish and Zionist history, by Jacob De Haas, Bloch Publishing Company, New York. (296 pp.) The chapters of the first part of the book are as follows:

I. Contemporary Jewish History
II. The Making of a Man
III. Zionist Mass Growth from 1914–1920
IV. Stations to the Balfour Declaration
V. Peace Policies and Visit to Palestine
VI. Disastrous London Conference
VII. Soldier in the Cause

The second portion of the book contains reprints of addresses and articles which have been listed in the bibliography of articles under the heading "Zionism."

1932 *Mr. Justice Brandeis,* edited with a preface by Professor Felix Frankfurter, pp. v and vi, with an introduction by Mr. Justice Holmes, p. ix, Yale University Press, New Haven. (232 pp.) This book contains articles most of which appeared in law reviews in November 1931 on the occasion of Mr. Justice Brandeis's 75th birthday. The chapters and their first appearance are as follows:

I. "Mr. Justice Brandeis," by Charles E. Hughes (*Columbia Law Review*, vol. XXXI, p. 1071).
II. "The Social Thought of Mr. Justice Brandeis," by Max Lerner (*Yale Law Journal*, vol. XLI, p. 1).
III. "Mr. Justice Brandeis and the Constitution," by Felix Frankfurter (*Harvard Law Review*, vol. XLV, p. 33).
IV. "The Industrial Liberalism of Mr. Justice Brandeis," by Donald R. Richberg (*Columbia Law Review*, vol. XXXI, p. 1094).
V. "Mr. Justice Brandeis and the Regulation of Railroads," by

Henry Wolf Bikle (*Harvard Law Review*, vol. XLV, p. 4).

VI. "The Jurist's Art," by Walton H. Hamilton (*Columbia Law Review*, vol. XXXI, p. 1073).

The book also contains a topical list of cases involving constitutional questions and other issues of public law from December 4, 1916, through June 1, 1931.

1933 *Brandeis: Lawyer and Judge in the Modern State*, by Professor Alpheus Thomas Mason, Princeton University, Princeton. (203 pp.) The chapters are:

I. Judges Rule the State
II. The People's Attorney
III. The Challenge of Corporate Aggregates to Social Intelligence
IV. Brandeis: Sense, Sanity, Idealism
V. Bourbon Law in the Industrial Age
VI. More Life in the Law: The Brandeis Brief
VII. More Life in the Law: The Logic of Realities in Supreme Court Opinions
1. *Ex facto jus oritur;* 2. Founding Trade Unionism on the Facts and the Law; 3. The Stable Rate Base and the Fair Rate of Return; 4. This Tangled Web of Freedom; 5. Holmes and Brandeis: Skeptic and Crusader.
VIII. Conclusions

BOOKS PARTLY ABOUT JUSTICE BRANDEIS

1928 *Jews Are Like That!*, by James Waterman Wise (published under pseudonym of "Analyticus"), Brentano's, New York, Chap. I, pp. 1–24: "Louis D. Brandeis."

1930 *Pilgrims of '48*, by Josephine Goldmark, Yale University Press, New Haven. This book has numerous references to the family and youth of Justice Brandeis.

1930 *The Changing Years*, by Norman Hapgood, Farrar & Rinehart, New York, Chap. xiii, pp. 184–201: "Mr. Brandeis." This chapter deals particularly with the Glavis-Ballinger dispute and with Justice Brandeis's relations with President Wilson and with the cause of Zionism.

1934 *The Libraries of the University of Louisville*, compiled by Anna Blanche McGill, University of Louisville, Louisville, Kentucky. This pamphlet contains references to gifts to the University made by Justice Brandeis of collections on various subjects and includes extracts from letters written at the time

of the presentation of the various collections, particularly on pp. 11, 13, 16, 18, 21, 33, 35, and 55.

In Connection with the Opposition to the Confirmation of Justice Brandeis a Number of Documents and Pamphlets Are of Interest.

"Brandeis and Brandeis, The Reversible Mind of Louis D. Brandeis, 'The People's Lawyer,' " issued by the United Shoe Machinery Company, Boston, 1912 (57 pp.), with supplementary pamphlet of 15 pp. issued in 1914.

"The Documents in the Case, Being Testimony of Public Men in Favor of the United Shoe Machinery Company," issued by the latter, Boston, 1915 (61 pp.).

Brief on Behalf of the Opposition, Submitted by Austin G. Fox and Kenneth M. Spence of New York, 1916 (99 pp.).

Hearings before the Subcommittee of the Committee on the Judiciary of the United States Senate, on the Nomination of Louis D. Brandeis to be an Associate Justice of the Supreme Court of the United States, together with the Report of the Subcommittee (2 vols., pp. 1319, 125, 371), published as Senate Document 409, 64th Congress, 1st Session, vols. 16, 17 (Serial vol. 6926, 27), 1916.

Majority Reports of the Committee on the Judiciary of the United States Senate, 64th Congress, 1st Session, on the Nomination of Louis D. Brandeis as a Justice of the Supreme Court, Government Printing Office, Washington. 60 pp. (being part of the foregoing).

III

Articles about Justice Brandeis

"Volunteer Attorney-General for the Public Interest"
Hampton's Magazine, vol. 24, pp. 859–61, June 1910.

"Brandeis, Teacher of Business Economy"
Philadelphia Public Ledger, December 4, 1910.

"Attorney for the People"
The Outlook, vol. 96, pp. 919–20, December 24, 1910.

"Brandeis and the Railroads"
American Review of Reviews, vol. 43, pp. 9–11, January 1911.

"Who Is This Man Brandeis?" by Frederick N. Coburn
Human Life, vol. 12, pp. 9–10, February 1911.

"Practical Idealist"
Hearst's Magazine, vol. 20, pp. 149–50, February 1911.

"Unselfish Work Done in the Public Interest," by Ernest Poole
American Magazine, vol. 71, pp. 481–93, February 1911.

"Altruism of Louis Brandeis"
General Literature, vol. 50, pp. 263–6, March 1911.

"Brandeis, Trouble-Maker" by Judson C. Welliner,
Hearst's Magazine, vol. 21, pp. 1603–7, January 1912.

"Brandeis on Trusts"
The Outlook, vol. 102, pp.146–7, September 28, 1912.

"Louis D. Brandeis Pays Partners for His Service to People," by Philip J. Holvosa
Boston American, September 29, 1912.

"Brandeis on Labor and the Trusts"
The Outlook, vol. 102, pp. 469–71, November 2, 1912.

"Betraying New England!" by John F. Moors,
New England Magazine, vol. 49, pp. 9–21, 57–73, March, April 1913.

"Reply to Brandeis," by L. Chamberlain
Harper's Weekly, vol. 58, p. 22, April 4, 1914.

"Up from Aristocracy," by Levy S. Richard,
Independent, vol. 79, pp. 130–2, July 27, 1914.

"The Apostle of Efficiency in the Management of Public Service Corporations," by A. H. Robbins
Central Law Journal, vol. 80, pp. 78–9, January 22, 1915.

"Brandeis, the Man and Zionist Leader," by Edward A. Filene
Boston Post, July 4, 1915.

"Associate Justice, Supreme Court of the United States"
Lawyer and Banker, vol. 9, pp. 5, 64; February 1916; *Chicago Legal News*, vol. 48, p. 213, February 3, 1916.

"Brandeis and the Supreme Court"
The New Republic, vol. 6, pp. 4–6, February 5, 1916.

"From Labor Board to the Supreme Court"
The Survey, vol. 35, p. 531, February 5, 1916.

"Just the Man for Judge," by Hamilton Holt
Independent, vol. 85, p. 185, February 7, 1916.

"Mr. Brandeis for the Supreme Court"
The Outlook, vol. 112, pp. 295–7, February 9, 1916.

"Louis D. Brandeis," by Tattler
The Nation, vol. 102, p. 159, February 10, 1916.

"Brandeis' Nomination"
Harper's Weekly, vol. 62, p. 146, February 12, 1916.

"People's Lawyer for the Supreme Court"
Literary Digest, vol. 52, pp. 362–4, February 12, 1916.

"Rumpus over Brandeis"
Harper's Weekly, vol. 62, p. 169, February 12, 1916.

"Mr. Brandeis," by John Barker Waite,
The Nation, vol. 102, pp. 220–1, February 24, 1916.

"Brandeis as a Jew"
Literary Digest, vol. 52, p. 520, February 26, 1916.

"Fight For and Against Confirming Brandeis for the Supreme Court"
Current Opinion, vol. 60, p. 158, March 1916.

"Up From Aristocracy—the Career Of the Bohemian Jew Named for a Seat in the Supreme Court"
Current Opinion, vol. 60, pp. 166–8, March 1916.

"Mr. Brandeis," by Louis Bartlett,
The Nation, vol. 102, pp. 251–2, March 2, 1916.

"Brandeis and the Shoe Machinery Company"
The New Republic, vol. 6, pp. 117–19, March 4, 1916.

"Contest over the Nomination of Louis D. Brandeis for the Supreme Court"
The Survey, vol. 35, p. 681, March 4, 1916.

"Unfair and Inexpedient Hearings with Reference to the Nomination of Brandeis"
The Outlook, vol. 112, pp. 539–40, March 8, 1916.

"Brandeis Hearings"
The Nation, vol. 102, pp. 272–3, March 9, 1916.

"Opposition to the Confirmation of Mr. Brandeis as Justice of the Supreme Court"
The New Republic, vol. 6, p. 139, March 11, 1916.

"Case against Brandeis"
The New Republic, vol. 6, pp. 202–4, March 25, 1916.

"Mr. Brandeis, Harvard, and Academic Freedom"
The Outlook, vol. 112, pp. 723–4, March 29, 1916.

"Mr. Brandeis on Trial"
Literary Digest, vol. 52, pp. 888–9, April 1, 1916.

"Truth: Coming Out of Mr. Taft and Mr. Root against Mr. Brandeis"
Harper's Weekly, vol. 62, p. 324, April 1, 1916.

"Senator Cummins on Legal Ethics; Criticism of Mr. Brandeis as Counsel for the Interstate Commerce Commission"
The New Republic, vol. 6, pp. 292–3, April 15, 1916.

"Boston Tribute to Brandeis"
Harper's Weekly, vol. 62, p. 424, April 22, 1916.

"Mr. Brandeis," by Florence Kelley
The Survey, vol. 26, pp. 191–3, May 13, 1916.

"Saving the Supreme Court"
The New Republic, vol. 7, pp. 31–2, May 13, 1916.

"The President and Mr. Brandeis"
The Outlook, vol. 113, pp. 109–10, May 17, 1916.

"Brandeis Heresy Trial"
Independent, vol. 86, pp. 265–6, May 22, 1916.

"Brandeis Or —? Portrait of Mr. Brandeis Altered to Bring Out the Resemblance to Abraham Lincoln"
Independent, vol. 86, p. 323, May 29, 1916.

"Brandeis," by William Hard
The Outlook, vol. 113, pp. 271–7, May 31, 1916.

"Mr. Justice Brandeis, New Associate Justice of the United States Supreme Court"
South-Western Law Review, vol. 1, pp. 41–2, June 1916.

"Boyhood of Brandeis, An Early View of the Man," by Bert Fort
Boston American, June 4, 1916.

"Associate Justice, Supreme Court of the United States"
Central Law Journal, vol. 82, pp. 403–4, June 9, 1916.

"Close of the Brandeis Case"
The New Republic, vol. 7, pp. 134–5, June 10, 1916.

"Supreme Court on the Front Page"
The Survey, vol. 36, p. 279, June 10, 1916.

"Justice Brandeis"
The Outlook, vol. 113, pp. 341–2, June 14, 1916.

"Mr. Justice Brandeis"
Literary Digest, vol. 52, p. 1768, June 17, 1916.

"As a Friend Sees Justice Brandeis"
Literary Digest, vol. 53, pp. 28–30, July 1, 1916.

"Associate Justice, Supreme Court of the United States"
Ohio Law Bulletin, vol. 61, pp. 240–1, July 17, 1916.

"Mr. Justice Brandeis, New Associate Justice of the United States Supreme Court"
Case and Comment, vol. 23, pp. 254–5, August 1916.

"An Analysis of Louis D. Brandeis," by Edgar Clifton Bross
Eastern and Western Review, vol. 9, pp. 13–17, August 1916.

"Plenipotentiary for Russia: Judge Brandeis Proposed"
The New Republic, vol. 15, pp. 358–9, July 27, 1918.

"Justice Brandeis in Palestine" by William E. Smythe,
American Review of Reviews, vol. 60, pp. 609–15, December 1919.

"The Philosophy of Justice Brandeis, Credited with Fathering Woodrow Wilson's Theory of Regulated Competition," by Charles G. Ross
St. Louis Post-Dispatch, June 19, 1927.

"Americans We Like; Justice Brandeis: Apostle of Freedom," by Norman Hapgood
The Nation, vol. 125, pp. 330–1, October 5, 1927.

"Brandeis in Zionism," by Jacob de Haas
Menorah Journal, vol. 14, pp. 134–47, February 1928.

"Sustaining an Act of Providence"
The Survey, vol. 62, pp. 344–5, June 15, 1929.

"Justice Brandeis and the Constitution," by Joseph Percival Pollard
Scribner's Magazine, vol. 87, pp. 11–19, January 1930.

"Legal Philosophy of Justices Holmes and Brandeis," by Walton Hale Hamilton
Current History, vol. 33, pp. 654–60, February 1931.

"Martyrdom of Mr. Justice Brandeis," by William Seagle
The Nation, vol. 132, pp. 156–7, February 11, 1931.

"Justice Brandeis—Gentlemen and Jurist," by George R. Farnum
Law Society Journal, vol. 3, pp. 3–6, May–November 1931.

"Industrial Liberalism of Justice Brandeis," by Donald R. Richberg
Columbia Law Review, vol. 31, pp. 1094–1103, November 1931.

"The Jurist's Art," by Walton H. Hamilton
Columbia Law Review, vol. 31, pp. 1073–93, November 1931.

"Mr. Justice Brandeis," by Charles E. Hughes
Columbia Law Review, vol. 31, pp. 1071–2, November 1931.

"Mr. Justice Brandeis," by Elemér Balogh
Harvard Law Review, vol. 45, pp. 1–3, November 1931.

"Mr. Justice Brandeis and the Regulation of Railroads," by Henry Wolf Bikle
Harvard Law Review, vol. 45, pp. 4–32, November 1931.

"Mr. Justice Brandeis and the Constitution," by Felix Frankfurter
Harvard Law Review, vol. 45, pp. 33–111, November 1931.

"Mr. Justice Brandeis—Exponent of Social Intelligence," by Alpheus T. Mason
American Political Science Review, vol. 25, pp. 965–79, November 1931.

"Social Thought of Mr. Justice Brandeis," by Max Lerner
Yale Law Journal, vol. 41, pp. 1–32, November 1931.

"Mr. Justice Brandeis, the People's Tribune," by Elizabeth Glendower Evans
The Survey, vol. 67, pp. 138–41, November 1, 1931

"Mr. Justice Brandeis, 75 Years Old," by Edwin W. Patterson
The Nation, vol. 133, pp. 513–14, November 11, 1931.

"Mr. Justice Brandeis"
The New Republic, vol. 69, pp. 4–6, November 18, 1931.

"Mr. Justice Brandeis and the Constitution," by Alpheus T. Mason
University of Pennsylvania Law Review, vol. 80, pp. 799–841, April 1932.

"Inalienable Right to Be an Iceman"
Literary Digest, vol. 113, p. 13, April 9, 1932

"Statesman of the Law," by H. J. Laski
The New Republic, vol. 72, p. 50, August 24, 1932.

"The Contribution of Mr. Justice Brandeis to Administrative Law," by Louis K. Jaffe
Iowa Law Review, vol. 18, pp. 213–27, January 1933.

"Mr. Justice Brandeis," by James I. Ellmann
Commercial Law Journal, vol. 38, pp. 363–71, August 1933.

"Mr. Justice Brandeis," by Harold J. Laski
Harper's, vol. 168, pp. 209–18, January 1934.

"Supreme Court: Nine Mortal Men," by Theodore P. Wallen
Literary Digest, vol. 117, p. 9, April 7, 1934.

IV

Topical List of Opinions

Written Since 1931

(From October 1931 through June 4, 1934, following the classification adopted by Professor Frankfurter at pp. 225 to 232 of his book.)

1. *Due Process and Equal Protection of the Law*

Packer Corporation *v.* State of Utah, 285 U. S. 105 (1932); New State Ice Co. *v.* Liebmann, 285 U. S. 262 (1932) (dissenting); American Surety Co. *v.* Baldwin, 287 U. S. 156 (1932); Young *v.* Masci, 289 U. S. 253 (1933).

2. *Taxation*

(National and State, including Amendments V, XIV, and XVI.)

Iowa-Des Moines National Bank *v.* Bennett, 284 U. S. 239 (1931); Burnet *v.* Coronado Oil & Gas Co., 285 U. S. 393 (1932) (dissenting); North American Oil Consolidated *v.* Burnet, 286 U. S. 417 (1932); United States *v.* Kombst, 286 U. S. 424 (1932); McDonnell *v.* United States, 288 U. S. 420 (1933); Pacific Coast Steel Co. *v.* McLaughlin, 288 U. S. 426 (1933); Louis K. Liggett Co. *v.* Lee, 288 U. S. 517 (1933) (dissenting in part); First National Bank of Shreveport *v.* Louisiana Tax Commission, 289 U. S. 60 (1933); Brown *v.* Helvering, Commissioner of International Revenue, 291 U. S. 193 (1934).

(No opinions were written under the topics, 3. *Freedom of Speech*, 4. *Bill of Rights*, or 5. *Impairment of Obligation of Contract.*)

6. *Commerce Clause*

(Including Interstate Commerce and Anti-Trust Act.)

Atlantic Coast Line R. Co. *v.* United States, 284 U. S. 288 (1932); Adams *v.* Mills, 286 U. S. 397 (1932); Alton R. Co. *v.* United States, 287 U. S. 229 (1932); Dickson *v.* Uhlmann Grain Co., 288 U. S. 188 (1933); St. Louis Southwestern R. Co., *v.* Missouri Pacific R. R. Co., 289 U. S. 76 (1933); Bradley *v.* Public Utilities Commission of Ohio, 289 U. S. 92 (1933); Chassaniol *v.* City of Greenwood, 291 U. S. 584 (1934).

7. *National versus State Powers*

(Not otherwise classified.)

Van Huffel *v.* Harkelrode, 284 U. S. 225 (1931); Chase National Bank *v.* City of Norwalk, 291 U. S. 431 (1934); Ex parte Baldwin, 291 U. S. 610 (1934); McKnett *v.* St. Louis & S. F. Ry. Co. 292 U. S. 230 (1934); Lewis *v.* Fidelity & Deposit Co. of Maryland, 291 U. S. 658 (1934).

8. *Suits By and Between States*

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9. *Claims By and Against Governments*

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10. *Administrative Law*

(Excluding Taxation and Commerce Clause.)

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11. *Patents and Copyrights*

Permutit Company *v.* Graver Corporation, 284 U. S. 52 (1931).

12. *Miscellaneous Cases*

St. Paul Fire & Marine Insurance Company *v.* Bachmann, 285 U. S. 112 (1932) (insurance); United States *v.* Limehouse, 285 U. S. 424 (1932) (filthy letters in the mail); Canada Malting Company, Ltd. *v.* Paterson Steamships, Ltd., 285 U. S. 413 (1932) (admiralty); United States *v.* Smith, 286 U. S. 6 (1932) (senatorial confirmation of federal officers); Bradford Electric Light Company, Inc. *v.* Clapper, Admrx., 286 U. S. 145 (1932) (full faith and credit); Earle & Stoddart, Inc., et al *v.* Ellerman's Wilson Line, Ltd., 287 U. S. 420 (1932) (admiralty); Fairmount Glass Works *v.* Cub Fork Coal Company, 287 U. S. 474 (1933) (appeal and error); Frank Cook *v.* United States, 288 U. S. 102 (1933) (treaty); City of Harrisonville, Mo., *v.* W. S. Dickey Clay Manufacturing Company, 289 U. S. 334 (1933) (injunction against nuisance); National Surety Company *v.* Valeria E. Coriell, et al. 289 U. S. 426 (1933) (corporate reorganization); Yarborough *v.* Yarborough, 290 U. S. 202 (1933) (full faith and credit); First National Bank of Cincinnati *v.* Flershem, 290 U. S. 504 (1934) (corporate reorganization); Texas & Pacific R. Co. *v.* Pottorff, Receiver, 291 U. S. 245 (1934) (national banks); City of Marion *v.* Sneeden, Receiver, 291 U. S. 262 (1934) (national banks); Gay *v.* Ruff, 292 U. S. 25 (1934) (removal to federal court); Loughran *v.* Loughran, 292 U. S. 216 (1934) (full faith and credit).