THE SPEECHES OF LOUIS DEMBITZ BRANDEIS, 1908-1916

Dissertation

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by

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PREFACE

When the name of Louis D. Brandeis is mentioned today, most people remember him as the distinguished Justice of the United States Supreme Court. Much of the material written about him emphasizes the Court period and his outstanding contribution to jurisprudence from the Supreme bench.

During the years, Brandeis' work on the Court has forced into the background an equally distinguished career as an advocate before the courts and in an earlier day as a pleader of the people's causes. From about 1897 until he was appointed to the Supreme Court, Brandeis was engaged continuously in a variety of campaigns, reforms, and public enterprises. Very early in the century he took his place on the national scene as an active leader in social, economic and political controversies.

This study has concentrated on the less known but equally important period immediately prior to Brandeis' entrance upon his judicial career. Examining Brandeis as a public speaker, it has attempted to analyze the important attributes which made him successful in this type of activity.

A project of this kind, although bearing one author's name, is more than one man's work. It is a pleasure to be able to recognize here those who have helped along the way.
The assistance of the faculty members on my advisory committee has been both continuous and constructive. Professors Dayton E. Heckman and E. Allen Helms of the Department of Political Science read parts of the dissertation and gave valuable counsel. Professors Earl Wiley, Henry Moser, and William Utterback of the Department of Speech have read the early drafts and given valuable assistance. My advisor, Professor Harold F. Harding of the Department of Speech, has been most generous of his time and very helpful at each stage of the study. To make this record complete, my gratitude to each of these men is recorded here.

The librarians of the University of Louisville (Kentucky) Law Library, Mrs. Gerald Kirven and Mary Jo Arterberry, were very cordially cooperative during my two visits. My special appreciation must be expressed for their permission to work in the Brandeis collection housed there.

During my visit to the Boston Public Library, John M. Carroll, Deputy Supervisor of the Reference Division, and the staff in the Patent Room gave generous and thorough assistance, making my work there more efficient. The same is true of the staff in the New York Public Library. Helen Newman, librarian for the United States Supreme Court Library, has been helpful on my visits there, and her valuable counsel and advice have been
very much appreciated.

The inter-library loan service staff in the Ohio State University library, in charge of Mrs. Mabel Crowe Blake, was always prompt and cordial in its work. Maudie Nesbitt, librarian at the College of Wooster, gave considerable time in inter-library loan services. The libraries which loaned material were those of the State University of Iowa, Northwestern University, Cornell University, The Library of Congress, and the John Crerar Library of Chicago. The staff members of the newspaper library of the Ohio State Museum gave frequent assistance both in making their own files available and in providing microfilm services.

From time to time various members of the Brandeis family, and others who knew him, have been most cordial and gracious in granting time for interviews. These contributed greatly to the interestingness and completeness of the study. These interviews were with Adele Brandeis, at Louisville, Kentucky, June 6, 1950; Charles G. Burlingham, at New York, June 16, 1950; Clyde S. Casady, at Boston, June 13, 1950; Leilia Colburn, at Boston, June 14, 1950; Judd Dewey, at Boston, June 13, 1950; Joseph Gilbert, at New York, June 16, 1950; and Louis B. Wehle, at New York, June 16, 1950.

Those who have done the typing of the manuscripts, Mrs. Ralph Wagner and Anne Genung of Wooster and Mae Starbuck of Columbus, have been faithful and competent in
their tedious assignments.

The members of my family have shown an amazing tolerance to the demands of the academic life. They have been inspired by my wife, Dorothy Whitted Drushal, who must share the credit for an appreciation of the goal and for the sacrifice to achieve it.

To all of these who have made the task both pleasant and profitable, I record here my sincere gratitude.
CHAPTER I
INTRODUCTION

1. Purpose

The purpose of this study is to present from the point of view of the rhetorical critic an analysis of some of the significant speeches of Louis Dembitz Brandeis during the period 1908 to 1916.

2. Method

For many centuries the work of the rhetorician has been the concern of scholars. From the early critic-teachers of Greece through the rhetors of Rome and the new education of the Renaissance, the study of public address has been as diverse in approach as it has been persistent. Professor Cooper noted in his introduction to Plato's Gorgias¹ that "an attack upon rhetoric was nothing new, and is perennial." Aristotle was both a critic and a teacher.² Cicero was both an orator and a critic of the oratory of others.³ Legatees of this problem have striven continuously to find a guiding rule by which the critic could approach the study of public address with the assurance that he was following a path that at best would be accepted by the orthodox, and at worst would be recognized as standard by the nonconformists. To date no literary scholar has found the formula of complete objectivity for the critic, rhetorical or otherwise.
Although no complete answer to the question has been found, certain principles of criticism have developed through the years, so that at the present time the critic has at least a starting point for his work. Though it is not the purpose of this study to analyze the history of rhetorical criticism in its attempt to develop these criteria, it is important at this point to consider the basis for the study of public address in general, and more particularly to present the methodology of this study.

During every period of political development, during every era of man's modern culture, and in whatever degree of educational advancement, public address has been recognized as one of the integral functions of society. When democracy flourished, it became the molder of public opinion and the tool of the peoples' leaders and would-be leaders. When iron hands throttled the voice of the people, public address was still studied for its artistic achievement. In modern times, since freedom of speech has been considered one of the inherent conditions of a free society, public address has been one of the major factors in shaping the political and social patterns of any given era. It is true, as Professor Wichelns pointed out, that newer methods of mass communication are now in vogue. "But, human nature being what it is," he continued, "there is no likelihood that face to face persuasion will cease to be a principal mode of exerting influence, whether in courts, in senate-
houses, or on the platform." More significantly for this study, Wichelns concluded the paragraph with these words: "It follows that the critical study of oratorical method is the study, not of a mode outworn, but of a permanent and important human activity."^4

The place of the student of public address as a critic has had an important development. From Lucian to De Quincey and later, there have been those for whom a study of public address was "rhetorical play."^5 Hudson suggested that the addition of the study of a persuasive purpose makes a study an earnest endeavor. The principle applied in other arts is basically applicable here. "Critics ask where art comes from, how it becomes what it is, and what it does...."^6 Thonssen and Baird noted that this "impulse to critical inquiry" has developed among students of rhetoric, though its growth here has been more sporadic than in some areas of study.^7

It is worthwhile, therefore, for students of speech and of public affairs to come to a better understanding of the purpose and function of the speaker in modern society. This is all the more true when the speaker plays an outstanding role in the political life of his era. The techniques of rhetorical criticism provide one approach to such a goal.^8

Several modern scholars have followed the Aristotelian pattern as a basis for their approach to rhetorical criticism.^9
His influence has been continuous in this field. His contribution emphasized the value of the study of the speaker, the speech and the audience in their interrelations. He determined the scope and provided the method for critical judgment.

In the criticism in this study the basic Aristotelian pattern will be used, with some practical modifications. A chapter will be devoted to the speaker. Another will be devoted to the audiences in general, with analysis of the specific audiences in the chapters for each speech. In the chapter for each speech there will be a brief discussion of the effect on the audience, and a later chapter will deal with the impact of Brandeis on his day. In discussion of the speeches the classical divisions of ancient rhetoric will be followed. The type of criticism will be essentially judicial.

3. Similar Studies

In recent years numerous studies of this type have been undertaken as doctoral dissertations. It is of at least passing interest to note these approaches.

Only one study has been made of the speeches of a United States Supreme Court Justice, with the emphasis on the speeches of the pre-court period. Donald Streeter's excellent work on Lucius Quintus Cincinnatus Lamar, Jr., first Southerner to be appointed to the Supreme Court after
the Civil War, could be considered in many respects a prototype for this dissertation. It was similar in that Streeter took a group of speeches in a given period, and then used them as the basis for a judgment as to the speaking methods and techniques of Lamar. It was different in that Lamar's term on the Court was so brief as to make his pre-court period almost his entire life. Such was not the case with Brandeis.

Other studies in rhetorical criticism have given scholarly stature to the methods utilized here. Bower Aly followed Aristotelian patterns in his analysis of the speeches of Alexander Hamilton at the Poughkeepsie convention. Robert D. Clark's study of Bishop Matthew Simpson emphasized the biographical approach. In his study of Benjamin Ryan Tillman, Lindsey S. Perkins followed more closely the Aristotelian pattern of analysis. He studied "The Man Tillman," "Tillman's Major Issues," "Tillman's Audience," and "Tillman on the Platform." Each of these studies has suggested points in methodology which have been utilized in the study of the speeches of Brandeis.

4. The Choice of Brandeis

During my reading of Catherine Drinker Bowen's biography of the late Justice Holmes I found the name of Brandeis frequently mentioned. Some time later, the first complete biography of Louis Dembitz Brandeis to be written
after his death, appeared. Because of the interest aroused by the former work, I read the new book of Professor Mason with considerable interest and care. The story of Brandeis' life was a pertinent chapter in the development of American government. Since no study of his speeches had appeared among the various works on him, these were chosen as a basis for this work.

The three reasons which make a study of Brandeis and his public speeches acceptable to this writer may be summarized as follows:

1. The author's interest in public affairs led him to search for a subject which would be related to one of the great periods of American history and to one of the leading characters in such a time. If one is to make any attempt to understand the contemporary political trends, it is helpful to analyze significant trends of earlier periods. In most respects Brandeis meets this requirement. He exerted his most significant national influence during the early part of this century and was a leader in many of the important movements of that era. This makes him an attractive subject of study.

2. To be appropriate for such a study, the leader should be an effective speaker. Brandeis was all of that. While the complete defense of this point is reserved for a later part of this dissertation (Ch. XI), it is pertinent here to note that he was widely in demand as a speaker for
many types of occasions in many parts of the country. He is known to have given every type of speech except a campaign speech in his own behalf. He was successful in accomplishing the predetermined objectives of his speeches. He developed a technique which became for him quite effective. Chief Justice Fuller recognized this ability when he called him the most able man ever to appear before the United States Supreme Court.19

3. It is not enough that the man be an able speaker. It is essential also that he exert some influence upon the events of his day, that he be active in contemporary struggles. Here Brandeis meets the test. He was active in most of the major national discussions before the people prior to the World War. In some of them he personally led the forces fighting on one side of the issue. He became known as the "people's advocate." He was active in Zionism, labor conciliation, wage and hour laws, railroad rate cases, railroad management, anti-trust cases, public lands disputes, and presidential campaigns. His name was widely known, whether he was hated or respected, revered or despised, feared or sought.

It must also be noted introductorily that he continued to achieve distinction as a member of the United States Supreme Court. During the long period he was on this tribunal, he came to be highly respected for his thoroughness
and his singular contributions to constitutional theory.

It would appear, therefore, that Brandeis was a man of such significant achievement as to be worthy of scholarly study, and that his speeches were of sufficient significance in their day to reward the critic who studies them.

5. Choice of Period

The choice of the period between 1908 and 1916 seems a natural one. It might be said correctly that this is Brandeis' "National Period," the era when he began to achieve national stature and in which he began to concern himself chiefly with national problems.

Prior to 1908 most of his battles had been local, limited to Boston and New England. Some of these were over the Boston railway cases, the New Haven and Boston and Maine merger (which lasted until 1911), the trade unions, and women's suffrage. Even the work which he considered his outstanding achievement, the Massachusetts Savings Bank Insurance plan, was almost concluded by 1908.

The year 1908 is marked as a beginning of his "National Period" because of the Oregon maximum hours law which he defended before the United States Supreme Court. He came into the case at the invitation of the state of Oregon and won a significant victory, which placed his name before a national public.

During this period he engaged in many battles which
made him even more famous. This was the period of the railroad rate cases, the Ballinger-Pinchot feud, his party alignment first with La Follette and then with Wilson, and his espousal of the Zionist movement.

The appointment and confirmation as an Associate Justice of the United States Supreme Court abruptly ended the career of Brandeis as a pleader from the public rostrum. No member of that august body has ever taken more seriously than Brandeis what Max Lerner called the monastic vows of political chastity. Brandeis had high regard for the Court, and an equally high regard for his position as an adjudicator of controversial issues. He felt it highly improper that one in such a position should make public statements which might in some way be construed as prejudicial to any cause pending before the court, or which might conceivably appear there in the future. Brandeis addressed the Chicago Bar Association a few days before his appointment was announced. After that startling news was released, he cancelled his pending speaking engagements, and after his confirmation, made only a few speeches in behalf of Zionism. After 1921, even these decreased. The break with his hectic and controversial period as a pleader of the people's causes was clean and decisive.

It is proper, therefore, to call the period from 1908 to 1916 the period of Brandeis' participation in the national forum. It is from this period that the speeches
to be used in this study have been taken, and it is this period which forms the background for the consideration of Brandeis as a public figure.

6. Summary

It is appropriate for a student of rhetorical criticism to analyze the public addresses of an influential figure in a given period in history. Although there has always been some difficulty in defining the limits and functions of the critic, the pattern has been sufficiently established to provide a starting point and a modus operandi for the modern writer.

Because of his distinguished participation in the controversies and struggles of his day, Louis Dembitz Brandeis becomes a fit subject for such a study. He was influential in the economic and political discussions of the early part of this century. His work was almost always that of a pleader in the public forum. He developed, prior to his appointment to the Supreme Court, a national importance recognized by his contemporaries. His available speeches in this period constitute an important part of the discussion of the issues of that day.
CHAPTER I

FOOTNOTES


8It is important to note here a definition of the term "rhetorical criticism". To avoid repetition, only two will be drawn from the literature for use here. Wichelns (infra, note 4, p. 209) stated: "If we turn now to rhetorical criticism...we find that its point of view is patently single. It is not concerned with permanence, nor yet with beauty. It is concerned with effect. It regards speech as a communication to a specific audience, and holds its business to be the analysis and appreciation of the orator's method of imparting his ideas to his hearers."

Thonssen and Baird (infra, note 7, p. 16) find little disagreement with this point of view in their definition. "Rhetorical criticism can thus be defined as a comparative study in which standards of judgment deriving from the social interaction of a speech situation are applied to public addresses to determine the immediate or delayed effect of the speeches upon specific audiences and, ultimately, upon society."
Early in his work Bower Aly suggested: "Aristotle's plan and point of view will be utilized in this essay in criticism, not only because they are generally applicable and sound, but also for convenience." (Bower Aly, The Rhetoric of Alexander Hamilton, New York: Columbia University Press, 1941, p. 32.)

Cooper noted that "there is no book on the subject since Aristotle's that is not at least indirectly indebted to his." (Cooper, Rhetoric, op. cit., p. xvii.)


Wichelns (supra, note 4, p. 183 ff.) suggested three types of criticism: biographical, biographical and literary combined, and literary, or that which concerns the work and ignores the man. Thonssen and Baird (supra, note 7, p. 17) suggested four types of criticism. "Not all of these types are consistent with the definition set forth in the preceding section, but they are currently employed and therefore deserve notice . . . . These types are the impressionistic, analytic, synthetic and judicial." While any critic, rhetorical or otherwise, will at one stage or another tend to emphasize each of these types, the basic purpose of a critic may be identified by one of these terms. The emphasis in this study is on judicial criticism. Thonssen and Baird observed that this type "combines the aim of analytic and synthetic inquiry with the all-important aim element of evaluation and interpretation of results."

Donald Clint Streeter, A Rhetorical Criticism of the Major Public Addresses of Lucius Q. C. Lamar, During the Period 1874 to 1890 (unpublished Doctor's dissertation, University of Iowa, Iowa City, 1948), pp. 1-22.

Bower Aly, Hamilton, op. cit., presented to the graduate faculty of Teachers' College of Columbia University as a doctoral dissertation.

Robert D. Clark, "The Oratorical Career of Bishop Matthew Simpson," Speech Monographs, XVI, No. 1, August 1949, p. 1 ff. Dr. Clark presented this dissertation to the graduate faculty of the University of Southern California.

Lindsey S. Perkins, "The Oratory of Benjamin Ryan Tillman," Speech Monographs, XV-No. 1, 1948, p. 1 ff. Dr. Perkins presented this study as a dissertation to the graduate faculty of Northwestern University.


19 George W. Norris, 317 U. S. at xxiv.

20 *Muller v. Oregon*, 208 U. S. 412. See p. 36 ff. for comment on this case.

1. The Problem of Biography

To know the speech, one must know the speaker. If a critic is to make more than a superficial analysis of form and style, it is important that the life and work of the speaker become the starting point of the study. The judicial critic will need to have more than a mere chronology of the major events in the speaker's life. He must attempt to understand the man and his reaction to the problems which involved him in struggles with his contemporaries.

Such a point of view broadens the scope of the function of the critic, but at once narrows and limits his duties as a biographer. It becomes important to the rhetorical critic to discover the factors in the life of the speaker that made him speak as he did. Why he spoke on certain issues, why he was silent on others, and why he took the positions he did become significant.

The scope of the critic is therefore broadened, because he must know more than the lines and words of the speech. He must explore the life of the speaker to analyze the reason why he behaved as he did. It must be granted that such analyses are difficult, even with the added advantage of historical perspective. To determine conclusively the causal relationship between event and speech may not
always be possible to the last logical detail. However, it is imperative to find in biographies some of the trends, some of the influences, some of the stimuli which moved the speaker's life.

As the scope of criticism is thus broadened to include biography, the biographical study itself is delimited rather narrowly. The rhetorical critic may survey the full story of the life of his subject, but he does not report all of these details. He looks for the specific items which will throw more or less direct light upon the attitudes and policies of the man as a speaker. The problem of determining the narrowness of the limits of such biographical reporting was clearly presented to the critics writing in *History and Criticism of American Public Address.* Each of the speakers reported there had been studied previously from the point of view of the biographer. In fact, most of the writers in this volume started with already published and well documented biographies as their basic material. What they attempted, and in many instances achieved with considerable success, was to find the biographical factors which provided the backgrounds of the rhetorical patterns developed by the speaker. With such a limitation upon himself, the critic turns to the biographers for what light they can throw upon his problem.

The study of biography may be approached from one of
three points of view. First, the author may consider himself an objective reporter, the impartial contemporary of some significant person. An investigator using this approach will attempt to determine the forces which have influenced the individual studied. Not content with mere chronology, he includes references to those forces which made the man what he was, those influences against which his subject fought to gain distinction. A writer of this kind avoids the role of the "muckraker" or the "glorifier." He tries to give simply and clearly the story of the life and influence of the man he has studied.

A second approach places the biographer in the role of the pleader. For one reason or another, the author elects to add to his biographical material a plea for recognition for his subject, a pointed defense of his activity; or, conversely, an indictment of his alleged shortcomings and a magnification of his misdeeds. These writers use biography not as an historic record, but as grist for some mill.

The author, in the third place, may assume the role of the critic--a literary, rhetorical, philosophical, or political critic, as his subject and interest may demand. Of necessity, in this case, the author goes beyond the mere reporting of facts. He becomes perforce an interpreter, an evaluator. He presumes to interpret the intent and will of his subject. He places a yardstick--his own,
helpfulness. Where the book becomes critical Mason allows the contemporaries to be the evaluators. In a sense the process of selection gives Mason's own high estimate of Brandeis, but the book in its major objectives is the result of a reporter's attempting an objective analysis of a subject.

Lief more clearly pleads a case. He is out to prove that Brandeis is a great American. He takes a stand at the outset and concludes with praise of the subject's work and worth. The same comment should be made on the first of the important biographical essays to be published on Brandeis, that of Ernest Poole in the American Magazine. He introduced Brandeis to his public, and at the same time urged his public to find him one of the truly great Americans.

In his earlier work, Mason assumes a more critical attitude toward both the man and his work. In his The Brandeis Way he presents an analysis of the Massachusetts Savings Bank Insurance Plan, its inception, its enactment, and its growth in such a manner as to give a critical evaluation of the work of Brandeis in this field. His Brandeis: Lawyer and Judge in the Modern State similarly attempts to measure his stature as a legal mind and practitioner.

De Haas is a pleader for the recognition of Brandeis as a leader in the Zionist movement. Most of the other biographical material appeared around the time of the Supreme
Court appointment, and drew heavily on Poole, and on other magazine and newspaper stories.

The author of this study in no way attempted to add major material to the biographical data compiled by these authors. Some points will be mentioned in discussions of the speeches that were not covered by previous students. However there is no major biographical material not taken from these earlier writers. What this particular section of this study attempts to do is to find in the life of Brandeis those circumstances and events which, as contributory influences, may have determined his approach to the issues of his day.

2. His Heritage

The family background of Louis Dembitz Brandeis is a significant clue to some of his later attitudes. Therefore it becomes a point of interest to report it in this study.

The cultural heritage of Brandeis from both his father's and his mother's families was important. Although Louis was born in Kentucky, his parents had emigrated to America only eight years before. Adolph Brandeis had come over in 1848 as an "advance agent" and "scout" for the entire family, and for a group of friends. In the spring of the following year, the Wehles, the Dembitzes, and the Brandeises followed to the land which Adolph had reported was full of opportunity. From this migration, the future
Associate Justice of the Supreme Court received his foundations for his American ideals.

On his father's side, Mason noted, "Adolph Brandeis, son of Simon and father of Louis, was born in Prague, May 13, 1822, of an old Bohemian-Jewish family which traced back to the fifteenth century." In 1843 Adolph graduated from the Prague Technical Institute with distinction. Not finding employment to which he was suited he worked at a variety of jobs, none to his liking. In 1846 he tried to find employment in Hamburg, his work taking him to England from time to time.

When the revolution broke out [at home] in 1848, he hurried home. Before he could join the rebels, however, he was stricken by typhoid fever. This turned out well, for when the Austrian Imperial Government suppressed the revolt, Adolph's name was not among those proscribed. To him, as to so many others, 1848 was always the 'wonderful year' when 'the spirit of the Lord informed the people of Europe and His mighty voice overthrew the tyrants.'

Upon his arrival in America in the fall of 1848, Adolph visited some of the well-known centers in the east, and then moved on into the middle West to get acquainted with its opportunities. For a time he served as a farm hand in Butler county, near Hamilton, Ohio. It was while here, and later when working in Cincinnati, that he decided upon Cincinnati as the location from which his family in Europe could explore the area and eventually determine upon a place to settle. Consequently he wrote to his family to
plan to come to America, that he had found a place for them. Very soon, therefore, the "steamer Washington sailed from Hamburg, April 8, 1849, carrying the Wehles, Brandeises and Dembitzes, twenty-six persons in all. Twenty-seven great chests contained their belongings, ranging from two grand pianos and a cheval glass to feather beds, copper pots and pans."  

Fredericka Dembitz, Adolph Brandeis' finance, was among those who made the journey to the new world. Her father, a graduate in medicine from the University of Königsberg in Prussia, practiced medicine in various Polish cities with not too outstanding success financially. Fredericka lived for some time with the Wehles in Prague, which led to her meeting Adolph Brandeis. Her formal education consisted only of six months at public school, and about a year at a girls' high school in Frankfort. She studied assiduously under her father, and then, after going to Prague, educated herself in her uncle's library. Somewhere and from someone, probably her parents, she had acquired a zest for learning and knowledge which would not be denied, even though she could not attend formal schools. It is not surprising, therefore, to discover this same eagerness for learning in her children.

Much has been written of the trip across America which was made by this group of travelers from Prague. Goldmark described it in most detail. Lief and Mason...
mentioned it as an unusual initiation into the wonders of the new world. They traveled by barge and steamer up the Hudson, across the Erie canal, and across Lake Erie to Sandusky. From Sandusky to Cincinnati they journeyed by train. There Adolph had a large house awaiting them, so that they could make plans for the future as they lived comfortably.

The town selected for their start in business was Madison, Indiana. As the terminus of the first railroad built in Indiana, and the transfer point between the Ohio and Indiana lines, and the Ohio River, many expected it to grow and keep pace with, if not to surpass, Cincinnati. The Brandeises and Wehles moved to Madison to live. The Dembitzes remained in Cincinnati where it was believed the father as a doctor and the brother as a lawyer would have greater opportunity for practice. At Madison the families started a grocery and a starch factory, and settled down to make their new homes.

The Brandeis home in Madison was something of a cultural center. Those who loved music frequently met there, enjoying both the performance and discussion of music and the arts. When Kossuth was touring and lecturing in that part of the country he was entertained at the Brandeis home. The newcomers made a favorable impression on the community and soon were accepted into it.

But Madison did not enjoy the prosperous development
that had been anticipated. The starch factory failed. People began to move away to more promising localities. Even though the families were happy there, they decided to move. The Gottlieb Wehles returned to New York to live. The Brandeis family moved on to Louisville in 1851. Later Adolph's brother Samuel came, and built up a large medical practice. In 1853 "Lewis Dembitz began a notable legal career" there.18

At the time the family moved to Louisville, Fannie was the only child. Amy was born on April 9, 1852. Two years later Alfred was born on March 23, and Louis, the youngest of the family, was born November 13, 1856. Mason reports that "Louis came in on the rising tide of the family's fortunes, for his father was on the way to becoming a prosperous grain and produce merchant."19 Louisville was a thriving business center, a busy river town, and a transportation center. Wealth was in evidence in the homes throughout the city. In such an environment the Brandeis family prospered and made a place for themselves in the affairs of the city.

Political affairs in Kentucky were extremely fluid between 1840 and 1860. As what was to become a border state it was giving considerable attention to slavery. The Brandeises and Wehles while living at Madison were shocked by the slavery in evidence across the river. After moving to Louisville, they were vigorous in their anti-
slavery activity. Kentucky, one of the oldest of the new states, was rapidly becoming an important center of political controversy. In many respects the frontier had moved on westward by the 1850's. Louisville was the center of political as well as commercial affairs as it served to connect the expanding West, via St. Louis and the river, with the more settled East.

The major issue facing Kentuckians was slavery in its many economic and political implications. The difference between the problem here and in the deep South developed because of the location of the state. In Kentucky there were many who openly sympathized with the northern point of view, enough, in fact, to prevent secession. On the other side of the issue, slavery was permitted, and entailed little social stigma. The underground railroad had many stations just across the river in Ohio, Indiana and Illinois. All of these conditions kept the issue alive for the citizens of Louisville.

The people were discussing the internal progress of the state as promised by several of their governors, but not accomplished. Other problems centered around the development of trade, the advancement of the railroad, the rapid growth of population, the financial policies of the state government, and the westward movement of the population. The telegraph and reaper were still new when the
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Brandeises came to Louisville. The decline of the Whigs and the birth of the Republican Party were topics of the day for Kentuckians, as for others.

The Brandeis family plunged immediately into an active participation in the civic life of Louisville. Goldmark reported that "public affairs for these adoptive children of America had always been the familiar concerns of the household. 'I have got to the point where politics over here interest me much more than European politics,' [Adolph] wrote in another early letter during his first months in America; it was an interest which never subsided."22

The household was the center of much discussion of the politics of the day. Although they had known him barely three years, Adolph, the father, and Lewis Dembitz the uncle, became ardent admirers of Henry Clay. His ideas influenced their political bent. James Speed, brother of Joshua Speed, the friend of Lincoln, was a close friend in Louisville. In 1860 Lewis Dembitz23 was one of the twenty-three Kentucky delegates to the Republican convention in Chicago which nominated Lincoln. The children in such an environment could not easily escape the influence of these men of affairs. Adolph Brandeis wrote much later: "To this early influence, not unnaturally, the set of the sons of the house may be ascribed."24

Louis Brandeis married Alice Goldmark in New York, March 23, 1891. She was the daughter of the revolutionist,
Dr. Joseph Goldmark. Proscribed by the Austrian government, under indictment for treasons, Goldmark fled to America. While here he made a name for himself as a physician and scientist. Later he was returned to Austria, tried under a new regime, and freed. Brandeis had found a wife who shared his heritage, and with whom he shared his ideals. She also understood his policies and goals.

Mason commented at length on the value of the Brandeisian heritage.

'The greatest combination of good fortune any man can have,' Brandeis said later, 'is a parentage unusual for both brains and character.' In Louis the significant characteristics of both parents were blended in happy and well-balanced combination. From his father he inherited sound judgment, subtle wit, and a remarkable capacity for the persuasive management of men. From his mother stemmed a romantic strain, an insatiable desire to better conditions, unflinching faith in his fellowmen. She possessed 'preeminently,' Justice Brandeis remarked, 'a sense of duty to the community, not so much by preaching, but by practice.'

Lerner traced this same influence in Brandeis' life and work.

The earliest influence in fashioning the mind of Mr. Justice Brandeis—and perhaps therefore the deepest and least eradicable—was a strain of romantic liberalism whose essence was a gallant and optimistic struggle for certain supposedly primal human rights. It was a liberalism compulsive enough in its emotional force to lead his parents to emigrate to America from Bohemia after the unsuccessful revolutions of 1848.

Goldmark observed in this connection that those who
came over in 1848 were of such an unusual calibre that they were destined to make an important contribution to American culture.

It was no chance coincidence that the newly come Germans and Austrians in the United States (for the other European revoltés, French and Italian, were at that time not minded to emigrate) fortified liberal tendencies in the new world as they had in the old, and threw themselves to the anti-slavery movement. It was no chance coincidence that they became honored members of the early American scientific and medical fraternity; that they took the lead in the musical development of the United States, choral and orchestral; and lent their support to its intellectual and artistic growth.

Out of this background of revolution against oppression, supported by the search for new opportunities in a new land, fired by a quest for learning, Louis Dembitz Brandeis found his early ideals and ideas. It is not surprising to find some of these same principles enunciated in his speeches in later life.

3. His Training

The discussion of the education and training of Brandeis falls naturally into three parts. First, the lower schools of Louisville; second, the short though significant period in Dresden, Germany; and the third period, Harvard Law School.

Louis attended first a private school in Louisville. From here he went to the German and English Academy in Louisville, and then on to the Louisville Male high school.
He distinguished himself in each of these schools. At the age of ten he joined the Websterian Debating Society. "The main concern of this youngest member was not the political issues of the day, but the accuracy of the treasurer's accounts. Wiry Louis was ready to battle over a discrepancy of forty cents." Mason noted the thoroughness which characterized his work:

At the German and English Academy of Louisville, Louis' grades, almost without exception, were 6, denoting perfection. On one occasion the principal made a point of stating that 'Louis deserves special commendation for conduct and industry.' At the Louisville Male High School his grades for the sophomore year were mostly 6, none being as low as 5, on a scale in which 5 signified excellent,' and 6 'without fault'. In his sixteenth year Louis was awarded a gold medal 'for preeminence in all his studies' by the University of the Public Schools in Louisville.

Thoroughness in his work was manifest early. It will be important to trace this characteristic in his later invention techniques when the speech involved more than forty cents, and the stakes were higher than lower school report cards.

Previously a child of good fortune, it was, oddly enough, financial adversity that influenced the next phase of Louis' education. The grain firm of Brandeis and Crawford suffered heavy losses in 1872. Anticipating the economic collapse before it hit the nation, Adolph
dissolved the firm to await better times. Lewis Dembitz persuaded him to take his family to Europe during this period. Louis had intended to continue his education in the Gymnasium in Vienna, but in spite of his excellent records in Louisville, he could not meet the entrance requirements. The years 1872-73 were spent in private study in Vienna and travel throughout Europe. When Alfred decided to return to Louisville to work, Louis determined to try for admission to the Annen-Realschule in Dresden. He asked for a waiver of entrance examination, and a waiver of the requirement that a birth certificate and a certificate of vaccination be presented. At the age of seventeen he argued with the principal: "The fact that I am here is proof of my birth and you may look at my arm for evidence that I was vaccinated." So successfully did Louis argue his case that the rector permitted him to matriculate without the required test. This was a tribute to the good judgment of the rector as well as early evidence of the future Supreme Court Justice's power of persuasion.30

The two years in Dresden made some lasting impressions on the young student. Ernest Poole noted these in his essay in 1911. The authoritarian tendencies, the autocracy of the faculty, and the almost military discipline aroused intense resentment. He told Poole: "I was a terrible little individualist in those days, and the German paternalism got on my nerves."31 He was disciplined
for whistling to get into his quarters late one night. When he recalled this to Poole he said: "This made me homesick. In Kentucky you could whistle! I wanted to go back to America and I wanted to study law. My uncle, the abolitionist, was a lawyer; and to me nothing else seemed really worth while."32

Mason reported Brandeis' comments to his clerk, made some years later. Paul A. Freund recalled:

I heard him say that although he did well in his studies theretofore, it was not until he went to Dresden that he really learned to think. He said that in preparing an essay on a subject about which he had known nothing, it dawned on him that ideas could be evolved by reflecting on your own material. This was a new discovery for him.33

Perhaps it was only a coincidence, but one presaging greatness, that the future jurist should sense the values of freedom and learn the fruits of reflective thinking at the same time.

Brandeis entered Harvard Law School at the age of nineteen on September 27, 1875. Two years later he graduated with a record that has not yet been equalled for high grades. He remained for a year of graduate study during which he tutored some beginning students, sat in on examinations, and toward the end of the year served as a proctor in Harvard College. All of this was energetically undertaken, in spite of trouble with his eyes, which threatened blindness for a time, and the financial reverses of his family.
Although a review of the entire legal training of the future Justice is not important here, it is of interest to note two facts of his life at Harvard: 1. The reaction of his contemporaries to his work; 2. His reaction to the type of training he received.

Lief reported that Louis came to Harvard without the usual academic degree, and what for Harvard was important then, he lacked "identity of background." These handicaps, if such they may be called, were quickly overcome. "What distinguished him in the eyes of teachers and classmates were his intellectual qualities." Lief noted further:

"When he rose in the recitation hall to take part in eviscerating a case the class expected a treat. He had the polish of a gifted actor, and the speech of a man with a broad mental grasp."

Mason quoted Bruce, a classmate, on the similar effect he had upon his fellow students. Bruce recognized him as equal if not superior to those who had graduated from the New England colleges. Charles C. Burlingham, noted admiralty lawyer who later figured in the court fight, recalled that he learned to know Brandeis while he was an undergraduate and Brandeis was in law school. The undergraduates who looked toward the law considered him an example of brilliance and thoroughness.

Brandeis' reaction to his training was that of a great mind meeting a strong challenge and growing in the
struggle. Langdell had introduced the case system of study only four years before Brandeis' entrance. This study instilled in him a distrust of secondary sources. It gave him little awe of textbooks as such. Poole reported his reaction to such study.

'As a whole, he said, 'I have not got as much from books as I have from tackling concrete problems. I have generally run up against a problem, have painfully tried to think it out; with a measure of success, and have then read a book and found to my surprise that some other chap was before me.'

Brandeis appreciated the opportunities of the case method. It was consistent with the thoroughness which he had already manifested, and stimulated learning by reflective processes, a method which had been brought so forcefully to his attention in Dresden. Mason called this his "natural bent toward inductive processes."  

Another aspect of his training which he appreciated was the Harvard law club system. The clubs gave an opportunity for practice sessions for which he prepared with characteristic thoroughness. These clubs provided the "courts" before which cases were tried in the manner of moot courts in the modern law school. His activity in his club continually interested him.

In summary it may be noted that his educational achievements were the result of a happy and fortuitous meeting of the ready mind with a stimulating heritage,
and the educational machinery sufficiently effective to develop the individual to the greatest degree possible.

4. His Law Practice

The work of Louis D. Brandeis as a practicing attorney may be divided into three periods. The first is the short period of a few months which he spent in St. Louis. The second covers the time he was a member of the firm of Warren and Brandeis, ending in 1897. The third begins in 1897 with the formation of the firm Brandeis, Dunbar and Nutter, and ends with his appointment to the Supreme Court in 1916.

The first period, although lasting less than a year, helped to crystallize in Brandeis' mind the type of lawyer he wanted to be and the type of community in which he wanted to work. He was not pleased with his prospects in St. Louis. Although not unhappy in his relationship with Taussig, his partner, and although he was glad to be in the same city with Fannie and her husband, he still saw little future there for him. He yielded to the insistence of a law school friend, Samuel D. Warren, Jr., and returned to Boston to establish a firm with him. His St. Louis career had lasted from November, 1878 to July, 1879.

The second period was the most important from the point of view of trial practice and financial income. The firm of Warren and Brandeis was recognized very early
as one of the better coming young firms. As further preparation, young Brandeis held for two years the position of law clerk to Chief Justice Gray of the Supreme Judicial Court of Massachusetts (later Associate Justice Gray of the United States Supreme Court). Harvard connections helped the young men along. Their firm began to expand its interests and areas of practice. Both men took an interest in the Harvard Law School, and Brandeis, especially, spent much time in developing the Law Review, and in assisting in financial campaigns. Both men were "socially acceptable" in Boston, which did not hurt their legal opportunities. Brandeis had offers to teach at the Harvard Law School, offers which came in several different forms and on different occasions. He finally declined all of them, deciding rather to devote his full time to the practice of law. Chief Justice Gray apparently sealed his decision with his praise when he stated: "I consider Brandeis the most ingenious and most original lawyer I ever met, and he and his partner are among the most promising law firms we have got."41

The financial success of the firm may be measured by the fact that by 1897, in little less than eighteen years of practice, Brandeis had earned almost a million dollars. He was now a successful corporation lawyer, so successful that he began to delegate some of his work to other members of his firm. The partnership with Warren
ended in 1889. It was necessary for Warren to take up the active management of the paper manufacturing firm of his father, who had died that year. The firm name remained the same until 1897, and the cordial friendship of the two remained strong until Warren's death.42

In 1897 the third phase of Brandeis' legal practice began with the reorganization of the firm into Brandeis, Dunbar and Nutter. Both of these men had been taken into the firm a number of years previously. For Brandeis it meant the beginning of his life as a public servant. Slowly he had been emerging as a public figure, first in Massachusetts, and then in New England. He was beginning to venture onto the national scene. After 1897, most of the trial work, most of the counseling with clients, and most of the day to day legal work was done by other members of the firm. Brandeis devoted himself to appellate work and to cases which were directly related to the public causes to which he now devoted so much of his time. In a very real sense, this marked the end of his career as a Boston lawyer and the beginning of an illustrious career as a public servant. The public service which he gave was not the usual office-holding political "plum." Rather he spent his time on non-paying assignments which were at times unpopular, at times misunderstood, but in each case vigorously and often bitterly fought out on behalf of some group of citizens whom Brandeis considered important.
More important to this study than a catalog of his legal career is some analysis of the characteristics of Brandeis the lawyer. This phase of the subject considers, first, the specific Brandeis brief, and secondly, some general observations concerning his legal career.

The "Brandeis brief" was so named because it represented a departure in method of pleading before the United States Supreme Court, and because it became the forerunner of a new method of presenting cases before that tradition-bound tribunal. The case at bar was the Oregon statute limiting the time which women would be permitted to work in certain types of industries to ten hours a day. Curt Muller owned a laundry in which he wanted to employ women who would work beyond the limit prescribed by the new statute. The case came up through the Oregon courts and was scheduled before the United States Supreme Court. The National Consumers League was eager to assist in its defense. They first invited Joseph H. Choate, but he declined, having no sympathy for the position of the League. Next they approached Brandeis who agreed to take the case, provided he received an invitation from the State of Oregon. When this was forthcoming, he assumed the direction of the appeal before the court.

Up to this time it was accepted appellate practice to depend upon precedents in law and precedents in court
decisions as the foundation upon which to base the reasonableness of an appeal. Attorneys preparing cases for presentation felt bound by the rules which implied that the Court could take cognizance of only such material as the legislative act in question, the evidence presented in the trial court, and the citation of precedents involving similar points on law or procedure.

In the Oregon case the interpretation of the act was not in doubt. The evidence presented in the trial courts was acceptable, and the facts of the case presented to the Supreme Court were not challenged. To rely on precedent in this case would have been fatal, for only two years earlier, in *Lochner v. New York* the Supreme Court had overruled a maximum hours law for bakeries in New York State. If a successful appeal were to be made, some other basis for a decision must be found.

It was at this point that Brandeis decided to present what has become the historic brief. In his presentation of the written brief he submitted less than three pages of discussion of the law. He then presumed to present over one hundred pages of factual material purporting to prove that it was harmful to women, and contrary to the general welfare, for women to work more than ten hours in one day. He cited laws in other countries, reports of medical bodies, sociological studies, industrial reports, the history of
working conditions for women and the relationship between working conditions and the political, social, and economic well being of the nation. He presented facts, matters which would be received outside the Supreme Court, as the basis for their decision within the Court. Here was the essence of the revolutionary procedure. It said, in effect, that the Supreme Court (or for that matter any appellate court) cannot close its mind and record to evidence outside the case itself, if that materially and realistically relates to the issues at hand. Argument for appeal could be supported by material other than law, trial evidence, or judicial precedent. In this way Brandeis "recognized and accepted the quasi-legislative capacity of the Court and sought to make judicial decisions as liberal as possible."\(^{45}\)

The method itself aroused as much comment as the results of the case. The Court accepted the Brandeis point of view, Justice Brewer commenting in the opinion on the thoroughness of the presentation, violating tradition by mentioning Brandeis' name in a commendatory manner. Here is what McCune called "throwing at the courts not only legal citations but also page after page of economic facts justifying the legal position pleaded."\(^{46}\) Mason observed: "The masterful fashion in which he brought something of the spirit of modern science to the court-room may be Brandeis' chief claim to fame in the history of our law. He ended the reign of *nolumus mutare.*"\(^{47}\) Poole noted that this type
of brief "is significant for what it proves beyond its point. For the knowledge of the whole civilized world on the subject of overwork is assembled here . . . ." Lief referred to the event of the presentation before the court:

This was an intellectual gathering to his taste, but he listened sadly as opposing counsel contended that women were endowed, equally with men, with the fundamental right of liberty; that their right to contract with employers could not be impaired. In the silence of this solemn chamber the dry bones of legalism rattled; a dead hand tried to shut the court against the living world. Brandeis swept aside these archaisms and produced a picture of the hazards of modern industrialism . . . . A month later the Court unanimously upheld the Oregon statute. Such a use of economic analysis as part of judicial pleading has become an accepted procedure. "Lawyers for the New Deal strategists, from 1933 on, used practically no other approach." It was this case more than anything else which brought Brandeis before a national public. He took other cases of this type, representing states whose social legislation was being contested before the Supreme Court. These cases and causes began to take such a large proportion of his time that he had become what Burlingham called "the darling of the reformers." Turning next to some general comments upon his legal career, it is important to consider his method of practice and philosophy of law.

Brandeis' methods of practice were characteristic
of his attitude toward life in general. He was an individualist. He wore no man's collar. He followed his own paths to ends of his own choosing. In this light must be considered his attitudes toward his practice. Lief noted:

With a million dollar grip on life he could still have practiced law in his own peculiar way, looking not to the client's victory primarily, but to the community's larger gain which would in turn benefit the individual. But because he sought solutions with a judicial eye he created suspicion among the perplexed. They were accustomed to retaining lawyers for their own sweet uses.

Brandeis felt that above all other considerations the common good of the people superseded that of any given client, a point of view which led to some bitter misunderstandings, and, later, to charges of questionable ethical practices. This inspired him to speak frequently on what he considered the high responsibility of lawyers in American society, and to call often for more "people's lawyers." He desired no higher praise for himself than this title.

"The Brandeis Method" has been that of applying knowledge and techniques of modern science to the practice of law and the solution of social and economic problems. Many times he did this by assuming the role of the publicist. He was criticized at the time of his appointment to the Supreme Court for being nothing more than a paid publicist for revolutionary causes. Although much more than a publicist, he learned to utilize these methods in his pro-
gram for reform. Mason made this point concerning his techniques:

The Brandeis method had been to arouse interest so the public will save itself by right action. His consideration of any problem has usually three stages: (1) thorough investigation by and with experts, (2) public education by both press and platform, (3) legislative measures securing such changes in economic and social relations as the facts demand. 54

It was in his attitude toward his own practice and toward his clients that Brandeis caused considerable controversy, and later evaluations vary as to the attitude which dominated his thinking as a practicing lawyer. Burlingham takes one extreme position. He summed up his own evaluation by pointing out: "Brandeis was a 'mean' practitioner. In law you give and take, but Brandeis was all take and no give. He was bitterly hated, not because of the shoe machinery case, but because of his way of practicing." 55 This was one reaction to his determined insistence upon the "right" as he saw it, without compromise. "Brandeis' career aroused bitter antagonism. He has often been maligned and sometimes purposely misunderstood." 56 Yet he was recognized by his conferees as an outstandingly successful lawyer, one whose opposition should not be aroused. Holmes classified lawyers as kitchen knives, razors and stings. Brandeis, he said, was a sting. 57

Contrasting with the Burlingham view is the observa-
tion of one of his former law clerks, now a Harvard Law School professor. Professor Freund said:

His enormous driving force was controlled by an equally remarkable sense of balance. If he was a devil on wheels to his opponents, he was an austere judge to his clients. The role of 'counsel for the situation' appealed to his constructive talents and to his faith in the power of reasoned thought to find accommodations within the framework of principle.58

These policies sometimes brought him into delicate relations with those who adhered to the more formalized standards of practicing ethics and procedure.

Professor Freund further noted that his "counsel for the situation" techniques resulted in unexpected activity by Brandeis.

After guiding an association of employers to victory against a striking union, he converted the congratulatory meeting into a forum for a lecture to his clients on the just claims of labor, which included a greater share in the responsibilities of industrial management. In a similar vein, when addressing a gathering of labor leaders, he was quick to seize the occasion as an opportunity to win their support for the unpopular cause of scientific management.59

Perhaps Charles A. Beard summarized the point of view when he said: "Above all, he seeks to draw his jurisprudence out of the realities of life--its work, its economy, and its social arrangements."60

5. The Man Brandeis

To understand the public work of any speaker, it is important to know his basic personality traits, the private habits of choice which underlay the formal front known by
the people. For Brandeis these are equally significant and will be discussed here under the following three subdivisions: 1. description of him as a person, his habits and traits; 2. his work as a publicist; and 3. his basic philosophies.

For a description, Lief refers to him as a Harvard law student: "There was detectable Southern softness in his voice . . . This blackhaired, blue-eyed fellow, with high color suffusing his olive skin . . ." Poole gave his impressions.

His face, with its high forehead, prominent cheek-bones, deep-set eyes and heavy lines about the broad and sensitive mouth, gives the impression of immense force, of a mind keen, subtle, trained, a mind of large vision, big ideals. And yet it is a likable face; his manner is kindly and he has many devoted friends. Catherine Drinker Bowen found him an "extraordinary man."

"Tall, extremely thin, black-haired, with blazing eyes, Brandeis was like an electric wire that trembled with highly charged energy. But with it he was quiet and possessing a quality of gentleness that sat strangely upon a man so young." Brandeis' son-in-law, as well as others, noted that he resembled Lincoln, and that "his appearance arrested attention."

The habits and personal traits of Brandeis suggest an austerity not commonly found among men of wealth. He lived a simple life, avoiding many of the trappings of
"over-civilized society." His early office was devoid of easy chairs. His home was not cluttered. His personal habits called for only extremely careful expenditures of money.

He was devoted to his family. Adele Brandeis spoke of the devotion of her father Alfred to Louis. They corresponded almost daily for many years. Lief noted that "in his letter-writing his informality and frugality were evidenced by the use sometimes of the folded sheet of court stationery... As a correspondent he was punctual. His simplicity and directness made one ashamed not to avoid superfluity and ostentation." Lief also noted that Glavis, who helped select him for the Ballinger case, "found Brandeis so gentle he hesitated to entrust his case to so unassuming a lawyer." Another of his habits was his devotion to accuracy. Bowen noted this trait. "Brandeis had a passion for thoroughness; his mastery over facts, statistics, was stupendous. 'If you can't solve it by law, you can solve it by mathematics,' he said. Holmes was not so sure. He laughed a little at this young passion for facts, but he respected it too." In an interview with Harvey Briet she recalled that she had to interview many people for her book on Holmes. "Brandeis was the easiest... I learned to divide judges into pompous and non-pompous, but Brandeis was wonderful. I wanted to know what Holmes' firm's offices
looked like, and instead of the usual blown-up stuff, Brandeis told me exactly. "You went in this door and you saw such and such, and to the right there were such and such." And with a typically feminine note she added: "He was so wonderful he made me want to cry."69

Mr. Judd Dewey recalled his manners as perfect, yet not ostentatious.70 Brandeis admired imagination wherever he found it. Dewey noted too, that Brandeis never personalized evil, allowing no resentment against people, but only contempt for their inadequacy, or, as he might believe, their error. Mr. Hapgood once suggested to Brandeis that after the railroad battles he could make another good point against Mr. Mellen, "and Mr. Brandeis showed the essence of his mind by saying that the fight against Mellen had already been won, and that he did not care to pound people who were beaten."71

Brandeis was a very careful correspondent. His son-in-law stated that he answered all of his mail, omitting none, and he usually replied promptly.72 He was an inveterate saver of personal papers, correspondence files, notes of all kinds. He kept scrap-books of newspaper clippings about subjects in which he was interested. In later life the office staff had charge of filing these returns from clipping services. Some like to think this was due to a "sense of destiny," others attribute it to pride, but as likely it simply reflected his passion for
thoroughness: never throw anything away for it might provide a fact for future use.

Frequently Brandeis is referred to as a publicist. It is generally admitted that he became skillful at the technique of informing the public of the facts and arguments on issues in which he was interested. Following one of the rate cases, the Boston Post observed: "The best known publicist in the country today is Louis D. Brandeis, 'Citizen' Brandeis of Boston and the United States."73

Later this same year he had discussed in the press and thereby brought national attention to a gift by an officer of the U. S. Steel to his wife of a necklace costing $250,000. Brandeis was criticized in many circles for this notice, suggesting the trickery of a demagogue. The Boston Transcript was one of the papers that came to his defense editorially.74 Gilbert noted that he was first a lawyer, and then, as a means of attaining the legal objective, he was a publicist. It appears that the term "publicist" was thrown at him tauntingly, but that he was completely familiar with every device for influencing public opinion, and did not hesitate to utilize them whenever necessary.

Any attempt to summarize the guiding philosophy which provided the stimulus for Brandeis is, as Frankfurter said of such an attempt for his writings, "saved from presumption by its folly."75 It is important however
to find at least a few clues to his philosophy of govern-
ment.

Brandeis worked hard for trade unions, their de-
velopment and their rights and privileges. He served
frequently as arbiter of their disputes and was held in
high esteem by many of their leaders. Yet, as Mason sug-
gested, "there is no evidence that Brandeis entertains any
illusions as to cure-all trade unions. Strong advocate
that he is of collective bargaining, no one is more con-
scious of the abuses that have attended this movement...
There is nothing to be gained by substituting the tyranny
of labor for the tyranny of capital." Even Everson failed to
support her thesis that Brandeis favored "socialized regu-
lated capitalism," but he did want capitalism to succeed.
The Chicago Daily Socialist, surprisingly enough, criti-
cized Brandeis for working too hard in "endeavoring to
find a way by which capitalism can be saved." While he
resented the sweat shops, and such outbreaks as the Home-
stead strike, he realized that labor had responsibilities
which it must recognize or the labor movement must fail.

But what of his political philosophy? What basic
concepts were his guiding principles? Mason objected to
the classification of Brandeis as a "visionary destructor
and projector who would tear down the old merely to build
by schemes new and unfamiliar." He saw him rather as an
idealist, one who envisioned a government which was in
reality a "truer democracy." "His own continuing problem is how best to adapt institutions and laws to meet the exigencies of our machine age, and yet retain the human-economic values of laissez-faire individualism." Ernst recalled his eagerness to have the power of industrial and social forces kept free from the politics of the state. Brandeis was a visionary, a dreamer, and yet one who wanted in the here and now to accomplish as many of the goals of democratic society as possible. As Judd Dewey recalled, he had a sense of the urgency of the times, and the feeling that it was personally his responsibility to carry forward democracy as far as was within his power. 

There has been considerable discussion as to how much of the New Deal of the Roosevelt thirties was inspired by Brandeis. Mason thinks he was its spiritual father. "There is scarcely a phase of the recent social and economic debacle that he did not foresee. In their effort to deal with it, the Roosevelt administrators have been guided by the philosophy and by something of the spirit of Brandeis." Lief believed that this direct influence was overestimated by the newspapers of the day.

His influence on the fashioning of the New Deal and the share of his disciples in its direction were overstated. From the beginning he regarded the program—apart from the question of constitutionality—as having been drawn up too hastily. The desperate condition of the country when Congress sat in extraordinary session to pass the President's bills did not excuse headlong drafting, nor condone poor results. Many hands put their contributions in, but not enough minds came together; there should have been more
mature deliberation. Whether or not he suggested the New Deal, Brandeis was an advocate of social experimentation, and as such he approved of the spirit back of these early efforts of the Roosevelt administration. Further, his technique demonstrated in the Brandeis brief was used by the New Deal philosophers to gain spiritual and judicial acceptance of the program. Lief builds a rather good case, however, for his disappointment with the result achieved.

Brandeis the public servant had a philosophy of service to the people. "The keynote of Justice Brandeis' character is his dedication of mind and energy to the services of the public." A clearer understanding of his own philosophy may be found in his own statements.

I have no rigid social philosophy. I have been too intense on concrete problems of practical justice. And yet I can see that the tendency is steadily toward governmental control. The government must keep order not only physically but socially. In old times the law was meant to protect each citizen from oppression by physical force. But we have passed to a subtler civilization; from oppression by force we have come to oppression in other ways. And the law must still protect man from things that rob him of his freedom, whether the oppressing force be physical or of a subtler kind.

Concerning his free advice for public causes he wrote:

Some men buy diamonds and rare works of art. Others delight in autos 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 public
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 so 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.86

6. The Associate Justice

Although the major purposes of this study center around the period from 1908-16, it would be a serious omission not to include at least a summary of the period when Brandeis was known as a member of the United States Supreme Court. In retrospect, some of the important aspects of his life revealed there permit a better appreciation of the man of 1908-16, and perhaps help to clarify his objectives and methods. Two important titles suggested themselves for this period: 1. The appointment battle; and 2. Judicial method and philosophy.

a. The Appointment Battle.

Secretary McAdoo had scheduled a small dinner party for the evening of January 28, 1916. On this Friday, before the diners had gathered, the bomb had been dropped. The people had an issue, and the press a new Washington dateline event. At noon that day, President Wilson had sent to the Senate the nomination of Louis Dembitz Brandeis to be Associate Justice of the Supreme Court of the United States, vice Joseph R. Lamar, deceased.
Gilson Gardner reported that the nomination "came like a bomb from an unseen Zeppelin on the Senate." The Boston Transcript was shocked by the "bolt out of the blue." The Nation noted an "almost universal gasp of surprise." The New York Times more cautiously noted a "near sensation." In retrospect, the Boston Post can be given the award for prophetic understatement when the editor had the temerity to suggest that "it may be that opposition to Mr. Brandeis' appointment will arise in the Senate."

The year 1916 was a presidential year. In consequence, every appointment, every decision of the "administration was carefully analyzed to discover whatever vote-getting potentialities it might possess. The Brandeis appointment was no exception. Some thought it was an attempt to placate the progressives. Others saw in it an appeal to the Jewish vote. Others suggested that the appointment might make Hughes determined to stay on the Court to preserve the conservative balance, and thus automatically remove Hughes as a possible presidential candidate. On the other hand there were some evidences that this was not entirely a political appointment. Wilson had long admired Brandeis and thought highly of much of his work. Taking almost no one into his counsels, he sent the appointment directly to the Senate without clearing it with the usual political interests.
The reaction of the press to the appointment was both immediate and vigorous, both pro and con. The Boston Transcript correctly observed that "the President has stirred up a hornet's nest in the Senate exceeding any of his previous ingenuous performances in that line." The Literary Digest noted that "no appointment to the Supreme Court could have created a greater sensation or caused more talk than the one actually made by the president." Press reaction was generally in the same startled vein.

What was the difficulty? What were the objections? The Boston Transcript headlined on February 5: "OPEN TRIAL FOR BRANDEIS!" Papers soon began to describe the Senate investigation with the terminology of the courtroom, referring to the "trial" the Brandeis "case" or the "indictment" and the "evidence in court."

Two major charges were laid against Brandeis. He was accused first, of lacking judicial temperament, and, secondly, of being too radical for the conservative court. In one sense these are not separate, but in the presentation of the evidence against him, they made two counts in the "indictment."

No one challenged his effectiveness as a lawyer. "His critics as well as his supporters testify to his great ability as a lawyer, his remarkable fund of information on public affairs, and his clear grasp of every problem which engaged his attention." But this was not
enough, apparently, for a place on the highest court.

The judicial temperament charge was bandied about before the subcommittee at some length. Although a vague term at best, it was stated for the opposition by the Detroit Free Press: "Of all the Americans who have passed before the public view in the last ten years, Louis D. Brandeis is in temperament and training perhaps the least fit for the calm, cold, dispassionate work of the Supreme Court of the United States."\(^{100}\) The Philadelphia Record said that whether or not he could "shake off his habits of mind and become judicial is the only point at issue."\(^{101}\) The Pittsburgh Post contended that "the selection is of a man eminently qualified and endowed with judicial temperament."\(^{102}\)

The second charge was simply stated by the New York Commercial. "A man who denies the rights of property should not pass judgment upon them as long as the law recognizes them."\(^{103}\) Many who admired his legal acumen sincerely opposed the nomination because he had served for so many of the "onward and upward" movements. On somewhat similar grounds the New York Sun observed with some vehemence:

The time has come when the muckrakers shall sit in the seat of publicist and the sensational demagogues take the place of statesman, and when we shall be given over to the heralds of the statutory millenium who would make everybody equal, and perfect by penal enactment. . . Perhaps again
Mr. Wilson, in accordance with his sometimes singular methods of reaching a given result had no other purpose than to test the Senate’s vigilance and fitness in the exercise of its duty to prevent the Supreme Court from such utterly and even ridiculously unfit appointments as this.  

The other side of the issue was presented by the Chicago Journal.  

The appointment of Louis D. Brandeis to the Supreme Court of the United States is one of the best ever made by this or any other administration. Mr. Brandeis is a rare and valuable combination of a conservative and a radical. The Supreme Court will be stronger for Mr. Brandeis’ presence, and the whole land will be the better for this proof that public service is not a bar to judicial preferment.

There were three issues which might be called secondary. On the question of race, some thought that his Germanic background and education might make him unfit, especially in time of war with Germany. Although it was commonly noted in the press that Brandeis was the first Jew to accept nomination to the Court, it was generally agreed even by his bitter opponents on the New York Commercial as well as by the Christian Science Monitor that “he was neither supported or opposed by Senators or others because of his race or religion.” Perhaps the witness quoted by the New Republic came close to the question at hand.

We have what I may call an aristocracy of the Boston bar; I do not use the word at all offensively; on the contrary, they are high-minded, able, distinguished men. But they cannot, I think, consider with equanimity
the selection of anybody for a position on the great court of the country from that community who is not a typical, hereditary Bostonian.108

A second minor issue was that of the women's suffrage movement. Brandeis had come out in favor of their case, but it is very doubtful if this played any part in the appointment battle.

A third secondary issue was the opposition his opponents in previous battles felt they could take here. All of those who had opposed him in earlier causes now took occasion to appear against him, or to write against him, hoping to have this last word in victory over his friends. These objections did not prevail, but they caused a lot of the smoke of battle.

The sub-committee of the Senate Judiciary Committee was first at a loss as to how to proceed with their investigation. They soon decided upon public hearings, allowing all to come who had any statement to make on the matter at hand. The Boston Transcript noted: "The decision to admit the press and public to what virtually is to be an open trial of a nominee for the Supreme Court of the United States is unprecedented, at least in recent years."109 Though opposing the appointment, this paper went on to attack the method as being undignified and unnecessary.

The hearings took on the nature of a trial not alone by the nature of the charges and the attendant publicity, but by the appearance of counsel for the "plaintiff," and
counsel for the "defense." The committee investigated the charges, examined witnesses, and heard all manner of reports. President Wilson entered the battle with a letter to the chairmen of the committee. Finally it became apparent that the conclusion of the struggle was near, and that the forces opposing Brandeis had expended themselves. The *New Republic* noted: "A very active career of thirty-five years at the Bar has been searched with a fine and venomous toothed comb, and these so-called facts have trickled thinner and thinner as the investigation has proceeded."110

Finally, on May 28, in executive and secret session, the Senate agreed that on Thursday, June 1, at 4:55 p.m., it would go into executive session, and that at 5:00 p.m. it would begin to vote on the appointment. It further stipulated that both the full reports of the majority and the minority in both the sub- and full committees would be filed and made a part of the record.111 The battle was over. Brandeis was confirmed by an almost strict party vote of 47 to 22. During the struggle the *New York Times* had noted: "Judges of little distinction and no very marked qualities often miss the honor of a contest over their nomination."112 By this criterion Brandeis had been "honored" as had few federal appointees in history. He was sworn in as Associate Justice on June 5, before one of the largest crowds ever to attend such a ceremony.
From now on he would be carving a new record, not of the pleader in the public forums, but of the judge deciding what the law is, and of a judge voicing his hopes of what the law should become.

b. Judicial Method and Philosophy

It is always difficult for a layman to fathom the workings of the judicial mind in its own element. To attempt such a course in this study is especially difficult, for as Max Lerner correctly observed, Brandeis "no where mapped out his legal philosophy in the form of prolegomena to all future systems of judicial decision."\footnote{113} Dean Landis, once his law clerk, who served so near to what Justice Cardozo called the heart of the judicial process, recognized the impossibility of summing up in short space the philosophy of a man of Brandeis' stature.\footnote{114}

In spite of these difficulties, it adds to an appreciation of some of his earlier work to attempt the impossible, to find at least some suggestions of his philosophy as it matured, so that it may throw some light on his years of struggle in the public forum.

His methods themselves give some clues to the type of mind and bent of philosophy. Compatible with the thoroughness of his preparation for the trial of a case was the thoroughness with which he prepared an opinion or a dissent for the Supreme Court. He took no stenographer
to Washington, and used none there until quite late in his career. The first draft of an opinion was written in long hand and sent to the printer. Then the work really got under way. Mrs. Brandeis once complained to Judd Dewey that she thought her husband had re-worked one opinion at least sixty times, each re-writing meaning a trip to the public printer. Frankfurter reproduced a page from a proof of a decision which eventually underwent twenty-six revisions. A half-dozen trips to the printer were not at all uncommon. Freund noted in this regard: "One remembers the preparation of the first opinion of a term, which had finally passed what seemed to be the ultimate revision, and the Justice's disquieting observation: "The opinion is now convincing, but what can we do . . . to make it more instructive?" Hamilton reported that the opinion in the O'Fallon case went through at least thirty drafts. Here was the judge mindful of the significance of his utterance, anxious that his every word become as instructive and convincing as possible—and willing to take the time and effort to make it so.

Brandeis used the dissent as a device for educating the public to his ideals of law in action in the modern state. In preparing a majority opinion for the court, that which was to become the decision, a Justice must so write that those holding that view all accept his statement as essentially their own. These opinions are frequently
passed around for comment and criticism among the majority before they are released for the public. The dissent is not so constricted by the necessity to please legal minds. Speaking of the Brandeis dissents, Hamilton observed that they were "his own utterance unconfused by the need of voicing the opinion of others; it is not the law, but the law as he would have it be . . . His great dissents attest his most dominant value; he has a profound belief in the power of truth ultimately to prevail."

As a writer, Brandeis was dependent upon the clear-cut, concise and direct style. He did not have, as did Holmes, "the gift of compressing a lifetime of thought into a single gleaming sentence that lights up and integrates everything else he said." The solid stuff of his opinions is set forth to advantage by a simple, straightforward, lucid style, without rhetorical flourish. In the memorial proceedings, Judge Learned Hand stated:

Nor can I more than mention the clear, style which so well betrayed the will that lay behind; the undiverted purpose to clarify and convince. How it eschewed all that might distract attention from the thought of its expression. The telling phrase, the vivid metaphor, the far-fetched word that tenses the reader and flatters him with the vanity of recognition—these must not obtrude that which alone mattered: that conviction should be carried home. So put it that your hearers shall not be aware of the medium: so put it that they shall not feel you, yet shall be possessed of what you say. If style be the measure of a
man, here was evidence of that insistence upon fact and reason which was at once his weapon and his shield.  

Chief Justice Stone observed that Brandeis "was never willing to sacrifice clarity to the turn of the phrase, for he wished above all to be understood." Even so, as he had already noted, the decisions of Brandeis, "in their discussions of the principles of constitutional government and of civil liberty . . . rise to heights of dignity and power which place them among the great examples of legal literature."  

Some of his earlier cases and decisions held something of literary charm, such as New York Central Railroad v. Winfield. There is something of the striking and powerful language in support of civil rights in his concurring opinion in Whitney v. California. In Pierce v. U. S. he provided in his dissent, Holmes concurring, an excellent example of his analytical rebuttal technique. He proceeded point by point, sentence by sentence, to analyze the case, adding at the conclusion his plea for justice as he saw it. It is very interesting to note that in many of the cases where Brandeis wrote the opinion for the Court, the official reporter, as in U. S. v. Morehead, omitted the customary preliminary summary of the case and said simply: "The case is stated in the opinion." The Brandeis opinion was so complete and thorough that a preliminary statement of law and facts
was superfluous. Although his first opinion was for a unanimous court,\textsuperscript{128} he did not always run with the majority. Not until the thirties did much of his point of view become acceptable to the majority of the court. Even then, he was in the majority in overriding much of the New Deal emergency legislation, delivering himself the opinion in the case overruling the Frazier-Lemke Act.\textsuperscript{129}

Two cases are of significance because they give emphasis to a point of view characteristic of Brandeis. Both of these pronouncements were dissents. In \textit{Burnet v. Coronado Oil Company},\textsuperscript{130} in which the majority had based a tax decision upon \textit{stare decisis}, Brandeis gave in his dissent a careful analysis of the effect of this doctrine upon the decisions of the court. It left no doubt that he did not feel the Court bound to place itself under the "dead hand of the past" in this stultifying manner. His position typified his independence of thought and action, his insistence upon the freedom of the individual to arrive at his own conclusions based upon all of the evidence that the scientific world could muster on a given point at issue.

A second case demonstrated Brandeis' implicit faith in the value of experimentation in government. In the \textit{New State Ice Co. v. Liebman}\textsuperscript{131} the Supreme Court overruled a license law in the state of Oklahoma, which, it
was contended, interfered with the rights of an individual to manufacture ice as he pleased. The opinion of the court held that it was not constitutional to "dispense with this right in the interest of experimentation." Brandeis took this phrase as the thesis of his dissent. It is one of the modern treatises on social experimentation. Thurman Arnold must have been influenced by it in his *Symbols of Government*. Brandeis argued for the right of a state to experiment with its own social problems in an attempt to meet the needs of the modern day. He demonstrated once again his zeal for thoroughness, appending footnotes to his dissent on almost every point, even including the running temperatures for the State of Oklahoma. Government was not a static thing to Justice Brandeis, set in molds unchangeable. He urged that new ideals be tried. "If we would guide by the light of reason, we must let our minds be bold."133

To summarize his views on a constitution which he held to be "as big as the minds of men,"134 one must recognize that, as viewed by Justice Brandeis, the function of government "is not merely the preservation of an assumed 'natural' liberty, but a positive duty through cooperative aid to set men free from the tyrannies that otherwise might be imposed by nature and other human beings."135 Professor Freund has given one of the best summaries of this philosophy of the man who was a "coldly passionate and relentless
adversary," who "showed little of the conventional respect for the captains and kings and the mandarins in our society," a man who was "so irreverent toward the god of things as they are." He stated:

I suggest that his liberalism as a judge lay rather in an essential morality of mind, and that this quality is his essential and enduring contribution to the work of the Court. What I call his morality of mind gives a coherence to his labors that transcends his contribution to this or that particular sector of law, impressive as those contributions have been.

I would suggest four principle manifestations of the essential quality of mind which he brought to his task: (1) An insistence on knowledge as indispensable to judging; (2) rejection of opportunism; (3) An insistence on jurisdictional and procedural observances; and (4) rejection of sentimentality.

The tribute given by Chief Justice Stone at the memorial meeting of the Bar of the United States Supreme Court was representative of the high regard which Brandeis earned during his life. "In the fullness of time, we have seen the shafts of criticism which were directed at Brandeis, the lawyer and judge, turned harmlessly aside by the general recognition of his integrity of mind and purpose and of his judicial wisdom."
CHAPTER II

FOOTNOTES

1 Oliver faced this problem in his work on the British orators: Fox, Sheridan, Burke and Pitt. He attempted to analyze their life histories to find a reason for their espousal of the causes in which they became famous as speakers. (Robert T. Oliver, *Four Who Spoke Out*. Syracuse, N.Y.; Syracuse University Press, 1946. 196 pp.)

2 The problem must be approached inductively, bringing to bear as many types of evidence as possible. Even then, the critic cannot always be sure that he has looked back correctly, and has read the mind of the speaker accurately. However, in spite of this accepted hazard of criticism, it is the obligation of the rhetorical critic to attempt to determine what influences in the speaker's life contributed to his position on the issues of his day.


10 Mason, *Free Man's Life*, op. cit., p. 11.
His Uncle Lewis Dembitz had a profound effect upon the life of young Brandeis. He always admired him, and attempted to follow him. It was his own success that urged Louis to take up law. Out of great respect and admiration Louis who was christened Louis David Brandeis, had his name changed to Louis Dembitz Brandeis. (Mason, Free Man's Life, op. cit., p. 27.)

24 Goldmark, op. cit., p. 284.
27 Goldmark, op. cit., p. 172.
28 Lief, Personal History, op. cit., p. 18.
30 Ibid., p. 30.
31 Poole, op. cit., p. x.
32 Mason, Free Man's Life, p. 31.
33 Loc. cit.
34 Lief, Personal History, op. cit., p. 21.
35 Loc. cit.
36 Loc. cit.
37 Mason, Free Man's Life, op. cit., p. 47.
38 My interview with Burlingham, New York City, June 16, 1950.
39 Poole, op. cit., p. xii.
40 Mason, Free Man's Life, op. cit., p. 35.
41 Ibid., p. 61.
42 Ibid., p. 68.
43 Muller v. Oregon, 208 U. S. 412.
44 198 U. S. 45 (1905).
47 Mason, Lawyer and Judge, op. cit., p. 122.
48 Poole, op. cit., p. xxxii.
49 Lief, Personal History, op. cit., p. 137.
50 McCune, op. cit., p. 13.
51 My interview with Burlingham, New York City, June 16, 1950.


53 Loc. cit.

54 Mason, Lawyer and Judge, op. cit., p. 73.

55 My interview with Burlingham, New York City, June 16, 1950.

56 Mason, Lawyer and Judge, op. cit., p. 74.


59 Loc. cit.


62 Poole, op. cit., p. ix.

63 Bowen, Yankee from Olympus, op. cit., p. 289.

64 My interview with Joseph Gilbert, New York City, June 16, 1950.

65 My interview with Adele Brandeis, June 6, 1950.

66 Lief, Personal History, op. cit., p. 486.

67 Ibid., p. 159.

68 Bowen, Yankee from Olympus, op. cit., p. 290.


72 My interview with Joseph Gilbert, New York City, June 16, 1950.

73 *Boston Post*, February 20, 1911.

74 *Boston Transcript*, December 20, 1911.


76 Mason, *Lawyer and Judge*, op. cit., p. 58.


82 Mason, *Lawyer and Judge*, op. cit., p. v.


85 Poole, op. cit., p. vi.


Quoted in Literary Digest, February 12, 1916, p. 363.


See Appendix V for chronology of the court appointment battle.


Quoted in Boston Transcript, January 29, 1916, p. 3.

Loc. cit.

Loc. cit.


Loc. cit.

Quoted in Boston Transcript, February 7, 1916, p. 10.


See the Congressional Record for June 1, 1916, for the complete report of the committees and the investigations of the nomination.


Mimeographed MS of speech, delivered June 6, 1950, New York City, p. 1.


Paul Freund, 317 U. S. at xix.


Lerner, "Social Thought" op. cit., p. 10.

317 U. S. at xxxv.

Learned Hand, 317 U. S. at xi.

C. J. Stone, 317 U. S. at xlvi.

244 U. S. 147.

274 U. S. 357.

253 U. S. 239.

243 U. S. 607.

Hutchinson Ice Cream Co. v. Iowa, 242 U. S. 153.

130 285 U. S. 393.

131 285 U. S. 262.


133 285 U. S. 262, at 306.


136 Paul Freund, Understanding the Supreme Court, op. cit., p. 48.

137 Ibid., p. 49.

138 C. J. Stone, 317 U. S. at xlvi.
CHAPTER III

AUDIENCES AND OCCASIONS

1. The Nature of the Occasions Chosen by Brandeis.

A study of the nature of the audiences before which a man spoke and the occasions of which he was a part reveal his significant characteristics. The rhetorician is therefore concerned with the audiences chosen by the speaker, and the occasions which he believed his speaking could influence. It is the purpose of this chapter to discuss the character of Brandeis as revealed by the audiences he selected in relation to the times in which he lived. (Later chapters will deal with the effect of his speaking upon the audiences and the general results of his oratory.)

The average politician appealing to the constituents in his own bailiwick will accept every possible opportunity to speak to those who may later determine his future at the polls. When a man reaches national stature as a statesman, an author, or a commentator on public affairs, he becomes more discriminating in the selection of his audiences. Unless he turns professional lecturer, his selection of occasions will be guided by his backgrounds and by his desire to exert certain influences upon the times.

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These trends may be clearly observed in the speeches of Brandeis. During the period, 1904 to 1908, he pushed one cause directly to the people of Massachusetts as a politician out to influence voters, and during this period he attempted to achieve one goal. While the Savings Bank Life Insurance plans were pending before the legislature, he would speak to almost any audience at any time. The record of those years shows him speaking four and five times a week emphasizing one group of ideas, all centered around the need for such an insurance plan and its values to the citizens of that state.

Early in the period between 1908-16 Brandeis became nationally famous as a pleader of causes, and as an effective and provocative public speaker. As he received more and more requests from across country, the limitations of time forced him to a pattern of selection. The nature and implications of his pattern are the concern of this chapter.

Brandeis' audiences may be placed in six groups:
1. Business and manufacturing organizations; 2. labor union leaders and members; 3. Congressional committees; 4. state and federal commissions; 5. religious conferences; 6. incidental groups. Further, it will be pertinent to consider certain omissions from the list.

Of primary importance and interest were the business groups which Brandeis addressed. There was an
opportunity to exert a tremendous influence through these audiences upon the people who in his judgment could control the business life of the nation. He considered the education of business and industrial leaders in the hard facts of economics to be one of his major tasks. It is not surprising to find him accepting such invitations as would provide an opportunity for the furtherance of these aims.

Some of the audiences in this category indicate his point of view. They included the Economic Club of New York, (November 1, 1912), The National Association of Advertising Managers in New York City (May 14, 1914), The National Rivers and Harbors Congress (December 9, 1914), The Economic Club of Boston (February 11, 1908). These were all typical of the type of audiences he tried to reach.

At the same time he was pleading his causes through the pages of the weekly journals and the daily press. The business men soon knew what kind of a speaker he was and what kind of subjects he would be likely to use before them.

Some of the subjects he used on these occasions were: "The Road to Social Efficiency," "Hours of Labor," "The Constitution and Minimum Wage," "Competition," "On Maintaining Prices," and "Constructive Co-operation vs. Cut-Throat Competition." The audiences knew what he would urge, and they were attracted by his ability to present a
A second group of audiences, one in which he was equally interested, consisted of labor union leaders, social workers among labor groups, and union members. His work here was a continuing interest, starting shortly before the turn of the century, but coming to a head in his work with the garment workers in 1910 and the attempts to adjudicate their differences with their employers. It was the Homestead strike of 1892, he said, which influenced him perhaps more than any other single factor to turn his active mind toward the solution of labor-management problems. In the strife surrounding this series of events he saw developing a possible solution to these dilemmas, a type of answer to the question which might eventually destroy capitalism. He was always willing to speak to these groups if he thought he could help them arrive at some solution to what he considered one of the basic problems facing an industrial democracy.

Some of the groups addressed indicate his interest here: Boston Central Labor Union (April 2, 1911), Annual Banquet of the Boston Typothetae (April 21, 1904), State Convention of the American Federation of Labor, Fitchburg, Massachusetts, and, during the garment workers deliberation in New York, he spoke to various units of their unions.
Some of the subjects he used on these occasions were: "Organized Labor and Efficiency," "The Right to Work," and "The Employers and Trade Unions." When speaking to labor union members, he usually addressed himself directly to their own problems rather than to the larger principles of economics which he urged on other leading organizations.

Among the outstanding forums frequented by Brandeis were the Congressional Committees. When bills were pending in which he had an interest, he was always ready and willing to appear to give facts and opinion to influence the action of the committee. In one instance, the Ballinger-Pinchot feud, he was employed as active counsel for the Ballinger interests, and collaborated with George Wharton Pepper in presenting that side of the dispute to the Joint Investigating Committee.

Other appearances before such groups included the New York State Factory Investigating Committee (January 22, 1915), Senate Committee on Patents (May 15, 1912), House Committee on Interstate and Foreign Commerce (January 30, 1914), House Committee on the Judiciary, (February 16, 1914), House Committee on Interstate and Foreign Commerce, (January 9, 1915), Senate Committee on Interstate Commerce (December 14-16, 1911), and the same committee (June 26-27, 1914). Some of these ap-
pearances were at the requests of clients, some at the invitation of the committee, and a few on his own initiative. These presentations were in a very real way public occasions, before important audiences. He was not unmindful of this larger audience reached through the press, and in consequence accepted these opportunities to increase the scope of his influence.

Similar audiences, with similar influence and prestige and with almost equal opportunities, were the state and federal commissions before which he represented some specific cause. The most famous arguments were presented before the two rate hearings held by the United States Interstate Commerce Commission. In the first one in 1910-11, he appeared as counsel for the Traffic Committee of Commercial Organization of the Atlantic Seaboard. The second was the famous "Five Percent Case," in which he appeared as special attorney employed by the Commission, a kind of general counsel in the public interest. These hearings were in 1914.

In Massachusetts he appeared frequently before legislative committees, industrial and labor commissions, and the various state insurance bodies. His interests were varied, but ever since his early Boston days, the transit battles, and the gas company reorganization, he was eager to carry his cause to the people through these audiences.
The religious conferences on Zionism began to attract his interest rather late in his career. He was already fifty-six years old when he formally allied himself with the Zionist cause. Although among his grandparents there were active and devout members of the Jewish sect of Frankists, his own parents had never formally aligned themselves with orthodox Jewry. His uncle, Lewis Dembitz, had been a strict orthodox Jew. Mason reported that Brandeis found the desire of Zionists for a small, self-governing state "an impelling cause." He further reported his active speaking on behalf of the movement. "In 1912 and 1913 Brandeis appeared frequently on the speakers' platform, practically making cross-country tours on behalf of Zionism."2

The two collections of Brandeis's writing and speaking on Zionism are those edited by De Haas and Goldman. De Haas presented a biographical sketch of Brandeis with the emphasis on his Jewish work, including a collection of his various pronouncements, interviews, and speeches on Zionism. The Goldman collection gave the speeches but not the citations to other works. It is not as complete as the De Haas collection.

Typical of the audiences selected for the speeches on Zionism were the Young Men's Hebrew Association, Chelsea, Massachusetts (May 18, 1913), Conference of Menorah Societies (January 1915), Boston Zionist Convention

It is significant to note that the Zionist Cause was the only one to which Brandeis gave public attention after his elevation to the Supreme Court. He had a high regard for the dignity of the Bench. Because of this keen sense of the public responsibility of a justice, he declined all speaking engagements which might in any way appear prejudicial to causes pending before the Court or cases likely to appear there. Such a cautious reserve limited him almost exclusively to Zionism, and even speeches for it were rare after 1924. The subjects for these occasions centered around two themes: 1. the opportunity of the Jews in Palestine; 2. the urgent need for Jews to accept their opportunities for personal and group development.

The incidental audiences which Brandeis chose in this period varied from student groups to legal meetings and commemorative occasions. By this period he had attained such a reputation that he was sought as a speaker for those gatherings which wished to honor both the
speaker and the occasion by inviting some outstanding authority in a given area to appear as a part of the program. He was offered enough of these invitations so that the process of selection must have been difficult for him.

Typical of the audiences chosen for these addresses were those at the Ethical Culture Meeting House in Boston (February 10, 1912), Brown University Commencement (June 1912), Memorial meeting for Frederick W. Taylor (October 22, 1912), The Fourth of July Oration, Faneuil Hall, Boston (1915), and the Chicago Bar Association (January 3, 1916). The address before the Chicago lawyers was his last major address on public affairs before assuming the robes of the Associate Justice. On several occasions he lectured at the Massachusetts Institute of Technology and he frequently accepted opportunities to direct the attention of students toward the economic problems facing the country. In this category came the appearance before the American Academy of Political and Social Science in Philadelphia (January, 1915). 5

An analysis of the audiences before which he appeared reveals several significant traits of character, several of the habits of choice which went to make up the pleader, the speaker, and orator in Brandeis.

First, it reveals a paramount interest in the economic side of public affairs. The subjects for appearances in the eastern half of the United States emphasized
the problems of politics as related to finance, business practices, and the relationships between business and government. The audiences before which this theme was developed were almost uniformly composed of those who directly or indirectly could take some steps to influence the conditions under which business is conducted in America. Economic clubs, business groups, leaders of industry and finance all heard the pleas which Brandeis brought before them. The choice of audiences here indicates a singleness of purpose, a characteristic which was outstanding in the life and work of Brandeis.

Secondly, Brandeis early learned that the judicious selection of his audiences greatly increased the size of his national following and the prestige and distribution of his ideas throughout the land. Appearances before Congressional committees, U.S. commissions, and other agencies were like standing on a national platform with the press serving as the carrier of his speeches. Because of the earnest conviction that what he believed was good for the nation, Brandeis was eager to have what for him became a message of service and salvation spread widely and quickly throughout the nation. His opponents considered these appearances as but the desire of Brandeis to thrust himself forward egotistically into the national scene. From his writings and speeches however, it is easy to gather a sense of his sincerity and earnest-
ness. Further, his continuous turning aside of invitations to run for public offices indicated that he did not hold that these opportunities were for personal political advancement.

Thirdly, the pattern of audience selection showed an interest in all phases of the industrial problems facing democracy. He was active before laborers, and, although he did not always say what they hoped to hear, like other audiences they respected his mastery of facts and the singleness of purpose which motivated his public life.

Fourthly, the selection of audiences showed a keen interest in an attempt to inspire an enthusiastic support of democracy as a form of government. His Fourth of July address at Faneuil Hall on "True Americanism" was a challenge in the highest tradition of the long series of addresses given in that hall. He addressed the lawyers on these themes. He urged the attorneys to increase their sense of responsibility to their profession, and through it to the nation. He urged the graduation classes to take an active interest in public affairs. He utilized the Congressional Committees as agencies whereby he could sound a loud, clear call for some solution to the economic problems of the day which would make democracy work.

Finally, the selection of audiences is one of the many indices of his independence of thought and action. Some thought that if he took his case to the employers he
should not consort with the unions. Some considered his aid to the unions a treason to his own class. On one instance he appeared before the Interstate Commerce Commission for the shippers, and then later he argued an almost identical case before the same group, advocating a different decision. His enemies considered this disloyalty at its worst and later threw it back at him in the Senate Hearings on his appointment. However, in the selection of his audiences, as in other phases of his life, Brandeis elected to walk the uncommitted way, to keep himself a free man.

2. His Popularity as a Speaker.

A study of Brandeis' popularity as a speaker reveals that there was widespread interest in the man and his speeches. Frequent invitations to speak poured in upon him from all sides. He had reached a high point in his career as a public pleader by 1912, and he continued to be in great demand right up to his appointment to the Supreme Court.

In the year 1911, for example, he received more than 125 invitations to appear before organizations of various kinds from most of the United States. In 1912 he had a similar number. Obviously, he declined most of them. He limited himself, as discussed above, to those audiences which would provide him the widest publicity for his
"causes." Many of these groups wanted him as a part of a "lecture series." Others were interested in what he had to say. Others were in sympathy with causes he had represented in the courts and before Congress. After Muller v. Oregon, he was in great demand by labor groups. Most of these invitations he declined. He appeared, however, in behalf of various states which had wage and hour cases before the U.S. Supreme Court. These successes added to his fame and increased the demand for his services. He concluded this series with the minimum wage case of Stetler v. O'Hara.

His popularity as a political observer and commentator lay behind the invitation of La Follette and the Progressives to Brandeis to undertake a speaking tour in behalf of the Progressive party. It was agreed that his national influence was great enough by 1912 that if he could be counted in the La Follette camp, it would add considerable weight to that candidacy. He undertook a short tour in January, 1912, going as far west as Minneapolis. His speech in Columbus, Ohio, was before the rather small group attending the Progressives' convention. The tour was not well handled. Brandeis missed several appointments, spoke on several occasions without previous publicity, and the press relations were not carefully arranged. In Minneapolis he was well received, but in
other cities he was not welcomed by the Progressives who were not in the La Follette camp.

He was not always popular with the politicians for he still maintained his intellectual independence. Although he would favor their party or their candidate, he would often inject opinions and attitudes with which the party leaders were not in agreement. This venture into the national political scene was undertaken because of his admiration for La Follette, and it became quite apparent that this type of pleading at the hustings were not altogether to his liking.

Two different booking agents tried to enroll Brandeis in their list of attractions. In July, 1911, J. S. McBrien, of Lincoln, Nebraska, urged Brandeis to permit him to be booked on the lyceum circuit in Nebraska. In spite of the fees proffered, Brandeis courteously declined. An agent with a wider potential audience approached him in September of the same year. The Whitied Entertainment Bureau, managed by the Redpath Lyceum Bureau, wanted to provide Brandeis with such dates and audiences as he chose, at a fee to be named by him. He declined this invitation also. Apparently, he was not concerned with speeches just for the sake of oratorical experience. Nor did he need the money. Since a commercial booking agent could not provide the audiences he
wished to influence, he had no need for their services. Brandeis reached the peak of his popularity as a speaker by 1912. From 1912 to 1916 he had his choice of audiences and his choice of occasions. Following his plan he chose to utilize his energies and abilities to emphasize the Brandeis solutions to the paradoxical problem of an industrial society.

3. The Climate of Opinion.

Hollingsworth suggested a much wider concept of the audience than is commonly held by rhetoricians. It is not alone the group of persons assembled in a given place for a stated purpose, as is the usual concept of an audience. In a much wider, more general sense the audience includes all of the factors of "the social situation in which one individual is the object of attention on the part of other human beings." It is not difficult to agree with Hollingsworth that an understanding of audiences in the specific sense must be based upon an understanding of the total political scene, the social milieu, the economic forces which provided the stimuli for the speaker and his audience.

For this reason it is important to consider not only the period of 1908-16, but the years immediately before, both as to their political development and the antecedent of attitudes held by the audiences later faced by Brandeis the pleader.
a. Background Events.

As a beginning it is necessary to go back to the death of President William McKinley on September 14, 1901. The "normal" administration of this rather colorless president had been broken only by the Spanish-American War. Now that this unfortunate event had ended in victory, McKinley had pledged himself to a "careful and sensible" administration of the nation. On such a platform he defeated Bryan in the election of 1900, and with such hopes he inaugurated his second term in March, 1901. His sudden death elevated to the presidency a brash and unpredictable Vice-president who had been placed, it was thought, where he could do the least harm. Now he was to lead the country in directions which would make the pleading of a Brandeis acceptable and tolerable to great numbers of people, and toward patterns of thinking which would encourage such men as Debs and less radical insurgents.

One of the first movements of note was the trust-busting campaign of the new administration. In some respects it never achieved as much actual reorganization as publicity, but it did revive the almost forgotten Sherman Anti-Trust Act of 1890 to the point where big business was strikingly reminded of the presence of government as an agency which could determine the size and nature of corporations. Those who had feared that there was no agency
powerful enough to withstand the economic machinations and political pressures of large interlocking and interdependent financial empires, now took some heart from these actions by the Roosevelt administration.

The Roosevelt leadership was felt in another way, at that time considered bold and experimental. The president intervened to assist and direct in the arbitration of the coal strike of 1902. The anthracite workers made demands upon the bankers who owned and controlled these mines. It became apparent early in the strike that an important segment of the country was endangered. The President persuaded the men to return to work, and the owners to accept arbitration. The success of the venture, as compared with the lack of strong leadership from the government during the notorious Homestead strike of 1892, at once raised Roosevelt to new heights of prestige. At the same time it accentuated the importance of labor relations in the minds of the voters. Further, it established the precedent of government intervention in behalf of the people in major labor disputes.

In his annual message to the Congress in 1902 President Roosevelt had lashed out at the big corporations and demanded that the government take a strong stand. He stated: "This country cannot afford to sit supine on the plea that under one peculiar system of government
we are helpless in the face of new conditions." Bassett, the historian, noted that "the president was willing to strengthen the constitution if it was not strong enough to deal with the problem." However, in spite of the prestige of the president, nothing came of his plea for corporation control in the 1902 Congress, for it ignored his direct requests. Yet on February 13, 1903 the Congress established a new department of Commerce and Labor with a cabinet member at the head, a step which was lauded by men like Brandeis, who saw in it an important move in the proper interest of government in business relationships. The action of Congress was a reflection of the climate of opinion of the day, a part of a public reaction which demanded a new emphasis, even though Congress was not willing to go as far as the hold-over Populists desired.

The President could not be ignored in his position, although the Congress, controlled by regular Republicans, would not go far with him. In 1902 he made a speaking tour through New England in which he stated in his own way some of the demands Bryan had been urging in the West. He had belabored the railroads, he had excoriated the trusts, and he had made it clear that if he instead of the slow-moving Congress were in charge there would be drastic action.

The panic of 1903 aroused suspicions as to the value
of trusts and large corporations. President Roosevelt was in the position of one whose warnings had not been heeded. The rebound from the panic was very quick, stocks rose again, and the public confidence soon cautiously revived. The whole series of events emphasized the popularity of Roosevelt, a significant development in view of the election of 1904.

The Roosevelt-Parker campaign of 1904 was a whirlwind against a zephyr. Wherever the President went he was received with popular ovations. The stolid Parker, an able man lacking strong audience appeal, lost some of his own party by repudiating Bryan's earlier stand on silver, an insult to the Westerners. The results gave Roosevelt every northern state, breaking into the solid south with victory in Missouri. Popular reform in government seemed to be rising. Yet a "steadier" Congress did not appear to move so rapidly nor so drastically.

In Roosevelt's second term, there were several other suggestions of a change in the relationship between government and the economic forces of the nations. Upton Sinclair's book, The Jungle, on the meat packers' practices, had created a furor to the extent that meat purchases declined noticeably. The result was a series of laws controlling the processing, distribution, and labeling of meats sold in interstate commerce.

A law was enacted prohibiting contributions to cam-
campaign funds by large corporations. Late in Roosevelt's second term Judge K. M. Landis startled the country in general and corporations in particular by a $29,000,000 fine levied against the Standard Oil Company. Although the U.S. Circuit Court of Appeals eventually set aside the fine as excessive, the sentence gave notice to corporations that they were subject to direction and control by representatives of the people when these representatives deemed their actions prejudicial to the best interest of the country.

In 1908 the President sent a blast to Congress condemning men of wealth who wanted to become forces of reaction "to discredit those who administer the law, to discredit all who honestly administer the law, to prevent any additional legislation which would check and restrain them."12

Roosevelt had picked his Secretary of War, William H. Taft, for the Republican nomination. The Democrats returned to Bryan. In the strong wave of popular support of Roosevelt, Taft was elected. In this election several minor parties emerged with surprisingly strong popular support. Debs and Handford received more than 420,000 votes. The Taft administration began with many persons holding high hopes that some of the promises of the earlier administrations could be paid off in new activity on the
part of the government in behalf of the "people vs. the corporations."

These developments are significant for this study, for it was in this period that Louis D. Brandeis was making his name in Boston as a lawyer for the people against the corporate interests of New England. The traction contests, the gas-rate battles, and the beginnings of his fight with the New Haven and the Boston and Maine railroads came in this era of popular unrest. It is of further importance here to have noted the political developments of the period 1908-16, for it was during this time that Brandeis made his most effective speeches.

b. Political Points of View.

The Brandeis period of 1908-16 covered the presidential term of William Howard Taft and the first term of Woodrow Wilson. The political, economic, and social points of view and developments of this period become important to this study.

Taft came into office on the wave of Republican popularity engendered in no small way by the personal popularity of Roosevelt. Had Taft not had this support, Bryan might have won. Late in his administration Roosevelt sent messages to Congress asking for measures consistent with his advancing ideas. Congress looked upon these with ill-disguised contempt. Early in his administration
Taft signed the Payne-Aldrich tariff law, a step which irritated the western Republicans and served to indicate that Taft was not going to be the progressive President that his predecessor had hoped he would become. The Ballinger-Pinchot controversy, in which Brandeis played such a significant role, gave the reformers little hope that Taft would work in their behalf.

Some measures, however, indicated the power of the insurgent Republicans when combined with sufficient Democratic help. A corporation tax, though small, was introduced for the first time. The bill which became law was not as important for its revenue return as for its recognition of the principle that the government could tax the returns of a corporate body. The income tax amendment was also passed by Congress and by 1913 had been added to the constitution. The third significant measure was the successful effort in the House of Representatives to curb the power of the Speaker. Heretofore the Speaker could appoint all of the committees and in addition was himself the member of the powerful rules committee, a group which could control, for all practical purposes, the bills coming onto the floor of the House. In 1910 the insurgents rebelled, and, joining with the Democrats, stripped the Speaker of the power to appoint committees, and enlarged the membership of the rules committee to ten members appointed by the House, eliminating the Speaker from membership.
Bassett makes the point that although the insurgent Republicans did not achieve many of their goals in relation to the control by government of the economic forces of the nation, the Taft administration made several notable advances. These were chiefly in the areas of currency reform, conservation, and political investigations. Along with the changes noted above, the way was prepared for later progress in the Wilson administration.

In spite of some of these signs of progressivism, the old guard of the party dominated the political scene throughout the Taft administration. As the country approached the conventions and elections of 1912, it became apparent that there would be a strong progressive opposition to the renomination of President Taft. Early in the year the forces behind La Follette waged a vigorous campaign. Brandeis was persuaded to make a speaking tour in behalf of his friend. He spoke to Progressive Party gatherings as far west as Minneapolis. After La Follette's health broke and he no longer was a possible candidate, Roosevelt accepted the "draft" to enter the Republican race. Following a vigorous battle in the Republican convention over the seating of delegates, the Taft forces carried the day. The nomination of Taft was the signal for the formation of a new party, with Roosevelt and Hiram Johnson of California as the standard bearers. A bitter campaign followed, with the victory going to the Democrats.
Wilson now had the opportunity to demonstrate his ability to give the country the "New Freedom" he had promised during the campaign.

A significant factor in this campaign was what might be called the "protest vote." The socialists behind Debs and Weimer rolled up more than 930,000 votes. If the Roosevelt votes are considered as a protest, another 4,000,000 may be added. The campaign heard a voice of protest against the previous administration. The votes indicated its intensity. Brandeis had been a part of this protest, both in the campaign and in the public battles in which he played an active part.

The Wilson administration began with a reduction of the tariff. The amendment paved the way for a graduated income tax. A new Federal Reserve Act provided the needed stabilization for currency and banking. An anti-trust act was passed, and in 1916 a farm credit agency helped provide credit for the agricultural regions. Wilson wanted to submit railroad securities to the careful scrutiny and regulation of the interstate Commerce Commission, but the shadows of the approaching European war provided him with an excuse to yield to the suggestion that the railroads alone should not have their financial affairs so closely scrutinized.

The Democrats, still in control of Congress in 1914,
found the country becoming engrossed in foreign affairs. Earlier they had not pushed with vigor for internal and domestic reforms. The difficulties with the Mexicans were becoming more serious. The European war was the chief topic of interest. The legislators could not ignore the possibility that the United States might become involved. One of the slogans for Wilson emphasized that the Democrats had kept the United States out of the war.

The campaign of 1916 saw a reunited Republican party, with Charles Evans Hughes at the head, make serious inroads into the Democratic majorities. The domestic policies of Wilson had consolidated his rather substantial following, and his shrewd political moves in this area of government enabled him to win the election. It was in the early part of 1916 that the Brandeis appointment to the Supreme Court was announced. This was one of the many acts which contributed to the political prestige of Wilson. The appointment was consistent with the attempts of Wilson to keep a working compromise between the conservative elements of the Democratic party and the more progressive westerners.


Beard\textsuperscript{14} suggested that one of the significant trends in the economic thought of the latter half of the nineteenth century centered around what he called the doctrine of individualism. Such a philosophy followed Sumner in
his teaching at Yale University after 1872, where he emphasized that "all civilization had come from free initiative; that all hope of progress and improvement lay in giving the fullest liberty to individuals; and that government interference with this liberty was injurious to mankind."

Around the turn of the century this thesis was attacked rather vigorously in university and political circles with the suggestion that man's destiny at times needed guidance, that the function of government was to exert such controls as might be necessary to enable every man to reach his maximum economic and political potential.

Brandeis grew to political maturity in the midst of these discussions. By 1908, both points of view were continuously before the public. How far government could go in protecting and directing the economic affairs of the nation had become one of the big issues of the day. Extreme individualism was being attacked by those who contended that the government exists to protect and serve all individuals and must of necessity control some groups in order to give the fullest expression to democracy. By 1908 the labor forces were beginning to rise and take their place in these deliberations.

It is not surprising in view of these prevailing doctrines to find a man like Brandeis writing on The Curse of Bigness. It is not surprising to find him
writing on Other People's Money, an analysis of the money trusts and banking principles generally. Government had made several advances in the direction of direct control over the economy of the nation. As noted above, the income tax, the Federal Reserve Act, the anti-trust laws all were the product of this new belief in the relation of government to the economy. The Federal Trade Commission Act of 1914 established a new principle. It "departed from the old faith that sharp competition would of itself bring prosperity, and indicated a trend toward a new faith—in government regulation of business enterprises in the public interest."16 The first focus of the argument on the economic function of the individual crystallized during the time when Brandeis was one of the strong voices in the public forum.

Beard succinctly expressed the objectives of those who sought social reforms.

Older than the political insurgency that went by the name of Progressive, related to it, and yet in many respects fundamentally independent of political partisanship, were efforts of humanitarians to realize ideals social in nature that transcended personal desires for self-preservation, wealth, prestige, and power.17

Dulles18 traced the challenge of the labor movement as it progressed in this era. Roosevelt's successful intervention in the anthracite strike in 1902 had impressed the nation. Strikes as a means of attaining an objective were not yet accepted but became more widely used and in
The early part of the twentieth century was the period of reforms. Prohibition laws were being urged more vociferously. Women's suffrage became a campaign issue in state and national elections. The status of the Negro was the center of much controversy. These reformers found a receptive audience among the people of America between 1900 and 1916.

In spite of the social nature of much of their work, Dulles noted that "these twentieth-century reformers looked to legislation which would equalize the tax burdens, maintain wage standards, enforce shorter hours, and provide decent housing as the only solution for the problems of industrialization and urban growth."19

Such an environment could do nothing but provide the economist-lawyer from Boston with his issues and his audiences. Whether the men make the issues or the issues determine the stature of the men need not be argued here. It must be noted, however, that when the surge of political economic, and social unrest was in its ascendency, there was a man like Brandeis to throw the weight of his knowledge of law and business onto the side of the reformers.

d. Significant Opinions.

In summary it must be noted that in this period, as in others in the past, the public officers did not always
accurately reflect the climate of opinion. Roosevelt had his troubles with his Senate. He sensed popular opinion on his side, and yet he could not accomplish all that he desired. Taft was not far from the corner of the old guard. Helms and Odegard noted that the period of Republican rule up to 1912 was dominated chiefly by the big business interests, in spite of the rise of labor-agrarian protest. The few reforms bills passed were due not to any particular political party or group of men, "but to the reform sentiment which pervaded the atmosphere."21

The seeds of conflict were always present. The ferment of political uprising, the upsurge of the progressive ideal, the voice of protest and revolt, all had a welcome audience. Groups of opinions were identifiable, but there was also an independence of action and thinking which was in no small measure a reflection of the advance of the times.

In such a period Brandeis attempted to influence opinion through his writing and through his speeches. It will be interesting to observe, as these speeches are studied, the direction of his pleading and the methods and techniques which he used to affect the public opinion of his day.
FOOTNOTES


2. Ibid., p. 414.


8. These letters are among the papers of which I examined in the Brandeis room of the University of Louisville (Ky.) Law Library.


12. Ibid., p. 836.

13. Ibid., p. 837 ff.


15. Ibid., p. 361.

16. Ibid., p. 392.
17. Ibid., p. 393.


19. Ibid., p. 86.


CHAPTER IV

SPEECH METHODS

1. Introduction

The purpose of this brief chapter is to report on the special speech methods used by Brandeis, with particular emphasis on preparation and delivery. It is important to understand these phases of his speaking technique. In the light of such observations the analysis of the speeches themselves will be more meaningful, and will present a clearer picture of Brandeis the public speaker.\footnote{1}

The chapter presents first a general discussion of the methods of preparation, the possible approaches, and the speech methods of preparation used by Brandeis. The second part of the chapter deals with that which the speech texts commonly call "delivery problems."

2. Methods of Preparation.

A discussion of the methods of speech preparation deals with the preliminary work of the speaker as he comes to any particular speech situation. A study of this phase is concerned with the steps the speaker feels he must take in order to arrive on the platform on a given occasion with a speech which satisfies his own personal standards.

Such an analysis of speech preparation is not to be confused with what modern writers refer to as methods of
Rather, it is the broader concept suggested by Cicero, the implication that the well prepared orator has a wide knowledge in the area of his speech. Dionysius similarly took the more comprehensive view of the term "preparation." It is not invention alone, but the specific method of producing a speech from the storehouse of ideas. It is the somewhat mechanical process of putting into language what the speaker has accumulated. It is the final stage in the total invention process, the kind of intellectual process first analyzed by Quintilian.

In the preparation for the speech there are three factors to consider: (1) sources, (2) analysis, and (3) organization.

Each speaker has his own types of source material to which he goes for his speech content. What he does with these ideas becomes his pattern of analysis. The order in which he decides to present his arguments and concepts forms his organizational procedure. Each of these factors must be considered in a discussion of the possible approaches any given speaker may make to his speech preparation.

For convenience of analysis, the methods of speech preparation may be classified as (1) casual, (2) studied, and (3) detailed. Each of these classes represents a point of view in preparation, a point of view toward
sources, analysis, and organization.

These three approaches may characterize the speaker's use of source material. Knowing that he must appear before a given society for their Memorial Day exercises, the speaker may rely upon sources already available. In this sense he is taking the causal approach. He may, however, recognize the need for additional data. Therefore he will study in preparation for this speech such sources as he may have at hand. From these he will select his material for his address. To carry the point a step further, the speaker may set down, as do some novelists, a point by point detailed listing of his sources, so that his task of analysis and subsequent organization follow very easily from these notes.

Different speakers may utilize analytical devices with varying degrees of thoroughness. The casual analyst will not seek for a pattern of presentation. Some will study carefully the themes available, the potential lines of argument, the issues created by the situation. Others will work out in great detail the reasoning processes, the sources of evidence as related to argument, the potential refutation of beliefs held by the resistant minds in the audience, and the rhetorical formulae by which he hopes to guide the thinking of the audience during the speech.

Once the sources have been mined, the analyses com-
pleted, there may yet be varying degrees of organization attempted by the speaker. There are some who attempt little or no organization. Even though he prepares well in the sense of exploration of materials, or analysis of the potentials of argument, yet this speaker may elect to prepare little or no outline. He may consider the organization of only casual and passing significance, and, therefore, not worth the effort. He may even wish to feel free from what he considers the confining influence of a complete outline.

Beyond this disdain for the outline, some speakers will attempt a carefully prepared outline as a study guide, with some hope of finding it useful in the speech. The speakers who prepare with more thoroughness and in greater detail will have a very careful plot of the organization of the speech. It is the climax of their preparation, the means by which the ideas are transformed into words. Whether the speech is to be given extempore or from manuscript, the preparation has been thorough, and the speaker has a sense of achievement in his work.

These prefatory considerations of degree and types of preparation serve as the basis against which the methods of Brandeis may be understood more clearly. An understanding of the degree to which he exhausted his
sources, completed his analyses, and mastered speech organization will reveal an important reason for the effectiveness of Brandeis the pleader.

2. Methods of Preparation Used by Brandeis.

One of the outstanding characteristics of Brandeis' method of preparation was the detailed and thorough way he would study his source material for a speech. Mason noted that the first phase of the approach to any problem was "thorough investigation by and with experts." As will be found in the analysis of the speeches, Brandeis applied the principle of thoroughness to his preparation. He built a reputation for exact and complete analysis so that in later life, he was expected to have facts for any given subject. His audiences and opponents simply assumed that Brandeis mastered the facts before he made public statements. Later Mason made the point that "it is impossible to apply the law to facts unless one knows both law and facts. In all the problems that he tackled, Mr. Brandeis has demonstrated that he knew both." If a speaker has all of the facts available on a given problem, he is able to face the opposition in court, the audience on public occasions, or the groups of crusaders with assurance and confidence. Brandeis often stated: "You may not understand the multiplication table, but you cannot argue with it." It was his feeling that the person who had the
facts could not be overcome. Attorney General Biddle suggested that Brandeis "believed profoundly that behind every argument is someone's ignorance, and that disputes generally rise from misunderstanding." Detailed and thorough research in all available sources was one of the distinguishing traits of Brandeis' speech preparation methods.

Lerner noted that Brandeis fought his way to conclusions after being confronted with a specific set of facts. In this process he was an astute and keen analyzer of the materials before him. He was careful to have every possible line of argument before him as he contemplated the direction that his own special pleading would take. Freund recognized in Brandeis the dominant devotion to reason, and his search to make his work stand the test of the analytical and rational hearer. These thorough analyses of the material at hand were not only present in his preparation for a speech, but in his preparation for a campaign or for a written opinion or dissent on the Court. His preparation for the Savings Bank Insurance promotion demonstrated his careful thoroughness in every detail. He learned the insurance business, every law on insurance, workmen's compensation, and savings banks, and the background of such plans in other countries. The same study characterized his preparation of his Court opinions and decisions. His presentation of cases before
the Supreme Court established his reputation for clear analysis. McCune commented upon his technique of economic analysis which even today is known as the "Brandeis brief." Part of his reputation as a speaker grew out of the ability which he demonstrated as he went to the heart of any given problem by careful preliminary analysis of the facts and issues at hand. As will be noted later, the speeches themselves reveal the care with which their author examined the issues.

The object of speech organization for Brandeis was persuasiveness. Part of the study with which he prepared his speeches was devoted to finding an organizational pattern which would prove most persuasive and instructional. Freund observed this trait in his work with him as a clerk in his Court days. It was not enough for Brandeis to have the confidence that goes with facts and statistics; nor was it enough for him to have the personal satisfaction that he had probed deeply into this material for the best analysis possible. He had to go the additional step and organize his material in such a way that the hearing public would be impressed as strongly as he with the rightness of his position. In the subsequent analysis of his speeches the problem of organization will be investigated in detail. Suffice it here to note that as in the other types of preparation,
he meticulously formulated the most effective outline possible.

3. Methods of Presentation.

Two problems are of concern in this section: (a) What type of presentations did Brandeis make? (b) What were some of the characteristics of his delivery?

a. Presentation Method.

By the term "methods of presentation" the author means what many of the modern writers include under a discussion of delivery, or preparing the speech for delivery. Four types are usually considered, viz., extemporaneous, memoriter, impromptu, and reading.

There is no record of Brandeis' impromptu speaking. One may assume that on occasion he was called upon "for a few words" on short notice, or no notice at all. Even his brief statements extant do not fall into this category, as many of them were made after his usual careful preparation. His news conferences with the press were planned in considerable detail. In a sense some of his replies were impromptu, but he had prepared for the occasion. In the accepted sense of the term, Brandeis could not be classified as an impromptu speaker.

To select one of the three remaining types for Brandeis is not easy. Because of his keen memory, almost anything he undertook to deliver was soon mastered verba-
tim. If he is to be considered an extemporaneous speaker, the testimony of one of his early assistants is interesting, for he noted that even in the Savings Bank Insurance campaign, Brandeis would pretend to be speaking extemporaneously, but to his certain knowledge the speech had been carefully worded and memorized for the specific audience at hand.

His secretary Miss Leila Colburn suggested that he gave very few extemporaneous speeches, and that even those which appeared so were almost completely memorized.

He drafted his speeches first in long hand, with a little stub of a pencil, two inches long, soft lead. Then they were typed triple spaced, after which he would work it over. Then he would redraft, and in the process would memorize it, or at least so much that he needed no notes.18

Even when he used a manuscript, his thoroughness of preparation enabled him to be free from the written page. His nephew, who accompanied him to Chicago for the speech on "The Living Law," noted that even though it was all written out before him, he had memorized so carefully that he appeared to be "half speaking and half reading."19 In the Gompers debate he used no notes.20 Some of his short statements were given to various groups without notes, but they were thoroughly prepared almost to the point of memorization.

In conclusion it should be observed that because of his thoroughness in preparation for delivery, much of his speaking was memorized, that his extemporaneous speaking
was always carefully prepared, and that his manuscripts were read only after the kind of preparation which made delivery seem that of memoriter speaking.

4. Delivery Characteristics.

Brandeis' nephew described the Gompers debate in Tremont Theatre, Boston. The impressive-looking speaker was tall, stooped, long-legged. He spoke slowly and cautiously, perhaps a little ponderously. He had a flexible, deep voice. He got much of his impressiveness through the flexibility of his voice. Brandeis' appearance gained immediate attention, and that his "restrained delivery" immediately won the audience by his sincerity. A former secretary said that he was a "very expressive speaker, but not loud." He could speak "sharper" when he wanted to impress an audience. His son-in-law observed that Brandeis' appearance gained immediate attention, and that his "restrained delivery" immediately won the audience by his sincerity. Mr. Dewey spoke of the "eloquence of intensity," a sincerity which of itself attracted his hearers. He spoke with very few gestures, and in no sense of the word could be considered bombastic.

It would appear from those who commented upon this characteristic of his speech that he was mild in manner, direct and forthright, and calm in voice. Brandeis could use vocal variety for purposes of emphasis, but he did not tear a passion to tatters.
5. Summary.

1. Brandeis was most thorough in his preparation, in all phases. He was thorough in his search among source materials; he was thorough in analysis, and careful in organization.

2. Brandeis' delivery was forceful and direct, but not ostentatious.

3. Hearers were impressed with his sincerity and integrity and earnest but serious manner. He had a favorable ethos.
CHAPTER IV

FOOTNOTES

1 The chapters immediately following present a discussion of the nature of Brandeis' speech as observed from a reading of the group of speeches found in this research. The next group of chapters deal with a specific analysis of six of the speeches.

2 See infra, footnote 15.

3 Cicero, De Oratore, 1, xvi.


5 A discussion of these matters is significant here because it helps the reader understand the nature of the speaker, his own attitude toward the speaking process. Such material seems pertinent as suggested in the first four chapters of Book VII of Quintilian.


7 See infra, Ch. XI.

8 Mason, Lawyer and Judge, op. cit., p. 121.

9 My interview, Mr. Judd Dewey, in Boston, June 13, 1950.

10 317 U. S. at xxxix.


12 317 U. S. at xix.


14 Freund, op. cit., p. xix.
15 See Chs. V to X.


17 Contemporary definitions of these terms are:
Extempore: speech that is prepared but delivered from notes or outline.
Memoriter: a speech which is memorized verbatim for delivery.
Impromptu: a speech that is prepared on the spot, at the place and time when and where the speaker is called upon to speak.
Reading: the reading of a prepared manuscript.


20 Ibid.

21 Ibid.

22 My interview with Miss Leilia Colburn, Boston, Mass. June 14, 1950.


24 My interviews with Wehle and Dewey.
CHAPTER V

SPEECH ANALYSIS: "THE BALLINGER INVESTIGATION"\(^1\)

1. The Speech Situation.\(^2\)

The first major assignment for Brandeis following the wage and hour trials was his employment by Collier's magazine to appear as counsel in the investigation of conservation policies by a joint committee of Congress. The formal title indicated that it was in investigation of the Department of the Interior and its Bureau of Forestry. More popularly it was called the "Ballinger-Pinchot Feud" because of the part played by Secretary of the Interior Ballinger and the leading protagonist, the Chief Forester in the Department of Agriculture, Gifford Pinchot. Since Ballinger was in the center of the battle, it is often referred to simply as "the Ballinger affair," or "the Ballinger investigation." The last phrase will be used in this study. The speech itself was the closing argument delivered in room 210 of the Senate Office Building on May 27, 1910.

Mason observed that "the Muller case brought Brandeis to the national stage, and the Ballinger-Pinchot controversy kept him there."\(^3\) Brandeis was only one of the several lawyers involved, but he earned more than his share of the publicity in the press as the case pro-
gressed. It was in this assignment that Brandeis learned
to use the press release and the press conference to the
best advantage. His speech at the conclusion of this in-
vestigation is one of his major public utterances because
it showed him as a capable debater, a shrewd handler of
witnesses before the national committee spotlight, and a
thorough student of whatever task he had at hand.

For purposes of this study only a brief review of
the events leading up to the investigation is necessary.
During his administration, Theodore Roosevelt made a vigor­
ous fight for conservation of lands and their natural re­
sources, "supported by James R. Garfield, Secretary of
the Interior, and Chief Forester Gifford Pinchot of the
Department of Agriculture." When Taft succeeded him as
pledged to continue these policies, he elevated one of the
attorneys who had served in various public lands suits to
be Secretary of the Interior. Pinchot, as Chief Forrester
in Agriculture, feared that the new Secretary would not
energetically follow conservation practices, so he kept
a close watch on the department's activities. Throughout
the entire case he served as the battler for conservation
and urged much of the action against Ballinger which
later proved his undoing.

The events which led up to the investigation appeared
harmless enough. Less than five months after taking office,
Ballinger reopened for sale certain allegedly valuable
"coal lands in Alaska, known as the Cunningham claims." Roosevelt had withdrawn these from the market as a conservation measure, and for what he called the general welfare and public interest. Now they were reopened for sale under strange circumstances. Louis R. Glavis, Chief of the General Land Office Field Agents in the Interior Department, suspected collusion between the Guggenheim interests and Ballinger. He made his charges directly to President Taft. After a hurried study of the case, Taft supported Ballinger, and approved the dismissal of Glavis. Upon his removal from office, Glavis released the entire matter to the nation in an article in Collier's magazine. Newspapers took up the cry, and in a short time the administration had a potential scandal on its hands. Ballinger encouraged a complete and thorough investigation. The stage was set for the expose of Glavis' disloyal behavior, and an exoneration of Ballinger, after which he threatened to sue Collier's for a million dollars.

Mason reviewed the alignment of legal talent, describing their assignments.

During Christmas week of 1909 Collier's called an emergency war council of those involved at the house of Henry L. Stimson, a New York lawyer. Present were Gifford Pinchot, his brother Amos, George Wharton Pepper, James R. Garfield, Robert J. Collier, and Norman Hapgood. Their main work was to line up legal talent to counsel Glavis and Pinchot at the forthcoming investigations. Stimson and Pepper agreed to handle the legal work, and at the insistence of Hapgood, Brandeis was also retained at a fee of $25,000, plus expenses.
With his precise role still undetermined, Brandeis came to New York on January 12, 1910, and worked in seclusion at the Harvard Club, seeing no one but Hapgood. After a few days he had acquired a working knowledge of the Interior Department, public land laws, conservation, and other relevant matters. By that time each lawyer's task had been decided. Stimson, it turned out, could not find time to take any major role at all. George Wharton Pepper of Philadelphia and Nathaniel A. Smyth of the New York Bar were to represent Pinchot. Brandeis, Joseph P. Cotten, Jr. (who later served as Undersecretary of State in the Hoover cabinet), and George Rublee of New York were to act for Glavis.

Early in the proceedings, knowing the partisan nature of the committee might indicate the possibility of a "white-wash job," Brandeis sought and secured the right for counsel to interview witnesses appearing before the hearing. "The Committee tried to run its hearings like a court, but the effect was more theatrical than judicial." George Wharton Pepper, counsel with Brandeis, reported in his autobiography the circumstances of the investigation and nature of the audience.

The proceedings before the committee were in form judicial, but the judicial atmosphere was wholly wanting. The Committee was a political body, governed by political considerations. Even on questions of admitting or rejecting evidence, the vote was a party vote. Day after day the great committee room was crowded with spectators whose attitude toward the proceedings was that of rooters at a football game.

After the array of legal ability appeared on the scene for Glavis and Pinchot, Ballinger subsequently engaged Col. John J. Vertrees, a Tennessee spellbinder and lawyer,
and Edward Finney, an attorney in the Department of the Interior, as his legal staff. Pepper described Vertrees as a "lawyer of the old school, a fire-eating Southerner, experienced in combats of various sorts, but quite helpless when called upon to meet the more subtle strategy of Brandeis." Thus the scene was set for the great drama which was subsequently to make the President appear a liar, to make the Attorney-General seem an accomplice in fraud, and to cause the Secretary of the Interior to resign in disgrace and disgust.

It is not pertinent here to review the technical nature of much of the testimony. Through Glavis and associates, much evidence was introduced which supported the Glavis-Pinchot contention that there had been collusion, and that the work of Ballinger had not been in the general interest of the public. Brandeis hammered away at Ballinger personally, attempting to pin most of the blame on his shoulders. Col. Vertrees and the Ballinger group relied on their legal position, emphasizing the legality of the removal of the claims, the legality of the proceeding removing Glavis, and the propriety of the entire land claims business. By means of the testimony of a stenographer in the Interior Department, the person who had transcribed some of the correspondence between the department and the Attorney-General and the President, Brandeis brought out that the testimony of Ballinger's
colleagues as to certain dates on the letters and what transpired between certain dates could not possibly be true, even though the President and Attorney-General had both made public statements to the contrary. To say the least, this proved highly embarrassing to both of these officers. Pepper thought Brandeis had gone too far in implicating the President and his Attorney-General, but Brandeis felt that the truth had to be told in order to make his point that there had been collusion between Ballinger and "the interests," to show that Ballinger had not acted in good faith, and to show that he had not testified truthfully. The impact of this disclosure on the public was sensational in every way. The hearings came to a rapid close.

Brandeis, Pepper, and Col. Vertrees addressed closing summaries to the investigating committee on May 27-28, 1910. Five hours had been allotted to each side. Brandeis spoke for two hours and ten minutes. The vote of the investigating committee was seven to five favoring Ballinger's position. However, the vote followed strict party lines. Neither house ever acted on the committee's report, and in a few months Ballinger was forced by public opinion to resign his position. In the immediate vote, Brandeis lost his cause, but in the longer view his point was won effectively.¹⁰

The specific occasion of the speech here studied
was the final period of summation to the committee. Adele Brandeis described the scene to the author. She told how seats were at a premium, because the President had been drawn into the case. The spectators sat on sides according to their convictions. She went to the hearing for this speech with her aunt, but she sat on one side, with her Uncle Louis and the "Pinchot ladies," while her aunt, because her other uncle was Secretary of Commerce, had to sit with the administration forces. One of the expectations of the crowd was that Brandeis would attempt to drive home a strong indictment of the President and the Attorney-General. Even though this course was not followed, the expectation caused much of the tension and excitement of the occasion.

The audience was about equally divided in partisanship. It came to hear a heated debate and it was not disappointed. Brandeis had never appeared in this role on the national scene. Although he appeared before national committees and commissions later, here was the first audience to see him in this type of action. Yet in this case, as in many of his other speeches, Brandeis talked to the nation at large through the press, so much so that people began to refer to him as a "publicist" rather than a crusader. It was a mixed audience, chiefly composed of wives of administration officers, relatives of both parties, and government workers. The record shows that
at the conclusion of Brandeis' speech there was "prolonged applause." The others rated the notation "applause."

The subject for a speech of this type would be difficult to assign. It is usually cited as "the Ballinger Investigation" speech. The audience needed no subject, for they had been following the affair with avid interest throughout the entire proceedings. The general public looked upon the speeches as summations to the "jury." Stimson called it the "closing argument in the investigation." Everyone knew what it was to be, so that for the people of that day it needed no attractive title.

2. The Speech Type.

In theory, and only in theory, the setting would demand a deliberative speech, for it was presumably the purpose of the investigation to plan future action and to determine future policies for the government. However, with the actual turn of events, with opposing legal counsel, with one man the focus of charges, countercharges, and evidence, with one man, for all practical purposes, placing his professional life before the bar of public opinion, it could hardly be considered other than a courtroom scene. Before the hearing had progressed very far it became clear that whatever speeches were given would be forensic in nature, for it was indeed an evaluation of
things past, of events for which a man stood in judgment. The nature of the speeches themselves, their approach to the problem, was typical of courtroom and trial procedure.

The purpose of the speech can be stated in very simple language. Brandeis attempted to prove that Ballinger was guilty of behavior improper for a high officer of the government. The implication of the address was that Ballinger should be removed forthwith from his office of trust. As noted above, the public had reason to anticipate that Brandeis might have an auxiliary purpose in his speech of challenging the veracity of the Attorney-General, and, at the very least, of questioning the judgment of President Taft. The public was disappointed. The point against Taft and Wickersham had been made in the hearing and had been well handled by the press. Brandeis chose rather to direct his entire summation to the culpability of Ballinger. For many this tended to heighten the importance of the part played by the Secretary of the Interior. If, in view of the testimony, the behavior of other officers, superior and subordinate, was not of significance, then the behavior of the accused must be all the more open to criticism.

As to classification of the purpose, for all practical purposes it was to actuate. Brandeis attempted to influence the votes of the twelve men before him. In this specific task he failed to gain a majority. However,
the ultimate purpose was achieved. The interest of his immediate employer was also served in that Collier's was not sued for libel. Pinchot later called it a victory. "Just as later in the Supreme Court of the United States, Brandeis showed himself to be a most exceptionally able, fearless, patient, indomitable, farsighted, and socially minded lawyer and citizen, whose grasp reached every side of a question at issue and also its remoter consequences, Brandeis was a wonder. He it was who won our case."\(^\text{15}\)

3. The Speech Structure.\(^\text{16}\)

a. Backgrounds and Issues.\(^\text{17}\)

As the opening speaker for the final summations before the committee, it was Brandeis' responsibility to determine the issues upon which the arguments would develop, and to determine the attitudes and tendencies which would dominate, in all probability, the remainder of the hearings. A mass of testimony and documentary evidence had been presented to the investigators.\(^\text{18}\) The possible emphases were varied, and the final arguments, though in a sense anti-climactic, could be extremely embarrassing for the administration, or not.

Brandeis went right to the point he considered essential in his opening paragraph, leaving no doubt as to what he considered important. He directed the entire force of his summation to a single issue, to a single
point of conflict, a single question for the committee and the country to answer. The opening paragraphs of his speech are important to consider in this light.

Mr. Chairman, and gentlemen of the committee, a great mass of evidence has been submitted to you at these hearings, and a large number of subjects have been touched upon; some of them bearing on the fundamental conception of democracy, bearing on the demands of truth, of loyalty, and of justice. But whatever subject was touched upon, practically the center to which all testimony was directed has been the conduct of Mr. Ballinger, his acts, and his omissions. And in connection with that testimony, much had been said, and much evidence has been introduced, which, in our opinion, subjects him to severe criticism. Some of you undoubtedly will not agree with us as to the extent to which that criticism is justified; but I take it that the main issue which you have to consider is one on which men who have heard this testimony ought not to differ—because the main issue is this:—

Is the Department of the Interior, as Glavis phrased it, in safe hands? Or to put it in other words,

Has the conduct of Mr. Ballinger been such, his character such, are his associations such that he may safely be continued as trustee for the people of their vast public domain, that he may be continued as manager of the reclamation and other kindred services, that he may be safely relied upon to represent the people in that great and sacred trust?

Or to put it in other words, is Mr. Ballinger a man, single minded, able, enlightened, so zealous in the protection of the interests of the common people, so vigilant, so resolute, that he may be relied upon to protect the public domain, their great assets, upon which the welfare of the present and future generations of American people so largely depend; may he be relied upon to protect all that against invidious aggressions of special interests who are ever looking for the opportunity to seize upon that which is the property and the hope of the American people? Is Mr. Ballinger, in other words, the man to be the trustee of all this for the common people?
The issues which counsel could choose from the testimony heard were many. They might have argued the removal powers of the president. They could have evaluated the efficiency of the Department of the Interior. They could have reopened the old Roosevelt arguments on the worth of the conservation program. They could have spent considerable time arguing the actual value and worth of the Alaskan lands. Brandeis chose to emphasize none of these. He made it a very personal issue, a very direct and specific evaluation of the efficiency or inefficiency, the nobility or venality, the good administration or mismanagement of a single officer in the President's cabinet. By implication the other issues were on the periphery of the debate, but the argument followed the line laid down by Brandeis in his opening address.

So that there would be no doubt as to the stand of his clients, and no uncertainty as to his own position during the rest of his speech, he stated his answer to these issue-questions in the next paragraph:

We submit, Mr. Chairman and gentlemen, that whatever differences there may be in the committee as to the degree of culpability of Mr. Ballinger, for particular acts or omissions, there ought not to be any difference of opinion on that one question; that he is clearly not the man to be trustee; that he is not the man upon whom the American people can safely rely to protect them against the insidious aggressions of the special interests, whether it be because of his associations, whether it be because of peculiarities of his character, whatever may be the reason, he is not the man.
The pattern for the closing debate was thereby determined. Brandeis proceeded to speak to this single issue, and whatever other approach Col. Vertrees may have hoped for or feared, he was faced squarely with the position of the protagonists. Whatever else the committee members may have considered the significant implications of the investigation, they had the issue placed before them in no uncertain terms.

b. Arguments.

The basic arguments which Brandeis used to support his position on the main issue were similarly clear cut and succinct. He organized the entire case around two questions: (1) What has Ballinger's conduct been? and (2) What is his character? Positively stated, he predicated his ultimate conclusion on the contention that Ballinger's conduct was improper, and that his character unsuited him for the high office he held.

His first argument, the controversy on Ballinger's conduct, centered around two groups of material in evidence before the committee: the study of reclamation procedures, and the Alaska coal lands policies. For this final debate, George Wharton Pepper addressed the committee on the reclamation aspects of the work of the Department of the Interior, and Brandeis spoke on the Alaska coal lands dispute.
The first contention which Brandeis submitted to the audience as support for the argument that Ballinger's conduct had been improper was that the Secretary of the Interior had continued fraudulent claims, and had honored them by placing the coal lands back on the market. He cited the evidence which had been presented at the hearing much of it uncontested. He reviewed the statistics on the claims. He contended that Ballinger had stopped investigations which might show up the fraud which was being perpetrated. He traced the record of the case, showing all along Ballinger's part in the unsavory episodes.

One of the most impressive feats of Brandeis in this summation was his grasp of the voluminous evidence presented, and his knowledge of the history of public lands and the law involved. As Pinchot indicated, it was this ability to collate the material brought out in evidence, and to present it lucidly in his oral argument that made Brandeis the outstanding speaker in this series of addresses. It demanded that he keep clearly in mind the sequence of events, the persons involved, the comments and writings at every step of the way.

One example of this technique will suffice here. Consider the following paragraph taken from his summary of the record of the case:

Such was the situation when Glavis returned to the west in December, 1907, with that Love
report and with all other papers, prepared to investigate this matter; and what happened then? Glavis had hardly turned his back on Washington when ex-Governor Moore appeared in Commissioner Ballinger's office. There was brief conversation between them, followed by another brief conversation by the commissioner with Schwartz, a conversation which, according to Schwartz, lasted two or three minutes. In that conversation according to the commissioner, he did nothing but read—no, not read, but glance at—that Love report of August 2, a report which occupied as printed in the list about two-thirds of the page. And in that brief conversation in the presence of Governor Miles C. Moore, and subject to his potent influence, Commissioner Ballinger orders these claims, claims involving to the American people untold millions in value, to be clear listed: orders them clear listed in spite of the letter of instruction to Glavis which specifically referred to this Love report. Commissioner Ballinger was evidently determined not only to clear list these claims, but to hasten the issue of the patents in every conceivable way. The hastening of the patent seemed to be of some significance at the time, for, no doubt, the visit of ex-Governor Miles C. Moore was the result of the fact that a fortnight before the Morgan-Guggenheim Alaska syndicate had notified the Cunninghams of the acceptance of the option acquired under the agreement of July 20, 1909.

Speaking only from notes, without previously drawn manuscript, reading only when quoting letters or the record of the case, Brandeis amazed his hearers with the thoroughness of his presentation. The force of his argument lay in the weight of his evidence and the arrangement of his supporting details.

The second contention in support of his argument that Ballinger's conduct had been improper was that Ballinger had served as a lawyer for these same interests
which now appeared to be guilty of fraudulent attempts to purchase Alaskan lands. Brandeis did nothing more in this point than to relate in proper sequence the work of Ballinger, a sequence which condemned by its very order of events.

The third supporting point for this argument on Ballinger's conduct was that three times Glavis tried to intercede to save the lands, and three times Ballinger opposed him. Brandeis made each of these clashes one more indictment of the conduct of the accused. He showed how in each case the decision of the Secretary of the Interior was in the personal interests of those who were to take over the claims and against what he called the interests of the country.

Brandeis summed up this argument in this way:

Now, I say, gentlemen, there you have the conduct of Mr. Ballinger as commissioner, and as Secretary in regard to this great heritage of the American people. Is he the man whom you would put in as sole trustee of great properties belonging to you and committed to your care, if those properties were surrounded by the insidious special interests who like harpies were awaiting an opportunity to pounce upon your possessions?

In his second major argument Brandeis held that the character of Ballinger was such that he should not hold his present office. He introduced this argument by defining the kind of character he meant.

What is the one quality which you would demand above all others in a man who is to be trus-
of the people's property, with all the special interests seeking to prey upon it? It is resoluteness—vigilance, of course,—but resoluteness is needed; a man who would stand firm. What is Mr. Ballinger's record? Just take these facts we have been going over. 25

The people's lawyer then proceeded to an analysis of Ballinger's conduct, his correspondence, and his behavior on the witness stand to show that his character lacked the resoluteness essential to this great office. The reader is impressed with the clarity of the organization and the precision of the argument. It is simply yet forcefully stated. It is not difficult to follow. He showed that the conduct of Ballinger revealed his weakness of character. He read from his letters contradictory instructions, demonstrating his vacillation. He said of his appearance on the witness stand:

Gentlemen the time is too short. The occasion of his appearing on the stand is too recent that I should not be justified in considering his testimony minutely; but I cannot refrain from asking you just to formulate in your own minds what this man was on the stand—the extent of his evasions, the assumed lack of memory, and his misstatements. 26

The arguments on the main issue concerning the qualification of Ballinger had been clearly stated, supported by the testimony and documents presented, and were presented to the committee as the climax of the case directly against the Secretary of the Interior, and indirectly, against the administration.
c. Organization Pattern. 27

The organization of this speech, apart from the analysis of the argument, deserves consideration. In most respects it is typical of Brandeis, showing his own technique of persuasion. It differs from his pattern only in the peroration.

The exordium is typically brief. It is limited to a single paragraph. 28 He opened with a reference to what was obvious to them all, a reference to the great mass of evidence before them. He advised that he was going to help them through these volumes by adhering to a single theme.

The statement or narration was a clear wording of the main issue which faced the committee. 29 This took four paragraphs, for after stating the single issue, he restated it in several forms, to give emphasis to the importance of the theme, and to clarify the direction of the argument. The effectiveness of Brandeis as a public speaker lay, for one thing, in his ability to clearly state the theme of his address, to do it early in the speech, and to do it so clearly that everyone knew precisely to what point he was to address his remarks. In this speech he again demonstrated this method very clearly. After those first paragraphs, it became clear to all that Brandeis was limiting his argument
to the qualifications of Ballinger to hold the office of Secretary of the Interior, to enquire whether he could be faithful to a public trust.

The argument takes a large proportion of the speech, at least eighty-five per cent of it. It is typical of Brandeis' approach to a problem. He saturated himself with the facts and the evidence, and then produced a clear exposition of these ideas for his hearers. His arguments relied heavily upon facts and evidence, rather than upon persuasive appeals, colorful language, or vituperative rancor. He rarely used pathetic appeals. Except for some phrases concerning the duty of citizens to their country, the speech contains almost no emotionalism. The argument in this speech, as suggested above, is a model of clarity and directness. His support is from the evidence at hand, and the forcefulness grows from the impressiveness of the logical appeal.

One of the distinct characteristics of this particular speech is the peroration. Brandeis allowed himself a somewhat longer and more forceful conclusion than was his custom. He had a transition sentence from the argument to the peroration. "There he is. There is his character reflected on the witness stand just as it is reflected in all of his acts." Brandeis had just concluded a recapitulation of his final argument. He used
this summary sentence as a transition to his concluding analysis of the relationship between Ballinger and his subordinates. He compared the relationship between the accused and his predecessor, Secretary Garfield. They differed as "Hyperion from a satyr." He criticised the blind loyalty of the staff in the department to two such different leaders. He made this his concluding plea. He saw in this instance a danger. "The danger in America is not of insubordination, but it is of too complacent obedience to the will of superiors." He saw in this kind of loyalty a political subservience which was not healthful.

He was through with the Ballinger evidence and argument, but he used this rostrum for a final appeal for a higher type of government service, and a plea for conservation.

That is what we need [men who are not blindly loyal and subordinate to political intrigue], and that is what we must have, if our government is to meet our ideals. The means of attaining it is one of the great questions presented here. We are not dealing here with a question of conservation of natural resources merely; it is the conservation and development of the individual; it is the conservation of democracy; it is the conservation of manhood. That is what this fight into which Glavis entered most unwillingly means. That is what the disclosure Kerby made most unwillingly means. It proves that America has among its young men, happily, men of courage, and men in whom even the heavy burden of official life has not been able to suppress manliness.34

When with typical Brandeis bluntness, he concludes with this terse sentence:
Mr. Chairman, and gentlemen, I have already taken up too much of the time of the committee and I will suspend at this point.

As he had attempted to personalize the entire controversy in terms of the guilt of Ballinger, so he concluded with a similar attempt to personalize the ideal of good government service. These men who had fought the battle against Ballinger were the symbols of what America stood for, and the hope of democracy.

It is important to note that the peroration contains no detailed summary or recapitulation. Brandeis assumed that his hearers had heard and understood. There is no series of historical or literary allusions and quotations. These would have but adorned the logic, and Brandeis believed that the material of proof needs no adornment for rational beings. Yet he closed his speech, one of the most important of his career, with a brief appeal to the people of America to keep the standards of personal service high. This is as close as Brandeis comes to pathetic appeal.

d. Style.

In the support of his arguments with a summary of the facts presented in evidence, Brandeis developed what is almost a narrative style. He related the series of events which transpired in connection with the Alaska land claims in such a way to give the story in clear and
simple language. In this particular speech he does not need to rely upon statistics. It is the event that is important, and this importance is highlighted by the simple exposition given by the speaker.

Several of his stylistic devices in this speech should be noted.

He used adjectives cumulatively for the purpose of emphasis, as when speaking of the Guggenheim-Morgan interest he said they are "probably the most ambitious, energetic, resourceful, combination of capitalists in the world."

There were suggestions of parallelism, but these are infrequent and not overdone.

He frequently inserted a short sentence for contrast and emphasis. These were: "Note you, suspended, not revoked." "Note this Glavis asked." The imperative sentence gave some contrast, and called attention to the specific point, as in the above.

Brandeis used questions effectively. They would open paragraphs, as in "And what happened then?" and "Now, what happened?". The narrative would go on from these opening queries. He would use a series of questions for emphasis, as in this paragraph:

He [B allinger] says, however, that he never acted really as legal representative for the Cunningham claimants. Did he? What other interpretation could be given to his acts? Who else but
a lawyer could have written that affidavit which Schwartz testified to as being such an ingenious document and as indicating weeks of work on the part of the affiant and his attorneys?41

He used one analogy, that of the Board of Directors of a corporation and the government of the United States.42 He allowed himself the luxury of a single classical allusion, that of Hyperion and satyr.43 He used a single figure of speech, referring to the special interests as "harpies."44

These incidental illustrations of various linguistic techniques are interesting in two respects. First they show that Brandeis had the background necessary to use them, and that he knew how to use them effectively. They showed, secondly, that their very rare use gave a clue to the type of language Brandeis habitually used. The great majority of the sentences are simple declarations. The words are accurate and specific. There are few of the "flights of fancy" which characterized many of the effective speeches of the nineteenth century.

One interesting characteristic of his oral style was his use of the words "well" and "now" as paragraph openings. Particularly in this address, which was not delivered from manuscript, these words appear quite frequently as transitions or as introductions. In his more carefully prepared manuscript speeches such dangling beginnings do not occur.

Another characteristic of the style in this speech
was Brandeis' use of the historical present, as he would re-create scenes and events for the investigators. Here he used a technique of narration frequently adapted to make a scene clear and vivid. Webster used it in the White Murder Case speech. Brandeis used it here with good effect.

In passing it should be noted that Brandeis' style in this speech stood out in contrast to that of his chief opponent, Col. Vertrees. Pinchot described Vertrees as "a more or less fire-eating Southerner, a long lank Colonel from Tennessee." Vertrees filled his speech with figures, emotional appeals, and considerable vituperation. He was frequently interrupted by members of the committee to clarify a point, to come down out of the clouds of oratory to the evidence and argument at hand. Vertrees had not mastered the facts and law as had Brandeis. Perhaps these other devices were his only resources.

Brandeis and Vertrees had frequent disagreements over technical points and points of fact. Pepper related that during one of these Vertrees jumped to his feet, yelled at Brandeis that he was a liar, and that he knew that he was lying.

Brandeis, with his arms folded, and wearing an indulgent smile, looked silently at the old gentleman for a few seconds, and then asked with an air of deference, "Anything further, Mr. Vertrees?" The Colonel, literally speechless with rage, sank into his chair and Brandeis resumed
his argument at the point at which he had been interrupted.\textsuperscript{46}

4. Summary.

The speech of Brandeis in which he presented the closing arguments in the Ballinger investigation suggests several conclusions:

1. Brandeis sensed the importance of the occasion and used it to impress not only the present audience, but the nation.

2. He stated very clearly the issues at hand.

3. He outlined his argument, supported it with evidence from the record.

4. His speech could be outlined and analyzed according to the classical pattern.

5. His peroration was in the nature of an appeal for better public service.

6. His style was simple and direct, free from excesses of figurative language and strained analogies.
CHAPTER V

FOOTNOTES

1. The next six chapters consist of rhetorical analyses of six speeches given by Brandeis during the period 1908-16. They have been selected with four criteria in mind: 1. the importance of the speech to its contemporaries; 2. the availability of a reasonably accurate copy of the speech as it was given; 3. the representativeness of a Brandeis philosophy or point of view; 4. a speech typical of a class.

"The Ballinger Investigation" speech represented an address before a Congressional investigating committee, and showed Brandeis as a crusader for a cause which he believed represented the general welfare of the people.

"The Constitution and the Minimum Wage" explained some of his views on industrial relations. "The Five Per Cent Case" was a speech given before the Interstate Commerce Commission, on the railroad rate problem. Brandeis had become famous for his philosophy of the scientific management of the railroads. The speech represented both his point of view and a different speech situation. "True Americanism" is a fourth of July oration. It explains Brandeis' position on minorities. It is one of his few ceremonial speeches available, and the only one in manuscript form.

"The Jewish Problem: How to Solve It" is a speech on Zionism, to which he devoted much of his energy in the last part of the period under study. "The Living Law" reveals Brandeis' philosophy of democratic government, anticipating some of his later Supreme Court decisions. It was unique also in that it was delivered to an audience of lawyers.

2. The criticism of the speeches is divided into three parts. First, there is a discussion of the speech situation, or the audience, the subject, and the occasion. Secondly, the speech type is discussed. Thirdly, the structure and content of the speech are examined.


4. Loc. cit.

5. Loc. cit.

6. Ibid., p. 257.

7. Ibid., p. 258.

Ibid., p. 85.

In spite of the battle between Brandeis and the Taft administration the two later came to serve on the Supreme Court together, and developed a very high regard for each other. Brandeis considered Taft a great Secretary of War, a great Justice, but an average President. (Interview of author with son-in-law, Gilbert, op. cit.).

My interview with Adele Brandeis, June 6, 1950, Louisville, Kentucky.


Mason, Free Man's Life, op. cit., p. 281.

Throughout these chapters the Aristotelian classifications of speech types has been followed. See Cooper, Lane, The Rhetoric of Aristotle. New York: Appleton-Century, 1932. p. 16-17. The deliberative is a speech of counsel or advice, as to a political assembly. The forensic or judicial speech is used in prosecution and defence. The epideletic, or ceremonial, speech "is in the nature of an exhibition or display, eulogies--in general, speeches of praise or blame."

Pinchot, op. cit., p. 469.

For purposes of this study the analysis of speech structure has been divided into four categories: 1. Backgrounds and issues; 2. Arguments and their adaptation; 3. Organization patterns; 4. Style.

The term "issue," as used here, may be defined as the question which is the focus of conflict, the statement of the point upon which there will be inherent and basic difference of belief or position.

The total transcript of the testimony and documentary evidence in this hearing ran over 5000 printed pages.


20Ibid., p. 4904.
21Ibid., p. 4904-5.
22Ibid., p. 4908-9.
23Ibid., p. 4916.
24Ibid., p. 4919.
25Loc. cit.
26Ibid., p. 4920-1.

27The organization pattern, or outline, followed in this study is referred to as the classical form. Basically, the form comes from the Greek and Roman rhetoricians. It has various parts, according to the author quoted. Thomsen and Baird (op. cit., p. 400) agreed with Goppens in the longer list of parts: Introduction of exordium, narration or explanation; proposition; division; proofs, or argumentation; pathetic or emotional appeal; conclusion or peroration. Baldwin (op. cit.) likewise analyzed the parts of a speech according to the classical authors. This study follows Irwin in the use of shorter form of classical divisions. (Ramon L. Irwin, "The Classical Speech Divisions," QJS, XXV, 1939, pp. 212-13.) He stated: "Thus we may conclude that the famous 'classical order' of a speech consists actually of only four divisions: exordium (opening, proem), narration (statement), proof (argument), and peroration (epilogue)."

28Cf. ante, p. 126.
29Cf. ante, p. 126.
30Cf. ante., p. 128.
31Ballinger Investigation, op. cit., p. 4921.
32Loc. cit.
33Ibid., p. 4922.
34Ibid., p. 4923.
The discussion of style in this study centers chiefly around a discussion of word choice and composition of sentences. Brandeis used very little "linguistic ornamentation," so that those features of style will be noted only by their omission.

See Ballinger Investigation, op. cit., p. 4904 for example.

Ibid., p. 4906.
Ibid., p. 4900.
Loc. cit., and p. 4912.
Ibid., p. 4913.
Ibid., p. 4922.
Ibid., p. 4921.
Ibid., p. 4919.
Pinchot, op. cit., p. 473.
Pepper, op. cit., p. 85.
CHAPTER VI

SPEECH ANALYSIS: "THE CONSTITUTION AND MINIMUM WAGE"

1. The Speech Situation.

Brandeis habitually devoted much of his time and energy between 1908 and 1916 to the study of working conditions in modern industry. It was only natural that when legislation for minimum wages came before the various legislatures, and much later before Congress, he would show an intense interest in it. When cases came to trial growing out of violations of these laws, they were precedent setting. The speech analyzed in this chapter is Brandeis' oral argument before the United States Supreme Court in defense of the constitutionality of the Oregon minimum wage law. It was delivered in the Supreme Court chambers in the old capitol building on December 17, 1914. It was a case that had come up on appeal from the Supreme Court of that state, Stetler v. O'Hara.¹

Brandeis had examined carefully a case which came up to the Supreme Court from New York in 1904-05 dealing with the regulation of hours for women working in bakeries.² In this Lochner case the Court had ruled that such laws were unconstitutional. This precedent gave him more incentive for his work on Muller v. Oregon,³ which concerned some of the same essential issues. The Court reversed itself here, ruling the Oregon law constitutional. Brandeis
was invited then to appear as counsel and submit briefs in various similar cases. In Illinois he appeared before the state Supreme Court, even when involved in Washington in the Ballinger hearing, as counsel in their hours case. Lief noted in connection with the Illinois case that counsel used the "Brandeis Brief" technique.

...When the Illinois case came up Brandeis presented a brief of six hundred pages of medical or social experience. There were still only a few pages of law. Though straining under a heavy load in the Ballinger investigation he made the trip to Springfield for the oral argument and swayed the judges of the Illinois Supreme Court into overruling the earlier decision of their court.

The Attorney-General of Ohio, supported by suggestions from the Ohio Federation of Labor, requested his assistance in the hours case before that state Supreme Court. When the case later went to the United States Supreme Court, those supporting the legislation won their point. It was only natural that when the case concerning their minimum wage laws reached the Supreme Court, the Attorney-General for Oregon asked Brandeis to handle the pleading. His experience on these issues gave him a background for his speech.

The audience was the austere Supreme Court of the United States. There was the usual group of interested parties, plus a room full of spectators. By 1914, however, Brandeis had been related to issues before the public eye to the extent that such a speech would assume
a wider importance than for the present public alone.

The subject was clear, and the title of the case well known. It has usually been referred to as "The Constitution and the Minimum Wage." The speech was the concluding argument in this case and the opening argument in the subsequent long struggle over this issue.

The case before the bar of the Supreme Court was to test the validity of an Oregon law. The legislature there had established in 1913 an Industrial Welfare Commission and empowered it to provide such regulation of wages, hours of labor, and conditions of work as seemed on investigation necessary for the safety, health and welfare of employees. The commission at once promulgated a minimum wage requirement for women employed in factories and stores. The validity of the act under which these orders were issued was contested, and at the commission's request, Brandeis filed a brief in its support. The statute was unanimously sustained by the Oregon Supreme Court on grounds previously urged in support of hours of labor legislation for women. When the case came before the Supreme Court of the United States in 1916, Brandeis found three pages of his brief enough to state the points of law; but evidence to support his contention that the legislation had reasonable relation to public health, safety and welfare, filled three hundred and ninety pages. The Supreme Court divided equally on the constitutionality of the act, Mr. Justice Brandeis having been appointed to the Court after taking part in the preparation of the brief, not voting. It was generally understood that this decision established the validity of minimum wage legislation.

The decision was hailed as a victory for "progressive" legislation, so much of which had originated in Oregon cases. Brandeis had prepared the brief and had presented the oral argument before the court in an extremely effective speech.
Mason quoted a letter from Judge William Hitz, District of Columbia Supreme Court, to Professor Felix Frankfurter, dated December 14, 1914, which gave a jurist's reaction to the Brandeis presentation before the Court.

I have just heard Mr. Brandeis make one of the greatest arguments I have ever listened to...He spoke on the minimum wage cases in the Supreme Court, and the reception which he wrested from that citadel of the past was very moving and impressive to one who knows the Court...When Brandeis began to speak, the Court showed all the inertia and elemental hospitality which courts cherish for a new thought, or a new right or even a new remedy for an old wrong, but he visibly lifted all this burden, and without orationizing or chewing of the rag he reached them all and held even Pitney quiet.

He not only reached the Court, but he dwarfed the Court, because it was clear that here stood a man who knew infinitely more, and who care infinitely more, for the vital daily rights of the people than the men who sat there sworn to protect them. It was so clear that something had happened in the Court today that even Charles Henry Butler saw it and stopped me afterwards on the coldest corner in town to say that no man this winter had received such close attention from the Court as Brandeis got today, while one of the oldest members of the Clerk's office remarked to me that 'that fellow Brandeis has got the impudence of the Devil to bring his socialism into the Supreme Court.'

2. The Speech Type.

The basic purpose of this speech was to actuate the justices of the United States Supreme Court so that they would vote to sustain the Oregon Supreme Court decision in the Stetler case. It was a very clear-cut purpose, one which guided him throughout the speech. It must be remembered, however, that in addition to his oral argument,
which is analyzed here, the speaker had already filed with
the court three hundred ninety-three pages of brief in
support of his position. It could be said, therefore,
that the oral argument had its purpose of supporting the
written belief. It added the personal emphasis to what had
already been written, and, in addition, served as a refuta-
tion to the speech for the appellants which had just pre-
ceded.

The obvious classification of speech type places the
address in the forensic group. It was the final stage in
the trial of a man who had violated the law. The content
of the speech indicated that Brandeis was conscious of
this purpose.

If one speculates, as did Quintilian, that limiting
the types of oratory to three may be useful, but not always
complete, this speech provides an opportunity for an ad-
ditional classification. Perhaps Quintilian's term
"extrajudicial" applies. In any event, Brandeis spoke to
a larger audience than the present members of the Court.
To that limited group of hearers the speech was judicial.
To the vaster audience, it was extrajudicial, or even de-
liberative in nature, for it advised concerning national
policies, concerning events to come. The classification
of type of speech will depend, therefore, upon the type of
listener which responded to the speech.
Although it is not necessary here to go into a lengthy discussion of the constitutional backgrounds of such decisions, it is essential to an understanding of this speech to summarize the approach to the points of constitutional law involved.

After the adoption of the Fourteenth Amendment to the federal constitution cases began to come before the Court based on an interpretation of its various clauses, particularly what has come to be known as the "due process" clause. That amendment said in part: "...nor shall any state deprive any person of life, liberty, or property, without due process of law..." This clause began to have as wide or as narrow an interpretation as any given Court chose. The cases necessitated careful and discriminating interpretations of the definitions of the terms "life," "liberty," and "property," as well as careful scrutiny of the phrase "due process of law."

By the time of the Stetler v. O'Hara case, and the minimum wage arguments, a large body of decisions had grown up. Some of these had involved procedural questions. They applied to taxation and property rights. More specifically the due process clause was applied to an evaluation of state laws circumscribing police powers and the states' regulation of their various affairs. In 1888
The Court ruled on a case from Pennsylvania concerning the manufacture of oleomargarine. The issue was whether or not the state deprived of property without due process, when, in the exercise of its police power, it allegedly protected public health by controlling the content of oleomargarine. Various controls by the states of business activity, supposedly in the public interest, came under this same clause.

When the agitation arose concerning minimum wages and maximum hours, discussion on constitutionality centered around this due process clause. The phrase studied emphasized the deprivation of liberty, the liberty in this instance being the liberty of contract. When the first hours control case came up Mr. Justice Peckham, speaking for the Court as it declared the law unconstitutional, stated:

The statute necessarily interfered with the right of contract between employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution....

After discussing the police power of the state and the rights of the individual, Mr. Justice Peckham continued:

...it becomes of great importance to determine which shall prevail—the right of the individual to labor for such time as he may choose, or the right of the State to prevent the individual from laboring or from entering into contract to labor, beyond a certain time prescribed by the State.
The State admittedly had the right and power to protect the health and welfare of its citizens. Mr. Justice Peckham disposed of this aspect of the case.

It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law...

It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no substantial effect upon the health of the employee, as to justify us in regarding the section as really a health law...

The decision was five to four to throw out the New York law. It was enough for Mr. Justice Holmes to say in his dissent: "This case is decided upon an economic theory which a large part of the country does not entertain."26 The *Muller* case, in which Brandeis appeared so successfully, overruled this doctrine. The Lochner doctrine was superseded, a decision which was made chiefly, some felt, because the Oregon statute dealt with women only. Even where it has been extended27 it has been held valid.

The same type of reasoning was used in the minimum wage disputes. The question grew out of the interpretation of the due process clause. It involved the liberty of the individual, both as employer and employee, to contract for whatever value he could place or cared to place upon his
services. What Brandeis had to argue in this case was simply the legality or illegality of the law of the state of Oregon, and by implication the other states where these laws existed: Could these states use their police power, on the presumption of necessity to protect the health of citizens, to control the minimum wage at which persons could be employed? What Brandeis wanted the court to say in this case was what Chief Justice Hughes said much later: "The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many States evidences a deepseated conviction both as to the presence of the evil and the means adapted to check it." The restrictions of police power under the due process clause and the definition of liberty were to be the foci of the clash of argument.

With this background of decisions and reasoning before him, Brandeis faced the problem of augmenting his written brief with an analysis of the Oregon procedure, including the approach to the legislation itself, and the administrative policies adopted.

As will be indicated below, the speech here analyzed was both a refutation and direct argument on the issue. The major or inclusive issue was clear:

Is the Oregon statute provided for the control of the minimum wage by the State, in accord with the Constitution of the United States?
There were two subordinate issues: 1. Did the state of Oregon find the best and most reasonable solution to this problem? 2. Once it had satisfied itself as to the justice of its course, was the state of Oregon legally empowered so to act?

Brandeis devoted far more time to his discussion of the first of these points. In fact he had exhausted his time allotted before he reached the second issue, but "Chief Justice White told him it would be quite agreeable with the Court to hear him through."30

b. Arguments.

How much effect the ethos of the speaker would have upon the Supreme Court may be open to question. Naturally it was not known that Brandeis himself was only eighteen months away from the other side of the bench, even before the case at bar would be determined. His great friendship for Holmes had not yet developed. In the six years since the Muller case there had been changes in the Court membership. It was known that the same Justices opposed Brandeis, and it was known what they thought of him. The members of the Court could hardly have been unaware of the fact that before them was one of the most effective advocates the new philosophy of wages and hours control could have found. The Justices probably would have denied its influence, but they could not have failed to notice the strength of the counsel.
The pathetic appeal in this speech was negligible. Two instances fall in this category. The attack on the "forces of conservatism" was one of them.

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.31

Here was an appeal to the basic impulses for survival and national pride. The second, perhaps not as clearcut, but emotional in implication, comes in the concluding sentences of the speech, where he bases his appeal on the "striving for social justice and the preservation of the race."32 The appeal to self preservation again becomes an emotional type of proof.

In support of his position on the first subordinate issue, the reasonableness of Oregon's solution to its problem, Brandeis marshalled five arguments. Some of these were to refute opposing counsel, but they all bore on the issue considered in the first part of the speech.

First, he answered the argument of the opposition that the law was inherently compulsory by the counter proposal that it was instead a prohibitory act. Then he proceeded to justify the restriction in three ways: 1. inadequate wages "which are not sufficient to support women in health lead both to bad health and to immorality;" 2. "women need protection against being led to work for inadequate wages." 3. "adequate protection can be given
to women by way of prohibition; that is, by refusing to allow them to work for less than living wages." Then Brandeis added: "Those are the propositions which are, in substance, either expressly stated in the recitals of the act, or necessarily deduced from its language and provisions."33 His first argument was by explanation.

Parenthetically, before proceeding to his second argument, he clarified for the court why this legislation appeared when it did. Three influences, as he numbered them, accounted for the present law: 1. Great Britain's similar laws; 2. Publications of the Federal Bureau of Labor in 1910-11; 3. Massachusetts Commission of Minimum Wage report in 1912.34

Proceeding to his second argument, Brandeis contended that the state of Oregon had appraised the effectiveness of its statutes, the conditions of its women workers, quite properly, and had, therefore, sufficient grounds upon which to assume a problem existed. He cited thereafter, first, the Oregon investigation into the number of citizens who lived below a healthful standard of living; and, secondly, the investigation into the number of citizens who lived below this standard. Finally, the Oregonians discovered upon research that there were conditions present not peculiar alone to Oregon.

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. In the second place un-healthy and immoral women would impose on the community, directly or indirectly, heavy burdens by the development of ever-larger dependent classes which would have to be supported by the tax payers.

Before going on to an analysis of the problem which had this three-fold aspect, Brandeis followed his argument by explanation and by presenting the dilemma which faced Oregon. This served as a transition to his third argument.

Such are the results which the legislature found would flow in Oregon from women working less than living wages, results which affect vitally not only the present but also the future generations. Hence, the legislature was confronted with this alternative: either to seek, and possibly 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.

In his third argument Brandeis contended that Oregon solved the problem correctly. He did this chiefly by means of the method of residues, with an added example of the workability of the correct method. He stated the four possible methods available to the state of Oregon: 1. education; 2. unionization of women; 3. publicity; 4. compulsion by prohibition. He then explained why each of the first three remedies would be an unsuitable solution to the
social problem facing Oregon.

Brandeis made very effective use of recapitulation in this argument. After he explained each of the four possibilities, he repeated them all in a single statement. Then after reference to the Victoria experiment, he said the Legislature of Oregon recognized it must experiment, unless it wanted to try one of the other three methods, and here he repeated them. These repetitions must have been very effective in oral argument, for they would serve to keep reminding the hearer of the possibilities facing the legislatures. Further, they added to the coherence of the points supporting the argument.

His fourth argument is in refutation, saying that the objections to its workability are not valid. He analyzed two of these.

Finally, he answered what must have been a strong argument of the opposing counsel that such a law would be revolutionary. First, it was not revolutionary because controls with similar bases had been enacted in Britain over one hundred twelve years ago. Secondly, the child labor laws and regulations were in the same vein. Thirdly, it had not been enacted speedily or precipitously, but after thorough investigation of the needs of the state of Oregon. Finally, it was not revolutionary to anticipate the heavy burden upon the taxpayer that underpaid women would become ultimately. The local courts had an opportunity
to sense any revolutionary tendencies. "The Supreme Court of Oregon, likewise knowing something of local conditions, held that it was not."37

At last, after going beyond his allotted time, Brandeis comes to the discussion of the legal issue, Was the state of Oregon legally empowered so to act?

He admits that liberty of contract is important, and that it can be curbed only when shown to be in public interest. He reviewed the decisions dealing with public health and noted:

Upon careful examination of all 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.38

He then reviewed the tests for constitutionality.39 The legal issue boiled down to a rephrased question as follows: "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?"40 He devoted the remainder of his speech to this point.

He developed his argument by an appeal to experience in this country of examples of discriminatory legislation, and of the specific problems in the modern industrial state. Then, so that the point could not be missed, he repeated the issue following his proof:
The real test, as I conceive it, is: 'Is there an evil? If there is an evil, is the remedy, in 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 any arbitrary exercise of power?'

He showed how this act was not basically different from other acts held valid by the Court, and that other legislatures in other matters had been so empowered. His argument then concludes with this summary:

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.

Here was the summation of the legal philosophy under which Brandeis guided his public life. He presented it just as effectively in a statement before the New York State Factory Investigating Commission, January 22, 1915, when he spoke there in behalf of a minimum wage law:

I am unable to see that there is any difference in principle between a minimum wage law and a law governing the hours of labor, or a factory safety law or a child labor law or any of the other laws of this character. We set out with the principle, the fundamental policy, not only in the Constitution, but as the fundamental policy of the Anglo-American people that liberty should not be restricted except in so far as required, for the public welfare, health, safety, morals, and general public conditions....The liberty of each individual must be limited in such a way that it leaves to others the possibility of individual liberty; the right to develop must be subject to that limitation which gives everybody else
the right to develop; the restriction is merely an adjustment of the relations of one individual to another.\footnote{43}

What Brandeis' argument had accomplished was a reversal of Mr. Justice Peckham's point of view. He had reversed the 
\textit{Lochner} doctrine, and had succeeded in making his interpretation of due process the current law of the land.

c. Organization.

The great majority of Brandeis' speeches follow the classical pattern of exordium, narration, proof, and peroration. The address before the Supreme Court on "The Constitution and the Minimum Wage" is an exception to this practice.

In one sense, of course, the first paragraph of two sentences is an exordium.

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.\footnote{44}

He plunged immediately into the argument in answer to the counsel for plaintiffs.

The narration is never clearly stated as one basic purpose or objective of this speech. There are, as has been suggested above, two issues to which he addressed his attention. However, these are not stated following the introduction. They come later in the speech.
The argument, though clearly organized and well supported, follows the pattern of the two issues at hand, and at the same time grows out of the need for answering the preceding speaker. The effectiveness of this argument was in its clear organization. He stated the point at hand, then enumerated, one, two, and three, the reasons why such a contention is valid. He went right through the five arguments on the issue of Oregon's problem and solution, and then concluded with his arguments in support of the technical legal position. The argument was similar to his other speeches in its logical form; that is, it was basically logical in its appeal, clearly organized and ordered, and forceful in its presentation of evidence. However, the general organization of the entire speech is not in the classical pattern. Between the brief opening paragraph and to the almost equally brief concluding paragraph, he followed the problem-solution pattern of speech outline. He stated the problem, and then solved it. His method here was as effective as his other patterns.

The peroration is a single short paragraph. It admitted that the entire proposal is an experiment, but asked, who is to deplore experimentation? He concluded by saying:

The whole subject of women'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 women's minimum-wage act to
reconcile the existing industrial system with our striving for social justice and the preservation of the race. 45

Brandeis did not close with the heated plea he used in "The Jewish Problem: How to Solve It." It was not as abrupt as his close in "The Living Law." He concluded with a reference to his thesis that the experiment of democracy must solve the industrial and economic problems, and that the minimum wage act is but one step in the solution of this problem. 46

Perhaps one reason for the departure from his usual pattern in this speech was the fact that the written brief had already been submitted, and constituted, in the main, his total argument on the case. A second reason for his departure may have been the fact that opposing counsel had spoken just before him. In the "Ballinger Investigation" speech he spoke first. In the other speeches here studied, he was not faced with opposing counsel in this manner.

d. Style.

Lief commented on the style in this speech. "When Brandeis spoke he held the justices in close attention—with facts. His delivery was quiet, conversational, deeply earnest. His style was narrative." 47 Lief caught the two characteristic factors of Brandeis' style in this speech and in others, for this speech was no exception to his rule.

He marshalled facts. The printed brief contained over three hundred pages devoted to facts, and yet in his
oral argument he took great pains to show just what had happened in various countries, and specifically in Oregon and the Australian province, which Oregonians had chosen as their example.

It was also a narrative style. With simple and clear exposition he went directly to the heart of his point, and related the story of his case. He depended upon the intelligent rational mind to accept what to him was reasonable. There was, therefore, no need to embellish his ideas with ornaments which would detract from the facts upon which he relied.

Following Aristotle's classifications, the style of the address would be called both clear and appropriate. There were few metaphors, few faults of style, but a beauty which lay in the way he kept his language on the level of his audience.

Here before the Supreme Court his oral argument might well have become clouded by the jargon of the legal technician. He could have addressed himself to the difficult philosophical and historical implications of the democratic processes under the Constitution. He avoided these hazards. Instead, he spoke in terms of a grave problem, and a solution worth trying, an approach so simple that all could understand— even justices of the United States Supreme Court.
4. Summary

Brandeis' speech before the United States Supreme Court on the "Minimum Wage and Constitution" suggests several conclusions concerning the speaking ability of the Boston advocate.

1. Brandeis was careful to answer the arguments of opposing counsel in terms of the issues as he saw them, thus using the organization of his speech to good effect.

2. He demonstrated more clearly than in many speeches his effective argument by explanation.

3. He demonstrated his well ordered organization of each point.

4. He utilized repetition and method of residues effectively.

5. He kept his language appropriate to that of the greater audience, rather than limiting himself to the technical language of the Court.
FOOTNOTES

1 Stetler v. O'Hara, 69 Ore. 519, and 243 U. S. 629 (1916).
2 Lochner v. N.Y., 198 U. S. 45 (1905).
3 Muller v. Oregon, op. cit.
4 People v. Ellerding, 254 Ill. 579 (1912).
5 Lief, Brandeis, op. cit., p. 183.
6 Ex Parte Anna Hawley, 85 Ohio 495 (1911).
7 There the case was Hawley v. Walker, 232 U. S. 719 (1914).
8 The Old Senate Chamber.
9 The speech was subsequently published in Survey magazine, February 6, 1915, vol. 33, pp. 490-4, 521-4.
10 See footnote, post, No. 12.
11 Mason, Lawyer and Judge, op. cit., p. 111-2.
12 The decision did not hold after a change in personnel of the Court. In 1923 the Court reversed the Stetler decision in Adkins v. Children's Hospital, 261 U. S. 525. In 1936 when the Court overruled several New Deal measures, they held the same view in Morehead v. Tipaldo, 298 U. S. 587. Finally, the Court reversed the Adkins case, going back to the basic philosophy of the Stetler decision in West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937). Later, in U. S. v. Darby, 312 U. S. 100 (1941), the entire base of wage-hour legislation was given broad sanction, even for the national level.
13 Brandeis submitted the brief, worked on it, and spoke in its behalf, but a great deal of the research and preparation of the factual part of this brief was done by his sister-in-law, Josephine Goldmark. She has worked similarly in the Muller case, and the state cases.
14 Mason, *Free Man's Life*, op. cit., 253. Mason identifies Butler as Charles Henry Butler (1899-1940), a distinguished lawyer and author, specializing in International Law. Reporter of the United States Supreme Court, 1902-16, and editor of volumes 187-242 of the U. S. Supreme Court Reports.

15 There are several references in the speech to sections and pages in the printed brief.

16 Quintilian, *Institutes*, Bk. III, Ch. IV, p. 181 ff.

17 Proposed by Congress June 13, 1866, and was declared in force by the Secretary of State, July 28, 1868.

18 Amendments to the U. S. Constitution, Article XIV, Sec. 1.


23 *Lochner*, op. cit.

24 Ibid., p. 53-54.

25 Ibid. at 64.

26 Ibid. at 75.

27 See *U. S. v. Darby*, op. cit.

28 *West Coast Hotel Co. v. Parrish*, op. cit. at 399.


30 *Leif, Brandeis*, op. cit., p. 312.

31 *Frankel*, op. cit., p. 63.

32 Ibid., p. 69.
He anticipated here some of his obiter dicta in *Ashwander v. T. V. A.*, 297 U. S. 288 (1936).

Frankel, *op. cit.*, p. 65.

Ibid., p. 68.

Loc. cit.


Frankel, *op. cit.*, p. 52.

Ibid., p. 69.

His discussion of experimentation in the law represented one of Brandeis' basic philosophies. It was more fully set forth in his famous dissent in *New Ice Company v. Liebman*, 285 U. S. 262 (1932).


CHAPTER VII

SPEECH ANALYSIS: "THE FIVE PER CENT RATE CASE"

1. The Speech Situation.

In the years between 1907 and 1909, Brandeis had interested himself in the business of operating railroads and the financial systems underlying their corporate structure. The New England Lines were the first object of his scrutiny. He engaged in a long and protracted struggle with the New Haven road and its managers. He had blocked the merger of the New Haven and the Boston and Maine. He had exposed fiscal policies which were, at best, of questionable value to the stockholders. Outside of railroad circles this activity did not attract much attention, but Brandeis left his name well inscribed in the minds of those who ran the railroads of the country, and of those who studied their policies. The speech studied here was given in the hearing room of the ICC, in the Commerce Building, on April 30 and May 1, 1914.

The Interstate Commerce Commission had been established in 1887 with relatively limited powers. The power to control the rates charged by railroads had been specifically denied the Commission in its organization act. Later, under President Roosevelt's urging, the Hepburn Act was passed in 1906, but only after a bitter battle, for it conferred upon the I.C.C. the power to set rates.
for carriers. It went so far as to empower the Commission to determine the methods of accounting and bookkeeping which the carriers must follow. The Commission was given thereby the responsibility for stabilizing and standardizing the business operations of the railroads.

The first of the requests for an advance in freight rates came before the Commission in 1910. Hearings were set and the battle lines drawn for the struggle. Each of the railroads was represented by counsel, while only three attorneys represented the public. Brandeis had been retained to represent the shippers by the Traffic Committee of the Trade Organizations of the Atlantic Seaboard. The railroads had asked for a ten per cent horizontal increase, and the shippers were out to oppose it.

Charles B. Going, editor of The Engineering Magazine, summed up the Brandeis thesis on this hearing.

The railroads sought to justify the increased rates on the ground that they needed greater net income, and asserted that this need was due to increased operating costs, resulting mainly from higher wages. They contended that increased rates were imperative because the possibilities of economies in the operation of railroads had been practically exhausted.

Mr. Brandeis opposed the proposed advance on several grounds; but that which attracted most attention was his contention that there still existed in railroad operation huge possibilities of economies which could be attained by the introduction of scientific management—economies aggregated [sic] on all the American railroads 'at least a million dollars a day.'

The headline writers caught the phrase "a million
dollars a day," and spread it across the newspapers of the entire country. The contention created considerable agitation. One group of Western railroad executives telegraphed Brandeis that he could name his salary and they would employ him. Brandeis offered to help, but insisted that it be without charge! The railroad presidents used the headlines for rebuttal, but with specific suggestions implying that they who were the railroads' executives had the proper answers, and certainly knew more than Brandeis who was, after all, only a lawyer from Boston. Much of Brandeis' brief to the Commission, based upon testimony presented, attempted to prove the desirability of scientific management for the railroads.

In 1911 the Commission handed down its decision in which it denied the rate advance request of the railroads. The decree went so far as to suggest further economies on the part of the carriers, reflecting in their conclusions what Brandeis had been urging.

It was only natural that when the railroads renewed their request in 1913, Brandeis should participate in the case. The carriers requested a horizontal five per cent increase this time. It is Brandeis' speech before the Commission at the conclusion of the second, or the five per cent rate case, that is studied here.

In the first case Brandeis had been employed by the shippers. They approached him for the 1913-14 hearings
but he declined. However, the I.C.C., through Commissioner Harlan, sent a lengthy letter requesting Brandeis to serve not as counsel for either the railroads or the shippers, but for the Commission itself. He was reluctant to accept because he realized his previous stand was so well known that it would prejudice many against him. The Commission believed, on the other hand, that if Brandeis served as counsel the people would know that the task was thoroughly done, and that the investigation was not a mere perfunctory and routine hearing. Brandeis finally accepted.

The request had been filed in May, 1913, but it was December 1 before the hearings finally got under way. They dragged along for almost five months. It was not until April 1914 that oral arguments in summation were heard. Brandeis appeared on Thursday afternoon, April 30, and on Friday morning, May 1, 1914.

In the meantime, the railroads had hired Ivy Lee, a public relations counsel, to take their case to the people. The results of his work created a substantial amount of newspaper sentiment in behalf of the railroads. Brandeis had to use the hearings as the basis for the counter-attack in the press. Therefore his examination of witnesses was designed not only to bring out facts, but to earn headlines.

The decision of the Commission was handed down in July, with only a partial victory for the railroads.
decision was that the general rate increase would be denied but that an increase would be given to those roads in the Central Freight Association area. The Brandeis success was destined to be short-lived. In October the railroads requested that the hearings be reopened. Perhaps due to the intensity of the war feeling, the railroads added an appeal based upon patriotism and the need for defense. The Commission reversed its two previous decisions and granted the rates in a December, 1914, decision.

The nature of the audience and the occasion was similar to other committee hearings and to the Ballinger investigation crowds. Here was a situation and audience with which Brandeis was becoming quite familiar. He had argued for price control at an earlier hearing. He was frequently asked to come before committees studying wages and hours legislation.

Brandeis' experience had prepared him for the pleading before a critical but small group of listeners who would arrive at the decision. As is generally true in corporation practice, a great many of his early court cases were before a single judge or referee. It was not enough, as it is not enough today, for an advocate to be able to sway large audiences. Brandeis developed the technique, in the early days of government by commission, of effectively marshalling facts, organizing his material, and presenting a speech to audiences where the emotional
effect of the crowd was replaced by the intellectual re-
sponse of the small group. The seven member Commission,
five of whom were present to hear his summation was one
of the smallest of his national audiences.

The total time taken by this speech was approximately
four and one-half hours. There is no evidence as to his
use of notes or manuscript in this particular speech, but
from his known custom, it may be assumed that he spoke
extemporaneously.

2. Speech type.

The "Five Per Cent Rate Case" speech was deliber­
tive in nature. It was advice on policy for the national
government. While it was not delivered before a legisla­
tive body, it was before a commission acting in lieu of
the Congress, deriving its powers from, and continuously
responsible to, the law-making body which created it.

The purpose of the speech was to persuade the members
of the Interstate Commerce Commission to vote against the
rate increase requested by the railroads.

Both the purpose and the type are clear and unmis­
takable in this particular speech before this audience,
on this particular occasion.

3. The Speech Structure.

a. Backgrounds and Issues.

Rail communications had been opened to the Pacific
Coast in 1869 and from that time on the development of western lands included the rapid and extensive expansion of the railroads. At first the railroads received large land grants as incentive subsidies. Later they were accustomed to develop pretty much their own way, charging "what the traffic would bear," using rebates as special favors, and making the service only as reliable as the competition demanded.

The injection of federal influence first, and control subsequently, was a new trend. The appeals of the railroads for higher rates were likewise a comparatively new development. The railroads had been defeated once,\(^7\) chiefly through the efforts of Brandeis. Now in this present hearing they were confronted with the same counsel, not as representing the shipper, but for the impartial governmental agency.

The issues in this hearing were essentially the same as in the 1910 rate case. At that time the request was for a ten per cent increase in rates but now the request was for half that amount.

The major issue, simply stated, was, Shall the railroads be granted the rate raise?

The subordinate issues, however, were not as easily delimited. In fact, the approach of Brandeis to this summation speech was something of a disappointment to both the shippers and the railroad executives. He brought
smiles to the lawyers for the carriers and shocked expressions to the shippers when he opened with what he considered a basic assumption, namely, that the railroads were not getting sufficient revenue. However he used this as an assumption, and he did not attempt to prove this point. The subordinate issues to which he devoted most of his time, particularly on the second day of the speech, centered around two sub-points:

1. Are there other ways by which the railroads could get this income than by increased rates?
2. Is there anything in the condition of the carriers which should prevent the adoption of these measures?

While it is true that the opposing counsel would not accept all of his reasoning, they accepted the basic assumption that the roads needed more revenues. Incidentally, this position led to a break between Brandeis and some of the other counsel for shipping organizations. Particularly was this true of his relations with Clifford Thorne, an Iowa attorney representing shippers in that area. Thorne, active in the case for the shippers, believed that he had been double-crossed by Brandeis, and when the Brandeis appointment came up before the Senate investigating committee little more than two years later, he made this point against Brandeis.

b. Argument.

The first part of Brandeis' speech before the Com-
mission was delivered on Thursday afternoon, April 30. Most of the time here was devoted to refutation, although in his opening remarks he outlined his position. He stated, following his introductory comment:

Before I address myself specifically to these propositions, I want to call your hearers’ attention to certain erroneous and misleading statements which have been given currency not only in the long propaganda which had been made throughout the country in advocacy of the increased freight rates, but has been calmly repeated here by counsel for the carriers.

The first argument for the increase which was subject to his attack was the railroads’ contention that since freight rates had risen in foreign countries, so they should be raised here. Brandeis sent telegrams and cables to the officials of the various countries named: Switzerland, Italy, and Germany. He received assurances from these sources that the rates had not been raised, except for slight increases in Italy which were for local reasons. Here was powerful rebuttal to the claims of the carriers, from an almost unimpeachable source. It demonstrated the Brandeis technique for thoroughness.

The second contention, the one which occupied most of his time, was the argument of counsel for the railroads that everything else had gone up in price, particularly manufactured products, and, due to labor costs, the carriers likewise deserved increased rates. Brandeis took a large number of items, giving in each area a careful cost analysis and price survey. He successfully pointed
out that railroads paid less for some of their purchases. He showed that different shop management would save them more money than they would otherwise gain. He noted that gas companies had not increased their rates; neither had the electric light companies. He analyzed the telephone service, and, more nearly similar to the railroads, the various street railways in the country. These analyses concluded the major portion of his address on Thursday. At the beginning on Friday morning he added another service group which had not raised rates, viz., the bulk freight carriers on the Great Lakes. On Thursday afternoon he concluded with the question which prepared the audience for his major points on Friday morning:

With that situation presented before you [conditions in other carriers], it leads to the inquiry, Why are the railroads in what they call their plight? That I hope to take up tomorrow morning.12

In the morning session, Brandeis opened with a review of the issue, with a re-statement of the problem which faced the Commission:

What is the explanation of this remarkable fact that in all these other businesses, subject alike with railroads to increase in wages and governmental regulations, increase in taxes, and increase in cost of money, and increased supply, and increased cost of coal, that in all of these other businesses there is blooming health, and with the railroads there is said to be a condition of morbidity. The patient comes here for relief, and it is your duty, and necessarily you are desirous of ascertaining what the cause of that difference of conditions is.13
Brandeis suggested two possible causes for the plight of the roads. "It may be that the railroads have succeeded less well than all these other businesses in increasing their productivity, or it may be that the thing which the railroad is giving to its customers, called by the same name, is not the same thing which they got before."\textsuperscript{14}

There followed one of the most brilliant of Brandeis' analyses of business conditions. It was distinguished by the detailed knowledge of the cost accounting and fiscal policies of such a large number of individual lines. He astounded his hearers with a review of the status and methods of the Pennsylvania, the Baltimore and Ohio, the Norfolk and Western, the Bessemer and Lake Erie, the Buffalo, Rochester, and Pittsburgh, and the New Haven Railroads. He analyzed the relationships between their freight business and their passenger business. He considered the nature of the freight load on those lines showing a freight profit. The mere reading of the speech gives the impression of a complete grasp of the problem of railroad finances.

One of the situations which he analyzed in some detail concerned the development of high transfer charges in the large terminals. These were reported in New York with added lighterage fees, and for Chicago. He called these transfer fees improper practices, "leeches" upon the railroads. They influenced the total amount of the operating revenues. Brandeis observed:
These conditions have developed and grown up year by year, the costs are becoming greater and no general increase in freight rates can keep pace with such leeches upon the service.

What is true in New York and Chicago, he noted, is also true in Buffalo, Toledo, Philadelphia, and in everyone of those places you will find these or other similar leeches upon the revenue, growing and eating into the vitals of these railroads.15 The importance to the problem before the Commission of these "leeches" lay in Brandeis' contention that these drains on revenue would have to be removed, first to effect a great saving, and secondly to improve service. The luxury services of the roads could be eliminated. He further attacked the request for a general five per cent horizontal increase, contending that each of the twenty-two thousand different items carried by freight needed its own analysis of the cost of hauling, and hence the proper rate to be charged. He added these to the advantages of proper accounting, and scientific management, to conclude:

The opportunities for additional revenue are such as to make it clear that not fifty millions, but an amount more nearly approaching hundreds of millions, are easily within the grasp of the railroads, if the methods of conserving revenue are pointed out and followed. If these gentlemen in their efforts to get a greater government revenue out of the community, through an increase in rate, they will be able to secure that additional revenue.16

Brandeis stood firmly on his contention that the five per cent raise would only serve as a palliative, and
not as a remedy. He noted that the railroads had been sending releases to the press suggesting that if the increase were denied, government ownership of the roads would follow. Brandeis took the opposite view, that if the railroads continued to gloss over their basic weaknesses by the simple expediency of rate increases, the ultimate collapse of the roads was inevitable.

Some suggested that the credit of the roads would suffer. Brandeis then proceeded to examine the borrowing policies of several leading roads, revealing that they had had no difficulty in that regard, and could anticipate none. He concluded this section of his argument with a plea to the operators, an appeal to the pride of their profession:

> We must look at this matter and they must look at this matter courageously; they must not be stampeded by their friends in the financial district, but they must look at the matter as operating men and handle the problem manfully, as they have been manfully handled, and as operating men, live up to the great possibilities of the noble professions to which they have dedicated themselves.18

The appeal to their "Manfulness" was the concluding emotional appeal to a long and logical argument. In very few speeches, and certainly in only exceptional cases of extemporaneous speaking, would one find such a complete command of statistical data, much of it dealing with highly technical and complicated information. The didactic pattern was evident throughout. The point was stated, then
briefly explained. Brandeis then compiled such a mass of evidence from the record that it gave strength to his argument. The ease with which he guided the audience through the maze contributed to the effectiveness of the argument.

In this particular address, the effect of the ethical appeal cannot be overlooked. Brandeis had by this time attained considerable national fame. More particularly, he had attained a reputation for his knowledge of and interest in railroads, and for his battles against them. The newspapers saw this possibility at once. The Philadelphia Enquirer complained:

> Why should the Interstate Commerce Commission, which as a quasi-judicial body is supposed to maintain, and which certainly ought to maintain, an attitude of entire impartiality, need to be represented by counsel whose only business must be to furnish it with some reason or pretext for refusing to comply with the railroad companies’ request? How does it happen that Mr. Brandeis, whose hostility to the railroads is notorious, is chosen for its adviser?¹⁹

The Boston Evening Transcript, “his staunch supporter in the 1910 case,”²⁰ said in this connection:

> The railroads see in the person of Louis D. Brandeis, employed as special counsel for the Commission, a man with whom they will have to reckon. Mr. Brandeis’ attitude on the New England transportation system is familiar to everyone, and it is this attitude of his which is giving the railroads their greatest cause for uneasiness today. Mr. Brandeis has a desk in one of the offices of the Commission; legally he represents them; actually, it is felt, he will represent the kind of opposition to the
railroads for which he has long stood. His appearance then, in what amounts to a governmental capacity, indicates to the most casual observer that the Commission, by availing itself of Mr. Brandeis, had in effect given notice to the transportation interests it trusts Mr. Brandeis' judgment in this matter. 21

Seldom did an advocate approach his audience with a greater build up of ethical appeal both by his erstwhile friends and by his opponents. All admitted that what Brandeis would say would carry considerable weight just because he was saying it.

c. Organization pattern.

On reading the first part of this speech one could observe that there is no exordium. Further study leads to the conclusion that the exordium and narration are combined. The statement of the issue, the question at hand, served as the means whereby Brandeis prepared his audience for the material which was to follow. It justified his subsequent approach to the thousands of pages of testimony. 22 The exordium-narration is quoted to illustrate this immediate plunge to the heart of the problem, and the preparation for the arguments to follow.

May it please your honors, it may be helpful if at the outset I state the conclusions which a review of the record in these cases has brought to me. They are three:

First, that on the whole, the net income, the net operating revenues of the carriers... are smaller than is consistent with the assured prosperity and the welfare of the community... In view of this it is desirable that steps should be taken as promptly as reasonably may be
to increase those net revenues.

Secondly, that the method proposed by the carriers for increasing these net revenues is essentially unsound; that it is...entirely too low, and would, if approved, involve the exceeding of the powers vested by Congress in this commission; and as to that small part of the tariffs as to which it would be legal to approve them, it would be extremely unwise both for the carriers and for the community to grant that approval.

Third, there is nothing in the condition of the carriers which should prevent the adoption of those methods of increasing their revenues which are conformable to and in accordance with their interests, and that of the community, and there exist, as has been indicated in this record, adequate means of increasing those revenues without resort to unsound, largely illegal, and undesirable methods of the alleged horizontal increase.23

From these opening statements, Brandeis went directly to the refutation of opposing counsel's arguments. There followed the major argument for his own case on Friday, as discussed above.

The peroration, if such the concluding short paragraph may be called, was a plea for what Brandeis had been giving his hearers for over five hours: a plea to consider the facts.

If you gentlemen will look into the facts, instead of at the generalizations and general statements, you will find that there is nothing whatever in this situation which should prevent your doing what is of such importance to the railroads and to the community, and to us all, and that is to remedy the cause of this trouble, to stop the leeches, and to put an end to injustice, discrimination, and waste.24

In his conclusion, Brandeis mentioned the points for which he talked most: facts, injustice, discrimination, and waste. He wanted the Commission to contemplate
seriously the great number of facts which had been revealed in testimony and documents in evidence. He wanted the injustice of the slipshod financial policies discontinued. He wanted no discrimination against some lines, against some types of shippers, against some industries in certain areas. He deplored the waste brought about by inefficiency. This position was the basis of his approach to the problem of the railroad rate cases, and, indeed, the basis of much of his approach to any public problem.

d. Style.

When a speaker is confronted by voluminous statistics, large numbers of financial reports, and a series of accounting problems, his major problem in style is clarity. To review these orally in such a manner as to hold the attention of the listeners is an extremely difficult task. Such was the challenge facing Brandeis in this speech.

He was not unaccustomed to handling figures, for he had engaged in careful study of the mathematics underlying many of the laws, so that when he approached these problems, he would first know himself what was at stake. Then he proceeded to attempt to make it clear to the audience. "Holmes in '97 had put it this way--'the man of the future is the man of statistics and the master of economics.' Holmes never bothered to measure up to the prophecy. Brandeis took him seriously."25
Brandeis achieved clarity in several ways. First, he always stated in advance the conclusions that he knew the statistics would prove, so that the hearer would know toward what result he was moving. For example, before giving the date, he told his audience that the railroads had had little difficulty getting credit and borrowing money. Then he proceeded to give the data on the recent loans to railroads, the speed with which their bonds were purchased, and other information pertinent to his position. Second, he was careful to be specific in his explanation of terms used with his data. He did not say simply that "materials do not cost as much as formerly," but he took the cost of a locomotive and analyzed it in terms that the audience would know. Thirdly, he avoided technical terms, or when using them he explained their implications and related them to the point at hand. When he used the terms "cost-ratio," "operating ratio," he explained their meanings to the Commission.

His use of figurative language was limited to the one metaphor, the references to the "leeches" on the railroad revenue. He had one analogy, the consideration of the railroads as a patient coming to the Commission as the doctor. This was approximately the amount of figurative language one would expect in a four-hour Brandeis speech.

On this occasion there were four interruptions for
questions. He was interrupted first to make sure of the terminology in the freight-ratio issue. The chairman interrupted twice, once on a question concerning a volume of the record in which an item could be found, and again to clarify the relation between profit and loss and rates. His colleague interrupted once to clarify Brandeis' former position on the railroads' surplus.

4. Summary.

Brandeis' speech before the Interstate Commerce Commission on the "Five Per Cent Rate Case" suggests the following observations on his speaking technique:

1. Brandeis demonstrated again his ability to grasp the broad background of an issue and to present the material that supported his thesis.

2. He showed his mastery of the clear style, his ability to make language reveal the meaning of statistics and financial statements of various kinds.

3. He stood again for efficiency and scientific management, holding that the highest idea of community service demanded these goals of business and industry.
CHAPTER VII

FOOTNOTES


2 Mason quotes the New York Annalist on the opening of the hearings: "Promptly at 10 o'clock the person corresponding to the court crier or bailiff rapped for respectful attention. Everybody rose. The commissioners filed in and took their seats. The bentwood chairs creaked, papers rattled, and Louis D. Brandeis, representing all those who consume the commodity called transportation, began to comb his hair with his fingers. He ought not to do that. It is a distracting and tends to create uneasiness on the other side...." Free Man's Life, p. 339.

3 Ibid., p. 338-40.

4 The hearings had been opened in December, and a vast amount of evidence accumulated. Then there was adjournment for about sixty days to allow for examination and study of this material.

5 The Central Freight Association area was that part of the country north of the Ohio and Potomac Rivers, and east of the Mississippi.

6 Those present for this speech were: Messrs. Harlan, as chairman, McChord, Meyer, Hall, and Daniels.

7 Cf. ante p. 76.

8 Cf. post p. 183.


10 Ibid., p. 5234.

11 "Electric light, of course, is a newer industry." Ibid., p. 5238.

12 Ibid., p. 5239.
Delay in printing the report caused delay in final consideration.

22 *Five Per Cent Rate Case, op. cit.*, p. 5265.


25 *Leif, Brandeis, op. cit.*, p. 344.


28 *Loc. cit.*


CHAPTER VIII

SPEECH ANALYSIS: "TRUE AMERICANISM"

1. The Speech Situation.

The annual Fourth of July celebration in Faneuil Hall, Boston, is one of the oldest uninterrupted series of commemorative exercises in the United States. It is an occasion when the Bostonians pay tribute to their own historic past, their own part in the struggle for independence. Brandeis addressed this celebration in Faneuil Hall on July 5, 1915. The audience on this occasion was made up of mixed nationalities from the area. The Boston Post spoke of the group as being "a crowd of Americans, native and foreign born, men and women..." The audience knew the speaker as one who had made his way to success in their city.

Many looked upon him as a native of Massachusetts, forgetting his origin. Long before this time he had become distinguished as an advocate of unpopular causes and famous as one who was not afraid of the big corporations, the big unions, or big government. He had already declined the nomination for Mayor of Boston and for Governor of Massachusetts. He had already espoused the cause of Zionism. "It was the first time a Jew had been the city's orator for the day." There were some, without doubt, who did not approve the speaker, but it may be assumed that on
this occasion they were in the minority.

The subject was appropriate for the occasion. On Independence Day the subject of "True Americanism" would be well received by the Boston celebrants. The historical background of the occasion, the historical surrounding of the Hall itself, all provided the appropriate setting for a discussion of a theory of what the American heritage was, and what it should become. Naturally some people who attend these occasions go no matter what the subject or who the speaker. Certainly there were some of these "regulars" present for this speech. However, it is not unlikely that the popularity of the speaker, the civic implications of his subject, and the uniqueness of Brandeis as a speaker attracted many to this occasion.

In spite of the rainy day, more than 1000 people crowded into Faneuil Hall for the ceremonies and addresses. Judge James Madison Morton Jr. was the other speaker. Brandeis had the "main address" of the day, being designated as the official orator. As such he had his speech printed in the traditional manner by the city council.

The program opened with a prayer by the Rev. Charles B. Lyons, S. J., President of Boston College. Due to a "tire puncture caused by his automobile skidding on the rain-soaked street," Brandeis did not arrive on time at the hall. The prayer was over, and the orchestra was playing when he entered. The Boston Herald reported that
"the stored up applause burst out spontaneously. For several minutes he was unable to make his acknowledgment above the cheers." The Boston Post noted that Mr. Brandeis was delayed by a punctured auto tire, and did not arrive until after the ceremonies had begun. Mr. Brandeis was escorted to the platform while the orchestra was playing. The audience stood and cheered as he came through the hall. Three rousing shouts echoed to the roof.

After the preliminaries were concluded, and following Judge Morton's remarks, Brandeis was presented. Acting Mayor George W. Coleman introduced Brandeis as 'One of the most distinguished citizens of Boston, opposed only by those who ought to know better, consecrating great gifts in a superlatively generous way to his fellow men' and he expressed gratification that Mayor Curley had broad-mindedly set a new precedent in choosing the orator of the day. Mr. Brandeis reception indicated that the audience agreed with Mr. Coleman.

The response of the audience was enthusiastically favorable. The speech was not lengthy, only about twenty minutes long. The crowded hall gave him good attention and supported his appearance in every way possible.

The Boston Journal reported the event as follows: Faneuil Hall, crowded for the city's annual Independence Day oration, gave Louis D. Brandeis a rousing welcome and enthusiastically applauded the call for loyal citizenship in his address on 'True Americanism.' It was the first time a Jew has been the city's orator for the day.

The Boston Post headlined "Cheers for Brandeis at Faneuil Hall." The report emphasized the importance of
The occasion and the reception accorded the speaker.

The ideals of true Americanism toward which the people of these United States must strive to realize genuine democracy, were presented in a scholarly address by Louis D. Brandeis, Boston's Independence Day Orator, before a crowd which packed Faneuil Hall to the doors yesterday morning...a crowd of Americans, native and foreign born, men and women, who gave Mr. Brandeis an ovation and who applauded again the principles he presented.

Mr. Brandeis quietly and with his usual splendid diction, then delivered the oration, and exercises concluded with the singing of 'America.'

Mr. Brandeis was greeted by dozens of people afterward.

The Boston Globe gave the most detailed description of the program. Among other items it noted:

Louis D. Brandeis was cheered to the echo by an audience of 1000 or more at the Faneuil Hall exercises in commemoration of the signing of the Declaration of Independence yesterday morning, after he had expressed in his oration his conception of "True Americanism."

Mr. Brandeis' exposition of American ideals and their progress toward the broader Americanism of the future brought repeated demonstrations from the great crowd, many of whom craned their necks from the crowded doorway to get a glimpse of the speakers.

His suggestion that the possibility of an enduring peace abroad depends upon the recognition of just such ideals as those which supported the American nation was also warmly applauded.

The Globe further described the conclusion of the exercises:

At the close of his oration, Mr. David McKay
of the committee led three ringing cheers for Mr. Brandeis. The enthusiasm was catching and other cheers were called for. One lad in the gallery, with better heart than command of his tongue, called for 'three cheers for the p-p-public s-s-sentiment.'

Press comment evaluated the occasion as very successful. The acting Mayor gave a reception at the Parker House for forty guests, honoring the speaker. The papers gave the event wide coverage as one of the principal celebrations of the day, the official one for the city of Boston. Brandeis had again given an effective speech before an enthusiastic audience.

2. The speech type.

The purpose of the speech on "True Americanism" was to inspire, or to arouse to a sense of duty. More specifically, the purpose was to arouse in the audience a greater appreciation of the peculiarly American ideals of democracy.

The speech type should be classified as ceremonial, or epideictic. It is one of the few that Brandeis gave in that category. He was usually on the stump for some cause, or carrying the banner in a crusade. In a sense this was the case here, for he called for a rally to the American ideal. However, although it was persuasive in nature, it was not forensic, and it was not deliberative in the Aristotelian sense. It was an attempt to inspire the audience by referring to the occasion, the subject, and
3. The speech structure.
   a. Backgrounds and issues.

There was no background of controversy for the speech or the occasion of Brandeis' address on "True Americanism." It was not a belligerent striking out at the forces of evil—the "interests," the "big corporations," or any of his other favorite opponents. There was no particular social, economic, or political significance in the occasion apart from its patriotic and historical importance.

Yet it would not go unnoticed here in the center of staunch New England conservatism, that the orator for the day was a Kentucky-born Jew, son of immigrant parents. The background of the speaker himself, placed in the historic setting on Independence Day, must have contributed in no small measure to the general acceptance of both the speech and the speaker. The occasion gave Brandeis the opportunity to discuss the theoretical application and philosophical basis of some of the policies he had been following over the years.

The single issue around which Brandeis built his speech was: "Can we better understand and develop Americanism?" Although he used a very familiar phrase he wanted to leave no doubts as to what his own meaning and understanding of the term Americanism was. For this purpose there are three subordinate issues, which constitute
the main body of the discussion. These are:

1. Is there a difference between Americanism and Americanization?
2. Do we understand the American ideals?
3. Are these ideals peculiarly American?

These issues were not controversial for this audience, but they could be considered provocative. Brandeis used these questions to provide the framework for the persuasive exposition of his own ideas on the working democracy.

b. Argument.

In the speech on "True Americanism" the ethical appeal of Brandeis was very strong. As noted above, he was given cheering welcome to the hall. The papers referred to him as the well-known Boston lawyer. He was introduced as one who had made "superlatively generous" contributions of his talents to the city, state, and country. Many people came to the meeting because of the speaker, as well as the occasion. Under such circumstances the appeal of the speaker, based upon his character and reputation, must have been very strong. Some of the cheers at its conclusion would have come no matter what he said. They were for the man Brandeis, the speech provided the opportunity for an expression of public sentiment.

The speaker's acceptance by the public had been growing throughout the years. After 1908 he was known on a national scale. At home in Boston his stature continued
to grow. On the occasion of this speech his popularity had reached its zenith, for in less than a year he was to sit on the United States Supreme Court, whose vows he took very seriously. Although he made other speeches in the next eleven months, this speech represented the peak of his home-town acclaim.

In the commonly accepted view of the Fourth of July oration, one expects to find the speech full of emotional or pathetic appeal, full of colorful phrases, historical allusions, impassioned quotations from the founding fathers. Nothing of this kind appears in "True Americanism." Not even for such an occasion would Brandeis set aside his long established and habitual language patterns. If, in all of his career as a public speaker, there was an occasion when he could have taken the opportunity "to tear a passion to tatters, to very rags, to split the ears of the groundling," this was the time and place. The idea in all probability did not occur to him, but if it did, he quickly pushed it aside.

It cannot be concluded, however, that this speech was not without its emotional overtones. Aristotle suggested "persuasion is effected through the audience, when they are brought by the speech into a state of emotion." It is not alone the language of the speech itself which makes the audience react emotionally, but the situation
may likewise produce an emotional state in the audience. The reaction of the hearers to Brandeis' speech would indicate that such was the case. Thonssen and Baird, after a discussion of this problem observed:

The distinction between referential and emotive material does not necessarily imply that there is the right word or set of words for a particular statement....

The logical-affective dichotomy thus results from the way hearers respond to certain words or combinations of words. As we have just observed, no particular word is certain to be 'loaded' or affectively charged for all people; nor will it necessarily bear the same emotional relevancy at different times or in different configurations. Statements which are purely matter-of-fact designed to tell something without embellishment--might be highly effective in their influence upon hearers....

The reaction of the audience would indicate that the speech itself, combined with the influence of the situation produced an emotional reaction. It may be said, therefore, that considerable emotional appeal or proof was employed in this Fourth of July oration.

To what specific arguments did Brandeis adapt his logical proof? Three of these may be found in this speech. The first argument was concerned with Americanization. He spoke of the new groups coming to this country and what it meant to them to become new citizens. He emphasized that the process of Americanization was more than clothes, names, and customs. It was more than the English language. It consisted of a deep rooting of
interests and affections.

He must be brought into complete harmony with our ideals and aspirations, and cooperate with us for their attainment. Only when this has been done will he possess the national consciousness of an American. The people there understood what was involved in the Americanization process, for Boston is composed of many different minority groups, most of which were undoubtedly represented on this occasion.

The second argument centered around the concept of the American ideals. In a sense this section of the speech was expository in nature. However, the explanation of his stand implied an acceptance of his belief and an acceptance of his conviction. Such a position implied argument throughout. The first of these ideals was the development of the individual. Because of a consciousness of the need of the individual, America maintained the concept of life, liberty, and the pursuit of happiness. The ideal implied a high standard of education for all citizens.

Every voter is a part ruler of the state. Unless the rulers have, in the main, education and character, and are free men, our great experiment in democracy must fail. It devolves upon the state therefore to fit its rulers for their task. Every citizen must have an education, broad and continuous.

As might be expected of Brandeis, a man who had given continuous study to the solution of some of the economic problems of his era, he introduced as basic to the American ideal the economic concept of the American
standard of living. To Brandeis this was an essential part of man's freedom. "Furthermore, the citizen in a successful democracy must not only have education, he must be free....Control and cooperation are both essential to industrial liberty." Two things constituted freedom in the Brandeis sense. First there must be industrial freedom, and secondly, the individual must have a degree of financial independence. He had implied earlier in the speech that the American standard of living held out this hope to all of its citizens. It suggested a satisfaction of dreams, a satisfaction which can come only through the full development and utilization of one's faculties. In order that men may live and not merely exist, in order that men may develop their faculties, they must have a reasonable income; they must have health and leisure....The essentials of American citizenship are not satisfied by supplying the material needs or even the wants of the worker.

In many respects this was not the commonly accepted definition of the American ideal. Brandeis added the economic concepts. To this extent it became argumentative. The third point in his argument attempted to show what made these ideals distinctly and peculiarly American. This uniqueness lay first in a belief and secondly in political application of that philosophy. He gave his statement of the philosophy:

Many nations seek to develop the individual man for himself and for the common good. Some are as liberty-loving as we. Some pride themselves upon constitutions more democratic than our own.
Still others, less conspicuous for their liberty and democracy, claim to be more successful in attaining social justice. And we are not the only nation which combines love of liberty with the practice of democracy and a longing for social justice. But there is one feature in our ideals and practices which is peculiarly American—it is inclusive brotherhood. 18

Following this statement of the philosophical basis of Americanism in true "inclusive brotherhood," he suggested its political application:

Democracy rests upon two pillars: one, the principle that all men are equally entitled to life, liberty, and the pursuit of happiness, and the other, the conviction that such equal opportunity will most advance a civilization. Aristocracy, on the other hand, denies both these postulates. It rests upon the principle of the superman. It willingly subordinates the many to the few, and seeks to justify sacrificing the individual by insisting that civilization will be advanced by such sacrifice. 19

These arguments are not supported with evidence in the same sense as the contentions in the Ballinger Investigation speech. They were not based upon statistics in the manner of the Five Per Cent speech. It was a kind of a priori argument, in which the antecedent facts were assumed to be accepted by the audience. It was a non-belligerent type of argument most appropriate to the occasion.

c. Organization pattern.

The exordium for this speech was very brief. Brandeis opened with the quotation: E pluribus unum. His opening paragraph was an explanation of the use of this motto in
the development of the country. He showed how once we were few, but now as many, we still advance together under this same motto.

The statement of his purpose, the narration, was clear and concise. Apparently the nature of the occasion had been previously designated for him, and for the audience.

On our nation's birthday it is customary for us to gather together for the purpose of considering how we may better serve our country. This year we are asked to address ourselves to the newcomers, and to make this Fourth of July what has been termed Americanization Day.20

The narration of his purpose explains his subsequent position in the main body of the speech. It gives his reason for discussion of his theories and beliefs on Americanization, the American ideal, and the peculiar nature of American democracy. These became the major part of his argument, the bulk of the speech proper.21

The peroration was an appeal for the preservation of individual characteristics of minorities, as they had their own "differentiated development," so that at the same time they could become truly American. He then suggested this principle as one which could bring an end to the conflict.

On individualism of peoples he stated:

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 is unattainable.
The new nationalism adopted by America proclaims that each race or people, like each individual, had the 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. Not until then can the foundation be laid for a lasting peace among the nations.22

The concluding paragraph expressed the hope for world peace, a sentiment which was certainly acceptable to his audience.

The world longs for an end of this war, and even more for a peace that will endure. It turns anxiously to the United States, the one great neutral country, and bids us point the way. And may we not answer: Go the way of liberty and justice, led by democracy and the new nationalism. Without these, international congresses and supreme courts will prove vain and disarmament the "Great Illusion."

And let us remember the poor parson of whom Chaucer says:

"But Criste's loore, and his Apostles twelve,
He taught, but first he followed it hymselfe."23

Here again there was no attempt to interpret his earlier points in his peroration. He drew to a quick conclusion, stated his hope for peace and its basis, and then closed with poetry.

d. Style.

The basic Brandeis style of the simple declarative sentence was the pattern for this speech. It was the exposition of his theory of Americanism, a theory which he assumed needed only to be explained to be accepted. The choice was limited to relatively simple words and phrases,
not too difficult to understand.

He used the minimum of ornamenting devices. He had only one brief analogy. He used one example. He made reference to eighteenth and nineteenth century history, with which the audience certainly would be familiar. Aside from the opening reference to the motto, there was only one quotation, that of the sentences from Chaucer used as his conclusion.

If there is such a thing as an emotional style, it could not be found in this speech. Yet the emotional response, the enthusiasm generated by the combination of the speaker, speech, and occasion, was of such a character as to suggest that there was emotional content to the words above that which the average reader would find. In this respect Brandeis was able to select his own pattern for following the assigned theme of the day. He took the simple, direct and clear language of the average man, and described his theory in such a way as to arouse the hearers to a new appreciation of their American heritage.

4. Summary.

The speech of Brandeis on the Fourth of July celebration in 1915, entitled "True Americanism," was important to this study because of the following observations suggested by it:
1. Brandeis used simple direct language to gain an emotional response from the audience.

2. He used logical-affective argument as the basis for his appeal.

3. He did not ornament the language to gain his end.

4. He presented a unique interpretation of American ideals, based upon his own economic theories.
CHAPTER VIII

FOOTNOTES

3The celebration for Independence Day was on July 5, 1915, a Monday.
5Loc. cit.
6Post, op. cit., p. 7.
8Journal, op. cit., p. 5.
9Post, op. cit., p. 7.
10Globe, op. cit., p. 12.
11Loc. cit.
12Cooper, Rhetoric, op. cit., p. 9.
15Ibid., p. 6.
16Ibid., p. 7.
17Ibid., p. 6.
18Ibid., p. 8.
19Ibid., p. 9.
20 Ibid., p. 4.
21 Cf. ante p. 196.
23 Loc. cit.
24 See supra, note 23.
CHAPTER IX

SPEECH ANALYSIS: "THE JEWISH PROBLEM: HOW TO SOLVE IT"

1. The Speech Situation.

Brandeis' speech on "The Jewish Problem: How to Solve It" has been selected as representative of his public addresses in the cause of Zionism. Because he devoted much of his energy and time to the Jewish program, it is important to include one of this group of speeches in this study. The speech studied in this chapter was delivered June 2, 1915 before the conference of the Eastern Council of Reform Rabbis, in Temple Emanu-El, in New York City. His work in this area was as much a campaign and a crusade as was that on savings bank insurance, the wage and hour laws, or the scientific management for railroads. The speeches here were enthusiastically received; they resulted in giving him a place of leadership to the extent that Zionism constituted a unit of his life in the period under study.

One of the unique aspects of Brandeis and Zionism was the time at which he began his work. He was fifty-six years old before he became an avowed Zionist. He had not ignored the fact that he was a Jew. He had made minor gifts to the customary Jewish charities. He had spoken for Jewish groups as an inactive Jew, an "outsider." Not until 1912 did he become an active worker in the cause which was to be so important to him the rest of his life.
and in which he engaged actively until 1921.

Mason summarized the Jewish background as follows:

Brandeis came to Zionism and Judaism at the height of his career, and as a typical American assimilationist. His ancestral background included no formal religious observance, no nationalist leaning, no racial-culture interests such as a knowledge of Hebrew and the Talmud. Several members of the Brandeis and Goldmark families had married Gentiles. His law practice and social life had never been identified with any one race, sect or interest. His friends were indiscriminately Jews and Gentiles. He never attended synagogue, or other religious observances.

Brandeis' grandfather, Sigmund Dembitz, and great-grandfather, Aaron Behr Wehle, were devout members of a Jewish sect called Frankists, but their wives remained orthodox.... The only throwback to tradition was Brandeis' uncle, Lewis Naphtali Dembitz, who reverted to strict orthodoxy at the age of thirteen after making acquaintance with an orthodox classmate at boarding school in Prague. Uncle Lewis later developed into the Jewish scholar of the South and became an early American Zionist. Brandeis was fond of his uncle, and this affection may have planted the seeds of sympathy for Zionism.1

Mason accepts the De Haas version of Brandeis' conversion to Zionism.2 Joseph Gilbert, Brandeis' son-in-law, does not accept this view, but attributes the zeal for Zionism to other stimuli.3 Others suggested that it was the influence of the Flexners4 which made him see the opportunities to adopt their religious, social and political aspirations as his own. Mason probably correctly attributes some of the early impetus to Brandeis' experience with the great number of Jews involved in the garment workers strike in 1910, where he served as arbiter, and where he saw the plight of many of the Jews in that industry.5 Lief sug-
gested the influence of Aaransohn and his reports from the agricultural experiments in Palestine. Judd Dewey told of accompanying Brandeis to a Boston meeting in Plymouth Theatre where he made his first speech on behalf of Zionism. He stated that Brandeis approached it with as much zeal as any of his other crusades. Whatever and whoever the stimuli, it was announced at the Cleveland Zionist convention of 1912 that Louis D. Brandeis of Boston had joined the cause. It was the beginning of one of the important activities in the jurist's life.

As in other programs, Brandeis gave a great deal of time, energy, and money to the Zionist cause. He took time from his law practice, and his Washington appearances to go on lengthy speaking tours. He spoke frequently on the subject "Zionism and Patriotism."

In 1912 and 1913 Brandeis appeared frequently on the speaker's platform, practically making cross-country tours on behalf of Zionism. During the summer of 1914 Brandeis devoted his vacation to intensive study of the Jewish problem. In the fall and winter of 1914, paired with Dr. Schmarya Levin of the Actions Comité, he went on a speaking tour--Philadelphia and Baltimore, Pittsburgh and Rochester. In early 1915 he continued active in Zionist work. His speech on Zionism and Patriotism was published in several editions, and widely acclaimed.

The speech on "The Jewish Problem: How to Solve It" came when Brandeis was at the height of his interest and work in Zionism. It was delivered on June 2, 1915, before the conference of the Eastern Council of Reform Rabbis in
Temple Emanuel in New York City. It was, in one sense, the summation of the Bostonian's position on the whole problem of Zionism, the Jews, Palestine, and world peace. Both his friends and his critics accepted this speech as his magnum opus in the Jewish cause. Mason reported that up to 1919 it had been printed in five editions, comprising 50,000 copies. The effort was bold, in a way, because it presumed to suggest the solution to a problem that was centuries old. The content of the speech was as positive as the title. Many of his friends considered Brandeis just the man to present such a case for the Zionists, and for that reason they accepted it not only as his own point of view, but as that of the vast majority of his followers. The audience was one of the major groups in Jewry. The conference of Rabbis was an important place from which to address the world on such a subject.

Only a few days more than a year from this date, Brandeis was sworn in as an Associate Justice of the United States Supreme Court. Some of his friends in Zionism felt that in accepting this post he had abandoned them in the midst of their battle. In 1920 some of the Jewish leaders urged him to resign his seat on the court and take up the world leadership of the movement. He considered briefly, and then declined. He was interested in the Jewish cause the rest of his life, although he did not publicly and actively participate in its councils.
and program after 1921.

2. The Speech type.

This speech before the Rabbis should be classified as a speech to convince. Brandeis had been going about the country saying much the same thing in an effort to arouse his brethren to a more intense and active participation in the Zionist cause; he had urged and received many gifts. The purpose on these occasions was inspiration and action. He wanted joiners in the cause. He wanted the Jews of America to carry forward their share in the world-wide movement.

On this occasion, judging from the nature of the situation and the content of the speech, his purpose was more to reason with his audience, to gain an acceptance of his belief because of the logical position he took. Here was his apologia for his personal zeal of the past three years, and for the upsurge in the Zionist movement. Here was his considered and reasoned solution to the thorny and vexatious problem of what to do for all Jews everywhere. Quite probably some of the Rabbis differed with him, and certainly there were many who would read the speech who had not previously supported this view. Brandeis had on this occasion an audience that demanded his most convincing speech.

In the Aristotelian sense, it was a deliberative address. In every respect it was counsel for future
action. Although it was not delivered before a legislative body, the implications were clearly advisory, clearly an attempt to urge a course of action. The policy was not only for his immediate hearers, but for all Jews everywhere and for all governments who had to deal with Jews and Palestine.

3. The speech structure.

a. Backgrounds and issues.

The background of the issues brought forward by Brandeis in this speech grew out of the two directions the Jewish movement was taking throughout the world. The American Jewish Committee was eager to steer completely away from anything which resembled a nationalistic approach to a solution of Jewish problems. They did not want to propose a homeland for their people. These Jews approached unification from the philanthropic and humanitarian view, that Jews should help Jews wherever they are. It was completely outside their plans to have a Jewish state. There were other groups of "assimilationists" in this country and abroad.

Brandeis, on the other hand, had served as a member of a committee known as the Provisional Executive Committee for General Zionist Affairs, which took the position that the Jews should become a national unit. The leaders of this phase of the Zionist movement held that there should
be an American Congress of Jews which should attempt to solidify a nationalistic group with national aspirations. They desired the revival of the state for Jews. An understanding of these conflicting views helps one appreciate the meaning of the issues discussed in this speech.

The speaker himself stated the basic problem early in his address:

For us the Jewish problem means this: How can we secure for Jews, wherever they may live, the same right and opportunities enjoyed by non-Jews? How can we secure for the world the full contribution which Jews can make, if unhindered by artificial limitations?\(^\text{14}\)

Stated in terms of an issue, the questions became:

Will a national homeland for the Jewish people give Jews their rights and opportunities, and secure their full contribution for the world?

Brandeis' position on this issue was nationally known. He gave here a clear and forceful statement of what he viewed the problem to be, and what he considered the just solution.

There were two subordinate issues:

1. Are the Jews a nationalistic unit?

2. Is making Palestine a homeland for this nation the solution to the problem?

Subordinate to this second issue was a question that bothered many, Jew and Gentile alike: is the desire for Palestine as a Jewish nation consistent with patriotism as a citizen of America, Britain, France, etc.?

The speech answered each of the questions in a very
positive and effective manner. The fact that Brandeis did not dodge these issues, particularly in relation to patriotism, was one of the things that made the speech an outstanding contribution to the discussion of the problem.

b. Argument.

As in all of his 1915-16 speeches, there was a growing ethical appeal in support of the speaker's logical and pathetic arguments. Before many of his previous audiences, Brandeis had aligned himself with the forces of the common man. He was the "people's attorney" against the railroads, the trusts, the insurance companies, the big employers. In the same way he considered himself a leader for the oppressed Jews in his work in Zionism. He fought what he considered a battle to give every helpless Jew in the world a chance for equality and an opportunity for developing his best Jewish spirit.

Before the audience of Rabbis, he was the voice of a distinct segment of the Jewish people. A great deal of what he said would be acceptable because it came from such a leader. His ethical appeal for this audience would be forceful in itself.

There is not as much pathetic appeal in this speech as in some of his other statements on Zionism. For example, Zionism and Patriotism is a strong appeal to the historical heritage of both Jews and other national groups. As he went
about the country with this speech, it had a tremendous emotional appeal. Perhaps in speaking on Zionism before Jewish audiences Brandeis' speeches reached the height of emotional appeal. Yet on this occasion, before the well-educated Rabbis, he was true to form in that he presented to them a clearly outlined, logical argument for his position.

There are, however, in this speech several instances of the use of pathetic appeals. The appeals to the passions are found in some of his quotations.

He quoted Mazzini, on nationalism, and hoped that the Jews would likewise "proclaim to all the world that they also live, think, love, and labor for the benefit of all."

The appeal to national pride is used:

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?

He appealed to their Jewish cultural heritage.

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...

Again he said: "Let us insist that the struggle for liberty shall not cease until equality of opportunity is accorded to nationalities as to individuals."
These illustrations of pathetic appeal reveal that Brandeis had a mastery of this phase of speech making. In no other speech of his do we find the clear underlying implication of the emotional argument, several times specifically stated, and usually implied, coupled with the consistent logic of a clear outline, and with arguments well supported by reasoning and evidence.

A better understanding of this argument of this speech comes from an examination of the outline of that section.

I. The liberal movement will bring full liberty when it not only protects, but recognizes as equals minority groups.
   A. One people cannot and should not necessarily dominate others.
   B. Liberty must be for all, for only then will anti-Jewish sentiment diminish.
   C. Nationalities as well as individuals demand freedom.
      1. The differences between a nation and a nationality are clear.
      2. The Jews are a distinct nationality.

II. "Standing upon the broad foundation of nationality, Zionism aims to give it full development."20
   A. The nature of Zionism is clear.
      1. It is not to compel all Jews to live in Palestine, but to establish a place for all Jews who desire to go to a "legally secured home, where they may live together and lead a Jewish life."21
         a. A large population is not necessary.
         b. There is an eternal longing for Palestine among the Jews.
         c. Rebirth of the Jewish nation is not a mere dream, but is in process.
      2. It is not inconsistent with patriotism, but in accord with a scheme of multiple loyalties.
a. Other examples of multiple loyalties prove this point: e. g. Irish-Americans.
b. Real brotherhood is the main basis of Americanism.

B. Zionism must protect America and itself from demoralization.
   2. The moral influence of Zionists must be felt.

The first argument, on full liberty for all groups, is background to his conclusion concerning the Jewish nationality. He supported this argument with an historical analysis of the concept of liberty and what is meant at that time. He used the examples of the divisions of the various nationalistic units in Europe, showing that nation and nationality are not necessarily "co-extensive." He quoted W. Allison Phillips for his definition of nationality. His answer, then, to the issue, "Are Jews a nationalistic unit?" is a positive one supported by historical analysis and cited authority.

The second argument, on the development of Zionism, is the answer to the issue, "Is making Palestine a homeland for this nation a solution to this problem?" The nature of Zionism itself demands that there be a nation as well as a nationality. He supported this argument with statistics concerning the Jewish population, comparing Jewish influence in historical cultures—Persian, Greek, and Roman. He supported it further by a study of the examples of the colonizing units now at work in
Palestine. There were at that time more than fifty of them. He considered these the foundation for further Jewish development.

On the sub-issue of patriotism and Zionism, Brandeis used the argument that rather than being inconsistent with patriotism, it is an integral part of an acceptable system of multiple loyalties. He cited an authority for testimony to support these theses. He further developed this idea with interesting reasoning.

There is no inconsistency between loyalty to America and loyalty to Jewry. The Jewish spirit, the product of our religion and experience, is essentially modern and essentially American. Not since the destruction of the Temple have the Jews in spirit and 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 has also been the Jews' striving for ages. Their affliction as well as their religion has prepared the Jews for effective democracy.

This theory would have been received by many, but Brandeis went a step further in a positive assertion that was contrary to what many Jews held.

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 the future live lives and do deeds worthy of their an­cestors....

The final argument on the development of Zionism held that it could render a service to America. If America became, he reasoned, a nation with strong and active antipathies toward minorities, it would be demoralized. In the surroundings of freedom in America, the Jews can act in such a manner as to cultivate this opposition, or they have the greater opportunity of serving themselves and America by helping the nation live up to its truly democratic heritage. He cited a passage from Steed's *The Hapsburg Monarchy* in support. In that day Zionism gave courage, and came with the "force of an evangel." It can serve the same purpose in America. In this way the loyalty of Jews to America can never be questioned.

Throughout the speech Brandeis' didactic method was clear. He stated his point. He followed the statement with exposition, statistics, or testimony. Then he re-stated his point for concluding emphasis. He repeated this pattern with each of his major arguments, making a consistently logical appeal to his hearers.

An illustration of this method is found in the paragraph beginning: "The difference between a nation and a nationality is clear; but it is not always ob­served." He then proceeds to clarify his point and support his argument by citing the various nations which
have various nationalities within their borders. He concluded by restating his thesis in slightly different language.

c. Organization pattern.

In spite of the importance and length of this speech, Brandeis used the typically brief exordium. It was a single paragraph in which his previously announced subject was related to the "Jewish Problem" in terms of justice and injustice. In spite of the war-torn world, it was a time for hopefulness on the part of Jews.

The current of world thought is at last preparing the way for our attaining justice. ... 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.²⁵

The subject was related immediately to the current thinking of the audience and the background of the speaker's work for Zionism. It was clear that his appeal was to be on the basis of justice and liberty.

Brandeis always made the issues and his position very clear at the outset of his speech. The statement or narration was clear and concise. Usually Brandeis used a brief statement, but in this instance he chose to
present a rather elaborate narration of the theme of the address. He stated what he meant by the term "Jewish Problem." First he undertook to define the term "Jew" in its individual and collective meanings. He discussed the Jewish attitude toward Jews. He analyzed the attitudes of non-Jews, both those who respected Jews, and those who made them suffer, or who created the "Jewish disabilities."

Half a century ago the belief was still general that:

Jewish disabilities would disappear before growing liberalism. When religious tolerance was proclaimed, the solution of the Jewish Problem seemed in sight. When the so-called rights of man became recognized, and the equal rights of all citizens to life, liberty, and the pursuit of happiness became enacted into positive law, the complete emancipation of the Jew seemed at hand....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.'

He traced then the development of the continuing anti-semitism along side the growing liberalism, the democratic rights and privileges. He concluded the narration with this statement:

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.

Taken as a unit by itself, this narration is one of Brandeis' most complete. In none of his speeches does he leave the audience in doubt as to the issues and his stand.
On this occasion he very carefully defined each of his terms, laid down the issues, stated an almost insoluble problem, and then proposed to solve it.

The argument supported the contentions which Brandeis chose to emphasize. The order of development is at times historical, but it usually follows a logical pattern. When outlined, the argumentative section of the speech shows a coherence characteristic of Brandeis. It moves from point to point with clarity and ease. The hearer would be able to follow his line of reasoning. Those who had heard Brandeis before would recognize some of his stock ideas applied to this problem. Yet it would not be true to say that this was not a new speech for a new occasion. The problem-solution pattern is evident throughout the speech. The audience is aware of the problem by the time he gets to the basic argument. In it he explains and supports his own solutions to that age old Jewish Problem.

In this peroration Brandeis makes as strong a concluding appeal as in any of his speeches. He is not summing up his argument. He is not recapitulating his points. He launches into a forceful plea for the acceptance of his idea. The plea is characterized by frequent use of the imperative sentence. In the first paragraph of the peroration beginning, "Let us therefore lead--earnestly, courageously, and joyously in the struggle for liberation ...." he begins each sentence with the same imperative.
The second paragraph calls on the Jews to seek now for their destiny. "The fulfillment of these aspirations is clearly demanded in the interest of mankind, as well as in justice to the Jews." He makes this plea personal.

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....

When these men have aligned themselves with their cause, then the Jewish people must depend upon organization of their forces for progress. "Organization, thorough and complete, can alone develop such leaders and the necessary support."

He concludes with an ardent plea for this organization.

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.

Here is as near the emotional plea as one can find in Brandeis' speeches. In his enthusiasm for his new-found cause, he added to the forces of his habitual logic the emotional passion of his belief.

d. Style.

In this speech more than in any other Brandeis
demonstrated his ability to mix historical allusions with exposition and argument. In one section he supported his argument in language which refers to early Jewish history, Italian patriots, Greek culture, and Irish history.\textsuperscript{36} The use of questions is not as pronounced in this speech. His interrogations are limited to two, with rhetorical questions used only a little more frequently.

He frequently begins sentences with conjunctions, a habit of style characteristic of Brandeis' extemporaneous speeches. These do not especially detract from the effectiveness of any particular paragraph or idea presented in the speech. Only the stylistic purist would reject these as obtrusive and in poor taste. In his extemporaneous speaking he had what is sometimes called the conversational style.

He used contrasts to good effect in this speech. In defining Zionism, he first explained what it is not, carefully stating two erroneous concepts as falling outside the purposes of the movement. "It is not a movement to remove all Jews in the world compulsorily to Palestine. In the first place there are too many. In the second place, there is no compulsion."\textsuperscript{37} The following paragraph states the positive point of view in contrast to the negatives preceding. "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..."

There are some interesting duplications in this speech. He used a paragraph on the individuality of persons and nations in his Fourth of July oration a month later. In that same speech he used the same idea, if not the same language, that he used in this one to present his conception of the fundamental law of brotherhood as envisioned in the American ideal. In the speech Zionism and Patriotism which he had been using frequently in his speaking tours, he used a duplicate wording of his idea on Palestine.

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.®9

The concept of freedom, as implying economic as well as political freedom, appears in a brief form in this speech, coming from several earlier speeches, and appearing again in his Fourth of July oration.

These duplications are not to be deplored. They serve to emphasize first, that his thinking on these problems was consistent, and secondly, that he relied upon a happy phrasing once he had found it. During his cross-country tours for his various causes, it need not be assumed that each speech was a new and separate unit.

His emotional undertones,®0 his passionate perora-
tion, point up the truth of Mason's observation that "this cause, more than any other, fired Brandeis' imagination and captured his heart. It satisfied his love of adventure, brought to the surface his unflagging belief in the power of idealism." 41

4. Summary.

The speech on "The Jewish Problem: How to Solve It" is similar to Brandeis' other speeches in (1) its careful organization; (2) its clear analysis of the issues; (3) its well-supported arguments.

In addition this speech on one of his great crusades reveals these additional characteristics:

1. Brandeis had the ability to understand and the desire to use pathetic appeal effectively.

2. He could present the analysis of his problem and the statement or narration in an expanded and complete form if the occasion demanded.

3. If so inclined, he could utilize a strong plea in his peroration, calling for an emotional reaction to his logical presentation.
CHAPTER IX
FOOTNOTES

1Mason, Free Man's Life, op. cit., p. 441.

2Ibid., p. 443.

3Gilbert, My interview, op. cit.

4The Flexners were Jewish friends in Louisville, Kentucky, some of whom came to New York to live. They were close to the Brandeis family.

5Mason, Free Man's Life, op. cit., p. 442. It was his work in this dispute which caused some of his friends to start calling him "Judge." The title stuck, although he did not hold any public office until he was appointed to the Supreme Court.

6Leif, Brandeis, op. cit., p. 228.

7My interview with Judd Dewey, Boston, June 13, 1950. See also Leif, Brandeis, op. cit., p. 279.

8Mason, Free Man's Life, op. cit., p. 444-5.

9Mason accepted Leif's date for this speech as "in April." Apparently this is in error, for the papers reported the speech as of June 2, and Fraenkel and others support this date.

10Mason, Free Man's Life, op. cit., p. 448.

11Ibid., p. 459.

12It must be noted that the group following Brandeis and Brandeis himself were not without opposition. The American Jewish Committee took an opposing view. The press response was not enthusiastic. Mason reported (Free Man's Life, p. 449) that the Los Angeles Times said: "Brandeis, the Boston butter-in, is a high-grade opportunist. He...suggests that 'the immediate settlement...of the Jewish Problem...gives Jews an opportunity they have not had since the destruction of Jerusalem'--to acquire Palestine real estate at bargain prices. It is to be hoped that Brandeis and Gifford Pinchot and Amos Pinchot will open real estate offices in Jerusalem and thrive there--and stay there, above all, stay there." A Jewish paper, The Israelite, commented: "No one will deny
...that Mr. Brandeis is entitled to his opinion that Zionism is the panacea for all Israel's ills. But when he says that all those who do not agree with him 'are against their own people,' he is guilty of uttering that which is not true and of being grossly impertinent at the same time. Who is Mr. Brandeis to judge his Brethren? How does he come by the right to say that a Jew, be he ever so faithful, is an enemy of his own people, if he does not believe as Mr. Brandeis does? It is very much to be feared that his success and the psalms of praise that the Jewish press have been singing before him have turned Mr. Brandeis' head."

13Leif, Brandeis, op. cit., p. 329.
14The edition of the speech used (see footnote 35 ante) is in the Fraenkel collection, The Curse of Bigness. It is hereafter cited as Fraenkel. p. 218.
15Ibid., p. 221.
16Ibid., p. 224.
17Ibid., p. 225.
18Ibid., p. 222.
19Ibid., p. 231.
20Ibid., p. 225.
21Loc. cit.
22Cf. ante p. 214.
23Frankel, op. cit., p. 228.
24Loc. cit. and 229.
25Ibid., p. 213.
26Ibid., p. 219-20.
27Loc. cit.
28Cf. ante p. 215.
29Cf. post p. 224.
It should be noted here that of the two editions of this speech available sometimes employ different wordings. The Fraenkel text is usually, when otherwise compared, superior to the others and more accurate, and is therefore used in this instance.

Fraenkel, op. cit., p. 226.
Ibid., p. 225.
Loc. cit.
Ibid., p. 227.
Cf. ante p. 216.
Mason, Free Man's Life, op. cit., p. 464.
CHAPTER X

SPEECH ANALYSIS: "THE LIVING LAW"

1. The Speech Situation.

The audience for Brandeis' last formal address before the big battle over his appointment to the Supreme Court was the group of people best able to understand his language. The members of the Chicago Bar Association represented the legal philosophy of the middle west. Even though these men may have represented the dominant conservatism of the day, regardless of party, they were not without a liberal influence and a curiosity about the principles for which Brandeis stood. The speech was given on the Northwestern University campus, January 3, 1916.

Chicagoans were close enough to know much of the LaFollettes of Wisconsin. They had not forgotten the differences between Cleveland and Altgeld in 1894. They were aware of the labor uprising in Chicago and of the labor cases which had come up through their own courts only a short time before. Internal evidence in the speech* indicates that there was considerable interest in Chicago in the problem of the relationships of courts and lawyers to the will of the people. Part of this interest was undoubtedly the reason for inviting the Boston lawyer to address the group.

It was not Brandeis' first visit to Chicago. He 231
had come to Illinois and Chicago in his work on the wages and hours cases. He had spoken there in 1912 in the interest of the LaFollette campaign. As Chicago was well on the way to becoming the railroad capitol of the nation, his work on scientific management and his efforts to make the railroads of New England conform to good business practices had not gone unnoticed. The audience knew the speaker as one of their profession who was an independent thinker, a fearless advocate, and a person whose understanding and interpretation of the law were significant for his day. The members of the bar could listen to Brandeis not so much as an academic theorist, not as a politician playing upon vote-producing sympathies, but as one who spent his time in the thick of the battle on controversial issues of the period. As will be noted below, the audience had its effect upon the content of the speech, for the speaker used their own language and evidence which they would respect.

The subject chosen for this occasion was new for this audience. Yet in a wider sense it was a summary of Brandeis' philosophy of law as it should be applied to a dynamic democratic society. If he had not spoken previously in these terms of legal philosophy to legal minds, he had in practice stated these principles many times. The entire basis of his plea in Muller v. Oregon implied the principles of "the living law." The underlying philosophy of
his scientific management for railroads was the statement in economic terms of the general principles later enunciated in this speech. Because it knew the reputation of the man, the audience of lawyers would have a natural interest in hearing Brandeis discuss for them the underlying philosophy of the famous "people's lawyer."

The occasion was not of particular significance. The January meeting of the Chicago Bar was made notable by the speech, which had wide publication. The meeting itself had no historical significance, except as it provided an audience for the declaration of principles by the lawyer from Boston. Because of the turn of events, this speech was very widely read and studied, for only three weeks later the Brandeis appointment shocked the country. Those who looked for a statement of principles from the nominee found them here.

3. The speech type.

The purpose of this speech was to bring conviction to the hearers. They were not to be motivated to any kind of immediate action. While it contained information in which they were interested, it was not primarily designed to teach, or to bring new facts to their attention. It was not an attempt to arouse them emotionally, to fire them with zeal. It had its purpose geared to the existing attitudes toward the law. These attitudes and beliefs were to be influenced by Brandeis in his address on that occasion.
The following is a statement of the specific purpose of the speech, as found by an analysis of its content:

To convince the members of the Chicago Bar Association that "the lawyer and judge should be fitted to perform adequately the function of harmonizing law with life."

The speech would be classified as the deliberative type. It is an attempt, in the Aristotelian sense, to counsel for future action, to encourage the acceptance of a policy and a philosophy upon which such a policy could be built. Their future action was to center around the proper preparation of the future members of the legal profession, so that they might interpret the law and plead their cases in the light of the new discoveries and trends of the day.

On this occasion Brandeis came as close as modern speakers can to the kind of audience which the ancient classical orators addressed. Here were the law makers and law interpreters assembled in a professional audience. Like the members of the early Greek audience, or the members of the Roman forum, Brandeis spoke in Chicago to the political aristocracy, the leaders trained in the science of the machinery of government. It was a well chosen subject, before a select audience, one which might influence to a great extent the nature of the law for some time to come. Brandeis saw the opportunity to make an appreciable impression upon his hearers in favor of the theories and principles to which he had devoted his professional life.
3. The speech structure.

a. Backgrounds and issues.

The speech on "The Living Law" was not given in any environment of heated debate. Nor was it the culmination of a series of widely publicized events, as was the case with many of the other speeches of Brandeis. In terms of public interest there was no immediate crisis for which the speech brought a happy solution. It was not an urgent plea for an immediate decision favoring the people. Brandeis rather called to their attention a problem which certainly they had recognized, and then in the calm atmosphere of one speaking in the councils of the learned, he set forth his solution.

Although there was no immediate public issue, Brandeis drew upon a current problem for his theme. He felt very keenly that the people at large, the average intelligent laymen outside the field of the law, were losing their respect for the law and for judicial processes by which law was made the practical guide for social relations. He noted the lessening influence of the lawyer, the criticism of the efficiency of the judicial system, and the challenge to the way the law was administered, and considered these cause for alarm. It was against the background of such a recognition of the growing criticism of the law and lawyers that Brandeis spoke to the Chicago bar.
Two specific issues became the focus of his argument. They were:

1. Has the recent economic and social revolution affected legal science?

2. Can the lawyer be trained to a realistic approach to the law?

The first issue recognized a problem very much in the public mind. Brandeis used the term "legal science" to mean "the unwritten or judge-made laws as distinguished from legislation." The issue might have been personalized by reading it, "What effect does social change have upon judges?"

Following issue one, he came to the problem which the legal profession had to consider, "How far can we go in training men to be judges in a changing world?" Both of these problems considered what was for Brandeis the essence of the development of the legal profession in a democratic society. He proceeded to come directly to the point at hand with the kind of arguments lawyers could understand.

b. Arguments.

In supporting his position on these two issues, Brandeis relied almost wholly on logical appeal. There was no suggestion of any pathetic argument. Since he did not usually rely on emotional proof, an audience composed of lawyers was no appropriate group before whom to take exception.
Brandeis' ethical appeal at this time should have been strong. He had a national reputation in politics, in economics, in labor law and arbitration, and in pleading for difficult causes. He was already established as one of what Justice Holmes called "the onward and upward boys." He would certainly be considered at this time one of the leaders of the progressive group of lawyers devoted to bringing the legal profession abreast of the economic and political development of the times. In the course of the speech he quoted Ulrich Zasius to the effect that "in Germany during the Reformation... all sciences have put off their dirty clothes; only jurisprudence remains in its rags." Even in Chicago, Brandeis was recognized as one who wanted to help American legal science "put off its dirty rags." He would be heard because of his character and reputation, and many present would be favorably inclined to his argument because of the person presenting it.

The evidence used in support of his logical appeal is varied. His chief source of support came from the cases which he cited. He cited examples from Marshall, Kent, Story, Shaw, and Bentham. His quotations—there were more literary allusions in this speech than in his "cause" speeches—were from Charles R. Crane, Oliver on Hamilton, Euripides, Zasius, and Goethe. In each of these quotations he used the source as a means of clarifying
his own point. During the speech he cited thirteen court decisions, which before a lay audience would be too much technical material, but to the lawyers was very forceful evidence. To summarize the use of evidence in this speech, Brandeis relied heavily on his case citations, using more literary sources than usual to add clarity and interest to the speech.

An analysis of the arguments used to justify his position on each issue reveals both his method and his philosophy.

In considering his answer to the first question on the effect of the social and economic revolution on legal science, Brandeis made two points. First, there has been a social and economic revolution. One might think he would assume this, even in 1916, and proceed to other matters. However, the thorough Brandeis took time to cite the industrial changes and their effect upon human relations. Secondly, he made his point that legal science, more specifically the judiciary, ignored these changes. "Political as well as economic and social science noted these revolutionary changes. But legal science...was largely deaf and blind to them. Courts continued to ignore newly arisen social needs." He proceeded directly to substantiate this argument by pointing out the vascillating nature of the courts. To take material familiar to them, he cited the two Ritchie
cases, showing how the earlier decision was the unfortunate reflection of an outmoded philosophy, while the later demonstrated that the judges were beginning to become aware of the day in which they lived. He cited next the two cases from New York to show that in that state there was some "judicial awakening to the facts of life." He compared some recent decisions of the Supreme Court, showing the court's struggle to awaken to the facts of life, and the attempt on the part of the courts to regain their prestige.

The second issue brought out some of Brandeis' ideas for the training of the lawyer to be a judge in the modern state. He first emphasized that every lawyer should have economic and social education as well as legal. He no doubt delighted in the quotation from Professor Henderson, a University of Chicago professor of psychology, that "'a lawyer who has not studied economics and sociology is very apt to become a public enemy.'" He next deplored the demands of specialization upon the modern professions. A lawyer could become so involved in his own small circle of the law that he shut himself off from the economic and social demands of his day. Brandeis insisted that the solution was "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."
The two-fold argument in each of the issues appears, in summary, to be well supported, to consist primarily of logical argument, and to include some ethical appeal.

c. Organization pattern.

The exordium in this speech is longer, proportionately, than in many of Brandeis' speeches. He traced the constitutional development of democracy in America. He then raised the problem of the public attitude toward the lawyer and legal science, adding a note from James Bryce on the lawyer. Then he undertakes to establish his rapport with the Chicago audience by naming Chicago lawyers who had come east, Chicagoans who had made distinguished contributions to law, concluding with references to the Chicago Municipal Court and the American Judicature Society. He successfully adjusted to his audience by recognizing the genius of the members of the Chicago bar and their contributions to the problems which he planned to discuss with them.

The exordium is one of the best among Brandeis' speeches, because it does more than usual to prepare the audience for the point that is to follow. Brandeis frequently plunged immediately into a long speech with little more than an opening sentence stating the problem at hand. Perhaps he wanted to gain the confidence of his audience by a recognition of their own abilities and con-
tributions. In any event, he had a very carefully planned and effective introduction.

The statement was clear in this speech, as in all of Brandeis' public utterances. He never leaves the audience in doubt as to the issue at hand. He is a little more polished and less blunt here than some other places, but he comes directly to the point of the "challenge of existing law."

The proof, as analyzed above, formed the largest part of the speech, approximately eighty-five per cent. The peroration consisted of a simple summary and the concluding story of Bigligh as told to the speaker by Charles R. Crane. The concluding sentences were characteristic of Brandeis. There was no direct plea, no attempt at interpretation of the story, no presumption that the point needed an explanation to his hearers. He told the story and abruptly concluded. The only plea was implied in the mind of the listener. There was no repetition of his earlier points, no attempt to give an emotional turn to the final appeal. For this audience, the clear and concise peroration must have been very effective.

d. Style.

Brandeis prepared his speech for the Chicago bar with his usual care. In this instance he had prepared the usual thorough manuscript. In the presentation he
had the written draft before him, but referred to it only once or twice. He delivered it in a "dignified manner, and had it very well prepared." 

Perhaps the thoroughness of the preparation accounted for the content and its style. It was correct in every detail, no use of "well" and "now" to introduce the paragraphs. As was usually the case, he put the great majority of his sentences in the simple declarative form. They were clear and obviously appropriate for the audience at hand. By their clarity they created the specific impressions characteristic of Brandeis. Not one to deal in vague generalities, he specifically brought the problem of training lawyers to his audience. A reader does not get the impression that the speech is "padded" for either length or effect. He demonstrated the economy of style which gives a compact paragraph directed toward a single idea, clearly and briefly explained.

As illustrative of this style, consider the paragraph in which he moves through a terse explanation of his view on the social and economic revolution.

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 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 thralldom 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 employer 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.26

It is not a beautiful style in the sense of the English and American essayists. Brandeis demonstrated the ability to get to his point quickly and effectively. His topic sentence suggested the point at hand, following which he directly and forcibly used a minimum number of words and sentences to explain the implications of this revolution to a democratic society.

4. Summary.

The speech before the Chicago Bar Association entitled "The Living Law" is an example of Brandeis' deliberative speaking before a select audience. It further illustrates:

(1) Brandeis' ability to clearly state his issues
and drive immediately to the point.

(2) His well-supported and clearly stated arguments.

(3) His use of quotations to add emphasis to his exordium.

(4) His directness in the peroration.

(5) The economy of style characteristic of the Brandeis speech delivered from prepared manuscript.
CHAPTER X

FOOTNOTES


4Brandeis' nephew, Louis B. Wehle, accompanied him on the trip to Chicago for this occasion. The author interviewed Mr. Wehle, in New York, and received helpful information from him concerning the speech. (Hereafter cited as Wehle.)

5Fraenkel, op. cit., p. 323.

6Ibid., p. 313.

7Ibid., p. 318.

8Ibid., p. 317.

9As the cases are discussed in this text they are cited both as to the place in the speech, and the legal citation.

10Fraenkel, op. cit., p. 324.

11Ibid., p. 317.

12Ibid., p. 325.

13Ibid., p. 324.

14Ibid., p. 317.

15Loc. cit.

16Ibid., p. 318.

17Loc. cit.
The two cases cited here are from the Supreme Court of Illinois. The first one was Wm. E. Ritchie v. People of the State of Illinois, 155 Ill. 98, in which the court held in 1895 the laws regulating the hours of women were unconstitutional. The second case was W. C. Ritchie v. Wayman, 244 Ill. 509, in which the court held a similar law constitutional. Brandeis filed a brief to support the constitutionality of the law in this case, which was decided in 1910. Justice Carter held with majority each time.

The two New York cases dealt with hours and working conditions of women. In 1907 in People v. Williams, 198 N. Y. 131 the New York Court of Appeals held such a law unconstitutional. In 1915 in People v. Schweinler, 214 N.Y. 395, they reversed themselves, with two of the justices on the majority side in each case.

Ibid., p. 323.
Ibid., p. 325.
Ibid., p. 323.
Supra, p. 236.
Wehle, op. cit.
Ibid.
Fraenkel, op. cit., p. 318.
CHAPTER XI

GENERAL SUMMARY OF SPEECH PATTERNS

1. Invention. 1

An analysis of the speech patterns of Louis D. Brandeis, with emphasis on his invention techniques, recalls Aristotle's statement that "truth and justice are by nature more powerful than their opposites." 2 For if Brandeis' career and abilities as a speaker were characterized by any pattern, it was his constant search for truth, whether it was to be found in testimony, fact, statistics, or balance sheets. Coupled with this search was his continuing dedication to the concept of justice. Knowing that "truth and justice" have their own powerful appeal, he constantly sought to portray them with simple clarity.

Charles A. Beard has given an excellent summary of the Brandeis conception of democracy, a philosophy which underlay his search for ideas for a speech and was the great influence on his approach to any problem.

American society, as Mr. Brandeis then conceived it, should not be dominated by huge monopolies and trusts, but should be the home of 'the new freedom,' in which small, individual enterprises can flourish under the defensive arm of the government. The relations of the utilities and the public should be adjusted on principles of prudent investment, efficient capitalization, scientific management, and fair earnings equitably shared with the public under the sliding-scale rules. Trade unions are necessary to the upholding of decent living standards among the mass of workers, and in the weighting of judicial opinion they should be given the benefit of the doubt unless the mandate
of the law is too clear to be mistaken or the end sought is undesirable as ascertained by an inquiry into facts. The weakness of wage-earners in our industrial society, must be offset by state and federal legislation of a social character, and since the Constitution is blessed by 'a convenient vagueness,' such legislation would be sustained if the facts indicate that it is fairly calculated to accomplish a reasonable purpose...3

To this basic philosophy Brandeis brought a characteristic method of supporting his ideas, devoting himself to it with a thoroughness that gave distinction to his work. Early in his law practice, during his Harvard lectures, he set down "What the practice of law includes."
The following axioms from these notes revealed his early desire for facts.

Know thoroughly each fact. Don't believe client witness. Examine documents. Reason; use imagination. Know bookkeeping—the universal language of business; know persons. Far more likely to impress clients by knowledge of facts than knowledge of law. Know not only specific cases, but whole subjects. Can't otherwise know the facts. Know not only those facts which bear on direct controversy, but know all the facts and law that surround.4

Professor Mason commented on the thoroughness with which Brandeis applied these professional principles:

Brandeis' passion for public service he has in common with most progressives, but none has equalled his genius at practicing it. While Bull Moose gospellers were trumpeting generalities, vagaries and invectives, Brandeis toiled over dry details, facts and figures, the granite masonry of constructive conviction. He has had authoritative contact with the problems of his times and of our day, and for additional materials resorts to the primary sources. Brandeis early got the habit of correcting and developing his opinions and ideas by patient collation through the minds of others. He sought whatever light could be thrown upon his subjects from any angle. Having followed through on this
line and taken his stand, he is firm against all gainsayers. He can thus prove his judgment superior to that of others who have not gone through these slow procedures. His rule invariably is to know whereof he speaks.5

Brandeis had a basic philosophy, as analyzed by Beard above, and with that basic philosophy he had a tenacity of purpose which drove him to find all the facts possible about a given issue before him. Through the years he built up a large background of factual data concerning railroads, social legislation of various kinds, corporate structures of utilities, and, later, concerning Zionism and international affairs.6 At the end of his period as an advocate, Lerner could say that "Brandeis brought to the Court a first-rate legal mind, an arduous education in social realities, and a fund of economic knowledge. He brought a seriousness of intent, and an unwavering will."7 Cohen noted these techniques in court decisions, commenting upon "the unrivalled and encyclopedic references to economic writings on cognate subjects, as well as the vital grasp of the trend of the times."8

The premises of Brandeis' thinking arose from his being "the consistent champion of the widest possible scope of individual freedom, and the narrowest possible limitation of that freedom by federal or state action."9 His definition of liberty, broad enough in scope to include intellectual, political, and economic liberty, was an expression of this philosophy. His hatred of bigness,
in either corporations or government, went back to his original premise of providing the widest possible scope to freedom.

At one time or another he utilized all of Aristotle's lines of argument. He relied most heavily upon past fact and future fact. Relying on his sources, starting with his premise for freedom, he would utilize these lines of argument, very effectively carrying forward his point on the issue at hand. He relied on argument to affect rational listeners, and rarely sought for material which would have an emotional effect solely. "Where the brain was concerned, he couldn't be taken in by emotionalism."

After Brandeis' death, Senator Henry C. Lodge, Jr. similarly commented on this intellectual force: "It is a wonderful thing to contemplate a man the force of whose emotions is equalled by the power of his intellect."

To the rhetorician, it is important to note that he was not alone devoted to an intellectual approach to truth. Dean Acheson's comment is significant here: "But to him truth was less than truth, unless it were expounded so that people could understand and believe."

2.Disposition

An examination of most of Brandeis' speeches reveals a characteristic approach to the presentation of a problem to an audience. He had an ordered plan which moved from
point to point. His speeches were models of clarity, partly due to style, as discussed below, but equally due to the care with which Brandeis arranged his material. Points followed in a manner that the mind of the hearer could grasp.

As to speech organization, for example, he usually opened with a very brief exordium. It was never long, never condescending to the audience, but a simple statement of the reason for the speech. Without fail, very early in Brandeis' speeches he presented clearly analyzed but brief narration of the problem. This statement was always understandable in terms of the occasion; it was always revealing in terms of the conclusion which Brandeis hoped to make his audience accept.

His argument, the very large proportion of his speeches, was an ordered statement of points supported by evidence and data to reach a logical conclusion. In most of his speeches he followed a didactic pattern in which he stated his point, explained it carefully, supported it with abundant understandable evidence, and then concluded with a restatement of the point. He did not ignore the inductive or implicative method, especially in his arguments before courts. Poole noted that one of his major contributions to the legal brief was the use of the inductive method based upon a study of facts, replacing the old deductions based upon legal precedents and "abstract
theories of what is right and wrong."\(^{16}\)

The perorations were usually very brief. They were never a recapitulation of his previous points. They were not in that sense a summary of his speech. Brandeis would not insult the intelligence of his hearers to that extent, for, having made his point clear to them when he gave it in the body of the speech, he saw no reason to assume that they would need to have it repeated. More frequently he would employ brief statements of his hope for the future, a kind of visualization of what would come from his plan. On a few occasions he used analogies or illustrations to point up his theme for the conclusion. Sometimes he would appeal for the freedom and justice which underlay his hopes for America. These perorations were never lengthy, never flowery; sometimes they were almost abrupt.

An attempt to explore the Brandeis method of disposition and arrangement cannot ignore his thoroughness of preparation for any task before him. As Frankfurter observed:

He expressed views only after deep searching, and never without confronting the difficulties of a problem. His convictions were the product of long brooding; their formulation was the result of stubborn struggle for clarity.\(^{17}\)

Organization of his material was part of the "stubborn struggle." Beard noted the same point.
If from the substance of Mr. Brandeis' mind, we turn to his intellectual methods—by no means as separable as logicians sometimes imagine—we find certain characteristics just as well marked. All his reasoning is orderly, representing a clear-cut course of thought. His speeches, arguments, and judicial opinions march. They have a point of departure, a route, and a terminus; never do they wander through oceans of words along uncertain ways to irrelevant ends.¹⁸

Leif noted that "his mind gravitated toward the hard core of fact....In any appeal to Brandeis' judgment, oratory lacked force; he shut out eloquence--his conclusions were based on matters brought to the attention."¹⁹ It was this continuous search for the "hard core of fact" whereby he determined the route his speeches would take, their points of departure and their terminuses. He did not wander in his speeches because he had explored the route in advance in his thorough preparation.

Paul Freund called this trait of Brandeis his "dominant devotion to reason." The same characteristic was apparent when he delivered an opinion from the bench. "The patient earnestness with which he explained to the small assemblage the facts of the case and the reasons for the decision, was in acknowledgment that the Court is a law-giver only as its decrees find rational acceptance, in the hope that none might go away unpersuaded."²⁰

Morris noted that Brandeis was successful in his persuasion. He stated: "His arguments made a deep impression on the plain people...Brandeis was a novelty. He chose
to expound social principle in terms of hard economic and financial facts."21

His ability to use and to arrange facts was not an end in itself. It was to the end that some cause in which he believed might be explained and accepted more readily. Dean Landis noted a realization of this purpose. He said:

This quality [to strip your thinking of small and unnecessary things and deal with what matters] of his was to be found in his approach to almost every problem. As a young lawyer, I was intrigued by the mysteries of the law, believing somehow that given enough knowledge of its technicalities and its pronouncements, an agile mind could put together these pieces and find an answer. I can recall time and time again how the Justice would break a long and complicated record, grasp and throw aside the subtle and appealing arguments of the lawyers, and find embedded in the case the issue that really counted and the decision of which, one way or the other, couched in the appropriate language, would make a difference in the tenor of American life. All of a sudden law ceased to be a game of wits; instead, it became the instrument for the realization of the hopes of men and women intent on fuller happier lives.22

Judge Calvert Magruder commented on his habit of intellectual choice in his memorial article:

We see now more clearly that he had been a judge all his life. Even in the heat of fights that marked his unique career at the bar, it had been his wont to survey calmly the deeper issues involved and to apply his creative imagination to the task of finding the principles for harmonizing superficially conflicting interests."23

Throughout Brandeis' speeches one always finds his unique ability to come to a point. His preparation had been so thorough that he knew what was important, and what was not. His habit of choice, his well known ability to organize his material effectively was part of his dis-
tions as a speaker. As the Lowell (Mass.) Courier-
Citizen observed concerning a future appearance of Brandeis:
"Mr. Brandeis will unquestionably present a strong case, for
that is not only a characteristic of his, but is likewise
doubly probably from the fact that it is a topic in which
he is vitally interested."24

Brandeis' thoroughness of preparation, his strong
influence obtained by powerful argument was summarized by
Silas Bent, in his biography of Justice Holmes:

Whether in the courtroom or out of it, Brandeis
never learned the technique of bluff. He brought
into action a Big Bertha charged with devastating
facts and figures. His mental machinery was cool,
comprehensive and efficient, and he was incapable
of bulldozing an opponent or a witness as of ap­
pealing to the emotions of a jury. He mastered
words as he mastered statistics, and developed
English which was clean cut and muscular.25

3. Elocution.26

It would not be surprising to discover that Brandeis
had a cumbersome and dull style. The attention to details,
the thoroughness of preparation, the frequent revisions of
drafts of speeches and decisions, the enthusiasm for sta­
tistics and figures could produce that kind of linguistic
 technique. Not so with Brandeis, for he achieved a result
of clarity and interestingness which contributed decidedly
to his effectiveness as a speaker.

Aristotle suggested two qualities of an acceptable
style.27 "It is settled that a good style is, first of
all, clear. The proof is that language which does not
convey a clear meaning fails to perform the very function of language." He further explained that "Style...should be neither mean nor above the dignity of the subject, but appropriate...." The reading of Brandeis' speeches gives the impression that clarity and appropriateness are two of his chief objectives. His use of simple declarative sentences, his directness, and his use of words that are easily understood made his works models of clarity. Even when forced to use the technical terms of any given industry or profession, he explained them in terms that the laymen could understand. His style was likewise appropriate in that his choice of words fit the occasion and added dignity to it. In his ceremonial speeches, he presented his ideas in language suited to the occasion. In his Fourth of July Oration he gave a speech in harmony with the occasion, but at the same time did not fall into a fire-eating spell-binding type of language. For him appropriateness meant to avoid flowery language which served only to ornament and not to make clear. If ornamentation in language may be said to serve to heighten interest and to increase emotional response, Brandeis abjured this method to attain these goals. Rather, he insisted that interest came from the clarity of the material, and that such emotional enthusiasm as he allowed his hearer came from the basic appeal instead of the language itself.

Aristotle listed four faults of style which can be
the basis of a summary of Brandeis' language.\textsuperscript{29} First, Aristotle wrote of the misuse of compound words. These words were used so rarely by Brandeis as not to constitute a problem for him. They appeared more frequently in the Five Per Cent Rate Case speech. Such words as "costruction" were typical. Whenever he used them they were not, in the Aristotelian sense, an attempt to be poetical. Consequently he avoided this defect of style.

The second defect is the employment of strange words. Brandeis avoided this hazard by his choice of common words, those in contemporary usage. The third source of defect "lies in the use of long, or untimely, or crowded epithets."\textsuperscript{30} He avoided these almost completely. His practice indicated that he recognized the principle that "when a matter is plain, piling up words only dissolves the clearness and beclouds the senses."\textsuperscript{31}

The final Aristotelian "cause of bad taste lies in metaphor; for metaphors, too, may be inappropriate." Brandeis had no problem here, for he so rarely used metaphorical language that it could not be classed a defect of his speaking. In the railroad case he used two figures, which for him was a luxurious superfluous of ornamentation. He escaped this defect by avoidance.

Quintilian considered style as involving words taken singly or in conjunction. "In reference to words taken singly, we must take care that they be Latin, intelligible, elegant, and appropriate to that which we wish to
express."32 Brandeis, as stated above, would meet these criteria, except for the Latin and elegant standards. His words were always intelligible and appropriate, but lacked elegance in the Roman sense. "In regard to words in conjunction, we must see that they be correct, well arranged, and diversified occasionally with figures."33 Brandeis' words in sentences were correct, in that they had the perspicuity arising from propriety, which Quintilian liked. They were well arranged for correct emphasis. However, the language of Brandeis was not "diversified occasionally with figures." It had a scarcity of figures which would not have pleased Quintilian. In his later chapter34 Quintilian urges that ornament of style be used to increase interest. "But by polish and embellishment of style the orator recommends himself to his auditors in proper character..."35 Brandeis did not adhere to this rule. By Quintilian's standards of style, he measured up in clarity, appropriateness, and propriety, but failed to come up to his standard of embellishment by use of figures.

A discussion of Brandeis' style would not be complete without reference to Spencer's essay on "The Philosophy of Style" in which he discusses the problem of economy of effort. After reviewing some of his rules for style, Spencer observed:

On seeking for some clue to the law underlying these current maxims, we may see shadowed
forth in many of them, the importance of economizing the reader's or hearer's attention. To so present ideas that they may be apprehended with the least possible mental effort, is the desideratum towards which most of the rules above quoted point. When we condemn writing that is wordy, or confused, or intricate--when we praise this style as easy, and blame that as fatiguing, we consciously or unconsciously assume this desideratum as our standard of judgement. Regarding language as an apparatus of symbols for the convenience of thought, we may say that, as in a mechanical apparatus, the more simple and better arranged its parts, the greater will be the effect produced. In either case, whatever force is absorbed by the machine is deducted from the result. A reader or listener has at each moment but a limited amount of mental power available. To recognize and interpret the symbols presented to him requires part of this power; to arrange and combine their images suggested requires further part; and only that part which remains can be used for the realization of the thought conveyed. Hence, the more time and attention it takes to receive and understand each sentence, the less time and attention can be given to the contained idea; and the less vividly will that idea be conceived.

The Spencerian principle of economy of style characterized Brandeis' writing and speaking more adequately than any other single trait. He continuously strove to avoid the "wordy, confused, or intricate." He organized his material and selected his words to utilize the minimum amount of "mental energy" on the part of the hearer. He did not go along with Spencer, however, in the belief that the use of figures aided this process. He relied rather upon simplicity and efficiency of arrangement to convey his idea to the hearer with the least possible effort.

Beard noted that "he has a sense for the precision of language and uses it as a fine-edged tool. He has a
passion for concrete things, rather than abstractions, pertinent data revealing the intimate relation of laws and judicial decisions to practical affairs.™

Gilbert noted that he "never worried about his style of language."³⁸ Mason observed that "though preeminently a factualist, a stickler for statistics, he never lets himself be buried under the facts of industrialism."³⁹ Not often was his work described as a "graphic presentation."⁴⁰ It is important to remember that these characteristics carried over into his writing of opinions and dissents on the Supreme Court. There he emphasized again the economic and historical analyses of the problems.⁴¹ Walton Hamilton gave a description of this style which could likewise be a summary of his speaking:

An art, whose concern is mediation, is evident in Mr. Justice Brandeis' judicial style. It has been deliberately contrived to serve its unique purpose. His private conversation is marked by the veiled word, the pointed thrust, the neat characterization; and he possessed the gift of happy phrasing not incomparable to Holmes. Although his early opinions hold much of literary charm, he presently committed himself to a direct, straightforward style as the most effective judicial utterance. He aims at simplicity of statement, clarity of meaning, and persuasiveness of argument; he tries to attain these qualities without resort to colorful words or rhetorical flourish. The use of exposition to do duty as argument has an effectiveness all its own.... The lawyer finds his opinions in conventional language, concerned with legal questions, and filled with citations to the reports. The layman, after penetrating the outward form, discovers the facts, problems and arguments from the universe he knows. Yet the stuff of the
world seems at home in the habitat of the law; there is no intellectual fault-line between constitutional and social problems. Above all his writing is communication, rather than self-expression; it conveys to you meaning, rather than providing verbal receptacles for your own thought.42

Hamilton has gone further than anyone else in praising Brandeis for his "literary charm." Indeed, there is little evidence to support this conclusion. Brandeis was not a stylistic artist in the accepted sense of the term. What Hamilton noted in the latter part of the above statement, calling attention to Brandeis' clarity, persuasiveness, and simplicity, is consistent with conclusions based on an analysis of his writing and speaking, both in the period of this study and during his Court years.

Chief Justice Stone, in the memorial proceedings of the Supreme Court, observed some of the same characteristics.

He was never willing to sacrifice clarity to the turn of a phrase, for he wished above all to be understood. For a layman as well as layers his opinions are a compendium of the legal aspects of the social and economic phenomenon of our times. Together they constitute one of the most important chapters of the history of this Court.43

4. Memory.44

The evidence on Brandeis' techniques of memorization is rather meager. The chief sources are interviews with those who saw and heard him speak, and who were in a position to know.

His niece, who was present at the Ballinger investigation speech, observed that he spoke only from notes, and
she surmised that due to the length of the speech he had probably not written it out in detail, nor had he memorized it. In the Stetler case, he spoke to the Court extemporaneously, at least for the first part, which was in refutation of argument by opposing counsel. His nephew, who heard him give the speech on "The Living Law," noted that he had a manuscript but that his speech was "half manuscript and half memorized," and that he referred to it seldom during the speech. His stenographer noted that by the time he was through revising the draft of a speech she was typing he would have it almost completely memorized.

The Boston Transcript of June 9, 1911, in commenting on a speech at the sessions of the National Conference of Charities and Corrections, made this observation: "Mr. Brandeis spoke without notes, presenting the essence of his written paper in strikingly effective and epigrammatic style...."

The summary of the available evidence indicates his ability to extemporize when the occasion demanded. He memorized speeches for specific occasions. He never used a manuscript for an entire speech. Frequently he repeated speeches on the same or similar subjects so that he appeared to have memorized them.

5. Delivery.

Poole gave a description of Brandeis which revealed the picture his audiences saw:
His face, with its high forehead, prominent cheekbones, deepset eyes and heavy lines about the broad and sensitive mouth, gives an impression of immense force, and of a mind keen, subtle, trained, a mind of large vision, big ideals. And yet it is a likeable face; his manner kindly, and he has many devoted friends.50

Mason cited the New York World description of him:

Personally, he is a medium-sized, wiry man, rather uncouth in appearance, with piercing gray eyes and a mass of black hair streaked with gray that is always more or less tousled. He doesn't run much to clothes. He wears queer forlorn glasses and puckers his forehead when thinking deeply—which is most of the time. He can laugh infectiously, however, and tells a good story. If it weren't for the fact that he was born in Kentucky, he would be a typical Boston practitioner--green bag included. Even with Southern birth he had the Yankee accent as a result of early transplanting to Massachusetts soil. He talks with emphasis and to the point, with a trick of gesturing when he is particularly engrossed in developing an idea.51

These descriptions of Brandeis help us to understand something of his delivery. A son-in-law referred to his resemblance to Lincoln, noting that his appearance itself arrested attention.52 A nephew reported that he had a flexible, deep voice, a low baritone, but that he could go into the upper registers, and that he got "a good deal of effect through the flexibility of his voice."53

Brandeis was not a spell-binder linguistically speaking. Neither was he of the flamboyant type in delivery. He used few gestures, spoke with vigor and firmness, having a flexible voice which he used for effective variety and emphasis.
CHAPTER XI

FOOTNOTES

1 Several definitions of the term "inventio" may be found. Scholars are not at all in agreement that the Latin term should be translated as "invention." However, this English term has been rather widely accepted. Ehninger (Douglas Ehninger, "Select Theories of Invention in English Rhetoric, 1759-1828," unpublished Doctor's dissertation, The Ohio State University, Columbus, Ohio, 1949, p. 33-4) found that the term included at least three processes: "first there was an analysis of the questions; secondly, a determination of status in the Roman sense; and thirdly, in the Aristotelian sense of topics, the determination of the locus where some particular element of persuasion has its abode." The more practical and workable definition for the critic comes from Genung (John F. Genung, The Practical Elements of Rhetoric, Boston: Ginn and Company, 1895, p. 217): "Invention, as applied to literary undertakings, comprehends the various procedures involved in finding, sifting, and ordering the material of discourse." He assigned three states of the inventive act: finding the material; testing, chosing and rejecting; and carefully ordering.

2 Cooper, Rhetoric, op. cit., p. 5.


4 Mason, Free Man's Life, op. cit., p. 69.

5 Mason, Brandeis Way, op. cit., p. 27.

6 In a letter to a friend in 1919, Justice Holmes noted: "Brandeis the other day drove a harpoon into my midriff with reference to my summer occupations. He said you talk about improving your mind, you only exercise it on the subjects with which you are familiar. Why don't you try something new, study some domain of fact. Take up the textile industries in Massachusetts and after reading the reports sufficiently you can go to Lawrence and get a human notion how it really is. I hate facts. I always say the chief end of man is to form general propositions--adding that no general proposition is worth a damn." From Max Lerner, The Mind and Faith of Justice Holmes. Boston: Little, Brown, and Company, 1943, p. 444. Hereafter cited as Lerner, Holmes.

7 Ibid., p. xl.
Dispositio' almost always is translated "arrangement," which suggests to most persons the order of points, and nothing more....It is concerned with the principles of disposing (in the sense of using) the materials invented for a speech, in the best possible manner, for the purpose of effecting the end intended by the speaker in any given situation....[It is] the functional selection and use of materials for a particular purpose...." from Russell H. Wagner, "The Meaning of Disposition," in Studies in Speech and Drama, ed. by H. A. Wichelns, et al, Ithaca, New York: Cornell University Press, 1944, p. 285 and 293.

Poole, Brandeis, op. cit., p. xxxii.

Goldman, Brandeis on Zionism, op. cit., p. v.


Lief, Brandeis, op. cit., p. 486.

317 U. S. at xix.


Mimeographed address of Dean James M. Landis, to Brandeis Youth Foundation, June 6, 1950. p. 2.


Lowell (Massachusetts) Courier-Citizen, February 8, 1909.
Elocutio has been translated as "style." It is more than just word choice. It includes the broader concept of composition, ornamentation, as well as the proper use of words.

27 Cooper, Rhetoric, op. cit., p. 185 ff.
28 Cf. Ante, Chapter VIII.
29 Cooper, Rhetoric, op. cit., p. 190 ff.
30 Ibid., p. 190.
31 Ibid., p. 191.
32 Quintilian, Institutes, op. cit., p. 78.
33 Loc. cit.
34 Ibid., p. 86 ff.
35 Ibid., p. 86.
38 My interview with Gilbert, op. cit.
39 Mason, Lawyer and Judge, op. cit., p. 181.
40 Dorchester (Massachusetts) Beacon, December 12, 1908.
42 Hamilton, in Frankfurter, Brandeis, op. cit., p. 175.
43 317 U. S. at xlviii.
44 The term memory refers to the retention of the speech by the speaker, in its narrow sense. Broadly, it
refers to the degree to which he used notes, relies on manuscript, and extemporizes.

45My interview, Adele Brandeis, op. cit.

46My interview, Wehle, op. cit.

47My interview, Colburn, op. cit.

48Boston Transcript, June 9, 1911, p. 16 (Editorial page).

49Delivery refers to the platform presence, the use of the body and voice in the presentation of the speech.

50Poole, Brandeis, op. cit., p. ix.

51Mason, Free Man's Life, op. cit., p. 329. (from New York World, December 4, 1910.)

52Interview, Gilbert, op. cit.

53Interview, Wehle, op. cit.
CHAPTER XII

BRANDEIS' IMPACT ON HIS DAY

1. Effect on Trends and Attitudes.

The time covered by this study falls within the last of the three great movements of liberalism as defined by Vernon L. Parrington. The third “great stock-taking” of the effectiveness of the democratic machine came between 1903 and 1917. Of this era Parrington said:

The years 1903-1917 were a distinctive period -- a time of extraordinary ferment, when America was seeking to readjust her ideals and institutions to a revolutionary economic order that had come upon her. The popular phase was revealed in the muckraking movement, a movement which instructed the American middle class in certain elements of economics -- particularly the close connection between economics and politics. But underneath, an intellectual revolution was in progress, setting steadily towards a new social philosophy. The old America had been intensely conservative, naively provincial and self-satisfied, compassed by a complacence founded on optimism -- the gospel of the business man. The new America was eager and hopeful, impatient to square institutions to the new conditions. The total movement was profoundly democratic -- a new Jacksonian rising in protest against a menacing plutocracy.

Brandeis spoke and lived the pre-Court period of his public life chiefly in this era. Because of his activity it is necessary to raise the concluding question in this chapter: To what extent did his “profoundly democratic” philosophy influence the “intellectual revolution”?

A recurring question in the study of any of the popular figures of any time, but especially important in 268
this 1903-1917 period, is: Did the man influence the era, or, rather, was he the almost inevitable product of those political and social currents moving about him? A time as eruptive as Parrington says this era became, would of necessity produce some popular names. Was Brandeis more than this? Although we shall return to an answer later, a study of the major areas of Brandeis' interests reveals that he played the role of the leader to such a successful degree that it must be concluded he was more than a small-statured opportunist swept along with the tide.

Brandeis' major interests were in five areas: (1) legal methods and philosophy; (2) transportation and its relation to the economy; (3) trusts and corporate policies; (4) social legislation; and (5) Zionism. Each of these problems occupied his time and energy during the various phases of his career between 1908 and 1916, and in each he exerted a positive influence.

A summary of his efforts in these fields will throw some light upon his impact upon his day.

(1) Brandeis' interest in legal method and the philosophy of the law was manifest very early in his career. From the time of his influence in founding the Harvard Law Review to his lectures at the Massachusetts Institute of Technology and the Harvard Law School, to his work on the Supreme Court, he was continuously interested in improving the work of lawyers. He was not
alone an advocate; he was also interested in what the profession accomplished, and in how the law worked in achieving what the people in a democracy wanted and needed. Commager referred to Brandeis' contribution of "sociological jurisprudence" to the philosophy of the law, suggesting that this point of view became accepted by the court and country in the thirties and forties. 3

He demonstrated this interest in his approach to the Muller v. Oregon case, in his "Brandeis brief." He demonstrated it further in becoming what he frequently called "lawyer for the situation," rather than lawyer for clients. 4 He stated his philosophy in this regard when he spoke on "The Living Law," setting down his standards for the training of judges so that they could interpret the facts of national life as well as the law of the legislatures.

(2) His interest in the problems of transportation began with the New England railroads, and their attempts to merge. He fought these attempts because he felt it was in the public interest that the roads improve their operation, have the competition, and give better rates to the public thereby. When the rate cases came before the I.C.C. he spent long hours of research on railroad policies. He knew toward what end he was studying because of his earlier experience with the railroads.

(3) Brandeis' study of trust and monopolies began with the gas companies in Boston. Later he studied the shoe industry. Finally the same principles were applied
to railroads. When Fraenkel was looking for a title for his collection of Brandeis' works he chose *The Curse of Bigness*, for he considered it typical of his attitude toward industry. The little man had to have his chance. Lief noted that "Brandeis worshipped personal freedom. One might be rich and yet not free...."5 His inherent opposition to the trust and corporate giants lay in his belief that they stifled human liberty and freedom, which he continuously held included economic freedom. Poole observed this same tendency in his first important struggle, which was with the traction company in Boston. He fought to create a public opinion in that city that would allow for economic freedom for its citizens, and not, as he considered it, enslave them.6

(4) He became interested in improving the lot of the working man when he undertook the Savings Bank Insurance plan for Massachusetts. He took on the big insurance companies in his first big battle, because he felt that the man who received his weekly pay check was being milked of money in exorbitant insurance fees. From this he went into their working conditions. He was attracted to wages and hours laws by the National Consumers League, with which he cooperated on a number of cases. He went to various states to help plead cases before their Supreme Courts. He handled the cases before the U. S. Supreme Court.7
His interest in Zionism came late in this 1908-1916 period, but Brandeis devoted a tremendous amount of energy and time to it. Here again he was brought to Zionism by several considerations. Not the least of these was the plight of the garment workers in New York. He observed their living standards in 1910 when he went there to arbitrate the strike which was in progress.

The variety of interests to which Brandeis gave his time and mind, placed him in the "intellectual aristocracy" of the United States.

Now the question to consider is, To what extent was Brandeis persuasive in these areas?

1) In his legal methodology he left a record which in itself became a chapter in American jurisprudence. He opened the door of the Supreme Court to "the facts of life." In becoming the "people's lawyer" he demonstrated his philosophy that the law should represent the search of every man for the most effective participation in a democratic society. He brought to the Court "a fierce determination that nothing should destroy the right of criticism upon which democratic change depends." American law and lawyers will not soon forget the profound influence of the rugged jurist who developed and expanded a philosophy of the law as 'the application of ethical ideals, with freedom at the core.'

2) Brandeis was effective in his battle with the railroads. He almost single handedly prevented the
merger of the New Haven and the Boston and Maine lines. He successfully pled the rate case in 1910, and in 1914 succeeded for a time at least in postponing the five percent increase. Even in this ultimate failure he persuaded the I.C.C. that it should concern itself with the efficiency of the carriers as part of its over all control of rates, a policy which it has continued through the years.

(3) His continuing vigilance in the battle with the trusts and large corporations had its effect upon their policies. He convinced the gas company and the Boston city government that the company would profit by using the sliding scale of rates, lowering rates as it increased dividends, giving both the consumer and stockholder the benefits of efficient management. He took on the United States Steel Company and forced some of their policies into the limelight of publicity. He fought against the shoe monopoly with success. He became the champion of little business and of the individual owner and operator. Curti noted his influence in this area of American life. He called Brandeis "the people's lawyer;"

He showed how little fellows might conduct their business to their own great advantage...he attempted to strike an effective balance between the traditional values of voluntary action and individual initiative and the new imperatives of social control....Above all he pointed the way for the restoration of some measure of free competition among business units.14

(4) His success in the field of social legislation
has already been discussed. The greatest testimony to
his effectiveness here lay in the fact that whenever a
state was ready to defend its wages and hours legislation
before a supreme court, it called upon Brandeis to assist
in drawing the brief and in oral pleading. After the
Muller case, he was counsel in each of such case to come
before the Supreme Court. He frequently spoke on problems
of social legislation and control. He debated with
Gompers in Boston, on the incorporation of labor unions.
He spoke often on scientific management, as he did in de­
bate before the Economic Club of New York, March 27,
1911. These pleadings and speeches were widely publi­
cized and made their impact on the early years of this
century.

(5) The Zionist movement was given a tremendous impe­
tus by his work. He toured the country in its behalf. As
was typical of his reaction to a cause, he spoke and worked
with enthusiasm and vigor. He was successful in arousing
Jews to a greater realization of their potentialities.
He was further successful in interesting foreign governments
in the cause of Palestine as a home for the Jews. The
Balfour Declaration was influenced a great deal by his
judgment as he conferred by cable with Chaim Weizman on
the issues involved.

It is helpful in understanding the impact of Bran­
deis on his day to know of the evaluations of his contem-
poraries. A review of these leads to the conclusion which Holmes later reached. As he learned to know Brandeis, he was struck by "his complete integrity as well as by his vast knowledge, by his ethical sense, by his almost agonizing determination to do the right thing."18

Part of the public reaction to any particular individual may be ascertained by an examination of the contemporary press. It is one of the readily available, if not entirely accurate, reflections of public opinion in a given time.19 Although many journals have been previously cited, some of their comments are of interest in an evaluation of the effectiveness of Brandeis and of his influence upon the period.

The Sunday edition of the Boston American for October 4, 1908, carried a feature article entitled "Stories of Success of Louis D. Brandeis." It said in part:

Had he been so inclined he might have been Mayor of Boston, and Governor of the commonwealth, but Brandeis has never sought public office. He had rather battle for the people in a private capacity, and every day of his life he gives one of his busy hours to the cause of the public without compensation.

No man in Boston, or in America, better exemplifies the true meaning of the word success. He is not alone the success that comes with dollars; although Brandeis is in no immediate danger of going to the poorhouse. His is the ideal success which signifies not only the creation of a future, but which has made him justly famous as a lawyer of national renown through the battles he waged without pay for
the downtrodden, oppressed American citizens....
Brandeis is a modest man—he won't even
pose for a photograph for publication in the
press. 20

Commenting on the Muller case the writer of the article
observed:

His argument was delightfully original—in
fact he has been referred to as playing a 'joke'
on the judges of the high tribunal.
He ransacked the law books and couldn't find
a precedent. This would have put some barristers
out of business, but it tickled Brandeis. He
dealt in human facts, argued justice and common
sense....But Brandeis didn't want any precedents,
and he couldn't find them, and the judges had to
reason out the decision on a common sense basis,
and they did. 21

The Boston Post ran a feature article on "CITIZEN"
BRANDEIS.

The best known publicist in this country
today is Louis D. Brandeis, 'Citizen' Brandeis
of Boston and the United States. The railroad
magnate who would dare to ask 'Who is this man
Brandeis?' after Thursday's pronunciamento from
the Interstate Commerce Commission, would be a
fit candidate for the tomb. Mr. Brandeis has
been identified for good and all.
And he deserves the great reputation that
is his. Fighting almost single handed before
the commission for the shippers of the land,
braving the tremendous resources of the railroads,
toiling with incredible patience and pleading
with utmost brilliancy—for no reward save that
of knowing he was doing his duty as he saw it—
'Citizen' Brandeis won a victory for the people
such as few lawyers are privileged to obtain.
And the beauty of it is that there is no pose
in all this, no affectation, no taint of the
demagogue.
The self-imposed tasks of 'Citizen' Brandeis
in behalf of popular reforms are by no means
ended. Nor can opportunity for them ever be
closed. 22

The New York papers first took note of his work with
the garment workers. When he returned to speak to the
National Cloak and Suit Buyers Association, he spoke for
the rights of the strikers, a point not too popular at
that time. The New York Tribune commented that his "re­
marks were heavily applauded," but that the chairman
gently rebuked him for getting over into the forbidden
subject of the recent strikes.23

The Chicago Record-Herald spoke favorably of his
speech on behalf of La Follette, given January 2, 1912.
They spoke of his giving a new definition to Progressivism.
They emphasized his effective explanation of the struggle
between capitalistic power and the independence of indi­
viduals.24

Later, the Chicago Socialist noted his work in 1912:

Mr. Brandeis is endeavoring to find a way by
which capitalism can be saved. Perhaps he does
not so much out of love for the capitalist class
as in response to some inherent inclination, to
preserve the established order if possible. Mr.
Brandeis' progress along these lines is interest­
ing, especially as, if he is as sincere as may
justly be supposed, he can only wind up in the
Socialist ranks.25

From other sections of the country come newspaper
comments on his effectiveness as a speaker and upon his
stand on various issues.

The Syracuse (N. Y.) Herald26 commented upon his
address before the National Civic Federation Banquet at
Hotel Astor in New York in 1908 as being "the most in­
spiring speaker" of the sessions.
The Manchester (N.H.) Union\textsuperscript{27} spoke of his extremely interesting speech when he took the middle-of-the-road position in a discussion of socialism in 1909 in that city.

The Abingdon (Mass.) Herald reviewed one of his speeches on the Savings Bank Insurance Program:

Louis D. Brandeis, author of the plan of Savings Bank Life Insurance and old age annuities, delivered the address of the evening and it was followed with much interest by everyone. Mr. Brandeis not only has a firm grip on details of the scheme which has been put into operation throughout the Commonwealth under the law of 1909, but he has broad views as to its usefulness in counteracting the socialist tendencies with which this country in common with other countries is menaced.\textsuperscript{28}

In March 1909, Brandeis engaged in a debate with John B. Longer, one of the vice-presidents of the Traveler's Insurance Company of Hartford, before the Economic Club meeting at Massasoit House in Springfield. The Springfield Union commented:

Red-blooded altruism bounded through the address of Mr. Brandeis. His argument was in many ways idealistic, yet it was based upon solid economic principles. It was tinged with the opportunism that is founded on knowledge that the brotherhood of man is being made more real and tangible in the community with each succeeding day.\textsuperscript{29}

When Brandeis spoke in Columbus for the La Follette campaign, the Columbus Citizen\textsuperscript{30} and the Columbus Dispatch\textsuperscript{31} merely mentioned that he spoke to the state convention of the Progressives. The Ohio State Journal noted that "Brandeis praised La Follette to be answered
with a storm of applause." It editorialized that "The Progressive Republican meeting at the Chamber of Commerce was not a large assemblage, a hundred probably present, but it was very enthusiastic and likewise pugnacious."33

Earlier in this chapter the question arose: Did Brandeis influence his day, or was he almost completely created by his era? It is of interest to consider these observations in support of the conclusion that Brandeis was truly an importance influence in his day. (1) He was popularly recognized as belonging to a specific point of view, a point of view the direction of which he helped determine. (2) He made significant contributions to the methods used during the progressive days. (3) Although he declined public office, he was offered several positions, and considered for others, but turned them down because he could thereby remain free to exert whatever influence he desired. (4) That this influence was determinative was conceded by his contemporaries. (5) Subsequent developments reflected the positions taken by Brandeis, and showed the effect of his leadership.

Parrington wrote of trends and currents of this period. He spoke of the work of the journalists. Then he continued:

As it became evident how popular was the chord that had been struck, more competent workmen joined themselves to the group of journalists, novelists... essayists, historians, political scientists, philosophers, a host of heavy-armed
troops that moved forward in a frontal attack on
the strongholds of the new plutocracy.

He then listed the groups of men who had formed
the directive force of leadership for this time.

Few writers in the years between 1905 and
1917 escaped being drawn into the movement...; and with such popular novelists...; with such
political leaders...; with such scholars...; and such lawyers as Louis Brandeis, Frank P.
Walsh, and Samuel Untermyer, the movement
gathered such momentum and quickened such a
ferment as had not been known before in the
land since the days of the Abolition contro­
versy. The mind and conscience of America
were stirred to their lowest sluggish stratum,
and a democratic renaissance was all aglow on
the eastern horizon.34

Although not a contemporary of this earlier period,
Max Lerner gave an effective summary of the reaction to
Brandeis:

In Louis D. Brandeis, the able Boston lawyer,
the forces of liberalism gained no mean ally.
I say ally, because a common unquestioning
soldier he could never be: stern individualist,
who cared more about the integrity of his per­
sonality than about anything else, he had to
fight in his own fashion....

He was effective. Of that there can be no
doubt. The minutes of legislative hearings and
investigation, the records of lawsuits in which
groups of citizens organized as a 'league' of
some sort or other, applied for court action
against an encroaching corporation, the news­
papers that reported his speeches and activities,
and the journalists who commented upon them,
all attest to his effectiveness.

In two important aspects he stands out from
the group of the turn-of-the-century liberals
with whom his name is associated. He had a
passion for detail and concreteness where most
of them dealt in inventive and generalities.35
2. Evaluation of his techniques.
   a. As a judicial pleader.

Brandeis made his initial reputation before the courts. In his early days he was already known for the thoroughness which later enabled him to make his reputation.36 On the national scene it was his work before the Supreme Court which drew attention to him. It was in committee hearings and, in many respects, in court trials, that he learned that even from such platforms he had to influence the public opinion to his side. Poole noted in this connection:

Of the work of Brandeis here, [the Ballinger case] the most interesting part to me is his handling of the reporters. From the start, knowing how little he had to hope for from the majority of the committee, he presented his case direct to the American people. Night after night in his room he worked with the newspaper men, explaining the day's significant points. And the result of this work was great. For Mr. Ballinger's resignation was mainly due to the strong public sentiment made through the press.37

Brandeis had a clear understanding of law and its function. He held that "the constitution was as big as the minds of man."38 Mason noted that "Holmes followed Hobbes in suggesting that the dominant power should have its smooth and right way to accomplish its end. Brandeis followed Coke suggesting that popular opinion must conform to certain standards of social justice."39

Brandeis was one of the most effective judicial pleaders of his day. He knew the power and method of argument. He believed that truth and justice, being
more powerful than their opposites, could be given to an audience most effectively by those who mastered the facts. He spoke in the courts to the public, and both the public and the courts heard and were convinced.

b. An occasional speaker.

Brandeis rarely spoke just for the pleasure of an after dinner audience, or for a holiday crowd to delight in the ornamental display of beautiful language. Nor did he speak to arouse the emotions of the mobs. For example, when he spoke at dinner gatherings it was an attempt to sell one of his stock of ideas. At the National Cloak and Suit Buyers Dinner he took as his "text" "Get Together," meaning thereby "that employer and employee should endeavor to work harmoniously, because...each needs the other." He declined literally hundreds of invitations to speak at dinners, banquets, and special gatherings. Most of these he declined, because, as a rule, he felt that it gave him no opportunity to carry forward one of his ideals.

When he did accept these speeches, they became deliberative counsel for the future of the country. His speech on "True Americanism" was an explanation of his belief in the future of democracy as the agency to provide full and complete freedom to all its citizens. When he spoke to the members of the bar associations, it was to give them some underlying philosophy of the law as related
to the economic and social problems of the day, something to bring, as Mason phrased it, more life into the law.

Holmes spoke frequently in his earlier days, but the occasions were bar association dinners, anniversaries, and special occasions where a judge could be a decorative if not an essential part of the program. Brandeis spoke where he thought he could carry forward his ideas. After he was appointed to the Supreme Court he discontinued speech-making, except for a few speeches on Zionism, and he discontinued even these after 1921. A Justice of the United States Supreme Court had to keep himself apart from the struggles of the day, and, if he must keep apart from those battles, Brandeis had no desire to decorate the lecture platforms of the country.

Although he gave a few occasional or ceremonial speeches, Brandeis did not gain his fame in this type of public address, and these few speeches cannot be considered his contribution to public address.

c. As a pleader of causes.

Donald Richberg discovered the philosophy which made Brandeis the pleader of the people's causes when he said:

The function of government as viewed by Mr. Justice Brandeis is not merely the preservation of an assumed natural liberty, but a positive duty through cooperative aid to set men free from the tyrannies that otherwise might be imposed by nature and other human beings.
Very early in his professional career Brandeis gave himself and his time, occasionally with a fee, but more often without, to the defense of individual men upon whom he felt some tyranny was being imposed, either by nature or by other human beings. Against these forces he placed a brilliant mind, devoted to detail, impressed with the importance of knowledge, and dedicated to the reasonableness of truth and justice. In these causes he was "a convincing speaker, impressing his hearers with his remarks." 44

Brandeis was not concerned with either the size or the character of the opponent, if he believed the opposition stood in the path of the free individual. In the Ballinger case, Pepper believed it was going too far to implicate Attorney-General Wickersham and President Taft, but Brandeis did not hesitate. He felt that by so doing he could protect the interests of the people as a whole in conservation, and specifically he could defend Glavis. He did not hesitate to campaign with La Follette against the glib organized political machines. He was willing to take on the United States Steel Company or an association of all the railroads in the United States.

As Brandeis saw the future of America, he tried to visualize a democracy where there could be law and control of the greedy, and yet where the little man could have his chance to develop by his own initiative. He
believed these things had to be accomplished under law. Lincoln Steffens noted this tendency when he reported an evening spent with Brandeis in 1918.

And Brandeis, he is practical too. Sees the particulars and the problems generally...but he's the lawyer. He wants international laws or the Ten Commandments. 'They'll be broken,' he admits, 'but we must begin by having them before they can be broken.' So he says, and will not look at the causes why they will be broken or at the job of dealing with them--the causes. The fine thing about him tonight was that he projected his imagination into the future and saw--adventure; a world of men who will not be content to return to the sordid humdrum life we all have lived, but will try new things in science, business, industry....

Most of his pleading for causes was successful in its immediate effect. The gas company, the New England railroads, the wages and hour cases, the first railroad rate case, and others were immediately successful. To some extent his work in Zionism had immediate success. In others he was not immediately successful, but he gave an impetus to the movement or agency which subsequently influenced its policies. Certainly this was true of Zionism. He lost the second railroad case, but left his impression on the policies of the I. C. C. The decision in the Stetler case was reversed less than ten years later, but its philosophy dominated much of the later legislation which was upheld by the Court. His impact on his day was significant to a greater degree than that of any other man outside public office.
Perhaps his pleading for the American ideal of freedom and justice was not totally lost.

The extraordinary success which many of his seemingly idealistic measures and devices have already won affords some justification for believing that his democratic ideal, in both its political and industrial aspects, may yet be realized. Certainly that ideal is both the goal and inspiration of the forces of statesmanship now struggling to shape aright the course of the nation.

The pleading for causes did not stop with his elevation to the Supreme Court. There he continued to have his influence during the later years of his life. He came to be considered a great liberal, a term which has many connotations. Professor Freund sketched his portrait of this influence in a series of lectures analyzing Brandeis' philosophy of the law. Perhaps his definition of the liberalism of Brandeis comes close to an accurate summation of the approach to the causes for which Brandeis fought in early days, and which he followed with interest during his later years:

You will note that the portrait I have sketched does not resemble the typical picture of the liberal which many held today. Our age is contentious and frenetic, inclined to distrust the force of standards which one's adversaries may choose to ignore, inclined to seize its own innings and impatiently mark up victories and defeats day by day. And yet who can say that we may safely stake our vision of the future on the accumulation of little triumphs of the day unless they are earned by what I have ventured to call the morality of the mind—by understanding self-restraint, and evenhanded application of principle? The
liberalism of Brandeis the judge was marked by these qualities, and it may have meaning therefore beyond his office and his time, for our day and for the day we shall not see.
FOOTNOTES


2 Ibid., p. 346.


4 "For such work [public causes] he has urged the importance of big successful lawyers keeping themselves free. He has kept himself free; striving to hold a position of absolute independence 'between the wealth and the people.' On the one hand, he made no close political ties; he has declined every proffer of office, has occasionally even refused to work for or against any candidate. On the other hand, he has no connection with any big corporation. 'I would rather have clients,' he told me, 'than be somebody's lawyer.'" (Poole, *Brandeis, op. cit.*, p. 1).


7 After Brandeis' appointment to the Court, Professor Felix Frankfurter took over the handling of the Stetler case.

8 In his will the major portion of his three million dollar estate, after his family, went to Zionism and Palestine.


10 Cf. ante, Ch. III.


He so convinced the president of the gas company, James B. Richards, that, after the Boston battle was over, he retained Brandeis as counsel to the corporation. Brandeis served only a short time, but saw Richards often in later years.


Cf. ante, Chas. II and VI.


Lerner, Holmes, op. cit., pp. xl and xli.

"By public opinion is not meant the transitory sentiments of the moment, which at any time may be awakened by some public excitement, or which, responding to some passing passion, may rally the mob or stir a community into some ephemeral activity.

"It is rather to be understood to mean the opinion evolved by human experience which at length becomes the settled conviction of a people concerning their rights and duties, recognized and felt when the occasion of its origin cannot be traced or is forgotten, and which in time forms men's habits and customs and determines their moral attitude in the affairs of life." Hon. Allen Andrews, "The President's Annual Address," in the proceedings of the Ohio State Bar Association. Columbus, Ohio: The Champlin Press, 1911. p. 26.

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33 Ibid., p. 4.
34 Parrington, Main Currents, op. cit., p. 405-6.
36 Cf. ante, p. 107.
37 Poole, Brandeis, op. cit., p. xlv.
39 Mason, Lawyer and Judge, op. cit., p. 174.
40 New York Sun, February 15, 1911, p. 4.
41 Files of letters which I examined in the University of Louisville (Kentucky) Law Library.
42 See the Holmes bibliography in Lerner, Holmes, op. cit.
44 Newburyport (Massachusetts) Herald, July 21, 1909.
46 Mason, Lawyer and Judge, op. cit., p. 85.
CHAPTER XIII

SUMMARY AND CONCLUSIONS

1. Method

The method followed in this study was that of the rhetorical critic. The life and work of Louis Dembitz Brandeis were studied with a view to discovering the characteristics which affected his speaking, and to discovering the circumstances surrounding the specific addresses studied.

The classical pattern of rhetorical analysis was the basis for the critical part of the study. Each speech was studied from the point of view of (1) the speech situation, (2) the speech type, and (3) the speech structure. Under this final category of speech structure four approaches were made: (a) backgrounds and issues, (b) arguments, (c) organization, and (d) style.

2. Biography

Brandeis' parents had arrived in the United States some eight years before his birth. They were from highly cultured families of Bohemian and Prussian backgrounds. The family home was eventually established in Louisville, Kentucky, where Louis was born in 1856.

Educated in the local private and public schools, and in Dresden, Germany, Brandeis felt himself prepared for Harvard Law School. He entered in 1876, and graduated...
there in 1878, with the highest honors ever received.

After a brief law practice in St. Louis, he returned to Boston, which became the center of his activity up until 1916. During this varied and successful legal career, he became known as the champion of reform measures, and "the people's lawyer" in public causes. He made important contributions to legal philosophy and method and to many social and economic movements and trends.

The important factors in his early life which contributed to his life habits included the following:

1. The heritage of his independent ancestors.
2. The training in schools which maintained high standards.
3. The regimentation of the German schools, to which he reacted unfavorably.
5. Weak eyes which forced him to learn a quick mastery of material.
6. Some of his early cases and clients, which demanded a knowledge of business law and which forced him to become conversant with this field of jurisprudence.

2. Period of study

The period chosen for this study was Brandeis' "National Period," the era in which his country-wide influence came to its zenith, and during which he devoted
most of his time to national problems and cases. The case of *Muller v. Oregon* began this era in 1908. His appointment to the United States Supreme Court in 1916 marked the end of his crusades and campaigns.

3. The speeches criticized

Six major addresses representing different types, themes, and to a certain extent different methods were the basis of the major portion of this study. Specific conclusions are suggested here from these speeches.

(a) "The Ballinger Investigation"

(1) Brandeis sensed the importance of the occasion, and utilized the press to give his words wider acceptance.

(2) Following the classical pattern, his speech was carefully organized, his arguments well supported, and his analysis of the issues and evidence clearly presented.

(3) His style was direct and free from excesses, figurative language, and strained analogies.

(b) "The Constitution and the Minimum Wage"

(1) Brandeis used effective rebuttal techniques.

(2) He demonstrated the effective use of argument by explanation.

(3) He effectively used repetition and the method of residues.
(c) "The Five Per Cent Case"
(1) Brandeis demonstrated his ability to grasp the broad backgrounds of an issue, and to adhere to a thesis throughout the speech.

(2) He showed an unusual ability to explain statistics and other types of complicated financial statements, and to make these clear to the layman.

(3) In this speech he supported the theory of scientific management.

(d) "True Americanism"
(1) In this Fourth of July address Brandeis gave his unique interpretation of American ideals, based upon his own economic theories.

(2) On an occasion of this type he did not ornament his style but adhered to his policy of clear unadorned language.

(e) "The Jewish Problem and How to Solve It"
(1) The use of pathetic appeal appeared in this speech on a religious issue.

(2) He utilized a strong statement and narration and an effective pleasant appeal in his peroration.

(f) "The Living Law"
(1) As an example of a deliberative speech, Brandeis clearly stated his issues, and was able to drive immediately to the point.
(2) His analysis of the cases cited in this speech was particularly effective for this type of audience.

(3) He directly appealed to them to adopt his philosophy of law in the peroration.

4. Conclusions concerning Brandeis public speaking

From this study certain conclusions may be drawn which summarize the method and work of Brandeis as a public speaker. Some of these follow.

(a) Brandeis was able to sense the importance of a given issue and to utilize his speeches to make the most influential attack possible on the public opinion of the day.

(b) The arguments were very carefully organized and supported.

(c) He always made a clear statement of the issues of the speech.

(d) His mastery of evidence, particularly of statistics, financial statements, and fiscal data, was always thorough.

(e) He presented evidence in a clear and understandable manner.

(f) Effective rebuttal techniques were characteristic of his attacks on the opposition.

(g) He frequently demonstrated the effective use of argument by exposition.
(h) He could use repetition, the method of residues, and other special devices very effectively.

(i) He was very thorough in his inventional methods, although he rarely sought for material that would have an emotional effect.

(j) His habit of choice in disposition always revealed his unique ability to organize his data around the impelling points of his case or subject.

(k) His style of language usage was always clear and appropriate. He avoided any embellishment by means of figures.

(l) He adhered to the Spencerian principle of economy of style.

(m) He spoke either from manuscript or extemporaneously. Frequently he had prepared from a manuscript so thoroughly that he gave a memorized speech. When frequently repeating a speech he would follow similar patterns, suggesting memorization.

(n) His voice was baritone, with wide range and flexibility.

(o) He was not "flamboyant" in delivery, using few gestures.

(p) He spoke with vigor and firmness, with a voice that could be easily heard.

5. Some implications from this study

A study of this type suggests certain implications
and conclusions to the student in the field of speech. These grow out of the analysis of Brandeis' methods, a study of his speeches, and the critical commentary on his work. Some of these follow.

(a) Mastery of the facts and data in a given area are a valuable foundation for effective persuasive speaking.

(b) People respond to public speaking on important issues when such addresses are limited to bare statements of the facts.

(c) A style which is characterized chiefly by clarity may be widely accepted.

(d) The almost complete absence of figures of speech does not necessarily lessen the effectiveness of a speech.

(e) The absence of emotional appeals, pathetic proof, and colorful illustrations does not preclude the achievement of a positive response from an audience.

6. Brandeis and his day

Brandeis made his reputation before the courts in the early part of his career. His reputation for thoroughness, his effective pleading and his effective advocacy, all established him as a strong and successful lawyer.

From this center of an assured career, Brandeis launched out in search of more demanding tasks. He assumed the role of champion of causes which he believed were for
the common good. Here he was immediately successful in many varied lines. He kept before him his personal ideal of freedom and justice, and his own basic economic approach to the current political and social problems.

Brandes had an impact on his day, not only because he found important causes which get hold of him, but because he was one of the persons who shaped issues, who influenced the trend of his times.

He stood out for individualism as against the great uprising of socialism on the one hand, and of the accumulation of great fortunes on the other. In the immediate contingency, he put forward two ideas which were destined to exercise considerable influence on the life of the nation. One was the doctrine of 'social invention.' The other was the theory of the 'living law.' Both essentially were social applications of pragmatism.

Because of these pragmatic approaches to public problems, he was called by his opponents a radical, lacking in judgment and judicial temperament. Morris observed, however, that "he never ceased to believe that the old American ideals were still valid for a highly complex industrial society, and that within its framework the democratic way of life could be realized through the application of new knowledge to new conditions."² An editor of the Harvard Law Review commented:

Yet he did not originate a new view of life, nor did he make his impact upon any single work of mosaic learning . . . . It is the golden thread that runs through all his work, first as an active practitioner, later as a shining example of a
lawyer as a public servant though holding no public office, finally as a member of the Supreme Court. 3

It was this golden thread of a democratic ideal running consistently through his multifarious activities that made his impact upon the early years of this century a strong force in law and politics. By developing a "humanitarian passion . . . . allied with scientific curiosity" his ideal made him "the greatest of sociological jurisprudents." 4
FOOTNOTES


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People v. Williams, 189 N. Y. 131.


W. C. Ritchie v. Wayman, 244 Ill. 509.

William E. Ritchie v. People of the State of Illinois, 155 Ill. 98 (1895).


Stone, C. J., 317 U. S. at xlvii and xlviii.

U. S. v. Darby, 312 U. S. 100 (1914).
West Coast Hotel Co. v. Parrish, 300 U. S. 379.
Whitney v. California, 274 U. S. 357.

E. Special Documents:

Files of letters, University of Louisville Law Library. These were part of the collected papers in their Brandeis room.

Landis, James A., mimeographed MS of speech, delivered June 6, 1950, New York City.

Part Two

The items listed in Part Two are books which, though not cited directly, made important contributions to the writer's thinking on the subject of Brandeis and his public speaking.


Mr. Brandeis. Mr. Chairman and gentlemen of the committee, a great mass of evidence has been submitted to you at these hearings and a large number of subjects have been touched upon; some of them bearing on the fundamental conception of democracy, bearing on the demands of truth, of loyalty, and of justice. But whatever subject was touched upon, practically the center to which all testimony was directed has been the conduct of Mr. Ballinger, his acts, and his omissions. And in connection with that testimony much has been said and much evidence has been introduced, which, in our opinion, subjects him to severe criticism. Some of you undoubtedly will not agree with us as to the extent to which that criticism is justified; but I take it that the main issue which you have to consider is one on which men who have heard this testimony ought not to differ—because the main issue is this:

Is the Department of the Interior, as Glavis phrased it, in safe hands?
Or, to put it in other words, has the conduct of Mr. Ballinger been such, is his character such, are his associations such that he may safely be continued as trustee for the people of their vast public domain, that he may be continued as manager of the reclamation and other kindred services, that he may be safely relied upon to represent the people in that great and sacred trust?

Or, to put it in still other words, is Mr. Ballinger a man, single minded, able, enlightened, so zealous in the protection of the interests of the common people, so vigilant, so resolute, that he may be relied upon to protect the public domain, their great assets, upon which the welfare of the present and future generations of American people so largely depend; may he be relied upon to protect all that against the insidious aggressions of special interests who are ever looking for the opportunity to seize upon that which is the property and the hope of the American people? Is Mr. Ballinger, in other words, the man to be the trusted of all this for the common people?

We submit, Mr. Chairman and gentlemen, that whatever differences there may be in the committee as for the degree of culpability of Mr. Ballinger for particular acts or omissions, there ought not to be any difference of opinion on that one question; that he is clearly not the man to be trustee; that he is not the man upon whom the American people can safely rely to protect them against the indidious aggressions of the special interests.
Whether it be because of his motives, whether it be because of his associations, whether it be because of peculiarities of his character, whatever may be the reason, he is not the man.

Now, let us consider, in the first place, what his conduct has been. And in respect to his conduct we have been able to lay before you with some detail the facts in two important connections: The facts relating to Alaska coal lands and those relating to reclamation. So far as his conduct concerns reclamation, you will hear from Mr. Pepper. So far as it concerns the Alaska coal lands, the situation is this:

For some years prior to November 12, 1906, the surveys and explorations of Alaska had made it clear that there were vast areas of coal of great value. The laws were ill adapted to protect that property of the people for the people. Speculators in large numbers were lured to that territory as a field of exploration. Recognizing these facts, President Roosevelt, on the 12th of November, 1907, withdrew those coal lands from entry, in order, no doubt, that there might be developed soon some system of legislation which would adequately protect that which was the people's. Of course, laws subsequently enacted could not affect any claims legally entered, any claims upon the land legally located.

A very large number of claims to coal lands had been
made before that date, claims numbering nearly a thousand. About 150,000 acres of coal lands, believed to be the most valuable, and certainly the most accessible, of any known had been located on, but no patents had been granted; indeed, with the exception of 30 claims, none of these thousands of claims had, up to the spring of 1907, proceeded even as far as entry. The situation, therefore, was this: If those claims were not legal, the power rested in the Department of the Interior to have them canceled, and a clear title to the land would remain in the people. In the spring of 1907 it was the belief of Secretary Garfield, it was the belief of the land officials—a belief carried over from the administration of Secretary of the Interior Hitchcock—that all, or substantially all, of those claims were fraudulent. If so, then they could all be canceled, and all the coal claims lent. If so, then they could all be canceled, and all the coal claims of Alaska could thereafter be dealt with in a way which was fair, wise, and enlightened, and for the best interests of the people of America.

Such was the situation when Mr. Ballinger became the Commissioner of the Land Office, March 5, 1907; and he agreed with Secretary Garfield, and with his associates in the Land Office that those claims should be thoroughly investigated to the end that all claims not legal, all claims fraudulently located, might be canceled.
Shortly after that Mr. Ballinger left for the West, and a little later instructions were given to Horace Tillard Jones, an agent known to have no embarrassing affiliations, believed to be competent, and known to be honest to investigate these claims thoroughly. Jones received his instructions under date of June 21, 1907.

Promptly he proceeded to Juneau, Alaska, to get such information as was available there; and upon his return to Seattle on the evening of Saturday, July 20, he learned that Commissioner Ballinger, who had come to Seattle, his old home, desired to see him. On the following Monday morning he called upon the commissioner at his office in Seattle, and from that time—from Monday, the 22nd of July—throughout the period of Jones's investigations, he and Mr. Love, who was directed to assist him, were in constant, in almost daily, communication with Secretary Ballinger.

Mr. James. You mean the commissioner?

Mr. Brandeis. Yes; Commissioner Ballinger.

What happened then? This investigation which Jones entered upon with the idea that it should be thorough, with instructions that each and every claim should be investigated, was suspended at the expiration of nineteen days from the time that Jones called upon the commissioner at his request; suspended, when there had been investigated only 25 of the 461 claims, as to which Jones had brought back the addresses of the claimants from the Juneau office.
Twenty-five out of 461 claims. Jones made a preliminary report; submitted this preliminary report to Commissioner Ballinger in person. That report closed, as a result of this preliminary investigation, with a recommendation from Jones that each and every claim should be thoroughly investigated. He followed that report of August 10 with a supplemental report of August 13; and he took occasion, at the end of that second report, to repeat that these claims should be investigated, each and every one of them, by a fearless and experienced investigator.

Jones was turned off to other work. But again, on the last of November, he had occasion to send in a communication to the department and again in that, his third report, he called attention to the danger incident to a failure to investigate, and recommended that the investigation be resumed.

Meanwhile, Glavis had become the chief of division at Portland, and by becoming chief of the division at Portland he had become the superior of Jones. So when this Jones report of November 1 was sent to the Commissioner, Glavis accompanied it with the recommendation that from what he knew of the general situation he desired to urge that the investigation into the Alaska coal claims be taken up.

Now, why was this investigation, started in the best of faith and with the greatest vigor, suspended? There are certain facts which we can not ignore, and they are these:
The list of claimants which Jones brought back from Juneau, with 461 addresses, disclosed that of that number about 361 were residents of the Pacific coast States and Alaska; most of them, 250 residents of the State of Washington, and of those 250 residents of the State of Washington, 164 residents of the city of Seattle—Mr. Ballinger's home. Included in those 164 were men of great financial, political, and social influence in the city, some of them friends and associates of Mr. Ballinger. Now, we have not only the fact that in spite of these repeated recommendations of Jones, and finally of Glavis, the investigation of all these Pacific coast claims remained suspended, had been stopped and remained suspended, but we have the further fact that the only other claims of any number that there were, the claims of residents of Illinois and of Michigan aggregating in number about 80, were ordered investigated thoroughly by instructions addressed to Colter on the 24th of September, 1907.

There is another fact which is clearly brought to our attention, and it is this: That on the very day that Jones heard that Mr. Ballinger wished to see him, a contract was entered into between the Morgan-Guggenheim Alaska Syndicate, and a committee representing the Cunningham claimants, by which the Alaska syndicate acquired an option on a one-half interest in the Cunningham claims.

Now, it was known then, and it had been known when
the Jones investigation was directed, that this Alaska syndicate, composed of J. P. Morgan Company and the Guggenheims, probably the most ambitious, energetic, resourceful combination of capitalists in the world, that that body of men were, through their control of transportation, aiming for and rapidly acquiring a control of Alaska, through the transportation systems, through the large copper mines, through their fisheries, if they could supplement their existing power by the practical control of the coal situation, by owning some of the mines in connection with the transportation system, they would be confirmed in what, to a very great degree, they now have, the control of Alaska. All this was then known; and that knowledge was one of the facts which has always been deemed important in the consideration of this question from time to time in the Land Office since the spring of 1907.

Was the stopping of this investigation of Jones, so far as it related to the Pacific coast claimants, and the pursuit of that investigation, so far as it related to the claimants in Michigan and Illinois, a mere coincidence? Was the stopping of this investigation at the very time when the Morgan-Guggenheim Syndicate acquired its option on a one-half interest in the Cunningham claims; was that also a coincidence? And was it a coincidence that on the 17th of August, 1907, the very day that the Morgan-Guggenheim expert sailed for Alaska to examine the Cunningham
coal field, and the adjoining properties, was it a coincidence that on that very day Clarence Cunningham wrote Mr. Daniel Guggenheim:

We understand that the Commissioner of the General Land Office has said that these patents will issue in three months, and there is no reason why they should not, and as there are no contests—that is, no protests from others—there is no reason why the patents should not issue in due course.

Such was the situation in the summer and in the fall of 1907. After a while it came to be common talk in Seattle that as long as Mr. Ballinger was Commissioner of the General Land Office the coal claimants need fear nothing. That talk came to the ears of Mr. Glavis. That talk came to the attention of Henry M. Hoyt, Assistant to the Attorney-General, who was engaged at that time with Glavis in prosecuting certain coal-conspiracy cases in the States. Glavis and Mr. Hoyt were much distressed at that rumor and persistent talk. To Glavis there was another matter which created some concern. In an entirely different connection he had come in contact, about that time, the end of October, with one Charles D. Davis, the son of Clark Davis, who himself was the manager of the Alaska Coal and Petroleum Company, one of the concerns which had taken over, or was preparing to take over claims to Alaska coal lands. In talking with
that many things were said which led Glavis to believe that this concern, which acquired the Hunt group of claims, had taken the claims in violation, in fraud of the law; and as a zealous agent, ready to serve the Government in any way, he undertook to get from Davis an affidavit bearing upon that matter. Davis told him that Commissioner Ballinger, when in Seattle in the summer, had advised him not to make any affidavit or statement until charges had been filed—a situation which indicated to Glavis, as it must to others, that the commissioner was looking out more for the interests of private individuals than for those of the people.

These facts, coming together, disturbed Glavis very much; so much that he concluded to lay the matter before his immediate superior, Chief of Field Divisions Schwartz. Glavis wrote him a personal letter, which seems to me shows most clearly the way in which Glavis approached this whole subject (reading):

Dear Schwartz: There are a number of matters which I think ought to be talked over with you, one of which are the Alaska coal cases. I am worried about this matter and would like to confide in you, because you should know all about it, even though it will no doubt pain you as much as it has me when you hear it.

It will do me a great deal of good to talk over the Oregon situation also, meeting the clerks, etc. Wire me at Cheyenne to come in, if you possibly can do so, because
I am sure you will want to learn the true situation.

Schwartz showed this letter to Assistant Commissioner Dennett. Dennett telegraphed, then wrote Glavis. Ultimately, on December 6, Glavis received directions to come to Washington. Meanwhile, had provided himself with letters from Henry M. Hoyt to members of the Department of Justice, to the Solicitor-General, and to the Assistant Attorney-General, in order that if the Interior Department did not take such action as might be necessary to avoid what he believed to be a great injustice and might prove to be a great scandal, the facts could be laid before the Department of Justice.

On December 13, 1907, Glavis arrived in Washington. He talked the whole matter over with Schwartz; then Schwartz talked the matter over with Mr. Ballinger alone. Shortly afterwards Glavis was told to go to the commissioner; and the Commissioner Ballinger directed Glavis to make a full, complete, and thorough investigation of all these cases. Glavis left with the conviction that this was what the commissioner wanted, and he proceeded at once to equip himself for such an investigation. He made copies of all the voluminous papers in the files. He remained in Washington five or six days while this was being done. He had constant conferences with Mr. Schwartz while he was here, and on December 19 he left Washington for the West. While he was in Washington he found among the papers in
the files a report of Love's order, dated August 2, 1907, which figures largely in this case—a report which was regarded, it is said, as recommending the clear-listing of the Cunningham claims: but which to Glavis, and apparently to Schwartz indicated at that time directly the contrary. I have said that Jones began his investigation on June 21, 1907. Before that there had been a so-called investigation made by Love, a special agent resident in Alaska. This agent, in investigating the Cunningham claims, had talked only with Cunningham, and possibly one other of the 33 claimants. Then he satisfied himself by sending to the others for signature a form of affidavit in which the claimant asserted that he had no connection with any other, that each owned his own claim free from any interest of anyone else. Love accepted such affidavits and had thereon recommended that patents issue to the claimants. All this had happened before the Land Office determined in June, 1907, that a thorough and searching examination must be made of all Alaska coal claims. Most of the affidavits of Love, and the recommendations based thereon, dated back to December, 1906, and January, and February, 1907. It was partly because of the inadequacy of Love's investigations that Jones had been directed to take over the whole field. Clearly Glavis was directed to take over the investigation of the Cunningham cases; because in the very letter of instructions to him to investigate the Alaska coal claims, this Love report was referred to as one of
the documents, which he had already taken with him.

Now, the record at that time showed this: It showed that this Jones report of August 10, with the Jones report of August 13, in both of which he had recommended a thorough investigation of each and every claim, had arrived in the Land Office in August, as had also that August 2 report of Love. With those three reports on the land office files, an order was issued by Acting Commissioner Dennett, with the approval of Chief of Field Division Schwarz, that no claims to Alaska coal should be allowed to go to patent, without being first referred for investigation to Division P. That order was issued under date of September 1, with this Love report and these Jones reports upon the files. And as reports were from time to time made in the fall of 1907, by Division N—the mineral division—this order was recognized as in force. In the month of December, certainly as late as December 6, and perhaps several days later than that, we have the entry of Schwartz, acting on this provisional approval of the claims in Division N, and saying: "Hold this for further investigation."

Well, this was the situation with that Love report on the files of the General Land Office. And what did that Love report say? It was not a report written to recommend anything, but a report to say: "I have in the past recommended each and every one of these claims, but I now find certain facts which have just come to my attention, and which I deem it proper to report to the General
Land Office." What were those facts? The fact that it had always been the hope of each and every one of these Cunningham claimants that when patent issued they should combine together, and that entry certificates having issued that the claimants had come together, had now held a meeting with a view of forming a combination which they had always hoped would come about. The certificate of entry having issued, the claimants had now come together to form that corporation or that organization which was to take the claims over. Even Love, who still believed that the claimants were entitled to patents, believed that the facts he had ascertained should be called to the attention of the Land Office, and wished to put upon the office the burden of investigating this matter anew as to law or fact. Indeed, in regard to seven of the claims which he had not previously recommended to patent, he showed so full a recognition of the facts ascertained that he wrote the register and receiver calling attention to the same and indicating what, of course, was true, and believed to be true at that time, that the office might wish to have all the claims--not only the seven--but all the claims, examined into by another special agent.

Such was the situation when Glavis returned to the West in December, 1907, with that Love report and with all the other papers, prepared to investigate this matter; and what happened then? Glavis had hardly turned his back on Washington when ex-Governor Miles C. Moore appeared on
the scene. On December 23, Governor Moore appeared in Commissioner Ballinger's office. There was brief conversation between them, followed by another brief conversation by the commissioner with Schwartz, a conversation which according to Schwartz, lasted two or three minutes. In that conversation according to the commissioner, he did nothing but read—no, not read, but glance at—that Love report of August 2, a report which occupied as printed in the list about two-thirds of the page. And in that brief conversation in the presence of Governor Miles C. Moore, and subject to his potent influence, Commissioner Ballinger orders these claims, claims involving to the American people untold millions in value, to be clear listed; orders them clear listed in spite of the letter of instructions to Glavis which specifically referred to this Love report. Commissioner Ballinger was evidently determined not only to clear list these claims, but to hasten the issue of the patents in every conceivable way. The hastening to patent seemed to be of some significance at that time, for, no doubt, the visit of ex-Governor Miles C. Moore was the result of the fact that a fortnight before the Morgan-Guggenheim Alaska syndicate had notified the Cunninghams of the acceptance of the option acquired under the agreement of July 20, 1909.

Now, the chairman pointed out in the course of our hearings that patents ordinarily do not issue until from
three months to three years after the time when the order for clear listing is given; but here the most extraordinary haste was exercised. Commissioner Ballinger himself begins a series of telegrams to Juneau. He telegraphed for plats on the 7th, and such is the eagerness to know whether these plats are forthcoming that another telegram is sent on the 11th to know whether they had been mailed. There were seven of these claims which had not been reported on at all by Love. As to them he never had made a recommendation to the General Land Office. He had not made a recommendation to the General Land Office. He had not made it, because, in view of the facts that he had learned in August, he thought, no doubt, that the whole matter would be thoroughly investigated by another special agent.

In regard to those seven claims Mr. Ballinger telegraphed to find out what the status was, and to learn whether they could be included with the claims which he has clear listed. As a matter of fact, among those seven claims was the claim of ex-Governor Miles C. Moore himself. Not only that, but extraordinary speed, extraordinary haste, is shown in the way these claims are sent down for patent. It was then a wholly new thing to draft a patent to Alaska coal lands. Not a single patent had ever been issued for Alaska—of coal lands. In spite of the known procrastination in the much burdened offices of the Government, this work of drafting such a patent, this careful
work, which was to form a precedent for all the patents that might thereafter be issued, was performed so soon, that within a fortnight not only had the drafts been prepared and passed through the legal department, but six patents had been written out ready for execution, covering all the claims that were sent down to patent on the 6th day of January as having been approved by in Division N.

Now, the haste is further shown by the fact that of all these 33 Cunningham claims there had, at the time this clear listing order was passed in the Mineral Division as complying with other requirements of law. It was not a matter of importance, therefore that action should be quickly taken in Division P, because, with the exception of seven or eight, the claims had not been passed upon in Division N.

Compare with that haste to put through these patents, and doubtless to consummate the business of carrying out fully this Morgan-Guggenheim agreement with the Cunninghams—compare with that what was done with respect to notifying Mr. Glavis. It has been claimed by Mr. Ballinger and his counsel that Glavis was notified of this clear listing, so that if he saw any reason why the claims should not be patented he might notify the office. What was done? Glavis was notified, but he was notified in the first place after some of the claims had been sent down to the patent division for patenting.
If the commissioner had wanted to know from Glavis whether any reason existed why he should not clear list these claims, he would not have first entered the order clear listing them; he would first have communicated with Mr. Glavis. On the contrary he entered the order clear listing them, and then a fortnight later, on the 7th of January, he writes Glavis, taking the slow course of mail. He does not write, "Have you any reasons to suggest why these should not be clear listed?" but, "You are hereby notified that the claims in the annexed list have been clear listed in Division P, and have been sent to the Division N, the Mineral Division, for action." Just think of that! In the first place, sending the information by letter; in the second place, not asking him anything, but simply notifying him of the fact. Glavis being absent on other business, appears not to have gotten this letter until about the 20th of January. Soon after he received that letter he sent a telegram saying that these claims should not be clear listed. So there you have in this brief period two occasions already where Glavis intervened to protect the coal lands from improper action. The first, when he came to Washington in December, 1907, because of the failure to investigate, with a view to the cancellation of the claims; the second, five weeks later, when but for him Commissioner Ballinger would have patented these lands to the Cunninghams and the Morgan-Guggenheim syndicate.
When Glavis's telegram of January 22, 1908, arrived, Mr. Ballinger no doubt appreciated the indomitable zeal of Glavis, appreciated that the man who had the courage in his subordinate position to come on here to Washington to insist upon the protection of the public domain in the interests of the people, who was determined, as shown by the letters which he brought with him, to go to the Department of Justice if the Department of the Interior did not grant that protection—Commissioner Ballinger undoubtedly appreciated that such a man was not to be trifled with; and promptly this clear-listing order was suspended. Note you, suspended, not revoked. But Mr. Ballinger did not have the courage to communicate that fact to ex-Governor Miles C. Moore. Moore was left in the belief he held when he left Washington on the 11th of January, that these patents would be issued just as quickly as they could be put through. Not hearing from them, Moore finally on the 27th of February telegraphed to Mr. Ballinger to inquire the cause of the delay in the issuance of the patents. Did Mr. Ballinger frankly tell him that a question had been raised as to whether these patents should issue at all? No. He telegraphed him—it is practically the one communication of all the great number that bears his signature which he fully admits that he was responsible for; admits, because his own handwriting is there on the telegram, not merely as to signature, but in the carefully worded draft
Issuance of patents temporarily delayed.

Well, it was no doubt Commissioner Ballinger's intention that the delay should be only temporary; that somehow or other those patents should issue; and at that very time another way out was being considered by him. That was by the Cale bill. If that Cale bill had passed, those patents might have issued regardless of Glavis's objections and that troublesome obstacle would be overcome. But this Cale bill, which Mr. Ballinger drew, he says, as a private citizen, not as commissioner, in support of which he appeared before the congressional committee on March 3, the day before he retired from office—there he urged the bill which was to overcome this temporary delay—this Cale bill did not pass, partly because of the opposition of Secretary Garfield. And then a new situation arose. About that very time, three days afterwards, an event occurred which was of great significance. Glavis, secured from Clarence Cunningham the so-called Cunningham Journal, together with his affidavit of March 6. The Journal bore on its face the clear testimony of two things: First, and this is the important one, that there was just that kind of an illegal agreement between the claimants, which Glavis had believed existed, and which, if it did exist, should result in the cancellation of those claims, and, secondly, the journal also contained some reference, not of very great importance,
to the Guggenheims. After March 6, 1908, the Cunningham affidavit, and particularly the original Cunningham journal, stood as a terrible obstacle to the granting of patents.

And what happened then? Mr. Ballinger was out of office. He had no official control of the situation; but he still was not without influence, partly because of the knowledge and skill obtained while in office, and partly because of that close relation, political and friendly, with Mr. Garfield, the Secretary of the Interior, and with Mr. Dennett, Mr. Ballinger's own successor as Commissioner of the Land Office. Dennett was not only a friend; he was a protege of Ballinger's.

Now, what happened? Lawyer Ballinger undertook to aid these Cunningham claimants to get their patents, to act in a matter which he had acted upon as Commissioner of the General Land Office a matter on which he had as commissioner been called upon to pass, in the interests primarily of the people. To him as commissioner had been committed the extreme obligation of adequately investigating these claims and to determine whether they were fraudulent or not. As Commissioner of the Land Office he undertook to do this; to direct what should be done with them, and after he retired from the Commissionership, he, Lawyer Ballinger, undertook to do what? His first important act was to draw for the Cunningham claimants an affidavit for Cunningham's signature and in the interests of Cunningham
and his associates, an affidavit designed to enable Cunningham to get around the earlier affidavit; to get around the admissions contained in his own journal—an affidavit which I submit, according to the admitted documents in this case, contains allegations directly contrary to truth; an affidavit which asserts with great positiveness that the affiant and none of the Cunningham claimants had had any contract with the Guggenheims or with any other person except with one another. While facts subsequently discovered and made public during the period of this investigation show that Clarence Cunningham and Miles C. Moore and A. B. Campbell had, on July 20, 1907, entered into an option agreement by which the Morgan-Guggenheim syndicate of Alaska could get a one-half interest in the Cunningham claims and that option had been accepted on December 7, shortly before Miles C. Moore came to Washington.

Such is the affidavit which Lawyer Ballinger drew with a view to enabling these Cunningham claimants to get patents for that property. But Lawyer Ballinger not only lent to the Cunningham claimants in the drafting of that affidavit his skill and what knowledge he then had of the facts, he did more. He undertook personally to see Secretary Garfield, to see Commissioner Dennett, and to use all the influence that he would naturally have with those two men to secure the issuance of the patents. He undoubtedly would have had enough influence with Commissioner Dennett to get anything he wanted. His voluminous corres-
pondence with Dennett proves that; but Secretary Garfield had already formed his opinion in regard to these Cunningham cases which had been called to his attention earlier in the year, that is, in May, 1908. So he told Lawyer Ballinger when he came to West Mentor in September, 1908, that he believed the claims to be fraudulent, and he sent the September 4 affidavit to the Land Office with an order that nothing whatever should be done in that matter without conferring with him. The criticism, the review of that affidavit, which Lawyer Ballinger had prepared, shows clearly that all the elements of fraud which had been obvious in the original affidavit of Cunningham and from his journal could not be explained away.

Such was the action of Lawyer Ballinger; and when, on the 25th of September, Dennett wrote him "there is plenty of ginger these days," I do not believe at all that this was a reference to political conditions. I think it was a reference to the decisive action of Secretary Garfield referred to in that letter that he would do nothing whatever in the way of granting the Cunningham patents.

Well, six months from that time Lawyer Ballinger had become Secretary of the Interior, and as he became Secretary these same problems in regard to the Alaska coal cases which had occupied his attention as Commissioner were still active in the department, and among them the Cunningham coal cases.

Secretary Ballinger says that under a standing order
issued by him as to the division of the work of his depart-
ment, all matters relating to the Alaska cases would have
gone under any circumstance to First Assistant Secretary
Pierce and others for action; but that in view of the fact
that he had acted for these Cunningham claimants in the
interval before he became Secretary of the Interior, he
gave directions specifically to Assistant Secretary Pierce,
to Schwartz, to Dennett, to his own private secretary,
Carr, that he would have nothing to do with the cases. He
says, however, that he never acted really as legal repre-
sentative for the Cunningham claimants. Did he: What
other interpretation could be given to his acts? Who else
but a lawyer could have written that affidavit which
Schwartz testified to as being such an ingenious document
and as indicating weeks of work on the part of the affiant
and his attorneys? But if he did not act as legal repre-
sentative, so much the worse. He says that any dentist
or doctor might have gone to Secretary Garfield and to
Commissioner Dennett on behalf of these Cunningham claimants
just as well as he. Is not that the most damaging ad-
mission which Mr. Ballinger could have made in connection
with that transaction? Can it mean anything more than
this, that he went to them, capitalizing his friendship
with Secretary Garfield, capitalizing the influence which
he had with Commissioner Dennett, capitalizing, no doubt,
also the knowledge and the skill which he had acquired with
respect to this very matter when he was Commissioner of the General Land Office? Mr. Ballinger says he did not expect to be paid for this service. If he did not expect to be paid for this service, so much the worse. Why did he go? He says he did not want any Land Office practice; he did not want to be connected with these things, and it appears earlier in his correspondence in connection with another land office matter, that he refused to accept any retainer. Why, then, did he come to Washington on this errand? It was because of that irresistible influence of the Cunningham claimants, or some among the Cunningham claimants; in this instance C. J. Smith, his personal friend; C. J. Smith, the capitalist and Senator maker, a man who seems to have here had extraordinary power over Mr. Ballinger, and over all things in the State of Washington. Among the Cunningham claimants, and his friends, was also Horace C. Henry, and doubtless other persons who appear in this connection, Charles Sweeny and ex-Governor Miles C. Moore. Here you have a great body of truly influential men in the State of Washington, who ruled things in their party and in the State, ruled them by their financial power, as well as by their general abilities, and their social and other connections.

Well, when Lawyer Ballinger became Secretary he determined to be free of all this, and he says that he told each one of those who surrounded him, as an additional
precaution—although no such precaution should have been necessary, as the general order issued to Secretary Pierce covered the matter, but as a special precaution he told them—that he would have nothing to do with matters relative to the Alaska coal lands.

Now, I ask you, Mr. Chairman and gentlemen, viewing the evidence as it is, Was that a determination to avoid evil, or was it a determination to avoid the appearance of evil? See what happened? Within about a month ex-Governor Miles C. Moore, the tempter, the evil genius, appears again on the scene, this time by letter, by letter clamoring for his patent—the letter of April 9, 1909. If this general order was to stand, if these specific directions which Secretary Ballinger says he gave to these different people were really understood by them to mean what he said, why did Carr give that letter to Schwartz to draft the answer, and why did Schwartz draft the answer for Secretary Ballinger's signature, and Carr hand Secretary Ballinger this answer for signature? These intelligent and careful men would not have done this so shortly after the directions were given if they really thought that Secretary Ballinger was going to persist in having nothing to do with things Alaskan.

Well, about that time Glavis had been busily engaged in pursuing this investigation, and his daily records show how busily. Take this very period when Miles C. Moore's
letter was keeping Mr. Ballinger, Schwartz, and Carr busy; see what Glavis was doing. April 20, 21, 22, the days about there, Glavis is working until 10 and half past 10 and 11 at night, disregarding them, doubtless as he did at other times, holidays and Sundays, in the pursuit of his work, to bring it up to what is demanded. He finally goes to Washington. He has these cases in mind. He feels that a very important matter is to be decided. It is the question, What construction will be put upon the act of May 28, 1908, which had been passed as a substitute for the Gale bill, and which was a very different thing? This act at first seemed to promise a great deal to the claimants; it seemed to favor an amnesty, something that the Cunningham claimants could get in under; and as a matter of fact the attorneys for the Cunningham claimants, the same men who appear as Guggenheim attorneys here in the Land Office, were active in trying to have regulations passed which would enable them to make first a try under the act of 1904, and if that failed, to try again under the act of 1908, because they did not want to get patents under the act of 1908 if they could help it, because the antitrust provisions in it were too stringent.

The question whether the act of 1908 did really give an amnesty to persons situated like the Cunningham claimants and allow their claims to be patented, was one about which there was a difference of opinion in the department.
Glavis came to Washington and said: "That question ought to be decided before the report on the Cunningham claims and before the reports in the other cases, the final reports, are made." He and Schwartz and Commissioner Dennett had their talk with Secretary Ballinger on this point, and the Secretary agreed that the question should be decided by the highest law officer--the highest authority--by the Attorney-General of the United States.

Schwartz and Glavis were directed to draft the letter to him, submitting the question. On the 17th of May, 1909, they prepared it. On the 18th it received the approval, by initialing, of Commissioner Dennett and was sent to the Secretary for signature. But it was not signed by the Secretary, and although it was addressed to the Attorney-General of the United States, it did not go to the Attorney-General. It went to Assistant Secretary Pierce and he rendered an opinion which was favorable to the Cunningham claimants and to others. This decision was contrary to the contention which Glavis had made. As Glavis viewed it, it foreshadowed the patenting of all these Alaskan lands, or a large part of them, to the thousand claimants who were making application.

Was it an accident which led to the sending of that letter into the law office of the department instead of to the Attorney-General? It is certainly a remarkable accident that that letter, definitely addressed to the
Attorney-General, specially initialed by the commissioner for the signature of the Secretary, that that letter should have been sidetracked and gone into the office of the Assistant Secretary and of the other subordinates of Secretary Ballinger. And it is also a remarkable coincidence that, when it goes into the law department of the Interior, there should be rendered a decision which is just in accordance with what Commissioner Ballinger wanted when he drew the Gale bill, a decision which would give to the Cunningham claimants the opportunity of getting their patents and which would have settled in a very disastrous way, so far as the people of the United States are concerned, the Alaskan coal-land situation. Was it a coincidence, too, that again this tempter, Miles C. Moore, appeared on the scene? In some strange way he appears always when his presence is necessary to counteract the influence of Glavis, and apparently then. Glavis is here on the 17th. On the 19th Pierce rendered this decision. On the 21st Miles C. Moore appears on the scene. He sees Secretary Ballinger and Mr. Pierce, and remains here only on the 21st and 22nd.

No sooner has that decision of Pierce been rendered than Glavis is ordered to make his report on all these coal cases. He drafts a report; but not until he gets a peremptory order in writing that he must file that report. That he gets on the 24th; and the same day he draws up
his report, the report in which he says the Cunningham cases may be accepted as characteristic of all the cases, 782 in number, and that in view of Pierce's opinion of May 19, it would be futile to make further investigation.

Such is the report that he made; but he hesitates to file it. He is distressed over the situation. Happily he finds that his old friend and adviser, Henry M. Hoyt, who had since become Attorney-General for Porto Rico is in the city of Washington. He sees Hoyt, explains to him the situation, the early history of which Hoyt knew much of before. He discusses with Hoyt the act of 1908. Hoyt believes that Pierce's decision is wrong, believes with Glavis that a great scandal will come to this administration if these coal lands are patented under a decision rendered in the interval between holding office as commissioner and as Secretary, himself been counsel for these powerful Cunningham claimants. Hoyt believes it to be one of the important events of his life. He considers first going to the President's brother, who was a classmate and whom he knows well. But Glavis points out to Hoyt that there is no time for that; that he is being urged to file his report which is now overdue; and finally Hoyt concludes to go to the Attorney-General.

Hoyt goes to the Attorney-General; he takes with him the Pierce opinion, and he takes with him the report of March 23 in regard to the Cunningham cases, showing the
fraud. He takes with him also this report which Glavis had drafted on May 24, and lays these two Cunningham reports before the Attorney-General, and lays before the Attorney-General also his apprehension of the great scandal, as well as injustice, which will result if this matter is allowed to go forward.

The Attorney-General upon a cursory examination of the papers agrees with Hoyt in the opinion which Glavis had formed that the Pierce decision is wrong; and the Attorney-General says that the only question is, "How shall we get Secretary Ballinger to refer this matter to me?" He asks that Glavis should come to see him, and Glavis does so. Glavis goes the next morning, the morning of the 25th, to the Attorney-General. The result is that in some way the Attorney-General talks with Secretary Ballinger; and on the 26th the Attorney-General is formally requested to render an opinion which, when rendered on June 12th reverses the Pierce opinion.

For the third time Glavis has intervened to save the coal lands of the United States for the people to whom they belong.

The fourth act is quickly told. Glavis had even before this opinion was rendered by the Attorney-General, that is, soon after the matter had been referred to him, started off in further investigation of these Alaska claims. He gets back to the Pacific coast. All the time it has
been intended and expected that there should be a field investigation of the Cunningham claims and that a coal expert should go in the summer to Alaska to examine particularly a tunnel which was known to have been built, and which it was understood was so built that it would touch only about half of the claims. The tunnel had been paid for confessedly by all the claimants. If it was built, as supposed, namely, so that it could be used only in connection with about half of the claims. The evidence would seem to be conclusive that there was some combination at the time they agreed to pay in equal shares for the building of that tunnel, otherwise half the claimants would be getting nothing for the money they paid. It was also understood, I say, that such field investigations should be made. As late as the 20th of June when Schwartz was in Seattle, Kennedy's trip set for July 16, had been discussed between Schwartz and Glavis.

On the 29th of June Glavis received a telegram announcing that the Cunningham claimants had elected to proceed under the old law, the law of 1904, and that he should prepare for a hearing forthwith—that is, prepare for a hearing in these cases before he had the evidence which Kennedy was to bring back from Seattle. He believed such a course to be disastrous. He believed that there was a settled purpose of sacrificing the interests of the people to the interests of the Cunningham claimants and their
The Forest Service was legally interested in these lands, part of them being within the forest reserve, and therefore he applied to the forester, or one of the forest officials, to aid him in securing a delay of this hearing until Kennedy should return from Alaska. Secretary Ballinger was in Seattle at that time. He went also to Secretary Ballinger to lay this matter before him and said: "Here we are in danger of sacrificing the interests of the people by proceeding to a hearing in this case before we have this evidence." What did the Secretary do? It was an extraordinary ethical distinction which seems to have determined his course. Why, when he became Lawyer Ballinger he had seen no reason whatsoever why he should not act for the Cunningham claimants, in spite of having, as commissioner, acted for the Government in regard to those cases. When he became Secretary he had seen no reason why he should not issue an order, believed to be of great value to the Cunningham and other claimants, that those matters should be pressed forward to decision, should be expedited as much as possible. But when Glavis came to him and set forth this situation, that the hastening of the hearing might result disastrously to the people, his ethical conceptions prevented him from interfering to protect the interests of the people. His previous connection as lawyer for the Cunninghams did not prevent his interfering
and hastening proceedings in the interests of the claimants, but it did prevent him from interfering and delaying proceedings in the interest of the people.

You know what happened. The Forestry intervened. The Interior Department, doubtless for political reasons, and with great reluctance; with more than reluctance, with indignation, and doubtless with anger, consented to a postponement of the hearing until October 15.

Note this thing that Glavis asked. The fact that he was demanding this postponement excited them to the point that they superseded this competent, experienced, and zealous agent, and put in control of these cases in his place one James M. Sheridan, a man who had graduated from the law school just one year before; a man who up to the time when he was put in full charge of these important cases had never tried a case in court; a man who had never even taken part in a hearing, in the mere taking of depositions, until within six months of that time; a man whose whole experience, even in such hearings, is comprised in his having spent a part or the whole of forty-one days in hearings between the 5th of January and the 17th of July, 1909. Such a man was put in to supersede Glavis because Glavis had done what? He had urged, in the interest of a fair trial, and the protection of the people, that the hearing should be delayed until Kennedy should get back from Alaska, three months later.

Well, Sheridan himself, when he came to Seattle and
looked over the papers agreed with the Forestry and agreed with Glavis that there ought to be this delay. But see how this result was regarded within the ranks. Dennett writes Schwartz in substance—Sheridan agrees that Kennedy will bring from Alaska important evidence; evidence material and that we should delay. "The Forestry is to blame for strengthening their case through the cooperation of the Forestry, instigated by Glavis's intervention, the Forestry is to be blamed. That was the fourth act of intervention by Glavis, and as in each of the three preceding instances his intervention resisting the action of his superiors was so obviously justified that ultimately the department had to do what he desired to have done in the interest of the people.

Now, what is Mr. Ballinger's excuse for all his conduct? What is his excuse for having clear listed those valuable lands in the face of the doubts arising, and that should have arisen, in everybody's mind on looking at the Love report. Mr. Ballinger says that he relied on others; that it was Schwartz's business; that he, Ballinger, therefore did not look into it, and never looked into the matter; that he did not even examine Love's report, that brief document; that he did not even read it. Then he states a thing that I believe will be incredible to every one of you. That when he looked at the report he did not notice that his personal friends Smith and
Henry, and his other acquaintances Sweeney and ex-Governor Miles C. Moore, and the like, were in the list of claimants set forth in the letter. Taking the man as he is, it is possible that in looking at a short sheet of paper, at the very top of which are the names of these men—his friends—his eye would not be struck by the names of the people he well knew? Yet Mr. Ballinger says he did not see them. But he insists, at all events, the responsibility for the clear listing rested upon Schwartz. And as to what has happened in the period of his secretaryship, with that he had nothing to do.

Now, it is true that he had nothing to do with the Cunningham cases during that period? It is perfectly true that he carefully refrained from the appearance of evil; that he did not issue any orders. But it is equally true that he knew about the cases. He told every one of these men that he did not want to have anything to do with the matter. I have been told that it is the common thing in clubs where they expect to do a lot of gambling, to have as the first rule of the club that "card playing for money is not permitted in this club."

Certainly that is the sort of order the Secretary issued, because these faithful trained men by whom he was surrounded would have never put up to him at every occasion and at every emergency something for him to do in these Alaska coal matters if it had not been intended that he should do it. I spoke of that answer to ex-Governor Miles
C. Moore of April 9 as one instance. Schwartz and Carr, those faithful ones, were going to impose upon the Secretary the answering of that letter; but he, ever careful to avoid the appearance of evil, refused to sign it, and the letter was rewritten. When it came to this interview about the Alaska coal claims on the question whether the matter should be submitted to the Attorney-General, it was the Secretary who determined that the Attorney-General, should pass upon it. Glavis and Schwartz drew and Commissioner Dennett initialed the letter, but the Secretary was to sign it. That was May 17 and 18. Again, Miles C. Moore wrote another letter, the letter of the 22nd of May, 1909, which arrived on the 24th. The faithful Finney drafted a reply and the faithful Finney drafted a letter, no doubt, with the full knowledge that the rest of them had that the Secretary would have nothing to do with Alaska coal matters. But he drafted the letter for the Secretary's signature, and the Secretary in that instance—as people will forget things at times—forgot to refuse to sign it.

Now we come to the 26th, when the formal letter to the Attorney-General was to be rewritten. Finney did the same thing. He drafted it again for the Secretary's signature; but under other advice the letter was rewritten, to be signed by Assistant Secretary Pierce. Yet Secretary Ballinger, not thinking that there was any danger in the disclosure of this particular letter, wrote a personal
letter to the Attorney-General, inclosing this other letter, which, for form and appearances sake, he had had the Assistant Secretary Pierce sign. It may be that it was also with a like view to avoiding the appearance of evil that this letter of May 26 was suppressed when these matters were sent to the President in September, 1909, for the letter first appeared as the result of calls from me during this investigation. But however that may be, there you have the fact that, whenever it came really to doing anything concerning these Alaska coal claims, the Secretary was always there.

Now just think of this. A real crisis came in this matter when Glavis sought to protect the people by getting delay in the hearing and others attempted to thwart him. It happened that Dennett and the Secretary were both in Seattle. Dennett ran to the Secretary and had the discussion concerning "the important cases" on July 20. Then it began to appear that, doubtless for political reasons, it would be unwise, in view of the forestry intervention, to insist upon that hearing taking place immediately.

Dennett does not dare grant a postponement of hearing. What does he do? He telegraphs Secretary Ballinger this advice: "Advise you to authorize Schwartz," who is in Washington, "to consent to delay." None of them dare do a thing about these Alaska coal cases without coming to the Secretary for approval. Dennett was the Commissioner of
the Land Office, whose place it is to attend to these land matters; Schwartz, who was the acting commissioner in Washington, was also the chief of the field divisions under whose jurisdiction all of these arose. Yet those two men together do not dare act. They telegraph to Secretary Ballinger, "advise you to authorize Schwartz to consent to a delay." Gentlemen, just think how unimportant ordinarily consenting to a delay in the hearing of a case is. Why should there have been this terrible difficulty about consenting to a delay of two or three months, most of which is the vacation period? No; it was because the Secretary had his hands, his grip, on these cases. This control is not evidenced by documents. He did not need writings. He was surrounded by men of the category of those who, "at the winking of authority understand a law." It is only when they are separated, when they have to communicate by wire or by letter—we are fortunate enough to get the documents—that we are able to bring the definite proof of the fact.

Now, I say, gentlemen, there you have the conduct of Mr. Ballinger as commissioner, as lawyer, and as Secretary in regard to this great heritage of the American people. Is he the man whom you would put in as sole trustee of great properties belonging to you and committed to your care, if those properties were surrounded by the insidious special interests who like harpies were awaiting an oppor-
tunity to pounce upon your possessions?

Such was his conduct. Now consider his character as reflected in that conduct, and as reflected also in the correspondence and in the testimony which he has given on the stand. What is the one quality which you would demand above all others in a man who is to be trustee of the people's property, with all the special interests seeking to prey upon it? It is resoluteness vigilance, of course—but resoluteness is needed; a man who would stand firm.

What is Mr. Ballinger's record? Just take these facts that we have been going over.

Commissioner Ballinger in Washington with Secretary Garfield and with the other land officials agrees with them that these Alaska coal-land claims, presumably fraudulent, should be investigated thoroughly. That is early in June, or the middle of June, 1907. He has perhaps no knowledge of his friends and influential people in the State of Washington being interested in them.

Commissioner Ballinger goes to the State of Washington. Then, begins, undoubtedly, the pressure of these men; for the investigation had begun; and all those influential men there—Smith and Henry and Moore and Sweeney and Nelson and Chilberg, and all the rest of them—perhaps begin to press. Garfield is thousands of miles away; the Land Office is 3,000 miles away. The immediate thing is all of those claimants in Seattle, influential citizens of Seattle, pressing against investigations. So the Jones investigation
of the Pacific Coast claimants is stopped; but as there are no influential citizens of Illinois or Michigan pressing him, the investigations of the Michigan and Illinois claims go on.

Well, Glavis hears the rumors, as I have told you, and goes to the city of Washington in December hotfoot, armed with the letters to the Department of Justice. There is Glavis right by the side of the commissioner. The Alaska claimants, these influential citizens of the State of Washington, are 3,000 miles away. After a few moments' consideration the commissioner changes absolutely his course and authorizes a complete investigation of the cases.

Glavis turns his back, on the 19th of December, and starts out for the coast; but before he gets there the tempter, Miles C. Moore, with all his potent influence, arrives on the scene. Now he is with Commissioner Ballinger, and he is the embodiment of all the influence of the State of Washington. The commissioner's apprehensions of Glavis seem to vanish. Glavis is now 3,000 miles away; Moore is on the field and Moore holds it. The claims are ordered clear listed.

Then we come to the 22nd of January, 1908. Glavis and Moore are both far away from the commissioner; but there is in the commissioner's mind, obviously, the recollection of those letters to the Department of Justice which Glavis had and the memory of Glavis's indomitable zeal. Freed
from the personal presence of Miles C. Moore and the influence that goes with it, the Secretary again changes his course. He says, "We will stop this." The clear-listing order is suspended.

Now, that vacillation goes right through all of Mr. Ballinger's acts. Whenever there is pressure, there you will find yielding. The only cases where there can be any doubt as to what Mr. Ballinger will do is where there is pressure from both sides at the same time.

Now, is this the kind of man that you gentlemen would put in charge of that great property, if it were absolutely yours, to be preserved for you children and your children's children? A man who is absolutely unable to resist pressure? Why, his action while he was Lawyer Ballinger shows it also in an extraordinary way— I mean during the interval between his resignation as commissioner and his appointment as Secretary. He did not want to take this Cunningham case. He knew it was not right; he knew it was not according to the ordinary dictates of the lawyer's ethics; he knew it was contrary to the regulations of his department. He did not want to do it. His first thought, and naturally a proper one, was, "I do not want to do it, furthermore, I do not want any pay." But when Charles J. Smith came to him— not only his friend, but this important, influential man, this Senator-maker— when Smith came to him he could not resist. Contrary to his own
wishes, contrary to his judgment, he acted as counsel, and he came on here and used, or attempted to use, what influence he had with Garfield and Dennett to accomplish the ends of the Cunningham claimants. He saw that even if he did this, it was not a nice thing to take money for it. He did not want to take pay; but when C. J. Smith and Cunningham pressed money on him, of course he took it.

Now, just this same quality which manifests itself in his actual conduct in the case has manifested itself in an equal degree in regard to his statements on and off the witness stand.

Gentlemen, the time is too short and, indeed, the occasion of his appearing on the stand is so recent that I should not be justified in considering his testimony minutely; but I can not refrain from asking you just to formulate in your own minds what this man was on the stand—the extent of his evasions, the assumed lack of memory, and his misstatements. He did in his testimony precisely what he did in dealing with the Cunningham cases. Always ready to meet the immediate occasion, the pressure of the moment, by doing or saying what seemed easiest; but doing the thing regardless of whether it was the right thing regardless of whether it was true, and not bearing in mind either the law, the great law of truth which should have governed him, or even intelligently considering the future with the difficulties his action must develop.
There he is. There is his character reflected on the witness stand just as it is reflected in all of his acts.

Certainly, as I have said, the one quality that you need for the position of Secretary of the Interior is resoluteness. You need a man of the character of Stonewall Jackson; but I do not believe anybody would ever think of calling this man Stonewall Ballinger. That would never come. It is the constant yielding, whether it be of statement or of action, that absolutely unfits him for this position, regardless of any question of his motives.

I have said little about his immediate subordinates or associates, upon whom he desires to cast the burden of the errors that have been made; and to a very considerable extent they have shown a ready loyalty in bearing that burden, if that be loyalty. They have a certain kind of loyalty, but not the true loyalty. There could be no greater difference in the whole aspect and the whole conduct of the Department of the Interior than is manifested in its policies and in acts in the two administrations—that of Secretary Garfield and that of Secretary Ballinger. Those two men differ from one another as Hyperion from a satyr, yet those subordinates seem to have worked equally loyally with each. They worked, in the main, in absolute harmony with Secretary Garfield's views as to policies, and they stand without a protest when Secretary Ballinger reverses it all.
Now, that is not loyalty. It is not loyalty of the kind that you want in a public servant; it is not loyalty of the kind that you want in the persons who are to aid that trustee in handling the great heritage of the people. The loyalty that you want is loyalty to the real employer, to the people of the United States. This idea that loyalty to an immediate superior is something commendable when it goes to a forgetfulness of one's country involves a strange misconception of our Government and a strange misconception of what democracy is. It is a revival—a relic of the slave status, a relic of the time when "the king could do no wrong," and when everybody owed allegiance to the king. The people to whom our officials owe allegiance are the people of the United States, and every man in it who is paid by the people of the United States, and who takes the oath of office owes that allegiance to the people of the United States and to none other. These men who stand by the Secretary with a sort of personal fidelity and friendliness are actually disloyal. They may claim that they are not insubordinate to him; but they are insubordinate to the people of the United States.

Take this very matter that has caused a great deal of comment and called for a great many questions from the committee—the question with regard to Mr. Kerby; the question as to whether he ought to have communicated or ought to have given to the world the truth. Here was an
investigation devoted by law to the ascertainment of the truth. Secretary Ballinger's answers to the various calls that I had made and his answers on the stand and the answers of several of those by whom he is surrounded were directly inconsistent with the truth. This committee by its vote had apparently barred the opportunity of forcing the introduction of the documents. Should Mr. Kerby, like the bookkeeper of the defaulting treasurer, have stood by in his selfish blind loyalty to that man, or should he recognize that, as an American citizen, as a part of the American Government, he owed it to the people of the United States to come forward and tell what he knew, so that there should be nobody, high or low, who stood between him and the people, knowing the truth?

Just think of this situation. Suppose you gentlemen were the board of directors of a great corporation and had reason to believe that the president of that corporation was not acting properly, and suppose you, as directors, instituted an investigation into the condition of that corporation, and the president and those around him who did his bidding gave testimony and withheld from you, the investigating committee, facts which ought to be known and documents which existed, and suppose that one private secretary, paid by the corporation of which you were the directors, came out courageously and told the facts; ought he to be the subject of criticism? Ought he not to be a subject of the greatest admiration that he should have had
the courage to stand up against all the slaves who surrounded
him, and come out like a man, and showed that, high or low,
in America a man is a man who makes himself so, regardless
of his position, and that the Secretary of the Treasury or
the President of the United States himself is no better
than the humblest citizen, if that humblest citizen has
the courage and other qualities of manhood.

This idea of insubordination, gentlemen, and the
horror with which some men view insubordination, involves
an absolute misconception of what we ought to do and what
we ought to strive for in American government. The danger
in America is not of insubordination, but it is of too
complacent obedience to the will of superiors. With this
great Government building up, ever creating new functions,
getting an ever increasing number of employees who are
attending to the people's business, the one thing we need
is men in subordinate places who will think for themselves
and who will think and act in full recognition of their
obligations as a part of the governing body. Even military
service is improved by such action on the part of the indi-
vidual. So it manifested itself in Cuba in our own army
and in South Africa in the fighting of the Boers. We want
every man in the service, of the three or four hundred
thousand who are there, to recognize that he is a part of
the governing body, and that on him rests responsibility
within the limits of his employment just as much as upon
the man on top. They cannot escape such responsibility,
they cannot be men if they are not proper officials. They cannot be worthy of the respect and admiration of the people unless they add to the virtue of obedience some other virtues— the virtues of manliness, of truth, of courage, of willingness to risk positions, of the willingness to risk criticism, of the willingness to risk the misunderstandings that so often come when people do the heroic thing.

That is what we need, and that is what we must have, if our Government is to meet our ideals. The means of attaining it is one of the great questions presented here. We are not dealing here with a question of the conservation of natural resources merely; it is the conservation and development of the individual; it is the consideration and development of democracy; it is the conservation of manhood. That is what this fight into which Glavis entered most unwillingly means. That is what the disclosure which Kerby made most unwillingly means. It proves that America has among its young men, happily, men of courage and men in whom even the heavy burden of official life has not been able to suppress manliness.

Mr. Chairman and gentlemen, I have already taken up too much of the time of the committee and I will suspend at this point.

THE CHAIRMAN. It is now quarter past 12 o'clock, and the committee will take a recess until 2 o'clock, if that is agreeable to you, Mr. Pepper.

MR. PEPPER. Certainly, Mr. Chairman.
(Author's Note: Following is a copy of the speech of Louis D. Brandeis, entitled "The Constitution and the Minimum Wage." The title is one added later as a matter of convenience to the oral argument delivered before the United States Supreme Court, in the chambers in the old capitol building in the case of Stetler v. O'Hara (243 U. S. 412) on December 17, 1914. The text used here is from The Curse of Bigness, edited by Osmond K. Fraenkel (New York: Viking Press, 1935), pp. 52-69. It may also be found in Survey for February 6, 1915, under the same title.)

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 a 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 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 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 in-
dustry 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
in many trades and in most communities to organize women effectively. So the legislature of Oregon found itself obliged to reflect 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 sanctions—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, or 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 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 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 reflected 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, concluded 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 beneficient results were obtained.

If the three hundred and sixty-nine extracts form reports and other publications which appear in my brief, are examined, it will be found that few of those who de-
scribe 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 inefficient, 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 employment. 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 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 permissible
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 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 had 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 investigation 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 not 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 the 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, 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 Com-
mission 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 the 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 semi-monthly 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 between 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 cutthroat 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—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.
Mr. Brandeis. May it please your honors, it may be helpful if at the outset I state the conclusions which a review of the record in these cases has brought to me. They are these:

First, that on the whole, the net income, the net operating revenues of the carriers in official classification territory are smaller than is consistent with their assured prosperity and the welfare of the community, and that this is notably true of the central freight association lines, and it is true practically as to other lines, also, because of the central freight association scale.

In view of this, it is desirable that steps should be taken as promptly as reasonably may be to increase those net revenues.

Secondly, that the method proposed by the carriers for increasing these net revenues is essentially unsound;
that it is, except as to a small part of the tariffs that have been submitted, entirely too low, and would, if approved, involve the exceeding of the powers vested by Congress in this commission; and as to that small part of the tariffs as to which it would be legal to approve them, it would be extremely unwise both for the carriers and for the community to grant that approval.

Third, that there is nothing in the condition of the carriers which should prevent the adoption of those methods of increasing their revenues which are conformable to and in accordance with their interests and that of the community, and that there exist, as has been indicated on this record, adequate means of increasing those revenues without resort to the unsound, largely illegal, and undesirable method of the alleged horizontal increase.

Before I address myself specifically to these propositions, I want to call you honors' attention to certain erroneous and misleading statements which have been given currency not only in the long propaganda which has been made throughout this country in advocacy of increased freight rates, but has been solemnly repeated here by the counsel of the carriers.

It has been represented here to your honors, as to the country, that the situation in which the railroads are of doing business at the old rates is exceptional; that they stand alone; that they alone have not been able to do what others have done—increase the price to the consumer;
the price which, as they say, is justified by certain in-
creases in cost of operation. They are not content to turn
to what they admit, in their general statement, to be evi-
dence of that fact in regard to other businesses in America.
They point to it as a world-wide movement, and ask you to
look to Switzerland, Italy, Germany, and other countries as
bearing evidence that in this particular matter of freight
rates those rates have been raised abroad, as an indication
creating an atmosphere which might lead you to regard more
favorably the application to increase the rates here.

Such is not the fact. So far as certain of the spe-
cific countries to which they have referred are concerned,
it is true. Through the courtesy and thoughtfulness of the
Department of State, the commission has been furnished with
correspondence, with communications from our representatives
abroad, which were the result of an application of the
railroads' bureau, inquiring what the facts were, and the
facts as they come to us from the Department of State are
in direct contradiction of what has been raised. This is
what our minister says, under date of December 24, addressed
to the Department of State:

Immediately upon the receipt of the above instructions
(asking this information at the request of the Bureau of
Railway Economics) I addressed a note on the subject to the
general direction of the Seiss Federal Railways, to which I
received a reply of this day, as per inclosed translation.
From this reply it appears that the rates, passenger
and freight, have not been increased since the time of the
repurchase of the five principal lines by the Confederation.
These lines were all taken over by the Swiss Government in
the years from 1899 to 1909.
Then, as to the inquiry of Germany. There were several cable messages on the subject. I will read the last one first, as making it clearer:

January 5, 1914.

With reference to my telegram of January 3, I am now informed by foreign office that no increase worth mentioning, either in passenger or freight rates, has occurred since 1909 on the Prussian State Railways or the Imperial Railways of Alsace-Lorraine.

And the statement to which that was a supplement was this:

I am just informed by the foreign office that the only increase in railway rates in Germany, except the Prussian State Railways and Imperial Railways, which have occurred since 1909 are those affecting passenger rates for fourth class on the Wurttenberg Railways, which, from the 1st of December, 1909, have been raised from 2 to 23 pfennigs per kilometer. Any readjustments for classification of goods have only tended to reduce freight rates.

Then, as to Italy. There there was a slight raise, and the character of the remedy is interesting:

To obtain money for the economic betterment of the personnel, by which is meant an increase in pay of employees, both on the active and retired list, and for the purchase of more rolling stock, on June 1, 1911, an increase of 9 per cent was made in the price of commuters' tickets, which enjoyed a reduction of 40 per cent or more from the normal tariff. An increase of 6 per cent was also made in the price of round-trip tickets. At the same time an increase of 1 cent a ton for loading and unloading freight at railway stations was put into effect. The loading and unloading of freight at railway stations is generally done by the railway officials in Italy instead of by shippers or the consignees, as in the United States. The latter, however, have the privilege of doing this work themselves, in which they are obliged to pay the railway 60 per cent of the regular tariff as a sort of demurrage charge.

I do not consider what happened in Italy or Germany or Switzerland of the least importance in the consideration
of this question; but it is of importance as a part of that general propaganda which has been made before the commission, and far more in the country, as to this allegation that everything else has gone up in price, and why not railway service; why not railway-freight service?

That is not true. We have had a very serious problem in regard to the cost of living, but it is a problem which has been confined almost exclusively to the increase in the food cost. So far as the rise of our costs is concerned, so far as the costs of our manufactured articles are concerned, those purchased by the railways and those purchased by the community, there has not been an increase in cost. We have had here in these last years what we have had in America ever before, what we have had in America as compared with Europe in years before contemporaneously. We have had proof of the fact that high wages do not mean high costs, that high wages do not necessarily mean high labor costs, but that, on the contrary, we in the manufacturing world have been perfectly cognizant of and recognizing this one idea, that higher wages meant, to a very great extent, lower cost, because it tended to greater efficiency.

In the 1910 case this subject was gone into very carefully with respect to railway supplies, through the investigation which Mr. Lyon had made and which he stated with great clearness and force in his brief at that time. It was shown, as the commission stated, to the commission's
surprise, that railway material, instead of increasing, had on the whole decreased; and what was true then is true now. There are two exceptions only that are in any way significant. The exceptions deal not with manufactured materials but with raw materials, coal, and ties. There has been some, not a very great, increase in that price, but when you come to the manufactured material you find what we have found constantly in our country and what has made our country a great commercial country, an industrial nation—you find that with higher wages we have produced more than the increase in price.

It has been said in passing from time to time that in addition to coal and ties, lumber has gone up. The direct statement of Mr. Walker, in the very admirable statement to which Mr. Butterfield refers, shows that the price of lumber at the lumber mills has gone down, not up, in these years, and he based his report upon the investigation of the Forest Service. He said:

According to the report of the Forest Service, above referred to, the average f.o.b. mill price of the lumber produced in the United States was 16.54 in 1906, 16.56 in 1907, 15.37 in 1908, 15.38 in 1909, 15.30 in 1910, 15.05 in 1911. Prices recovered somewhat in 1912 but declined again in 1913.

Now, of this fact, to which I have definitely referred, that higher labor costs do not mean and have not resulted in higher prices generally, we have most striking evidence in the testimony coming from the carriers, that which was furnished by Mr. Wallis, the general superin-
tendent of motive power on the Pennsylvania. There you have a system which, besides manufacturing transportation, manufactures the instruments of transportation, manufactures locomotives. It happened that Mr. Wallis was able to state that in 1913 they were manufacturing or had made locomotives of precisely the same pattern they made in 1903. He was asked how the prices compared, and he stated that, according to his recollection the prices were about the same in 1913 as they were in 1903, but he volunteered that he could give the definite information on that subject, and he did so. That you will find on pages 90 to 93 of the brief, and it is well deserving of careful study.

Instead, as Mr. Wallis remembered, of the prices being about the same, he found that the locomotives made in 1913, after eliminating certain items which were additions, cost over $500 less than those which were made in 1903.

But that is perhaps not the most interesting or instructive fact to which he called attention. The labor cost in these locomotives was reduced from $6,084 to $5,099, a reduction of nearly $1,000, a reduction of nearly 20 per cent in the labor cost of making that machinery.

When you return to the reports which the Pennsylvania Railroad has made to this commission, showing the rate of wages of machinists and shopmen in 1903 as compared with
1913, you have this fact, that the wages of machinists have increased more than 40 per cent; but although you have increased the wages of these men about 35 per cent, say, on the average, in those 11 years, the labor cost on these engines was about 20 per cent less than it was in 1903.

And that, even, does not tell the whole story, because when you read by Mr. Wallis's careful, instructive statement, you will find that the costs with which he compared these engines, the job of 1903 which was compared, was a job of making 25 engines, whereas the 1913 job was a job of making 3 engines, and according to all manufacturing experience, it must have been cheaper to make your engines in lots of 25 than it would be in lots of 3.

There you have what was done by efficient shop management, scientific management by a man who is able to get and to put into force the best that could be done in the way of utilizing the efforts of man in the manufacture of products.

What appears there in so striking a form is entirely in accord with what you will find in the general field of manufacture. Raw materials in these years have been constantly rising, partly as a result of a natural tendency toward exhaustion of supplies, more largely through the control which combinations have of sources of supply; but in spite of that, the ingenuity of man applied to industrial processes of production has been able to overcome
these rises in cost of raw material and the proper increase of wages to which men have been entitled, partly because of the increase in the cost of food products and partly because of that general and proper desire on the part of Americans to increase the living conditions for the working-man.

Pass, then, from manufacturing to other fields. The railroad service is but one of a number of public services. What has been the experience in the other public services? Mr. Brownell called attention, with a great deal of detail, to what he called the reduction in the price of the railroad service, comparing 1903 with 1913. He is entirely right when he says that if the 1913 business had been done on the 1903 rate, there would have been a larger income, to the amount of over $60,000,000; but if he had gone back to 1898 and told you what the income of 1913 would have been if done at the 1898 rate, he would have had to tell you that the income of 1913 would have been 43,000,000 smaller than it really was, because between 1898 and 1903 there was a marked rise in rates, both freight and passenger. The passenger rates to-day are precisely the same, on the average, as they were in 1898. Of course, the whole shading is but a very slight matter, but we are dealing with such huge sums that a very slight difference in per cent produces large figures.

But compare the situation—either the increase since
1898 or the slight decrease from 1903 with to-day. Compare
the situation in railroads with what prevails in other
public services. Take gas. From one point of view, you
ought to have expected a greater increase in cost reduc-
tions in railroads than in gas, because the gas industry
is a later industry, and, other things being equal, the
progress, the increase, is largest in the earlier years,
and as gas has a start perhaps of three-quarters of a
century over railroads, one would have supposed that when
you got down to 1898 or 1913 you would have a slower reduc-
tion, if any.

Again we know that coal and oil are the raw materials
from which gas is made, and we know of the increase in the
cost of coal and the higher prices which have been charged
for oil. But what is the situation? What are the facts
in regard to gas? In the briefs are cited the average
prices for gas for about 60 companies in the State of
Massachusetts for every year from 1898 down to 1913. In
every one of those years there have been reductions. They
have gone, as I recall it, from 1.14 a thousand feet down
to 85 cents, as the average price for a thousand feet. You
see a step taken each year. Of course, each company does
not take a step each year, but a number of companies are
reducing. Almost all of these companies have a different
price, but they are reducing, and as I recall it in the
last year, this year of rising prices, as is said, certainly
of high oil and coal prices, you have 19 of the companies reducing their rates and getting down to 85 cents.

Have those companies been unprosperous? Quite the contrary. Those companies have, most of them, paid dividends, and those that paid dividends paid, as I recall it, dividends of between 8 and 9 per cent. Have those companies been free from taxes? Quite the contrary. These railroads have been complaining of the increase in the rate of taxation, and it has been large in percentage; but the relation of the railroad taxes to gross revenues, in spite of all those increases, is extremely small as compared with gas in Massachusetts. The companies in Massachusetts which are paying these high dividends coincidently with the reduction in the price of gas to the consumer are paying to the Commonwealth for the privilege of doing business there and of being protected about 9 percent of their gross revenues. These railroads are paying from 3 to 4 percent of their gross revenues in the way of taxes.

Take the case of electric light. Electric light is, of course, a newer industry. You would naturally expect reductions, therefore, in electric light; but those who are engaged in the electric light business have been confronted by every one of these elements of increase in rates, in costs, that the railroads deal with. They have had labor and labor paid higher. They have had taxes, and they have
had, above all, as most of them rely upon coal, the increased cost of coal to deal with.

But what is the situation? The cost of electric light, the measured cost based upon the kilowatt hour, has been reduced one-half since 1898, and the cost of what is furnished to the public, that is, the light, by reason of the introduction of more effective lamps, the light cost, the cost per candlepower delivered, has dropped to one-fourth of what it was in 1898.

Take the telephone service. We know that the telephone service, on the whole, has been reduced in cost and that the profits have been extraordinarily large.

But let us come to another industry; one that is perhaps as near to railroading as anything can possibly be that is not the present steam railroad. That is the street railway. In one of the financial editorials of the New York Times of last Sunday we find this:

The misfortunes of the steam railroads last year were not reflected in the earnings of street railways throughout the country. Figures for 286 leading public utility companies collected by the Financial World show gross earnings for last year of $866,416,000 an increase of $54,857,000 and net earnings of $370,801, an increase of $19,492. The surplus after charges and dividends aggregating $81,113,000, showed a gain of $2,665,000. The 286 companies concerned had outstanding at the end of the year $2,151,000,000, an increase of $87,820,000 during the year.

What is the situation in regard to street railways? The question would naturally occur to you, is labor,
which has been rising, as we all see, in all of these industries, so important a part of the street railway business as it is of the steam? I say these wages have been rising everywhere. Mr. Wishart has furnished, in his excellent testimony and in his interesting "The railroads' cost of living," this comparison between the railroad rise in wages and the rise in wages in other industries. In railroads he made them, in the case of the New York Central, 36 per cent. In the other industries, based upon the reports of the Department of Labor, they were 40 per cent per hour raise, with a reduction on account of the number of hours of work. So we had a situation which, as Mr. Wishart has stated with great frankness, is the same on railroads as in other industries. The ratio of increase has been the same.

Now, what relation, in this street railway business, has labor borne to the total operating expenses? That question cannot be answered with absolute accuracy, because strangely enough with all the accounting that the railroads are doing, they are not able to state to us, in the operating cost of a railroad, what the proportion is of labor. They can tell you all that they pay in wages, but a part of all that they pay in wages, at least on a large percentage of the roads, goes into improvements, into additions, into expenses of the roads; and when they report the wages paid it is not wages paid merely in operation, but
it is wages paid in operation and also in many of these services, provided there have been additions and improvements as there are usually upon every railroad almost every year.

The figures which are quoted on the brief, which are furnished by the answers that have been given to certain questions in the reports, show that of the total operating expenses, a trifle over 60 per cent goes in personal service for wages. When you take the report which the Bureau of the Census has made for the street railways, by a very strange coincidence the percentage is just the same, with only this difference, which may be instructive. Taking the street railway figures, the comparative figures of the census as compiled for 1902 with 1907, you find that there has been a small reduction in the proportion of total operating expenses that are paid. It is a reduction from 62 per cent of the total operating expenses to 60 per cent of the total operating expenses.

In the case of the railroads you will find a slight increase in the period, as stated in the brief, of about 60 or 60 and a fraction per cent to something under 61 per cent. You find, therefore, in this subject of wages, in comparing thus superficially the results of operation on the street railways with the results of operation on the steam railways that wages, personal service, on which these rises have been so marked, have occurred not only
in both but as bearing practically the same proportion to the total operating expenses. But not only do you find here that the street railways have been prosperous, as everyone knows; but, as everyone also knows, there have been constant increased reduction in price, or rather the giving of more service for the same price. There has been a constant tendency in all of the cities, practically, to increase the distance which you could travel for 5 cents. In some cities there has been a reduction in the rate of fare. In Detroit, in Cleveland, you have had reductions from 5 cents to 3, or from 5 cents to 4. So in Toledo you have had reductions; but you have actually, in effect, reductions widespread over the country, because you have been able to travel a longer distance for the same money.

With that situation presented before you, it leads to the inquiry, Why are the railroads in what they call their plight? That I hope to take up to-morrow morning.

THE CH AIRMAN. The arguments will be resumed to-morrow morning at 10 o'clock.

(The commission, at 4.31 o'clock p.m., adjourned until Friday, May 1, 1914, at 10 o'clock a.m.)

ARGUMENT OF LOUIS D BRANDEIS ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION—Continued.

Mr. Brandeis. Let me add one other to the businesses in which a reduction of prices has come in recent years in spite of increased wages and governmental regulation—that
of the bulk-freight carriers on the Great Lakes, to which Mr. Butler gave us such interesting data.

What is the explanation of this remarkable fact that in all these other businesses, subject alike with the railroads to increase in cost of money, and increased supply, and increased cost of coal, that in all of those other businesses there is blooming health and with the railroads there is said to be a condition of morbidity? The patient comes here for relief, and it is your duty, and necessarily you are desirous of ascertaining what the cause of that difference of condition is.

Two possible causes will suggest themselves. It may be that the railroads have succeeded less well than all these other businesses in increasing their productivity, or it may be that the thing which the railroad is giving to its customers, called by the same name, is not the same thing which they gave before. Either one or both of those causes may be the reason or the potent reason why the railroads should be in a less satisfactory condition than all these other businesses have been during this long period of American prosperity.

Let us see whether the railroads have progressed in productivity. Mr. Lyon stated very clearly that the business of a railroad, so far as it dealt with freight, was to produce transportation by train-mile and to sell it by ton-mile. Now, look what they have done; look what Mr.
Willard has done in that respect since the Advance Rates case of 1910.

The Baltimore and Ohio ton-miles have increased 18.6 per cent and train-miles have decreased 15 per cent. That means that the train-load has increased 40 per cent. Is not that a remarkable advance in efficiency that Mr. Willard has wrought in these three years? Does it not show, as it involved necessarily the expenditure of considerable capital, that the capital of the Baltimore & Ohio, which was expended under Mr. Willard's direction in effecting that result, was well expended; that it had earned not merely interest, presumably, but far more than the interest on the money which was borrowed for that purpose? But Mr. Willard's achievements are not limited. We know that the cost of coal to the Baltimore and Ohio and the cost per ton has increased, but owing to the efficient management which Mr. Willard has introduced the consumption of coal per mile or per 100-mile hauls has decreased. It has decreased so much as to overcome the increased price in the coal, the improvement being some 9 per cent. There you have a definite and clearly demonstrable advance in efficiency, as clear as result of what efficiency can do as could be presented anywhere.

Now, what would you expect from that result? You ought to expect that the operating costs would have been diminished and not increased, because that increase in
train loading is more than what is comparable to the 9 per cent increase in wages; and yet we find, upon examining the operating ratios of these two years, that instead of a decrease, which you might have assumed from that remarkable advance in productivity, you have an operating ratio of 70.8 in 1910, as against 73.84 in 1913, a difference of nearly four points. Some small part of that may be attributable to the reduction in rate, but only a small part. But you are investigating this cause and are called upon to look to see what is the cause. When you turn from Mr. Willard's account and look at what other railroads have done when you look over the long sheet of returns and exhibits from the other railroads in official classification territory, the impression must come to you that what Mr. Willard has experienced in increase is the common experience of railroads—that that which leads the carriers to tell you about increased wages and increased taxes and increased legislative burdens is an experience in common. You gain nothing in your advance in this inquiry by looking at those things that they have in common. But you say to yourselves, Is not there among these lines—35 or more railroads—are not there some that did not have this experience in which Mr. Willard and the others shared? If we could find some railroads whose operating expenses did not increase we might then hope to get some line on what may have been the cause, the special cause, as to why
this great increase in efficiency which Mr. Willard has brought about in his train movements has not produced the results which you would expect. Well, you look down the list and you find that there are two railroads, small ones relatively, which show instead of an increase in operating revenue a decrease. The Kanawha & Michigan shows an improvement; that is, a decrease in operating ratio from 69.82 in 1910 to 66.17 in 1913. By virtue of that it is enabled to increase its net income applicable to dividends from 6.30 in 1910 to 11.17 in 1913.

There is a railroad in Central Freight Association territory, far up in New England, the Central New England. In 1910 its operating ratio was 57.34 and in 1913 it was 52.99 and by virtue of that improvement the Central New England had applicable to dividends in 1910 only 4.47 per cent and in 1913 8.45 per cent. What was the cause? It wasn't a matter of locality; it wasn't a matter of similarity of traffic, because the Kanawha & Michigan is a coal road and the Central New England is a road devoted to merchandise traffic. It is not a fact that it is due to different management, because a no more able or efficient man in managing has appeared than Mr. Willard; but because when you turn to the Central New England you find the Central New England is a part of the New Haven system, and at the same time that the Central New England has reduced its operating ratio the way that I have pointed
out its parent company, the New Haven, which surrounds it in its tracks and with which it is operated almost as a unit, has increased its operating ratio from 62.95 to 68.63, an increase of 5.5 points. It is not therefore a difference in traffic; it is not a difference in management; it is not a difference in locality of the railroads themselves. What is it? What have these two railroads in common and in what respects do they differ from the Baltimore & Ohio?

When we look into the Kanawha & Michigan, and when we look into the Central New England we find this situation: That both of these railroads, handling as they do the most diverse traffic, having very different average rates for transportation, and having different kinds of traffic, have this in common: Neither of them has any appreciable passenger traffic. Each of them has but a trifle over 13 per cent of passenger-train revenue, and all the rest is from freight. Differing the New England from its mother and its neighbor, the New Haven, with its high operating ratio, the New Haven, as against 13 or 14 per cent, has 50 per cent, or a trifle over one-half of all of its revenue from passenger service. The Baltimore & Ohio has a very appreciable proportion, far above that of these other roads. Perhaps that may be an explanation. Therefore, what would be the suggestion? Is it the passenger traffic which makes the difference? And that leads us, therefore, to endeavor to ascertain whether in any other
branch of the service we find these ton-miles and this in-
crease in train mileage, which has been so marked under
Mr. Willard's management. Possibly another great depart-
ment of the Baltimore & Ohio's service is subject to condi-
tions far more adverse, and our natural tendency therefore
is to look into the accounts and to see what the passenger
service costs.

Mr. Bond, with some indignation, as we go to turn to
those accounts, says they are no good. I dare say they
are not correct in all particulars. The problem of railroad
cost accounting, the science of railroad cost accounting, is
almost in a rudimentary state; but Mr. Willard, an ex-
perienced and efficient railroad manager, when he came upon
the Baltimore & Ohio Railroad in 1910 recognized that an at-
tempt must be made at once to separate passenger service
from the freight service, so far as cost accounting was
concerned. And we have, beginning in January, 1910--and if
I remember right Mr. Willard came on the road in the middle
of January of that year--we have, beginning with the very
beginning of Mr. Willard's administration of that road, an
attempt to allocate expenses between passenger and freight.
Considerable success has been attained, when you think of
how short a time Mr. Willard has been pursuing that difficult
problem, because he has attained, it is said, an allocation
specific of 70 per cent of the total, leaving only 30 per
to be apportioned. Take these figures, subject to all of the criticism which Mr. Bond may give to them, and which we know they must be subject to, owing to the lack of perfection in that branch of railroad science, and what do we find? We find, taking the figures for the first full fiscal year which we have, in the year ending June 30, 1911, and comparing them with the figures for June 30, 1913, exactly what we would have expected in respect to the freight traffic under Mr. Willard's efficient administration, because the freight ratio of operating expense has been reduced in that two-year period from 68.16 per cent to 66.44 per cent, or nearly two points.

At the same time what do we find in regard to the passenger traffic? We find that the passenger cost in those two years, according to those figures, has increased from 82.39 per cent to 106.23, showing, according to those accounts, that the passenger traffic in the year ending June 30, 1903, absolutely cost the Baltimore & Ohio Railroad six points above—that is, 6 per cent—without taking to account capital charges.

Putting it another way, the difference between the freight ratio and the passenger ratio in this fiscal year of Mr. Willard's administration was 14.23 per cent. The difference between the freight and the passenger ratio in the three full fiscal years of Mr. Willard's administration was 39.71, or nearly 40 per cent. Now what does that
mean? The passenger ratio, as figured out here, means that in that short period, according to these figures, the passenger costs have increased nearly 24 points. Applying that upon the total passenger revenue we make an increased operating expense for the passenger-train service of over $4,000,000 more, as a matter of fact than the total amount that the 5 per cent advance upon all the freight rates would amount to, taking the year 1913 as your base. So you have that situation. There may be error in it; there probably is error in it, but those are the figures which I am sure Mr. Willard has had worked out with a desire to give himself and to give others who may wish or have occasion to consider the subject the best information that he is able to give.

But not only that. They have had so much faith in those figures that in the very month of April, 1914, within a month of the time that we are sitting here, these figures have been used the representatives of the Baltimore & Ohio Railroad in presenting their case to the Government on the railway mail paid service as showing underpayment, which the Government of the United States is guilty of, in respect to the railways, for carrying the mail. But of that more later.

I say Mr. Willard's figures may not be correct, and Mr. Bond's indignation, I am sure, is not justified by them. He may be correct in his statements, but the best
we can do in the present imperfect condition of railway accounts, is to look about us to see whether we can get from others any light on this problem.

It happens that just to the north of the Baltimore & Ohio is the great system of the Pennsylvania. On the Pennsylvania system it is not a new thing to separate the accounts. They have been doing it for just half a century—the making a separation between freight and passenger. Every year in that period the Pennsylvania Railroad has given to its stockholders a statement showing the separation of freight and passenger earnings and expenses. It is needless to say that the Pennsylvania Railroad, in making that separation, has desired to inform its officers and to inform its stockholders—and whatever may have been the situation in the past, we can feel assured that with a distinguished engineer at the head of that system, a man whose scientific training would make him eager under all circumstances to ascertain the truth and to know that only by the truth can he be safely guided, and, with a very excellent accountant, a man who has devoted his abilities to the solving of that science, which is, perhaps the greatest of all sciences—the matter of safety—we can be perfectly assured that if Mr. Bunting prepares these figures, and they pass on from year to year under Mr. McCrea's supervision, that they are the best that they can do, and that whatever inaccuracies there are in them
are those inaccuracies and imperfections that are the sub-
ject necessary of all human endeavor.

Now, what does the Pennsylvania Railroad show? De-
spite Mr. Bond's indignation, it shows exactly the same
trend which you find on the Baltimore & Ohio. The figures
are somewhat different; the spread is somewhat different;
and it may be because of difference in the efficiency of
management, and certainly in the accomplishment of freight
trains on the Baltimore & Ohio before Mr. Willard came to
that company, was doubtless very much greater than it has
been since. But what do we find? We find, taking a little
longer period in going over the figures of the Pennsylvania,
which we do for two reasons: In the first place, we are
told that in those figures some changes have been made in
method of separating and allocating expenses since 1907.
Therefore, I go back to that year and compare that year
with the present and see what the movement has been.

We find that in 1907 the operating ratio of the
Pennsylvania for freight was 71.6 per cent. In 1913 its
operating ratio was 73.4 per cent. There is a difference
of 2.2 per cent; an increase in those six years of 2.2
per cent. In those six years you have had, no doubt, 10
or more per cent increase in wages; you have had increase
in taxes, and you have had these increases in legislative
burdens; but the efficiency of the Pennsylvania manage-
ment, dealing with its freight, has enabled it to keep down these operating expenses to 2.2 per cent; and keep them down there in spite of that liberal charge of maintenance and equipment and maintenance of way, of which Mr. Lyon and Mr. Thorne have spoken.

MR. LYON. Did you not make an error in speaking of freight ratio——

MR. BRANDEIS. It is operating ratio in freight. Taking it now in passenger service. In 1907 the passenger ratio was 74.4. It differed there very little from the freight, which was then 71.6. In 1913 it had grown to 92.6, an increase in those six years of 18.2 per cent, whereas the freight ratio had risen 2.2 per cent.

Now, that may suggest itself to you that the extraordinary increase in passenger ratio may be due to the much discussed New York passenger terminal. Let us see. No doubt in part it is, but the New York passenger terminal was not open for service and was not operated until the year 1911, and it did not enter into these accounts until the year 1911. Let us therefore watch the trend between 1907 and 1910, the period before the opening of the New York passenger terminal. We find that the passenger ratio in that period, 1907 to 1910, increased from 74.4 to 86.1, and you got that increase of about 12 points in that short period anterior to the opening of the New York terminal. How did the freight grow during that period? The freight
went from 71.6 to 70.7. It went down. The operating ratio in freight went down only one point, while the operating ratio in passenger went up nearly 12 points during that period.

Taking that situation on the Pennsylvania, and what is the effect of it? How does it affect these operating results? You have this: For 1907 to 1913 the operating passenger revenues of the Pennsylvania increased from $31,000,000 to 38,000,000. What became of their net earnings from passenger operations? While the revenues themselves increased $7,000,000, the expenses increased so much that the net earnings decreased from over $8,000,000 to $2,800,000. You had in that period, from the passenger service itself, a difference of nearly $6,000,000 between $5,000,000,000 and $6,000,000 loss by the increased operating expenses.

How was it with the freight? The freight revenues increased about $12,000,000. A large part of that increase was loss, but you come out in the end with $1,000,000 more freight earnings than you had at the beginning. But you were dealing with very much larger sums. You are dealing with $135,000,000 of freight earnings as against only $38,000,000 of passenger earnings. So I say, taking the Pennsylvania's experience, it tends to show that the figures of the accountants for the Baltimore & Ohio are in the right direction, even if they are not absolutely accurate.
What is the effect of this upon the Pennsylvania? What is the effect—and I am talking about operating expenses. What does it leave? It leaves that great, vast Pennsylvania property in that terminal, but its share of the Pennsylvania Railroad that is used in passenger service is practically not adding one penny to the revenue. The net result of that, as figured out in 1911 by Mr. Bunting—and, of course, it was an estimate, as these things had to be estimated—but he and Mr. McRea went over it at that time and they figured out that the passenger service was making a return upon the property invested in the passenger business of about one-third of 1 per cent a year, and at the same time the property invested in the freight service was earning a return of over 7 per cent.

Since that time passenger ratios have grown worse and not better. Although we have not the exact figures for this year, it may be safely asserted that upon the same basis we would find no return at all from the passenger train service.

So much for the Pennsylvania.

To the south of the Baltimore & Ohio is another railroad which everybody recognizes is peculiarly well managed, allied with the Pennsylvania, and having in Mr. Johnson an extremely competent president—the Norfolk & Western Railroad. Its conditions are different. They, too, have undertaken to separate the passenger and freight
service. They have done it since 1907. Apparently when they started they took as their basis the same operating ratio for the two, which was 64.8 or 64.7, the operating ratio of both freight and passenger. What has the movement been? In freight but a very slight increase. It increased from 64 to 65, an increase of a little over one point. But in passenger service the increase has been from 64 to 72.

There is another road which is known as being exceptionally well managed, and that is the Bessemer & Lake Erie. They also have undertaken to separate freight and passenger, and they have done it since 1907. What has been their experience? In 1907 the freight operating ratio was 56.95, slightly less than 57, and in 1913 the freight ratio is 57.57, slightly greater than 57, and the whole difference between 1907 and 1913 in freight ratio on the Bessemer & Lake Erie is sixty-two one-hundredths of 1 per cent.

When you come to the passenger ratio you not only have a very much larger operating ratio in the passenger service, ninety-six and a fraction per cent in 1907, but when you come to 1913 it has gone up to over 106 per cent, showing that they are doing passenger business at an actual loss without counting return on investment at all.

There is another railroad known as being very well managed, the Buffalo, Rochester & Pittsburgh. What are
the results as to that road? They are known to have improved their property very much. Their freight ratio increased from 1907 from a freight operating ratio of 56 per cent to 63 per cent in 1913, an increase of 7 per cent. Their passenger ratios were increased from 86.93, or about 87, to above 115 per cent, an increase of 28 points in those years. In each instance, or the instances we have taken, the railroads have the reputation in the railroad world of being exceptionally well managed, and in each one of these instances we find differing percentages; but the common trend of all show an increased cost of passenger business as compared with freight, and in some instances we find an actual reduction in freight movement.

Coming lastly to the one railroad in the United States whose passenger train revenues, I believe, exceed the freight train revenues, and that is the New Haven road. It is now managed by a man known as an able railroad manager, and Mr. Elliott, in his statement to the stockholders only a few days ago, stated the result of the operation of his road. He said more than 50 per cent of our revenue comes from passenger trains, and for passenger trains the cost of operation is so great as to leave nothing whatever for taxes or for investment. In that great New Haven property you have more than one-half of the total revenues, segregated as they are for passenger and freight, not contributing one cent, according to
Chairman Elliott's figures and judgment, to the taxes and interest and possible dividends upon that stock.

Those are the figures. What are the probabilities of those figures being correct? We have merely to consider what the passenger service is to-day and what it was. We know this increased cost has come through increased wages. They are perfectly defined. As stated, they are between 30 and 40 per cent in this period of years since the late nineties. They have been very large in these recent years since arbitration. In the freight business, as Mr. Willard's experience and data which he has given has shown, the increased productivity has enabled the management to overcome, as it has overcome in all of these other businesses of which I speak, the increased rate of wage, and the labor cost has been reduced although the wage has been increased.

But, when you come to the passenger service you have a very different situation. They haul more tons than they do in freight. They run less train-miles: they have larger cars that load heavy, and on the larger cars, if loaded to capacity, the tare on the great 50-ton car is a great deal less than upon the 20 or 30 ton car. These added wage costs and other costs have been overcome in freight, but what have you in the passenger service? You have just the reverse. The tare in the passenger service has become infinitely greater. With the introduction of
steel cars you are carrying 50 per cent more dead weight to every passenger than you carried before. All of the other expenses are similar, and what have you gained? Not anything in carrying capacity. If there has been a growth of density of traffic and your trains before were not full, you have gained something by carrying more passengers per car, but in these older communities in New England and Pennsylvania and in the eastern communities where the passenger traffic is large, and where every seat is taken in every passenger coach ordinarily, you have gained nothing, but it has been a mere addition to the cost of carrying the passenger. And what more? The electric light, the ventilation, sanitation, and all of those things which we have and which we ought to have, cost money. Not only have these particular things cost money, but there has been nothing to counterbalance that increase in the cost of operation which comes from the increased wage and from governmental regulations in the aid of safety to humanity. It is just what we should have expected. And there is one other thing that Mr. Lyon referred to, and that is the expensive Pullman service. Prosperity brings more use of Pullman cars but a greater use on the part of each passenger. A man takes a section instead of a berth. Every time that a man takes a section instead of a berth and it is necessary to put on another Pullman, you are adding more to the railroad's expense; and every time
you substitute a steel Pullman for a wooden Pullman you are adding more to the railroad's expense; it is not wonderful and it is not surprising. There is nothing in those figures to create indignation or even doubt on the part of Mr. Pond. They are perfectly in accord with what a man's reasoning on this subject would expect.

Then there is one other element in connection with this passenger train service which we expect to find unre- munerative; and more and more unre- munerative, and that is the matter of the railway-mail pay. A committee of Congress is now investigating this subject; and it would be improper, in advance of that investigation, to express any opinion, certainly as to what the Government ought to pay for the Railway Mail Service: it is contended by the representative of the Government that the ordinary rules should not apply as to compensation; that by reason of what the Government has given to the railways in protection, in rights of way and the like, there should not be expected that same return upon Government business that there is upon private business. It is unnecessary to express any opinion as to whether that view is correct or is not correct. But it seems to be contended by the railway representatives, and sincerely contended by them, that there is a great under-payment, and the representatives of the Baltimore & Ohio, figuring that on the basis of the passenger-train expense, figured an underpayment to the Baltimore & Ohio of over
§500,000 a year. It would not be surprising if that was correct; it would not be surprising if Mr. Peter's contention that $15,000,000 correct. We know that there is a weighing of mails only once in four years, and we know the rapid increase in mail weight each year. We know that since the parcel post has been introduced that that increase has been particularly rapid.

It is not for us, as I say, to determine whether the Government ought to pay more or not, or what the considerations ought to be; but we can not, I think, feel any grave doubts, if we examine the figures which have been submitted to the committee, that that service which is carrying the railway mails is an unremunerative service to the railroads.

So I say, when you are trying to find out why it is that these railroads, as compared with other businesses, have failed to overcome these increases, you will find in the passenger department of that business a very important explanation. But that is not all. Let us pursue the same process exactly and turn again to these railroads which seem not to have suffered as the Baltimore & Ohio, the New York Central, and the Pennsylvania, and others have suffered, from the great increase in operating cost.

Let us turn again to the Kanawha & Michigan and the Hocking Valley, to the Pittsburgh & Lake Erie, and to the Bessemer & Lake Erie, and what do we find there?

I spoke of the extraordinary advance which Mr. Willard
had made in train efficiency in three years. Extraordinary as his advance is, he reached only, in the year 1913, an average of 851 tons per train. That was his trainload. If you will look at the Hocking valley, you will find that the Hocking Valley had 851 tons, the Bessemer & Lake Erie had 1,001 tons, and the Pittsburgh & Lake Erie had 1,157 tons. But that does not mean that Mr. Willard is not as efficient as the managers of these other companies. We have no reason to believe that certainly, and when we turn to the Pittsburgh & Lake Erie and remember that the Pittsburgh and Lake Erie is a part of the New York Central system, we have as important confirmation and protection of Mr. Willard against any suggestion that he has not been efficient. While the Pittsburgh & Lake Erie Railroad trainload is 1,157 tons, the trainload of its parent company, The New York Central Co., is only 432 tons.

There must be some other reason. What is that other reason? It is the character of the freight traffic.

Mr. Willard failed to obtain a higher trainload, as compared with these other railroads, because the percentage of his traffic which is heavy bulk freight, as the products of mines—coal, ore and coke—is smaller than that of these other roads. He therefore cannot effectuate as to a part of his traffic—and a larger part than on any of these other roads—he cannot effectuate, utilize, and apply this heavy efficiency, this heavy train movement through which he had accomplished what he did.

On the Hocking Valley 80 per cent of all the freight
is products of mines; on the Bessemer & Lake Erie 87 per cent of all the freight is products of mines; and on the Baltimore & Ohio only 65 per cent of all freight is products of mines. Now, what difference does that make? It makes a world of difference. Coal and ore are carried in these large cars. With the money borrowed by the Baltimore & Ohio they have been carrying 50-ton cars, loaded not only to capacity but to a large extent above the loading capacity --50 ton cars carrying 55 tons in very many cases. How do they move? They move just as rapidly and just as slowly as is necessary to carry that load from one place to another, the largest load, which, consistently with railroad conditions, can be carried from one place to the other, and carried, as you see, in the smallest number of cars which it is possible to carry that load in.

In the carrying of that freight there has been no increased cost; there has been a greatly decreased cost. That is perfectly obvious, when you consider the relation, as Mr. Lyon pointed out, of these other coal roads to the fact in regard to the actual carriage of that coal. But Mr. Willard has on his line a great deal of other traffic. That is not only ordinary merchandise traffic, but is carried to a great extent at a better rate than this heavy bulk traffic, when you consider it in cents per hundred pounds or per ton. But the condition is entirely different. Even if that other traffic is carried as slow freight, just
as slow as coal, you can not load a car of that light stuff heavy; you do not get full capacity and overloaded capacity ordinarily on those articles of merchandise, and a very large part of that other traffic does not stand in this relation of slow freight, as to which, Mr. Lyon said, there was no desire except to take it from one point to another point at the lowest possible cost without regard to time or any other condition.

In regard to the other freight there is the very important element—time. It is expedited freight; it is special dispatch freight, and there is a great deal of difference in cost of moving that freight rapidly and the cost of moving the other freight slowly or the same freight slowly. And why? You cannot load the trains as heavily. There are different degrees of expedited freight. Some of it goes very quickly, like the packing house products from Chicago to New York, in 60 hours, in as quick time as the passenger trains moved a century ago. Then there is freight which is not classed as dispatch freight, but is nevertheless rapid, moving upon a rapid schedule—time freight. By taking those two classes of freight together, the highly expedited freight and the medium freight, and comparing the carriage of that freight with the carriage of slow freight, and you see how much a trainload amounts to. In the figures which Mr. Willard has worked out in order to determine what could be done in order to lessen the cost
in respect to what seemed to him, economically, an unneces-
sary dispatch service, he showed this: He found that the
average percentage of trainload of the time or special dis-
patch freight was only 63 per cent of what it was on the
slow freight or ordinary freight, as it is called.

What an immense difference that is in cost; in wage
cost, when you consider the wages and the other elements
of expense in hauling a train, and that the whole effort has
been to increase the trainload. Here is a large part of
this freight as to which you can only get 63 per cent train-
load capacity. There are a number of reasons for that,
and some of them are physical. The resistance of the air
in moving rapidly is greater, and at the time these cars
move you can not always get a full load. That is the reason
that a great many of these cars that move are not only
special dispatch cars, but they go regardless of the
quantity in the car. The big cities vie with each other
for this express service, in the different regions, and
that movement has gone on. It costs and the cost of it
is huge.

Mr. Willard has figured out, in undertaking to find
out where operating economics would be made, how much he
could save by turning a part of these cars--special dis-
patch freight--into ordinary freight by merely having them
take 24 hours more for the journey; by making the cars run
85 per cent capacity instead of 63 per cent, and in making
that apply not to all the special dispatch freight, but to all of that portion of the special dispatch freight which he believed it was unnecessary to carry in that manner for any economic reasons. Some freight must be carried rapidly. Perishable freight must be carried rapidly, and the rest of it need not be carried rapidly, except as far as commercial considerations make it desirable. Mr. Willard figured out, or had figured out for him, that the saving in merely lengthening the schedule of three-fourths of the special dispatch freight would amount to over four hundred thousand a year, conservatively figured, on that same traffic. That gives you an idea of what it costs. If I may ask you to look in the brief at the list of articles which move as time or special dispatch freight, I will say that that has increased from time to time, so that practically everything is put upon that special schedule of time, dispatch, or expedited freight, except the heavy bulk freight, the products of mines, the heavy forest products, and articles of that kind.

You have a clear differentiation between the two kinds of freight. That has been going on increasingly; more regardless of quantity, cars are sent out from our great cities and more expedited trains put on from time to time, and there is more traffic. You will find there why it is it costs more, and that in spite of the efficiency introduced by Mr. Willard through this heavy train movement, which has met the difficulties which we have considered.
THE CHAIRMAN. Does the record show the volume of expedited traffic, in percentage to the whole traffic in the case of any railroad?

MR. BRANDEIS. I do not think the record does show it. It is not referred to specifically in the brief. In respect to the Baltimore & Ohio we had two months shown in a report made by Mr. Willard. That was forwarded by request from Mr. Willard to me, and is referred to in the brief. That gives the volume of that service and by calculation with the known figures some estimate could be made as to the exact percentage which it bears.

Now, therefore, I say when we compare the unsatisfactory result of freight service, despite these improvements, on the Baltimore & Ohio, with the very satisfactory conditions on the Kanawha & Michigan, the Hocking Valley, the Pittsburgh & Lake Erie, and the Bessemer & Lake Erie, we have there one explanation. But there is another; indeed, several others. The Kanawha and Michigan, the Hocking Valley, and the Central New England are not running between any great cities, and that makes a great difference, because one of the extraordinary elements of expense in freight service has been incident to the growth of our great cities; and the most striking example of that is in connection with the Chicago situation, has made a most illuminating report on that subject. He has shown how, through the extension of freight switching in Chicago, these costs mounted up
step by step, for two reasons: In the first place, by ex-
tension of the freight switching first from the road that
make the haul to other roads. It was a comparatively
simple matter when the freight switching upon a road itself
meant the switching of freight to a private industrial
track, but it became a very different matter when this
freight switching involved not only that, but the switching
of freight from one road to another road, and it became far
more serious when they were not only doing that switching
on competitive business but doing it also on noncompetitive
business; and it became far more serious still, in the last
few years, when the rising costs made it necessary prac-
tically to double or more the switching charges.

And so, as Mr. Delano has pointed out so clearly in
his statement, various parts of which are quoted in the
brief, it came to a point where the switching cost in
Chicago equaled and sometimes exceeded the total amount
which the railroad received for carrying the freight. There
you have an extraordinary situation.

I have been talking about carload lots. When you
come to the less than carload lots you have an even more
serious situation in many respects. There you have the
situation which bred ferry-car service, by which you had
the switching from a place of business of less than carload
lots from one railroad not only to another railroad, but
sometimes through a third to another railroad, and all at
the expense of the carrier who made the haul. Incident to
that you had in Chicago the terminal and trap car service. There has been much discussion at the hearings which we have had on the subjects, all of which are unfinished and as to which it has been announced that there would be further hearings later—but there has been much discussion between shippers and counsel, and much assertion that it was cheaper, all things considered, to do this ferry car service or spotting service than for the railroad to furnish on team tracks or at every freight house these facilities. That may or may not be. That subject is not open for discussion here. We will doubtless have occasion to consider it later. But what is certain, and what nobody for a moment could controvert, is that these practices, which have grown up as an incident to the creation of these great cities like Chicago, have increased the terminal cost so much as to make a large part of the traffic not only unremunerative, but practically free, so far as the haul from place to place is concerned.

There is quoted in this brief a most illuminating statement also of Mr. Pfeifer, counsel for the Chicago & Eastern Illinois, in regard to that situation. He shows that not only is this true in respect to business destined to Chicago or shipped from Chicago, but that it is true of much of the business that passes through Chicago to other points beyond. He says that he can furnish the proof that on l.c.l. business from Pittsburgh to Milwaukee the cost
of handling that business in Chicago—I mean incidental cost—is more than the total amount paid for the haul from Pittsburgh to Milwaukee, and that Pittsburgh and Milwaukee are cities in which the terminal costs are considerable, or certainly in one of the cities the terminal costs are considerable.

But Mr. Maxwell testified on this subject in a very clear and convincing way. He showed that in regard to an appreciable part of the business on the Wabash the terminal cost at Chicago ate up everything: that the terminal cost in Chicago on some of the coal which came from the mines left nothing, not enough to pay for the interest and depreciation charge on the equipment which was used in carrying the coal from the mines: that after paying the switching charges there was but $3 left, and there had been a haul of 200 miles. The average cost of a freight car, considering its service, is over 2 cents a mile. Here there was only a cent and a half for the cost of hauling, for the terminal cost at the other end and a return on the capital invested. The terminal cost at Chicago had absorbed practically everything.

Mr. Johnstone, of the Lake lines, showed exactly the same thing. He showed how, in this period from 1903 to 1913, the cost of switching which the Lake lines had to absorb had more than doubled, almost trebled—from $4.50 up to about $12 a car. There you have changes which have
been taking place and which have been bringing about this result.

Take another circumstance in connection with Chicago. Think how much of the business of these railroads is Chicago business. Mr. Maxwell said that the business of the Wabash, which has an eastern as well as a western end, was perhaps 17 per cent, and with a number of these railroads the Chicago business amounts to 20 or 25 per cent of their entire traffic. That traffic is subject to such charges as these, which are increasing each year and increasing rapidly. What is true of Chicago in the West is markedly true of New York in the East.

While Mr. Willard was on the stand Commissioner Hall put a most searching question when he asked about the deficit in these outside operations. That brought from Mr. Willard and Mr. Shriver a most educating reply.

The cost in those outside operations—the deficit in those outside operations to which Mr. Commissioner Hall referred—was due to the deficit in the lighterage service, the so-called free lighterage in New York Harbor.

Let us see what that situation is. Years ago, Mr. Shriver says—it was 30 or 40, as he thinks—the railroad with business destined to New York made an allowance of 3 cents, an arbitrary 3 cents, for the expense of lighterage at New York and incidental expenses. Mr. Shriver stated that that was long ago, and that the cost is very much
greater now, and when inquired further he said it is between 6 and 7 cents. He later sent in some figures showing exactly what the cost was, as compared with this 6 cents, figures which dealt with that portion of the cost which covers the lighterage strictly to the pier and the service in New York City. Those figures which Mr. Shriver gave must be added to the cost of handling in Jersey, the handling before the goods are put upon the lighter, and then what do we have? Another confirmation of Mr. Shriver's statement that the cost of that service was about or over 6 cents. What does that mean? Six cents a hundred pounds means $1.20 a ton, and this package freight in the average car is 22 tons. That means $26.40 a car--$26.40 a car on every car that moves into New York. This other expense at Jersey is necessary; it can not be loaded direct upon the lighter ordinarily, or in many cases, because this lighterage free freight is, under the practices and under the existing tariffs, entitled, if for domestic use, to 10 days free storage, and if for export use from 30 to 60 days free storage. That means that in order to release the car the stuff has to be unloaded out of the car, loaded into a warehouse to be stored there free; loaded from the car into the lighter and carried free over to New York City. The average cost per car is $26.40, and in many cases, perhaps in the average case, about 33 per cent of the gross revenue that comes from that car--$80 a car is a
pretty fair return for hauling a car a considerable distance -- $26.40 would probably be 33 per cent of the total revenue received from those cars, and on many cars it is very much more; very much more. Cases are shown in the brief showing how important articles are moved into New York under this practice, consuming from 50 to over 100 per cent of the total revenue. You find articles such as agricultural implements from Auburn, and you find all kinds of articles moving into New York Harbor, and on every pound of that stuff the railroad must be actually losing money in the cost of operation, to say nothing whatever about the freight bearing its fair share of taxes or interest on investment.

Just examine the three or four examples which our examiners have picked out from a great mass to show you what the result of that practice is in New York City. That is a change which has come along. That is one of the changes which Mr. Willard has had to battle against when he has been trying, through greater efficiency, to meet these rising costs. It is not the increasing cost of labor. Those costs he can meet in the larger part, but it is the increase in cost of these other free services which are coming along and which are extending all the time, and the cost of which is extending. You have the difference there as compared with the estimate of 3 cents which would amply reward the carriers, not for the cost of operating, but as a part of its compensation. If the railroad fix a
3 cents for this service taking the old period on time, when operating expenses were supposed to be two-thirds of the average of the cost, that meant that at that time they estimated the cost of this New York service to be 2 cents. Now, this New York service is costing not 2 cents but 6 cents a hundred pounds, and is costing more all the time, not merely because things cost more—because labor is higher and stevedores and others have to be paid more than they were before—but because the service rendered is greater. The lighterage district of New York has been extended and the haul made longer. How can the efficiency in train movement overcome such things as that? Mr. Willard battles in vain with such leeches and such burdens as that upon his traffic.

And see what that means, gentlemen. If, instead of this traffic coming to New York City it had been destined to Jersey City, Weehawken, or some point on the Jersey side, the rate would have been exactly the same, and this $26.40 a car additional cost that the carrier has to bear is a cost that they must bear, because it happens that the freight is destined to New York City instead of being destined to Jersey City or Weehawken. Now, that is a large part of the traffic. Taking the Erie Railroad, which is one of the great sufferers here, we find that 25 per cent of the freight revenues are on business destined to or shipped from New York City. You have there in the East
just the same situation as you have in Chicago in the West.

These conditions have developed and grown up year by year, the costs are becoming greater and no general increase in freight rates can keep pace with such leeches upon the service.

I took New York and Chicago because they are the most important freight centers in the country, and conditions are perhaps worse there than elsewhere. But what is true of New York and Chicago is true of these other cities, and it presents itself in different forms in different cities. We took Buffalo, we took Toledo, we took Philadelphia, and in every one of those places you will find these or other similar leeches upon the revenue, growing and eating into the vitals of these railroads.

When you consider those things; when you consider the passenger train service, you can see why it is that advances have not been made adequate to overcome increasing cost of operation. But there are many other conditions, conditions under which naturally very similar situations arise—unremunerative service for causes differ one from the other. Some of them the carriers are responsible for, although they may not perhaps be responsible for this. Let me speak of the matter to which Mr. Lyon referred incidently, and that is the absorption of local rates in connection with differentials.
Take this example: you hear Mr. Butler consider about the ocean-and-rail differential routes to Chicago. The Baltimore & Ohio is a party to one of those routes in connection with the Merchants & Miners’ Transportation Co. which sends its ships from Boston and Providence. In the canal season the rates ocean and rail, first class, from Boston to Chicago, via the Merchants & Miners and the Baltimore & Ohio is 63 cents, as against a 75 cent all-rail rate. Under the tariff these differential routes absorb the freight from inland; that is, you can not only ship from Boston but you can ship from Springfield by this route to Chicago, the goods being shipped down to Boston and from Boston by the Merchants & Miners to Baltimore, and from Baltimore to Chicago. The local rate from Springfield to Boston is 21 cents. That leaves 42 cents for the ocean voyage to Baltimore and the rail transportation from Baltimore to Chicago. On a division of that rate the Baltimore & Ohio receives 26.8 cents for its rail haul of about 859 miles. You may not be able quickly to determine whether 26.8 cents is enough to cover the cost or not, but I tell you that the regular Baltimore & Ohio all-rail first-class rate from Baltimore to Chicago is 72 cents. This business from Springfield via the ocean-and-rail differential line is hauled for a little more than one-third of the all-rail rate from Baltimore to Chicago. It must go through Baltimore and be handled, as has been pointed out, from ship
into the car at Baltimore—not by the shipper or by the railroad or the steamer. Just think of that! Does it seem reasonable to raise 5 per cent this 72 cent rate when this traffic is being carried through at about one-third of that amount, and will be raised only 5 per cent on that one-third?

The Baltimore & Ohio is by no means the only sinner in this respect. You have exactly the same situation in regard to the Chesapeake & Ohio and the Norfolk & Western with respect to the ocean-and-rail differential.

Take the rate, ocean and rail, via the Old Dominion Steamship Co. from New York to Norfolk, and connecting them with the Chesapeake and Ohio. That route absorbs the local rate from Hartford, Conn., the first-class rate. The first-class rate from New York to Chicago and from Hartford to Chicago via this line is 21 cents. The local rate from Hartford to Chicago via this line is 21 cents. The local rate from Hartford to New York is 10 cents. Therefore you have 11 cents to pay for the water haul from New York to Norfolk and the rail haul of 950 miles from Norfolk to Chicago. The Chesapeake & Ohio's share of that is 7.32 cents. That means $1.46 a ton. If that had started at the beginning of the Chesapeake & Ohio Railroad, at the very point where it begins at Norfolk to the point where it ends, in Chicago, the shipper would have had to pay $4 a ton; but on account of that running start that began back
at Hartford he pays only $1.46 for that ton. (Laughter)

There you have the case of such rates as that. But wholly aside from those rates, there is in the business that is done such a mass of unremunerative rates that the wonder is constant at the efficiency of the managers in so dealing with certain classes of bulk freight that it should overcome the loss in the other things. The representatives of the commission, having in mind some instance where the rate was clearly unremunerative, by question 6 of the questions submitted under date of December 20, called upon the railroads to give, in respect to the principal commodities carried, illustrative instances of where they were carried in largest movements. The results of that are astounding.

THE CHAIRMAN. Do you mean that these rates do not produce a profit or that they create a loss?

MR. BRANDEIS. They create a loss; not only a loss to the railroad, but an operating loss, because to my mind everything creates a loss which does not contribute something to taxes and interest. These rates not only fail to contribute anything to taxes and to interest, but fail in many instances to contribute anything whatever to the cost of hauling from one place to another.

Now, we have a rate put up to us, a rate of so much per 100 pounds or so much a ton; the quoted rate does not tell the story of the relation of operating expenses or operating revenue and it does not tell the story accurately
as representing the rate which a shipper pays, because in operating revenue is included only that which the carrier retains. That which he pays to third persons for some special service in connection with the transportation does not appear in the operating revenue. That is absorbed; it is deducted. In other words, it is paid out before you have any revenue which the carrier can devote to the ordinary expenses of conducting his business, and in the hope of having something left for capital. These deductions for such things as terminal services—I mean allowed deductions for terminal switching service, for bridge service, or for some one of these many services which are performed—are so extensive in many cases as to leave only a relatively small percentage of the amount the shipper pays to the railroad which does the work.

For illustrative examples, you will find some on page 174 of the brief taken from the Baltimore & Ohio and the Erie, as it is those roads that presented most piteously their position to the commission.

You will find in most of those instances a rate per ton-mile that looks low, and a net rate that looks low, but the thing that is most important to look at is to see what the car-mile yields, and you will find in those instances the Baltimore & Ohio carrying laboriously, and no doubt most efficiently, flour 564 miles to New York City and having in the end retained in revenue not 1 cent for
its capital obligations, but perhaps enough to pay interest and depreciation and repairs on the car in which it hauls it. Here is 2.11 cents a car-mile and 2.31 cents a car-mile, and if you go down further in that list and look at flour for export, you will find a case of 1.669 cents, considerably less than compensation for the use of the car in which the flour is hauled.

Now, with respect to the New York Central. On page 171 you will find where the New York Central has carried cattle from Chicago to New York, and that is the New York Central's rate from Buffalo to New York City. That traffic is hauled in private cars and among the deductions there is the payment to the private car owner, and what appears there? You are carrying cars which have to be hauled back empty and for which you have got to pay as they are hauled, and you are getting for carrying this live stock, for the movement both ways, 1 1/2 cents a car-mile. Think of that, gentlemen! That is expedited freight. That is no slow freight, which, like the coal, coke, and ore, may move in such volume and such speed and under such circumstances as best suit operations. Next to passenger trains, that must be given the right of way, and it moves at such a rate as that! Does it seem fair? Does it seem reasonable that coal, coke, and ore should be raised 5 per cent and this rate on cattle, the rate on flour, and
the rate on agricultural implements and the like should be raised 5 per cent to meet what is supposed to be a need of the railroad? Is it not perfectly clear that while such things are happening, while you have such terminal charges and such absorptions and such drafts upon the revenues of these carriers as are exhibited and as could be multiplied many, many fold if there were time, that that is a situation that could not be met; that it is the worst form of palliation which is bound to produce more and not less trouble if we go forward with it. But can you? Have you the legal right to do what these gentlemen, in the very best of faith, I am sure, are asking you to do? They have told you why they ask a 5 per cent increase in the rate, and that is full justification for their asking it. It seems to be the easier way. It seems almost the only possible way, but they can not answer the question—it is not the way that you have the legal right, as to most of the tariffs here, to allow, as I view it. What is that right? These rates, which they are speaking of as a general increase in rates, are specific and not general. There is no such thing as a "general" advance, except as a myriad of single instances may make it appear general.

Each single rate has to be set up. So specific was this proceeding that, as these gentlemen have told us, it has cost the carriers, it is estimated, a million and a half dollars to put these tariffs before the commission.
That may be an excessive estimate, but we know this: That there are 22,000 separate tariffs, each tariff dealing with a large number of rates. Every one of those tariffs has been acted upon separately by you when you suspended those tariffs in order that an investigation could be made. You made a specific order in respect to each one of those 22,000 tariffs, and each carrier was bound in respect to each one of those 22,000 tariffs, and each carrier was bound in respect to those tariffs to issue a separate order suspending them. Of course they could include in one paper an enumeration of them, as you have shown in one paper the different numbers, but every one of those 22,000 tariffs is numbered and you have acted on each one separately, as you were legally bound to do. Each of these 22,000 tariffs sets up an increase in rate. It varies. In some cases it is less than 3 per cent; in some cases between 3 and 4; in some cases between 4 and 5; in many cases 5; and in many cases it is more than 5 and all the way up, perhaps, to 40 or 50 per cent. You may hear the considerations relating to each of these tariffs altogether, but in contemplation of law you must make a separate order on each of these tariffs, and that order is that you consider the rates fixed by each of these tariffs are just and reasonable. That must be your finding if you allow the tariff to go into effect, and you can not legally allow that tariff to go into
effect unless you are ready affirmatively to make that finding; and when you come to make that finding, if you are in doubt, you must deny the tariff, because the law of your being, the law of Congress has said that if the rate is increased after January 1, 1910, the burden is upon the carrier to satisfy you that the rate is just and reasonable.

Mr. Glasgow spoke of our statute being dissimilar to the English statute, when it was similar in the respect in which he discussed it but different in another respect. All the carrier in England had to do was to show that the reason existed for increasing a rate, but the rates which are now up before you impose a greater burden under the orders of Congress than that upon the carrier. It is not sufficient for them to prove that there is a reason for an increase of rate, assuming the rate was satisfactory 1909, but they must prove that this new rate is just and reasonable. What have they offered in proof of that fact? I throw out of consideration now the central freight association scale, as to which special reasons apply. They have proven that the expenses of their systems as a whole have grown so that upon the figures which they present the net earnings and net income are, in my view, less than it is desirable in the interest of the community, as well as the railroads, that the railroads should earn. Does that show that these new rates, with an increase varying from 2 to 40 per cent, are just and reasonable?
If it were a fact, which it is not, that the cost of operation in respect to every bit of this service had increased proportionately to the rate there might be some basis for an argument that, assuming the rate to have been just originally, that it would now be just and reasonable to add to those rates the proportion of increased cost. If you had that situation such an argument might be made. I doubt whether it would be sound. But you have not that situation. You have a situation which makes it as clear as anything can be that the cost of operation has not increased ratably according to the rates as they were. In respect to a very large part of this traffic it is, I submit, perfectly clear that the cost of operation has, if anything, decreased during this period and decreased in respect to traffic, which already was highly burdened as compared with its cost, and in respect to other traffic it appears that traffic does not bear any part of the cost of transportation. No argument based on any reasoning can overcome those facts, and I submit there is no evidence in this record which would justify you in holding those rates to be just and reasonable. If you do, I submit you will not be in the exercise of the function confided to you. You will be exceeding that power of Congress and usurping, I submit, the power of the legislature and the power of Congress in finding these rates such as may be approved. If action is taken which it seems to me is contrary and in excess of law,
the courts are open to redress by the shippers, and we shall be plunged into an immense mass of litigation because despite the minimizing of protests by Mr. Butterfield, or, as he called it, the protests in this case are defined, specific, and numerous. I have set forth in the early part of the brief the protest of shippers against this increase that cover all of the heavy articles of shipments, articles that comprise a very large part of the traffic and a greater part of the profitable traffic of the railroads.

I believe when Mr. Lyon called attention to the advice that he had given his client, and as Mr. Glasgow, Mr. Ellis, and others have intimated, they suggested what must be obvious to your honors, that if in the absence of evidence to sustain that burden of proof, these particular rates by just and reasonable, and the finding of that fact is made, then the courts will be resorted to prevent such an act of, to say the least, injustice.

Of course, in regard to certain rates, a different situation exists. Specific evidence was put in as to the central freight association scale, evidence of the very nature that you are accustomed to action upon in determining the reasonableness of rates. It was shown in great detail and with great clearness by Mr. Maxwell that the central freight association scale is lower than any other in the United States, by comparison of that scale with the scale elsewhere--anywhere. It appears that those rates
are extraordinarily low, and their lowness is confirmed by the financial evidence which we have. I do not mean evidence of this particular year, or the last few years, but for a long series of years. If you take these railroads and compare the financial results of these central freight association roads with the financial results of operating ratios of the roads in the East, you see at once what the situation is— not in 1913 or 1912 or 1910, but going right back to 1902. Uniformly almost, these operating ratios, except in respect to coal roads, are higher, to my mind, than is consistent either with railroads or the interests of the community served. In respect to some of those rates which you may pick out, you have evidence on which you can act. You have evidence also of certain individual rates on which you can act. In those instances referred to in the brief, showing absolutely unremunerative rates, you will be justified at once in allowing a tariff increasing those rates, because it is obvious, at least as to some of them, that the rates are unreasonably low. But when it comes to other rates, we have what Mr. Johnstone to him, are not unreasonably low rates, and I refer to the question that was put as to the Lake cargo rate from Pittsburgh.

I say that you have legal evidence upon which you can act as to the central freight association rates and as to some other sporadic rates; but should you do it? Mr. Maxwell, who has given very frank and very instructive and
educating testimony in this case, has been frank in this respect also. He told us that this increase would not relieve their situation; that what they needed was an adjustment of rates similar to that which has been brought about on the Boston & Maine by a conference between Commissioner Prouty and the State commission, which is about to go into effect, as I understand from Mr. Maxwell.

That should be done to make things as they should be and not to intensify and perpetuate injustice and discrimination, but to relieve them. That is what should be done in regard to central freight association rates.

But you cannot relieve this situation until you do a great deal more. You will have to put an end to these leeches, many of which I have spoken of, and a great many more of which are indicated in the brief, in respect to the freight service and otherwise. And that is not all. They are not only leeches in connection with the shippers, but there are also leeches in connection with the officers of the corporation. We have a situation here of an extraordinary degree of conflicting interests. In the questions which the commission addressed to the carriers under date of December 20, the carriers were requested to give a statement which would show, with relation to the contract of these companies with other corporations, which of the officers was interested in each company. Of course, conflicting interest does not mean that you must necessarily
have been dishonest, but it does mean that the same men
have been on both sides of a bargain; that men have under-
taken to serve two masters.

You have no assurance and can have no assurance that
these railroads have done all that could be done to stop
the leeches as long as these conflicting relations continue.
You find them on Mr. Willard's road, as you do on the
others. The chairman of the board of directors, the man
that Mr. Willard succeeded as president, appears here as a
stockholder in seven of the concerns with which the Balti-
more & Ohio is doing business within the year. Another
director appears here as a stockholder in two or three of
the other concerns; another is a stockholder apparently in
six or eight concerns; and another is a stockholder in
three or four concerns. What is done by the stockholders--
by the high officials--is naturally done by their subordi-
nates.

I ought to say that Mr. Willard is not among those
who appear to be interested in companies which are dealing
with the corporation.

Those things have got to end. There are other
lesser leeches, numerous in themselves, many of them in-
volving perhaps only a small amount individually, but
which as an aggregate result in a fearful load upon the
system. I spoke of the cost of this passenger train
service being heightened by a flagrant practice of hauling
private cars. I do not mean the hauling of private cars upon a road for an official upon that road, which is merely taking him from place to place where he can do his work, but I refer to the hauling of private cars for others not connected with the railroads as an act of courtesy at the expense of stockholders and the communities. The Erie Railroad, in the year 1913, for the wife of a director and the widow of a director, not only the hauling of a private car but the hauling of two trains free, for which the ordinary pay at the tariff rate would have been $3,200; for the hauling of cars for the daughters and wives of high officials, at least eight cars in a year, upon which the tariff rates would have been $3,200. These cars are hauled free, not only for high officials, but for people all the way down the line.

We find this practice followed on behalf of the secretary to the president of the Western Union Telegraph Co., the second, third, and fourth vice presidents, the assistant engineer, the assistant counsel, and other officials of various kinds, and with regard to their wives, mothers, and mothers-in-law. We have not the returns from all of these in, but we have returns from 55 railroads which show what, at the tariff rates, those things would have amounted to $400,000 a year, if they had been paid for instead of given free. Of course, that is not by any means an important thing--$400,000 a year, or perhaps a million dollars
for all of the railroads—but it is something that is worth
saving, and it is only by saving the small amounts that
these gentlemen can hope to cope with the necessities of
this situation. But that practice is demoralizing, and it
shows these men below, who ought to save and who ought to
be doing what they can to counteract the increased ex­
penses, and ought to be doing all they can in recompense
for the increased wages what they get, that the men on top
do not mind the expense to the road; that they are living
luxuriously as they travel, because when they go to the
hot springs and such places, instead of traveling like
ordinary men, they have a private car for their wives,
themselves, their mothers-in-law, or some other persons.

That $400,000 is multiplied many, many fold as the
result of the use of such perquisites and such luxurious
courtesies to other people at the expense of the stock­
holders of the road.

Now, the brief, may it please your honor, is full of
suggestions which will come as an answer to that question--
the second question—as to how can the revenues be raised.
I say it is full as to that suggestion, because, of course,
at this hearing we can not go into any of those situations,
and as indicated in the brief, the hearing on none of those
numerous questions has been finished. We must give all
interested a chance to be heard and we must, above all have
time to set before you the result and the most illuminating
answers which are coming from the carriers to the questions
which you have addressed to them.

The opportunities for additional revenue are such as to make it clear that not fifty millions, but an amount more nearly approaching hundreds of millions, are easily within the grasp of the railroad, if the methods of conserving the revenue are pointed out and are followed. If these gentlemen will cooperate in their efforts to get a greater gross revenue out of the community through an increase in rate, they will be able to secure that additional revenue. But the question must come to you: Have we time? This can not be done in a week or in a month, certainly not all of it. Is the situation of the railroads such that we can not take the time, or are we in an emergency where we must act?

I say, however great the emergency is, it is not your province to act, except as to very few of these rates, and that to act upon the others would be beyond your power. But there is no occasion, as I see it, I have said, and I will say again, that, whatever may be true of the rates, the net operating revenues and the net income of these properties are not such as to give assured prosperity to the railroads such as the welfare of the community demands. I say that because I believe that as long as our railroads are owned by private individuals that we must be generous in the return which we allow. Capital invested in railroads, as in other business, yields according to the skill and honesty of the management, different returns.
We must give to those of our railroads that are managed well, where the judgment is good, and where the roads are managed with integrity and skill and with a special effort and desire to advance the interests of the railroad as well as the community, an opportunity to earn—I myself care little for the laying down of any specific rule as to the percentage, because I never would stick to any limit at all. If the per cent is such as will yield just and reasonable rates, but which will yield to those who manage well and who have exercised good judgment as ample reward for their efforts and for the risks of the stockholders as if they had engaged in some other similar business involving similar risks, they should earn it. Of course, that involves the earning of surplus, and you need a surplus, not only to provide for the lean years which must come—and which ought not to drive us into a panic when they so come—but in order that there may be such stability to the property as will assure to the investor a sense of safety and induce him to take securities at a relatively low rate.

The policy of the Pennsylvania Railroad in this respect seems to me to have been eminently wise and to have been in accordance with the public interest. The point made by Mr. Thorne is sound, that we ought not to be building up a surplus taken out of the community and then have the community pay for it again, thereby making an undue return upon that surplus and ultimately, if the railroad
is taken by eminent domain, paying for what has been accumulated in addition to a handsome return paid out to the stockholders.

I think proper provision could be made by which that question of surplus could be determined. I, for one, think it very much better to run the risk in the court of protecting the community against injustice in respect to the surplus, when that question comes up, rather than to deny the surplus which is essential to the retaining of capital at reasonable rates. We have had that question to deal with in connection with a surplus accumulated in our gas cases. When our gas companies consolidated they had a property valued at twenty-four and a half million dollars of which the capital paid in by the stockholders had been only $15,000,000. When they undertook to capitalize that company they wanted to capitalize it for $24,000,000 the property, but our public-service commissioners hesitated to act, and the legislature acted and allowed the consolidation in the basis of the original capitalization, which amounted to 4 1/2 per cent upon the value of the property—not that 4 1/2 per cent was all that was allowed to be earned, because the stockholders are now getting not 4 1/2 per cent but 9 per cent upon that capitalization.

The public-service commission ultimately, with the acquiescence of corporations, was perfectly able to deal with that question of surplus that had been accumulated.
While I would much rather it were possible to remove a fact—this fact that Mr. Thorne suggests as being such a peril to the community—I myself would rather look with hope to the ultimate working out of this problem by the Supreme Court of the United States with the aid of the commission and other courts, instead of denying to the railroads to-day that which, in good business judgment, in looking to the immediate future with which we have to deal, is an essential of the health of the railroad.

MR. THORNE. Mr. Brandeis, did you understand me to deny any surplus?

MR. BRANDEIS. I thought you were rather niggardly as to surplus.

MR. THORNE. I allowed the same surplus that the commission did in 1910, and if your remark applies to my allowance it applies to the other.

MR. BRANDEIS. Now, as to the emergency. I say, that as I view it, they have not charged too much in their maintenance account, although Mr. Thorne and Mr. Lyon are entirely right when they say that they charged, as compared with earlier years, very much more—more than enough to account for these reduced earnings—but I say that that maintenance account is not properly subject to objection as it stands, because, as I view it, they were undermaintained in the earlier periods, and that is true especially
in regard to equipment. The depreciation charges on equip­ment on a very large number of these railroads were clearly inadequate. They were inadequate if you consider nothing more than the physical life of the equipment, but we have got to consider not only the physical life, but the utiliza­tion and obsolescence. When you make a reasonable allowance for obsolescence, in view of the constant changes which are going on in transportation, these railroads, even with the liberal depreciation charges allowed in 1913, have done no more than the prudent business man should do, and that we should want them to do. In dealing with the future of these corporations, these large maintenance charges do have a bearing upon what the financial condition of the railroad is now. Those in Central Freight Association territory are bad, but they are not as bad as they appear from these ac­counts, but because there happened in the spring of 1913 an extraordinary flood, which affected a large number of these lines.

The unanimity of counsel in saying jointly what they had to say about the railroads in the brief has also ex­tended to silence. It was not confined to speech. Every one of the five counsel who spoke was entirely silent in respect to the flood of 1913, and yet that was a large factor in considering the situation, not only with the Central Freight Association lines proper, but of the great trunk lines, the four great trunk lines which have been
constantly before us, or three of them at least—the Penn­
sylvania and Erie to a slight extent but particularly with
reference to the Baltimore & Ohio, counsel have been silent.

Mr. Willard has in this respect, as in others, been
frank and helpful. He has told us in his report to the
stockholders exactly the situation, and in explaining the
great increase in operating expenses he calls attention to
what the flood had contributed. These expenses included
$576,000 directly locatable to flood damage, $794,000 inci­
dent to reconstruction etc. Then he goes on to describe
the following damages. He tells you further that the
physical damage from the flood was placed approximately at
$3,000,000. But that is not all. In addition to that
$3,000,000 expense they had an increased operating expense,
which Mr. Willard also calls attention to, in passing
trains over other roads or over other divisions of the road,
which traffic, as he said, interfered not only for days,
but as I remember it, in one instance for a whole month,
with the direct operation.

Mr. Willard also informed us that the traffic which
was actually lost amounted to a million and a half dollars.
Clearly the loss to the Baltimore & Ohio, according to
Mr. Willard's figures here, was at least $4,000,000, and
probably nearer $5,000,000, due to that flood.

Now, what would have happened if there had not been
a flood in 1913? As I say, part of that flood damage fell
in the fiscal year ending June 30, 1913, and part of the balance fell in these horrible eight months about which we have been hearing from time to time. The desirable thing to do, therefore, was to take not a fiscal year, but to take the calendar year 1913, and compare the calendar year 1913 with all this flood damage and all of its increased wages and with what passed before—taking in everything—and we find that the lessened income, allowing for all these increased maintenance charges which Mr. Thorne speaks of, and we find that the reduction of income on the Baltimore & Ohio in 1913, as compared with 1912, is far less than the flood damage. It amounts to a little over $31,100,000, and the flood damage must have been between $4,000,000 and $5,000,000.

So there you have a situation not satisfactory, but a situation which, allowing for this extraordinary flood, leaves the 1913 calendar year much ahead, or enough ahead of 1912 to take care amply of all the increased capital which was invested in the business.

That is a mere illustration. There is another respect in which counsel have observed silence, and that is the change which has come after the dark period of eight months. It is a happy coincidence that at this very time we are receiving returns for the nine months, the returns not only from these railroads in official classification territory, but from others, and the spring of 1913 was a
glorious period in operating revenue, except so far as interfered with by the flood. We hear a great deal about the depression in business that is some way or another associated with the failure to decide this case—that is, in some people's minds. But the returns which are coming in now for March are showing increasing gross, and happily, also, increasing net. The first voice that came was from New England. Chairman Elliott, a few days ago, said to his stockholders that after the dreary period came March, 1914, showing $150,000 improvement in their net income over the preceding year, and as he said, the first two weeks in April show also an increase in gross. Up to yesterday we had collected, as they have come in, the reports of 147 roads for March, giving the March returns, some within and some without this territory.

The aggregate increase in net revenue was $2,290,000, and a decrease of $1,000,000. There was a distinct increase of net revenue, and let it be said that the decrease of net revenue was mainly in respect to lines that could perfectly afford it. The Bessemer & Lake Erie, the Lehigh Valley, and other coal roads were among those who showed a net decrease, because of the diminished coal business at the present time. The other roads largely were showing increases. And since that report was made up, there comes in a report from the Baltimore & Ohio which must have cheered everyone as he read his paper this morning. As
the paper tells us the Baltimore & Ohio made an exceptionally strong statement for March with an increase in gross of $184,000 and a gain in net of $851,000, which is larger than reported for any road either in the East or West.

Of course, these differences are not made up altogether, or perhaps in large part—by improved business. There was a flood then, and there is not a flood now. There were heavy maintenance charges then, and maintenance charges are not found necessary now, because of what was done then. But you have this situation: Mr. Willard, with the same skill that he has shown in operating his railroad in other respects, and increasing his train loads, is grappling with this situation manfully— the bringing of operating expenses into accord with operating revenue. Of course, when the business had a sudden drop, when they had been accumulating men all the time to do this extra work, then a change comes, they can not all of a sudden reduce their expenses, and this discharging of men, as I believe, was not for any improper purpose or with a view of affecting the commission's or public opinion, but was done with a view of bringing the operating of these railroads in accord with their business, and that Mr. Willard has accomplished. I could go on, if time and your patience permitted, and point out in detail, in respect to the other railroads, and particularly in respect to this, how
this question is not alarming. While it is not alarming, we ought, as I said at the outset, to proceed as rapidly as we can in applying a remedy to this situation. The path has been blazed and considerable of the work has been done with the cooperation of the commission.

If these railroads will cooperate with one another to improve the situation they will bring about a result which will be as beneficial to them as it will be to the community; but to undertake to apply this palliative, which is not a remedy, would bring, as I believe, disaster to them, and if not disaster very great changes to the community.

We have heard a great deal about the fear of Government ownership, but I do not know whether it is to be feared or not. But I feel very certain that no steps could be taken which would so advance that time when Government ownership comes as to grant this so-called horizontal increase which is asked. I feel that the question we have before us is not so much the future of the railroads, as to whether they, by the granting of this increase, should get relief, but the more important question for the moment even is the question of whether governmental regulation of railroads is the method which will be pursued long. It is commission government and commission regulation which is really involved in this application. If, in the light of these facts as they have developed here, it should appear
that there is no way of taking care of this situation except to continue the abuses that exist and to intensify the in¬
justice with respect to particular traffic and to stretch or go beyond the terms of the law and the delegation which
Congress has made, then indeed, there would be a crisis, and a crisis which would be as unfortunate for the railroads as it would be for the rest of the community.

We must look at this matter and they must look at this matter courageously; they must not be stampeded by their friends in the financial district, but they must look at the matter as operating men and handle the problem man¬
fully, as they have been manfully handled, and as operating men live up to the great possibilities of the noble pro¬
fession to which they have dedicated themselves.

There is no difficulty in getting all the capital that is needed for these railroads, despite what the bankers or their friends may say; all of those statements are di¬
rectly in contradiction of the facts as they are recorded in the financial papers.

Take the month of March. There has been issued in the month of March security after security for these rail¬
routes which are involved. The Chesapeake & Ohio gets $33,000,000—and one railroad after another. This is the Wall Street Journal, of April 2, from which I am quoting:

Chesapeake & Ohio, $33,000,000; Norfolk & Western, our of equipment, $10,000,000; Chicago, Rock Island & Pacific, $7,500,000; the Carolina, Clinchfield & Ohio,
\$5,000,000; the St. Louis Southwestern \$1,700,000; the Chicago, St. Paul & Omaha, \$1,700,000; and the Buffalo, Rochester & Pittsburgh, \$1,400,000.

And so on and so on.

Within the last few days J. P. Morgan & Co. have taken twenty-five, thirty, or forty millions of the New York Central's bonds. The New York, New Haven & Hartford has just arranged for an extension of its \$60,000,000 of notes, and there is no real difficulty in getting money that is needed. The serious difficulty that exists is that which results from the fact that the credit of some of the roads has been abused in the past. The operations of the New Haven, the Frisco, the Pere Marquette, and the Cincinnati, Hamilton & Dayton and other roads have thrown a very proper discredit upon the management of those roads, which necessarily affects them all. They have not realized that we are all our brother's keepers, and what the New Haven does in the East, what the Frisco does in the West, and what is done in connection with the Pere Marquette and the Cincinnati, Hamilton & Dayton must affect them all. Aside from the specific effect which the Cincinnati, Hamilton & Dayton transaction has upon the Baltimore & Ohio, whatever strain there may be, must come in a measure from that overhanging evil. They have been extending their credit. The Pennsylvania, of course, has ample credit. If it needs money it has securities with which it can buy it. Why should it not part with its Southern
Pacific stock, or some of it, or why should it not part with its Norfolk & Western stock and other stock? Why should it have bought New Haven stock? Why should the New York Central Railroad have been spending its credit in buying New Haven stock? There is such a thing as saturating a market, even with the best securities.

When these gentlemen have expended their credit—not these gentlemen, but the men who control these gentlemen, the boards of directors, with their interlocking relations, and their communities of interest—when they have expended their credit, by extending their operations away beyond their roads, those who follow after, those who are on the firing line may have trouble. Fortunately, as to many of them—as to Mr. Willard—those troubles may be in part allayed. The Reading stock, which, during all this time has had a market value of $35,000,000, has been lying in the treasury of the Baltimore & Ohio Railroad, paying a little over 4 per cent return upon the market value. That was a happy investment for the Baltimore & Ohio. If the Baltimore & Ohio needed money, they did not have to go out and borrow it. They could have sold the Reading stock, for which there has been at all times an ample market.

And so it is with regard to many of these other roads. They have been wasting their credit; not necessarily wasting it in the sense of buying things that are not worth the money, although that was the trouble with the New Haven;
not necessarily wasting it by improper transactions, as be-
tween the Frisco directors and the directors of the sub-
sidiary lines themselves; not necessarily wasting it there,
but not recognizing that there is a limit even to the
best of credit, and that it should be preserved for a time
when it is needed.

If you gentlemen will look into the facts, instead
of at the generalizations and general statements, you will
find that there is nothing whatever in this situation
which should prevent your doing what is of such importance
to the railroad and to the community, and to us all, and
that is to remedy the cause of this trouble, to stop the
leeches, and to put an end to injustice, discrimination,
and waste.

THE CHAIRMAN. We will take a recess at this time,
and the argument will be resumed at 2 o'clock.
APPENDIX D

TRUE AMERICANISM

(Author's note: Following is a copy of the Fourth of July Oration delivered in Faneuil Hall, Boston, on July 5, 1915. The text used was taken from the book Brandeis on Zionism, edited by Solomon Goldman, (Washington, D. C.: Zionist Organization of America, 1942), pages 3 - 11. What is apparently the original manuscript of this speech is among the Brandeis papers at the University of Louisville, Law Library, Louisville, Kentucky.)

E pluribus unum, Out of many one, was the motto adopted by the founders of the Republic when they formed a union of the thirteen states. To these we have added, from time to time, thirty-five more. The founders were convinced, as we are, that a strong nation could be built through federation. They were also convinced as we are, that in America, under a free government, many peoples would make one nation. Throughout all these years we have admitted to our country and to citizenship immigrants from the diverse lands of Europe. We had faith that thereby we would best serve ourselves and mankind. This faith has been justified. The United States has grown great. The immigrants and their immediate decendents have proved themselves as loyal as any citizens of the country. Liberty has knit us closely together as Americans. Note the common devotion to our country's emblem expressed at the recent Flag Day celebration in New York by boys and girls representing more than twenty different nationalities warring abroad.

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On the nation's birthday it is customary for us to gather together for the purpose of considering how we may better serve our country. This year we are asked to address ourselves to the newcomers and to make this Fourth of July what has been termed Americanization Day.

What is Americanization? It manifests itself, in a superficial way, when the immigrant adopts the clothes, the manners and the customs generally prevailing here. Far more important is the manifestation presented when he substitutes for his mother tongue the English language as the common medium of speech. But the adoption of our language, manners and customs is only a small part of the process. To become Americanized the change wrought must be fundamental. However great his outward conformity, the immigrant is not Americanized unless his interests and affections have become deeply rooted here. And we properly demand of the immigrant even more than this. He must be brought into complete harmony with our ideals and aspirations and cooperate with us for their attainment. Only when this has been done will he possess the national consciousness of an American.

I say "he must be brought into complete harmony." But let us not forget that many a poor immigrant comes to us from distant lands ignorant of our language, strange in tattered clothes and with jarring manners, who is already truly American in this most important sense; who has long shared our ideals and who, oppressed and
persecuted abroad, has yearned for our land of liberty and for the opportunity of aiding in the realization of its aims.

What are the American ideals: They are the development of the individual for his own and the common good; the development of the individual through liberty, and the attainment of the common good through democracy and social justice.

Our form of government, as well as humanity, compels us to strive for the development of the individual man. Under universal suffrage (soon to be extended to women) every voter is a part ruler of the state. Unless the rulers have, in the main, education and character, and are free men, our great experiment in democracy must fail. It devolves upon the state, therefore, to fit its rulers for their task. It must provide not only facilities for development but the opportunity of using them. It must not only provide opportunity, it must stimulate the desire to avail of it. Thus we are compelled to insist upon the observance of what we somewhat vaguely term the American standard of living; we become necessarily our brothers' keepers.

What does this standard imply? In substance, the exercise of those rights which our Constitution guarantees, the right to life, liberty and the pursuit of happiness. Life, in this connection, means living, not existing; liberty, freedom in things industrial as well as political;
happiness includes, among other things, that satisfaction which can come only through the full development and utilization of one's faculties. In order that men may live and not merely exist, in order that men may develop their faculties they must have a reasonable income; they must have health and leisure. High wages will not meet the workers' need unless employment be regular. The best of wages will not compensate for excessively long working hours which undermine health. And working conditions may be so bad as to nullify the good effects of high wages and short hours. The essentials of American citizenship are not satisfied by supplying merely the material needs or even the wants of the worker.

Every citizen must have education, broad and continuous. This essential of citizenship is not met by an education which ends at the age of fourteen, or even at eighteen or twenty-two. Education must continue throughout life. A country cannot be governed well by rulers whose education and mental development are gained only from their attendance at the common school. Whether the education of the citizen in later years is to be given in classes or from the public platform, or is to be supplied through discussion in the lodges and the trade unions, or is to be gained from the reading of papers, periodicals and books, in any case, freshness of mind is indispensable to its attainment. And to the preservation of freshness
of mind a short workday is as essential as adequate food and proper conditions of working and of living. The worker must, in other words, have leisure. But leisure does not imply idleness. It means ability to work not less but more, ability to work at something besides breadwinning, ability to work harder while working at breadwinning, and ability to work more years at breadwinning. Leisure, so defined, is an essential of successful democracy.

Furthermore, the citizen in a successful democracy must not only have education, he must be free. Men are not free if dependent industrially upon the arbitrary will of another. Industrial liberty on the part of the worker cannot, therefore, exist if there be overweening industrial power. Some curb must be placed upon capitalistic combination. Nor will even this curb be effective unless the workers cooperate, as in trade unions. Control and cooperation are both essential to industrial liberty.

And if the American is to be fitted for his task as ruler, he must have besides education and industrial liberty also some degree of financial independence. Our existing industrial system is converting an ever increasing percentage of the population into wage-earners; and experience teaches us that a large part of these become some time financial dependents, by reason of sickness, accident, invalidity, superannuation, unemployment or premature death of the breadwinner of the family. Contingencies like these,
which are generally referred to in the individual case as misfortunes, are now recognized as ordinary incidents in the life of the wage-earner. The need of providing indemnity against financial losses from such ordinary contingencies in the workingman's life has become apparent and is already being supplied in other countries. The standard worthy to be called American implies some system of social insurance.

And since the child is the father of the man, we must bear constantly in mind that the American standard of living cannot be attained or preserved unless the child is not only well fed but well born; unless he lives under conditions wholesome morally as well as physically; unless he is given education adequate both in quantity and in character to fit him for life's work.

Such are our ideals and the standard of living we have erected for ourselves. But what is there in these ideals which is peculiarly American? Many nations seek to develop the individual man for himself and for the common good. Some are as liberty-loving as we. Some pride themselves upon institutions more democratic than our own. Still others, less conspicuous for liberty or democracy, claim to be more successful in attaining social justice. And we are not the only nation which combines love of liberty with the practice of democracy and a longing for social justice. But there is one feature in our ideals and practices which is peculiarly American--it is
inclusive brotherhood.

Other countries, while developing the individual man, have assumed that their common good would be attained only if the privileges of their citizenship should be limited practically to natives or to persons of a particular nationality. America, on the other hand, has always declared herself for equality of nationalities as well as for equality of individuals. It recognizes racial equality as an essential of full human liberty and true brotherhood, and that racial equality is the complement of democracy. America, has therefore given like welcome to all the peoples of Europe.

Democracy rests upon two pillars: one, the principle that all men are equally entitled to life, liberty and the pursuit of happiness; and the other, the conviction that such equal opportunity will most advance civilization. Aristocracy, on the other hand, denies both these postulates. It rests upon the principle of the superhuman. It willingly subordinates the many to the few, and seeks to justify sacrificing the individual by insisting that civilization will be advanced by such sacrifices.

The struggles of the eighteenth and nineteenth centuries both in peace and in war were devoted largely to overcoming the aristocratic position as applied 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 only 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.

America, dedicated to liberty and the brotherhood of man, rejected the aristocratic principle of the superman as applied to peoples as it rejected the principal when applied to individuals. America has believed that each race had something of peculiar value which it can contribute to the attainment of those high ideals for which it is striving. America has believed that we must not only give to the immigrant the best that we have, but must preserve for America the good that is in the immigrant and develop in him the best of which he is capable. America has believed that in differentiation not in uniformity, lies the path of progress. It acted on this belief; it has advanced human happiness, and it has prospered.
On the other hand, the aristocratic theory as applied to peoples survived generally throughout Europe. It was there assumed by the stronger countries that the full development of one people necessarily involved its domination over another, and that only by such domination would civilization advance. Strong nationalities, assuming their own superiority, came to believe that they possessed the divine right to subject other peoples to their sway; and the belief in the existence of such a right ripened into a conviction that there was also a duty to exercise it. The Russianizing of Finland, the Prussianizing of Poland and Alsace, the Magyarizing of Croatia, the persecution of the Jews in Russia and Roumania, are the fruits of this arrogant claim of superiority; and that claim is also the underlying cause of the present war.

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 adopted by America proclaims that each race or people like each individual, has the 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. Not until then can the foundation be laid for a lasting peace among the nations.

The world longs for an end of this war, and even more for a peace that will endure. It turns anxiously to the United States, the one great neutral country, and bids us point the way. And may we not answer: Go the way of liberty and justice, led by democracy and the new nationalism. Without these, international congresses and supreme courts will prove vain and disarmament "The Great Illusion."

And let us remember the poor parson of whom Chaucer says:

"But Criste's loore, and his Apostles twelve, He taughte, but first he followed it himselve."
APPENDIX E

THE JEWISH PROBLEM: HOW TO SOLVE IT

(Author's Note: Following is a copy of the speech by Louis D. Brandeis entitled "The Jewish Problem: How to Solve It." It was delivered June 2, 1915 before the conference of the Eastern Council of Reform Rabbis in Temple Emanu-el, in New York City. The text used here is from The Curse of Bigness, edited by Osmond K. Fraenkel (New York: Viking Press, 1935), and is on pages 218 to 232. Portions of this address appear in other publications. A shorter version appears in Louis Dembitz Brandeis, by Jacob De Haas (New York: Bloch Publishing Co., 1929))

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 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 pyramidal 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 nationality 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 civiliza-
tion advance. Strong nationalities assume their own su-
periority, and come to believe that they possess the divine
right to subject other peoples to their sway. Soon the be-
lief in the existence of such a right becomes converted into
a conviction that a duty exists to enforce it. Wars of ag-
grandizement 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 individ-
uals. 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 ac-
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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 development 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 com-
munity 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 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 imitative, 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 to 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 the 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 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 declasse 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 pre-
served, 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
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 Aaron-sohn, the discoverer of wild wheat; great pedagogues like David Yellin; craftsmen like Boris Scatz, 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 belonging 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 acute­
ness, 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 re­
spected 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 enoble, 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 recog-
nize 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 cooperation 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, 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, thorough 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.
APPENDIX F

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 Fruend. 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 management 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 is 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 the right." Such was the case also in Germany during the reformation, when Ulrich Zasius 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 hundred 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, in which a majority of the judges of the Supreme Court of the United States had declared void a New York Court law limiting the hours of labor for bakers; and the Ives case, 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 better appreciation by the courts of existing social needs.

In 1895 the Illinois court held in the first Ritchie case that the eight-hour law for women engaged in manufacturing was unconstitutional. In 1908 the United States Supreme Court held in Muller v. Oregon that the Women's Ten-Hour Law was constitutional. In 1910 the Illinois court held the same in the second Ritchie case. The difference in decision in the two Ritchie cases was not due to the difference between a ten-hour day and an 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 within restricted 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 has 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, that court held that an act prohibiting night work for women was unconstitutional. In 1915 in the Schweinler case 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. As late as 1911, when the court in the Ives case 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 of 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, 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 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. 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 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 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 amendments. They are more apt to desire repeal of statutes than enactment. But both business men and working men 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, in which it is held that manufacturers of a competitive trademarked 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 wide-spread 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 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 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.
**APPENDIX G**

**CHRONOLOGICAL TABLE OF EVENTS IN THE LIFE OF**

**LOUIS D. BRANDEIS**

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1856, November 13</td>
<td>Born in Louisville, Kentucky.</td>
</tr>
<tr>
<td>1862-67</td>
<td>Miss Woods Private School, Louisville.</td>
</tr>
<tr>
<td>1867-70</td>
<td>German and English Academy, Louisville.</td>
</tr>
<tr>
<td>1870-74</td>
<td>Louisville Male High School.</td>
</tr>
<tr>
<td>1874-75</td>
<td>Annen-Realschule, Dresden, as student.</td>
</tr>
<tr>
<td>1875-78</td>
<td>Student, Harvard Law School.</td>
</tr>
<tr>
<td>1878</td>
<td>Admitted to St. Louis, Missouri Bar.</td>
</tr>
<tr>
<td>1879-1897</td>
<td>Lawyer in firm of Warren and Brandeis, Boston.</td>
</tr>
<tr>
<td>1882-3</td>
<td>Lectured on evidence at Harvard Law School, during the leave of absence of Professor Thayer.</td>
</tr>
<tr>
<td>1886, July 21</td>
<td>Member of the self-appointed committee to establish an alumni association for Harvard Law School. After the adoption of the constitution he became the first secretary.</td>
</tr>
<tr>
<td>1889</td>
<td>Admitted to Bar of the United States Supreme Court.</td>
</tr>
<tr>
<td>1890</td>
<td>Published, with Samuel D. Warren, the study &quot;The Right to Privacy, in the December, Harvard Law Review.</td>
</tr>
<tr>
<td>1891</td>
<td>Married Alice G. Goldmark, of New York, March 23.</td>
</tr>
<tr>
<td>1894-96</td>
<td>Presented series of lectures at Massachusetts Institute of Technology on &quot;Business Law.&quot; Later published by M.I.T.</td>
</tr>
<tr>
<td>1899</td>
<td>Completed earning his first million dollars.</td>
</tr>
</tbody>
</table>
1897-1916 Senior member of firm of Brandeis, Dunbar, and Nutter, Boston.
1897-1911 Attorney for Public Franchise League, and Massachusetts State Board of Trade.
1908 Counsel for State of Oregon, in Muller v. Oregon.
1910-11 Counsel for Commercial Organizations in I.C.C. Advance Rate Case.
1910 Counsel for Collier's Weekly in the Ballinger investigation.
1910, May 27 Delivered summation address in the Ballinger Investigation.
1910-16 Chairman, Arbitration Board, New York Garment Workers.
1911-12 Speaker and worker in the Progressive party.
1912 Joined Zionist movement.
1913-14 Special Counsel for the I.C.C. in the Five Per Cent Railroad Rate Case.
1914, April 20- May 1 Delivered summation to the I.C.C. in the Five Per Cent Case.
1914, December 17 Argued Stetler v. O'Hara for State of Oregon, before United States Supreme Court.
1915, June 2 Addressed Eastern Council of Reform Rabbis in New York on: "The Jewish Problem and How to Solve It."
1915, July 5 Addressed the annual Fourth of July Célébration in Faneuil Hall, Boston.
1916, January 3 Addressed the meeting of the Chicago Bar Association, on the Northwestern University campus on: "The Living Law."
1916, January 28 Nominated by President Wilson to be Associate Justice of the United States Supreme Court.
1916, June 1  Confirmed as Associate Justice by the Senate.
1916, June 5  Took oath of office from Chief Justice White.
1916, December  Delivered first opinion, Hutchinson Ice Cream Company v. Iowa.
1939, February 13  Retired from the Supreme Court.
1941, October 5  Died, Washington, D.C.
APPENDIX H

CHRONOLOGY OF THE CONFIRMATION BATTLE

1916

January 28: The appointment was sent to the Senate, Friday noon.

January 28: Referred by the Judiciary Committee to a sub-committee with Chilton, Chairman, and Fletcher, Clark of Wyoming, Walsh and Cummins.

February 9: Public Hearings opened.

February 11: Letter of "Fifty-five Bostonians released in opposition.

February 16: Senator Works substituted for Senator Clark, absent.

March 14: President of the American Bar Association release a letter in opposition.

March 15: Sub-committee public hearings closed.

April 3: Sub-committee reports to the Judiciary Committee in favor of confirmation by strict party vote, 3 to 2.

May 8: President Wilson's letter to the chairman of the committee urging confirmation, released to press.

May 12: Judiciary Committee reopens public hearings.

May 16: Judiciary closed public hearings.


May 24: Judiciary Committee reported out the nomination favoring confirmation, by a strict party vote, 10 to 8.

May 26: In executive session, Senate agreed to vote without debate on June 1.

June 1: Senate voted to confirm, by almost strict party vote of 47 to 22.
APPENDIX I

SOME IMPORTANT SPEECHES OF LOUIS D. BRANDEIS

Below are listed some of the important speeches made by Louis D. Brandeis during the period of this study, 1908-1916. In no sense is this a complete catalog. It is presented to show the type of subjects and audiences which interested Brandeis during this time.

<table>
<thead>
<tr>
<th>Date</th>
<th>Subject and audience</th>
<th>Place</th>
</tr>
</thead>
<tbody>
<tr>
<td>April 30, 1914</td>
<td>Regulation of Prices, Committee of House of Representatives</td>
<td>Washington, D.C.</td>
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<tr>
<td>May 27, 1910</td>
<td>The Five Per Cent Case, ICC</td>
<td>Washington, D.C.</td>
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<tr>
<td>February 11, 1908</td>
<td>Concluding argument before Washington, D.C. committee investigating Ballinger. The Committee, and filled hearing room.</td>
<td>Boston</td>
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<tr>
<td>April 2, 1911</td>
<td>Organized Labor and Efficiency, Boston Central Labor Union</td>
<td>Boston</td>
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<tr>
<td>June 10, 1911</td>
<td>Business--A Profession, Commencement exercises</td>
<td>Brown University</td>
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<tr>
<td>February 10, 1912</td>
<td>Big Business and Industrial Liberty, Ethical Culture Meeting House</td>
<td>Boston</td>
</tr>
<tr>
<td>Date</td>
<td>Subject and audience</td>
<td>Place</td>
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<tr>
<td>October 22, 1915</td>
<td>Memorial meeting for Frederick W. Taylor Guests at Memorial meeting</td>
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<tr>
<td>November 1, 1912</td>
<td>The Regulation of Competition Against the Regulation Monopoly Economic Club</td>
<td>Boston</td>
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<tr>
<td>May 14, 1913</td>
<td>On Maintaining Makers' Price National Association of Advertising Managers</td>
<td>New York, N.Y.</td>
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<tr>
<td>January, 1915</td>
<td>Interlocking Directors American Academy of Political and Social Sciences</td>
<td>Philadelphia</td>
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<tr>
<td>February 5, 1914</td>
<td>The Democracy of Business Chamber of Commerce of the United States</td>
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<tr>
<td>February 8, 1915</td>
<td>An Essential of Lasting Peace Economic Club</td>
<td>Boston</td>
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<tr>
<td>December 9, 1914</td>
<td>Constructive Cooperation vs. Cut-throat Competition National Rivers and Harbors Congress</td>
<td>Washington, D.C.</td>
</tr>
<tr>
<td>January 24, 1916</td>
<td>The Common Cause of the Jewish People Jewish Congress Organization Committee</td>
<td>Carnegie Hall New York, N.Y.</td>
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<tr>
<td>January, 1915</td>
<td>The Call to the Educated Jew Conference of the Inter-collegiate Menorah Association</td>
<td>New York, N.Y.</td>
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<tr>
<td>July 7, 1916</td>
<td>Duties of Jewish Democracy Provisional Emergency Committee at Zionist Convention</td>
<td>Philadelphia</td>
</tr>
<tr>
<td>Date</td>
<td>Subject and audience</td>
<td>Place</td>
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<tr>
<td>March 20, 1913</td>
<td>Plymouth Theatre</td>
<td>Boston</td>
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<tr>
<td>May 18, 1913</td>
<td>Chelsea Young Men's Hebrew Association</td>
<td>Chelsea, Mass.</td>
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<tr>
<td>October, 1914</td>
<td>The Rebirth of the Jewish Nation</td>
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<tr>
<td>June 26-28, 1915</td>
<td>Boston Zionist Convention</td>
<td>Boston</td>
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<tr>
<td>June, 1915</td>
<td>The Jewish Problem: How to Solve It</td>
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<td></td>
<td>Eastern Council of the Central Conference of Reform Rabbis</td>
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<td>September 27, 1915</td>
<td>Jewish Unity and the Congress</td>
<td>Baltimore, Md.</td>
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<tr>
<td>November, 1915</td>
<td>Democracy in Palestine</td>
<td>Washington, D.C.</td>
</tr>
<tr>
<td>January 24, 1916</td>
<td>Jewish Rights and the Congress</td>
<td>Carnegie Hall New York, N.Y.</td>
</tr>
<tr>
<td>July 4, 1915</td>
<td>True Americanism</td>
<td>Faneuil Hall Boston</td>
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<tr>
<td>January 3, 1916</td>
<td>The Living Law</td>
<td>Chicago</td>
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<td></td>
<td>Chicago Bar Association</td>
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</tbody>
</table>
I, John Garber Drushal, was born in Lost Creek, Kentucky, July 16, 1912. I received my secondary school training in Riverside Institute, Lost Creek, Kentucky. My undergraduate training was obtained at Ashland College, Ashland, Ohio, from which I received the Bachelor of Arts degree in 1935. In 1938 I received the degree of Master of Arts from the Ohio State University. During some of my periods of residence in graduate school I have held graduate assistantships and assistantships. I studied one summer in the graduate school at Cornell University.

In 1936-37 I was an instructor at Ashland College. After another period of study, I was an instructor at the University of Missouri during the year 1938-39, and later a visiting assistant professor during the summer of 1942.

In 1939 I began teaching at Capital University, Columbus, Ohio, continuing there until 1946. This period was interrupted by three years service in the United States Naval Reserve. Since 1946 I have been a teacher at the College of Wooster, Wooster, Ohio, except for a year's leave of absence for graduate study during 1949-50. I am now an assistant professor in the Department of Speech at Wooster.