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THE DEVELOPING LAW OF CORPORATE CONCENTRATION

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I

THE LEGAL INSTITUTION known as "the corporation" has served as an avenue for fundamental changes in the system of ownership and economic organization familiarly known as "the private property system." By making possible the aggregation of many ownerships, it has constrained the erection of a system placing management in the hands of a non-ownership group, though still nominally representative of the owners. The exigency of technical development has favored vastly increased size and scope of the corporate enterprise. This has been powerfully aided by the system of distribution dependent on national markets. Great size in many crucial fields thus becomes advantageous.¹

Subsequent to 1920, large corporations have found it possible to generate their own capital by withholding part of their earnings from distribution to their shareholders.² They were thus freed from the necessity of gathering capital from the savings of a great number of private individuals. This still further removed corporations which had achieved size from dependence on the system of individual capital accumulation, individual choice of investment, and individual assumption of risk.

The aggregation of individual savings for investment purposes has likewise taken place. The most important single avenue by which this has occurred has been the growth of the great insurance companies, more especially life insurance companies. By combining the feature of insurance

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¹ Stocking and Watkins, *Monopoly and Free Enterprise* 53-84 (1951).

² This is characteristic of industrial corporations, though it is not true of public utilities and railroads. General Electric Co., General Motors Co., United States Steel Corp., and the chief members of the Standard Oil group, for example, have not been significantly in the capital markets for thirty years.

with their ability to handle savings, private individuals have felt more secure, by entrusting their savings to these companies. As of the present, the function of applying individual savings to investment and capital appreciation has increasingly come into the hands of a relatively few large insurance companies, and the tendency is increasing.³

Aside from financial corporations, the number of essential industries controlled by concentrates is great, though measurement is a matter for economists rather than for lawyers. The situation in any case is well recognized. The most recent study⁴ carries forward a study made by Professor Clair Wilcox.⁵ Of interest is Professor Wilcox's classification of industry into 135 different trades. A "concentration ratio" is worked out. Fifty-seven per cent of the value of all manufactured products was accounted for by industries in which the four largest producers or less turned out half the total value. Concentration was highest, on the whole, in the most essential industries.

The existence of concentration and the concentrates is here assumed rather than argued. There is debate as to whether the trend is toward concentration, or away from concentration, or whether concentration is more or less static. The most recent dispassionate summary of the subject by Professor M. A. Adelman,⁶ of the Massachusetts Institute of Technology, reviews the material, concluding that the evidence is not determinative either way, but submits as a demonstrable fact that the largest 139 manufacturing corporations held 49.6% of the assets of all manufacturing corporations in 1931, and held 45% of such assets in 1947—a slight reduction in percentage, though, of course, a huge increase in actual volume.⁷ In a country the size of the United States that degree of concentration would

³ According to the Institute of Life Insurance, *Life Insurance News* (Dec. 28, 1950), there were 83,000,000 life insurance policy holders in the United States. Even allowing liberally for duplication, roughly half of the entire population, and far more than half of its income-receivers, use the life insurance companies as a vehicle for savings and investment. Total assets were over \$63,000,000,000 at the end of 1950. Though there are 609 life insurance companies, approximately 70% of these assets are in the hands of the ten largest companies (Shanks, Statement before Subcommittee on Study of Monopoly Power of House of Representatives Committee on Judiciary, Nov. 30, 1949, reprinted by Prudential Life Insurance Co., 1950). For a recent press summary, see *N.Y. Times*, § 3, p. 39, col. 6 (Dec. 17, 1951); for their participation in the Voluntary Credit Restraint Committee, see *N.Y. Times*, § 2, p. 50, col. 5 (Dec. 20, 1951).

⁴ For a recent economic study on the subject, see Stocking and Watkins, *Monopoly and Free Enterprise* (1951).

⁵ Wilcox, *Competition and Monopoly in American Industry* (TNEC Monograph No. 21, 1940).

⁶ *The Measurement of Industrial Concentration*, 33 *Rev. of Econ. and Stat.* 269 (1951).

⁷ *Ibid.*, at 276.

be sufficient to pose legal, governmental and social problems so long as it continued.

Further, concentration is by no means wholly an affair of the 139 "largest" corporations. Key industries of crucial importance are frequently concentrated, even though in themselves they are relatively small in terms of asset values; and through this concentration they exert a degree of control disproportionate to their size. Much of so-called "small business," reckoned in assets, is actually controlled by a concentrate. Thousands of gasoline stations, motor car dealers, and so forth, are nominally individual enterprises, but their major policies are necessarily dictated by the companies whose products they sell.⁸ On any theory, the phenomenon of concentration is so great that its juristic effects cannot be disregarded.

We may take as a base the unchallenged minimum of facts, leaving the economists to measure the trends. It is here submitted that a juristic pattern of dealing with concentrates is emerging. The purpose of this paper is to examine this pattern.

II

Upon the evidence, the following propositions seem warranted:

(1) An immensely important area of American industrial and financial economy is administered in each field by "concentrates," composed of not more than five or six large corporations in each identifiable field. (The word "concentrate" is here used in preference to the newly-coined word "oligopoly.")

(2) In essential fields, that is, where the community has come to rely on the concentrate as a source of supply of a commodity or service deemed necessary or powerfully desired by the community, certain minimum and more or less uniform requirements are imposed by the community upon the concentrate.

(3) These requirements fall into two categories:

(a) requirements insisted on by the community as a whole. First among these is the requirement that there shall be an adequate supply of the commodity or service, made available at a price "acceptable" to the community. Other requirements are beginning to emerge including, among others, the maintenance of employment, reasonably continued technical advance, creation of a viable system of supply and distribution in times of emergency such as war, or acute need for national defense.

⁸ In 1940, Professor Clair Wilcox estimated that 57% of the value of all manufactured products was accounted for by industries in which the four largest producers, when there were that many, turned out half or more of the total value. Wilcox, *op. cit.* supra note 5, at 234.

(b) requirements addressed to protection of individuals dealing with the concentrate or any part of it. First among these is the emerging requirement that the commodity or the service shall be rendered to individuals without discrimination. A second group of requirements relates to protection of labor, which finds specialized expression in labor law and corresponding administration.

These requirements appear, expand and develop as the American economy develops, and as community consciousness of its needs and of the needs of masses of individuals emerges and crystallizes; or as the impact of war or emergency causes the community to deal with a given situation. Such dealing is commonly accomplished politically, with the intervention, friendly or hostile, of the national government. The impact of the concentrate on the state and the state on the concentrate is thus steadily growing.

(4) In the American system, the result of such an impact has invariably been the working out of a rudimentary "plan" defining, with greater or less precision, the relations between the concentrate and the political state. These rudimentary plans may remain static for some period of time, though they are more likely to develop and to expand the area of their definition and scope as impacts increasingly take place.

(5) This evolution is not a matter of chance. In modern industrialized society, neither the political state nor the concentrate can avoid the impact, nor can they avoid the ensuing regulation of their relationships. Choice of action lies between greater or less exactness in detail in defining relations. The issues to be resolved are the criteria by which the management of the concentrate shall be deemed to have performed (or failed to perform) the requirements imposed by the community.

(6) The results of the arrangements or rudimentary plans emerging from the successive impacts between concentrates and the community are embodied in law. This law may take the form of court decisions, notably decrees in antitrust litigation, legislation, or administrative regulation. When thus expressed, such law may be called "explicit law."

(7) Existing and foreseeable community requirements, even when fulfilled by concentrates without impact or resulting legal arrangements, though they have not resulted in explicit rule of law, are nevertheless foreseeable, enforceable obligations of the concentrate. They are, in substance, inchoate rules of law, failure to respect which leads to prompt impact and an arrangement compelling their fulfillment.

(8) The resulting content suggests the gradual evolution of a legal system of economic rights and privileges, duties and obligations evolving with

the evolution of the industrial and financial system of the United States. This system at present relies upon and expects the acquiescence of the concentrates in the defined objectives of the American democracy.

The issue is thus not between a "free" or unplanned economy and a "planned" economy, but between differing views of the objectives for which planning shall be carried out, the extent and definition of obligations when these objects have been apprehended, and, endlessly, what groups shall make these determinations.

This evolution in the American system parallels the evolution of socialist institutions in other parts of the world. Thus, separation of management from ownership, which is rapidly becoming complete, parallels the elimination of private ownership in socialist countries and the substitution of politically appointed figures for groups selected by and responsive to private business communities.

The antithesis, accordingly, is no longer between the classic form of "capitalism" and classic "socialism." It is rather antithesis between methods, objectives, motivations and directing groups within two different legal-economic systems having a good deal in common. The chief difference is the differing emphasis given to individual choice of occupation and way of life.

III

The foregoing summarizes the essential conclusions reached after examination of a very great amount of evidence. The corporation, historically, has been the avenue by which change from the private possessory system of the late eighteenth and the nineteenth centuries toward the organization system of the twentieth century has taken place in the United States. This parallels the change in political organization which appears to be the avenue by which changes took place in Europe. As a result, in the American case, the great corporation, as monopoly or in a concentrate, has become increasingly an arm of the state, held to certain of the limitations imposed on the state itself by the Bill of Rights requiring the concentrate to respect certain individual rights and to assure a measure of equal protection of the laws within the scope of its power, as well as to fulfill the economic function it has undertaken of production, supply and service.

It is true that the application of law to this fact situation has been apparently disparate. Some situations have been dealt with by special acts of Congress, some by decrees rendered in antitrust cases, some by contracts with government agencies, some by a combination of governmental action of one sort or another, and some by application of rules of Consti-

tutional law in extraneous litigation. But in all cases the net result has been to erect a relationship between the political state and the concentrate. Careful examination supports the statement that, factually, a pattern of political-economic organization has emerged; that it recurs irrespective of political parties, and that its root cause is the dependence of the community on a concentrate of large corporations dominating essential industries, and that this necessarily entails the responsibility of these concentrates to meet more or less acceptably the community demands.

There is, clearly, no possibility of presenting here more than an outline of the evidence in support of these hypotheses. What follows therefore is rather an annotated outline than a full exposition.

It is safe to say concentration in the hands of not more than four great corporations is the economic structure of over half the volume and certainly of the most essential output of American industry.

The history of developing law of concentrates is almost invariably history of an impact between a concentrate of great corporations and the community, leading eventually to an arrangement of some sort governing the relations of the concentrate with the community through the intervention of the political state. A partial list follows. There has been excluded from this list the transportation industry because its situation is well known,⁹ and also because of its peculiar historical position. Under American law, transportation as a public utility was always both the beneficiary of, and subject to, regulations because of the peculiar position it had vis-à-vis the state. Electric light and power is not excluded, not because it is not also subject to this historical requirement, but because in this industry certain peculiar characteristics appeared transcending the normal public utility regulation ownership.¹⁰ What follows is substantially an annotated list of an impressive number of specific situations already covered by specific government-industry plans brought into being by legislation, court decision, or administrative action, or a combination of these.

1. *Commercial Banking.* This, of course, stands in a class by itself, owing to the peculiar relation of commercial banking credit with the national currency. The various impacts on the community are matter of American history. Among these may be mentioned the controversy over the second

⁹ Yet, schematically, the enactment of the Interstate Commerce Act of 1887, 24 Stat. 379 (1887), 49 U.S.C.A. § 1 (1951), was probably the greatest single illustration of the principle here urged, and probably the first great instance of impact with resulting adjustment. See Sharfman, *The Interstate Commerce Commission* (Commonwealth Fund, 1931).

¹⁰ The various branches of federal power legislation were distinctly not the normal rate-regulation measures familiar in state legislation. They were, in terms, acts to organize or reorganize, in some measure, the structure of the industry.

Bank of the United States in the Administration of Andrew Jackson;¹¹ the ensuing and unsatisfactory experiments with state banking systems; the emergence of the national banking system in 1864;¹² the repeated banking and credit crises up to and through 1907;¹³ at length, the development of a recognized central planning system beginning with the Federal Reserve Act of 1914,¹⁴ the breakdown of the system in 1933, the revisions of the Federal Reserve Act in 1933-34-35,¹⁵ and minor revisions since that time. Concentration existed de jure, of course, in Andrew Jackson's time, and was then dissolved. It existed de facto commencing roughly in 1890 and continuing substantially through the decade of the 1920's.¹⁶ The commercial banking pattern is, however, unique and not likely to be duplicated. Nevertheless, the final emergence of the Federal Reserve Bank as a central planning and steering organization deserves a place in the list.

2. *Capital Credit (Investment Banking)*. Application of capital through the great life insurance companies and like agencies has reached no similar arrangement with the state except in emergencies. Yet, as of today, concentration of the function of capital application has reached a point suggesting the likelihood of some such adjustment. Presently, a temporary adjustment exists by arrangement between the Federal Reserve Board and the National Voluntary Credit Restraint Committee, which in turn operates through regional committees.¹⁷ These committees, under authority of the Defense Production Act, are exempted from liability under the antitrust laws,¹⁸ and are permitted and encouraged to lay down rules guiding the direction of flow of savings into capital loans, the expressed

¹¹ The literature of this struggle is extensive. See, for example, 5 Channing, *History of the United States* 434-66 (1921); Catterall, *The Second Bank of the United States* (1903); James, *Andrew Jackson, Portrait of a President* (1937) (especially cc. 13, 16 and 17); Schlesinger, *The Age of Jackson* (1946).

¹² 13 Stat. 100 (1864), 12 U.S.C.A. § 11 (1945). See, for a summary of its purposes, *Davis v. Elmira Savings Bank*, 161 U.S. 275 (1896).

¹³ Elaborated in the record of the so-called Pujo Committee.

¹⁴ 38 Stat. 251 (1913), 12 U.S.C.A. § 221 (1945); explained in *United States v. Davenport*, 266 Fed. 425 (W.D. Tex., 1920).

¹⁵ 49 Stat. 704 (1935), 12 U.S.C.A. § 1 (1945) amending the original Federal Reserve Act of 1913. Mr. Marriner Eccles who formulated the bill stated: "laissez-faire in banking and the attainment of business stability are incompatible. If variations in the supply of money are to be compensatory and corrective . . . there must be conscious and deliberate control." Mitchell, *Depression Decade* 168-71 (1947).

¹⁶ Developed by investigation of the Senate Committee on Banking and Currency, commencing in 1931, for which Ferdinand Pecora was eventually counsel.

¹⁷ The record of this committee is not yet available. It operates under supervision of the Federal Reserve Board which approves its plan of operation.

¹⁸ 64 Stat. 798 (1950), 50 U.S.C.A. App. § 2071 (1951).

reason for the operation being to prevent loans which may be considered as "inflationary," and to steer capital towards industries deemed essential to the community or needed for the national defense.

This is an emergency situation which may vanish as and when the present emergency is over. But if and when the state intervention is withdrawn, the policies of a relatively small number of great companies will remain to operate as a planning and control apparatus without state intervention. Should the result fail to meet the needs of the community, it would seem almost inevitable that some arrangement will be demanded.

3. *Steel*. Steel is admittedly a concentrate. Prior to 1946 the steel concentrate and the community at large had no determinative impact upon each other, except for the emergency impacts in World War I and World War II. But at the conclusion of World War II, such an impact did take place, chiefly because the civilian demand for steel far outran the existing capacity. The demand anticipated by the steel industry itself (not over 90 million tons) proved a very great under-estimate;¹⁹ the demand actually proved to be nearer 110 million tons. The ensuing shortage led to a great controversy in 1947, partly as a result of which the so-called Federal "Voluntary Allocation Act"²⁰ was passed. Under it, the industry committee representing the steel industry undertook to obtain state approval of allocation plans which, in any case, were being put into effect by the industry from sheer necessity.²¹

The experience in steel is brief, but perhaps determinative. A still greater impact was, of course, caused by the defense emergency presently prevailing. The allocation plan commenced in time of peace has been resumed and stepped up in time of emergency. Yet the interesting fact is that even prior to the defense emergency, a combined industry-state planned operation was demanded—demanded, indeed, quite as much by the industry as by the community.

4. *Aluminum*. This was a monopolized industry up to the close of World War II. Monopoly had occasioned complaint and impact, and the classic first impact—antitrust action—had been commenced by the Department of Justice. At the close of the war, the United States Government ob-

¹⁹ Estimate of Mr. Sykes, President of Inland Steel Co., on behalf of the steel industry, presented to the Senate Subcommittee on Small Business.

²⁰ 61 Stat. 945 (1947), 50 U.S.C.A. App. § 1912 (1951). Its machinery was cumbrous; about 11% of steel products distribution was eventually controlled by industry plans authorized under the Act, and approved by the Secretary of Commerce.

²¹ *Ibid.*, at § 402(a); 708(a) and (b) of the Defense Production Act, 64 Stat. 798 (1950), 50 U.S.C.A. App. § 2061 (1951), exempting approved plans from the prohibition of the antitrust laws is taken from the Voluntary Allocation Act of 1947.

tained a final decree requiring dissolution of the industry.²² But at that time the United States Government had built a great number of aluminum plants, a majority of which were being operated by the Aluminum Company of America. Agreement was finally reached on the erection of the aluminum industry into a concentrate composed of Alcoa, Reynolds Metal Company and Kaiser Aluminum Company, all of more or less comparable size, and fitted out with war plants.²³ More recently a fourth member of the concentrate has appeared: Anaconda Copper Company has been assisted to enter the aluminum business.

At the moment, of course, all aluminum is severely controlled in the emergency interest of national defense. Absent this emergency, it is quite conceivable that for some period of time the national supply of aluminum concentrated in three (or perhaps four) great companies will suffice, and that an "acceptable" price will be maintained, occasioning no further impact. Clearly, should the supply of aluminum prove insufficient there will be further intervention by the government.

5. *Electric Light and Power.* In addition to the normal, or at any rate historical, exercise of power of regulation over electric light and power, separate and distinct problems developed out of the great move towards concentration in the hands of great pyramid holding companies which characterize the decade of the '20s.²⁴ The salient facts of the controversy need no reviewing here. Partly as a protection to investors, and partly in an endeavor to bring the problem into manageable form, the Public Utility Holding Company Act²⁵ was passed, giving to the Securities & Exchange Commission the task of simplifying corporate structure, and providing for the integration of operation on more or less regional lines.

Simultaneously with this was an impact caused by the fact that the electrical industry in the United States had lagged far behind other industrialized countries in making electrification available to rural commu-

²² *United States v. Aluminum Co. of America*, 148 Fed. 2d 416 (C.A. 2d, 1945). Because four Supreme Court Justices were disqualified, by special act of Congress the Circuit Court of Appeals for the Second Circuit heard the case, Judge Learned Hand writing the opinion.

²³ Report of the War Assets Administration to Congress, Feb. 12, 1947, on "Aluminum Plants and Facilities." The government disposition of these plants furnished the basis on which Aluminum Co. of America successfully resisted the contention of the Department of Justice that the decree in the antitrust case should dissolve the company into a number of independent units.

²⁴ A long series of local struggles had cumulated to a national issue, largely dramatized by Senator George W. Norris of Nebraska. A not inconsiderable part of American political history in the decade 1920-1930 turned on this issue.

²⁵ Public Utility Act of 1935, 49 Stat. 803 (1935), 15 U.S.C.A. § 79 (1951). For history, economic and legal analysis of this whole subject, the reader is referred to *Twentieth Century Fund, Electric Power and Government Policy* (1948).

nities.²⁶ There being no legal power to compel extension of privately owned facilities (beyond relatively small extensions),²⁷ the United States intervened directly through the Rural Electrification Authority under the authority of the Rural Electrification Act.²⁸ The result was an extension of rural electrification with the result that, where about thirty per cent of farms were electrified in 1920, nearly ninety per cent were electrified in 1948, the increase being divided more or less evenly between private and government financed operations.²⁹

Simultaneously with this, a much larger piece of planning was going forward to the tune of bitter controversy, but nevertheless to the economic advantage of great areas. Again the means was direct government intervention, through government-constructed and government-owned production. In the southeast, this was done through the Tennessee Valley Authority; in the southwest, through the power development attendant on the Hoover Dam; in the northwest, through the power development of the Columbia River. The scheduled power development in the east, the St. Lawrence, was blocked owing to controversy over the Seaway. This is a pattern emerging slowly owing to determined opposition by the elec-

²⁶ In 1925, only 3.2% of the 6,300,000 farms in the United States were served by electricity. In 1935, only 10.9% were electrified. In that year, the percentages in some countries were these:

Denmark.....	85%	electrified farms
Germany.....	90%	" "
France.....	95%	" "
Netherlands.....	99.9%	" "

Jurisdiction to compel extension is exercised commonly by state public utilities commissions. Frequently the legal power to compel extension is, in terms, broad; but has been severely limited in practical application. But a Missouri commission found that an extension of seven hundred feet of trolley line to a schoolhouse was unreasonable. *Herchenroeder v. St. Joseph Co.*, 16 Mo. Public Service Comm'n Rep. 306 (1927). A California commission forced a water company to extend its mains two thousand feet to a settlement of one hundred families. *Lukrawka v. Spring Valley Water Co.*, 169 Cal. 318, 146 Pac. 640 (1915). A review of the cases indicates power to compel extension of lines and service within relatively narrow limits to areas where profitable operation can be demonstrated.

²⁷ The Rural Electrification Administration was originally created by the President by Executive Order 7037, May 11, 1935, under authority of the Emergency Relief Appropriations Act. Subsequently, in 1936, the Norris-Rayburn Act, the present Rural Electrification Act, was passed, 49 Stat. 1363 (1936), 7 U.S.C.A. § 901 (1945).

²⁸ *Ibid.* The best review of the large picture is found in Twentieth Century Fund, *Electric Power and Government Policy: A Survey of the Relations between Government and the Electric Power Industry* (1948). See also the "Report of the President's Committee on Water Power Policy," released by the Government in 1951.

²⁹ This conclusion fairly follows from the report of the Twentieth Century Fund Committee, *op. cit. supra* note 25, at 766-67.

tric power industry but with considerable definiteness.³⁰ Intervention of the state in this case is split into an illogical division of functions between the Securities & Exchange Commission, acting under the Public Utility Holding Company Act, regulatory powers granted to the Federal Power Authority, and direct jurisdiction of the Department of the Interior over the northwest and southwest production projects, while a fourth element is introduced by the separate powers and organizations of the Tennessee Valley Authority.³¹

6. *Oil.* The oil industry, commonly thought of as a stronghold of unregulated enterprise, in point of fact works under a planning system vigorously sought by it and largely organized by a mechanism of its own choice. Impact began first in the early '20s when a shortage was feared and the Federal Oil Conservation Board was constituted to assure an adequate supply. But in 1926 the problem was reversed when new discoveries, commencing with the Seminole Field in Oklahoma, cascaded supplies into the market, followed by the development of Kettleman Hills in California (1928), Oklahoma City (1929) and of the greatest oil pool in the world, East Texas (1930). As a result, the American Petroleum Institute in 1929 set up a plan for voluntary production control and market stabilization; the Department of Justice condemned this as violative of the Sherman Act. It then attempted a code of fair practice under Federal Trade Commission procedure (July, 1929) which proved ineffective. A voluntary committee on petroleum economics in 1930 worked with the Bureau of Mines and the Department of Interior, endeavoring to estimate petroleum consumption and equate production to these estimates, by curtailing acknowledged production. This involved state cooperation. In 1931 an agreement was made between three states—Oklahoma, Kansas and Texas—but much oil not contemplated in the agreement circulated between states, the three states found themselves unable to enforce their local policies, and the problem of "hot oil" became literally a fighting issue.³² Under the short-lived NRA, an oil code was approved on August 19, 1933, the

³⁰ The Government program was fought first in the courts on constitutional grounds. *Tennessee Elec. Power Co. v. TVA*, 21 F. Supp. 947 (E.D. Tenn., 1938), *aff'd*, 306 U.S. 118 (1939). The propaganda and political campaign is going on even now. For the earlier stages of it, see Ransmeier, *Shadow and Substance in the TVA Controversy* 6, Vanderbilt Univ., Papers of the Inst. of Research and Training in the Soc. Sci. (1941); Lief, *Democracy's Norris* (1939); Lilienthal, *TVA, Democracy on the March* (1944); Collins, *Uncle Sam's Billion Dollar Baby* (1945); Green, *An Analysis of the Real Cost of TVA Power* (1948).

³¹ Hodge, *The Tennessee Valley Authority, A National Experiment in Regionalism* (1938).

³² For the spectacular and turgid history, see Hayden, *Federal Regulation of the Production of Oil* (1929); Watkins, *Oil: Stabilization or Conservation?* (1937); Frey and Ide, *A History of the Petroleum Administration for War* (1946). For the local warfare and resulting martial law, see *Sterling v. Constantin*, 287 U.S. 378 (1932).

Secretary of Interior becoming the Oil Administrator, and a Federal Tender Board was set up to try to chart the flow of illegal or "hot" oil. This was submerged in 1935 when the NRA was held unconstitutional.³³ However, on February 22, 1935, Congress enacted the Connally "hot oil" Act as emergency legislation,³⁴ re-establishing the Federal Tender Board, and it is today substantially the enforcing agency, administered by the Oil and Gas Division of the Department of Interior. But the major planning operation was really set up in 1935 by an interstate oil treaty or compact executed by the Governors of the mid-continent oil producing states, and consented to by the Congress on August 27, 1935.³⁵ This compact has been continued to the present with biennial approval by the Congress, the twenty-one oil producing states being presently parties to it.

The substance of the agreement calls for the producing states to "coordinate" their policies through an interstate Oil Compact Commission, so that production shall be substantially equated to estimates of consumption made annually by the Bureau of Mines of the Department of Interior. We can perhaps exclude, as merely temporary, the World War II mechanisms for planning, carried on through the Petroleum Administration for War in conjunction with an industry committee, the Petroleum Industry War Council. As a practical matter, the Oil and Gas Division of the Department of Interior, created by an Executive Order in 1946,³⁶ operates in conjunction with the National Petroleum Council to estimate probable consumption, and the Interstate Commission regulates production. The heart of the job is thus an arrangement by which an estimate of production is made by a federal agency acting in conjunction with an industry committee, and an interstate oil compact causes the states so to handle their local regulation that production shall more or less equate to those estimates. A federal law, the Connally Act,³⁷ makes possible its enforcement.

³³ *Schechter Corp. v. United States*, 295 U.S. 495 (1935).

³⁴ 49 Stat. 30 (1935), 15 U.S.C.A. § 715 (1948). This is now part of the permanent Federal Code.

³⁵ H.J.R. 407, 74th Cong. 1st Sess. (1935), approving the compact under the provision of U.S. Const. Art. 1, § 10. For the scheme itself, see Statement of A. G. White, Chief Economist, Petroleum Economics Division, Bureau of Mines, Dept. of Interior, American Petroleum Institute, Petroleum Industry Hearings before the TNEC 547-550 (1942). For a criticism, see Rostow, A National Policy for the Oil Industry (1948). The petroleum industry generally appears to support the plan.

Obviously, specialized production problems (handling of offset wells, prevention of wasteful use of oil fields, and other conservation needs) enter the picture. Yet the dominant impact was a flow to market of suddenly discovered oil, resulting in a price for crude oil claimed to be below cost of production.

³⁶ Exec. Order No. 7932, amending Order No. 7756, 11 Fed. Reg. 5985 (1946).

³⁷ 49 Stat. 30 (1935), 15 U.S.C.A. § 715 (1948).

Yet the scheme would be probably impossible were it not for the fact there is considerable degree of concentration in refining so that, at bottom, the refineries really enforce a legal system of planning in whose devising they themselves played a major part.

This is strictly a planning operation. It approximates the outline of the production and consumption budgets which form part of the basic planning of the Labor Government which has just relinquished office in Great Britain.

7. *Sugar.* Reference need only be made to the Sugar Act of 1948³⁸ recently reenacted for a further period of four years. The salient portions of the plan appeared first in Section 608(a) of Title 7 of the Agricultural Adjustment Act³⁹ which in turn was superseded by the Sugar Act of 1937.⁴⁰

The concentrate in question is, of course, the small group of sugar refineries headed by the American Sugar Refining Company; these, however, have to work with a much larger group of smaller refineries, chiefly beet sugar producers in the Middle West. Here at the request of the industry and under a plan substantially conceived by them, the Department of Agriculture in each year estimates the amount of raw sugar which the country will presumably need, and fixes the quotas for imports from sugar producing countries outside the United States which will supply all the estimated raw material needed. Quotas thus fixed may be increased or decreased in the event that circumstances require it, but the intended effect is to stabilize the price of sugar by equating supply (controlled through the control of imports of raw sugar) to estimated demand.

This particular piece of industry-government planning is interesting because, again, it originated in demand for it by the industry rather than by the community. In point of fact, the plan has contributed to the finan-

³⁸ 61 Stat. 922 (1947), 7 U.S.C.A. § 1100 (Supp., 1951). The sugar industry has benefited—or suffered—less from *laissez faire* than most industries. British planning and control measures affected American Colonial history as, for instance, in the case of the Sugar Act of 1733. The late Charles W. Taussig, Esq., of New York, ran across a manuscript report of a committee of North American sugar producers and merchants who had repaired to London to lobby for inclusion of provisions advantageous to them. Aside from tariff control, with a differential granted to Cuba to assist her in achieving independent national status after the Spanish-American War, relatively little direct intervention occurred in this country until 1933. In the period of depressed prices in 1920–1933, a private plan was evolved by the late Thomas Chadbourne, Esq., of New York, the gist of which was that Cuba would reduce its sugar production and exports under stated conditions of production and price, the hope being that the United States' price of raw sugar would thus be stabilized. Though the Cuban government enacted the plan, it failed owing to increase of production elsewhere. Since adoption of the Agricultural Adjustment Act of 1933, 48 Stat. 31 (1933), 7 U.S.C.A. § 601 (1939), some sort of controlled system in the United States has been in virtually continuous operation.

³⁹ 48 Stat. 31 (1933), 7 U.S.C.A. § 608(a) (1939).

⁴⁰ 50 Stat. 903 (1937), 7 U.S.C.A. § 1100 (1939).

cial stability of the sugar refineries and also of the beet sugar producers and the relatively small Louisiana and Florida cane sugar producers. On the other hand, it has kept the price of a staple commodity to the American consumer higher than it might otherwise have been.

8. *The Radio Industry.* The impact here arose from the inescapable physical fact that more than one radio transmission station cannot occupy the same wave length.⁴¹ Mere requirement of order in the air waves forced the government, in the person of Mr. Herbert Hoover (then Secretary of Commerce) to attempt regulation and planning; and when the courts decided he had not power to do this in 1927,⁴² legislation was obtained from the Congress. The scheme of the Federal Radio Act of 1927⁴³ was amplified, in the light of further experience and considerable discussion, between the government authorities and the radio industry, by the Federal Communications Act of 1934⁴⁴ constituting the Federal Communications Commission with power to license stations and allocate wave lengths. The result of their allocation has been to constitute four major national networks—a concentrate; and smaller regional networks, again local concentrates.⁴⁵ Locally, of course, there can be a very considerable degree of free competition. But the sequelae of the plan have been unlimited—and the end is clearly not yet.

9. *Electronics.* The large and growing electronics industry has not yet reached as defined a pattern as some of these we have noted. Yet, prac-

⁴¹ In 1912, to carry out the provisions of the Treaty of London, the Congress of the United States passed an Act requiring all radio stations to require a license for the operation of a radio transmitter. 37 Stat. 302 (1912), 47 U.S.C.A. § 51 (1927).

⁴² By this time, the concentrate was complete. Under agreement of 1920, American Telephone & Telegraph Company, Westinghouse, General Electric, the then owners of Radio Corporation of America, had arranged matters under their patent rights. General Electric and Westinghouse were to make radio receiving sets. Radio Corporation of America did the selling. American Telephone & Telegraph had the exclusive right to make transmitters. American Telephone & Telegraph Company desired to limit its business to communications and it dropped out in 1926, in favor of Radio Corporation of America. The radio transmitting stations accepted the assumed power of the Department of Commerce for a brief period; these powers were then challenged and held insufficient, *Hoover v. Inter-City Radio Co.*, 286 Fed. 1003 (C.A.D.C., 1923) holding that the powers of the Secretary of Commerce were not discretionary; but the Secretary's regulations were in general accepted. But in 1926, the Zenith Radio Corporation simply ignored an order of the Secretary of Commerce who commenced criminal action under the penal section of the Act of August 13, 1912. The Court held that Secretary Hoover did not have the power he claimed, *United States v. Zenith Radio Corp.*, 12 F. 2d 614 (N.D. Ill., 1926), and the Attorney General of the United States rendered a similar opinion, 35 Atty. Gen. Rep. 126 (1926). President Coolidge then appealed to Congress and the result was the Radio Act of 1927, 44 Stat. 1162 (1927), 47 U.S.C.A. § 81 (1927).

⁴³ 44 Stat. 1162 (1927), 47 U.S.C.A. § 81 (1927).

⁴⁴ 48 Stat. 1064 (1934), 47 U.S.C.A. § 151 (Supp., 1951).

⁴⁵ [This footnote has been omitted.—Ed.]

tically, there has been both impact and a degree of ordered result arising out of the fact that a considerable part of armament work is electronic, and that the government of the United States is far and away the largest customer for the more advanced electronic developments. Just as after World War I, the government of the United States, largely acting through the Navy Department, caused the creation of the Radio Corporation of America, so today the handling of government orders is building, in advance, a concentrate chiefly of four companies—General Electric, Radio Corporation of America, International Telephone & Telegraph Company and Westinghouse—with a number of smaller companies like Sylvania slowly emerging. In this respect, the end is clearly not yet though the present stage of affairs is not fully disclosed for security reasons.⁴⁶

10. *Wire Telegraph*. Note need only be made of the wire telegraph industry. This is now a monopoly, created by Congressional approval given to the merger of Western Union Telegraph and Postal Telegraph.⁴⁷

Mention may also be made of the Packers and Stockyards Act of 1921⁴⁸

⁴⁶ The impact of the electronics industry upon the state is interesting, and perhaps may be the pattern for impacts in other industries—for instance, chemicals. World War II immensely widened the use of electronics, for example, in the fields of radar, proximity fuses, marine and submarine sonic devices and the like, as well as in more intensive developments of radio communication. Later, developments in the field of nuclear fission still further forced research and application in the electronics field. Research was carried on not only by the government itself but also by contract in the laboratories of the larger electronics companies. As practical applications were worked out, "developmental orders" were placed by the government, one objective being to give the plants of these companies experience in technique in manufacturing the ensuing devices. This, of course, had a double effect: the means of manufacturing the desired devices were brought into being, but also the companies themselves were made fully familiar with the latest developments in research available to the government even though they ranged beyond the discoveries in their own laboratories. The Atomic Energy Commission has announced that certain of these companies, including General Electric Company, have been given experimental contracts, for example, to turn atomic power into practical use. The larger companies thus become virtually partners of the government in developmental operations, and have, in consequence, an inevitable senior position in civilian and commercial development. But in the developmental stage the requirements of military secrecy as well as great technical efficiency necessarily limit the number of companies thus endowed with almost incomparable "know-how."

This, of course, has not prevented a series of skirmishes or even pitched battles between the government and the industry in other respects. A recent antitrust decree, *United States v. General Electric Co.*, 82 F. Supp. 753 (D.C.N.J., 1949), decided that General Electric Company, Westinghouse Electric Company, and others, had conspired to monopolize the incandescent electric lamp business, and at present proceedings suggest the possibility of a decree requiring General Electric to divest itself of part at least of its incandescent lamp business. Yet in dealing with this the court took note of the fact that the General Electric Company had accomplished outstanding mechanical and technological advances, making possible progressive price reduction policy.

⁴⁷ Communications Act of 1934, at § 222, 57 Stat. 5 (1943), as amended, 61 Stat. 501 (1947), 47 U.S.C.A. § 222 (Supp., 1951).

⁴⁸ 42 Stat. 159 (1921), 7 U.S.C.A. § 181 (1939).

which, however, must be taken in conjunction with the decree obtained as a result of a Sherman Act proceeding against the principal meat packers in 1920. Not infrequently consent decrees embody a scheme to provide, *ad hoc*, judicially, legislation serving as a basis of the plan. In one interesting case an antitrust decree furnished the sole base—for example, the handling of the gunpowder industry as a result of a decree obtained in *United States v. E. I. du Pont de Nemours & Co.*⁴⁹

The list could be multiplied at tedious length—and this without touching on the agricultural fields of staple grains, cotton, and the like, which are outside the industrial field and in general do not rest on the basis of corporate concentration of function. A word is in order relative to the industries, equally concentrated, which have not had serious impact and, therefore, have not been drawn into some industry-government planning operation.

Notable among these is the telephone industry. This is substantially a monopolized industry. But the planning of this giant corporation has so nearly kept step with the requirements of the community that there has been no major complaint. The service has been undeniably the best in the world. The rates have been on the whole acceptable. The extension of service has been rapid enough so that—save as an aftermath of war—telephone service has been substantially available to anyone who desired it. The corporation has severely refrained from using any of the by-product powers which can flow from power over communications.⁵⁰ The com-

⁴⁹ 188 Fed. 127 (C.C. Del., 1911). The "Powder Trust Case" and decree thereunder was one of the early pattern cases in concentrates. Having adjudged E. I. du Pont de Nemours & Company guilty of monopolizing the gunpowder trade, the court ruled that it should not only divest itself of part of this business but should set up, equip, staff, and finance the entry into the business of two other corporations (Atlas Powder Company and Hercules Powder Company), thus creating a concentrate of three in place of a monopoly of one. This has been, virtually, the pattern of the industry ever since. It is interesting to note that nearly forty years later an exactly similar solution was worked out in the aluminum industry, though in that case the government brought the two competitors, Reynolds Metals Company and Permanent Metals Company (later Kaiser Aluminum Company) into existence by sale to them of war plants.

⁵⁰ Of interest in this connection is the decision by the American Telephone & Telegraph Company, in or about 1924, to drop out of the radio broadcasting field though they had been one of four companies associated in developing this industry. The essential decision was that transmission of communications was a business in itself; entertainment, education, advertising and so forth, was a quite different business. Again, though Bell Telephone laboratories had pioneered much of the work in television, American Telephone & Telegraph Company took no part in exploiting the resulting industry, presumably for the same reason. A single instance of serious impact, when the community felt its requirements were not being met, arose from the shortage of telephones and telephone equipment immediately following World War II. The community accepted the company's statement attributing shortage to production restrictions in wartime, and so, rightly, were convinced that the company was doing everything possible to meet the requirements. This was a sharp contrast to the attitude taken both by and towards

munity, and indeed the state, have relied on the American Telephone & Telegraph Company and its component parts to satisfy the need; and community expectations have been met.

To a less extent somewhat the same thing is true of the automobile industry—again an industry dominated by concentration though with a high degree of competition within the corporate frame. This competition, and vigorous management, has in the main satisfied the community demands. There have been occasional preliminary skirmishes, leading to an industry policy of freely exchangeable patents; there have been moments (this was notable through 1947–1949) when the price policies of the companies and the practices of the dealer-marketing arrangements led to widespread complaint. But the impact was not severe and was safely navigated, at least for the time.

On all the evidence, of which the foregoing is a sample, it is submitted that the pattern of relations of the corporate concentrate with the government is the formation of arrangements which involve a greater or less degree of planning. This is no longer a dim possibility. It is an accomplished fact, a road regularly traveled, a process not generally known publicly but generally accepted.⁵¹

Indeed, in all these cases, if the government did not intervene a high degree of industry national planning would be occasioned by the mere fact of the concentrate itself. In that case, the planners would be officers of corporations, enjoying no public or political status. But planning there would be. It could hardly be otherwise. Even in the case of highly competitive industries—for example, the motor car industry—the margin within which competition is possible is relatively small. The area in which large companies are necessarily controlled by underlying conditions, as for instance, the cost of labor, the cost of materials, the break-even points of large factories, and so on, means that the bulk of their policies by sheer necessity coincide. Small, individual producers cannot easily invade the field. In any case, there is a large common denominator of habit and point of view among men who though they nominally, and perhaps actually, compete, nevertheless live in the same or similar backgrounds, deal with the same problems, are judged by the estimate of their colleagues in the industry,

the steel industry where the record disclosed that the steel industry had underestimated the post-war demand in the first place, believed it temporary in the second place, and was believed to have been motivated in part by fear of expanding production.

⁵¹ In the antitrust sector, this is beginning to be recognized. See a very thoughtful article by Carlston, *Antitrust Policy: A Problem in Statescraft*, 60 *Yale L.J.* 1023, especially at 1083 (1951), suggesting that the antitrust laws are really relied on to define and require conformity to norms of conduct for business institutions.

and thus tend to conform to common patterns of thought and behavior. In the strictly monopolized industries, of course, there is, almost by hypothesis, planning.

IV

Examination of these industrial fact situations and of the resulting relative stabilization of their relations with the community indicates the existence of community requirements capable of enforcing their satisfaction. This may be called the "inchoate law" of the system of industrial concentrates, up to the point where it has become explicit, as it often has.

As far as can be stated, the requirements thus imposed are as follows:

First: The industry must supply an amount of goods and services for which it has made itself responsible sufficient to meet reasonably anticipated demand.

Second: The price must be "acceptable." This does not mean "fair" or even "equitable." It means, quite simply, a price which does not incite the anger or opposition of the community, or create a feeling that the community is being victimized. An "acceptable" price is not to be confused with the "reasonable" price concept in Public Utility law.

In addition to this, two further requirements appear slowly to be materializing though they perhaps represent the community requirements of tomorrow rather than of today. They are:

Third: Requirement that the industry shall be so operated as to give some stability of employment;

Fourth: Requirement that the industry shall not be discontinued or relocated in a manner which will occasion a great measure of hardship or distress to the community in which it operates.

V

We have thus far examined only the results of requirements imposed for the assumed benefit of the community as a whole. It is necessary to follow now the emerging requirement of a degree of minimal protection for individuals dealing within the system of a concentrate.

By far the most developed branch of this subject deals with relations of employers with labor. It comes under the separate and quite systematized head of "Labor Law." It is not dealt with here—not because it is not relevant but because it is already a specialized, well recognized, and very highly developed system of law. The other, less systematized, branch of the same subject is the protection offered individuals other than employees who deal with concentrated economic power.

The basic emerging concept appears to be a restatement, in economic

terms, of the constitutional requirement that every man is entitled to "equal protection of the laws," and that no arm of the state shall deny him life, liberty or property without due process of law.

It is here submitted that a corporation or concentrate of corporations, so situated that it has power seriously to affect the individual life of a patron or customer, has become an arm of the state so that its actions are reviewable to determine whether or not they accord with the constitutional limitations and requirements imposed on states. Two applications of this rule have already been made, namely, (1) that a corporation in a position of such power may not unreasonably discriminate as between one customer and another; and (2) it may not exercise its economic power so as to deny or hinder the exercise by any person of his constitutional right of freedom of speech and freedom of worship. It seems probable that these two applications (which have already begun to find judicial expression) are merely the beginning of rather wider and more detailed application as economic power may increasingly be exercised by nominally private enterprises.

Again, the argument can only be summarized in this paper.

Within the historic field of public utilities, discrimination on account of race was matter of frequent controversy in the courts; discrimination was forbidden by Section 3 of the Interstate Commerce Act.⁵² The second is both personal and economic—economic distribution through rebates or other discriminatory service, favoring or penalizing one as against another, was outlawed as a practice of carriers under the Act.

This might be dismissed as merely carrying forward an historic public utility pattern. But the same could not be held true of the reasoning of the courts in *Mitchell v. United States*.⁵³ There, the dictum of the Court was that while discrimination was certainly a violation of Section 3 of the Interstate Commerce Act, yet in any case "the denial to the appellant of equality of accommodations because of his race would be an invasion of a fundamental individual right which is guaranteed against state action by the Fourteenth Amendment."⁵⁴ In 1948, the Supreme Court in *Shelley v. Kraemer*,⁵⁵ set up a line of reasoning bound to enter the field we have been discussing. In that case, racial restrictive covenants made by and between private land owners were held unenforceable by the state courts since in enforcing them, the state courts would be committing a violation of rights created by the first section of the Fourteenth Amendment, and guaran-

⁵² 24 Stat. 380 (1887), 49 U.S.C.A. § 30 (Supp., 1951).

⁵⁴ *Ibid.*, at 94.

⁵³ 313 U.S. 80 (1941).

⁵⁵ 334 U.S. 1 (1948).

teed to the individual. "The rights established are personal rights," observed the Court. It was true, the Court observed that *private* conduct alone, however discriminatory or wrongful, does not violate rights guaranteed by the Fourteenth Amendment.⁵⁶ But where the action violative of such rights is taken by authority derived from the state, the Amendment comes into play. There remains only the question whether violation by a corporation has this color of state action.

Obviously, a corporation exists by virtue of a charter; it comes into existence and derives authority to act as a collectivity by reason of state authority. In some sense, indeed, it exists by reason of the state interest in carrying forward commerce and industry. The economist would add that the power it derives from its size is an essential element of, if not a direct and foreseeable result of, such state action. In at least one leading case, *Marsh v. Alabama*,⁵⁷ the Supreme Court approached the subject. There a corporation owned a company town; as owner, it prosecuted for trespass the distributors of religious tracts on the streets of the town; the Supreme Court held that when private property had reached the point of being engaged in a public function, the exercise of property rights could not interfere with the Constitutional right of freedom of speech and of religion. Taking the two lines of argument—that flowing from *Shelley v. Kraemer* and that flowing from *Marsh v. Alabama*, the conclusion seems reasonably predictable. If, for instance, a corporation dealing in goods or services essential to the life of an individual discriminates against a customer on the ground of race or in a matter which invades his Constitutional right of freedom of speech or religion, it would seem that there is a violation of the guarantees of the Fourteenth Amendment. One remembers that the old decree of exile in Rome was prohibition of the use of fire and water within a stated distance of that city. Refusal to serve, or discrimination in service, by a corporation could, in an extreme case, accomplish that result. The thrust of the doctrine here propounded is precisely that where the corporation by reason of size or of degree of concentration has acquired power giving it the capacity to impede personality or personal life it has become, *tanto qanto*, an arm of the state both because it is a state chartered corporation and because it is relied on by the community as a necessary part of its economic function.

The doctrine here put forward goes no farther than that. An individual corporation may perhaps indulge the luxury of private discrimination

⁵⁶ *Ibid.*, at 13.

⁵⁷ 326 U.S. 501 (1946).

against a customer in a situation in which fifty other corporations are quite prepared to meet the customer's demand. In such case, there is no denial of equal protection of the laws for the simple reason that the corporation is not in a position to produce that result. But as it accumulates power, as it is increasingly able appreciably to affect the conditions of life of its customer, it approaches, and at length, falls under the limitations imposed on the state itself.

The foundation cases raised the problem of discrimination on the ground of race or religion. The principle of equal protection of the laws would seem to apply with equal force to a problem merely economic. If, for example, one of the principal members of the aluminum concentrate, for strictly intra-mural reasons, disliked a certain fabricator of aluminum and by consequence unreasonably discriminated against him, either in price, terms of service, and so forth, so as to endanger his livelihood, it would appear that the Constitutional principle would apply. And this would be true likewise in a case in which the corporation acted as buyer as well as seller, though here the lines are far less clear, and the law is likely to be longer developing. More probably, in this respect, the law will develop as a by-product of the Antitrust Act. Indeed, the development is foreshadowed by the present actions against American Telephone & Telegraph Company, asking divestiture of its interest in Western Electric, and against the Dupont Company, asking it to dispose of its holdings in General Motors.^{57a} The express reason urged is that this tends to require purchase by the connected companies of their respective products, and denies others a fair chance at the market. Certain of the provisions of the Robinson-Patman Act tending to prevent discrimination in terms of sale fall perhaps into the same category. As in the race discrimination cases, the first line of attack is through the field of trade regulation. But the ultimate principle seems Constitutional in nature.

If, instead of electing to carry on its economics through the form of the concentrate, the United States had adopted the practice of carrying on the same functions through a socialized governmental bureau, the Fifth Amendment (or in the case of the state, the Fourteenth Amendment) would clearly apply. As the form of the concentrate, and peculiarly the state regulated and state planned concentrate, becomes increasingly the mode, there would seem to be no escape from similar treatment. We have come a long

^{57a} The complaints are found in the CCH Trade Reg. Rep. ¶61,219, *United States v. E. I. du Pont de Nemours & Co.*, Civil Action 49, c. 1071 (1949), and ¶61,186, *United States v. Western Electric Co. and American Telephone & Telegraph Co.* (1949).

way from the dictum of Justice Bradley in the *Civil Rights Cases*⁵⁸ that a private wrong cannot offend the Constitution. We have traveled that distance because, quite simply, the large corporation, especially in a concentrate which dominates an industry, is not "private" in any individual sense.

VI

The emergence of the concept of protection of individuals, be they suppliers or customers, along with the emerging system of rights of labor and workmen, means in substance a system of protection for the individuals constituting all of the groups with which a great corporation comes into contact. And here perhaps is the deep cleft between the systems now competing for dominance in the modern, industrialized world. The legal structure in our system subjects the dominant economic organization and the holder of the power created by it to limitations for the purpose of protecting individuals in their essential freedom. It subjects them to a measure of planning for the protection of the community as a whole in the measure and to the extent that the community considers protection to be necessary. In this respect, we are merely doing to great corporations what the Norman law, later Magna Carta, did to the Crown and the great nobles in the feudal period. Even in the case of a modern corporation there is coming to be the right to cry, "Haro," and assure a hearing where personal liberty has been unreasonably invaded.

We may close by glancing down a very long vista.

History appears to exhibit a cycle in which social organization is sometimes dominated by organization and ascendant power, and at other times by highly individualized life with a high degree of individualized possessory property. The core of the feudal system rested not on property but on power. This was gradually dispersed: the collectivized power of the feudal dukes dissipated into the individual titles of tiny landholders in the nineteenth century. The industrial era appears to have compelled a large measure of recollectivization of property. It has used the socialist bureau or the modern corporation as its two principal methods. In great areas, we have moved away from the individual and possessory property stage into a stage of great organization. But organization, economic as well as political, turns on power, not on title. Protection of individual liberty might possibly be carried out by impeding or preventing recollectivization of economic function with its attendant increase of power in private or public hands or in both working together. Nowhere, so far as this writer

⁵⁸ 109 U.S. 3, 17-18 (1883).

is aware, has such a policy been successfully pursued in recent years. Apparently the community has wanted or needed the results of large organization more than it feared the existence of such organization. It follows that the protection of the essential freedoms instinctive in Anglo-American law and in the American democracy involves the development of at least two bodies of law, both of which are appearing. The first is a requirement that the collectivized organisms essential to the economic life of the modern state shall be so handled that they can and do acceptably perform their functions of supply and growth. The second is that within them, and as an offset to their necessary organization and power, the basic rights of individuals shall be as scrupulously protected against them as they were against the erstwhile political state. Thus we are merely retracing in this field a legal history analogous to that of the taming of feudal institutions since Magna Carta, seven centuries ago.