Schmollers Jahrbuch 136 (2016), 285 – 302
Duncker & Humblot, Berlin

The Last Autonomist: Louis D. Brandeis and the Struggle for Antitrust

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Abstract

Louis Brandeis was the greatest opponent of industrial "bigness," but not the first. After a brief introduction to his life and intellectual commitment to small scale and decentralization of authority in both production and government, this essay considers Brandeis's ideas about policy toward large firms in the context of the controversy in the United States Supreme Court over the interpretation of the Sherman Antitrust Act between 1890 and 1911. Opponents of bigness ("autonomists") on the Court believed that allowing the market to determine the size of firms made firms too large and supported direct controls on growth, and opposed the common law rule of reason as an obstacle to limiting the size of firms. In 1911, the Court definitively rejected both these propositions in favor of a policy of efficiency in production and indifference to large scale, interpreting the Sherman Antitrust Act to include the rule of reason and leaving the question of firm size to fair competition alone. Brandeis, surprisingly, supported the Court on both these issues. The essay discusses his reasons for doing so, based in a misreading of the implications of bounded rationality, a concept Brandeis clearly anticipated, his gradual recognition after 1911 of why bigness had succeeded in the United States, and the disappointment this caused him. It concludes with a short speculation on how Brandeis might approach the contemporary problem of climate change.

JEL Codes: A13, B31, K21, L4

1. A Jefferson for the Twentieth Century

"Two souls," wrote the journalist Dorothy Thompson in 1938,

> dwell in the bosom … of the American people. The one loves the Abundant Life, as expressed in cheap and plentiful products of large-scale mass production and distribution … The other soul yearns for former simplicities, for decentralization, for the interests of the 'little man,' revolts against high-pressure salesmanship, denounces 'monopoly' and 'economic empires,' and seeks means of breaking them up (quoted in Hawley 1966, 472).

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More than any other American, Louis Dembitz Brandeis was the authoritative voice of this "other soul," the keeper of Thomas Jefferson's republican faith in "little men and little institutions" (Mason 1946, 5) and the strongest and most persistent critic of large-scale organization in production and government in the United States. Born in 1856 to a family of liberal Jews who fled Austria after 1848 to prosper as small merchants in Louisville, Kentucky, Brandeis was educated at a Dresden *Realschule* and the Harvard Law School. By the age of forty, he had won wealth and standing in Boston's cultural elite through his brilliant representation of corporate interests, but after 1904, he turned his talents and passion for justice vehemently against those interests. First as "the people's attorney" in a variety of public causes and then, for twenty years after 1916, from his seat on the United States Supreme Court, Brandeis became the indefatigable champion of small enterprise, attacking the economic and political power of big business and freely invoking the authority of state and municipal government to sustain the regime of competition he thought that power was destroying (on Brandeis's life, see Strum 1984 and 1993; Urofsky 2009).

At the core of Brandeis's philosophy were the ideas of decentralization and privacy and a deeply felt commitment to the autonomy and personal development of the individual in all aspects of social life. Throughout his long and distinguished public life, from both the bar and the bench, Brandeis stood squarely behind the claims of the small, independent entrepreneur against those of the corporation and the trust, the prerogatives of the states and municipalities against the federal government, and the right of every citizen "to be let alone" by the state, "the most comprehensive of rights and the right most valued by civilized men" (*Olmstead v. United States* 1928, 478). But against these rights he insisted on the personal responsibility of free men and women and the recognition of their obligations to others. "All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community" (*Duplex Printing v. Deering* 1921, 488), and Brandeis would not hesitate to use governmental power in creative ways to enforce that duty. "His activity," wrote the editors of his letters, "in all its phases, was united by a set of unwavering assumptions and goals to preserve democracy and individual opportunity in an industrialized America" (Brandeis 1978, 1, xxxii).

I have argued elsewhere (Adelstein 1989) that Brandeis was not the embodiment of coherent, consistent liberal values this characterization suggests. He was instead an original, insightful social theorist of deeply contradictory impulses who closely mirrored the ambivalence of his contemporaries in the face of the organizational demands of mass production and the pursuit of profit and efficiency that is encapsulated in Thompson's two souls. In a jurisprudence grounded in a moral and political commitment to personal responsibility and the flowering of individuality as the essential prerequisites of democracy, and in an economics that distinguished bigness from monopoly and attacked the

former while tolerating the latter in the service of smallness, Brandeis gradually conceived and articulated a seamless theory of political economy that, despite its flaws and gaps, remains a compelling brief for responsible individualism, decentralization and the dispersal of power in every sphere of life (*ibid.,* 620–46). But in his uncharacteristic, apparently uncritical enthusiasm for Frederick Winslow Taylor's system of scientific management, Brandeis endorsed a managerial philosophy that denied the individual development at the center of his jurisprudence and exalted the very exercise of power in corporate hierarchies that his economic prescriptions were intended to minimize. He embraced Taylor's image of business firms as machines and scientific management's transfer of responsibility in the workplace from workers to managers, and as legal scholars like Frederic Maitland (in Gierke 1987, xxvi) were portraying corporations are reified social beings, "no fiction, no symbol [but] a living organism and a real person, with body and members and a will of its own," Brandeis, in his nascent Zionism, professed a similarly organic collectivism, urging every Jew to "regard himself not as an isolated being with an existence bounded by birth and death, but as part of a larger whole, as a limb of the social body [striving] after its happiness as though it were his individual well-being." This was, he said, "the very essence of the truly triumphant twentieth-century democracy," and in time he came to envision an ideal economy of small, Taylorist firms populated by just the kind of collectively-minded people who might work contentedly in such an environment (Adelstein 1989, 646–55, quotations at 653).

Brandeis was not a mind of one piece. Like his contemporaries, he stood uncertainly with one foot in the older America, clinging to a Jeffersonian ideal of independent, responsible individuals flourishing in small-scale economic and political forms, and one in the new, drawn to the twentieth century's vision of collective identity and its manifestation of collective human power in huge, tightly managed industrial firms. But here, I set these contradictory aspects of Brandeis's thought aside. They are easier to see as problematic in retrospect than they could have been at the time and, more importantly, they are greatly overshadowed philosophically and historically by the "intense libertarianism" (Thomas 1985, 97) and passionate commitment to individual development of the Brandeis his biographers have justly admired and on whom I focus here. This more familiar Brandeis was small scale's most resourceful and constant champion. For him, bigness was not just inefficient but immoral, stifling the spirit and entrepreneurial energy of common people, separating owners of firms from responsibility for their conduct, enabling corporations to seize effective control of the levers of democracy, and reducing ordinary citizens to voting spectators of, rather than full participants in, their own government. In his increasingly lonely crusade against bigness and his frustration at its defeat, we can appreciate the difficulties and dilemmas that confronted even the greatest of Jefferson's successors in a Hamiltonian America.

2. Autonomy and Efficiency

Brandeis was the greatest opponent of bigness, but not the first. After 1870, the American economy was transformed with astonishing speed by the introduction of new technologies of mass production, first in the railroads and soon in a broad range of industries from oil and steel to canned goods and cigarettes. Around these hugely productive and expensive new machines, manufacturing enterprises of unprecedented size and power emerged, seemingly overnight, to integrate them profitably into the rapidly expanding economy. Americans had never before seen anything like these privately controlled economic behemoths. They were perplexed and divided by the revolution in production and organization they were not just witnessing but themselves propelling with their eager consumption of inexpensive, mass-produced goods, and by the dilemma of development it posed, namely the question of what economic and political life in twentieth-century America was to become.

The rising industrial giants offered Americans not only a cornucopia of material wealth undreamed of even a generation before, but a deeply impressive model of human organization and collective power, solidly grounded in the modern virtues of rationality, efficiency, scientific administration, and corporate organization. But at the same time, they posed a lethal threat to political values and traditional ways of organizing work that Americans had long held dear. For all the material comforts the new order entailed, many were troubled by the seemingly irresistible drive toward greater wealth and industrial concentration and its devastating effects on small business and entrepreneurial opportunity. They lamented the disappearance of free-ranging, independent judgment exercised by a substantial class of small proprietors and the loss of economic independence and autonomy brought about by the relocation of so much production from small to large firms. They watched with alarm as professional managers increasingly exercised detailed control over the daily activities of millions of workers in pursuit of corporate profit and made economic decisions of great consequence to all Americans largely without their participation (Zunz 1990, 12–36). Others embraced the new industrial order and dismissed these concerns as nostalgic. They saw bigness as inevitable and socially desirable and, if competition were kept open and policed for unfair and abusive tactics, potential competition as sufficient to check the excesses of monopoly. For them, the dazzlingly efficient creation of material wealth in the great firms had simply made alternative values in production and ways of organizing work that did not operate to enhance profits obsolete (Adelstein 2012, 139–60).

Was bigness a blessing or a curse? Should economic autonomy and personal responsibility in business be sacrificed for the material wealth and collective power represented by the new corporations? This was the question that galvanized American politics for thirty years before 1911, when Brandeis first joined the public debate. Would Americans trade their traditional economy of modest,

more equally distributed production in small forms centered on individuals and favoring economic independence, personal responsibility and decentralized authority, for a new industrial order that vastly increased aggregate wealth but distributed it far more unequally? Would they elevate the corporate interests of large firms above those of individuals and small firms in the name of efficiency, and make possible the scientific rationality, close discipline, and managerial hierarchy the industrial giants required? Would they, as Brandeis put it in 1913, sell their birthright for a "mess of pottage" (Brandeis 1925a, 261)?

Industrial bigness came to the United States in two phases, through two distinct processes of growth, with the Sherman Antitrust Act of 1890 unfortunately sandwiched between them. In the first, from 1870 to the early 1890s, manufacturers of all kinds created loose horizontal agreements to stabilize falling prices and allocate production in response to the excess capacity created by the wave of optimistic investment after 1865. Cartels and similar arrangements among competitors in labor-intensive industries typically failed quickly, but those in the emerging mass-production industries generally succeeded. By 1890, many had tightened into large, unitary trusts or holding companies whose small numbers in their industries gave them significant control over prices and outputs (Chandler 1977, 209–84 and 315–31). These were the time-honored tactics of monopoly, against which Americans had long held a special animus and about which there existed a well-developed body of common law in American courts. So it is not surprising that the Sherman Act of 1890, the legal ground on which the battle over bigness would be fought over the next twenty years, was a law against monopoly that, with one crucial difference, borrowed its language from the common law — every contract or combination "in restraint of trade" was declared illegal, and every act of "monopolizing" made a felony.

But the development of American industry did not stop in 1890, and in the century's final decade, many of the most successful mass-production firms, already made very large by their price-stabilizing absorption of horizontal competitors, grew much larger still, in response to a different set of pressures. To ensure what Alfred Chandler (1977, 241) called "throughput," the steady flow of resources in and out of costly facilities needed to sustain profitable operation, the giants integrated vertically by acquiring previously independent suppliers and distributors. This brought whole domains of economic activity, involving many thousands of people once linked primarily by market exchange, within the ambit of consensual but tightly centralized production collectives. Small businesses were again annihilated in large numbers, and the commercial culture and widespread entrepreneurial opportunity they represented still more gravely threatened by the expanding corporate hierarchies and the new organizational values they nurtured and enforced. By 1904, after seven years of convulsive consolidation and incorporation in the wake of a deep depression, the economic and social landscape was dominated by the several dozen huge corporations that continued to frame American life for most of the twentieth cen-

tury (Chandler 1977, 287–376; Lamoreaux 1985, 187–91; Walton and Rockoff 2002, 372–6).

As all this was taking place, it became clearer to *autonomists* like Brandeis that the problem was not monopoly but bigness, the herding of millions of heretofore relatively independent farmers, tradesmen, laborers, and merchants into large corporate hierarchies and the replacement of broadly dispersed entrepreneurial opportunity and personal responsibility in small enterprises with widespread employment and diffused responsibility in big ones. In their view, low prices were not, as the proponents of efficiency maintained, a blessing of bigness, but a curse. It was precisely their ability to push prices far below what smaller firms could match that drove the growth of the new giants and threatened small business with extinction, and it was their size itself, and not any power over prices they might have or abuse, that was transforming the experience of work and responsibility for millions of people in ways that endangered the American experiment in free government itself. In 1942, long after the battle against efficient bigness had been lost, Joseph Schumpeter described the autonomists' cause this way:

> Even if the giant concerns were all managed so perfectly as to call forth applause from the angels in heaven, the political consequences of concentration would still be what they are. The political structure of a nation is profoundly affected by the elimination of a host of small and medium-sized firms the owner-managers of which, together with their dependents, henchmen and connections, count quantitatively at the polls and have a hold on what we may term the foreman class that no management of a large unit can ever have; the very foundation of private property and free contracting wears away in a nation in which its most vital, most concrete, most meaningful types disappear from the moral horizon of the people (1950, 141–2).

But by the time the opponents of bigness could recognize and articulate their cause and mount a campaign against it, the federal statute intended to address the industrial problem, the anti-monopoly Sherman Act, was already in place. The struggle between efficiency and autonomy, between bigness and smallness as organizing principles for the new century's political economy, would be fought on its conceptual battlefield, which was strongly tilted against the autonomists. The language of the Act, the common law of trade restraint and the conceptual vocabulary they generated were all logically indifferent to bigness. They were incapable of articulating, and thus permitting some explicit resolution of, the political and cultural problems caused not by insufficient or unfair competition among large corporations but by the economy of large corporations itself. As an object of common law doctrine or American industrial policy since the Sherman Act, bigness simply does not exist.

The idea of "contracts in restraint of trade" poses a paradox. Every contract restrains trade — the point of contracting is to move relations from the uncertainty of free exchange to the predictability of mutual obligation, to the advan-

tage of all sides. How can the law encourage contracts but oppose restraints of trade at the same time? The common law's answer was to preserve every person's liberty to enter into whatever contractual relations they desired, so as to guarantee a free and competitive contracting environment for all. Hence the *rule of reason*: contracts were lawful unless they "unreasonably" interfered with the freedom of others to contract or compete themselves. The common law was not hostile to monopoly itself, or even to contracts that fixed prices or limited outputs. Instead, it condemned monopolizing behavior, "unfairly" excluding actual or potential competitors from the field rather than defeating them honestly within the rules of fair competition (Sklar 1988, 93 – 117).

None of this has anything to do with bigness. Monopoly firms can be big or small; big firms may or may not be monopolies. Everyone who wants an original work of art or needs a dentist in the countryside is typically at the mercy of a small monopolist with more power over price than Andrew Carnegie ever had. Carnegie Steel grew as large as it did because that was the only efficient and profitable way to produce inexpensive steel with costly equipment, a trope repeated in dozens of other capital-intensive industries of the time. Some of the entrepreneurs who built these firms behaved very badly indeed — the original list of "unreasonable" restraints of trade attached by the Supreme Court to the Sherman Act was largely inspired by the monopolizing behavior of John D. Rockefeller's Standard Oil. But Carnegie, and most of the others, did not. Nothing in the explosive growth of Carnegie Steel would have raised an issue at common law. Carnegie's way was not to fix prices but to invest in new technology and facilities when times were bad, cut production costs ruthlessly, and meet the market price for steel, whatever it was, at a larger profit than anyone else could achieve (Livesay 2000, 87 – 143). In most of the mass-production industries, there was little monopolizing, and no monopoly, since even the most tightly organized industries still left room for small independent firms. The problem with big firms was not that they were monopolies, but that they were *big*. Anti-monopoly laws attack big and small monopolists alike, and anti-bigness laws attack big firms whether they monopolize or not. But anti-bigness laws don't attack monopoly, and anti-monopoly laws don't attack bigness.

Given the ideological chasm separating the visions of efficiency and autonomy, the intensity of the debate in the press and in Congress over "the trusts" in the months preceding the passage of the Sherman Act is easy to understand. What is surprising is the near absence of dissent, in the midst of this passionate controversy, to the Senate's approval of the Act's final language — 52 for, 1 opposed, 29 absent. The legislative friends of efficiency, aware of the common law's indifference to fairly won bigness, wanted simply to write the rule of reason into the Act. The law, they believed, should permit contracts that restrained trade or reduced the number of competitors, even where they led to very large firms or monopoly power, unless this restraint was "unreasonable," achieved through unfair methods of competition or by making it impossible

(not merely unprofitable) for others to compete. The autonomists, aware of the same indifference, saw the rule of reason as an obstacle to the direct assault on bigness they thought necessary. They wanted aggressive intervention in the market processes that produced efficient bigness, limiting the capitalization or operational scale of firms, or breaking up big ones to preserve or restore the existence of smaller competitors, even at the substantial cost of the material wealth that the foregone bigness would have produced. "In the determination of questions," as William Jennings Bryan told a conference on trusts, "we should find out what will make our people great and good and strong rather than what will make them rich" (quoted in Blicksilver 1985, 61).

In the end, the Sherman Act made *every* contract in restraint of trade illegal, omitting the crucial word "unreasonable" that would have imported the common law rule of reason into the statute, and reproduced the logical paradox that robbed the Act as passed of any meaning at all. This is why senators of every persuasion could support, or at least not oppose it. Those who welcomed bigness were confident that federal judges would interpret the Act in the only plausible way, by inserting the missing qualifier before the phrase "restraint of trade." For the enemies of bigness, the absence of the crucial adjective created room to argue that the Act did not import the common law or its rule of reason at all, and that courts were free to exercise broad supervisory powers over large firms in pursuit of autonomist objectives different from the efficient production of wealth. In this way, and not for the last time, Congress threw the responsibility for interpreting a meaningless statute, and thus making detailed national policy on the question it was supposed to address, to unelected federal judges. Between 1890 and 1911, that is exactly what they did. Fully reflecting the people's deep ambivalence over the dislocating, disorienting reconstitution of economic life occurring before their eyes, the judges nodded first to the antitrust of efficiency, then to autonomy, before making their peace with bigness at last (Adelstein 2012, 161 – 83).

In the earliest cases, the lower courts instinctively read the rule of reason into the Act, generally vindicating combinations and cartel agreements where there was no attempt to preclude entry by others and no injury to the public beyond the intended control of prices or outputs. Bigness as such was no offense, nor was the simple existence of monopoly power without clear evidence that it had been abused. But in 1897, the autonomists on the Supreme Court seized the high ground, rallied by Justices John Harlan and Rufus Peckham, both best known for their roles in other, more famous judicial dramas. In *United States v. Trans-Missouri Freight Association* (1897), the Court considered a cartel agreement among several small railroads to stabilize rates after a punishing rate war, and over a strong dissent for four efficiency-minded justices by Edward White, struck it down as an illegal restraint despite its being well within the common law's range of reasonableness. For the Court, Peckham explicitly rejected the rule of reason and poured the autonomist creed into the empty Act in words

Brandeis or Schumpeter might have used, at the same time that they illustrated the futility of articulating the problem of bigness in the language of trade restraint:

> Trade or commerce … may nevertheless be badly or unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class, and the absorption of control over one commodity by an all-powerful combination of capital. … [This] is unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein. … [I]t is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others (*United States v. Trans-Missouri* 1897, 323–4).

By 1904, Peckham had abandoned the cause of "small dealers and worthy men" to protect their oppressors' right to contract free from any governmental interference of which the judges disapproved. For a time, Harlan held the autonomist fort, and in *Northern Securities Company v. United States* (1904) gathered a plurality of four around the proposition that the Sherman Act made it illegal for firms to merge when this would reduce the number of active competitors in a given market, a reading that could clearly be used to block any merger at all, reasonable or unreasonable, in an effort to limit the size of firms. But the words of the Sherman Act themselves, the logical power of the common law of trade restraint and, most importantly, the people's apparent unwillingness to dismantle a now fully rooted industrial order to restore an old, austere regime of smallness were too much for the dwindling forces of autonomy to overcome.

In 1911, White, now Chief Justice, was at last able to secure a majority for incorporating the common law rule of reason into the Sherman Act, and in *Standard Oil Company v. United States* (1911) and *United States v. American Tobacco Company* (1911) established that only contracts that unreasonably restrained trade were illegal under the Act and began to construct the open-ended list of monopolizing behaviors that would constitute unreasonable restraints. The result of the struggle was a judge-made policy that, without ever confronting the question of bigness directly, encouraged vertical integration wherever cost economies could be realized and, once firms had grown very large in this way, forbade them only from actively excluding competitors and colluding horizontally to fix prices or outputs. In *United States v. United States Steel Corporation*, a case pursued by both Taft and Wilson against the successor to Carnegie Steel, the Court dismissed the complaint because the government could

not show that the company had acted unreasonably or unlawfully, and interred any remaining hope of an antitrust of autonomy by explicitly declaring that "the law does not make mere size an offence" (1920, 451). Having assisted in the prosecution before coming to the Court in 1916, Justice Brandeis took no part in the decision.

3. Trees That Scrape the Skies

Brandeis was largely silent on these issues until 1911, when in a series of popular essays and appearances before congressional committees he began to assert himself on bigness and become autonomy's most thoughtful and resourceful champion. After 1916, he represented its values as best he could from the bench, though he rarely spoke in public about economics or politics. But in 1922, he informally addressed a group of religious educators and paraphrased his remarks in a private letter shortly thereafter. The result is a remarkably cogent distillation of a lifetime of thought and action that Philippa Strum aptly describes as "one of the few serious and competent efforts to bring Jeffersonianism into the industrial era" (1984, 193). Brandeis urged his audience to

> [s]eek for betterment within the broad lines of existing institutions. … Remember that progress is necessarily slow; that remedies are necessarily tentative; that, because of varying conditions, there must be much and constant enquiry 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.
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> The 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.
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> 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 cooperative enterprises. This participation in and eventual control of industry is likewise an essential of obtaining justice in distributing the fruits of industry. … 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 process of common living (Brandeis 1978, 5, 45 – 6).

All of this militates for smallness, the continuous devolution of authority from the center to the periphery in both economics and government. Law must come, where possible, from the states and localities, not just to tame Leviathan but to encourage responsible experimentation in public policy and the benefits this could bring to policymaking everywhere. But government needed the

power to address the imbalance and injustice that inevitably proceed from bigness.

Brandeis combined a conservative respect for evolved institutions and a deep skepticism about the efficacy of reform by legislation with a recognition of the cognitive limitations of human actors and a reliance on decentralized, entrepreneurial experimentation as the surest route to progress in the face of inevitable human ignorance and fallibility. "Many men are all wool, but none is more than a yard wide," he said, so we must "adjust our institutions to the wee size of man" (quoted in Mason 1946, 620; Brandeis 1978 [to Harold Laski, 1921], 5, 16–17). As his frequent allusions to progress and betterment intimate, his commitment to the individual was fundamentally moral and political. Like Jefferson, Brandeis believed that genuine democracy required a certain kind of independent, self-reliant citizen, a person accustomed to governing himself responsibly and thus capable of appreciating the subtleties of political questions and deliberating fairly with others to resolve them. And like Peckham and Bryan, he was prepared to trade material wealth for autonomy in the workplace and the opportunity for as many ordinary men and women as possible to assume personal responsibility for their own enterprises and livelihoods.

One might expect such a man to have joined the autonomists on the legal barricades as the battle over bigness was being waged in the Court, and to have supported the kind of legislation they knew was required to limit the size of firms, but he did neither. When *Standard Oil* was decided, Brandeis's immediate response was to help his friend Senator Robert La Follette draft a bill that accepted the rule of reason just as it had been articulated and applied by the Court and sought merely to specify more clearly in the statutes what behaviors would constitute unreasonable restraints or unfair practices under the Sherman Act. The bill failed, but its objective was achieved in 1914, after Wilson, tutored by Brandeis, had been elected with a mandate to continue the fight against the trusts. The battle over bigness was rejoined in Congress, with autonomists pleading for legislation that would overturn the rule of reason and reverse the victory of efficiency in the courts. But with Brandeis heavily involved in its construction, Congress instead passed the Clayton Act, which included the list La Follette had called for and nothing else that would disturb the regime of bigness (Strum 1984, 145–53; Urofsky 2009, 317–9).

For decades, friends of efficiency had argued that the question of how large firms should grow should be left to the market. Legislated limits on size presumed an answer it was impossible for legislators to know, and could only be artificial and arbitrary. The only way to determine how big was too big was, first, to police the market fairly to keep the avenues of competition clear and open to all, and then submit as many entrepreneurial experiments in size and form as their originators believed would be profitable to the test of market competition. When firms believe expansion will increase profits, they will grow, and when they conclude that further expansion will be unprofitable, they will

stop growing of their own volition. If the market proves them right, they will have discovered the most efficient scale for their particular operations; if not, their errors will be revealed by competition and the costs paid by those who made them. On this point too, Brandeis strongly endorsed the policy of efficiency. There is, he wrote in 1912,

> in every line of business a unit of greatest efficiency. What the size of that unit is cannot be determined in advance by a general rule. It will vary in different lines of business and with different concerns in the same line [and] with the same concern at different times because of different conditions. What the most efficient size is can be learned definitively only by experience. The unit of greatest efficiency is reached when the disadvantages of size counterbalance the advantages [and] exceeded when the disadvantages of size outweigh the advantages. For a unit of business may be too large to be efficient as well as too small (Brandeis 1925b, 206 – 7).

A substantial virtue of this approach is its commitment to consumer sovereignty. It lets the people ("consumers") decide, through their choices of what to buy and where to work, just how much fairly earned bigness they want and allows the market to adjust the size of firms to those preferences. But if the question of optimal size is indeed best left to fair competition in markets, and firms have grown large because consumers in fact prefer the wealth that large scale makes possible to the political and moral virtues of smallness, then bigness can be eliminated only by legislation that overturns this outcome and, as the autonomists had to concede, deprives the people of what they want in favor of what others think is better for them.

At the climactic moment in the struggle, then, when autonomy's last hope was to overturn the judicial decision for efficiency by popular legislation, the great autonomist threw his considerable intellectual and moral weight behind the keystone policies of efficient bigness, the common law rule of reason, with its distinction between good and bad trusts and benign tolerance of the former, and committing the question of how large firms were to grow to a market cleansed of unethical practices, where consumer preference and corporate profit would be the final arbiters of size. Why?

The answer begins with Brandeis's prescient emphasis before 1916 on the cognitive and informational impediments to optimizing behavior imposed by human frailty, what economists now call *bounded rationality*. "With the growth in size," he wrote, "comes an increasing cost of organization and administration which is so much greater than the increase in the volume of business that the law of diminishing returns applies" (quoted [1915] in Lief 1941, 22).

> Man's work often outruns the capacity of the individual man; and no matter how good the organization, the capacity of an individual man usually determines the success or failure of a particular enterprise. … Organization can do much to make concerns more efficient [and] larger units possible and profitable. [But] organization can never supply the combined judgment, initiative, enterprise and authority which must come from the

> chief executive officer. Nature sets a limit to his possible achievement. As the Germans say: 'Care is taken that the trees do not scrape the skies' (Brandeis 1925b, 223 – 4).

This much may still be true, though modern theories of the firm suggest that effective organization can do much more to extend the limited capacities of individuals than Brandeis imagined (e.g. Lazonick 1991; Langlois and Robertson 1995). But bounded rationality led him to a crucial error. If human frailty ensures that the costs of organization and administration will outweigh the benefits of expansion before firms become "too big," then the market can be relied upon to produce firms that are both efficiently sized, because they stop growing at just the point where the advantages of expansion are balanced by its costs, *and* modest in scale. If this is so, then enterprises that exceed the modest scale dictated by nature's limits must be inefficiently large, and could only have achieved their size through unfair or unethical practices of the sort the rule of reason is meant to forbid. And if this is so, a detailed and aggressively enforced rule of reason was all that was needed — once the outlawed practices that enabled the bloated giants to grow so large were effectively policed, they would simply collapse under the weight of their own inefficiency (Cullis 1996, 392 – 7). It seemed an autonomist's dream come true: the virtues of smallness achieved without coercion in fairly policed markets with no loss of efficiency or wealth from the absence of bigness.

But it was not, because the first of these propositions is simply false. The lesson historians and economists have taken from the experience of Carnegie Steel and thousands of firms since is that businesses can grow efficiently even to colossal scale, and then shrink efficiently back again, as conditions warrant. Capital-intensive firms grew very large before 1911 without unreasonably restraining trade, thrived and grew still further under the rule of reason in the sixty years that followed, and then contracted or perished as technology and competition changed dramatically after 1970. Brandeis was right that firms will grow until it is unprofitable for them to grow larger. But for a variety of reasons — some having to do with the economics of mass-production, some with the ability of organization to overcome human frailty, and some with consumers' desire for cheap goods at the expense of autonomy — the fairly won efficient scale of some firms will be far larger than Brandeis thought desirable, or even possible. Bigness in many areas of production *is* efficient, and autonomy cannot be had without material cost after all. Smallness, as everyone could see once the mass-production firms had begun to deliver their bounty, demanded a kind of determined, principled austerity, a self-imposed poverty, that only the most disciplined and stalwart autonomists could hope to sustain and that bigness could wash away in a flood of inexpensive goods if only people would adjust their values and culture to its demands.

Slowly, Brandeis came to realize this and why the battle had been lost. If fair competition produced efficient bigness, it must be because consumers, the ordi-

nary men and women in whom he and Jefferson had placed their faith, preferred cheap goods to small scale. Had it been otherwise, they would have refused the mass-produced wealth pouring from the industrial corporations and paid the higher prices and accepted the material deprivation that production in small, collegial firms would inevitably demand. They did not, and accommodated themselves to the new order, just as Karl Marx and the vast majority of economists in our own day would predict — in a world of markets, they say, efficient production of wealth is an irresistible force. But to Brandeis, the people who "hated monopoly and loved bigness" had done the unthinkable, abandoning the economic autonomy and personal responsibility that made them free for the addictive wealth and ease made possible by the industrial discipline of mass production, reducing themselves from active citizens to passive consumers, "servile, self-indulgent, indolent, ignorant" (Brandeis 1978 [to Ray Stannard Baker, 1931 and George Soule, 1923], 5, 482, 92).

"It's clear, I think," he wrote Felix Frankfurter in 1925, "that the gentle enslavement of our people is proceeding apace … & that the only remedy is via the individual. To make him care to be a free man & willing to pay the price." But he could not escape the devastating conclusion that the people had indeed made clear, through the complex interplay of their choices in markets, legislatures, and courts over an entire generation, that they preferred the comforts of corporate hierarchy to the rigors of industrial liberty. A short time later, again to Frankfurter, he let his anger show:

> Isn't there among your economists some one who could make clear to the country that the greatest social-economic troubles arise from the fact [that] the consumer has failed absolutely to perform his function? He lies not only supine, but paralyzed & deserves to suffer like others who take their lickings 'lying down.' He gets no worse than his just desert. But the trouble is that the parallelogram of social forces is disrupted thereby. It destroys absolutely the balance of power (Brandeis 1978 [to Felix Frankfurter, 1925 and 1926], 5, 193, 207).

Brandeis's own enduring commitment to the moral virtues of smallness was reflected in the material asceticism of his later life and his increasingly lonely struggle, epitomized in his frustrated, futile dissent against the long-settled rights of large corporations to constitutional protection in *Liggett v. Lee* (1933), to preserve the autonomy cherished in the America of his birth against the organizational demands of the industrial age (Mason 1946, 432–5; Adelstein 2012, 216–8). But in the compass of his own lifetime, and to his deep disappointment, the people made clear that they did not care to be free in the way he hoped they would, and were not willing to pay the price this kind of freedom required of them. Brandeis never forgave them for it.

4. A Jefferson for the Future

Brandeis would surely be dismayed by much of what has become of the American economy and political culture in the seventy-five years since his death in 1941, but not surprised. The advance of bigness has continued unabated, even as many of the industrial behemoths of the early twentieth century have been displaced by technology, media, and banking corporations of comparable size and even greater economic and political power. Capital still knows no borders, so just as burgeoning industrial firms moved from state to state in the nineteenth century to escape one's regulatory reach or enjoy the fiscal largesse of another, their successors now choose among countries for the same reasons, or to seek ever cheaper labor. A hundred years ago, the US federal government could, if it chose, impose effective regulatory constraints on the light-footed giants, but there is no such international authority today (for which Brandeis would certainly be grateful), so their behavior is increasingly unchecked by law as developing countries compete for their favor with lax regulation and the governments of developed ones worry about jobs and tax bases. States and nations, rich and poor, become beholden to the corporations for the work and wealth they can bring, politicians of every party who depend on them for campaign funding do their bidding once they're elected, and voters find it very hard to effect meaningful change in the direction of their government no matter whom they elect.

At the same time, as the great majority of Americans continue to earn their livelihoods as employees, the labor unions that once provided what Brandeis saw as an essential, private counterweight to large firms in the interests of workers have declined to insignificance. The increasing power of finance, itself a product of the drive for ever greater efficiency and profit in production, impels firms to cut costs ruthlessly and destroys all vestiges of the mutual commitment of employer and employee and more equal distribution of power and income that characterized the nineteenth-century workshops and businesses that Alexis de Tocqueville and Brandeis admired. So stock prices rise, wages fall, goods become cheaper, and as more and more of the economy's wealth is funneled through smaller numbers of large corporations, with nothing to disturb the grip of their executives on it or the desire of their stockholders for it, less and less of it passes from employers to workers. Brandeis's dream of cooperative, collegial workplaces and widespread entrepreneurial responsibility has largely gone unrealized, save for the franchising of local outlets by huge corporations. He would sadly trace all of this, the increasing inequality of income and wealth it has produced, and the necessarily imperial ambitions of a centralized American state committed to "growth" and the material prosperity of an economy dominated by large corporations, to the apparently insatiable desire of those very workers, in their contemptible new identity as "consumers," for ever more output at ever lower prices, come what may.

But he would, I think, see both hope and political opportunity in the environmental movement. Brandeis's enduring faith in the facts as best they can be known, in science and the scientific method, and in the need for experimentation in the face of complex problems, would lead him first to accept the reality of climate change and the threat it poses and then, as "attorney for the situation," to mediate among the many interests engaged in this universally urgent issue in search of a rational solution acceptable to as many as possible. But he would not see the adjustments in economic and social life necessitated by climate change as a catastrophe against which old ways must be protected. He would embrace them as an opportunity to reorganize our lives in new, more modest ways that preserve both our autonomy and the environment.

What makes the message of the environmentalists so difficult for so many to accept is easy to see. Very few would argue with the goal of preserving a planet habitable for human beings, and only a minority of the most obstinate or interested are unwilling to entertain the possibility that climate change poses a serious threat to that objective. There is great uncertainty about what is and will be happening to the atmosphere and climate, when, and with what consequences, and how effective or costly various policies might be in addressing them. And there is dispute over whether climate change has been caused by the way the developed countries have organized production over the last century and a half, to maximize both the material wealth humans can extract from the earth and the stress this pursuit puts on its atmosphere and resources.

But no one doubts that any effective effort to slow or reverse the effects of climate change will require that we in the developed countries moderate our pursuit of material wealth and learn to live with less. What this means, and how life might change as a result, have been discussed far less than the stark facts of climate change and the technical aspects of addressing it. Preserving a habitable planet seems to many to be possible only at the price of a radical reduction in the quality of life for all, a frightening prospect to which contemporary political and economic discourse offers little alternative. What will the world look like if climate change is effectively controlled? How will production and distribution be organized? What will we lose, and what might we gain? The urgency of the issue demands a revolution in the way we think about what we want to produce, and how, but we seem to lack a positive, hopeful perspective from which to make it, a way to see the necessary reduction in material wealth not as a recipe for universal misery but as an opportunity to build a better way of living for individual men and women. Brandeis's mature philosophy of smallness, of continuous devolution of power and responsibility from the center to the periphery and unwavering devotion to the intellectual and moral development of the individual in every sphere of social life, offers precisely that. He lets us see what might be possible if we can free ourselves from the addiction to wealth and strive instead to spread active, responsible participation in the direction of industry and government as broadly as possible.

He would have delighted at the chance to make his case, and Jefferson's, for the twenty-first century.

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