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CONSTITUTIONAL LIMITATIONS ON CORPORATE ACTIVITY—PROTECTION OF PERSONAL RIGHTS FROM INVASION THROUGH ECONOMIC POWER

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Introduction

Inevitably the results of concentration so endlessly discussed by economists[1] find reflection in the legal system. The modern state, having ultimate responsibility for the national economy, necessarily sought the production of conditions by industry which would satisfy the political demands. A variety of tools lie to the hand of the political

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1. The discussion of concentration in American economics has been continuous and intense for more than two decades. Among more recent discussions may be noted: Wilcox, Competition and Monopoly in American Industry (TNEC Monograph 21, 1941); Stocking and Watkins, Monopoly and Free Enterprise (1951) (and the report of the Committee of which James N. Landis, Esq., was Chairman, concluding, among other things, concentration should be discouraged except where definite justification for it could be presented); Warren, Extent of Enterprise Monopoly in the United States, 1899-1939 (1951) (a part of the so-called "Free Market" study at the University of Chicago), raising the question as to whether concentration really does exist and contesting in some degree the conclusions of Dr. Wilcox; Adelman, *Measurement of Industrial Concentration*, 33 Rev. of Econ. & Stat. (1951). Professor Adelman's research is both the most modern and the most detached. His conclusion is that 45% of the assets of all manufacturing corporations is concentrated in the 139 largest American corporations.

This is pure property concentration: it takes no account of the secondary effects as, for instance, the amount of "small business" whose policies and conduct is dictated by the concentrate on which it depends as, for instance, motor dealers depend on the great motor companies or gasoline stations on the oil companies. In any case, Professor Adelman's figure is impressive enough. The output of American manufacture is roughly half of the manufacturing output of the entire world: 45% of American manufacturing assets and approximately that of its product is probably the greatest concentration of economic power ever achieved in modern history.

state. It can impose requirements. It can offer privileges, advantages, and subsidies maximizing probability of profit. It can supply capital. It can, if need be, own businesses, and as an ultimate resource can take over almost any given corporation (of significant scope) in any industry.

But the modern state must likewise cope with the desires of many millions of individuals. The problem is not one of aggregates or general economics. It is matter of individual application. A man wants his job; a family wishes to buy, at an acceptable price, goods and services it needs or strongly desires. In the field of labor (which lies aside from this study) organized groups insist that their numbers shall be able to get jobs, or perhaps keep them on some sort of determined tenure, and at an acceptable wage scale.

Save in the field of labor, where the growth of labor unions has compelled rapid and more or less systematic development, the evolution of law has been largely unsystematic. It has grown out of a series of major or minor crises, all of which have a common element. In each case the industry concerned failed to meet some widespread demand in some quarter of the community with which it dealt. This generated political action energizing intervention in one form or another by the political state.

The solutions arrived at from these impacts have taken form in law. The forms are diverse, but as a group they indicate a pattern which steadily repeats itself. It is therefore allowable to predict that future impacts will be similarly solved. This is the basis for suggesting that new fields of law are in process of emergence.[2]

Of interest is the fact that the emergent fields of law do not base themselves on particular or formal "corporation law." American corporations are theoretically subject to a formal, but, for economic purposes, largely nominal control by the law of the state in which they are incorporated. This, only incidentally important here, is the true "corporation law," the state statutes by which the creation and administration of a corporation are regulated. Under this law the corporation acquires its charter, which is its constitution, and sets up its by-laws, which govern its internal procedure and functioning and the method of holding its stockholders' and directors' meetings by which corporate action is taken. Most statutes leave the widest latitude to the corporation and its stockholders to set up their own methods of

2. The administration of antitrust law is one of the legal tools which has been invoked by the state. See Carlston, *Anti-Trust Policy: A Problem in Statecraft*, 60 YALE L.J. 1073 (1951). Professor Carlston's point is that the anti-trust laws are really used to try to establish and enforce norms of corporate behavior, and that the fundamental problem dealt with is that of distribution of power in the community.

procedure. This law determines the property interests of stockholders, their share in the corporate income, and the like, again leaving great capacity in the corporation managers and shareholders to determine these interests by agreement.

In earlier days, this branch of law likewise regulated the relations of the enterprise to the community. The old royal charters in England were designed not only to create a collective body capable of doing business and to endow that body with certain powers, but also to obtain from it certain results. Specially chartered corporations of the seventeenth, eighteenth and nineteenth centuries were far more than devices by which a number of individuals could jointly go into business with limited liability. They were expected, perhaps required, to perform stated duties to the community—perhaps running a ferry, founding a colony or establishing the East Indian trade. Performance of these functions and securing whatever revenue the enterprise paid to the Crown were the primary reasons why a charter was granted.

For practical purposes, the prevailing corporation laws have relinquished the objective either of imposing social duties or of protecting individuals. They merely grant the privilege of carrying on an enterprise in corporate form, afford a vehicle for establishing stockholders' contractual rights, and establish a method by which boards of directors, officers and personnel may manage. The attempts to limit by charter the size or the scope of operations, or to guide into, or hold operations in, some specific field of activity, have been substantially abandoned. Provisions imposing some degree of social control, or directing corporate action for community purposes, were, indeed, a feature of the early American special charters, and were carried forward into many of the nineteenth century state statutes permitting incorporation.[3] The device failed, and practically every state has eliminated these provisions, though there remains a remnant of legal doctrine which can occasionally be taken hold of under unusual circumstances.[4] It is a curious fact

3. See, *e.g.*, Mass. Laws Jan. Sess. 1818, c. 179, An Act to Incorporate the Proprietors of the Maine Flour Mills. This Act constituted a corporation for the purpose of manufacturing corn and grain into meal and flour. It limited the property holdings to $30,000 worth of real estate, all to be located in the County of Kennebec, and personal property to the value of $20,000. It required the corporation to brand the containers of its flour or meal, under a penalty of $2.00 for each container not so branded; and at the same time provided a penalty of $20.00 for each offense in case any party other than the corporation should use the corporate brand.

Instances could be multiplied.

Recently a careful history of the corporation laws in the state of New Jersey has appeared, CADMAN, THE CORPORATION IN NEW JERSEY (1950). The development is entirely clear. In the early part of the 19th century, the act of incorporation was a state act, designed to get a specified commercial result, but under private financing and operation.

4. Failure of the device was accomplished partly by the nullification of the judicial decision of the doctrine of ultra vires, *e.g.*, Jacksonville, M., P. Ry. v. Hooper,

that, in mid-twentieth century practice, in the many struggles between the corporation and the state, classic corporation law is almost never availed of to adjust relations between the corporate enterprise and the community. That law is vigorously used to adjust relationships between management and stockholders, between stockholders themselves, and occasionally between the enterprise and creditors. But in regulating relationships between the corporation and the community or in protecting individuals, it is not now used, and there is little sign that future developments will turn on corporation statutes.

Though true corporation law has abandoned the task of regulating relations between the corporation and the community, the large corporation, monopoly or concentrate (and in some cases highly competitive, multi-unit industries) is encountering a rapidly growing and extremely powerful field of law, quasi-law, and public expectations as to conduct hardening into law. With this newer field this study is principally concerned.

I

This new law is crystallizing in two distinct areas.

One area (not dealt with in this paper except incidentally) embraces the economic and political-economic obligations and privileges, through which and by which the industry is expected to produce an economic result acceptable to the community. In it, the corporation, or a concentrate of corporations, is dealt with as an entity; the objective of this area of law is to provide such generalized effects as adequate supply of the product, an acceptable price, reasonable stability of operations and employment, and so forth. This is, really, the gradual building of a system of industrial planning.

The other area, far less defined, includes a body of rules governing the rights and position of individuals with whom the corporation deals as supplier.

These two fields of emergent law may be briefly described.

160 U.S. 514 (1896), considerably enlarging the doctrine of "incidental powers," and the application of the doctrine of estoppel to those attempting to assert *ultra vires*, until the doctrine was cut down to the extremely limited proportions set out in Mutual Life Insurance Company v. Stephens, 214 N.Y. 488, 108 N.E. 856 (1915). The draftsmen of the Ohio Corporation Law in 1928 endeavored to wipe out even the remnants of the doctrine by providing that a corporation should have all the powers which natural persons would have. However guidance of corporate enterprise in accepted social channels was to be made, the corporation law had not proved a feasible means.

Recognition of this fact did not, however, eliminate the problem. Corporations were and are the largest collectivities known in the American jurisprudence outside the government itself; some of them (American Telephone & Telegraph Company, General Motors) are larger on any standard of comparison than the smaller or less populous American states.

In point of fact when the community is dissatisfied with the economic situation prevailing in any given industry, political pressures are set up; and the state is necessarily brought into contact with the chief units in the industry. Especially when the industry is a monopoly, or a concentrate of large corporations, these corporations find themselves immediately dealing with the Government, which transmits the pressure on it to the chief elements in the industry to satisfy the community's desire. Occasionally an abuse can be rectified or condition created by simple fiat, the state by appropriate legislation insisting that the industry change its course of action in some respect. More often the industry immediately responds that it also is in the grip of economic conditions, and that if it is to be used as an instrumentality to meet the community's desire, conditions must be changed, or additional resources must be given. The ensuing result is a crude plan, indicating the objective desired, indicating the obligations imposed on the industry, or at least a method by which they can be made specific, and as often as not providing for assistance by the Government in one form or another. Occasionally there is direct Government entry into the industry. The result is usually reached by a combination of pressures on the industry, drawn from existing or newly created law or from public opinion, and by counter-pressure exerted by the industry itself, which freely and forcibly asserts its own interest and necessities. Both demands have to be considered and met, for unless the state proposes to take over and administer the industry itself, it is obliged to recognize the claims of the industry to the extent they are reasonable as well as the claims of the public. Until both are recognized, and satisfied to the point of reaching a viable result, the period of impact and crisis continues. When solution has been reached offering a reasonable result, a period of more or less stable legal and economic relationships follows.

The chronicle of industrial crises and impacts of this kind forms a great and familiar part of American political and economic history to which brief allusion may be made here.

Five chief methods of resolving these crises and impacts have appeared in the American legal system.

(1) The impact may be resolved by the passage, after political conflict, of legislation applicable to a particular industry, creating a framework within which that industry shall operate and develop. Thus, interstate railroads, after a series of impacts lasting more than twenty years, came under such a scheme for practical purposes in 1903 when the ineffective Interstate Commerce Act of 1887 was amended and took

its present basic form in legislation stimulated by President Theodore Roosevelt and sponsored by Senator Hepburn.[5] This base, extended from time to time but not radically altered, furnished the framework within which American railroads have since operated for nearly half a century. A specific statutory plan emerged for the maritime industry in the Merchant Marine Act of 1936.[6] Great parts of the electrical power industry have been dealt with likewise, though the development in that field has been so rapid that the pattern has probably not yet fully emerged. Thus, the Tennessee Valley Authority[7] handles the electric power problem in that great watershed, and the Boulder Canyon Project Act[8] and the Bonneville Project Act of 1937[9] perform, in less complete fashion, the same function for the areas in the valleys of the Colorado and Columbia Rivers. The interstate phases of the industry are regulated by the Federal Power Act of 1935, while a national pattern of "integrated systems" is imposed by the Public Utility Holding Company Act of 1935.[10] The oil industry succeeded in working out a pattern of production stabilization under the Interstate Oil Compact,[11] a treaty made between some twenty-four states calling for a common policy of oil conservation, and approved biennially by the Congress of the United States. The list, which runs all the way from aviation to stockyards and takes in sugar, radio and commercial banking, could be multiplied.

These and other specific solutions usually reflect the end of a struggle, or at least a struggle in process of solution, involving an

5. INTERSTATE COMMERCE ACT, 24 STAT. 379 (1887), as amended by the "Hepburn Act," 34 STAT. 584 (1906). The provisions of both acts are now dispersed through 49 U.S.C. (1946).

6. 49 STAT. 1985 (1936), 46 U.S.C. § 1101 *et seq.* (1946). This Act dissolved the old Shipping Board and transferred its regulatory powers to the newly created Maritime Commission.

7. TENNESSEE VALLEY AUTHORITY ACT OF 1933, 48 STAT. 58 (1933), 16 U.S.C. § 831 *et seq.* (1946). See HODGE, THE TENNESSEE VALLEY AUTHORITY, A NATIONAL EXPERIMENT IN REGIONALISM (1948).

8. BOULDER CANYON PROJECT ACT, 45 STAT. 1057 (1928), 43 U.S.C. § 617 *et seq.* (1946); BOULDER CANYON PROJECT ADJUSTMENT ACT, 54 STAT. 774 (1940), 43 U.S.C. § 618 *et seq.* (1946); and the powers given to the Secretary of the Interior thereunder. Upon these Acts depend the Imperial Irrigation District and the Parker Dam, separately authorized by the RIVERS AND HARBORS IMPROVEMENT ACT OF 1935, 49 STAT. 1028 (1935).

9. 50 STAT. 720 (1937), 16 U.S.C. § 832 *et seq.* (1946). A number of related operations arose from this core for the development of the Colorado River, notably the Grand Coulee Dam, constructed by the Bureau of Reclamation; see Rivers and Harbors Improvement Act of 1935, § 2, 49 STAT. 1039-1040 (1935).

10. PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, 49 STAT. 803 (1935), 15 U.S.C. § 79 *et seq.* (1946), which relates to powers of the Securities and Exchange Commission with respect to holding companies; FEDERAL POWER ACT, 49 STAT. 838 (1935), 16 U.S.C. § 791a *et seq.* (1946), which gives the Federal Power Commission jurisdiction over the interstate transmission of electric energy.

11. INTERSTATE COMPACT TO CONSERVE OIL AND GAS (1935), the text of which is contained in 57 STAT. 383 (1943).

entire industry. Some were reached by relatively amicable discussion. More of them emerged as a result of pitched battles whose records filled the current newspapers and furnish material for historians.[12] In these instances, attacks were made, forces marshalled, the lines met, points of view were stated, grievances were exhibited, defenses were made, interest was asserted and, through political action, a balance of some sort was reached.

(2) A second group of solutions have resulted from court action taken by the Federal Government and based on highly generalized rules of law such as the antitrust acts. Attack is made on a specific corporation or group of corporations, and by judicial decree a norm of conduct for that corporation is laid down, theoretically capable of being enforced in the courts. Where there is a developing impact of an industry-concentrate upon the state, this is one of the classic methods by which solution is initially attempted. The most familiar of these generalized rules of law, invoked to meet an industrial situation, is the Sherman Antitrust Act of 1890 which, for practical purposes, was not seriously used until 1903.[13] From then on, during half a century, the singularly general rule, prohibiting "monopolies and combinations in restraint of trade" or "conspiracy to restrain trade," has been the tool most frequently used. Clash of a corporation with the state is

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12. A relatively amicable solution (for better or worse) was reached when the SUGAR ACT OF 1948, 61 STAT. 922 (1947), 7 U.S.C. § 1100 *et seq.* (Supp. 1951), was passed. For practical purposes, the terms of the Act were settled by discussions between representatives of the Louisiana cane sugar producers, the American beet sugar producers, the Hawaiian and Puerto Rican cane sugar producers, and the representatives of the great sugar refining companies, together with representatives of the Cuban sugar producers. As a result, the Secretary of Agriculture determines the amount of sugar needed to meet consumer requirements of the continental United States, and sets a quota limiting the amount of raw sugar which may be imported. The government was prepared to enter these discussions because of its desire to protect the cane and Western beet sugar farmers, and also provide a stable supply of refined sugar for the East.

This may be contrasted with the head-on collision occasioning much of the public utilities legislation, where a running political battle over many years culminated in a Senate investigation conducted by Senator Hugo Black, and a commercial battle of epic proportions developed prior to the passage of the Public Utility Holding Company Act. An earlier instance was the passage of the Hepburn Act giving the Federal Government power to regulate railway rates in 1903; President Theodore Roosevelt was accused (even then!) of having yielded to "Communist" influence.

13. 26 STAT. 209 (1890), 15 U.S.C. §§ 1-7 (1946). Serious use of the Antitrust Act was first made by President Theodore Roosevelt during his first term and the Act was still more vigorously used by his successor, President William Howard Taft. The Sherman Act was then conceived of as a means of preventing monopolies and large aggregations of capital. Yet even in the early cases a decree of "dissolution" became a form of disposition of the industrial resources. The pattern familiar today of splitting an industry into a concentrate of three companies appears first in U.S. v. du Pont de Nemours Company, 188 Fed. 127 (C.C. Del. 1911), *modified*, 273 Fed. 869 (D. Del. 1921), familiarly known as the "Powder Trust Case." There the decree directed the du Pont Company to equip, staff and finance two other powder companies, Hercules and Atlas. The three-company concentrate has dominated the gun powder industry ever since.

frequently evidenced first by a brush with the Department of Justice under the antitrust laws. In many instances, the law has been interpreted so as virtually to give to the federal courts the power to work out, *ad hoc,* plans of relationship between corporations found to have violated the law and the economic community in which they operate. Decrees under the antitrust law more often than not are in the nature of special judicial legislation designed to govern specific phases of the conduct of the corporation or group of corporations brought before the court. In some cases, these decrees attain the stature of a rudimentary plan for the industry.

(3) Another avenue toward solution appears through exercise of power, obtained by some strong Government administrative agency for quite different purposes, which by circumstance gives that agency a strategically decisive position in an industry. A typical case of this sort is found in the handling of the aluminum manufacturing situation by the War Assets Administration and the Surplus Property Board.[14] Those agencies, having power to dispose of Government-owned war plants for the manufacture of aluminum and following standards laid down by Congress, were able to erect a new pattern for the aluminum industry, substituting, in effect, a three-company concentrate for a single-company monopoly. It is probable that the National Production Authority under the current Defense Production Act may find itself with similar power in other industries. In these cases the commanding position of the Government was acquired "accidentally"; that is, it came as an incident of operations primarily intended to achieve quite different results.

(4) In a fourth group of cases control is exercised because the Government itself, directly or indirectly, enters the industry and undertakes operations. Two illustrations of this are the entry of the Government in 1935 [15] into the field of rural electrification through the

14. Lengthy litigation resulted in a decision, U.S. v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), that the Aluminum Company of America was a monopoly and should be split into a number of component parts. The case was remanded for decree. But meanwhile the Surplus Property Board (later the War Assets Administration) had virtually set up the Reynolds Metal Company and the Permanente Company (now the Kaiser Aluminum Company) as co-producers. Accordingly the final decree did not dissolve Aluminum Company of America, but merely required its severance from its Canadian affiliate, Aluminium Company, Ltd.

15. The rural electrification program began under Exec. Order No. 7130 (1935), under the EMERGENCY RELIEF APPROPRIATION ACT OF 1935, 49 STAT. 115 (1935). The Rural Electrification Authority in its present form was set up by the RURAL ELECTRIFICATION ACT OF 1936, 49 STAT. 1363, 7 U.S.C. § 901 *et seq.* (1946). In theory, both operations were designed to authorize the lending of money for rural electrification; but, no barriers appearing, the organization of cooperatives for this distribution was proposed by Mr. Murray Lincoln, encouraged by the Rural Electri-

Rural Electrification Authority, and its entrance in 1933 into the field of capital banking through the Reconstruction Finance Corporation. One may argue whether the Tennessee Valley and the Columbia River operations fall into this class.[16]

(5) Fifth, there are pressures not yet hardened into any form of law, but solidly based on the wants and expectations of the community. To violate these settled expectations entails immediate controversy, leading to political action, and very probably to invocation of one or more of the methods of control mentioned above. When an industry finds itself under investigation by a Congressional committee or engaged in a political battle in which it answers criticism, or endeavors to fend off adverse legislation and the like, it is under pressure. Some community want or expectation has not been fulfilled; some norm of expected conduct has been violated; at all events, political pressure has developed. By following this area of controversy and estimating the political pressure, one can almost forecast the area of development of the explicit law of tomorrow. Many industries, some concentrated and some frankly monopolistic, have avoided serious impact with the state because of the care with which they have anticipated these community expectations and the fidelity with which they have fulfilled them. One of the largest corporations in the United States is the American Telephone & Telegraph Company; it has held a substantial monopoly over a vital community service for many decades; yet its standards of performance have so well satisfied the community that impacts between it and the state have been singularly slight as industrial history goes.[17]

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fication Administrator, Mr. Morris Cooke, and the resulting program amounted to supplying not only capital but research, technical assistance, and planning, so that the bulk of the operating decisions may fairly be said to be made by an agency of the Federal Government.

16. Unquestionably the Federal Government intervened for direct production of power in both the Tennessee Valley and the Colorado River projects, as indeed President Hoover's Administration did when it authorized construction of Boulder Dam. Yet in all three cases, the primary motive was less an attempt to provide a framework for the power industry than to make available resources to areas which clearly needed them. Later, of course, the projects developed both as great regional developments and as "yard sticks" by which it was thought the performance of private utility companies could be judged.

17. A useful study could be made of the great corporations forming concentrates in particular industries whose operations have not brought them into serious controversy with public opinion and therefore have occasioned only a slight impact between their operations and those of the state. Besides AT&T, the motor industry has been in the main very successful in this respect, as has also the electrical supply industry. More recently, however, the electrical supply industry has been forced into contact with the state because of the extreme interrelation of defense orders with electronics and because of the fact that the American electronics industry almost of necessity comes into contact with the highly concentrated European electronics industry. The European system is, of course, a cartelized system, and the interaction of the two systems has produced a modicum of conflict in the United States.

II

The second field of growing law, with which this article is chiefly concerned, is the tendency to give specific constitutional or legal protection to individuals in their dealings with private units wielding great economic power. This is a distinctly American development in a period characterized by mass demand for better standards of living and for a modicum of justice in economic matters. Both by history and tradition, American thought and American law shrink from the assumption that individuals are merely members of a group. They, as men and women, have individual claims on society just as they have individual duties to it. These rights and duties can be economic as well as political; the full scope of the individual guarantees contained in the Bill of Rights is not exhausted by providing for the political and intellectual freedoms there prescribed. Protection of life, liberty and property contained in the Fifth and Fourteenth Amendments, though speaking the old language of possessory property and of individuals defending themselves against arbitrary feudal government, does at least set up the implication that corresponding protection exists where the individual derives his economic life not from possessory property, but from position in a modern industrial world.

From this there is being generated a quiet translation of constitutional law from the field of political to the field of economic rights. The main outlines of this new body of law are only scarcely discernible now; yet its future history is certain to be important. Certain quasi-constitutional rules governing the behavior of corporations, and of the officials within them, are beginning to be imposed by the courts and by public opinion. Their extension may determine the course of American economic development as clearly as did the constitutional thinking of Madison and Jefferson in the political field a century and a half ago. The emerging principle appears to be that the corporation, itself a creation of the state, is as subject to constitutional limitations which limit action as is the state itself. If this doctrine, now coming into view, is carried to full effect, a corporation having economic and supposedly juridical power to take property, to refuse to give equal service, to discriminate between man and man, group and group, race and race, to an extent denying "the equal protection of the laws," or otherwise to violate constitutional limitations, is subject to direct legal action.[18]

18. On closer historical analysis, the parallel between the position attained by an industrial concentrate and that of the feudal system is surprisingly close. The feudal lord was the operator of the principal economic activity, namely, use of agricultural land, and he likewise controlled the marketing of goods and products in

The doctrine should not be surprising. On logical analysis, a corporation, being a creature of the state, which owned, let us say, a dominant department or chain store system, could not offer its facilities to white men and refuse them to Negroes; could not, through whim or dislike, refuse to serve a family or a customer which it disliked; could not give undue favors to a group it wished to foster at the expense of the rest of its public. This would be true despite the fact that, as owner, it could theoretically do what it pleased with its own property. And this legal restraint would apply not only to rules embodied in the corporation's constitution and by-laws, but also to its regulations, practices and day-to-day dealings. The Bill of Rights and the Fourteenth and Fifteenth Amendments would thus have direct application to and also throughout any corporation whose position gave it power. The preconditions of application are two: the undeniable fact that the corporation was created by the state and the existence of sufficient economic power concentrated in this vehicle to invade the constitutional right of an individual to a material degree.

This is new as a rule of law, but it is typically American in tradition. Instead of a social attack on an enterprise as an enterprise, with nationalization or socialization as the aim, this is the application of a set of general rules to the organisms and individuals who govern them, with a view to achieving a freer order of individual life. Under this theory certain human values are protected by the American Constitution; any fraction of the governmental system, economic as well as legal, is prohibited from invading or violating them. The principle is logical because, as has been seen, the modern state has set up, and come to rely on, the corporate system to carry out functions for which in modern life by community demand the government is held ultimately responsible. It is unlimited because it follows corporate power whenever that power actually exists. It resolves the conflict between the property notion that an owner can do what he likes with his own and the governmental concept that a public agency is obliged to serve all alike within strict constitutional limitations, evenhandedly, up to the limit of its capacity. Instead of nationalizing the enterprise, this doctrine "constitutionalizes" the operation.

his area. He also was the political governor. The provisions of Magna Carta protecting the lords against their feudal overlord, the king, were clearly intended to protect the economic as well as the political rights claimed by the feudal lords who rose against King John. In succeeding centuries, the doctrine was naturally invoked by the lesser orders to protect them against the feudal chiefs themselves. Invasion of personality obviously can be accomplished by economic as well as by physical or political action. Obviously when economic power derives from the state itself, the theoretical condition leading to the emergence of Magna Carta and still later to our own Constitutional Bill of Rights is present.

The emergence of this doctrine is worth examination.

Corporations in early English law were in form, in fact, and in legal cognizance a device by which the political state got something done. They were far more like the bodies corporate we call "public authorities" today. A ferry had to be run; a harbor needed wharves; a colony needed to be developed; a particular line of industry needed encouragement. A royal charter was granted with more or less defined privileges, frequently intended to attract capital. The state retained residual control over the operations which it could exercise at pleasure. Few in the seventeenth or eighteenth centuries would have disputed that a corporation was an agency of the state—probably not before the early nineteenth century, either in England or in the United States.

Corporations were so regarded, it seems reasonably plain, when, in 1787, the United States drafted its Constitution. A proposal was made to the Constitutional Convention that the Federal Government be given power to charter corporations;[19] this was referred to committee, and the committee reported negatively. Madison's Notes indicate the reason. Corporations were commonly regarded as state monopolies; they were not too popular. They were also a powerful agency by which the nascent Federal Government might enter, affect, perhaps even control and dominate the commercial field. The specter of national corporations deriving power from the Federal Government repelled the delegates. The proposal was dropped.

Later, the Supreme Court held that the Congress had power to charter corporations incidental to, or in aid of, its governmental functions, the leading case being that of *McCullough v. Maryland.*[20] There,

19. Mr. Pinkney proposed as a power to be granted to the legislative authority, "to grant charters of incorporation." 2 MADISON'S RECORDS OF THE FEDERAL CONVENTION OF 1787, 325 (Farrand ed. 1937). Debate took place some three weeks later, oddly enough on a motion of Benjamin Franklin to include canals as proper subjects of Federal action along with post offices and post roads. Madison suggested an enlargement of the motion to include a power, "to grant charters of incorporation where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent." The ensuing debate brought out the fact that there would be considerable opposition; though Mr. Wilson thought that the creation of mercantile monopolies was necessarily authorized by the power to regulate trade, Colonel Mason was "afraid" of monopolies of every sort which he did not think were by any means "already implied," and the Madison suggestion was abandoned. A proposal to permit creation of corporations for canal purposes only was then lost in committee by a vote of eight to three. *Id.* at 615, 616. Evidently there had been considerable discussion outside of committee and off the floor of the Convention. Unquestionably the real fear was that expressed by Mr. King, that the power to incorporate would be associated with certain state acts establishing banks and the like, a subject of contention in Philadelphia and New York.

20. 4 Wheat. 315 (U.S. 1819). The Court had some trouble because Alexander Hamilton, in his report favoring the creation of the Bank of the United States, had said that it must be "under private, not public, direction; under the guidance of individual interest, not public policy."—surely not the first time that the report of an

incorporation of a national bank by the Congress was considered within the powers delegated to the Federal Government because it was in aid or implementation of the federal power to create a system of banking and currency. The doctrine of incidental power to incorporate has been availed of continuously thereafter, but always with the underlying limitation that a federal charter may be granted as a means of performing some function or exercising some power delegated to the United States.

(With the power have come some of the sequelae the Constitutional Convention feared. In at least one recent case, it was held that a corporation (even though privately owned) carrying out a function of the United States was immune from state taxation and generally immune from state legislation; this decision followed a concurring opinion of Mr. Justice Jackson in a case involving the Federal Reserve Board (likewise a body corporate), declaring that doctrine with respect to the Board.[21] The sequel certainly affirms the nature of federal corporations. So far as concerns federal corporations, they are by very hypothesis agencies of government. With this premise, it would certainly follow that the action of a federally chartered corporation would be governed by the constitutional limitations imposed on any agency of the Federal Government.)

By historical precedent, certainly at the outset, the situation of state chartered corporations was the same; that is, they were agencies of the chartering state. Had the question come up, let us say, in 1800, when there were only 300 recorded corporations in the United States, all of which derived their authority from the states or predecessor colonies, the lawyer arguing that they were purely private and, because private, not within the scope of constitutional limitations on governmental action would have had the difficult side of the argument.[22]

Executive Officer had later embarrassed the Court! *Id.* at 341. Chief Justice Marshall brushed aside Mr. Hopkinson's argument: "The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. . . . The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else." *Id.* at 411.

21. United States v. Allegheny County, 322 U.S. 174 (1944). Pittman v. Home Owners' Loan Corp., 308 U.S. 21 (1939). Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). The doctrine that a federal corporation is amenable only to federal law came up argumentum in the case of Matter of New York, New Haven & Hartford Railroad, F.2d in the Circuit Court of Appeals. Judge Learned Hand in the course of the argument noted his concern that federal corporations (like the Reconstruction Finance Corporation, a party in that proceeding) might emerge as instruments more or less immune from state law, thus having a specially favored position in American commercial life.

22. There were few corporations existing in the United States when the Constitution was adopted in 1789. One writer estimated six. Baldwin, *American Corpora-*

The case would have been otherwise in the latter part of the nineteenth century. By this time, the long battle had been fought about and against specially chartered corporations. These had multiplied. General corporation laws had become common. The state legislatures had virtually granted power to any group of private citizens to incorporate and to carry on virtually any kind of business under the corporate form, and had turned their backs on special charters. The corporation had virtually become a mere method of business organization; it was regarded as a private institution, and in the main really was. For corporate business was then in economic fact private. The operations of the small shop, or of the small factory, did not attain a power-position capable of invading personality save in rare instances, and these were chiefly in the field of railroads and public utilities. True, the underlying premise remained and was steadily used by the courts: incorporation, even under general laws, was a state act designed to further a state purpose, namely, the encouragement of trade and commerce (if nothing else).[23] Courts continued to insist that ultimate control over and responsibility for the administration and functioning of the corporation remained with the state because the corporation's existence and functioning was an exercise of the sovereign political power of the state itself. But, absent any economic power seriously to invade individual life, it is not surprising that the constitutional question lay dormant.

The problem of protecting personality did come up in the fields where concentrated corporate power chiefly existed: the service rendered by railroad systems. Here, instead of the direct constitutional approach, the courts first dealt with the subject either as a matter of classic public utility regulation or as regulation of interstate commerce under the commerce clause. The current of authority is tortuous though it gradually assumes fairly clear direction.

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tions before 1789, 1 AMERICAN HISTORICAL ASSOCIATION ANNUAL REPORT 253, 254 (1902). Another writer, DAVIS, CORPORATIONS, A STUDY OF THE ORIGIN AND DEVELOPMENT OF GREAT BUSINESS CORPORATIONS AND THEIR RELATION TO THE AUTHORITY OF THE STATE (1905), believes there was a slightly greater number. Baldwin estimated that by 1800 some three hundred corporations had been chartered in the thirteen states. Certainly there were not many; all of them were clearly created in order to foster a project which the state desired to have carried out. Historically it would seem hardly arguable that a corporation was *pro tanto* an "arm of the state." Nor has there been any abandonment of the theory through generalization of corporation laws and the free granting of the corporate privilege.

23. See Goldman v. Postal Telegraph, Inc., 52 F. Supp. 763 (D. Del. 1943); Havender et al. v. Federal United Corp., 24 Del. Ch. 318, 334, 11 A.2d 331, 338 (1940): "The state has an interest in the corporate structures erected under its authority. Having provided for the mergers of corporations, they are not regarded with disfavor. On the contrary, mergers are encouraged to the extent that they tend to conserve and promote corporate interests." The theory is that the state through its corporation laws is seeking to promote commercial activity and general economic welfare. See Morris v. Public Utilities Co., 14 Del. Ch. 136, 122 Atl. 696 (1923).

The first case slanted heavily against any great protection of personality. In 1878, the United States Supreme Court decided, in *Hall v. DeCuir,*[24] that a Louisiana reconstruction statute requiring of railroads and other common carriers such as steamboats that their rules and regulations make no discrimination on account of race or color, was unconstitutional. The court thought the statute interfered with interstate commerce; in Chief Justice Waite's words (at p. 488):

> "State legislation which seeks to impose a direct burden on interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress."

A judgment in favor of a Negro who had been denied accommodations in a section reserved for white passengers was accordingly reversed.[25] The doctrine stood as late as the *Chiles* case in 1910, when a regulation of the Chesapeake & Ohio Railroad reserved a car for white passengers and a Negro brought action for being expelled from such a car. When the case reached the Supreme Court the Court decided that such a regulation was not prohibited by the Constitution since it was not a burden on interstate commerce if "reasonable" by common law standards.[26] This drove a wedge into *Hall v. DeCuir,* since it logically followed from the Court's reasoning in the *Chiles* case that an individual had justiciable interest in such regulations, and that regulations of the corporation if not "reasonable" might be unconstitutional, at least as impeding the free flow of interstate commerce.

Meanwhile the Congress of the United States had intervened. In 1903, it had amended Section 3 of the Interstate Commerce Act so as to make it unlawful for any carrier to subject any person to any undue or any unreasonable prejudice or disadvantage whatever. The Congress had in mind rebates and preferential rates and services. But in *Mitchell v. United States,* the statute was held to give to all travelers the right to equal facilities, though not to outlaw segregation.[27] The legal controversy as to what is "equal treatment" required to be afforded individuals by common carrier regulation is still going on. Recent cases, such as *Bob-Lo Excursion Company v. Michigan,*[28]

24. 95 U.S. 485 (1878).

25. Unquestionably the Supreme Court's decision in the case cited was influenced by the growing tide of hostility towards reconstruction legislation generally. Even so, the specific holding of the case merely prohibits state action on the ground that the field was exclusively reserved to the Congress. At that time, of course, the doctrine had not emerged that individuals acquire direct rights through the first ten Amendments to the Constitution and the interpretation of the Fourteenth and Fifteenth Amendments had not crystallized.

26. Chiles v. Chesapeake & O. R. R., 218 U.S. 71 (1910).

27. 313 U.S. 80 (1941).

28. 333 U.S. 28 (1948).

strongly suggest that *Hall v. DeCuir* and possibly even the holding in the *Chiles* case that segregation is "reasonable" are no longer law. "Reasonableness" presumably changes with the times and the community mores.

Without change of constitutional doctrine, one effect of *Mitchell v. United States* was to introduce a new field in which rules of law became applicable to corporate regulations and practices, as they affect interstate commerce. The clear right of a corporation to make rules and regulations and to adopt practices was recognized, but such rules and practices must not "burden interstate commerce." If "reasonable," they do not burden interstate commerce; if "unreasonable," they do. It followed that within the interstate commerce field a rule or practice must be reasonable; and one criterion of reasonableness is whether without justification it improperly discriminates or differentiates between one individual and another. In practice, there is little real difference between this criterion of "reasonableness" and the criterion of "equal protection of the laws" applied to state action.

It does not appear to the writer that the field opened in the *Mitchell* case is limited to public utilities, though the rule-making practice is more commonly exercised by public utility enterprises. A rule or practice, for example, imposed by an oil company, a chain of gasoline stations or even chain stores, could conceivably burden interstate commerce quite as much as any regulation of a railroad. If, for example, a rule was made forbidding sale of gasoline to any car containing both Negroes and whites, the case would squarely be presented.

III

A third line of authority involves the direct application of the Bill of Rights and the Fourteenth and Fifteenth Amendments to corporate action and practices. If corporate regulations can be a burden on interstate commerce, whose regulation is delegated to the Congress, they may also be a burden on or denial of civil rights whose preservation is constitutionally guaranteed. This doctrine indeed had already been stated by Mr. Justice Stone in *Jones v. City of Opelika* in the case of a municipal corporation.[29] But, four years later, the doctrine was extended by the doctrine of *Marsh v. Alabama.*[30] The substance of the doctrine there laid down is that where a corporation is privately performing a "public function," it is held to the constitutional standards regarding civil rights and equal protection of the laws that apply to

29. 316 U.S. 584, 600-610 (1942).
30. 326 U.S. 501 (1946).

the state itself. In the *Marsh* case, a corporation owned and operated a company town. A company employee deputized to carry out minor police functions arrested a Jehovah's Witness for distributing literature and so forth on its streets, the specific charge being in the nature of trespass on private property. The Court held that administration of private property of such a town, though privately carried on, was nevertheless in the nature of a "public function," that the private rights of the corporation must therefore be exercised within constitutional limitations, and the conviction for trespass was reversed. For those interested in a clear distinction, the decision of *Watchtower Bible & Tract Soc. v. Metropolitan Life Co.* is interesting.[31] There the company owned a large apartment house and a Jehovah's Witness insisted on the right to enter the corridors and halls of the building and to call on the individual residents. The New York Court of Appeals fully accepted the doctrine of *Marsh v. Alabama,* but held that operating the internal corridors of an apartment building was not a "public function" in the same sense as operating streets in a company town—an entirely reasonable line to draw.

It had been observed in *Marsh v. Alabama* that ". . . the corporation can no more deprive people of freedom of press and religion than it can discriminate against commerce." [32]

In *Republic Aviation Corporation v. NLRB* the Supreme Court stated that the rights of private property must yield to rights created by federal statute.[33] *A fortiori,* this would be true in the case of rights created by the Constitution itself. It remained only for a square holding that the Bill of Rights created individual rights as well as limitations on governmental or state action.

And, shortly, such a decision came down. This was the now famous case of *Shelley v. Kraemer,*[34] a litigation attempting to enforce a covenant prohibiting transfer of real property to a Negro. The Court observed,

> ". . . the rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." [35]

Without squarely holding that all covenants of the nature complained of were void, the Court did hold that any process of law in a state court enforcing them was action prohibited by the Fourteenth Amendment.

31. 297 N.Y. 339, 79 N.E.2d 433 (1948).
32. 326 U.S. at 501 n. 4.
33. 324 U.S. 793 (1945).
34. 334 U.S. 1 (1948).
35. *Id.* at 22.

In view of the square holding of the Court as to the existence of the individual constitutional right, it was perhaps unnecessary to seek state action and strike that down.

There remains as unfinished business the classic doctrine of the *Civil Rights Cases*.[36] There, it had been squarely decided that civil rights of individuals, though guaranteed by the Constitution against state aggression,

> ". . . can not be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs or judicial or executive proceedings. The wrongful act of any individual unsupported by any such authority, is simply a private wrong."

There is a gap in direct application of constitutional rules to corporate action which the courts have not yet bridged. *Jones v. Opelika* was a case involving a municipal corporation which, of course, was an arm of the state. *Marsh v. Alabama* involved action of a private corporation, but it had invoked the state police power when it prosecuted for trespass. *Shelley v. Kraemer* was a private covenant, but state power had been invoked when the plaintiff petitioned to the state courts to secure enforcement. The case remains open, so far as authority is concerned, where the corporation is able to enforce its rule, or carry out its practice, without calling on the state to assist in its enforcement. Though the area is narrow in legalistics, it is immense in economics: most corporate practices and regulations are directly applied. Invasion of personality can come simply from refusal to sell or give service.

Some advances have been made even in this field. Corporations or associations, private in character, but dealing with public rights, have already been held subject to constitutional standards. Political parties, for example, even though they surrender statutory organization and are in form private clubs are within this category. So also are labor unions on which statutes confer the right of collective bargaining. Thus, in *Steele v. Louisville & Nashville R. R.* it was observed,[37]

> "If . . . the [Railway Labor] Act confers this power on the bargaining representative of a craft . . . without any commensurate statutory duty towards its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is

36. 109 U.S. 3 (1883).
37. 323 U.S. 192, 198 (1944).

also under an affirmative constitutional duty equally to protect those rights."

And a state court has held that a labor union can not be regarded as a private association of individuals free of constitutional restraints, but that the Fifth Amendment applies to all union officials exercising the privileges granted them under federal statutes.[38]

Again, a private corporation leasing and operating a municipal swimming pool is under a constitutional duty to adopt regulations giving equal protection to all citizens (*Lawrence v. Hancock*[39]). The private practice of a corporation (or apparently any aggregate body) taken under or in furtherance of a privilege granted by the state falls within the area of constitutional control.

But this strongly suggests that corporations enjoying privileges of any kind under statutory arrangements, and acquiring power of discrimination, may be held to like tests. The radio industry functions almost entirely under the privileges and licenses granted by the Federal Communications Commission; it would seem inconceivable that the provisions of the Fifth Amendment should not apply to the corporations holding these licenses, certainly in their exercise of the license privilege. And this would be true even outside the areas specifically covered by the Federal Communications Act. Where, likewise, under the provisions of the present Defense Production Act, an industry Advisory Committee formulates and administers rules for industrial allocation or, as in the case of credit, passes on the general standards by which loans shall be granted or withheld and is correspondingly granted immunity from antitrust law provisions, the principle would apply. In these cases, the committees of the corporations constituting them have become in some measure agencies of federal economic policy.

IV

Remains the final question: is a corporation, having achieved economic power making discrimination possible, subject to constitutional tests as to its practices and regulations *merely* because it is a corporation? Obviously the act done or practice adopted must really invade personality contrary to some constitutional privilege, else there is no wrong. In the absence of very considerable concentration of economic power in a given area, the problem does not arise. But, if there is power, accompanied by invasion of an individual right guaranteed by the Constitution, then it would seem that the mere enjoyment of a state corporate charter is sufficient justification for invok-

38. Betts v. Easley, 161 Kan. 459, 169 P.2d 831 (1946).
39. Lawrence v. Hancock, 76 F. Supp. 1004 (S.D. W. Va. 1948).

ing operation of the Fourteenth and Fifteenth Amendments. It has steadily been held that

> "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." [40]

Though the statement was made by Mr. Justice Brandeis in the course of a dissenting opinion, this doctrine has never been questioned. It is commonly invoked by state courts, and for that matter by corporations, to justify the right of a legislature to change or modify stockholders' rights. Implicitly, it would seem, state action in granting a corporate charter assumes that the corporation will not exercise its power (granted in theory at least to forward a state purpose) in a manner forbidden the state itself. Mr. Justice Bradley's doctrine in the *Civil Rights Cases,* that a private wrong does not offend the Constitution, ceases to have application if the wrong-doer is a corporation, enjoying the corporate privilege and corporate powers by grant from the state and thereby attaining a position giving it power to commit the wrong.

It is here that the phenomenon of concentration becomes controlling. For concentration accomplishes two results. It sets up the large corporations, members of the concentrate, as economic mechanisms on which the community and the public rely for goods or services. Concentration means either no choice or a very limited choice of suppliers of such goods or services. By reason of such a limited choice, the members of the concentrate acquire power substantially to invade constitutionally-created rights of personality. If there are fifty stores in the vicinity from which an individual can satisfy his needs, discriminatory practice by any one of them has little or no effect on the individual. If there is a single chain of stores, the effect may be to drive him out of the neighborhood.

One can imagine, for instance, a summer community, served only by a chain store system which falls in with a local scheme to exclude outsiders. Included in that scheme might be a refusal by the chain store to serve those individuals on the same basis as the others. On this theory, if the chain store really afforded the chief supply function in the community, denial of such service would be denial of equal protection of the laws, and possibly a taking of property; and court action would be to redress the wrong. Obviously the imposition of this class of liability does depend on actual power: were there

40. Liggett Co. v. Lee, 288 U.S. 517, 545 (1933).

twenty groceries in the vicinity, the fact that this one corporation pursued this peculiar course would not suffice. There would be no remedy, there being no substantial impact. The corporation operating the single store would not have power sufficient to affect seriously the life of any individual. On the other hand, if substantially all these stores were controlled by the same corporation, the power would be obvious. The second basis—power residing in an instrumentality created by the state—would be present, and the doctrine would come into play. The denial by private employees of complainant's right to deliver pamphlets on the streets of one mill town, dealt with in *Marsh v. Alabama,* involved a mixture of corporate and "public" power. The court argued that this denial of a constitutional right was carried out by the corporation employee in substantial performance of public functions. But what made them "public" except the fact that the one corporation owned the entire town? The whim of a single houseowner directed towards his tenants' religious practices might be private. The prejudice of the owner of ninety per cent of the available housing would be a public matter. One may reasonably forecast, in the future, direct application of constitutional limitations to the corporation, merely because it holds a state charter and exercises a degree of economic power sufficient to make its practices "public" rules.

A fortiori, this would be true if the corporation occupied a special status, always providing it had actual power to invade personality. Thus, states commonly do limit the number of charters they will grant to banks and insurance companies, as well as to public utilities. Special status is accorded indeed to some corporations under the prevailing federal plans for industrial regulation, a familiar one being exemption from the antitrust laws. The "private" quality of a corporation under these circumstances is no more visible than was the private quality of the Bank of the United States in *McCullough v. Maryland.*

V

In this new field of constitutional law as applied to economic life various areas of impact are apparent.

The first area of impact is that whose application has already been forecast: the impact of the control of the economic organization on the consumer or patron by restriction of its goods and services. This is the case of the would-be customer of the chain store, of the would-be tenant in a housing development, or the would-be patron of a gas and light company. Or, for that matter, the case of the small manufacturer seeking steel from the great organizations.

A second prospective area of possibly emerging law extends into the great and ill-defined field of access to business opportunity. It is far more difficult, and almost completely uncharted. Thus companies like the General Motors Corporation, or Standard Oil of New Jersey, dispose of the livelihood of great numbers of individuals nominally engaged in small private enterprises as agents for the sale of cars, operators of small gasoline stations. Distribution of the product is a necessity in rendering the service which the public appears to demand of these concerns. The public would demand this service of the state were private concerns not prepared to provide it. Can corporations in the position of these powerful concerns discriminate as between man and man and group and group in dealing with these areas of livelihood-opportunity? Can they withdraw a sales agency agreement from one man because the general superintendent of the district dislikes him or wishes to give the opportunity to a relative? And so on, through the whole complicated gamut of operation from distribution back to production.

There is no point in speculating here as to solutions which may be reached tomorrow. The difficulties are evident. Authority to select personnel, to judge the effectiveness of agents, and to adopt methods of distribution or production is almost essential to the effective carrying out of any operation. Courts have long declined to enter the field of business operation or to review the business judgment of corporate managers. The modern state, either through its executive or legislative arm, would probably be cautious in entering the field for the same reasons. This is, perhaps, the precise difference between the dogma of socialism and the American doctrine of seeking, pragmatically, a social result. Entry into internal operations means assumption of final responsibility for the ultimate result. If American thinking tends to look askance at the great corporate bureaucracies, it is even more distrustful of government bureaucracy.

It is allowable to forecast, therefore, that in this early stage of economic constitutional law, the application will be primarily to the impact of corporate power on consumers of goods and services; but that the doctrine will be applied with extreme caution to operations of the economic opportunities implicit in them.

The latter field suggests a development of the field of law we commonly call antitrust legislation. Here, undeniably, the doctrine of "restraint of trade" can have application; but instead of a direct attempt to apply specific rules, the effort is made to create an economic situation giving the maximum freedom of economic opportunity. When, in 1950, the American Government brought action against the American

Telephone & Telegraph Company to require it to divest itself of its huge subsidiary, the Western Electric Company, the specific ground alleged was that American Telephone & Telegraph Company was the only substantial American buyer of telephone equipment. So long as it owned the manufacturing subsidiary, no outsider would have real opportunity to sell equipment to the telephone company. Consequently, the Government argued the ownership of this supplier by the telephone monopoly "restrained trade." In conclusion, the Government sought that the telephone company should not only divorce itself from its subsidiary, but should be required to satisfy its equipment needs by permitting any supplier to bid for contracts. Feeling its way in the new field, the modern state sought application of the antitrust laws rather than of a constitutional doctrine. We may forecast, perhaps, that, for some time to come in the field of economic functioning, these rather than the constitutional rules will be the area of impact in this new field of legal and social thinking.