



Celebrating the 100th Anniversary of Louis D. Brandeis' Appointment to the U.S. Supreme Court

## **What a Little Sunlight Can Do Learning from the Economic Legacy of Louis D. Brandeis**

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Louis Brandeis knew well the power of the press. Whether it was performing for the newspapers in a fight he suspected he'd lose,<sup>1</sup> or amplifying Congressional findings and explaining them to the public, Brandeis harnessed publicity to defend democracy, fight corruption, and upend oligarchy. But a corollary to Brandeis's phrase "electric light is the best policeman" is that thieves hide well in the dark.<sup>2</sup> One lesson we can glean from Brandeis's legacy is that structural reforms happen in the public spotlight—often following crisis moments. But deregulation and corporate concentration happens slowly and in the shadows.

Brandeis's documentation of the sins of what he called "our financial oligarchy" laid the groundwork for his long legacy of economic reforms—the Clayton Antitrust Act of 1914, the Federal Trade Commission, the Federal Reserve Act, and the Banking Act of 1933, better known as Glass-Steagall. But after nearly fifty years of financial stability, a period of quiet deregulation flourished, allowing financial oligarchy to return. Today, the titans of banking are once again exerting enormous control over American industry, as they did in the time of Brandeis. What Brandeis called the "curse of bigness" that gave

the money trusts the power to “dominate the state” is with us today in the form of banks that remain too big to fail—and largely unaccountable to regulators or law enforcement.<sup>3</sup>

Then, as now, the path to upending this control is in the sunlight of disclosure and a galvanized public. This combination can make the unfinished work of financial reform a reality, even in the face of tremendous opposition. It worked in Brandeis’s time, it worked in the wake of the 2008 financial crisis, and it can work again—hopefully, it won’t take another financial crisis to actualize it.

### **What a Little Sunlight Can Do**

#### ***The Pujo Committee and Other People’s Money***

After the panic of 1907, with the rise of the Progressive movement, the patriarch of the “House of Morgan” banking dynasty J. Pierpont Morgan reluctantly launched a public relations offensive on behalf of his embattled bank.<sup>4</sup> The move came after Congress launched the “Pujo Committee,” which was created to investigate the so-called “money trust” of elite Wall Street interests that exerted undo power over American finance. Brandeis, the arch-nemesis of the House of Morgan, relentlessly publicized the Committee’s work in a series of articles in *Harper’s* magazine in 1913.

Brandeis documented how the role of investment bankers grew from advising people on how to invest, to growing into giant trusts that acquired control over parts of American industry like the nation’s railroads. As bankers entrusted with the deposits of savers, investment bankers used “other people’s money” to make these vast acquisitions. He discussed how the bankers would try and manipulate stock prices to their benefit, and how by sitting on multiple Boards of Directors, bankers like J. Pierpont Morgan (of JPMorgan) and George F. Baker (of First National of New York) exercised vast control over American companies (both sat on forty-eight separate corporate boards).<sup>5</sup> In 1914, Brandeis’s articles were compiled into a book called *Other People’s Money and How the Bankers Use It*. The exposure the book generated helped rally public opinion against the largest banks, and ultimately led to the passage of the Clayton Antitrust Act of 1914.

But the influence and legacy of Brandeis's writings on Pujo didn't end there. When another banking crisis in 1929 sent the country into a massive Depression, the 1933 re-issue of *Other People's Money* helped inspire the passage of the Glass-Steagall Act, which split the more boring commercial banking from the riskier investment banking, and forced the break-up of the House of Morgan into JPMorgan and Morgan Stanley. In a letter to then-chairman Thomas Lamont, future JPMorgan chairman Russell Leffingwell wrote of Glass-Steagall, "I have little doubt that [Brandeis] inspired it, or even drafted it."<sup>6</sup>

The separation of commercial from investment banking, along with other reforms of the time like the creation of the Securities and Exchange Commission, whose mission is to protect investors and ensure that companies are providing accurate disclosures (a cause Brandeis championed), ushered in a half century of financial stability, with the lowest rate of bank failures in U.S. history.<sup>7</sup>

### *The Fight to Illuminate the Fed's Shadowy Emergency Lending*

Another piece of Brandeis's economic legacy is his role in shaping the Federal Reserve. In the wake of the Pujo Committee, President Woodrow Wilson was confronted with two plans for creating a centralized bank. At a meeting at the White House on June 11, 1913, Wilson asked Brandeis to help him decide which plan to take.<sup>8</sup>

The first plan, proposed by Representative Carter Glass and his advising economist Henry Parker Willis, was a modified version of a 1912 plan that emerged out of the National Monetary Commission, headed by Senator Nelson Aldrich (R-RI), and was widely favored by the banks.<sup>9</sup> The Glass-Willis plan proposed a decentralized reserve system that would be privately held by a maximum of twenty independent banks.

The second plan formed when Secretary of State William Jennings Bryan, Senator Robert L. Owen (D-OK), and Treasury Secretary William McAdoo heard about Glass-Willis and feared the repercussions of allowing private banks to directly issue currency.<sup>10</sup> The Bryan plan sought a compromise between a completely government-run central bank (which McAdoo wanted, but was seen as politically impossible) and the more privatized

system offered by Glass-Willis. Private banks would participate in the system, issue Federal Reserve Notes that were government obligations, and the members of its governing body, the Federal Reserve Board, would be appointed by the President and confirmed by the Senate.

It was Brandeis who helped convince Wilson to move forward with the Bryan plan over Glass-Willis. Brandeis had hoped the proposed private/public blend for the Federal Reserve would deter both overt government control and overt private control.<sup>11</sup> But Brandeis was quickly disappointed by the way Wilson implemented the new Federal Reserve Board. As Philippa Strum documents in her biography of Brandeis, *Brandeis: Justice for the People*, Brandeis and other progressives were “horrified at Wilson’s appointment of bankers to the Federal Reserve Board, a move that delighted the business community.”<sup>12</sup> One can imagine that Brandeis might have been similarly horrified by the actions the Fed took to fight the disclosure of the extent of its emergency lending during the financial crisis, but equally pleased with the muckrakers who fought tirelessly to expose it, bringing new and important reforms in the wake of their hard-fought disclosure.

From 2007 to 2010, the Fed provided billions and billions of dollars in emergency assistance each day to troubled institutions—with the amount of assistance they provided peaking on December 5, 2008 at a staggering \$1.2 trillion.<sup>13</sup> The assistance consisted of loans and other liquidity programs, and the Fed provided it not just to failing U.S. banks, but also to foreign-owned banks, and non-financial firms like Caterpillar and Toyota.<sup>14</sup> These programs were *completely separate* from the \$700 billion Troubled Asset Relief Program (TARP) bailout, and its beneficiaries were completely undisclosed to Congress at the time.<sup>15</sup> We only know the full details of these programs because of the diligence and perseverance of the late Mark Pittman,<sup>16</sup> and the rest of the Bloomberg News team.

Part of the very Federal Reserve Act that Brandeis helped to create allowed this extensive secret bailout to occur—although the relevant language was first added in 1932, many years after the initial passage that Brandeis had influenced, and evolved over time. Section 13(3) of the Federal Reserve Act allows the central bank in “unusual and exigent

circumstances” to provide emergency loans and other assistance to banks and, as of 1991, to non-banks as well.<sup>17</sup>

In *Other People’s Money*, Brandeis famously wrote, “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”<sup>18</sup> Perhaps that is why the Fed fought so vociferously to keep secret just how unstable hundreds of firms were during the worst parts of the financial crisis—they feared the outcomes transparency would bring.

The Bloomberg team knew that the Fed was giving out loans—but they didn’t know who was actually getting the money, as the data was all compiled in aggregate. So Bloomberg News filed a Freedom of Information Act (FOIA) request to find out which firms the Fed was loaning money to through these programs. The Fed refused to disclose it, arguing that most relevant documents were at the New York Fed, who they alleged wasn’t subject to FOIA law.<sup>19</sup> So on November 7, 2008 Bloomberg LP sued the Fed, and as Bob Ivry documents in his book *The Seven Sins of Wall Street*, a protracted legal battle began.

In April 2009, Judge Loretta Preska of the Southern District of New York ruled that the Fed should hand over the loan information. The Clearing House Association, a 156-year-old group of the biggest banks in the U.S., joined the Fed to appeal Preska’s decision.<sup>20</sup> In May 2010, the court of appeals ruled in favor of Bloomberg. At this point, the Fed finally gave in, and decided not to appeal. That left only the big U.S. banks in the form of the Clearing House Association to fight it, and they did, appealing the decision at all the way to the Supreme Court.

On March 21, 2011, the Supreme Court refused to take the case. The Fed was forced to send Bloomberg their data on the extent of emergency lending during the crisis—which they chose to do in 29,000 pages of PDFs.<sup>21</sup> After painstakingly copying the data into a more usable and parse-able electronic format the *Bloomberg* team carefully compiled their findings in 2011, along with a stunning interactive website that allows visitors to search by company name and explore the extent of the loans and assistance the

Fed gave the firm.<sup>22</sup> Unfortunately, Mark Pittman wasn't able to see the fruits of his labor, as he passed away in November 2009.

But the efforts of Pittman have found its legacy in law. Reforms to the emergency lending he tirelessly fought to document making their way into the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 1101 of Dodd-Frank specifies that extensions of credit by the Federal Reserve be limited to programs with “broad-based eligibility.” In other words, the Fed can no longer shovel billions and billions in emergency assistance to a single institution. But some lawmakers sought even further reforms to strengthen the protections against bailing out failing firms, in part in reaction to what many view as the Fed's insufficiently rigorous interpretation of Section 1101 in their proposed rules.<sup>23</sup> Senators Elizabeth Warren (D-MA) and David Vitter (R-LA) drafted bipartisan legislation with still clearer restrictions: Their bill, the Bailout Prevention Act, only allows the Fed to provide assistance to solvent firms, and it requires that the lending happen at a penalty rate.<sup>24</sup> The Fed incorporated some of the Senators' suggestions in its final version of a rule implementing Section 1101, but problems remain: for example, it still allows borrowers in need of emergency loans to self-certify their own solvency.

Had Congress known at the time about the trillions of dollars in low-interest loans the Fed provided (separate and apart from the \$700 billion in TARP aid), far more sweeping reforms might have been achieved. After all, the Fed's secrecy during the crisis greatly benefited the biggest banks, enabling them to lie about their financial condition. On November 26, 2008, Bank of America (BAC)'s CEO Ken Lewis wrote to shareholders that BAC was “one of the strongest and most stable major banks in the world,” but didn't mention that his firm owed the Federal Reserve \$86 billion dollars that very day.<sup>25</sup>

Former Democratic Senator Ted Kauffman told *Bloomberg* that if Congress had known at the time the extent of the help the Fed was providing, “he would have been able to line up more support for breaking up the biggest banks.”<sup>26</sup> Kauffman's proposal—a joint effort championed by Senator Sherrod Brown (D-OH)—was a modern version of Brandeis's break-up proposal.

Brandeis argued that size could be restricted through taxation, and that “every business unit above a certain size should be forced to pay a tax large enough to be a burden for an inefficient mammoth.”<sup>27</sup> Rather than creating a tax, the Brown-Kauffman amendment would have created absolute limits on bank size, including a prohibition on any bank holding company holding more than 10 percent of the total insured deposits in the U.S., and on any bank having liabilities greater than 2 percent of G.D.P.

It should not have taken intrepid journalism to bring some sunlight to the Fed. And the co-operation of the Fed with the nation’s largest banks to suppress the full truth of their emergency lending shows the Fed being far too close with the financial firms they are meant to supervise. This would not have surprised Brandeis, who as Jeffrey Rosen notes, “understood the likelihood that federal officials who are given broad discretion to regulate the financial industry will be successfully defanged by the lobbying power of our financial oligarchy.”<sup>28</sup> But the spotlight created by the doggedness of Mark Pittman forced a policy change after public outrage (and a segment on the Fed lending on *The Daily Show*<sup>29</sup>)—and that is a victory Brandeis would surely appreciate.

### *Providing Disclosures for Consumers and Fighting Conflicts in Investments*

The close partnership Brandeis had with President Wilson allowed them to create a stunning legacy of economic reform. Today, President Obama is taking a step to ensure his own legacy when it comes to protecting America’s retirement savers from conflicted investment advice.

In *Other People’s Money*, Brandeis wrote of investment bankers violating the trust of small investors: “Advice cannot be unbiased where the banker, as part of the corporation’s management, has participated in the creation of the securities which are the subject of sale to the investor.”<sup>30</sup> Such conflicted advice remains today—and many of American’s retirement savers are not even aware such a conflict exists. In the United States, not all retirement advisors are bound to make recommendations that secure your financial future. Instead, some are able to take kickbacks from their firms in exchange for pushing certain products on their clients—whether or not they are in their best interest.

The Council of Economic Advisers estimates that the bad advice these kickbacks incentivize cost Americans \$17 billion a year.<sup>31</sup>

To address this problem, President Obama has backed a plan by the Department of Labor to reduce the harmful impact of conflicts-of-interest by closing loopholes in the fiduciary standard—in other words, by requiring all retirement advisers to act in their customers’ best interests. The White House’s involvement has brought significant new media attention to the issue. In February of 2015, the President teamed up with AARP, financial advocacy groups, and Senator Elizabeth Warren to host a press event lauding the importance of the rule.<sup>32</sup> From publishing extensive information about the importance of the rule to the White House website,<sup>33</sup> to directing the Council of Economic Advisors to measure the impact of conflicted retirement advice, the President has made this fight his own, which has helped to rally additional political support among his party.

The support will be needed; the modest proposal has unleashed a firestorm of industry lobbying against it. One of the proposal’s fiercest critics is Rep. Ann Wagner (R-MO). She has sponsored multiple bills that would effectively kill the Department of Labor’s proposal by delaying it indefinitely. She told a group of 800 insurance brokers and executives that she was “at war with the Department of Labor” and that she is willing to cut off funding for the Department if they don’t back off from the rule, saying to applause in the room full of brokers and executives, “If push comes to shove . . . by god, we’ll just defund them.”<sup>34</sup>

Brandeis was focused on disclosures because he believed in the importance of an informed citizenry. He also thought that such disclosures to investors, if they were truly accurate, could help break the power of the financial oligarchy, as investors would be able to hold banks to account: “To be effective, knowledge of the facts must be actually brought home to the investor, and this can best be done by requiring the facts to be stated in good, large type in every notice, circular, letter and advertisement inviting the investor to purchase. Compliance with this requirement should also be obligatory, and not something the investor could waive.”<sup>35</sup>



Although Brandeis was speaking about investors, not consumers, his comments seem prescient when reviewing the passage in 2009 of the Credit Card Accountability Responsibility and Disclosure (CARD) Act. The CARD Act was meant to curtail some of the worst practices in the credit card industry, such as imposing penalty APRs on consumers who were as little as one hour late, or changing the card's APR and applying that new interest rate retroactively to balances incurred prior to the rate change. The CARD Act prohibited these practices, and also directed companies to standardize the way they presented the interest rate—in easy-to-understand language and in large type.

Brandeis's consumer advocacy also led to his fighting for the creation of the Federal Trade Commission (FTC), which is particularly appropriate given that a little less than a century later, the Consumer Financial Protection Bureau (CFPB) would come into being as a new regulator created by Dodd-Frank to ensure consumer financial markets are fair, transparent, and competitive. The Bureau notes on its website that “an informed consumer is the first line of defense against abusive practices”<sup>36</sup>—a very Brandesian notion. Two ways they are pursuing that are through new disclosures on mortgage loans,<sup>37</sup> and an online database,<sup>38</sup> which allows customers to see what sorts of complaints have been filed with them against a given financial firm. But, the CFPB's mission is broader than the disclosure-centered solutions Brandeis proposed for consumers. The CFPB also has the authority to bring enforcement actions against firms that violate federal consumer financial laws. In its short life, the CFPB has already returned over \$11.2 billion to 25.5 million Americans scammed by their financial companies.

The CFPB was the brainchild of a Harvard law professor specializing in bankruptcy who served on the Congressional Oversight Panel that monitored the administrations implementation of the \$700 billion TARP bailout. Elizabeth Warren, whose work and writings have been compared to Brandeis,<sup>39</sup> tirelessly championed the CFPB in the press, on television appearances, and in Washington, and helped ensure it was included in Dodd-Frank. For her advocacy, Warren, like Brandies did in his time, has earned the ire of the financial sector she works to reform. Both Warren and Brandeis were the targets of paid advertising campaigns against them. The New Haven railroad that Brandeis fought

to break up “paid for a series of anti-Brandeis articles in newspapers and magazines and the services of a Harvard Law School professor who delivered supposedly scholarly lectures on the virtues of the New Haven.”<sup>40</sup> Warren is no stranger to such tactics. She was attacked in an advertisement run during the November GOP Presidential Debate,<sup>41</sup> and she has criticized the very scholar-for-pay model New Haven deployed to attack Brandeis.<sup>42</sup>

Warren was the natural choice to run the new Bureau after Dodd-Frank was signed into law, but like Brandeis himself, was vehemently opposed by the banking sector. Her would-be nomination became an extended fight, as ugly as the fight for Brandeis to serve on the Supreme Court. But unlike Brandeis, in the end she was not given a nomination. She made her way to Washington anyway, winning a seat in the Senate in the 2012 election. There, she has given barn-burning speeches on the Senate floor, railing against the political power of Citigroup,<sup>43</sup> that are reminiscent of Brandeis’s long campaign against the concentrated political power of JP Morgan.

Despite these many victories—from wringing transparency out of the Fed to an entire agency dedicated to protecting consumers—much remains to be done. The banks still wield enormous economic power, and they increased it beginning in the 1980s through a steady drumbeat of deregulation.

### **Growing Large in the Shadows**

#### ***The Return of the “Curse of Bigness”***

In *Other People’s Money*, Brandeis describes how concentrations of power that threaten democracy do not happen overnight. “Usurpation,” Brandeis writes, proceeds “by gradual encroachment rather than by violent acts” that are “subtle and often long-concealed.” Brandeis tells us that it was by these sorts of slow and steady moves that “Caesar Augustus became master of Rome.”<sup>44</sup>

This slow and steady usurpation of power by the financial sector that Brandeis described occurred in banking regulation in the 1980s and 1990s with little fanfare and public scrutiny. A banking regulator less known by the public—the Office of the

Comptroller of the Currency (OCC)—played a central role in this drama in the mid-1980s. In her paper “The Quiet Metamorphosis,” Cornell Law Professor Saule Omarova painstakingly documented the slow erosion of restrictions on commercial banks, and how these erosions have helped banks to consolidate power. The OCC began broadly interpreting the “business of banking” to mean dealing in any kind of financial risk, allowing commercial banks to begin dealing in riskier products like derivatives, which are largely traded off of centralized exchanges, in “over-the-counter” markets that are hidden from the public.<sup>45</sup> As Omarova writes, the transformations happened in the shadows: “It was not the highly visible acts of Congress but the seemingly mundane and often nontransparent actions of regulatory agencies that empowered the great transformation of the U.S. commercial banks from traditionally conservative deposit-taking and lending businesses into providers of wholesale financial risk management and intermediation services.”<sup>46</sup> But everything came to a head in 1998, when Travelers Insurance and Citicorp merged to form the largest corporation ever: the behemoth Citigroup with \$700 billion in assets. The merging of an insurance company and a bank violated the 1956 Bank Holding Company Act. Sandy Weill moved ahead anyway because current law allowed for a two to five year window to come into compliance, and he believed the law would change prior to that window being over.<sup>47</sup>

Weill was right. The final nail in the coffin of Glass-Steagall came with the signing in 1999 of the Gramm-Leach-Bliley Act. The law’s proponents proclaimed that we were in a new, more modern era of banking, and that the old rules didn’t apply. Bankers and politicians, from Travelers’ Chairman Sanford “Sandy” Weill to Citigroup Chairman John Reed, from Treasury Secretary Robert Rubin to President Bill Clinton, all failed to heed Brandeis’s warnings.

A period of extreme consolidation of banks followed, as firms merged to create “financial supermarkets” that combined all aspects of financial services into one institution: banking, insurance, mortgages, credit cards, investment banking, brokerage services, and mutual funds. According to Jeffery Rosen in *American Prophet*, these new concentrations of financial companies “surpassed even the concentrations that galvanized

Brandeis during the Progressive Era.” Rosen also points to a 2011 Fox Business interview with Thomas Hoenig, who is now vice chairman of the Federal Deposit Insurance Corporation (FDIC) but was the president of the Federal Reserve Bank of Kansas City at the time. Hoenig said that following overturn of Glass-Steagall “the largest 20 institutions of this country went from controlling 35 percent of the financial assets in this country to 70 percent.”<sup>48</sup>

This dramatic concentration of economic power came to an infamous head during the 2008 financial crisis, when the U.S. government rescued the nation’s biggest banks from a disaster brought on by their own excessive risk taking, hyper short-termism, and predatory lending.

### *Wall Street’s Control of Physical Commodity Markets*

But Gramm-Leach-Bliley didn’t just allow the nation’s banking system to consolidate. It also allowed banks to quietly expand into activities totally outside the traditional realm of banking—with little to no disclosures to the public required about them.

Prior to 1999, the Bank Holding Company Act (BHCA) of 1956 restricted bank involvement in non-banking business activities like mining and storing metals or running power plants. But Gramm-Leach-Bliley amended the BHCA and rolled back these restrictions. Again, we turn to Professor Omarova, who documents the deregulation and the dangers it presents in the pinnacle paper on the topic, *Merchants of Wall Street: Banking, Commerce and Commodities*. After Gramm-Leach-Bliley, the Federal Reserve could grant banks permission to conduct non-banking business through new structures called “financial holding companies.” So long as the non-banking business was deemed to be “complementary” to their financial activities, and didn’t threaten the “safety or soundness” of either the bank or the financial system as a whole, the Fed could approve the activity.<sup>49</sup>

But Wall Street’s participation in these markets has led to allegations of everything from artificially driving up prices to costing consumers millions in ill-gotten fees. The global risk manager at beer-maker MillerCoors told a Senate Subcommittee that

Goldman and JPMorgan—who control aluminum warehouses—were purposely delaying deliveries in order to maximize profits. The longer the aluminum stays in the warehouses, the more MillerCoors has to pay in rent.<sup>50</sup> Coca-Cola, who also needs aluminum for the cans its drinks come in, has faced similar problems.<sup>51</sup> These beverage manufactures have accused a “cadre of Wall Street banks” of artificially inflating the price of aluminum by as much as \$6 billion.<sup>52</sup> News reports have shown that zinc has been affected by the same problem.<sup>53</sup> Finally, the Federal Energy Regulatory Commission accused JPMorgan of manipulating power markets in California and the Midwest from 2010 to 2012,<sup>54</sup> which cost those consumers \$125 million. JPMorgan paid \$410 million to settle the allegations.<sup>55</sup>

In addition, serious conflicts of interest have arisen as banks simultaneously own the raw materials, their storage facilities or mining operations, and trade them on behalf of clients. For example, in 2014 Reuters found that Morgan Stanley owned three power plants—giving its energy traders special insight into the power markets.<sup>56</sup> It begs Brandeis’s question from a century ago, “Can there be real bargaining where the same man is on both sides of a trade?”<sup>57</sup>

Omarova juxtaposes the problems with conducting physical commodities activities by the banks with Brandeis’s prior warnings, noting that Brandeis “famously warned against the dangers of combination . . . that gave financial institutions direct control over industrial enterprises.”<sup>58</sup> Omarova continues:

By giving banks that are already ‘too-big-to-fail’ an additional source of leverage over the economy—and, consequently, the polity—it elevates the dangers inherent in cross-sector concentration of economic power to a qualitatively new level. When large financial conglomerates that control access to money and credit also control access to such universal production inputs as raw materials and energy, their already outsized influence on the entire economic—and, by extension, political—system may reach alarming proportions.<sup>59</sup>

The firms that the Fed has granted permission to conduct physical commodities activities under the complementary authority are among the nation’s largest banks: they

include Citigroup, Goldman Sachs, Deutsche Bank, and JPMorgan. And while Deutsche Bank and JPMorgan have publicly said they intend to cease these activities, Citigroup and Goldman Sachs have publicly stated their intentions to either continue,<sup>60</sup> or to grow<sup>61</sup> their commodity activities.

This expansion is still poorly understood, and the public remains mostly in the dark about it, which is due to the serious lack of disclosure requirements. Brandeis would surely be horrified to learn that public disclosure only comes through a single metric supplied to the Board on a quarterly basis,<sup>62</sup> and supplied to the Securities and Exchange Commission as a part of the quarterly reports they must file.<sup>63</sup> Most of the transparency and insight to date have come only through press reports.

Former Senator Carl Levin (D-MI) and Senator Sherrod Brown (D-OH) have both fought to bring new light to these shadowy activities. Levin, acting in his capacity as Chairman of the Senate's Permanent Subcommittee on Investigations, launched a two-year investigation into the issue, and found that both Goldman and JPMorgan can influence prices in the commodity markets.<sup>64</sup> And Brown held two hearings about bank involvement in physical commodities in the Senate Committee on Banking, Housing, and Urban Affairs in the last two years<sup>65</sup> This Congressional scrutiny has put pressure on the Fed to act. In 2014, the Fed finally made some preliminary motions, and it has since claimed that it would propose new rules to address the problem.<sup>66</sup> But at the time of this writing, no proposal has been released. In the meantime, a bipartisan coalition of Senators—Senators Elizabeth Warren (D-MA), John McCain (R-AZ), Angus King (I-ME), and Maria Cantwell (D-WA) have stopped waiting. As part of larger bill to restore the separation of commercial and investment banking (“The twenty-first-century Glass-Steagall Act”), the Senators have included language would repeal the portions of Gramm-Leach-Bliley that allow for banks to participate in physical commodities.

### *Dominating the State: Post-Crisis Concentration and Unaccountability*

The consolidation that Gramm-Leach-Bliley began only accelerated after the financial crisis. The five biggest banks in 2015 were 38 percent larger than they were in 2008, a

fact that Senator Elizabeth Warren (D-MA) is quick to repeat.<sup>67</sup> Brandeis's nemesis JPMorgan is the largest U.S. bank with \$2.6 trillion in assets—a massive sum that's nearly 15 percent of the United States 2014 Gross Domestic Product.<sup>68</sup> This concentrated economic power also translates into political power: In the 2013–14 election cycle, Wall Street banks and financial interests reported spending more than \$1.4 billion to influence decision-making in Washington.<sup>69</sup>

Brandeis long feared that outsized firms would find many noxious uses for their bigness. In his Supreme Court dissent to *Liggett Co. v. Lee*, Brandeis got very specific about the risks. He wrote that by growing so large, corporations had developed “such concentration of economic power that so-called private corporations are sometimes able to dominate the state,” removing “many of the checks which formerly operated to curb the misuse of wealth and power.”<sup>70</sup>

In the years since the 2008 financial crisis, the ability of banks to “dominate the state” remains on full display. None other than former Attorney General Eric Holder described the problem at a speech at New York Law School, where he said that in corporate America, “the buck still stops nowhere” when wrongdoing occurs, because “responsibility remains so diffuse, and top executives so insulated, that any misconduct could again be considered more a symptom of the institution’s culture than a result of the willful actions of any single individual.”<sup>71</sup> But Holder’s remarks are very curious, since Congress and the Bush Administration passed the Sarbanes-Oxley Act (SOx) of 2003 to mitigate this exact problem in the wake of corporate accounting scandals.

In addition, the size and complexities of U.S. banks are things that the financial regulators have the tools to impact. And there are a number of ways the Attorney General could have held financial firms accountable for the crisis—bringing criminal cases against banks that illegally foreclosed on service members of the U.S. military, to name just one.<sup>72</sup> Unfortunately, in too many instances, America’s law enforcement and regulatory agencies not only fail to use the tools they possess that could limit bank size, they also sometimes work to ensure a soft landing for any bank guilty of malfeasance or mismanagement.

To take just a few examples: When the British multinational banking and financial services company (HSBC) was found to have laundered billions of dollars to drug cartels, the Department of Justice declined to pursue criminal charges, and instead allowed the bank to settle for \$1.9 billion, an amount estimated at just five weeks income for the firm.<sup>73</sup> After four banks were convicted in 2015 of conspiring to manipulate currency prices (by using chatrooms called “The Cartel” and “The Mafia,” no less) several regulators including the Securities and Exchange Commission (SEC)<sup>74</sup> and the Department of Housing and Urban Development<sup>75</sup> took drastic steps to waive any automatic penalties the banks’ criminal conviction would otherwise have triggered. And when Credit Suisse pled guilty in 2014 to helping American clients dodge U.S. taxes, the Department of Labor (DOL) chose to waive away the automatic penalties triggered by the conviction. Following the granting of the waiver, a lawyer representing Credit Suisse sent an email to the Department with “thank you” repeated 600 times.<sup>76</sup>

Regulators have tried to explain away the lack of consequences for banks’ crimes. At an event at the London School of Economics, Treasury Secretary Jack Lew said that the waivers regulators sometimes issue to overturn the consequences of convictions are there to “make sure that the impact of the penalties doesn’t have unintended consequences.”<sup>77</sup> But Congress created automatic disqualifications that are triggered by criminal convictions for a reason—it was very much an *intended* consequence. Unfortunately, it’s an intended consequence that regulators continue to ignore.

## Conclusion

Rather than waiting for another crisis, we must heed Brandeis’s call to break up concentrations of economic power, and we must create policy that prevents them from forming in the first place. In some sectors, firms are breaking themselves up voluntarily. In 2014, Hewlett-Packard made the decision to split itself into two companies: one that would focus on PCs and printers (HP, Inc), and another that would focus on providing services and hardware to businesses (Hewlett-Packard Enterprise). Activist investor Carl



Ichan successfully pressured eBay to spin off its payment processor PayPal. And IBM “routinely sheds big units that no longer fit with its strategy.”<sup>78</sup>

The financial services industry, however, is still bucking this trend. Bank CEOs of today laud their size as a virtue. JPMorgan CEO Jamie Dimon has spoken of the “huge benefits to size,”<sup>79</sup> while Bank of America CEO Brian Moynihan has said they need to be large because “our clients are operating around the world.”<sup>80</sup> They aren’t just larger. They are increasingly consolidating the most important management of their sprawling firms in a single individual: five out of six of the largest U.S. banks have their CEO also serving as Chairman of the board.<sup>81</sup> But change may not be as hard as it seems.

In the years following the 2008 financial crisis, some of the very executives who benefitted from the undoing of pieces of Brandeis’s economic legacy have found that Brandeis’s “curse of bigness” was not a misnomer. First, there was Sanford “Sandy” Weill, who in 2012, to the visible shock of the news anchors on the business channel CNBC, called for a return to the Glass-Steagall separation of commercial and investment banking.<sup>82</sup> Then, in November 2015, former Chairman and Chief Executive of Citigroup Jack Reed wrote an op-ed for the Financial Times that not only said that overturning Glass-Steagall was a mistake, but, in comments that echo what Brandeis said over one hundred years ago, said that “there are very few cost efficiencies that come from the merger of functions—indeed, there may be none at all.”<sup>83</sup> Reed explained that he and his fellow bankers were wrong to believe that “the larger the institution the more efficient it would be” and admitted that bigness may well drive up price:

It is possible that combining so much in a single bank makes services more expensive than if they were instead offered by smaller, specialized players . . . As I have reflected about the years since 1999, I think the lessons of Glass-Steagall and its repeal suggest that the universal banking model is inherently unstable and unworkable. No amount of restructuring, management change or regulation is ever likely to change that.”<sup>84</sup>

With *mea culpas* from former bank executives, and a 2016 elections that keeps asking of candidates, “Do you support bringing back Glass-Steagall,” or “will you break up the

banks?” we are living in a moment that brings great opportunity to complete the unfinished business of financial reform.

Phillipa Strum wrote in *Justice for the People* that Louis Brandeis and President Woodrow Wilson were a “formidable team that changed the terms of political debate.” But she notes that they didn’t achieve all they set out to: “They would have liked the country to ask, ‘How can the trusts be destroyed?’ instead of ‘Should the trusts be controlled?’ Instead, they got the country to ask ‘How should the trusts be regulated?’”<sup>85</sup>

We can imagine that Brandeis probably would have similar concerns about the way Dodd-Frank dealt with bigness: by giving regulators tools they could use to break up the banks. Brandeis would have preferred the approach still championed by Senator Sherrod Brown, who has introduced legislation such as the Safe, Accountable, Fair, and Efficient (SAFE) Banking Act, and the Terminating Bailouts for Taxpayer Fairness (TBTF) Act, both of which would actually force such break ups.

But we can draw an important lesson in patience from the pace at which Brandeis managed to achieve his goal of breaking up corporate power that threatened democracy: Brandeis waged a nine-year war against the JPMorgan-controlled New Haven railroad, seeking to prevent a railroad monopoly from forming. As Strum notes, the battle began in 1905 and Brandeis “lost a number of rounds, including prevention of the New Haven–B & M merger, but eventually won the war in 1914 when President Wilson’s attorney general forced New Haven to give up both the B & M and all its trolley and steamship lines.” In 2015, we were seven years out from the financial crisis and five years out from Dodd-Frank. With the public spotlight and scrutiny that elections can bring in 2016, there are many reasons to be optimistic in the ongoing war against the “curse of bigness.”

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