Dissent of Justice Louis Brandeis (Louis K. Liggett Co. v. Lee (288 U.S. 517) 1933)

A Brief Historical Vote

The proliferation of nationwide chains like A&P and Walgreen's in the 1920s and 1930s spurred state legislators to design policies to protect independent retailers from what they considered unfair and potentially ruinous competition. One widely embraced policy was a chain store tax. The tax came in many forms but the central element was a tax that increased depending on how many stores were in the chain.

Some courts struck down these taxes as unconstitutional; others upheld them. One case involving Florida's chain store tax made its way to the U.S. Supreme Court. By a 6-3 vote the Court struck down the law. Justice Brandeis' dissented. His dissent has come to be considered one of the most enduring discourses on the threat of concentrated economic power and the need to allow state governments the tools to combat that threat.

The full unedited dissent and majority opinion as well as footnotes are available here.

Brandeis' Dissenting Opinion

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

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

The Florida law is general in its terms. It prohibits the operation, after September 30, 1931, of any retail store without securing annually a license; and provides, among other things, for annual fees which are in part graduated. If the owner operates only one store, the state fee is $5; if more than one, the fee for the additional stores rises by step increases, dependent upon both the number operated and whether all operated are located in a single county…

The plaintiffs are thirteen corporations which engage in Florida exclusively in intrastate commerce…The plaintiffs can succeed only if the discrimination is unconstitutional as applied to them; that is, as applied to corporations…

For the reasons to be stated, the discrimination complained of, and held arbitrary by the court, is, in my opinion, valid as applied to corporations.

The Federal Constitution does not confer upon either domestic or foreign corporations the right to engage in intrastate commerce in Florida. The privilege of engaging in such commerce in corporate form is one which the state may confer or may withhold as it sees fit…

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

incidents of like corporate enterprise are deemed inimical to the public welfare and it is desired to protect the community from apprehended harm…

Whether the citizens of Florida are wise in seeking to discourage the operation of chain stores is, obviously, a matter with which this Court has no concern. Nor need it, in my opinion, consider whether the differences in license fees employed to effect such discouragement are inherently reasonable, since the plaintiffs are at liberty to refuse to pay the compensation demanded for the corporate privilege and withdraw from the state, if they consider the price more than the privilege is worth.

But a review of the legislation of the several states by which all restraints on corporate size and activity were removed, and a consideration of the economic and social effects of such removal, will help to an understanding of Anti-Chain Store Laws; and will show that the discriminatory license fees prescribed by Florida, even if treated merely as a form of taxation, were laid for a purpose which may be appropriately served by taxation, and that the specific means employed to favor the individual retailer are not constitutionally objectionable.

… The prevalence of the corporation in America has led men of this generation to act, at times, as if the privilege of doing business in corporate form were inherent in the citizen; and has led them to accept the evils attendant upon the free and unrestricted use of the corporate mechanism as if these evils were the inescapable price of civilized life, and, hence, to be borne with resignation. Throughout the greater part of our history a different view prevailed. Although the value of this instrumentality in commerce and industry was fully recognized, incorporation for business was commonly denied long after it had been freely granted for religious, educational, and charitable purposes (for a number of reasons)… corporate encroachment upon the liberties and opportunities of the individual. Fear of the subjection of labor to capital. Fear of monopoly. Fear that the absorption of capital by corporations, and their perpetual life, might bring evils similar to those which attended mortmain.

There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations. So at first the corporate privilege was granted sparingly; and only when the grant seemed necessary in order to procure for the community some specific benefit otherwise unattainable. The later enactment of general incorporation laws does not signify that the apprehension of corporate domination had been overcome. The desire for business expansion created an irresistible demand for more charters; and it was believed that under general laws embodying safeguards of universal application the scandals and favoritism incident to special incorporation could be avoided.

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

In many other states, including the leading ones in some industries, the removal of the limitations upon size was more recent. Pennsylvania did not remove the limits until 1905. Its first general act not having contained a maximum limit, that of $500,000 was soon imposed. Later, it was raised to $1,000,000; and, for iron and steel companies, to $5,000,000. Vermont limited the maximum to $1,000,000 until 1911… Maryland limited until 1918 the capital of mining companies to $3,000,000; and prohibited them from holding more than 500 acres of land (except in Allegany county, where 1,000 acres was allowed). New Hampshire did not remove the maximum limit until 1919…Michigan did not remove the maximum limit

until 1921…Indiana did not remove until 1921 the maximum limit of $2, 000,000 for petroleum and natural gas corporation. Missouri did not remove its maximum limit until 1927. Texas still has such a limit for certain corporations.

Limitations upon the scope of a business corporation's powers and activity were also long universal. At first, corporations could be formed under the general laws only for a limited number of purposes-usually those which required a relatively large fixed capital, like transportation, banking, and insurance, and mechanical, mining, and manufacturing enterprises. Permission to incorporate for 'any lawful purpose' was not common until 1875; and until that time the duration of corporate franchises was generally limited to a period of 20, 30, or 50 years.

All, or a majority, of the incorporators or directors, or both, were required to be residents of the incorporating state. The powers which the corporation might exercise in carrying out its purposes were sparingly conferred and strictly construed. Severe limitations were imposed on the amount of indebtedness, bonded or otherwise. The power to hold stock in other corporations was not conferred or implied. The holding company was impossible.

In 1903, almost half the states retained limitations on corporate indebtedness.

New Jersey was the first state to confer the general power of intercorporate stockholding. Although unconditional power was not conferred until the Act of 1893, it had been the practice of corporations formed in New Jersey to purchase the shares of other corporations. In no other state had there been a provision permitting the formation of holding companies, although by special act, notably in Pennsylvania, a few such companies had been formed. The scandal to which the series of Pennsylvania holding-company charters gave rise led to a constitutional amendment in that state forbidding the grant of special charters. New York, like other states, had specifically prohibited intercorporate stockholding, except where the stock held was that of a corporation supplying necessary materials to the purchasing corporation, or where it was taken as security for, or in satisfaction of, an antecedent debt.

The removal by the leading industrial states of the limitations upon the size and powers of business corporations appears to have been due, not to their conviction that maintenance of the restrictions was undesirable in itself, but to the conviction that it was futile to insist upon them; because local restriction would be circumvented by foreign incorporation. Indeed, local restriction seemed worse than futile. Lesser states, eager for the revenue derived from the traffic in charters, had removed safeguards from their own incorporation laws. Companies were early formed to provide charters for corporations in states where the cost was lowest and the laws least restrictive.

… The Red Book on Arizona Corporation Laws (1908)…(notes), 'The remoteness of Arizona from the Eastern and Southern State has in a measure delayed the promulgation of the generousness of its laws. New Jersey, Delaware and West Virginia have become widely known as incorporating states. More recently Arizona, Dakota, New Mexico and Nevada have come into more or less prominence by the passage of laws with liberal features.'

The race was one not of diligence but of laxity. Incorporation under such laws was possible; and the great industrial States yielded in order not to lose wholly the prospect of the revenue and the control incident to domestic incorporation.

The history of the changes made by New York is illustrative. The New York revision of 1890, which eliminated the maximum limitation on authorized capital, and permitted intercorporate stockholding in a limited class of cases, was passed after a migration of incorporation from New York, attracted by the more liberal incorporation laws of New Jersey. But the changes made by New York in 1890 were not sufficient to stem the tide. In 1892, the Governor of New York approved a special charter for the General Electric Company, modelled upon the New Jersey act, on the ground that otherwise the enterprise would secure a

New Jersey charter. Later in the same year the New York corporation law was again revised, allowing the holding of stock in other corporations.

But the New Jersey law still continued to be more attractive to incorporators…The New York Evening Post, March 23, 1896, said: 'The Evening Post has frequently pointed out that New York capital is driven to shelter in New Jersey by reason of the more liberal laws of that State governing the incorporation of companies as compared with the laws of New York. Nearly all large corporations doing business in this City and State are incorporated under the laws of New Jersey or some other State, where more liberal laws prevail and in which inducements are thereby held out to attract capital thither and make it their legal home.' Corporations might be formed in New Jersey to do all their business elsewhere, the state made its policy unmistakably clear.

Of the seven largest trusts existing in 1904, with an aggregate capitalization of over two and a half billion dollars, all were organized under New Jersey law; and three of these were formed in 1899. During the first seven months of that year, 1336 corporations were organized under the laws of New Jersey, with an aggregate authorized capital of over two billion dollars. The Comptroller of New York, in his annual report for 1899, complained that 'our tax list reflects little of the great wave of organization that has swept over the country during the past year and to which this state contributed more capital than any other state in the Union.' 'It is time,' he declared, 'that great corporations having their actual headquarters in this State and a nominal office elsewhere, doing nearly all of their business within our borders, should be brought within the jurisdiction of this State not only as to matters of taxation but in respect to other and equally important affairs.'

In 1901 the New York corporation law was again revised.

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

Able, discerning scholars have pictured for us the economic and social results of thus removing all limitations upon the size and activities of business corporations and of vesting in their managers vast powers once exercised by stockholders-results not designed by the states and long unsuspected. They show that size alone gives to giant corporations a social significance not attached ordinarily to smaller units of private enterprise.

Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business have become an institution-an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the state. The typical business corporation of the last century, owned by a small group of individuals, managed by their owners, and limited in size by their personal wealth, is being supplanted by huge concerns in which the lives of tens or hundreds of thousands of employees and the property of tens or hundreds of thousands of investors are subjected, through the corporate mechanism, to the control of a few men. Ownership has been separated from control; and this separation has removed many of the checks which formerly operated to curb the misuse of wealth and power. And, as ownership of the shares is becoming continually more dispersed, the power which formerly accompanied ownership is becoming increasingly concentrated in the hands of a few.

The changes thereby wrought in the lives of the workers, of the owners and of the general public, are so fundamental and far-reaching as to lead these scholars to compare the evolving 'corporate system' with the feudal system; and to lead other men of insight and experience to assert that this 'master institution of civilised life' is committing it to the rule of a plutocracy. The corporation has already advanced so far that perhaps two-thirds of our industrial wealth has passed from individual possession to the ownership of large corporations whose shares are dealt in on the stock exchange; that 200 nonbanking corporations, each with assets in excess of $90,000,000, control directly about one-fourth of all our national wealth, and that their

influence extends far beyond the assets under their direct control; that these 200 corporations, while nominally controlled by about 2,000 directors, are actually dominated by a few hundred persons-the negation of industrial democracy.

Other writers have shown that, coincident with the growth of these giant corporations, there has occurred a marked concentration of individual wealth; and that the resulting disparity in incomes is a major cause of the existing depression. Such is the Frankenstein monster which states have created by their corporation laws.

Among these 200 corporations, each with assets in excess of $ 90,000,000, are five of the plaintiffs. These five have, in the aggregate, $ 820,000,000 of assets; and they operate, in the several states, an aggregate of 19,718 stores. A single one of these giants operates nearly 16,000. Against these plaintiffs, and other owners of multiple stores, the individual retailers of Florida are engaged in a struggle to preserve their independence-perhaps a struggle for existence. The citizens of the state, considering themselves vitally interested in this seemingly unequal struggle, have undertaken to aid the individual retailers by subjecting the owners of multiple stores to the handicap of higher license fees. They may have done so merely in order to preserve competition. But their purpose may have been a broader and deeper one. They may have believed that the chain store, by furthering the concentration of wealth and of power and by promoting absentee ownership, is thwarting American ideals; that it is making impossible equality of opportunity; that it is converting independent tradesmen into clerks; and that it is sapping the resources, the vigor and the hope of the smaller cities and towns... at the highest, its aim is to eliminate altogether the corporate chain stores from retail distribution. The legislation reminds of that by which Florida and other states, in order to eliminate the 'premium system' in merchandising, exacted high license fees of merchants who offered trading stamps with their goods.

The plaintiffs discuss the broad question whether the power to tax may be used for the purpose of curbing, or of exterminating, the chain stores by whomsoever owned. It is settled that a state 'may carry out a policy' by 'adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry.' And, since the Fourteenth Amendment 'was not intended to compel the states to adopt an iron rule of equal taxation,' it may exempt from taxation kinds of business which it wishes to promote; and may burden more heavily kinds of business which it wishes to discourage.

To do that has been the practice also of the federal government. It protects, by customs duties, our manufacturers and producers from the competition of foreigners. It protects, by the oleomargarine laws, our farmers and dairymen from the competition of other Americans. It eliminated, by a prohibitive tax, the issue of state bank notes in competition with those of national banks. Such is the constitutional power of Congress and of the state Legislatures. The wisdom of its exercise is not the concern of this Court.

Whether chain stores owned by individuals may be subjected to the discrimination here challenged need not, however, be decided. This case requires decision only of the narrower question-whether the state may freely apply discrimination in license fees against corporate chain stores. The essential difference between corporations and natural persons has been recognized by the federal government in taxing the income of businesses when conducted by corporations, while exempting a similar business when carried on by an individual or partnership.

It has, at other times, imposed upon businesses conducted by corporations heavier taxes than upon those conducted by individuals. The equality clause of the Fourteenth Amendment presents no obstacle to a state, likewise, taxing businesses engaged in intrastate commerce differently according to the instruments by which they are carried on; provided the purpose of the discrimination is a permissible one, the discrimination employed a means appropriate to achieving the end sought, and the difference in the instruments so employed vital. The corporate mechanism is obviously a vital element in the conduct of business. The encouragement or discouragement of competition is an end for which the power of taxation may be exerted. And discrimination in the rate of taxation is an effective means to that end.

The requirement of the equality clause that classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation,' is here satisfied. Mere difference in degree has been widely applied as a difference justifying different taxation or regulation. The difference in power between corporations and natural persons is ample basis for placing them in different, classes. Even as between natural persons, where the equality clause applies rigidly, differences in size furnish an adequate basis for discrimination in a tax rate. The size of estates, or of bequests, is the difference on which rest all the progressive inheritance taxes of the states and of the nation. Difference in the size of incomes is the basis on which rest all progressive income taxes. Differences in the size of businesses present, likewise, an adequate basis for different rates of taxation. And so do differences in the extent or field of operation.

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

Since business must yield to the paramount interests of the community in times of peace as well as in times of war, a state may prohibit a business found to be noxious and, likewise, may prohibit incidents or excrescences of a business otherwise beneficent. Businesses may become as harmful to the community by excessive size, as by monopoly or the commonly recognized restraints of trade. If the state should conclude that bigness in retail merchandising as manifested in corporate chain stores menaces the public welfare, it might prohibit the excessive size or extent of that business as it prohibits excessive size or weight in motor trucks or excessive height in the buildings of a city. It was said in United States v. United States Steel Corporation, that the Sherman Anti-Trust Act did not forbid large aggregations; but the power of Congress to prohibit corporations of a size deemed excessive from engaging in interstate commerce was not questioned.

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

The mere fact that the taxpayer is a corporation does not, of course, exclude it from the protection afforded by the equality clause. Corporations and individuals, aliens and citizens, are for most purposes in the same class. Ordinarily, they have the same civil rights; are entitled to the same remedies; are subject to the same police regulations; and are also subject to the same tax laws. Where such is the case, the corporation taxpayer is entitled, like the individual, to the protection of the equality clause against discrimination. however effected.

But the chief aim of the Florida statute is apparently to handicap corporate chain stores-that is, to place them at a disadvantage, to make their success less probable. No other justification of the discrimination in license fees need be shown; since the very purpose of the legislation is to create inequality and thereby to discourage the establishment, or the maintenance, of corporate chain stores; since that purpose is one for which the power of taxation may be exerted; since higher license fees is an appropriate means of discouragement; and corporations have not the inherent right to engage in intrastate commerce. The clear distinction between the equality clause and the due process clause of the Fourteenth Amendment should not be overlooked in this connection. The mandate of the due process clause is absolute. That clause is of universal application. It knows not classes. It applies alike to corporations and to individuals, to citizens and to aliens.

The equality clause, on the other hand, is limited in its operation to members of a class. It is true that the Florida Anti-Chain Store Law, like others, is not drawn so as to apply only to giant corporate chains. In terms, it applies to the small corporations as well as to the large; and also to natural persons. But the history of such legislation indicates that these laws were aimed at the huge, publicly-financed corporations; and that the statutes were couched in comprehensive terms in the hope of thereby avoiding constitutional doubts raised by judicial statements that the equality clause applies alike to natural persons and corporations. It was said in Quaker City Cab Co. v. Com. of Pennsylvania that the equality clause precludes making the character of the owner the sole fact on which a discrimination in taxation shall depend. And in Frost v. Corporation Commission, it was said … 'that a corporation is as much entitled to the equal protection of the laws as an individual.'

These statements require, in my opinion, this qualification. Whenever the discrimination is for a permitted purpose-as when a state, having concluded that activity by corporations should be curbed, seeks to favor businesses conducted by individuals-the corporate character of the owner presents a difference in ownership which may be made the sole basis of classification in taxation, as in regulation. The discrimination cannot, in such a case be held arbitrary, since it is made in order to effect the permitted hostile purpose and is appropriate to that end.

The plaintiffs contend, for a further reason, that there is no taxable difference justifying the discrimination in license fees. They assert that the struggle between them and the independently owned stores is, in fact, not an unequal one; and, in support of this assertion, they call attention to those paragraphs in the bill which describe the co- operative chains of individual stores and their rapid growth. These paragraphs allege that by 'affiliations and cooperative organizations single grocery (and other) store owners have adopted the best features of chain store merchandising and have secured substantially all the benefits derived therefrom, while at the same time they have avoided burdens of capital investment, insurance, etc., incident to the carrying of a large stock in a central warehouse.' The bill sets forth how this has been achieved, describing in detail the recent advances in efficiency of such co-operative merchandising. It alleges, moreover, that the members of a co- operative chain have the superior advantage of the good will and personal interest of the individual owners, as compared with the hired managers of the regular chains; and that all these facts were known to the Legislature when it enacted the statute here challenged.

These allegations are admitted by the motion to dismiss; and they are supported by recent experience of which we may take notice. But it does not follow that, because the independently owned stores are overcoming through co-operation the advantages once possessed by chain stores, there is no taxable difference between the corporate chain and the single store. The state's power to apply discriminatory taxation as a means of preventing domination of intrastate commerce by capitalistic corporations is not conditioned upon the existence of economic need. It flows from the broader right of Americans to preserve, and to establish from time to time such institutions, social and economic, as seem to them desirable; and, likewise, to end those which they deem undesirable.

The state might, if conditions warranted, subject giant corporations to a control similar to that now exerted over public utility companies. Or the citizens of Florida might conceivably escape from the domination of giant corporations by having the state engage in business. But Americans seeking escape from corporate domination have open to them under the Constitution another form of social and economic control-one more in keeping with our traditions and aspirations. They may prefer the way of co-operation, which leads directly to the freedom and the equality of opportunity which the Fourteenth Amendment aims to secure. That way is clearly open. For the fundamental difference between capitalistic enterprise and the co-operative-between economic absolutism and industrial democracy-is one which has been commonly accepted by Legislatures and the courts as justifying discrimination in both regulation and taxation.

There is a widespread belief that the existing unemployment is the result, in large part, of the gross inequality in the distribution of wealth and income which giant corporations have fostered; that by the control which the few have exerted through giant corporations individual initiative and effort are being paralyzed, creative power impaired and human happiness lessened; that the true prosperity of our past came not from big business, but through the courage, the energy, and the resourcefulness of small men; that only

by releasing from corporate control the faculties of the unknown many, only by reopening to them the opportunities for leadership, can confidence in our future be restored and the existing misery be overcome; and that only through participation by the many in the responsibilities and determinations of business can Americans secure the moral and intellectual development which is essential to the maintenance of liberty. If the citizens of Florida share that belief, I know of nothing in the Federal Constitution which precludes the state from endeavoring to give it effect and prevent domination in intrastate commerce by subjecting corporate chains to discriminatory license fees. To that extent, the citizens of each state are still masters of their destiny.